Report of the EFTA Court

2002

Foreword

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

The first *Report of the EFTA Court* covers the period from *1 January 1994 to 30 June 1995* and contains an overview of the activities of the Court and the decisions during that period. The Report also contains general information on the establishment of the Court, its jurisdiction, legal status and procedures. The reader is referred to the first Report of the Court for information on these general matters. Since then the EFTA Court has issued five reports which, like the first Report, contain a general overview of the activities of the Court, including the decisions of the Court during the periods covered.

The present *Report of the EFTA Court* covers the period *1 January 2002 to 31 December 2002*.

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

A collection of the relevant legal texts for the EFTA Court as amended, can be found in the booklet EFTA Court Texts (latest edition March 2000). The booklet is available in English, German, Icelandic and Norwegian, and can be obtained from the Registry.

Decisions of the EFTA Court which have not yet been published in the Report may be obtained from the Registry by mail or e-mail, or on the EFTA Court Home Page on the Internet. All addresses are provided in Chapter I below.

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I. Administration of the Court

The ESA/Court Agreement contains provisions on the role of the Governments in the administration of the Court. Thus, Article 43 of the Agreement stipulates that the Rules of Procedure shall be approved by them. Article 48 of the Agreement states that the Governments shall establish the annual budget of the Court, based on a proposal from the Court. A committee of representatives of the participating States has been established and has been charged with the task of determining the annual budgets. This Committee, the ESA/Court Committee, is composed of the heads of the Icelandic, Liechtenstein and Norwegian Missions to the European Union in Brussels. During the period covered by this Report, the Committee has, *inter alia*, been dealing with the budget of the Court and the appointment of judges.

In accordance with Article 45 of the ESA/Court Agreement, the Governments of the EFTA/EEA States decided on 14 December 1994 that the seat of the Court should be moved from Geneva to Luxembourg as soon as suitable premises could be made available. Since 1 September 1996, the Court has had its seat at 1, rue du Fort Thüngen, Kirchberg, Luxembourg. The Court of Justice and the Court of First Instance of the European Communities as well as the other European institutions are also situated in Luxembourg.

Provisions regarding the legal status of the Court are to be found in Protocol 7 to the ESA/Court Agreement entitled: Legal Capacity, Privileges and Immunities of the EFTA Court. The Court has concluded a Headquarters Agreement with Luxembourg, which was signed on 17 April 1996 and approved by the Luxembourg Parliament on 11 July 1996. This Agreement contains detailed provisions on the rights and obligations of the Court and its staff as well as privileges and immunities of persons appearing before the Court. Excerpts of the Agreement are published in *EFTA Court Texts*, and the full text can be found in the Journal Officiel du Grand-Duché de Luxembourg A-No. 60 of 4 September 1996 p. 1871.

Provisions for the internal administration of the Court are laid down in the Staff Regulations and Rules and in the Financial Regulations and Rules as adopted on 4 January 1994 and as later amended.

As provided for in Article 14 of the Protocol 5 to the ESA/Court Agreement on the Statute of the EFTA Court, the Court remains permanently in session. Its offices are open from Monday to Friday each week, except for official holidays.

The Court has received a number of visits during the period covered by this Report.

In cooperation with the EFTA Secretariat and the EFTA Surveillance Authority, a home page on the Internet has been created. The home page of the Court is found via the following Internet address:

http://www.eftacourt.lu

covering general information on the Court, its publications, including decisions and press releases and legal texts governing the activities of the Court.

The Court's e-mail address is:

eftacourt@eftacourt.lu

II. Judges and Staff

The members of the Court in 2002 were as follows:

Mr Thór VILHJÁLMSSON (nominated by Iceland)
Mr Carl BAUDENBACHER (nominated by Liechtenstein)
Mr Per TRESSELT (nominated by Norway)

The judges are appointed by common accord of the Governments of the EFTA States. Judge Vilhjálmsson was appointed for a period of three years from 1 January 1994 and was reappointed for a period of six years commencing 1 January 1997. Judge Baudenbacher was appointed for a period of six years commencing 6 September 1995 and was reappointed for a period of six years commencing 6 September 2001. Judge Tresselt was appointed for a period of six years commencing 1 January 2000.

Judge Vilhjálmsson was elected President of the Court on 11 January 2000 for a period of three years, ending 31 December 2002.

Mr Lucien Dedichen was appointed Registrar of the Court for a period of three years commencing 1 September 2001.

On 12 June 2001, the ESA/Court Committee decided by common accord to approve for a period of three years with effect from 2 July 2001, the following list of persons who may be chosen to serve as *ad hoc* Judges when a regular Judge is prevented from acting in a particular case pursuant to Article 15 of the Statute:

Nominated by Iceland:
Ms Dóra Guðmundsdóttir, lögfræðingur
Mr Stefán Már Stefánsson, professor

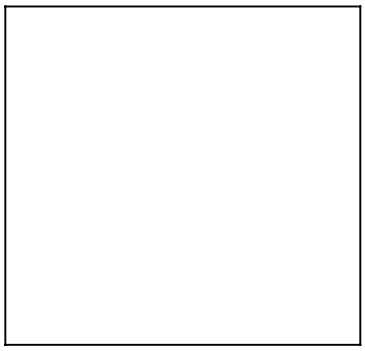
Nominated by Liechtenstein:
Mr Marzell Beck, Rechtsanwalt
Mr Martin Ospelt, Rechtsanwalt

Nominated by Norway:
Mr Henrik Bull, førsteamanuensis
Ms Bjørg Ven, advokat

In addition to the Judges, the following persons were employed by the Court in 2002:

Ms Svava ARADÓTTIR, Secretary
Mr Davíð Þór BJÖRGVINSSON, Legal Secretary
Ms Harriet BRUHN, Financial and Administrative Officer
Mr Dirk BUSCHLE, Legal Secretary (from 1 June 2002)
Ms Evanthia COFFEE, Lawyer-Linguist
Mr Lucien DEDICHEN, Registrar
Ms Helga ADOLFSDOTTIR, Administrative Assistant (until 17 May 2002)
Ms Hrafnhildur EYJÓLFSDÓTTIR, Administrative Assistant
Ms Sigrid HAUSER-MARTINSEN, Secretary
Ms Linda HELLAND, Lawyer-Linguist
Ms Janet JACKSON, Secretary (until 10 November 2002)
Mr Mads MAGNUSSEN, Legal Secretary
Mr Meinhard NOVAK, Legal Secretary (until 31 May 2002)
Mr Gilles PELLETIER, Caretaker-Messenger
Ms Kerstin SCHWIESOW, Secretary (from 11 November 2002)

CURRICULA VITAE OF THE JUDGES AND THE REGISTRAR



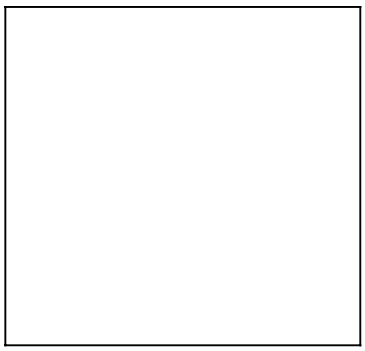
Thór VILHJÁLMSSON

Born 9 June 1930 in Reykjavik, Iceland.

Studies: St. Andrews University, Scotland; University of Iceland (cand jur 1957); New York University; University of Copenhagen.

Professional career: Journalist 1957–1958; Deputy Judge, Reykjavík Civil Court, 1960–62; Judge 1962–67; Professor 1967–76; Dean, Faculty of Law, 1968–70; Director, Institute of Law, 1974–76; Judge, European Court of Human Rights, Strasbourg, 1971-1998; Vice-President of that Court 1998; Judge, Supreme Court of Iceland, 1976–1993, President 1983–84 and 1993; Judge of the EFTA Court since 1 January 1994.

Member of Icelandic delegations to UN General Assembly 1963, UN Sea-Bed Committee 1972 and 1973, Law of the Sea Conference 1974 and 1975 and other international conferences. President, Association of Icelandic Lawyers, 1971–74; Editor, Icelandic Law Review, 1973–83. President of the EFTA Court since January 2000.



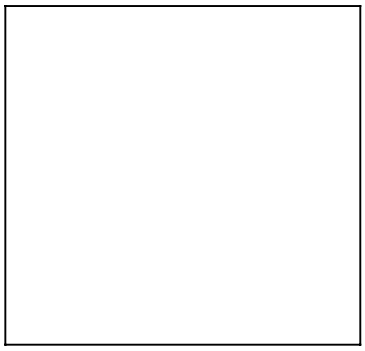
Carl BAUDENBACHER

Born 1 September 1947 in Basel, Switzerland.

Studies: University of Berne 1967-1971; Dr. jur. University of Berne 1978, Alexander-von-Humboldt-scholar, Max Planck Institute of Intellectual Property Law Munich 1979-1981, Habilitation/Privatdozent University of Zurich 1983.

Professional career: University of Berne and Zurich, Assistant, 1972-1978; Legal Secretary, Bulach District Court, 1982-1984; Visiting Professor, Universities of Bochum, Berlin, Tübingen, Marburg, Saarbrücken, 1984-1986; Professor of Private Law, University of Kaiserslautern, 1987; Chair of Private, Commercial and Economic Law, University of St. Gallen since 1987; Managing Director of the University of St. Gallen Institute of European Law 1991; Visiting Professor, University of Geneva, 1991; Expert advisor to the Liechtenstein Government in EEA matters 1990-1994; Visiting Professor, University of Texas School of Law, since 1993; Chairman of the St. Gallen International Competition Law Forum since 1993, offered the Chair of German and European Private, Commercial and Economic law at the University of Bochum, 1994; Member of the Supreme Court of the Principality of Liechtenstein, 1994-1995; Judge of the EFTA Court since 6 September 1995.

Publications: 18 books and over 90 articles on European and international law, law of obligations, labour law, law of unfair competition, antitrust law, company law, intellectual property law and comparative law.



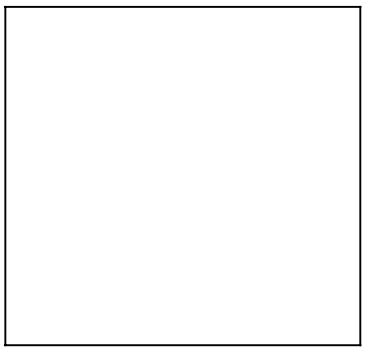
Per TRESSELT

Born 4 January 1937 Bergen, Norway.

Studies: University of Oslo, Cand. jur. 1961.

Professional career: Entered Norwegian Foreign Service, 1961. Various posts, including Legal Department of Foreign Ministry and Permanent Mission to the UN, New York. Special Adviser to the Foreign Minister on Arctic and Antarctic Affairs, 1978. Director General, Legal Department, Foreign Ministry 1983. Ambassador to Berlin 1989, Consul General Berlin 1990. Ambassador to Moscow 1994-1999. Judge of the EFTA Court since 1 January 2000.

Member of Norwegian Delegation to the Seabed Committee and to the Third United Nations Conference on the Law of the Sea 1971-78, and of Delegation to negotiate a Trade Agreement with the European Economic Community 1972-73. Co-Agent for Norway in the Case concerning maritime delimitation in the area between Greenland and Jan Mayen (Denmark v. Norway), 1988-93. Member of the Arbitral Tribunal in the Southern Bluefin Tuna Cases (Australia and New Zealand v. Japan), 2000. Member of the Permanent Court of Arbitration from 1993. Member of the Court of Conciliation and Arbitration within the OSCE from 1999.



Lucien DEDICHEN

Born 14 February 1962 in Oslo, Norway.

Studies: University of Oslo 1983 – 1990, cand. jur; College of Europe, Bruges, Belgium 1988 – 1989, Diploma of Advanced European Legal Studies; Faculté de Droit et de Science Politique d'Aix-Marseille, Aix-en-Provence, France 1987/1988; Royal Norwegian Naval Academy (OMA III) 1980 – 1982, second lieutenant, including one year active duty as officer in the 23rd fast patrol boat squadron.

Professional career: Junior adviser, Ministry of Foreign Affairs, Oslo, Norway, 1990/1991; trainee, Legal Affairs department of the EFTA Secretariat, Geneva, Switzerland, 1991; legal officer, Legal Affairs department of the EFTA Secretariat, Geneva, Switzerland 1991 – 1992; legal officer, Legal Affairs department and the EEA Coordination Unit of the EFTA Secretariat, Brussels, Belgium 1992 – 1999; legal consultant, TelePluss AS, 1999 – 2000; Registrar of the EFTA Court since 1 September 2001.

Publications: co-author: *EEA Law, A commentary on the EEA Agreement*, CE Fritzes AB 1993; "Securing a smooth shift between the two EEA pillars: prolonged competence of EFTA institutions with respect to former EFTA States after their accession to the European Union," CMLR 32, 1995; *EØS håndboken, EØS-avtalen – innhold og praktisering*, Universitetsforlaget 1998.

III. Decisions of the Court

Case E-1/01

Hörður Einarsson
v
The Icelandic State

(Differentiated value-added tax on books – Article 14 EEA – Competing products – Indirect protection of domestic products)

Summary of the Judgment

1. The EEA Agreement does not cover the tax system of an EEA State. EEA law does not restrict the freedom of each EEA State to establish a tax system that differentiates between products on the basis of objective criteria. However, the power of an EEA State to levy VAT does not exclude the application of EEA rules.

2. The application of EEA rules to the levying of VAT on books in the national language at a lower rate than on books in other languages, is addressed.

The function of the second paragraph of Article 14 EEA is to cover all forms of indirect tax protection in the case of products which, without being similar within the meaning of the first paragraph of Article 14, are nevertheless in competition with each other, even if only partial, indirect or potential. Books in the national language and books in foreign languages are at least in partial competition with each other.

Most of the books in Icelandic that are subject to the preferential VAT rate, are produced in Iceland, and the books in foreign languages that are subject to the higher, regular, VAT rate, are chiefly imports.

The primary objective of the contested VAT rule is to support the national book industry, by making books in Icelandic more affordable and competitive. This indicates that the rule is intended to have protective effect.

Mál E-1/01

Hörður Einarsson
gegn
íslenska ríkinu

(Mismunandi virðisaukaskattur á bækur – 14. gr. EES-samningsins – Vörur í samkeppni – Óbein vernd innlendrar framleiðslu)

Samantekt

1. Almennt tekur EES-samningurinn ekki til skattakerfa aðildarríkjanna. EES-réttur skerðir ekki frelsi aðildarríkis til að koma á skattakerfi sem gerir greinarmun á framleiðsluvörum á grundvelli málefnalegra viðmiða. Á hinn bóginn er vald EFTA ríkis til að leggja á skatta ekki því til fyrirstöðu að EES-reglum verði beitt.

2. Í málinu eru EES-reglur skýrðar með tilliti til heimilda til að leggja lægri virðisaukaskatt á bækur á þjóðtungu ríkis en á bækur á öðrum tungumálum.

Tilgangur 2. mgr. 14. gr. EES er að ná til óbeinnar skattaverndar af öllu tagi þegar um er að ræða framleiðsluvörur sem ekki eru sams konar í skilningi 1. mgr. 14. gr., en eru samt í samkeppni sín á milli, þótt svo sé aðeins að hluta, óbeint eða hugsanlega. Bækur á þjóðtungu og bækur á erlendum tungumálum eru að minnsta kosti að hluta til í samkeppni.

Flestar bækur á íslensku, sem hinn lægri virðisaukaskattur er lagður á, eru framleiddar á Íslandi, og bækur á erlendum málum sem hinn hærri og almenni virðisaukaskattur er lagður á eru að mestu innfluttar.

Helsti tilgangur hinnar umdeildu virðisaukaskattsreglu virðist vera sá að styðja innlenda bókaframleiðslu með því að gera bækur á íslensku auðkeyptari og samkeppnisfærari. Þetta bendir til þess að reglunni sé ætlað að hafa verndaráhrif.

A national provision of an EEA State providing that books in the language of that EEA State is subject to a lower VAT than books in foreign languages, is incompatible with the second paragraph of Article 14 EEA.

3. Article 13 EEA cannot provide a legal basis for justifying a derogation from Article 14 EEA on grounds relating to the public interest of sustaining and protecting the Icelandic language. That provision can only serve to justify derogations from Articles 11 and 12 EEA.

An analogous application of Article 6(3) TEU is rejected, as it must be assumed that the absence of a corresponding provision in the EEA Agreement is intentional.

The formulations in the Joint Declaration on Cultural Affairs, annexed to the Final Act to the EEA Agreement cannot, by itself, provide a concrete basis for national derogations from Article 14 EEA. An extension of the scope of application of the EEA Agreement on the basis of the parallels between this Declaration and Article 151 (4) EC would not be a proper exercise of the judicial function.

4. Protocol 35 to the EEA Agreement provides direction for the resolution of conflicts between rules of EEA law and rules of national law. In adopting Protocol 35 to the EEA Agreement, the EFTA States have undertaken to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in cases of possible conflict between implemented EEA rules and other statutory provisions.

The undertaking assumed under that Protocol relates only to EEA rules that have already been implemented in national law. That is the case for the main part of the EEA Agreement.

The undertaking assumed under Protocol 35 relates only to those provisions that are framed in a manner capable of creating rights that individuals and economic operators may invoke before national courts. Such is the case when the provision in question is unconditional and sufficiently precise. Article 14 EEA must be held to fulfil these criteria.

Regla í landslögum EES-ríkis, sem mælir svo fyrir að virðisaukaskattur á bækur á tungu þess ríkis sé lægri en á bækur á erlendum tungum, er andstæð 2. mgr. 14. gr. EES-samningsins.

3. Ákvæði 13. gr. EES verður ekki beitt til að réttlæta frávik frá 14. gr. EES á þeim grundvelli að það sé í þágu almannahagsmuna að vernda og efla íslenska tungu. Ákvæði 13. gr. EES getur aðeins réttlætt frávik frá 11. og 12. gr. EES.

Ekki er heldur unnt að byggja frávik frá 14. gr. með tilvísun til 3. mgr. 6. gr. samningsins um Evrópusambandið. Ekkert hliðstætt ákvæði er að finna í EES-samningnum. Þar sem samningurinn um Evrópusambandið var gerður á undan EES-samningnum verður að ætla að sá munur sé með vilja gerður.

Sameiginleg yfirlýsing um samstarf í menningarmálum, sem fylgir lokagerð EES-samningsins, getur ekki, ein sér, verið sérstakur grundvöllur fyrir ríkisbundnum frávikum frá 14. gr. EES

Það samræmist ekki réttilegri meðferð dómsvalds að leitast við að færa út gildissvið EES-samningsins á grundvelli hliðstæðna milli þessarar yfirlýsingar og 4. mgr. 151. gr. samningsins um Evrópubandalagið, eins og hún er eftir gildistöku Amsterdamsamningins.

4. Bókun 35 með EES-samningnum er til leiðsagnar um hvernig beri að leysa úr ósamræmi milli reglna EES-réttar og reglna landsréttar. Með samþykkt þeirrar bókunar hafa EES-ríkin skuldbundið sig til að setja, ef nauðsyn krefur, lagaákvæði þess efnis að EES-reglur gildi ef til árekstra kemur milli EES-reglna sem settar hafa verið í landslög og annarra reglna landslaga.

Skuldbinding sú, sem gengist er undir með bókun 35, varðar aðeins EES-reglur sem þegar hafa verið innleiddar í landslög, en meginmál EES-samningsins hefur verið lögfest á Íslandi. Skuldbinding sú, sem gengist er undir með bókun 35 varðar aðeins þau ákvæði sem þannig eru úr garði gerð að þau geti stofnað til réttinda sem einstaklingar og atvinnufyrirtæki geta reist á dómkröfur innanlands. Um slíkt er að ræða þegar viðkomandi ákvæði er óskilyrt og nægilega nákvæmt. Telja verður að 14. gr. EES uppfylli þetta skilyrði.

JUDGMENT OF THE COURT

22 February 2002*

(Differentiated value-added tax on books – Article 14 EEA – Competing products – Indirect protection of domestic products)

In Case E-1/01

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

Hörður Einarsson

and

The Icelandic State

on the interpretation of Articles 4, 10 and 14 of the EEA Agreement.

THE COURT,

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

Registrar: Lucien Dedichen

having considered the written observations submitted on behalf of:

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

DÓMUR DÓMSTÓLSINS

22. febrúar 2002*

(Mismunandi virðisaukaskattur á bækur – 14. gr. EES-samningsins – Vörur í samkeppni – Óbein vernd innlendrar framleiðslu)

Mál E-1/01

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

Hörður Einarsson

gegn

íslenska ríkinu

varðandi túlkun 4., 10. og 14. gr. EES-samningsins.

DÓMSTÓLLINN,

skipaður dómurunum Þór Vilhjálmssyni, forseta, Carl Baudenbacher og Per Tresselt (framsögumanni),

dómritari: Lucien Dedichen

hefur, með tilliti til skriflegra greinargerða frá:

* Beiðni um ráðgefandi álit er á íslensku.

– the Plaintiff, Hörður Einarsson, hæstaréttarlögmaður (Supreme Court Advocate), representing himself;

– the Defendant, the Icelandic State, represented by Skarphéðinn Þórisson, Attorney General (Civil Affairs), acting as Agent, assisted by Einar Karl Hallvarðsson, hæstaréttarlögmaður (Supreme Court Advocate), Office of the Attorney General (Civil Affairs);

– the Government of Liechtenstein, represented by Christoph Büchel, Director, EEA Coordination Unit, acting as Agent;

– the Government of Norway, represented by Helge Seland, Assistant Director General, Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Bjarnveig Eiríksdóttir and Dóra Sif Tynes, Officers, Department of Legal & Executive Affairs, acting as Agents;

– the Commission of the European Communities, represented by Richard Lyal, member of its Legal Service, acting as Agent.

having regard to the Report for the Hearing,

having heard the oral observations of the Plaintiff representing himself, and of the Defendant, the Government of Norway, the EFTA Surveillance Authority and the Commission of the European Communities, all represented by their Agents, at the hearing on 25 October 2001,

gives the following

Judgment

I Facts and procedure

1 By a communication dated 4 January 2001, registered at the Court on 11 January 2001, the Héraðsdómur Reykjavíkur referred to the Court, for an Advisory Opinion, several questions on the interpretation of Articles 4, 10 and 14 of the EEA Agreement, in order to enable it to assess the compatibility with those provisions, of a system of differentiated value-added tax (hereinafter VAT) applied under Icelandic law to books in the Icelandic language and books in foreign languages.

2 Those questions were raised in proceedings between Hörður Einarsson and the Government of Iceland, concerning the former's claim for a refund of the difference in VAT paid on the importation of books in foreign languages and the

– stefnanda, Herði Einarssyni hæstaréttarlögmanni, er flytur mál sitt sjálfur;

– stefnda, íslenska ríkinu. Í fyrirsvari sem umboðsmaður er Skarphéðinn Þórisson, ríkislögmaður, og honum til aðstoðar er Einar Karl Hallvarðsson, hæstaréttarlögmaður á skrifstofu ríkislögmanns,

– ríkisstjórn Liechtenstein. Í fyrirsvari sem umboðsmaður er Christoph Büchel, yfirmaður samræmingarsviðs fyrir EES samninginn,

– ríkisstjórn Noregs. Í fyrirsvari sem umboðsmaður er Helge Seland, aðstoðarráðuneytisstjóri í norska utanríkisráðuneytinu,

– Eftirlitsstofnun EFTA. Í fyrirsvari sem umboðsmenn eru Bjarnveig Eiríksdóttir og Dóra Sif Tynes, lögfræðingar á lögfræði- og framkvæmdasviði,

– Framkvæmdastjórn Evrópubandalaganna. Í fyrirsvari sem umboðsmaður er Richard Lyal, lögfræðingur hjá lagadeild,

með tilliti til skýrslu framsögumanns og munnlegs málflutnings stefnanda, sem flytur mál sitt sjálfur, svo og fulltrúa stefnda, ríkisstjórnar Noregs, Eftirlitsstofnunar EFTA og Framkvæmdastjórnar Evrópubandalaganna hinn 25. október 2001,

kveðið upp svofelldan

Dóm

I Málsatvik og meðferð máls

1 Með beiðni dagsettri 4. janúar 2001, sem skráð var í málaskrá dómstólsins 11. sama mánaðar, beindi Héraðsdómur Reykjavíkur nokkrum spurningum til dómstólsins til öflunar ráðgefandi álits varðandi 4., 10. og 14. gr. EES-samningsins, svo að Héraðsdómur gæti metið hvernig tilhögun mismunandi virðisaukaskattsálagningar á bækur samkvæmt íslenskum lögum, annars vegar á bækur á íslensku og hins vegar á bækur á erlendum tungumálum, samræmdist þeim ákvæðum.

2 Spurningar þessar komu upp í máli sem rekið er milli Harðar Einarssonar og íslenska ríkisins um kröfu hins fyrrnefnda til endurgreiðslu á mismun milli virðisaukaskatts greidds á bækur á erlendum tungumálum og virðisaukaskatts

VAT that would have been applicable if the books had been in the Icelandic language.

3 The national legislation contested before the Héraðsdómur Reykjavíkur is the Icelandic *Lög nr. 50/1988 um virðisaukaskatt* (Act No. 50/1988 on Value Added Tax), as amended (hereinafter the "VAT Act").

4 Section 1 of the VAT Act provides that VAT is to be paid to the State Treasury on all domestic transactions, and upon the importation of goods and services, as further provided for therein. Section 2 provides that the duty to pay VAT applies, in principle, to all goods, both new and used.

5 The first paragraph of section 14 of the VAT Act provides that VAT is to be levied at a general rate of 24.5 per cent. The second paragraph provides that VAT on the sale of certain goods and services is to be levied at the lower rate of 14 per cent. The sale of books written in or translated into Icelandic is subject to the lower VAT rate.

6 Section 14 of the VAT Act currently reads:

> "Value Added Tax shall be levied at a rate of 24.5 per cent, and shall accrue to the State Treasury.
>
> Notwithstanding the provision of the first paragraph, Value Added Tax on the sale of the following goods and services shall be levied at a rate of 14 per cent:
>
> 1. ...
> 2. Lease of tourist accommodation and hotel rooms, and other temporary accommodation service.
> 3. ...
> 4. Radio station listener charges.
> 5. Sale of periodicals, daily papers, and national and regional newspapers.
> 6. Sale of books in the Icelandic language, original publications as well as translations.
> 7. Sale of warm water, electricity and fuel oil for heating of buildings, and of water for bathing.
> 8. Sale of food and other goods for human consumption as laid down in further detail by administrative regulation, except sale of sweets, beverages and other goods subject to the Customs Tariff Numbers enumerated in an Appendix to this Act; sale of alcoholic beverages, and sale of milk not pasteurised. Sale and service by restaurants, canteens and similar establishments of prepared food shall however be taxable under the first paragraph of this Section.
> 9. Access to road constructions."

7 Since the VAT Act was first enacted, several amendments have been made regarding the levying of VAT on the sale of books in the Icelandic language. By the adoption of Act No. 119/1989, amending the VAT Act, all books in Icelandic were made exempt from VAT altogether, as was already the case for other printed material in Icelandic.

þess sem á hefði verið lagður ef bækur þessar hefðu verið á íslensku.

3 Þau landslög sem deilt er um fyrir Héraðsdómi Reykjavíkur eru hin íslensku lög nr. 50/1988 um virðisaukaskatt.

4 Ákvæði 1. gr. laga um virðisaukaskatt mæla svo fyrir að virðisaukaskattur skuli greiddur í ríkissjóð af viðskiptum innanlands á öllum stigum, svo og af innflutningi vöru og þjónustu, eins og nánar er ákveðið í lögunum. Í 2. gr. segir að skyldan til að greiða ríkissjóði virðisaukaskatt nái að meginstefnu til allrar vöru, nýrrar sem notaðrar.

5 Ákvæði 1. mgr. 14. gr. virðisaukaskattslaga mæla svo fyrir að virðisaukaskattur skuli almennt vera 24,5%. Í 2. mgr. segir að virðisaukaskattur á tiltekna vöru og þjónustu skuli þó vera lægri, þ.e. 14%. Af sölu bóka sem ritaðar eru eða þýddar á íslensku skal greiða hið lægra hlutfall.

6 Í núverandi mynd er 14. gr. virðisaukaskattslaga þannig:

> "Virðisaukaskattur skal vera 24,5%, og rennur hann í ríkissjóð.
>
> Þrátt fyrir ákvæði 1. mgr. skal virðisaukaskattur af sölu á eftirtalinni vöru og þjónustu vera 14%:
>
> 1. ...
> 2. Útleiga hótel- og gistiherbergja og önnur gistiþjónusta.
> 3. ...
> 4. Afnotagjöld útvarpsstöðva.
> 5. Sala tímarita, dagblaða og landsmála- og héraðsfréttablaða.
> 6. Sala bóka á íslenskri tungu, jafnt frumsaminna sem þýddra.
> 7. Sala á heitu vatni, rafmagni og olíu til hitunar húsa og laugarvatns.
> 8. Sala á matvörum og öðrum vörum til manneldis samkvæmt nánari afmörkun í reglugerð, þó ekki sala á sælgæti og drykkjarvörum og fleiri vörum sem flokkast undir tollskrárnúmer sem talin eru upp í viðauka við lög þessi, né sala á áfengum drykkjum og ógerilsneyddri mjólk. Sala veitingahúsa, mötuneyta og annarra hliðstæðra aðila á tilreiddum mat og þjónustu er þó skattskyld skv. 1. mgr. þessarar greinar.
> 9. Aðgangur að vegamannvirkjum."

7 Frá því er lög um virðisaukaskatt voru fyrst sett hafa allmargar breytingar verið gerðar hvað snertir álagningu hans á sölu bóka á íslensku. Með samþykkt laga nr. 119/1989 um breytingu á lögum um virðisaukaskatt voru allar bækur á íslensku undanþegnar virðisaukaskatti að fullu, eins og þegar var orðin raunin um annað prentað mál á íslensku.

8 The current rate of VAT applicable to books in Icelandic was introduced pursuant to Act No. 111/1992. Thus, VAT on the sale of all books in Icelandic, whether original publications or translations, is 14 per cent. Books in foreign languages continue to be subject to the general VAT rate of 24.5 per cent.

9 The Plaintiff, Hörður Einarsson, has on several occasions purchased books from abroad for his personal use. These books have been sent to him by post, with VAT payable on receipt. VAT has been charged at the rate of 24.5 per cent, in accordance with the first paragraph of section 14 of the VAT Act.

10 The case pending before Héraðsdómur Reykjavíkur concerns VAT levied on books imported from the United Kingdom and Germany. Upon importation of the books, and in accordance with two customs declarations of 26 July 1999 and one of 11 August 1999, the Plaintiff paid a total of ISK 3 735 VAT, representing 24.5 per cent of the purchase price.

11 In a letter dated 21 May 1999 to the Minister of Finance, the Plaintiff objected to the application of different rates of VAT on books in foreign languages and books in Icelandic. In a letter dated 16 July 1999, the Ministry of Finance informed the Plaintiff that it did not accept the objections raised.

12 Thereafter, the Plaintiff made a complaint to the Commissioner of Customs in Reykjavík and, subsequently, to the State Customs Board. The Plaintiff's complaints were rejected in both instances. The State Customs Board rendered its decision on 22 December 1999.

13 The Plaintiff then brought proceedings against the Icelandic State before the Héraðsdómur Reykjavíkur. In the proceedings, the Plaintiff has questioned whether the Icelandic VAT system for books is compatible with the EEA Agreement.

14 By judgment rendered on 27 November 2000, Héraðsdómur Reykjavíkur decided to submit a Request for an Advisory Opinion to the EFTA Court on the following questions:

> *1. Is it compatible with EEA law, in particular Articles 14 and 10 EEA, or, as the case may be, Article 4 EEA, that a value-added tax (VAT) on books, imposed in accordance with Icelandic law, is higher (24.5 per cent) on books in foreign languages than on books in the Icelandic language (14 per cent), when books in Icelandic are generally published in Iceland, while books in other languages are generally published in other countries, including other EEA countries?*
>
> *2. In particular, is (a) Article 14 EEA to be understood in the sense that books in Icelandic and books in other languages are similar products within the meaning of that provision, or (b) different taxation on books*

8 Núgildandi stig virðisaukaskatts á bækur var ákveðið með lögum nr. 111/1992. Þannig er virðisaukaskattur á sölu allra bóka á íslensku, frumsaminna og þýddra, 14%. Á bækur á erlendum tungumálum er áfram lagður hinn almenni virðisaukaskattur, 24,5%.

9 Stefnandi, Hörður Einarsson, hefur alloft keypt bækur erlendis frá til eigin nota. Þær hafa verið sendar honum í pósti, og hefur þá virðisaukaskatturinn fallið í gjalddaga við móttöku þeirra. Skatturinn hefur numið 24,5%, í samræmi við 1. mgr. 14. gr. virðisaukaskattslaga.

10 Mál það sem til meðferðar er fyrir Héraðsdómi Reykjavíkur lýtur að virðisaukaskatti, sem lagður er á bækur fluttar inn frá Bretlandi og Þýskalandi. Við innflutning bókanna, og samkvæmt tveimur tollskýrslum dagsettum 26. júlí 1999 og einni dagsettri 11. ágúst 1999, greiddi stefnandi virðisaukaskatt alls að fjárhæð 3.735 ísl. kr., er nam 24,5% af kaupverði þeirra.

11 Í bréfi til fjármálaráðherra dagsettu 21. maí 1999 mótmælti stefnandi því að mismunandi virðisaukaskattur væri lagður á bækur á erlendum tungumálum og bækur á íslensku. Í bréfi dagsettu 16. júlí 1999 tilkynnti ráðuneytið stefnanda að það féllist ekki á mótmæli hans.

12 Stefnandi lagði þá fram kæru hjá tollstjóranum í Reykjavík og síðan hjá ríkistollanefnd. Kærunum var hafnað á báðum stjórnsýslustigum. Ríkistollanefnd kvað upp úrskurð sinn 22. desember 1999.

13 Stefnandi höfðaði þá mál gegn íslenska ríkinu fyrir Héraðsdómi Reykjavíkur. Þar hefur stefnandi dregið í efa að hið íslenska kerfi virðisaukaskatts á bækur samrýmist EES-samningnum.

14 Með úrskurði upp kveðnum 27. nóvember 2000 ákvað Héraðsdómur Reykjavíkur að senda EFTA-dómstólnum beiðni um ráðgefandi álit. Eftirfarandi spurningar voru lagðar fram:

> *1. Er það samrýmanlegt EES-rétti, sérstaklega 14. grein og 10. grein EES-samningsins, eða eftir atvikum 4. gr. að samkvæmt íslenskum lögum um virðisaukaskatt sé lagður hærri virðisaukaskattur á bækur á erlendum tungumálum (24,5%) heldur en á bækur á íslensku (14%), og svo háttar til, að bækur á íslensku eru almennt gefnar út á Íslandi, en bækur á öðrum tungumálum eru almennt gefnar út utan Íslands, þar á meðal í öðrum EES-ríkjum?*
>
> *2. Sérstaklega er um það spurt, (a) hvort skýra beri 14. gr. EES-samningsins svo, að bækur á íslensku og bækur á öðrum tungumálum teljist vera sams konar framleiðsluvörur í merkingu ákvæðisins, eða (b)*

according to language, in the manner described above, likely to afford indirect protection to domestic book publishing?

3. Can the difference in the VAT percentage levied be justified by the aim of the Icelandic authorities to enhance the position of the Icelandic language through a lower rate of VAT charged on books in Icelandic?

4. Does Iceland's power to levy VAT prevent the application of EEA rules, in particular Articles 14 and 10 EEA, in the present case?

5. If, following the answers to the above questions, the rules regulating value-added tax on books are deemed incompatible with the EEA Agreement, do the EEA Agreement or the rules deriving therefrom contain any provisions as to what rules are to be applied in cases of conflict between national law and rules deriving from the EEA Agreement? [1]

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

II Findings of the Court

The fourth question

16 By its fourth question, which the Court finds must be examined first, the Héraðsdómur Reykjavíkur seeks to ascertain whether the power of an EEA State to levy VAT prevents the application of EEA rules.

17 The Court notes that, as a general rule, the tax system of an EEA State is not covered by the EEA Agreement. EEA law does not restrict the freedom of each EEA State to establish a tax system that differentiates between products on the basis of objective criteria (see Case E-6/98 *Norway* v *EFTA Surveillance Authority* [1999] EFTA Court Report 74, at paragraph 34). However, such differentiation is only compatible with EEA law if it pursues objectives which are themselves compatible with the requirements of the EEA Agreement, and if the particular rules are such as to avoid any form of discrimination, direct or indirect, against products imported from other EEA States or any form of protection of competing domestic products (see Case C-213/96 *Outokumpu* [1998] ECR I-1777, at paragraph 30).

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[1] The translation has been adjusted from the text that appears in the Report for the Hearing.

hvort mismunandi skattlagning bóka eftir tungumáli með framangreindum hætti sé til þess fallin að veita innlendri bókaútgáfu óbeina vernd.

3. Réttlætir það framangreindan mismun á gjaldstigi virðisaukaskatts, ef með hinu lægra gjaldstigi á bækur á íslensku vakir fyrir stjórnvöldum að treysta íslenska tungu?

4. Er vald íslenska ríkisins til álagningar virðisaukaskatts því til fyrirstöðu að reglum EES-réttar, sérstaklega 14. grein og 10. grein EES-samningsins, verði beitt í málinu?

5. Ef svarið við spurningunum hér að framan felur það í sér að reglur um virðisaukaskatt af bókum séu ósamrýmanlegar EES-samningnum, er spurt hvort samningurinn eða aðrar reglur sem af honum leiða hafa að geyma ákvæði sem mæla fyrir um það hvaða reglum skuli beitt þegar ósamræmi er milli reglna landsréttar og reglna sem leiða af EES-samningnum.

15 Vísað er til skýrslu framsögumanns um frekari lýsingu löggjafar, málsatvika og meðferðar málsins, svo og um greinargerðir sem dómstólnum bárust. Þessi atriði verða ekki rakin eða rædd hér á eftir nema að því leyti sem forsendur dómsins krefjast.

II Álit dómstólsins

Fjórða spurning.

16 Með fjórðu spurningu sinni, sem dómstóllinn telur að fyrst verði að taka afstöðu til, óskar Héraðsdómur Reykjavíkur svars við því hvort vald aðildarríkis EES til álagningar á virðisaukaskatti komi í veg fyrir að EES-reglum verði beitt.

17 Dómstóllinn telur að almennt taki EES-samningurinn ekki til skattakerfa aðildarríkjanna. EES-réttur skerðir ekki frelsi aðildarríkis til að koma á skattakerfi sem gerir greinarmun á framleiðsluvörum á grundvelli málefnalegra viðmiða (sjá mál E-6/98 *Noreg* gegn *Eftirlitsstofnun EFTA* [1999] skýrsla EFTA-dómstólsins 74, 34. lið). Á hinn bóginn er slíkur greinarmunur aðeins samrýmanlegur EES-rétti ef þau markmið, sem með honum er stefnt að, eru sjálf samrýmanleg kröfum EES-samningsins, og ef viðkomandi reglur eru þannig að þær stýri hjá allri beinni og óbeinni mismunun gagnvart framleiðsluvörum sem fluttar eru inn frá öðrum EES-ríkjum og hvers kyns vernd í þágu innlendrar samkeppnisvöru (sjá mál C-213/96 *Outokumpu* [1998] ECR I-1777, 30. lið).

18 The answer to the fourth question must therefore be that the power of an EEA State to levy VAT does not exclude the application of EEA rules.

The first and second questions

19 By its first and second questions, the Héraðsdómur Reykjavíkur is essentially asking whether Articles 4, 10 and 14 EEA preclude an EEA State from levying VAT on books in the language of that EEA State at a lower rate than on books in other languages.

20 The first question relates to both Articles 10 and 14 EEA. It follows from the case-law of the Court of Justice of the European Communities that the provisions of the EC Treaty corresponding thereto are mutually exclusive (see, inter alia, Case C-28/96 *Fazenda Pública* v *Fricarnes* [1997] ECR I-4939). The same must apply with regard to Articles 10 and 14 EEA. A charge that forms part of a general system of internal dues applying systematically to categories of products according to objective criteria applied without regard to the origin of the products, falls within the scope of Article 14 EEA (see Case C-90/94 *Haahr Petroleum* v *Åbenrå Havn and Others* [1997] ECR I-4085, at paragraph 20). Consequently, the contested provisions of the VAT Act must be dealt with under Article 14 EEA.

21 Article 14 EEA provides:

> "No Contracting Party shall impose, directly or indirectly, on the products of other Contracting Parties any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.
>
> Furthermore, no Contracting Party shall impose on the products of other Contracting Parties any internal taxation of such a nature as to afford indirect protection to other products."

22 The general purpose of Article 14 EEA is to guarantee the free movement of goods between the EEA States under normal conditions of competition by eliminating all forms of protection which may result in the application of internal taxation in a manner which discriminates against products from other EEA States, and to guarantee that internal taxation is neutral for the purposes of competition between domestic and imported products (see Case C-166/98 *Socridis* v *Receveur Principal des Douanes* [1999] ECR I-3791, at paragraph 16).

23 The Court finds it appropriate first to consider whether the contested provision of the VAT Act is contrary to the second paragraph of Article 14 EEA.

24 As the Court of Justice of the European Communities stated in its judgment in Case 184/85 *Commission* v *Italy* [1987] ECR 2013, at paragraph 11, with regard to the corresponding provision of the EC Treaty, the function of that provision is to cover all forms of indirect tax protection in the case of products which, without

18 Svarið við fjórðu spurningu er því að vald EES-ríkis til álagningar virðisaukaskatts kemur ekki í veg fyrir að EES-reglum sé beitt.

Fyrsta og önnur spurning

19 Í fyrstu og annarri spurningu sinni er Héraðsdómur Reykjavíkur í raun að spyrjast fyrir um hvort 4., 10. og 14. gr. EES-samningsins komi í veg fyrir að EES-ríki leggi virðisaukaskatt á bækur á sinni eigin þjóðtungu, sem lægri er en virðisaukaskattur á bækur á öðrum tungumálum.

20 Fyrsta spurningin varðar bæði 10. og 14. gr. EES-samningsins. Það leiðir af dómaframkvæmd dómstóls Evrópubandalaganna að ákvæði samningsins um Evrópubandalagið sem samsvara fyrrgreindum ákvæðum EES-samningsins, útiloka hvert annað (sjá t.d. mál C-28/96 *Fazenda Pública* gegn *Fricarnes* [1997] ECR I-4939). Sama verður að gilda um 10. og 14. gr. EES-samningsins. Gjald sem er liður í almennri ríkisbundinni gjaldtökutilhögun, lagt á með kerfisbundnum hætti og samkvæmt málefnalegum viðmiðum á vöruflokka án tillits til uppruna þeirra, fellur undir 14. gr. EES-samningsins (sjá mál C-90/94 *Haahr Petroleum* gegn *Åbenrå Havn o. fl.* [1997] ECR I-4085, í 20. lið). Af þessu leiðir að hin umdeildu ákvæði virðisaukaskattslaga verður að meta á forsendum 14. gr. EES-samningsins.

21 Í 14. gr. EES-samningsins segir:

> "Einstökum samningsaðilum er óheimilt að leggja hvers kyns beinan eða óbeinan skatt innanlands á framleiðsluvörur annarra samningsaðila umfram það sem beint eða óbeint er lagt á sams konar innlendar framleiðsluvörur.
>
> Samningsaðila er einnig óheimilt að leggja á framleiðsluvörur annarra samningsaðila innlendan skatt sem er til þess fallinn að vernda óbeint aðrar framleiðsluvörur."

22 Hinn almenni tilgangur 14. gr. EES-samningsins er að tryggja frjálsa vöruflutninga við eðlilegar samkeppnisaðstæður milli ríkja á hinu Evrópska efnahagssvæði, með því að koma í veg fyrir alla vernd sem kynni að stafa af skattlagningu innanlands sem felur í sér mismunun gagnvart framleiðsluvörum annarra aðildarríkja, og að tryggja að innlend skattlagning hafi engin áhrif hvað snertir samkeppni milli innlendrar og innfluttrar framleiðslu (sjá mál C-166/98, *Socridis* gegn *Receveur Principal des Douanes* [1999] ECR I-3791, í 16. lið).

23 Dómstóllinn telur rétt að huga fyrst að því hvort hið umdeilda ákvæði virðisaukaskattslaga fari í bága við 2. mgr. 14. gr. EES-samningsins.

24 Eins og dómstóll Evrópubandalaganna tók fram í dómi sínum í máli 184/85 *Framkvæmdastjórnin* gegn *Ítalíu* [1987] ECR 2013, í 11. lið, er hann fjallaði um hliðstætt ákvæði í samningnum um Evrópubandalagið, þá er hlutverk þess að ná til óbeinnar skattaverndar af öllu tagi þegar um er að ræða framleiðsluvörur sem

being similar within the meaning of the first paragraph of Article 14, are nevertheless in competition with each other, even if only partial, indirect or potential.

25 In determining whether products are in competition for the purposes of the prohibition laid down in the second paragraph of Article 14, the Court observes that it is not disputed that many of those who read Icelandic are also able to read certain other languages. At least for some groups of readers, books in different languages constitute alternatives. This observation applies generally, but will be particularly pertinent as regards certain specialised categories of books.

26 Moreover, there are important categories of books in which the textual contents may be a minor element compared with other content matter, such as illustrations, art reproductions, maps and tables. Even non-bilingual members of the public may have use of and benefit from such books in a foreign language.

27 The Court concludes from the foregoing that books in Icelandic and books in foreign languages are at least in partial competition with each other.

28 That being so, it is necessary to consider whether tax rules such as those at issue in the main proceedings afford indirect protection to domestic products within the meaning of the second paragraph of Article 14 EEA.

29 The contested national rule providing for a preferential VAT rate on books in Icelandic does not distinguish between books produced in Iceland and books produced abroad. It applies equally to all books written in Icelandic or translated into that language, regardless of where they are produced and published, and regardless of the nationality or seat of the producer and publisher.

30 Moreover, the Court notes that general trends in economic globalisation and technological developments are making it increasingly difficult to determine whether a product is wholly domestic. Publishers regularly produce books for different markets in different languages. The mere translation of the text into a different language may constitute a minor contribution to the final product. The foreign element may, in value, be equal to, or even greater than, the domestic element. To that extent, any protective effect of the differential VAT rates would also work in favour of foreign publishers, producers and other holders of rights to the original material.

31 The Court notes from the documents forwarded to it by the Héraðsdómur Reykjavíkur and from the written and oral observations presented by the parties, that most of the books in Icelandic that are subject to the preferential VAT rate, are produced in Iceland, and that books in foreign languages that are subject to the higher, regular, VAT rate, are chiefly imports.

32 From the observations of the Defendant, it appears that the primary objective of the contested VAT rule is to provide a basis for reduced prices on books in

ekki eru sams konar í skilningi 1. mgr. 14. gr., en eru samt í samkeppni sín á milli, þótt svo sé aðeins að hluta, óbeint eða hugsanlega.

25 Þegar ákvarða skal hvort framleiðsluvörur séu í samkeppni þannig að í bága fari við bann það sem kveðið er á um í 2. mgr. 14. gr., tekur dómstóllinn fram að ekki er umdeilt, að margir þeirra sem læsir eru á íslensku eru einnig læsir á önnur tungumál. Að minnsta kosti fyrir suma lesendahópa geta bækur á mismunandi tungumálum komið hver í annarrar stað. Þessi athugasemd á almennt við, en þó sérstaklega um bækur á ákveðnum sérsviðum.

26 Enn fremur eru til mikilvægir flokkar bóka þar sem lesefni kann að vera lítilvægur þáttur í samanburði við annað innihald, svo sem myndir, myndir listræns eðlis, kort og töflur. Slíkar bækur á erlendri tungu geta jafnvel haft notagildi og verið til gagns fólki sem ekki er læst á þá tungu.

27 Niðurstaða dómstólsins er því sú að bækur á íslensku og bækur á erlendum tungum eru að minnsta kosti að hluta til í samkeppni.

28 Fyrst svo er verður að taka til athugunar hvort skattareglur á borð við þær sem deilt er um í aðalmálinu veiti innlendri framleiðsluvöru óbeina vernd í skilningi 2. mgr. 14. gr. EES-samningsins.

29 Í hinni umdeildu reglu landslaga, sem mælir fyrir um lægra þrep virðisaukaskatts á bækur á íslensku, er ekki gerður greinarmunur á bókum framleiddum á Íslandi og bókum framleiddum erlendis. Hún gildir jafnt um allar bækur sem ritaðar eru á íslensku eða þýddar á þá tungu, hvar sem þær kunna að hafa verið búnar til og útgefnar, og hvert sem ríkisfang eða aðsetur framleiðanda og útgefanda er.

30 Einnig verður að geta þess að almenn stefna efnahagslegrar hnattvæðingar og tækniþróun gera það sífellt erfiðara að ákvarða hvort vara sé að öllu leyti innlend. Útgefendur framleiða iðulega bækur fyrir mismunandi markaði á mismunandi tungumálum. Það eitt að þýða texta bókar á aðra tungu kann að fela í sér fremur lítilvægt framlag til hinnar endanlegu afurðar. Hinn erlendi hluti kann að verðmæti til að vera jafn mikill, eða jafnvel meiri, en hinn innlendi hluti. Að þessu marki myndu öll verndaráhrif af mismunandi virðisaukaskatti einnig koma til góða erlendum útgefendum, framleiðendum og öðrum rétthöfum hins upphaflega efnis.

31 Dómstóllinn tekur fram, að í skjölum, sem honum hafa borist frá Héraðsdómi Reykjavíkur og í greinargerðum og málflutningi aðilanna kemur fram að flestar bækur á íslensku, sem hinn lægri virðisaukaskattur er lagður á, eru framleiddar á Íslandi, og að bækur á erlendum málum sem hinn hærri og almenni virðisaukaskattur er lagður á eru aðallega innfluttar.

32 Af málatilbúnaði varnaraðila er svo að sjá að helsti tilgangur hinnar umdeildu virðisaukaskattsreglu sé að stuðla að lægra verði á bókum á íslensku til stuðnings

Icelandic in order to support the national book industry, by making books in Icelandic more affordable and competitive, and thus enhance the ability of the market to sustain a literary culture in the Icelandic language. This indicates that the rule is intended to have protective effect, and confirms the incompatibility with the second paragraph of Article 14 EEA (see Case C-105/91 *Commission* v *Greece* [1992] ECR I-5871, at paragraph 22).

33 The Defendant has submitted that, since books in Icelandic are considerably more expensive than books in other languages, the difference in VAT rates does not significantly affect the difference in prices and, therefore, does not, in fact, have any protective effect. In support of that contention, the Defendant has referred to the judgment in Case 356/85 *Commission* v *Belgium* [1987] ECR 3299.

34 The Court notes that a 10.5 per cent difference in VAT rates is likely to affect the competitive relationship between books in Icelandic and books in other languages. Consideration must be given to the various segments of the book market. Indirect protection with regard to one segment of the book market is sufficient for the prohibition in the second paragraph of Article 14 EEA to apply.

35 From the above considerations, and on the basis of the information before it, the Court finds that the application of different VAT rates for books will imply that there is a protective effect within the meaning of the second paragraph of Article 14 EEA when the rate applied for books in the national language is lower than that applied for books in foreign languages.

36 The Court, therefore, concludes that a national provision of an EEA State providing that books in the language of that EEA State is subject to a lower value-added tax than books in foreign languages, is incompatible with the second paragraph of Article 14 EEA.

37 Based on the abovementioned finding, it is not necessary to consider whether the preferential tax treatment of books in Icelandic is contrary to the first paragraph of Article 14 EEA.

38 Moreover, it is not necessary to examine whether a national provision such as that contested in the main proceedings, is contrary to the general prohibition of discrimination on grounds of nationality set out in Article 4 EEA, as that provision applies independently only to situations governed by EEA law for which the EEA Agreement lays down no specific rules prohibiting discrimination (see Case E-1/00 *Íslandsbanki-FBA*, judgment of 14 July 2000, not yet reported, at paragraphs 35 and 36).

innlendri bókaframleiðslu, með því að gera bækur á íslensku auðkeyptari og samkeppnisfærari, og bæta þannig möguleika markaðarins til að halda uppi bókmenningu á íslensku máli. Þetta bendir til þess að reglunni sé ætlað að hafa verndaráhrif, og staðfestir að hún samræmist ekki 2. mgr. 14. gr. EES-samningsins (sjá mál C-105/91 *Framkvæmdastjórnin* gegn *Grikklandi* [1992] ECR I-5871, í 22. lið).

33 Stefndi hefur haldið því fram að bækur á íslensku séu talsvert dýrari en bækur á öðrum tungumálum og hafi hinn mismunandi virðisaukaskattur því lítil verðáhrif og því í raun engin verndaráhrif. Þessu til stuðnings hefur stefndi vísað til dómsins í máli 356/85 *Framkvæmdastjórnin* gegn *Belgíu* [1987] ECR 3299.

34 Dómstóllinn telur að mismunur á virðisaukaskatti sem nemur 10,5 af hundraði sé líklegur til að hafa áhrif á samkeppnisstöðu bóka á íslensku gagnvart bókum á öðrum tungum. Líta verður til hinna ýmsu geira, sem bókamarkaðurinn skiptist í. Óbein vernd innan eins markaðsgeira nægir til þess að bannið í 2. mgr. 14. gr. EES-samningsins eigi við.

35 Að ofangreindu athuguðu og á grundvelli fyrirliggjandi upplýsinga telur dómstólinn að mismunandi virðisaukaskattur á bækur gefi til kynna að fyrir hendi séu verndaráhrif í skilningi 2. mgr. 14. gr. EES-samningsins, þegar sá virðisaukaskattur, sem lagður er á bækur á þjóðtungunni er lægri en sá sem lagður er á bækur á erlendum tungumálum.

36 Niðurstaða dómstólsins er því sú að regla í landslögum EES-ríkis, sem mælir svo fyrir að virðisaukaskattur á bækur á tungu þess ríkis sé lægri en á bækur á erlendum tungum, sé andstæð 2. mgr. 14. gr. EES-samningsins.

37 Vegna þessarar niðurstöðu er ekki nauðsynlegt að taka til athugunar hvort sú skattalega meðferð, sem er hagstæð bókum á íslensku, brjóti í bága við 1. mgr. 14. gr. EES-samningsins.

38 Enn fremur er ekki heldur þörf á að athuga hvort regla í landslögum af því tagi sem deilt er um í aðalmálinu fari gegn hinu almenna banni við mismunun á grundvelli ríkisfangs, sem kveðið er á um í 4. gr. EES-samningsins, því að það ákvæði á einungis sjálfstætt við aðstæður þar sem EES-réttur gildir en engin ákvæði EES-samningsins banna mismunun sérstaklega (sjá mál E-1/00 *Íslandsbanki-FBA*, dómur 14. júlí 2000 sem ekki hefur enn verið útgefinn, í 35. og 36. lið).

The third question

39 By its third question, the Héraðsdómur Reykjavíkur is essentially asking whether the preferential tax treatment of books in Icelandic may be justified on grounds relating to the public interest in enhancing the position of the national language.

40 The Defendant and the Government of Norway have argued that under EEA law, there is a basis for objective justification of the Icelandic application of different rates of VAT on books. The objective is to sustain and protect the Icelandic language, which forms an essential part of Iceland's cultural heritage and contributes materially to the formation of the Icelandic identity. It has been argued that this objective must be regarded as permitting derogation from Article 14 EEA.

41 The Court acknowledges that support for the national language may be a cultural goal of high priority. However, the Court must examine whether, under EEA law, the pursuit of that objective would provide sufficient grounds for justification of a national tax rule that would otherwise fall under the prohibition contained in Article 14 EEA.

42 Article 13 EEA has been invoked as a possible legal basis for such justification. That argument must, however, be rejected. The Court recalls that the EEA rules on the free movement of goods are stricter than those on internal taxation. It follows from the wording and from the purpose of Article 13 EEA that it is only applicable as justification for derogations from Articles 11 and 12 EEA, relating to quantitative restrictions on imports and exports and measures having equivalent effect.

43 It has further been suggested that Article 6(3) TEU might offer a basis for derogation, since language is central to the maintenance of the national identity of a State. The Court notes that the EEA Agreement contains no corresponding provision. Since the Treaty on European Union was negotiated before the conclusion of the EEA Agreement, it must be assumed that this discrepancy is intentional. The Court cannot base its reasoning on the analogous application of Article 6(3) TEU in the instant case.

44 The Joint Declaration on Cultural Affairs, annexed to the Final Act to the EEA Agreement, has also been invoked in this regard. The Court notes that this Joint Declaration states that the Contracting Parties are mindful that the establishment of the fundamental freedoms will have a significant impact in the field of culture. On that basis, the Contracting Parties declare their intention to strengthen and broaden cooperation in the area of cultural affairs in order to contribute to a better understanding among the peoples of a multicultural Europe, and to safeguard and further develop the national and regional heritage that enriches European culture by its diversity. The Court cannot see that these formulations can provide a concrete basis for national derogations from the important provisions of Article 14 EEA.

Þriðja spurning

39 Í þriðju spurningu sinni spyr Héraðsdómur Reykjavíkur í raun hvort réttlæta megi hina hagstæðari skattameðferð á bókum á íslensku með þeim almannahagsmunum sem felast í að styrkja stöðu þjóðtungunnar.

40 Stefndi og ríkisstjórn Noregs hafa haldið því fram, að í EES-rétti sé fyrir hendi grundvöllur fyrir efnislegri réttlætingu á mismunandi virðisaukaskattsálagningu Íslendinga á bækur. Tilgangurinn er að efla og vernda íslenska tungu, sem er óaðskiljanlegur hluti íslenskrar menningararfleifðar og veigamikill þáttur í sjálfsmynd Íslendinga. Því hefur verið haldið fram að þetta markmið heimili frávik frá 14. gr. EES-samningsins.

41 Dómstóllinn er því sammála að stuðningur við þjóðtunguna geti verið afar mikilvægt menningarlegt markmið. Hins vegar verður dómstóllinn að kanna hvort það markmið getur samkvæmt EES-rétti réttlætt innlenda skattareglu sem að öðrum kosti myndi falla undir bannreglu 14. gr. EES-samningsins.

42 Vísað hefur verið til 13. gr. samningsins sem hugsanlegan lagagrundvöll slíkrar réttlætingar. Þeirri röksemd verður þó að hafna. Dómurinn bendir á, að í EES-rétti gilda strangari reglur um frjálsa vöruflutninga en um innlenda skattlagningu. Það leiðir af orðalagi og tilgangi 13. gr. samningsins að hún getur aðeins réttlætt frávik frá 11. og 12. gr. hans, sem fjalla um magntakmarkanir á inn- og útflutningi og ráðstafanir sem hafa samsvarandi áhrif.

43 Ennfremur hefur verið vísað til að 3. mgr. 6. gr. samningsins um Evrópusambandið kunni að vera grundvöllur að slíku fráviki, þar sem tungumál hafa afgerandi þýðingu við að halda uppi þjóðernisvitund í hverju ríki. Dómstóllinn tekur fram, að ekkert hliðstætt ákvæði er í EES-samningnum. Þar sem samningurinn um Evrópusambandið var gerður á undan EES-samningnum verður að ætla að sá munur sé með vilja gerður. Dómstóllinn getur því ekki byggt úrlausn þessa máls á reglu hliðstæðri 3. mgr. 6. gr. samningsins um Evrópusambandið.

44 Í þessu sambandi hefur einnig verið vitnað til Sameiginlegrar yfirlýsingar um samstarf í menningarmálum, sem fylgir lokagerð EES-samningsins. Í henni segir að samningsaðilar geri sér ljóst að tilkoma fjórfrelsisins muni hafa veruleg áhrif á menningarsviðinu. Samningsaðilar lýsa því yfir þeim ásetningi sínum að efla og auka samvinnu sína á sviði menningarmála til að stuðla að auknum skilningi milli ólíkra menningarsvæða í Evrópu og varðveita og efla þá menningarlegu arfleifð þjóða og svæða sem auðgar evrópska menningu með fjölbreytileik sínum. Dómstóllinn fær ekki séð að þessi orð geti verið sérstakur grundvöllur fyrir ríkisbundnum frávikum frá hinum mikilvægu ákvæðum 14. gr. EES-samningsins.

45 Finally, it has been suggested that the intentions reflected in the Joint Declaration correspond to the objectives of Article 151(4) EC, and that, by analogy, this provision of the EC Treaty, introduced by the Treaty of Amsterdam, may be relied upon by the EFTA Court in the present case. The Court considers that it would not be a proper exercise of the judicial function to seek to extend the scope of application of the EEA Agreement on that basis.

46 Based on the above considerations, the answer to the third question must therefore be that a national provision of an EEA State providing that books in the language of that EEA State is subject to a lower value-added tax than books in foreign languages, cannot be justified on grounds relating to the public interest of enhancing the position of the national language.

The fifth question

47 By its fifth question, the Héraðsdómur Reykjavíkur essentially seeks to ascertain whether, under EEA law, a provision of the main part of the EEA Agreement is to prevail over a conflicting provision of national legislation.

48 As a preliminary point, the Court notes that, in proceedings brought under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, it is not for the EFTA Court to rule on the interpretation of provisions of national legislation (see Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 15, at paragraph 78).

49 The Court recalls first its findings in Case E-9/97 *Erla María Sveinbjörnsdóttir* [1998] EFTA Court Report 95, at paragraphs 58 and 59, with regard to the protection of rights for individuals and economic operators foreseen by the EEA Agreement. The concerns underlying the findings in that case are also germane for the consideration of the present issue.

50 The Court observes that the main part of the EEA Agreement, including Article 14 EEA, has been made part of Icelandic law by the adoption of *Lög nr. 2/1993 um Evrópska efnahagssvæðið* (Act No. 2/1993 on the European Economic Area, hereinafter the "EEA Act"). Section 3 of the Icelandic EEA Act provides that "[s]tatutes and regulations shall be interpreted, in so far as appropriate, to accord with the EEA Agreement and the rules based thereon". In presenting the Bill for this Act to Parliament, the Government stated that this was intended as a special rule of interpretation, and that it would be limited by the provisions of the Icelandic Constitution.

51 Protocol 35 to the EEA Agreement provides direction for the resolution of conflicts between rules of EEA law and rules of national law. In adopting that Protocol, the EFTA States have undertaken to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in cases of possible conflict

45 Að lokum, hefur verið nefnt að fyrirætlanir þær, sem fram koma í hinni sameiginlegu yfirlýsingu, séu hliðstæðar þeim markmiðum sem kveðið er á um í 4. mgr. 151. gr. samningsins um Evrópubandalagið, og dómstóllinn geti því í þessu máli byggt á reglu hliðstæðri því ákvæði samningsins, sem fellt var inn í hann með Amsterdamsamningnum. Dómstóllinn telur ekki samræmast réttilegri meðferð dómsvalds að leitast við að færa út gildissvið EES-samningsins á þeim grundvelli.

46 Með vísan til ofangreindra forsendna verður að svara þriðju spurningunni þannig, að ákvæði í landslögum EES-ríkis sem mælir svo fyrir, að bækur á tungumáli þess beri lægri virðisaukaskatt en bækur á erlendum tungumálum, verði ekki réttlætt með vísan til þeirra almannahagsmuna að styrkja stöðu þjóðtungunnar.

Fimmta spurning

47 Í fimmtu spurningu sinni er Héraðsdómur Reykjavíkur í raun að leita svars við því hvort ákvæði í meginmáli EES-samningsins skuli, samkvæmt EES-rétti, gilda framar ósamrýmanlegu ákvæði í landslögum.

48 Dómstóllinn tekur fram í upphafi, að í málum samkvæmt 34. gr. samnings EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls er það ekki hlutverk EFTA-dómstólsins að dæma um skýringu ákvæða í landslögum (sjá mál E-1/94 *Restamark* [1994-1995] skýrsla EFTA-dómstólsins 15, í 78. lið).

49 Dómstóllinn minnir fyrst á álit sitt í máli E-9/97, *Erla María Sveinbjörnsdóttir* [1998], skýrsla EFTA-dómstólsins 95, í 58. og 59. lið, um réttindi einstaklinga og atvinnufyrirtækja sem EES-samningurinn gerir ráð fyrir. Þau sjónarmið sem lágu til grundvallar áliti dómstólsins í því máli eiga einnig við þegar athuguð eru álitaefni þessa máls.

50 Dómstóllinn tekur fram að meginmál EES-samningsins, þar á meðal 14. gr. hans, hefur verið tekið upp í íslensk lög með lögum *nr. 2/1993 um Evrópska efnahagssvæðið* (hér eftir nefnd "EES-lögin"). Samkvæmt 3. gr. íslensku EES-laganna skal skýra lög og reglur, að svo miklu leyti sem við á, til samræmis við EES-samninginn og þær reglur sem á honum byggja. Er ríkisstjórnin lagði frumvarp til laganna fyrir Alþingi var því lýst yfir að ákvæði þetta hefði að geyma sérstaka lögskýringarreglu, og myndi hún takmarkast af ákvæðum íslensku stjórnarskrárinnar.

51 Bókun 35 með EES-samningnum er til leiðsagnar um hvernig beri að leysa úr ósamræmi milli reglna EES-réttar og reglna landsréttar. Með samþykkt þeirrar bókunar hafa EES-ríkin skuldbundið sig til að setja, ef nauðsyn krefur, lagaákvæði þess efnis að EES-reglur gildi ef til árekstra kemur milli EES-reglna sem settar hafa verið í landslög og annarra reglna landslaga.

between implemented EEA rules and other statutory provisions. The Court understands that Section 3 of the Icelandic EEA Act has been enacted to fulfil that undertaking. In the present proceedings, the Court has heard argument by the Plaintiff raising doubt about the sufficiency of Section 3 in that respect. In keeping with what was stated in paragraph 48 above, consideration and interpretation of that provision fall to the national court.

52 The preamble to Protocol 35 to the EEA Agreement makes clear that the Agreement does not require any Contracting Party to transfer legislative powers to any institution of the EEA, and that the homogeneity of the EEA will have to be achieved through national procedures. It follows from that preamble and from the wording of Protocol 35, that the undertaking assumed under that Protocol relates only to EEA rules that have already been implemented in national law. As noted above, the main part of the EEA Agreement has been made part of national law. It is therefore implemented within the meaning of Protocol 35.

53 The undertaking assumed under Protocol 35 cannot, however, extend to every provision of the main part of the EEA Agreement. It relates only to those provisions that are framed in a manner capable of creating rights that individuals and economic operators may invoke before national courts. As the Court has previously held, such is the case when the provision in question is unconditional and sufficiently precise (see *Restamark*, cited above, paragraph 77).

54 Article 14 EEA is identical in substance to Article 90 EC. The latter Article has been considered to be unconditional and sufficiently precise (see Case 57/65 *Lütticke* v *Hauptzollamt Saarlouis* [1966] ECR 205). In view of the homogeneity objective and in order to ensure equal treatment of individuals throughout the EEA, Article 14 EEA must be held to fulfil the criteria of being unconditional and sufficiently precise.

55 The answer to the fifth question must therefore be that where a provision of national law is incompatible with Article 14 EEA, and that Article has been implemented in national law, a situation has arisen which is governed by the undertaking assumed by the EFTA States under Protocol 35 to the EEA Agreement, the premise of which is that the implemented EEA rule shall prevail.

III Costs

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

Að skilningi dómstólsins hefur 3. gr. EES-laganna verið sett til að uppfylla þá skuldbindingu. Í rekstri þessa máls fyrir dóminum hefur stefnandi borið brigður á að 3. gr. EES-laga sé fullnægjandi að þessu leyti. Í samræmi við það sem fram var tekið í 48. lið hér að ofan kemur það í hlut dómstóls aðildarríkisins að fjalla um það ákvæði og túlka það.

52 Í inngangi að bókun 35 með EES-samningnum kemur skýrt fram að í samningnum er ekki gerð krafa til þess að aðildarríki framselji löggjafarvald til stofnana EES, og að ná verði fram einsleitni innan EES með þeirri málsmeðferð, sem gildir í hverju landi um sig. Af inngangi og af orðalagi bókunar 35 leiðir að skuldbindingin sem gengist hefur verið undir með bókuninni lýtur aðeins að EES-reglum sem lögfestar hafa verið í landsrétti. Eins og þegar hefur verið getið, hefur meginmál EES-samningsins verið tekið upp í landslög. Meginmáli samningsins hefur því verið "komið til framkvæmda" í skilningi bókunar 35.

53 Skuldbinding sú, sem gengist er undir með bókun 35, getur þó ekki náð til allra ákvæða meginmáls samningsins. Hún varðar aðeins þau ákvæði sem þannig eru úr garði gerð að þau geti stofnað til réttinda sem einstaklingar og atvinnufyrirtæki geta reist á dómkröfur innanlands. Eins og dómstóllinn hefur áður talið, er um slíkt að ræða þegar viðkomandi ákvæði er óskilyrt og nægilega nákvæmt (sjá *Restamark*, áður vísað til, 77. liður).

54 Ákvæði 14. gr. EES-samningsins eru sama efnis og 90. gr. samningsins um Evrópubandalagið. Síðarnefnda greinin hefur verið talin óskilyrt og nægilega nákvæm (sjá mál 57/65 *Lütticke* gegn *Hauptzollamt Saarlouis* [1966] ECR 205). Með hliðsjón af markmiðinu um einsleitni og til að tryggja sömu meðferð einstaklinga á öllu evrópska efnahagssvæðinu verður að telja 14. gr. EES-samningsins uppfylla þá kröfu að vera óskilyrt og nægilega nákvæm.

55 Fimmtu spurningu verður því að svara þannig, að þegar ákvæði landslaga samrýmist ekki 14. gr. EES-samningsins og sú grein hefur verið innleidd í landslög, er upp komin staða sem skuldbinding EFTA-ríkjanna í bókun 35 gildir um, en hún er reist á þeirri forsendu, að EES-regla, sem innleidd hefur verið í landsrétt, skuli hafa forgang.

III Málskostnaður

56 Ríkisstjórn Liechtenstein, ríkisstjórn Noregs, Eftirlitsstofnun EFTA og Framkvæmdastjórn Evrópubandalaganna, sem lagt hafa greinargerðir sínar fram fyrir dómstólinn, skulu bera sinn málskostnað. Að því er lýtur að aðilum málsins verður að líta á málsmeðferð fyrir EFTA-dómstólnum sem þátt í meðferð málsins fyrir Héraðsdómi Reykjavíkur og kemur það í hlut þess dómstóls að kveða á um málskostnað.

On those grounds,

THE COURT,

in answer to the questions referred to it by Héraðsdómur Reykjavíkur by a judgment of 27 November 2000, hereby gives the following Advisory Opinion:

1. The power of an EEA State to levy value-added tax does not exclude the application of EEA rules.

2. A national provision of an EEA State providing that books in the language of that EEA State are subject to a lower value-added tax than books in foreign languages, is incompatible with Article 14 EEA.

3. Such a national provision cannot be justified on grounds relating to the public interest of enhancing the position of the national language.

4. When a provision of national law is incompatible with Article 14 EEA, and that Article has been implemented in national law, a situation arises which is governed by the undertaking assumed by the EFTA States under Protocol 35 to the EEA Agreement, the premise of which is that the implemented EEA rule shall prevail.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 22 February 2002.

Lucien Dedichen
Registrar

Thór Vilhjálmsson
President

Á ofangreindum forsendum telur

DÓMSTÓLLINN

að spurningum þeim, sem Héraðsdómur Reykjavíkur beindi til hans með úrskurði upp kveðnum 27. nóvember 2000, beri að svara með eftirfarandi ráðgefandi áliti:

1. Vald EES-ríkis til að leggja á virðisaukaskatt útilokar ekki beitingu EES-reglna.

2. Ákvæði í landslögum EES-ríkis, sem kveður á um að bækur á tungumáli þess beri lægri virðisaukaskatt en bækur á erlendum málum, samrýmist ekki 14. gr. EES-samningsins.

3. Slíkt ákvæði í landslögum verður ekki réttlætt með tilvísun til þeirra almannahagsmuna að bæta stöðu þjóðtungunnar.

4. Þegar ákvæði landslaga samrýmist ekki 14. gr. EES-samningsins og sú grein hefur verið innleidd í landslög, er upp komin sú staða sem skuldbinding EFTA-ríkjanna samkvæmt bókun 35 við EES-samninginn gildir um, en hún er reist á þeirri forsendu, að EES-regla, sem innleidd hefur verið í landslög, skuli hafa forgang.

Þór Vilhjálmsson Carl Baudenbacher Per Tresselt

Kveðið upp í heyranda hljóði í Lúxemborg 22. febrúar 2002.

Lucien Dedichen
Dómritari

Þór Vilhjálmsson
Dómsforseti

REPORT FOR THE HEARING
in Case E-1/01

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

Hörður Einarsson

and

The Icelandic State

on the interpretation of Articles 4, 10 and 14 of the EEA Agreement.

I. Introduction

1. By an order dated 4 January 2001, registered at the Court on 11 January 2001, the Héraðsdómur Reykjavíkur (Reykjavík District Court) made a Request for an Advisory Opinion in the case pending before it between Hörður Einarsson (hereinafter, the "Plaintiff") and the Government of Iceland (hereinafter, the "Defendant").

2. The dispute before the Héraðsdómur Reykjavíkur concerns the compatibility with the EEA Agreement of a provision of Icelandic law requiring the payment of lower rate of value-added tax (VAT) on the sale of books in Icelandic than on the sale of books in other languages.

II. Legal background

EEA law

3. The questions submitted by the national court concern the interpretation of Articles 4, 10 and 14 EEA.

SKÝRSLA FRAMSÖGUMANNS
í máli E-1/01

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

Hörður Einarsson

gegn

íslenska ríkinu

varðandi túlkun á 4., 10. og 14. gr. EES-samningsins (hér eftir "EES").

I. Inngangur

1. Með beiðni dagsettri 4. janúar 2001, sem skráð var í málaskrá dómstólsins 11. janúar 2001, óskaði Héraðsdómur Reykjavíkur eftir ráðgefandi áliti í máli sem rekið er fyrir dómstólnum milli Harðar Einarssonar, stefnanda, og íslenska ríkisins, stefnda.

2. Ágreiningurinn fyrir Héraðsdómi Reykjavíkur snýst um það hvort ákvæði íslenskra laga, sem gera ráð fyrir að hlutfall virðisaukaskatts á íslenskar bækur sé lægra en á bækur á öðrum tungumálum, séu samrýmanleg EES-samningnum.

II. Löggjöf

EES-réttur

3. Spurningarnar frá Héraðsdómi Reykjavíkur varða 4., 10. og 14. gr. EES.

4. Article 4 EEA reads as follows:

> *"Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."*

5. Article 10 EEA reads as follows:

> *"Customs duties on imports and exports, and any charges having equivalent effect, shall be prohibited between the Contracting Parties. Without prejudice to the arrangements set out in Protocol 5, this shall also apply to customs duties of a fiscal nature."*

6. Article 14 EEA reads as follows:

> *"No Contracting Party shall impose, directly or indirectly, on the products of other Contracting Parties any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.*
>
> *Furthermore, no Contracting Party shall impose on the products of other Contracting Parties any internal taxation of such a nature as to afford indirect protection to other products."*

National law

7. The national legislation contested before the Héraðsdómur Reykjavíkur is the Icelandic *Lög nr. 50/1988 um virðisaukaskatt* (Act No. 50/1988 on Value Added Tax, hereinafter the "VAT Act"), as amended.

8. Section 1 of the VAT Act provides that VAT is to be paid to the State Treasury on all domestic transactions, and upon the importation of goods and services, as provided for in the Act. Section 2 provides that the duty to pay VAT applies, in principle, to all goods, both new and used.

9. The first paragraph of section 14 of the VAT Act provides that VAT is to be levied at the rate of 24.5%. The general rule of 24.5% VAT is subject to the exceptions provided for in the second paragraph of section 14. From the second paragraph it follows that VAT on the sale of certain goods and services is to be levied at the lower rate of 14%. The sale of books written in Icelandic or translated into that language is subject to the lower VAT rate.

10. Section 14 of the VAT Act currently reads as follows:

> *"Value Added Tax shall be levied at a rate of 24.5%, and shall accrue to the State Treasury.*

4. Ákvæði 4. gr. EES er svohljóðandi:

"Hvers konar mismunun á grundvelli ríkisfangs er bönnuð á gildissviði samnings þessa nema annað leiði af einstökum ákvæðum hans."

5. Ákvæði 10. gr. EES er svohljóðandi:

"Tollar á innflutning og útflutning, svo og gjöld sem hafa samsvarandi áhrif, eru bannaðir milli samningsaðila. Með fyrirvara um það fyrirkomulag sem um getur í bókun 5 skal þetta einnig eiga við um fjáröflunartolla."

6. Ákvæði 14. gr. EES-samningsins er svohljóðandi:

"Einstökum samningsaðilum er óheimilt að leggja hvers kyns beinan eða óbeinan skatt innanlands á framleiðsluvörur annarra samningsaðila umfram það sem beint eða óbeint er lagt á sams konar innlendar framleiðsluvörur.

Samningsaðila er einnig óheimilt að leggja á framleiðsluvörur annarra samningsaðila innlendan skatt sem er til þess fallinn að vernda óbeint aðrar framleiðsluvörur."

Landsréttur

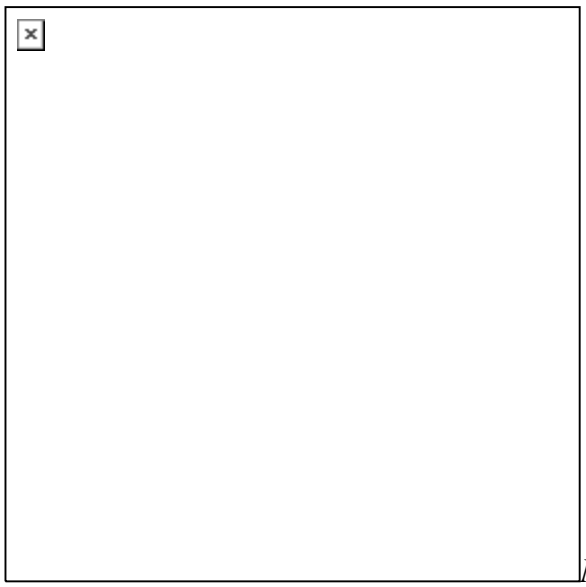
7. Íslensku lögin sem á reynir fyrir Héraðsdómi Reykjavíkur eru *Lög nr. 50/1988 um virðisaukaskatt* með síðari breytingum.

8. Í 1. gr. laganna kemur fram að greiða skuli í ríkissjóð virðisaukaskatt af viðskiptum innanlands á öllum stigum, svo og af innflutningi vöru og þjónustu, eins og nánar er ákveðið í lögunum. Samkvæmt 2. gr. nær skattskyldan til allra vara og verðmæta, nýrra og notaðra.

9. Í 1. mgr. 14. gr. laganna um virðisaukaskatt er mælt svo fyrir að virðisaukaskattur skuli vera 24.5%. Í 2. mgr. 14. gr. eru gerðar undantekningar frá almennu reglunni um 24,5% virðisaukaskatt. Þar kemur fram að virðisaukaskattur af tilteknum vörum og þjónustu skuli vera 14%. Þetta lægra hlutfall virðisaukaskatts á við um sölu bóka á íslensku, jafnt frumsaminna sem þýddra.

10. Ákvæði 14. gr. laga um virðisaukaskatt, eins og það er nú, er svohljóðandi:

"Virðisaukaskattur skal vera 24,5% og rennur hann í ríkissjóð.

 *Notwithstanding the provision of the first paragraph, Value Added Tax on the sale of the following goods and services shall be levied at a rate of 14%:*

1. ...
2. Lease of tourist accommodation and hotel rooms, and other temporary accommodation service.
3. ...
4. Radio station listener charges.
5. Sale of periodicals, daily papers, and national and regional newspapers.
6. Sale of books in the Icelandic language, original publications as well as translations.
7. Sale of warm water, electricity and fuel oil for heating of buildings, and of water for bathing.
8. Sale of food and other goods for human consumption as laid down in further detail by administrative regulation, except sale of sweets, beverages and other goods subject to the Customs Tariff Numbers enumerated in an Appendix to this Act; sale of alcoholic beverages, and sale of milk not pasteurised. Sale and service by restaurants, canteens and similar establishments of prepared food shall however be taxable under the first paragraph of this Section.
9. Access to road constructions."

11. Several amendments have been made regarding the levying of VAT on the sale of books in the Icelandic language since the VAT Act was first enacted. By the adoption of Act No. 119/1989 amending the VAT Act, all books in Icelandic were made exempt from VAT altogether, to bring them in line with other printed material in Icelandic.

12. The current rate of VAT applicable to books in Icelandic was introduced pursuant to Act No. 111/1992. Thus, VAT on the sale of all books in Icelandic,

Þrátt fyrir ákvæði 1. mgr. skal virðisaukaskattur af sölu á eftirtalinni vöru og þjónustu vera 14%:

1. …
2. Útleiga hótel- og gistiherbergja og önnur gistiþjónusta.
3. …
4. Afnotagjöld útvarpsstöðva.
5. Sala tímarita, dagblaða og landsmála- og héraðsfréttablaða.
6. Sala bóka á íslenskri tungu, jafnt frumsaminna sem þýddra.
7. Sala á heitu vatni, rafmagni og olíu til hitunar húsa og laugarvatns.
8. Sala á matvörum og öðrum vörum til manneldis samkvæmt nánari afmörkun í reglugerð, þó ekki sala á sælgæti og drykkjarvörum og fleiri vörum sem flokkast undir tollskrárnúmer sem talin eru upp í viðauka við lög þessi]5) né sala á áfengum drykkjum og ógerilsneyddri mjólk. Sala veitingahúsa, mötuneyta og annarra hliðstæðra aðila á tilreiddum mat og þjónustu er þó skattskyld skv. 1. mgr. þessarar greinar.
9. Aðgangur að vegamannvirkjum."

11. Allmargar breytingar hafa verið gerðar á reglum um virðisaukaskatt á sölu bóka á íslensku síðan lög um virðisaukaskatt tóku fyrst gildi. Með gildistöku laga nr. 119/1989, um breytingar á lögum um virðisaukaskatt, voru bækur með öllu undanþegnar virðisaukaskatti til samræmis við reglur sem giltu um annað prentað efni á íslensku.

12. Núgildandi reglur um virðisaukaskatt af bókum tóku gildi með lögum nr. 111/1992. Samkvæmt þeim er virðisaukaskattur af sölu bóka, hvort sem þær eru frumsamdar eða þýddar, 14%. Bækur á erlendum tungumálum falla aftur á móti undir almennu regluna um 24,5% virðisaukaskatt.

III. Málavextir og meðferð málsins

13. Stefnandi, Hörður Einarsson, hefur öðru hverju keypt erlendis frá bækur til einkanota. Bækur þessar hefur hann fengið sendar með pósti. Við afgreiðslu bókanna hefur honum, í samræmi við 1. mgr. 14. gr. laganna um virðisaukaskatt, verið gert að greiða 24,5% virðisaukaskatt.

14. Málið fyrir Héraðsdómi Reykjavíkur varðar álagningu virðisaukaskatts á bækur sem fluttar voru inn frá Bretlandi og Þýskalandi. Við innflutning bókanna, og í samræmi við póstaðflutningsskýrslur frá 26. júlí og 11. ágúst 1999 greiddi

whether original publications or translations, is 14%. Books in foreign languages continue to be subject to the general VAT rate of 24.5%.

III. Facts and procedure

13. The Plaintiff, Hörður Einarsson, has on several occasions purchased books from abroad for his personal use. These books have been sent to him by post, with VAT payable on receipt. VAT has been charged at the rate of 24.5%, in accordance with the first paragraph of section 14 of the VAT Act.

14. The case pending before Héraðsdómur Reykjavíkur concerns VAT levied on books imported from the United Kingdom and Germany. Upon importation of the books, and in accordance with two customs declarations of 26 July 1999 and one of 11 August 1999, the Plaintiff paid a total of ISK 3 735 VAT, representing 24.5% of the purchase price.

15. In a letter dated 21 May 1999 to the Minister of Finance, the Plaintiff objected to the application of different rates of VAT on books in foreign languages and books in Icelandic. The Ministry of Finance did not accept the objections raised, and informed the Plaintiff thereof in a letter dated 16 July 1999.

16. Following the letter from the Ministry of Finance, the Plaintiff made a complaint to the Commissioner of Customs in Reykjavík and, subsequently, to the State Customs Board. The Plaintiff's complaints were rejected in both administrative instances. The State Customs Board rendered its decision on 22 December 1999.

17. The Plaintiff then brought proceedings before the Héraðsdómur Reykjavíkur. In the proceedings, the Plaintiff has raised questions concerning the compatibility with the EEA Agreement of the Icelandic VAT system on books provided for in the VAT Act. On the 27 November 2000, Héraðsdómur Reykjavíkur decided to stay the proceedings and submit a Request for an Advisory Opinion to the EFTA Court.

IV. Questions

18. The following questions were referred to the EFTA Court:

> **1. Is it compatible with EEA law, in particular Articles 14 and 10 EEA, or, as the case may be, Article 4 EEA, that a value-added tax (VAT) on books is imposed in accordance with Icelandic law which is higher (24.5%) on books in foreign languages than on books in the Icelandic language (14%), when books in Icelandic are generally**

stefnandi samtals 3.735 íslenskar krónur, sem séu 24,5% af innkaupsverðinu.

15. Með bréfi til fjármálaráðherra, dags. 21. maí 1999, gerði stefnandi athugasemd við reglur um mismunandi virðisaukaskatt eftir því hvort um væri að ræða bækur á erlendum málum eða íslensku. Fjármálaráðuneytið féllst ekki á athugasemdir stefnanda og upplýsti hann um það með bréfi dags. 16. júlí 1999.

16. Í kjölfar bréfs fjármálaráðuneytisins kærði stefnandi álagningu gjaldanna til tollstjórans í Reykjavík og síðan til ríkistollanefndar. Kröfum stefnanda var hafnað á báðum stjórnsýslustigum. Úrskurður ríkistollanefndar var kveðinn upp 22. desember 1999.

17. Stefnandi höfðaði síðan mál fyrir Héraðsdómi Reykjavíkur. Við málsmeðferðina hefur stefnandi dregið í efa að íslensku reglurnar um álagningu virðisaukaskatts á bækur fái samrýmst EES-samningnum. Þann 27. nóvember 2000 ákvað Héraðsdómur Reykjavíkur að óska eftir ráðgefandi áliti EFTA-dómstólsins.

IV. Álitaefni

18. Eftirfarandi spurningar voru bornar undir EFTA-dómstólinn:

1. Er það samrýmanlegt EES-rétti, sérstaklega 14. grein og 10. grein EES-samningsins, eða eftir atvikum 4. gr. að samkvæmt íslenskum lögum um virðisaukaskatt sé lagður hærri virðisaukaskattur á bækur á erlendum tungumálum (24,5%) heldur en á bækur á íslensku (14%), og svo háttar til, að bækur á íslensku eru almennt gefnar út á Íslandi, en bækur á öðrum tungumálum eru almennt gefnar út utan Íslands, þar á meðal í öðrum EES-ríkjum?

2. Sérstaklega er um það spurt, (a) hvort skýra beri 14. grein EES-samningsins svo, að bækur á íslensku og bækur á öðrum tungumálum teljist vera sams konar framleiðsluvörur í merkingu ákvæðisins, eða (b) hvort mismunandi skattlagning bóka eftir tungumáli með framangreindum hætti sé til þess fallin að veita innlendri bókaútgáfu óbeina vernd?

3. Réttlætir það framangreindan mismun á gjaldstigi virðisaukaskatts, ef með hinu lægra gjaldstigi á bækur á íslensku vakir fyrir stjórnvöldum að treysta íslenska tungu?

published in Iceland, while books in other languages are generally published in other countries, including other EEA countries?

2. In particular, is (a) Article 14 EEA to be understood in the sense that books in Icelandic and books in other languages are similar products within the meaning of that provision, or (b) different taxation on books according to language, in the manner described above, likely to afford indirect protection to domestic book production?

3. Can the difference in the VAT percentage levied be justified by the aim of the Icelandic authorities to enhance the position of the Icelandic language through a lower rate of VAT charged on books in Icelandic?

4. Does Iceland's power to levy VAT prevent the application of EEA rules, in particular Articles 14 and 10 EEA, in the present case?

5. If, following the answers to the above questions, the rules regulating value-added tax on books are deemed incompatible with the EEA Agreement, do the EEA Agreement or the rules deriving therefrom contain any provisions as to what rules are to be applied in cases of conflict between national law and rules deriving from the EEA Agreement?

V. Written Observations

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

– the Plaintiff, Hörður Einarsson, hæstaréttarlögmaður (Supreme Court Advocate), representing himself;

– the Defendant, the Government of Iceland, represented by Skarphéðinn Þórisson, Attorney General (Civil Affairs), assisted by Einar Karl Hallvarðsson, hæstaréttarlögmaður (Supreme Court Advocate), Office of the Attorney General (Civil Affairs);

– the Government of Liechtenstein, represented by Christoph Büchel, Director, EEA Coordination Unit, acting as Agent;

– the Government of Norway, represented by Helge Seland, Assistant Director General, Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Bjarnveig Eiríksdóttir and Dóra Sif Tynes, Officers, Department of Legal & Executive Affairs, acting as Agents;

4. Er vald íslenska ríkisins til álagningar virðisaukaskatts því til fyrirstöðu, að reglum EES-réttar, sérstaklega 14. grein og 10. grein EES-samningsins, verði beitt í málinu?

5. Ef svarið við spurningunum hér að framan felur það í sér að reglur um virðisaukaskatt af bókum séu ósamrýmanlegar EES-samningnum, er spurt hvort samningurinn eða aðrar reglur sem af honum leiða hafa að geyma ákvæði sem mæla fyrir um það hvaða reglum skuli beitt þegar ósamræmi er milli reglna landsréttar og reglna sem leiða af EES-samningnum?

V. Skriflegar greinargerðir

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

– Stefnanda, Herði Einarssyni, hæstaréttarlögmanni, sem rekur mál sitt sjálfur;

– Stefnda, ríkisstjórn Íslands. Í fyrirsvari er Skarphéðinn Þórisson, ríkislögmaður og honum til aðstoðar er Einar Karl Hallvarðsson, hæstaréttarlögmaður á skrifstofu ríkislögmanns;

– ríkisstjórn Liechtenstein. Í fyrirsvari sem umboðsmaður er Christoph Büchel, yfirmaður samræmingarsviðs fyrir EES-samninginn;

– ríkisstjórn Noregs. Í fyrirsvari sem umboðsmaður Helge Seland, aðstoðarráðuneytisstjóri í konunglega utanríkisráðuneytinu;

– Eftirlitsstofnun EFTA. Í fyrirsvari sem umboðsmenn Bjarnveig Eiríksdóttir og Dóra Sif Tynes, lögfræðingar á lögfræði- og framkvæmdasviði;

– Framkvæmdastjórn Evrópubandalaganna. Í fyrirsvari sem umboðsmaður Richard Lyal, lögfræðingur hjá lagadeild.

Hörður Einarsson

Fyrsta og önnur spurning

20. Stefnandi, Hörður Einarsson, vísar til dóms dómstóls Evrópubandalaganna í máli *Framkvæmdastjórnarinnar* gegn *Danmörku*[1] og heldur því fram að

[1] Mál 106/84 *Framkvæmdastjórnin* gegn *Danmörku* [1986] ECR 833.

– the Commission of the European Communities, represented by Richard Lyal, member of its Legal Service, acting as Agent.

Hörður Einarsson

Questions 1 and 2

20. The Plaintiff, Hörður Einarsson, refers to the judgment of the Court of Justice of the European Communities in *Commission* v *Denmark*[1] and states that the aim of Article 14 EEA is to ensure the free movement of goods between the EEA States in normal conditions of competition, through the elimination of all forms of protection which result from the application of internal taxation which discriminates against products from other EEA States, and to guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products.

21. The Plaintiff contends that discrimination based on language is, in practice, as close as possible to discrimination based on nationality. Most EEA States have their own national languages, and none of them share a language with Iceland. For this reason, as well as the fact that books in Icelandic are typically produced and published in Iceland, whereas books in other languages are typically produced and published outside Iceland, the difference in treatment provided for in the VAT Act constitutes indirect discrimination in violation of Article 14 EEA.

22. The Plaintiff submits that books in Icelandic and books in other EEA languages are "similar" products for the purposes of the first paragraph of Article 14 EEA. Referring again to *Commission* v *Denmark*,[2] the Plaintiff states that, in assessing the similarity requirement, it is necessary to consider whether the products have similar characteristics and meet the same needs from the point of view of consumers. The concept of similarity must be interpreted broadly, and the question is not whether products are strictly identical, but whether their use is similar and comparable, based on objective and subjective criteria. The Plaintiff also refers to the judgment in *Jacquier* v *Directeur Général des Impôts*,[3] in which the Court of Justice of the European Communities held that products are similar if their characteristics and the needs which they serve place them in a competitive relationship.

23. In general, books are made from the same raw materials, and production methods are the same. The objective characteristics of books in Icelandic and

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1 Case 106/84 *Commission* v *Denmark* [1986] ECR 833.

2 See footnote 1.

3 Case C-113/94 *Jacquier* v *Directeur Général des Impôts* [1995] ECR I-4203.

markmið 14. gr. EES sé að tryggja frjálsa vöruflutninga milli ríkja á Evrópska efnahagssvæðinu við eðlilegar samkeppnisaðstæður, með því að afnema hvers konar vernd sem leiða kunni af beitingu innlendra skattareglna, sem feli í sér mismunun gagnvart framleiðslu frá öðrum EES-ríkjum, og að tryggja fullt hlutleysi innlendra skattareglna gagnvart samkeppni milli innlendrar og innfluttrar framleiðslu.

21. Stefnandi telur að mismunun á grundvelli tungumáls jafngildi því sem næst í reynd mismunun á grundvelli ríkisfangs. Flest EES-ríkin hafi sína eigin þjóðtungu og ekkert þeirra eigi tungumálið sameiginlegt með Íslandi. Af þessu, og jafnframt þeirri staðreynd að bækur á íslensku eru venjulega framleiddar og gefnar út á Íslandi, á meðan bækur á erlendum málum eru venjulega gefnar út utan Íslands, leiði að hin mismunandi skattlagning, sem gert sé ráð fyrir í lögunum um virðisaukaskatt, feli í sér óbeina mismunun sem ósamrýmanleg sé 14. gr. EES-samningsins.

22. Stefnandi telur að bækur á íslensku og bækur á öðrum tungumálum Evrópska efnahagssvæðisins séu "sams konar" framleiðsluvörur í skilningi 1. mgr. 14. gr. EES. Stefnandi heldur því fram, með vísan til fyrrgreinds dóms í máli *Framkvæmdastjórnarninnar gegn Danmörku*,[2] að til að ákvarða hvort skilyrðinu um að vörur séu "sams konar" sé fullnægt, sé nauðsynlegt að kanna hvort vörurnar hafi sams konar einkenni og fullnægi sömu þörfum frá sjónarhóli neytandans. Skýra verði orðin "sams konar" rúmt og við mat á því hvort vörur séu sams konar þurfi þær ekki að vera nákvæmlega eins, heldur þurfi að meta hvort notkun þeirra sé sams konar og sambærileg, á bæði hlutlægan og huglægan mælikvarða. Stefnandi vísar einnig til dóms í máli *Jacquier* gegn *Directeur Général des Impôts*,[3] þar sem dómstóll Evrópubandalaganna hafi talið að vörur væru sams konar ef eiginleikar þeirra og þarfir sem þær ættu að uppfylla gerðu það að verkum að þær væru í samkeppni hvor við aðra.

23. Bækur séu í aðalatriðum gerðar úr sama hráefni og framleiðsluaðferðir þær sömu. Hin ytri einkenni bóka á íslensku og bóka á öðrum tungumálum séu hin sömu. Um leið og stefnandi vísar til dóms í máli *Rewe* gegn *Hauptzollamt Landau*,[4] telur hann að sú staðreynd, að bækur séu flokkaðar undir sömu fyrirsögn í 49. kafla tollskrárinnar (Common Customs Tariff) óháð tungumáli, styðji sjónarmið hans.

24. Stefnandi bætir við að neytendur noti bækur, óháð tungumálum, til að fullnægja sömu þörfum, m.a. til dægrastyttingar eða upplýsingaöflunar. Stór hluti íbúa á Íslandi lesi tungumál annarra EES-ríkja. Oftast ensku eða norrænu tungumálin, svo og þýsku og frönsku þótt fátíðara sé. Af því leiði að aðrir valkostir koma almennt til greina í stað bóka á íslensku. Íslendingar lesi

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2 Sjá nmgr. 1.

3 Mál C-113/94 *Jacquier* gegn *Directeur Général des Impôts* [1995] ECR I-4203.

4 Mál 45/75 *Rewe* gegn *Hauptzollamt Landau* [1976] ECR 181.

books in other languages are the same. Referring to the judgment in *Rewe* v *Hauptzollamt Landau*,[4] the Plaintiff points out that all printed books are classified under the same heading in the Common Customs Tariff (Chapter 49), without any language distinction.

24. The Plaintiff adds that books are used to satisfy the same consumer needs, irrespective of language, *inter alia* for entertainment or enlightenment. A large part of the Icelandic population reads languages of other EEA States: English or the Scandinavian languages and, less often, German or French. Thus, books in Icelandic are generally substitutable. Icelanders read novels both in Icelandic and other languages, and students frequently read textbooks in English, Danish, Norwegian, Swedish, German or French.

25. The Plaintiff submits that it follows from *Commission* v *Denmark*[5] that the question of whether products meet the same needs must be assessed with regard to differing categories of consumers, as well as to the dynamics of consumer demand. The products in question need not satisfy the same requirements for every consumer. Books in languages other than Icelandic serve the same consumer needs as books in Icelandic for all Icelandic consumers who read foreign languages.

26. Based on the abovementioned arguments, the Plaintiff contends that books in foreign languages and imported from other EEA States should not be subject to a higher rate of VAT than the 14% VAT levied on books in Icelandic. In this context, the Plaintiff refers to the judgments in *Bobie* v *Hauptzollamt Aachen-Nord*[6] and *Haahr Petroleum* v *Åbenrå Havn and Others*.[7]

27. In the alternative, the Plaintiff submits that the two categories of books are competing products for the purposes of the second paragraph of Article 14 EEA. Referring to the case-law[8] of the Court of Justice of the European Communities, the Plaintiff contends that books in languages other than Icelandic afford an alternative choice to readers and are at least in partial competition with books in Icelandic. Therefore, the different treatment with regard to VAT levied on books in Icelandic and books in other languages constitutes a violation of the second paragraph of Article 14 EEA.

28. The Plaintiff adds that it may not be necessary to distinguish between the first and second paragraphs of Article 14 EEA in this case, since the contested VAT system on books must be regarded as a *per se* infringement of Article 14 as

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4 Case 45/75 *Rewe* v *Hauptzollamt Landau* [1976] ECR 181.

5 See footnote 1.

6 Case 127/75 *Bobie* v *Hauptzollamt Aachen-Nord* [1976] ECR 1079.

7 Case C-90/94 *Haahr Petroleum* v *Åbenrå Havn and Others* [1997] ECR I-4085.

8 Case 216/81 *COGIS* v *Amministrazione delle Finanze dello Stato* [1982] ECR 2701; Case 319/81 *Commission* v *Italy* [1983] ECR 601; Case 184/85 *Commission* v *Italy* [1987] ECR 2013.

skáldsögur á íslensku sem og öðrum tungumálum og stúdentar lesi tíðum sérfræðirit á ensku, dönsku, norsku, sænsku, þýsku og frönsku.

25. Stefnandi heldur því fram að það leiði af dóminum í máli *Framkvæmdastjórnarinnar* gegn *Danmörku*[5] að taka verði tillit til mismunandi hópa neytenda og síbreytilegrar eftirspurnar þeirra þegar svarað sé spurningunni um það hvort vörur fullnægi sömu þörfum. Það sé ekki skilyrði að vörurnar fullnægi sömu þörfum allra neytenda. Frá sjónarhóli allra Íslendinga sem lesa erlend tungumál fullnægi bækur á erlendum málum sömu þörfum og bækur á íslensku.

26. Með stoð í þessum röksemdum heldur stefnandi því fram að bækur á erlendum málum sem fluttar séu inn frá öðrum EES ríkjum eigi ekki að bera hærri virðisaukaskatt en 14%, sem sé sama hlutfall og lagt sé á bækur á íslensku. Til stuðnings þessu sjónarmiði vísar stefnandi til dóma í málunum *Bobie* gegn *Hauptzollamt Aachen-Nord*[6] og *Haahr Petroleum* gegn *Åbenrå Havn og fl.*[7]

27. Til vara heldur stefnandi því fram að þessir tveir flokkar bóka séu framleiðsluvörur sem séu í samkeppni í skilningi 2. mgr. 14. gr. EES. Með vísan til dóma[8] dómstóls Evrópubandalaganna heldur stefnandi því fram að bækur á öðrum tungumálum en íslensku séu einnig valkostur fyrir lesendur og séu þannig, a.m.k. að hluta til, í samkeppni við bækur á íslensku. Þess vegna feli sá munur, sem sé á álagningu virðisaukaskatts á bækur á íslensku og bækur á öðrum tungumálum, í sér brot á 2. mgr. 14. gr. EES.

28. Stefnandi heldur því einnig fram að það sé ekki nauðsynlegt að gera greinarmun á 1. og 2. mgr. 14. gr. í þessu máli, þar sem líta verði svo á, að hinar umdeildu reglur um virðisaukaskatt á bækur feli, sem slíkar, í sér brot á 14. gr. EES í heild. Til stuðnings þessu sjónarmiði vísar stefnandi m.a. til dóma í málum *Framkvæmdastjórnarinnar* gegn *Danmörku*[9] og *Haahr Petroleum* gegn *Åbenrå Havn og fl.*[10]

29. Með vísan til dómsins í *Haahr Petroleum* gegn *Åbenrå Havn og fl.*,[11] bætir stefnandi því ennfremur við að 10. gr. og 14. gr. EES útiloki hvor aðra. Þá bendir stefnandi á að það leiði af ráðgefandi áliti EFTA-dómstólsins í *Fagtún*-málinu[12] að 4. gr. sem slíkri verði aðeins beitt sjálfstætt um tilvik sem falla undir

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5 Sjá nmgr. 1.

6 Mál 127/75 *Bobie* gegn *Hauptzollamt Aachen-Nord* [1976] ECR 1079.

7 Mál C-90/94 *Haahr Petroleum* gegn *Åbenrå Havn o.fl.* [1997] ECR I-4085.

8 Mál 216/81 *COGIS* gegn *Amministrazione delle Finanze dello Stato* [1982] ECR 2701; Mál 319/81 *Framkvæmdastjórnin* gegn *Ítalíu* [1983] ECR 601; Mál 184/85 *Framkvæmdastjórnin* gegn Ítalíu [1987] ECR 2013.

9 Sjá nmgr. 1.

10 Sjá nmgr. 7.

11 Sjá nmgr. 7.

12 Mál E-5/98 *Fagtún* [1999] EFTA Court Report 51.

a whole. The plaintiff finds support for this view *inter alia* in the judgments in *Commission* v *Denmark*[9] and *Haahr Petroleum* v *Åbenrå Havn and Others*.[10]

29. Based on the judgment in *Haahr Petroleum* v *Åbenrå Havn and Others*,[11] the Plaintiff further adds that Articles 10 and 14 EEA are mutually exclusive. The Plaintiff also cites the statement of the EFTA Court in *Fagtún*[12] to the effect that Article 4 EEA applies independently only to situations governed by EEA law in regard to which the EEA Agreement lays down no specific rule prohibiting discrimination.

Question 3

30. The Plaintiff acknowledges that, in principle, differential internal taxation may be objectively justified. However, the Plaintiff contends that the VAT system on books at issue in the present case is not justified by the objective of enhancing the position of the Icelandic language, as argued by the Defendant.

31. The Plaintiff states that the Court of Justice of the European Communities has been reluctant to accept objective justification on grounds of cultural policy. The Plaintiff suggests that this would be even more difficult under the EEA Agreement than under the EC Treaty, since the former does not contain a provision corresponding to Article 151 EC.

32. The Plaintiff acknowledges that Iceland and the other EEA States may take various measures to promote their national languages. However, such measures must not constrain the free movement of goods. Measures of internal taxation usually serve fiscal purposes, and are not a logical means of promoting a language. The Plaintiff contends, in essence, that protection of domestic products is the true intention and the obvious consequence of the contested VAT system on books. Referring to the judgment in *Collectieve Antennevoorziening Gouda*,[13] the Plaintiff submits that the Government of Iceland has not proved that the measure has in fact enhanced the position of the Icelandic language, or that it is an indispensable measure for that purpose.

33. The Plaintiff suggests that the VAT system on books runs counter to the Joint Declaration on the Co-operation in Cultural Affairs, attached to the Final Act. On this point, the Plaintiff refers to the judgment in *Distribuidores Cinematográficos* v *Spanish State*.[14]

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9 See footnote 1.

10 See footnote 7.

11 See footnote 7.

12 Case E-5/98 *Fagtún* [1999] EFTA Court Report 51.

13 Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007.

14 Case C-17/92 *Distribuidores Cinematográficos* v *Spanish State* [1993] ECR I-2239.

gildissvið samningsins sem önnur og sértækari ákvæði samningsins er banna mismunun taka ekki til.

Þriðja spurning

30. Stefnandi fellst á að mismunandi innlend skattlagning geti, að meginstefnu til, verið réttlætanleg. Á hinn bóginn heldur stefnandi því fram, að þær reglur um virðisaukaskatt á bækur, sem fjallað sé um í málinu, verði ekki réttlættar með því að þær miði að því að efla íslenska tungu eins og haldið sé fram af hálfu stefnda.

31. Stefnandi heldur því fram að dómstóll Evrópubandalaganna hafi verið tregur til að fallast á að reglur verði réttlættar með tilvísun til menningarlegra markmiða. Stefnandi bendir á að það sé jafnvel erfiðara á grundvelli EES-samningsins en Rómarsamningsins þar sem fyrrnefndi samningurinn hafi ekki að geyma nein ákvæði sem samsvari 151. gr. Rómarsamningsins.

32. Stefnandi viðurkennir að Ísland og önnur EES-ríki hafi heimild til að grípa til ráðstafana til eflingar þjóðtungum sínum. Slíkar ráðstafanir megi þó ekki takmarka frjálsa vöruflutninga. Innlendar skattareglur séu venjulega settar til að afla tekna í ríkissjóð, en séu ekki rökrétt leið til að efla tungumál. Í stuttu máli, stefnandi heldur því fram að hinn raunverulegi tilgangur sé að vernda innlenda framleiðslu og það séu hinar augljósu afleiðingar af reglum þeim um virðisaukaskatt á bækur sem fjallað sé um í málinu. Með tilvísun til dóms í málinu *Collective Antennevoorziening Gouda*[13] heldur stefnandi því fram að ríkisstjórn Íslands hafi ekki sýnt fram á að ráðstöfunin hafi í reynd orðið til efla stöðu íslenskrar tungu og ekki heldur að það sé nauðsynlegt að grípa til þessarar tilteknu ráðstöfunar til að ná því markmiði.

33. Stefnandi bendir á að reglurnar um virðisaukaskatt af bókum séu andstæðar sameiginlegri yfirlýsingu um samstarf í menningarmálum sem fylgi lokagerð EES-samningsins. Um þetta atriði vísar stefnandi til dóms í málinu *Distribuidores Cinematográficos* gegn *Spáni*.[14]

34. Lögin um virðisaukaskatt heimila undanþágu fyrir allar prentaðar bækur á íslensku óháð menningarlegu gildi þeirra. Með því að vísa aftur til *Distribuidores Cinematográficos* gegn *Spáni*,[15] heldur stefnandi því fram að líta verði svo á að ráðstafanirnar sem um ræðir séu of víðtækar.

35. Stefnandi telur ennfremur að álagning lægra hlutfalls virðisaukaskatts á bækur á íslensku en bækur á öðrum tungumálum feli einnig í sér brot á 10. gr. mannréttindasáttmála Evrópu (tjáningarfrelsi). Líta verði á þetta sem skerðingu á rétti manna til að taka við upplýsingum og hugmyndum óháð landamærum.

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13 Mál C-288/89 *Collective Antennevoorziening Gouda* [1991] ECR I-4007.

14 Mál C-17/92 *Distribuidores Cinematográficos* gegn *Spáni* [1993] ECR I-2239.

15 Sjá nmgr. 14.

34. The VAT Act exempts all printed books in the Icelandic language, regardless of cultural value, content or quality. Referring again to *Distribuidores Cinematográficos* v *Spanish State*,[15] the Plaintiff submits that the measure in question must be regarded as overly broad.

35. The Plaintiff adds that the levying of a lower rate of VAT on books in Icelandic than on books in other languages is in violation of Article 10 of the European Convention on Human Rights (freedom of expression). It must be regarded as an interference with the right to receive or impart information and ideas regardless of frontiers. Fundamental rights, including the freedom of expression, must be taken into account when considering whether the contested provision of the VAT Act may be objectively justified. On this point, the Plaintiff refers to the judgment in *Familiapress* v *Bauer Verlag*.[16]

36. Books in languages other than Icelandic cannot be regarded as products harmful to the Icelandic language or Icelandic culture in general. The Plaintiff compares the impact of the printed word to that of television broadcasts, which are not subject to a differentiated tax burden. On that basis, the Plaintiff argues that the Icelandic "language policy" is inconsistent and disproportionate.

37. The Plaintiff concludes that the contested VAT system on books is not objectively justified by reasons relating to the protection of the Icelandic language.

Question 4

38. The Plaintiff states that, in principle, Iceland is free to arrange its internal taxation unaffected by the EEA Agreement. However, Article 14 EEA prohibits internal taxation, including VAT, which discriminates against products imported from other EEA States. Referring to the judgment in *Commission* v *Greece*,[17] the Plaintiff contends that Iceland is not entitled to use its system of taxation as a barrier to trade between the EEA States.

Question 5

39. The Plaintiff states that the question of which rule is to be applied in case of conflict between national law (in this case, section 14 of the VAT Act) and EEA law (in this case, Article 14 EEA) must be considered on the basis of the provisions of the EEA Agreement and their objective, as well as the case-law of the EFTA Court and the Court of Justice of the European Communities.

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15 See footnote 14.

16 Case C-368/95 *Familiapress* v *Bauer Verlag* [1997] ECR I-3689.

17 Case 176/84 *Commission* v *Greece* [1987] ECR 1193.

Grundvallarréttindi, þ.m.t. tjáningarfrelsið, verði að taka með í reikninginn þegar metið sé hvort unnt sé að réttlæta umræddar reglur um virðisaukaskatt. Um þetta atriði vísar stefnandi til dóms í máli *Familiapress* gegn *Bauer Verlag*.[16]

36. Ekki sé unnt að líta svo á að bækur á öðrum tungumálum en íslensku séu framleiðsluvara sem sé almennt skaðleg íslensku máli eða íslenskri menningu. Stefnandi ber einnig saman áhrif hins prentaða máls og sjónvarpsútsendinga, sem ekki sæti hliðstæðri mismunandi skattlagningu. Á þessum grundvelli heldur stefnandi því fram að ósamkvæmni sé í íslenskri málverndarstefnu og að hún samræmist ekki meðalhófsreglunni.

37. Stefnandi telur að niðurstaðan sé sú að hinar umræddu reglur um virðisaukaskatt á bækur verði ekki réttlættar með rökum sem byggja á vernd íslensks máls.

Fjórða spurning

38. Stefnandi heldur því fram að íslenska ríkið hafi, að meginstefnu til, heimild til að haga innlendum skattamálum óháð skuldbindingum í EES-samningnum. Samt sem áður felst í 14. gr. EES bann við skattareglum, þ.m.t. reglum um virðisaukaskatt, sem mismuna gagnvart innfluttum vörum. Með vísan til dóms í máli *Framkvæmdastjórnarinnar* gegn *Grikklandi*[17] heldur stefnandi því fram að íslenska ríkinu sé ekki heimilt að nota skattkerfi sitt til að hindra viðskipti milli EES-ríkjanna.

Fimmta spurning

39. Stefnandi telur að spurningunni um það hvaða reglu skuli beita þegar um sé að ræða ósamræmi milli landsréttar (í þessu tilviki 14. gr. laga um virðisaukaskatt) og EES-réttar (í þessu tilviki 14. gr. EES) verði að svara á grundvelli ákvæða EES-samningsins og markmiða hans, sem og dómaframkvæmdar EFTA-dómstólsins og dómstóls Evrópubandalaganna.

40. Það ákvæði EES-samningsins, sem hér um ræði, 14. gr. EES, sé grunnregla innan EES-réttarins, sem eigi sér samsvörun í Rómarsamningnum. Henni hafi verið veitt lagagildi í íslensku réttarkerfi með gildistöku laga 2/1993, sbr. 1. mgr. 2. gr.

41. Hvorki EES-samningurinn né Rómarsamningurinn leysi úr spurningunni um forgang. Það hafi þó ekki komið í veg fyrir að dómstóll Evrópubandalaganna mótaði reglu um forgang bandalagsréttar sem einu rökréttu og færu leiðina varðandi tengsl bandalagsréttar og landsréttar. Á hliðstæðan hátt kom skortur á

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16 Mál C-368/95 *Familiapress* gegn *Bauer Verlag* [1997] ECR I-3689.

17 Mál 176/84 *Framkvæmdastjórnin* gegn *Grikklandi* [1987] ECR 1193.

40. The provision of the EEA Agreement at issue, Article 14 EEA, is a legal provision of the highest order within EEA law, corresponding to a provision of the EC Treaty. It has been given the force of law under the Icelandic legal system through the adoption of Article 2(1) of Act No. 2/1993.

41. Neither the EEA Agreement nor the EC Treaty expressly resolves the question of primacy. This did not prevent the Court of Justice of the European Communities from accepting primacy for Community law as the only logical and workable relationship between Community law and national law. In a similar manner, the lack of explicit provisions in the EEA Agreement on State liability for incorrect implementation of directives did not prevent the EFTA Court from holding that such liability existed under EEA law in *Sveinbjörnsdóttir* v *Iceland*.[18] The Plaintiff contends that the EFTA Court would have a sound foundation for deciding in favour of primacy of EEA law, based on both the general purpose of the EEA Agreement and the explicit provision in Protocol 35 EEA.

42. The Plaintiff acknowledges that the EEA Agreement is not as far-reaching as the EC Treaty. However, referring again to *Sveinbjörnsdóttir* v *Iceland*,[19] the Plaintiff contends that the EEA Agreement is of such a nature that some of the common rules of interpretation are not automatically applicable to cases of conflict between EEA law and national law, where consistency of construction is required.

43. Three primary considerations apply, relating to the objective of homogeneity,to the reciprocal nature of the EEA Agreement, and to rights conferred on individuals. None of these considerations will be effective unless provisions of the EEA Agreement are given primacy over conflicting national legislation.

44. The principal reasons given for giving primacy to Community law in the judgment in *Costa* v *ENEL*[20] apply equally to the relationship between EEA law and national law.

45. The judicial defence of rights of individuals under the EEA Agreement in national courts would not be possible unless the provisions of the EEA Agreement are given precedence. On that basis, the Plaintiff contends that primacy is implied in the EEA Agreement itself.

46. Under Protocol 35 to the EEA Agreement, Iceland is under an obligation to let the "implemented EEA rules", including Article 14 EEA, prevail in case of conflict between the contested provision of the VAT Act and the EEA Agreement. However, the Plaintiff argues that the terms of Article 3 of Act No.

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18 Case E-9/97 *Sveinbjörnsdóttir* v *Iceland* [1998] EFTA Court Report 95.

19 See footnote 18.

20 Case 6/64 *Costa* v *ENEL* [1964] ECR 585.

skýrum ákvæðum í EES-samningnum um skaðabótaskyldu ríkisins vegna ófullnægjandi lögfestingar EES-samningsins, ekki í veg fyrir að EFTA-dómstóllinn kæmist að þeirri niðurstöðu í málinu *Erla María Sveinbjörnsdóttir* gegn *Íslandi*[18] að slík regla gilti samkvæmt EES-rétti. Stefnandi telur að EFTA-dómstóllinn hafi, bæði í markmiðum EES-samningsins og skýru ákvæði bókunar 35, nægilegan grundvöll til að kveða á um forgang EES-reglna.

42. Stefnandi viðurkennir að EES-samningurinn gangi ekki jafn langt og sé ekki jafn víðtækur og Rómarsamningurinn. Stefnandi heldur því aftur á móti fram, með vísan til dóms í málinu *Erla María Sveinbjörnsdóttir* gegn *Íslandi*,[19] að EES-samningurinn sé þess eðlis að ýmsar viðurkenndar lögskýringarreglur eigi ekki sjálfkrafa við þegar um sé að ræða árekstur milli EES-réttar og landsréttar.

43. Þrjú atriði beri að hafa í huga, en þau varði markmiðið um einsleitni, gagnkvæmni EES-samningsins og réttindi til handa einstaklingum. Ekkert af þessum þremur atriðum verði í reynd virk nema ákvæði EES-samningsins séu látin ganga framar ósamrýmanlegum reglum landsréttar.

44. Röksemdirnar sem búa að baki reglunni um forgangsáhrif Evrópuréttarins og fram koma í dóminum í máli *Costa* gegn *ENEL*[20] eiga með sama hætti við um tengsl EES-réttar og landsréttar.

45. Einstaklingar geta ekki varið rétt sinn fyrir dómstólum aðildarríkja nema fallist sé á að ákvæði EES-samningsins hafi forgang. Stefnandi heldur því fram að af þessum ástæðum verði að telja að reglan um forgang felist í EES-samningnum sjálfum.

46. Samkvæmt bókun 35 við EES-samninginn sé íslenska ríkið skuldbundið til þess að láta "EES reglur sem komnar eru til framkvæmdar", þ.m.t. 14. gr. hans, ganga framar í tilvikum þegar um sé að ræða árekstur milli þeirra og hinna umdeildu ákvæða laga um virðisaukaskatt. Jafnframt telur stefnandi, að 3. gr. laga nr. 2/1993, sem hafi það að markmiði að fullnægja bókun 35, sé ófullnægjandi þar sem aðeins sé gert ráð fyrir að ákvæði landsréttar skuli skýrð í samræmi við EES-rétt. Þessi annmarki leiði til réttaróvissu og ekki séu nægjanlega virt markmiðin um einsleitni og gagnkvæmni, sem séu meðal grundvallaratriða EES-samningsins.

47. Meginregluna um forgang EES-réttar verði að líta á sem hluta EES-samningsins. Með vísan til dóma[21] EFTA-dómstólsins og dómstóls

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18 Mál E-9/97 *Erla María Sveinbjörnsdóttir* gegn *Íslandi* [1998] EFTA Court Report 95.

19 Sjá nmgr. 18.

20 Mál 6/64 *Costa* gegn *ENEL* [1964] ECR 585.

21 Mál E-1/94 *Restamark* [1994-1995] EFTA Court Report 15; Mál 57/65 *Lütticke* gegn *Hauptzollamt Saarlouis* [1966] ECR 205; Mál 27/67 *Fink-Frucht* gegn *Hauptzollamt München* [1968] ECR 223.

2/1993, intended to implement Protocol 35 in Iceland, are insufficient since they merely provide that national legislation is to be construed in accordance with EEA law. This deficiency creates legal uncertainty and does not respect the requirements of homogeneity and reciprocity, which are fundamental elements of the EEA Agreement.

47. The principle of primacy of EEA law must be seen as an integral part of the EEA Agreement. Referring to the case-law[21] of the EFTA Court and the Court of Justice of the European Communities, the plaintiff submits that Article 14 EEA fulfils the criteria of being unconditional and sufficiently precise.

48. The Plaintiff concludes that it follows from the nature of the EEA Agreement and Protocol 35 to the EEA Agreement that EEA law prevails in cases of conflict between national legislation and provisions of the EEA Agreement.

The Government of Iceland

Questions 1 and 2

49. The Defendant, the Government of Iceland, points out that the first question posits that books in Icelandic are "generally published in Iceland", whereas it is estimated that about 30-40% of books in Icelandic, published in Iceland during 1999 and 2000, were printed abroad. Books in foreign languages are frequently published in Iceland.

50. The Defendant contends that the levying of VAT at a rate of 24.5% on books in languages other than Icelandic is compatible with the first paragraph of Article 14 EEA.

51. The Defendant notes that, in the assessment of whether products are "similar" for the purposes of Article 14 EEA, it is necessary to consider whether the products have similar physical characteristics, and whether they serve to meet the same needs from the point of view of the consumers. In the latter regard, language is of fundamental importance in assessing the utility of a book. The language of a book is a decisive, objective characteristic of differentiation. Only those who read Icelandic will derive any useful benefit from books in that language. The distinction is of such a fundamental nature that books in different languages can never be regarded as "similar" products. The ability to read the language is a prerequisite for the utility of a book. Consequently, it is not logical to argue that books in Icelandic and books in other languages are "similar" products for the purposes of the first paragraph of Article 14 EEA. The

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[21] Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 15; Case 57/65 *Lütticke* v *Hauptzollamt Saarlouis* [1966] ECR 205; Case 27/67 *Fink-Frucht* v *Hauptzollamt München* [1968] ECR 223.

skýrum ákvæðum í EES-samningnum um skaðabótaskyldu ríkisins vegna ófullnægjandi lögfestingar EES-samningsins, ekki í veg fyrir að EFTA-dómstóllinn kæmist að þeirri niðurstöðu í málinu *Erla María Sveinbjörnsdóttir* gegn *Íslandi*[18] að slík regla gilti samkvæmt EES-rétti. Stefnandi telur að EFTA-dómstóllinn hafi, bæði í markmiðum EES-samningsins og skýru ákvæði bókunar 35, nægilegan grundvöll til að kveða á um forgang EES-reglna.

42. Stefnandi viðurkennir að EES-samningurinn gangi ekki jafn langt og sé ekki jafn víðtækur og Rómarsamningurinn. Stefnandi heldur því aftur á móti fram, með vísan til dóms í málinu *Erla María Sveinbjörnsdóttir* gegn *Íslandi*,[19] að EES-samningurinn sé þess eðlis að ýmsar viðurkenndar lögskýringarreglur eigi ekki sjálfkrafa við þegar um sé að ræða árekstur milli EES-réttar og landsréttar.

43. Þrjú atriði beri að hafa í huga, en þau varði markmiðið um einsleitni, gagnkvæmni EES-samningsins og réttindi til handa einstaklingum. Ekkert af þessum þremur atriðum verði í reynd virk nema ákvæði EES-samningsins séu látin ganga framar ósamrýmanlegum reglum landsréttar.

44. Röksemdirnar sem búa að baki reglunni um forgangsáhrif Evrópuréttarins og fram koma í dóminum í máli *Costa* gegn *ENEL*[20] eiga með sama hætti við um tengsl EES-réttar og landsréttar.

45. Einstaklingar geta ekki varið rétt sinn fyrir dómstólum aðildarríkja nema fallist sé á að ákvæði EES-samningsins hafi forgang. Stefnandi heldur því fram að af þessum ástæðum verði að telja að reglan um forgang felist í EES-samningnum sjálfum.

46. Samkvæmt bókun 35 við EES-samninginn sé íslenska ríkið skuldbundið til þess að láta "EES reglur sem komnar eru til framkvæmdar", þ.m.t. 14. gr. hans, ganga framar í tilvikum þegar um sé að ræða árekstur milli þeirra og hinna umdeildu ákvæða laga um virðisaukaskatt. Jafnframt telur stefnandi, að 3. gr. laga nr. 2/1993, sem hafi það að markmiði að fullnægja bókun 35, sé ófullnægjandi þar sem aðeins sé gert ráð fyrir að ákvæði landsréttar skuli skýrð í samræmi við EES-rétt. Þessi annmarki leiði til réttaróvissu og ekki séu nægjanlega virt markmiðin um einsleitni og gagnkvæmni, sem séu meðal grundvallaratriða EES-samningsins.

47. Meginregluna um forgang EES-réttar verði að líta á sem hluta EES-samningsins. Með vísan til dóma[21] EFTA-dómstólsins og dómstóls

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18 Mál E-9/97 *Erla María Sveinbjörnsdóttir* gegn *Íslandi* [1998] EFTA Court Report 95.

19 Sjá nmgr. 18.

20 Mál 6/64 *Costa* gegn *ENEL* [1964] ECR 585.

21 Mál E-1/94 *Restamark* [1994-1995] EFTA Court Report 15; Mál 57/65 *Lütticke* gegn *Hauptzollamt Saarlouis* [1966] ECR 205; Mál 27/67 *Fink-Frucht* gegn *Hauptzollamt München* [1968] ECR 223.

Defendant finds support for this argument in the case-law of the Court of Justice of the European Communities, in particular in *Walker* v *Ministeriet for Skatter og avgifter*,[22] *Commission* v *Denmark*[23] and *Commission* v *Italy*.[24]

52. The Defendant submits that the contested VAT system for books is totally neutral with regard to the place of production of books, and does not give rise to any form of discrimination. The rate of 14% VAT is applied to all books in Icelandic, regardless of whether they are produced in Iceland or in any other EEA State. The different treatment is based exclusively on objective characteristics of the products, namely the language in which books are published. The VAT Act does not affect the possibilities for individuals and economic operators to produce books in Icelandic outside Iceland. Moreover, it does not prevent individuals and economic operators in Iceland from producing or publishing books in foreign languages.

53. The Defendant also contends that the levying of a lower rate of VAT on books in Icelandic than on books in other languages is compatible with the second paragraph of Article 14 EEA.

54. The Defendant points out that the second paragraph of Article 14 EEA presupposes that the products are in competition with each other. It follows from the arguments set out above in relation to the first paragraph of Article 14 EEA that there is no competition between books in Icelandic and books in other languages. Any competition between books in different languages must at least be regarded as negligible.

55. Even if some competition were deemed to exist, the Defendant considers that the contested provision does not afford indirect protection against competition within the meaning of the second paragraph of Article 14 EEA. Books in Icelandic are, in general, considerably more expensive than books in other languages, even though the VAT rate imposed on the former is lower. To support this, the Defendant refers to information obtained from the book trade.[25]

56. The Defendant is of the opinion that the judgment in *COGIS* v *Amministrazione delle Finanze dello Stato*,[26] referred to by the Plaintiff, does not provide any guidance for the interpretation of the second paragraph of Article 14 EEA. However, guidance may however be found in *Commission* v *Belgium*.[27] In

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22 Case 243/84 *Walker* v *Ministeriet for Skatter og avgifter* [1986] ECR 875.

23 See footnote 1.

24 Case 184/85 *Commission* v *Italy* [1987] ECR 2013.

25 Information on prices on books in different languages collected by the Defendant from a bookstore and book publisher in Iceland in April 2001 (Annexes 1 – 3 to the written observations of the Defendant).

26 Case 216/81 *COGIS* v *Amministrazione delle Finanze dello Stato* [1982] ECR 2701.

27 Case 356/85 *Commission* v *Belgium* [1987] ECR 3299.

þær eru framleiddar á Íslandi eða í öðru EES-ríki. Mismunandi skattameðferð sé að öllu leyti reist á hlutlægum einkennum framleiðslunnar, þ.e. tungumálinu sem bækurnar eru gefnar út á. Virðisaukaskatturinn hafi ekki áhrif á möguleika einstaklinga eða aðila í atvinnurekstri til að framleiða bækur á íslensku utan Íslands. Jafnframt hindrar þetta ekki að einstaklingar eða aðilar í atvinnurekstri framleiði eða gefi út bækur á erlendum tungumálum.

53. Stefndi heldur því einnig fram að álagning lægri virðisaukaskatts á bækur á íslensku en á bækur á öðrum tungumálum sé samrýmanleg 2. mgr. 14. gr. EES.

54. Stefndi bendir á að 2. mgr. 14 EES sé byggð á því vörurnar séu í samkeppni hvor við aðra. Það leiði af röksemdunum sem fram komi hér að framan varðandi 1. mgr. 14. gr. að engin samkeppni sé milli bóka á íslensku og bóka á erlendum tungumálum. Í það minnsta verði að líta svo á að samkeppni milli bóka á mismunandi tungumálum sé óveruleg.

55. Þótt litið yrði svo á að slík samkeppni sé til staðar telur stefndi að í hinum umdeildu ákvæðum felist ekki óbein vernd gegn samkeppni í skilningi 2. mgr. 14. gr. EES. Bækur á íslensku séu, að jafnaði, miklu dýrari en bækur á öðrum tungumálum, jafnvel þótt virðisaukaskattur á hinar fyrrnefndu sé lægri. Til stuðnings þessu vísar stefndi til upplýsinga sem hann hefur aflað meðal aðila sem stunda viðskipti með bækur.[25]

56. Stefndi er á þeirri skoðun að dómurinn í máli *COGIS* gegn *Amministrazione delle Finanze dello Stato*,[26] sem stefnandi vísi til, gefi ekkert til kynna um það hvernig túlka beri 2. mgr. 14. gr. EES. Aftur á móti sé dómurinn í máli *Framkvæmdastjórnarinnar* gegn *Belgíu*[27] leiðbeinandi í þessu efni. Í því máli hafi verið komist að þeirri niðurstöðu, að þrátt fyrir mismunandi virðisaukaskattsstig hafi innlenda framleiðslan verið mun ódýrari en erlenda framleiðslan. Dómstóll EB taldi að virðisaukaskatturinn hefði engin verndaráhrif þar sem skatturinn hefði ekki áhrif á verðið svo neinu verulegu næmi. Sá sem haldi því fram að um óbeina vernd sé að ræða beri sönnunarbyrðina fyrir því að mismunandi virðisaukaskattur hafi áhrif á verðið. Stefndi telur að ekki hafi komið fram neinar sannanir sem bendi til að hin mismunandi þrep virðisaukaskatts hafi áhrif á samkeppnisstöðu viðkomandi framleiðsluvara. Þvert á móti séu bækur á íslensku almennt dýrari en bækur á öðrum tungumálum.

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25 Upplýsingar um verð bóka á mismunandi tungumálum sem stefndi aflaði sjálfur frá bókabúð og bókaútgefanda á Íslandi í apríl 2001. (Viðauki 1 – 3 við skriflega greinargerð stefnda).

26 Mál 216/81 *COGIS* gegn *Amministrazione delle Finanze dello Stato* [1982] ECR 2701.

27 Mál 356/85 *Framkvæmdastjórnin* gegn *Beglíu* [1987] ECR 3299.

that case, it was established that, notwithstanding the different VAT rates, the domestic products were considerably less expensive than the foreign products. The Court of Justice of the European Communities held that the difference in VAT rates had no protective effect, as the VAT rates would not affect the prices to any significant extent. The party claiming that indirect protection exists has the burden of proving that the different rates will affect the prices. The Defendant submits that no evidence has been produced to indicate that the different VAT rates of the contested VAT Act affect the competitive position of the respective products. On the contrary, books in Icelandic are in general more expensive than books in other languages, despite the lower VAT imposed on the former.

57. The Defendant adds that Article 10 EEA is not applicable to the present case. It follows from the case-law[28] of the Court of Justice of the European Communities that the provisions of the EC Treaty corresponding to Articles 14 and 10 EEA are mutually exclusive. Based on the judgments in *Interzuccheri* v *Rezzano e Cavassa*[29] and *IGAV* v *ENCC*,[30] the Defendant submits that Article 14 EEA is applicable to a general system of internal taxation imposing duties systematically on both imported and domestic products on the basis of the same criteria. VAT is not imposed by reason of the fact that products cross a frontier. Therefore, the VAT levied on books in Iceland is outside the scope of Article10 EEA.

58. The Defendant further adds that differentiated VAT rates on books do not constitute discrimination on grounds of nationality, and are therefore compatible with Article 4 EEA.

Question 3

59. In the alternative, the Defendant states that the contested VAT rates on books must be considered justified on objective grounds, and as being proportionate to its legitimate purpose.

60. The Defendant states that it is the protection of the Icelandic language and Icelandic identity that underlies the contested VAT rate on books in Icelandic. When the Icelandic Parliament was considering whether to introduce a lower VAT rate on books in Icelandic than on books in other languages, particular emphasis was placed on the protection of Icelandic culture and the Icelandic language. The Defendant refers to a statement made by the Minister of Finance, who spoke for the bill, in his initial speech:

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28 Case C-28/96 *Fazenda Pública* v *Fricarnes* [1997] ECR I-4939; Case C-266/91 *CELBI* v *Fazenda Pública* [1993] ECR I-4337; Case C-90/94 *Haahr Petroleum* v *Åbenrå Havn and Others* [1997] ECR I-4085; Case C-212/96 *Chevassus-Marche* v *Conseil Régional de la Réunion* [1998] ECR I-743.

29 Case 105/76 *Interzuccheri* v *Rezzano e Cavassa* [1977] ECR 1029.

30 Case 94/74 *IGAV* v *ENCC* [1975] ECR 699.

57. Stefndi bætir því við að 10. gr. EES eigi ekki við í málinu. Það leiði af dómaframkvæmd[28] dómstóls Evrópubandalaganna að þau ákvæði Rómarsamningsins sem samsvara 14. gr. og 10. gr. EES útiloki hvort annað. Með vísan til dóma í málunum *Interzuccheri* gegn *Rezzano e Cavassa*[29] og *IGAV* gegn *ENCC*,[30] telur stefndi að 14. gr. eigi við um almennt kerfi innlendra skatta sem geri á kerfisbundinn hátt ráð fyrir sköttum á bæði innfluttar og innlendar framleiðsluvörur. Virðisaukaskattur sé ekki lagður á vegna þess að vara fari yfir landamæri. Þess vegna falli virðisaukaskattur sem á Íslandi sé lagður á bækur utan gildissviðs 10. gr. EES.

58. Stefndi bætir því ennfremur við að reglur sem mæli fyrir um mismunandi hlutföll virðisaukaskatts feli ekki í sé mismunun á grundvelli þjóðernis og að þær séu þess vegna samrýmanlegar 4. gr. EES.

Þriðja spurning

59. Til vara heldur stefndi því fram að líta verði svo á að hinar umdeildu

virðisaukaskattsreglur fyrir bækur megi réttlæta á hlutlægum forsendum og að þær séu hóflegar miðað við það markmið sem stefnt sé að.

60. Stefndi heldur því fram að hinar umdeildu reglur um virðisaukaskatt séu liður í verndun íslenskrar tungu og íslenskrar þjóðernisvitundar. Við undirbúning þeirrar ákvörðunar hvort gera skyldi ráð fyrir lægra hlutfalli virðisaukaskatts á bækur á íslensku en á bækur á öðrum málum, var lögð sérstök áhersla á verndun íslenskrar menningar og íslenskrar tungu. Stefndi vísar til orða frummælanda, fjármálaráðherra, þegar hann mælti fyrir frumvarpinu.

> *"Smáþjóð á ætíð undir högg að sækja þegar alþjóðleg fjölmiðlun geysar yfir með þeim ofurkrafti sem hún hefur gert á undanförnum árum og mun halda áfram að gera. Við þau skilyrði er mikilvægt að styrkja grundvöll þess sem íslensk menning hvílir fyrst og fremst á sem er þjóðtunga okkar, skáldskaparrit, fræðirit og aðrar bókmenntir á íslenskri tungu."*

61. Íslenska sé sérstakt tungumál, sem sé því sem næst eingöngu takmarkað við Ísland og hina 280 000 íbúa þess. Íslenskan eigi stöðugt í vök að verjast vegna áhrifa frá öðrum tungumálum. Ein ástæða þessa er takmarkað úrval sjónvarpsefnis á íslensku. Það hafi verið yfirlýst stefna ríkisstjórnar Íslands að vernda af öllum mætti þann hornstein íslenskrar þjóðernisvitundar og menningar, sem íslensk tunga sé. Þessarar stefnu gæti víða í íslenskum lögum. Stefndi vísar

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28 Mál C-28/96 *Fazenda Pública* gegn *Fricarnes* [1997] ECR I-4939; Mál C-266/91 *CELBI* gegn *Fazenda Pública* [1993] ECR I-4337; Mál C-90/94 *Haahr Petroleum* gegn *Åbenrå Havn and Og fl.* [1997] ECR I-4085; Mál C-212/96 *Chevassus-Marche* gegn *Conseil Régional de la Réunion* [1998] ECR I-743.

29 Mál 105/76 *Interzuccheri* gegn *Rezzano e Cavassa* [1977] ECR 1029.

30 Mál 94/74 *IGAV* gegn *ENCC* [1975] ECR 699.

> *"A small nation is always in a disadvantageous position when international mass media engulf it with such immense strength as seen in the past few years, and this will continue in the future. Under such conditions it is important to strengthen the foundation on which the Icelandic identity is chiefly based, which is our national language; fact and fiction literature in the Icelandic language."*

61. Icelandic is a distinct language; its use is in fact almost exclusively limited to Iceland and the 280 000 persons living there. Icelandic is subject to a continuous challenge from other languages. One of the reasons for this is the meagre selection of television programmes available in Icelandic. It has been a declared policy of the Government of Iceland to protect to the greatest possible extent the cornerstone of Icelandic identity and culture, the Icelandic language. This policy can be discerned in Icelandic legislation. The Defendant refers in particular to the Radio Broadcasting Act, the Personal Names Act and the various institutions established by law whose purpose is to promote and protect the Icelandic language. This policy is also reflected in the contested provision of the VAT Act.

62. When introducing VAT on books in Icelandic, the legislator took the view that, if the general VAT rate of 24.5% was applied, there could be irreparable negative consequences. Books in Icelandic were already relatively expensive, and Icelandic book publishers had been in difficulties for a long time. The result was the adoption of the current rate of 14% VAT, by the amendments to the VAT Act made in Act No. 111/1992. That lower rate of VAT is intended to strengthen the foundation of the Icelandic language by ensuring that books in Icelandic will continue to be published.

63. Icelanders are, in general, able to read and understand texts that are the original sources providing knowledge of the settlement of Iceland, written soon after the year 1100, on the basis of earlier oral sources. These texts can still be understood without any special education or knowledge on the reader's part, because the Icelandic language has remained fundamentally unaltered. This long linguistic history without fundamental alterations is unique, and is linked to the national policy of protecting the language. It is of inestimable value that the same language in which the Icelandic sagas, which rank among the foremost literary achievements of the Occident in the middle ages, has been preserved and handed down through many generations. For Icelanders it is invaluable, not only as a communicative tool, but also as a channel of cultural heritage between generations, and as a means of artistic expression. Written Icelandic preserves ancient word forms and letters. The Defendant also refers to the Icelandic tradition of personal names, a heritage unique in modern Europe. Lastly, Icelandic is practically devoid of dialects, and is regarded as a worthy research subject by linguists throughout the world, and the existence of living people speaking this ancient language is deemed of very high importance.

64. Referring to the fundamental considerations underlying Article 13 EEA, the Defendant contends that the Icelandic language constitutes a national treasure

sérstaklega til útvarpslaga, laga um mannanöfn og annarra aðgerða sem lög mæla fyrir um og hafa að markmiði að efla og vernda íslenska tungu. Þessi stefna búi einnig að baki hinum umdeildu reglum um virðisaukaskatt.

62. Við undirbúning reglna um virðisaukaskatt á bækur tók löggjafinn þá stefnu að ef hið almenna 24,5% hlutfall virðisaukaskatts yrði notað gæti það haft óafturtæk neikvæð áhrif. Bækur á íslensku voru þegar tiltölulega dýrar og íslenskir bókaútgefendur höfðu lengi átt í erfiðleikum. Niðurstaðan hafi orðið sú að gera ráð fyrir 14% virðisaukaskatti eins og gildandi reglur geri ráð fyrir samkvæmt þeim breytingum sem gerðar voru á lögum um virðisaukaskatt með lögum nr. 111/1992. Hið lægra virðisaukaskattsþrep miðar að því að efla undirstöður íslenskrar tungu með því að tryggja að áfram verði gefnar út bækur á íslensku.

63. Íslendingar geti almennt lesið og skilið texta frumheimilda um landnám Íslands, sem ritaðar hafi verið skömmu eftir 1100 á grundvelli eldri heimilda sem varðveist höfðu í munnlegri geymd. Þessir textar séu ennþá skiljanlegir án sérstakrar menntunar eða sérþekkingar af lesandans hálfu vegna þess að íslensk tunga hafi varðveist óbreytt í grundvallaratriðum. Þessi langa saga tungumálsins, án grundvallarbreytinga, sé einsdæmi og tengist þeirri stefnu stjórnvalda að varðveita tunguna. Það hafi ómetanlegt gildi að sama tungumálið og Íslendingasögurnar séu skrifaðar á, en sögurnar eru taldar meðal mestu bókmenntaafreka hinna vestrænu miðalda, skuli hafa varðveist kynslóð fram af kynslóð. Fyrir Íslendinga er tungumálið ómetanlegt, ekki eingöngu sem samskiptatæki, heldur einnig sem tæki til að flytja menningararfleifð frá einni kynslóð til annarrar og sem tæki til listrænnar tjáningar. Fornar orðmyndir og bókstafir hafi varðveist í íslensku ritmáli. Stefndi vísar einnig til íslenskra hefða varðandi mannanöfn, hefða sem séu einstakar í Evrópu samtímans. Að síðustu er nefnt að í reynd séu ekki til mismunandi íslenskar mállýskur og að íslenskan sé talin verðugt rannsóknarefni málvísindamanna um heim allan og ennfremur er litið svo á að mjög mikilvægt sé, að til sé fólk sem talar þetta forna tungumál.

64. Með vísan til þeirra grundvallarsjónarmiða sem búa að baki 13. gr. EES heldur stefndi því fram að íslensk tunga sé þjóðarverðmæti sem hafi listrænt og sögulegt gildi, sem Íslendingar hafi þann heiður og beri þá skyldu að vernda. Ef ríkisstjórn Íslands yrði svipt þeim möguleika að beita áhrifaríkustu ráðstöfunum til að varðveita þetta þjóðarverðmæti gæti það leitt til óbætanlegs menningartjóns. Tungumálið leggi grunninn að menningu þjóðar og þjóðernisvitund.

65. Stefndi telur að hinar umdeildu reglur um virðisaukaskatt á bækur séu mikilvægar þegar haft sé í huga hversu tiltölulega fáir tali íslensku, sem aftur leiði til vissra erfiðleika við útgáfu bóka á íslensku í samanburði við erlenda bókaútgáfu. Þetta sé hófleg ráðstöfun, sem miði að því að náð verði því lögmæta markmiði, að vernda íslenska tungu. Þetta sé jafnframt ráðstöfun sem sé óaðskiljanlegur hluti annarra ráðstafana sem þjóni sama markmiði.

of artistic and historic value, which the Icelanders have the honour and duty of protecting. Depriving the Government of Iceland of one of the most efficient means of protecting a cultural treasure would result in irreparable cultural damage. The language provides a foundation for national culture and identity.

65. The Defendant considers that the contested VAT rates for books is important in the light of the relatively low numbers of Icelandic speakers, and the resulting disadvantages for Icelandic book publishing as compared to foreign book publishing. It is a moderate measure, designed to achieve the legitimate aim of protecting the Icelandic language, and inseparable from the other means serving the same purpose.

66. In further support of the contention that protecting the Icelandic language is a legitimate aim, the Defendant refers to Article 6(3) EU, which provides that the European Union is to respect the national identities of its Member States. Language is the most decisive factor distinguishing one nation from another. This is all the more true when the cultural heritage of a nation is as intertwined with its language as that of the Icelanders.

67. The Defendant also refers to the judgment in *Groener* v *Minister for Education and the City of Dublin Vocational Educational Committee*,[31] in which the Court of Justice of the European Communities recognised the protection of language as a legitimate interest that may take precedence over the four freedoms, provided that the means and aims are proportionate.

Question 4

68. The Defendant states that the EEA Agreement does not provide for a fiscal or customs union, nor for co-ordination of taxation policy or an approximation of taxes. Domestic taxation is matter for each EEA State to decide. However, taxation must not lead to discrimination between domestic goods and goods imported from other EEA States.

69. The Defendant notes that it is undisputed that the Plaintiff is obliged to pay VAT on imported books. The dispute concerns the level of taxation. That question is not governed by the EEA Agreement. Even if the EFTA Court were to conclude that the provision of the VAT Act is not fully compatible with EEA law, it is not possible to derive from the EEA Agreement any right or duty to levy VAT at rates different from those prescribed by the VAT Act. An obligation to reduce the VAT rate on books in foreign languages would be in contravention of the sovereign right of an EEA State to establish the rates at which VAT is levied.

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[31] Case C-379/87 *Groener* v *Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR 3967.

66. Til frekari stuðnings því sjónarmiði að verndun íslenskrar tungu sé lögmætt markmið vísar stefndi til 3. mgr. 6. gr. samninganna um Evrópusambandið, þar sem gert sé ráð fyrir að Evrópusambandinu beri að virða þjóðareinkenni aðildarríkjanna. Tungumálið sé sá þáttur sem hafi hvað mesta þýðingu við aðgreiningu mismunandi þjóða. Þetta verði enn ljósara þegar haft sé í huga hversu menningararfleifð þjóðarinnar sé jafn samofin íslenskri tungu og raun ber vitni.

67. Stefndi vísar ennfremur til dóms í máli *Groener* gegn *Minister for Education og City of Dublin Vocational Educational Committee*[31] þar sem dómstóll Evrópubandalaganna féllst á að vernd tungumáls sem lögmæta hagsmuni sem gætu gengið framar fjórfrelsisreglunum, að uppfylltu því skilyrði að ráðstafanirnar og markmiðin væru hófsamleg.

Fjórða spurning

68. Stefndi heldur því fram að EES-samningurinn geri ekki ráð fyrir efnahags- eða tollabandalagi, né samræmingu stefnu í skattamálum eða samræmdum reglum um skatta. Það sé hlutverk einstakra ríkja að ákveða innlendar skattareglur. Aftur á móti megi skattareglur ekki leiða til mismununar milli innlendrar framleiðsluvöru og vöru sem flutt sé inn frá öðru EES-ríki.

69. Stefndi bendir á að óumdeilt sé að stefnanda sé skylt að greiða virðisaukaskatt af innfluttum bókum. Aðeins sé deilt um skatthlutfallið. Þetta álitaefni lúti ekki að reglum EES-samningsins. Þótt EFTA-dómstóllinn kæmist að þeirri niðurstöðu að ákvæðin í lögunum um virðisaukaskatt séu ekki að öllu leyti í samræmi við EES-samninginn sé ekki mögulegt að leiða af EES-samningnum rétt eða skyldu til að leggja á annað hlutfall virðisaukaskatts en það sem leiðir af lögunum. Skylda til að lækka hlutfall virðisaukaskatts á bækur á erlendum málum væri ósamrýmanleg óskoruðum rétti EES-ríkis til að ákvarða hlutfall virðisaukaskatts.

Fimmta spurning

70. Stefndi telur að EES-samningurinn hafi ekki að geyma neinar sértækar reglur varðandi árekstur milli reglna landsréttar og EES-reglna. Þá verði slíkar reglur heldur ekki leiddar af EES-samningnum með lögskýringum. Bókun 35 við EES-samninginn leggi þá skyldu á herðar EES-ríkjunum, að setja lagaákvæði þess efnis, að EES-reglur gildi í þeim tilvikum þar sem getur komið til árekstra milli EES-reglna sem komnar eru til framkvæmda og annarra settra laga. Á það verði þó að benda, eins og skýrlega komi fram í bókun 35, að þetta beri að gera á grundvelli reglu í landsrétti.

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31 Mál C-379/87 *Groener* gegn *Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR 3967.

Question 5

70. The Defendant submits that the EEA Agreement does not contain any specific rules on the issue of conflict between national rules and EEA rules. Moreover, no such rules can be derived from the EEA Agreement by way of interpretation. Protocol 35 to the EEA Agreement imposes a duty on EEA States to introduce a statutory provision to the effect that EEA rules are to prevail in cases of conflict between implemented EEA rules and other statutory provisions. However, as clearly stated in the Preamble to Protocol 35, this must be achieved through national procedures.

The Government of Liechtenstein

Questions 1 and 2

71. As regards the first paragraph of Article 14 EEA, the Government of Liechtenstein observes that, in order to assess whether books in Icelandic and books in foreign languages are to be qualified as "similar" products, regard must be had to the wide definition given in *COGIS* v *Amministrazione delle Finanze dello Stato*.[32] However, the Government of Liechtenstein states that it is not in a position to evaluate whether these products have similar characteristics and meet the same needs for the consumer. Moreover, the assessment of these criteria inevitably hinges on the languages involved.

72. The Government of Liechtenstein observes that it follows from the case-law of the Court of Justice of the European Communities on the corresponding Article 90 EC that the single individual is not the relevant standard for the assessment of the similarity of two products for the purposes of the first paragraph of Article 14 EEA. However, the Court of Justice of the European Communities has not dealt with product characteristics which are as closely linked to the individual consumer as books in a specific language. The cases have mostly dealt with products which could be (and probably were) consumed by all consumers on one occasion or another.

73. The Government of Liechtenstein acknowledges that if the general and broad approach of the Court of Justice of the European Communities is followed, the likely result is that books in Icelandic and books in other languages will be regarded as similar products, and the application of different rates of VAT will be contrary to Article 14 EEA. However, the products at issue in the present case are only to a limited extent comparable to the products considered in the previous case-law, and consumer needs with respect to books are different than with respect to other products. There is also the particular situation of the Icelandic

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[32] See footnote 26.

Ríkisstjórn Liechtenstein

Fyrsta og önnur spurning

71. Að því er varðar 1. mgr. 14. gr. EES, bendir ríkisstjórn Liechtenstein á, að við mat á því hvort bækur á íslensku og bækur á öðrum tungumálum séu "sams konar", verði að taka mið af skilgreiningu þeirri sem fram komi í dómi í málinu *COGIS* gegn *Amministrazione delle Finanze dello Stato*.[32] Þó telur ríkisstjórn Liechtenstein að hún sé ekki í aðstöðu til að meta hvort þessar vörur hafi sams konar eiginleika og hvort þær fullnægi sömu þörfum neytandans. Ennfremur, mat á þessum atriðum velti óhjákvæmilega á þeim tungumálum sem í hlut eiga.

72. Ríkisstjórn Liechtenstein bendir á að það leiði af dómaframkvæmd dómstóls Evrópubandalaganna varðandi 90. gr. Rómarsamningsins, að afstaða eins einstaklings sé ekki mælikvarði á það hvort tilteknar vörur séu sams konar í skilningi 1. mgr. 14. gr. EES. Aftur á móti hafi dómstóll Evrópubandalaganna ekki fjallað um einkenni framleiðsluvöru sem tengist með svo nánum hætti einstökum neytendum eins og bækur á tilteknu tungumáli geri. Málin hafa fram að þessu að mestu varðað vörur sem allir neytendur geti (og hafi sennilega) neytt.

73. Ríkisstjórn Liechtenstein fellst á að sé farið eftir því almenna og víðtæka sjónarmiði sem dómstóll Evrópubandalaganna hafi lagt til grundvallar sé líkleg niðurstaða sú að líta verði á að bækur á íslensku og bækur á öðrum tungumálum sem sams konar vörur og að mismunandi skatthlutföll séu því ósamrýmanleg 14. gr. EES. Aftur á móti séu þær vörur sem til umfjöllunar eru í þessu máli aðeins að takmörkuðu leyti sambærilegar við þær sem fjallað hefur verið um í eldri dómum og þarfir neytenda að því er bækur varðar aðrar en þegar um annars konar vörur er að ræða. Þá þurfi einnig að huga að sérstöðu íslenskrar tungu. Að teknu tilliti til þessara þátta telur ríkisstjórn Liechtenstein að viðeigandi sé að beita mismunandi reglum um skatthlutfall.

74. Að því er 2. mgr. 14. gr. EES varðar telur ríkisstjórn Liechtenstein, að því gefnu að flestar bækur á íslensku séu upprunnar á Íslandi, að hið lægra skatthlutfall fyrir bækur á íslensku geti leitt til mismununar, jafnvel þótt bækur á íslensku og bækur á öðrum málum séu aðeins í samkeppni að hluta til eða í óbeinni eða mögulegri samkeppni.

75. Ríkisstjórn Liechtenstein bendir á að hið lægra hlutfall virðisaukaskatts gildi fyrir allar bækur á íslensku, óháð því hvar eða af hverjum þær eru framleiddar eða gefnar út. Þar sem bækur á íslensku séu aftur á móti í reynd flestar framleiddar og gefnar út á Íslandi, geti hinar umdeildu reglur um virðisaukaskatt leitt til óbeinnar verndar innlendrar framleiðslu.

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32 Sjá nmgr. 26.

language to consider. In the light of these factors, the Government of Liechtenstein believes it is appropriate to adopt a differentiated approach.

74. As regards the second paragraph of Article 14 EEA, the Government of Liechtenstein considers that, assuming that most books in Icelandic have Iceland as their origin, the preferential rate for books in Icelandic might, in practice, result in discrimination, even if books in Icelandic and books in other languages may only be in partial, indirect or potential competition.

75. The Government of Liechtenstein acknowledges that the lower VAT rate applies to all books in Icelandic, regardless of where, and by whom, they are produced or published. However, since in practice, most books in Icelandic are produced and published in Iceland, the contested provision of the VAT Act may lead to indirect protection of domestic products.

76. The Government of Liechtenstein submits that it must be assumed that the different VAT rate may influence the decision of consumers to buy books in Icelandic. It is the objective of the differentiated VAT rates on books to make Icelandic titles more competitive. Even if the difference in VAT is not sufficient to eliminate the price differential between books in Icelandic and books in other languages, the lower VAT rate will still place the Icelandic titles in a more favourable position than would otherwise be the case.

77. The Government of Liechtenstein concludes that the contested VAT rates on books are incompatible with the second paragraph of Article 14 EEA.

Question 3

78. The Government of Liechtenstein acknowledges that the preservation of the national language as part of the national identity and cultural heritage is an objective of general interest.

79. However, the Government of Liechtenstein is in doubt whether Article 14 EEA allows for justification of any kind whatsoever and, if so, whether the contested VAT rate differential on books is proportionate or appropriate in the light of alternative measures and the objective pursued.

80. The Government of Liechtenstein submits that neither the EEA Agreement itself nor any rulings of the Court of Justice of the European Communities or the EFTA Court provide for any available grounds of justification in the present case. Internal taxation affording indirect protection of domestic products within the meaning of the second paragraph of Article 14 EEA is not capable of justification.

81. In addition, the Government of Liechtenstein contends that if the statement by the Defendant to the effect that competition would be unaffected by

76. Ríkisstjórn Liechtenstein telur að ganga verði út frá að mismunandi hár virðisaukaskattur geti haft áhrif á þá ákvörðun neytandans að kaupa bækur á íslensku. Það sé í reynd markmiðið með reglunum um mismunandi virðisaukaskatt á bækur að gera íslenskar bækur samkeppnishæfari. Þótt mismunur á virðisaukaskatti sé ekki nægilegur til að eyða verðmismun milli bóka á íslensku og bóka á örðum tungumálum, hefur hlutfall virðisaukaskatts samt þau áhrif að samkeppnisstaða íslenskra bóka verður betri en hún annars yrði.

77. Niðurstaða ríkisstjórnar Liechtenstein er sú að hinar umdeildu reglur um hlutfall virðisaukaskatts séu ósamrýmanlegar 2. mgr. 14. gr. EES.

Þriðja spurning

78. Ríkisstjórn Liechtenstein fellst á að vernd þjóðtungu, sem sé hluti af þjóðernisvitund og menningararfleifð sé markmið sem hafi almennt gildi.

79. Ríkisstjórn Liechtenstein telur aftur á móti vafa leika á hvort yfirleitt sé hægt að réttlæta frávik frá 14. gr. EES, og þótt á það yrði fallist, hvort hinar umdeildu reglur um mismunandi virðisaukaskatt séu hóflegar og viðeigandi þegar hafðar séu í huga aðrar leiðir sem unnt væri að fara og það markmið sem að sé stefnt.

80. Ríkisstjórn Liechtenstein heldur því fram að hvorki EES-samningurinn, dómar dómstóls Evrópubandalaganna né EFTA-dómstólsins geti verið grundvöllur til að réttlæta þær reglur sem um ræðir í málinu. Innlend skattlagning sem leiði til óbeinnar verndar innlendrar framleiðslu í skilningi 2. mgr. 14. gr. EES verði ekki réttlætt á hlutlægan hátt.

81. Að auki telur ríkisstjórn Liechtenstein, að sé sú staðhæfing stefnda rétt, að reglur um mismunandi háan virðisaukaskatt hafi ekki áhrif á samkeppni, stuðli reglurnar um virðisaukaskatt ekki að því að náð verði því markmiði sem að er stefnt, þ.e. að efla sölu bóka á íslensku.

82. Hvað sem því líði, þá felist í EES-samningnum aðrir möguleikar sem henti betur til að vernda og efla menningarlega hagsmuni og sem virðast eiga betur við en mismunandi virðisaukaskattur.

Fjórða spurning

83. Með vísan til dóms í máli *Noregs* gegn *Eftirlitsstofnun EFTA*[33] heldur ríkisstjórn Liechtenstein því fram að heimild Íslands til að leggja á virðisaukaskatt sé ekki takmörkuð með EES-samningnum sem slíkum. Á hinn

[33] Mál E-6/98 *Norway* gegn *EFTA Surveillance Authority* [1999] EFTA Court Report 74.

the contested VAT system were correct, the VAT system would not contribute to the objective pursued, that is, to promote the sale of books in Icelandic.

82. In any event, the EEA Agreement offers other possibilities which are better suited for protecting and promoting cultural concerns and which seem to be more suitable than a differentiation in VAT rates.

Question 4

83. Referring to the judgment in *Norway* v *EFTA Surveillance Authority*,[33] the

[33] Case E-6/98 *Norway* v *EFTA Surveillance Authority* [1999] EFTA Court Report 74.

Government of Liechtenstein contends that the power of Iceland to levy VAT is not affected by the EEA Agreement as such. However, certain provisions, including Article 14 EEA, contain requirements which must be respected whenever taxes are imposed.

Question 5

84. The Government of Liechtenstein states that it is not for the EFTA Court to decide the VAT rate applicable to books in Iceland. This must be left to the national court or to the national legislator. The general principles of the EEA Agreement only require that national provisions contrary to the EEA Agreement must not be applied.

The Government of Norway

Questions 1 and 2

85. In considering whether the Icelandic VAT system for books is contrary to the first paragraph of Article 14 EEA, the Government of Norway relies on *Walker* v *Ministeriet for Skatter og avgifter*,[34] and contends that a concrete assessment must be made to determine whether products are "similar".

86. The Government of Norway observes that the Icelandic VAT system places books in Icelandic and other books in different tax classifications. Referring to the judgment in *Fink-Frucht* v *Hauptzollamt München*,[35] the Government of Norway submits that this may indicate dissimilarity.

87. While acknowledging that books in different languages have numerous physical similarities, the Government of Norway contends that language must be seen as an objective characteristic. The most important aspects of books are their language and content, not the material presentation or the mode of production. Books in a language that prospective readers cannot read are of no value to them. Books in different languages do not fulfil the same consumer needs, and cannot be regarded as similar products within the meaning of the first paragraph of Article 14 EEA.

88. In considering the second paragraph of Article 14 EEA, the Government of Norway states that two cumulative conditions determine whether there is a breach: first, books in different languages must be considered as competing products, and, second, the VAT system must afford indirect protection to Icelandic books.

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34 See footnote 22.

35 Case C-27/67 *Fink-Frucht* v *Hauptzollamt München* [1968] ECR 223.

bóginn felist í tilteknum ákvæðum, svo sem 14. gr. EES, viss skilyrði sem verði að uppfylla þegar skattar séu lagðir á.

Fimmta spurning

84. Ríkisstjórn Liechtenstein telur að það sé ekki hlutverk EFTA-dómstólsins að ákveða hlutfall virðisaukaskatts á bækur á Íslandi. Það verði að eftirláta dómstólum landsins eða löggjafanum. Þær einu kröfur felist í EES-samningnum, að reglum landsréttar sem séu andstæðar honum verði ekki beitt.

Ríkisstjórn Noregs

Fyrsta og önnur spurning

85. Við mat á því hvort hinar íslensku reglur um virðisaukaskatt á bækur séu andstæðar 1. mgr. 14. gr. EES telur ríkisstjórn Noregs rétt að leggja til grundvallar dóm í máli *Walker* gegn *Ministeriet for Skatter og avgifter*,[34] og heldur því fram, að meta verði í einstökum tilvikum hvort vörur teljist "sams konar".

86. Ríkisstjórn Noregs bendir á að íslensku reglurnar um virðisaukaskatt geri ráð fyrir að hlutföll virðisaukaskatts á bækur á íslensku og bækur á öðrum málum sé mismunandi. Með vísan til dómsins í máli *Fink-Frucht* gegn *Hauptzollamt München*,[35] heldur ríkisstjórn Noregs því fram að á grundvelli þessa atriðis megi halda því fram að um mismunandi vörur sé að ræða.

87. Þótt fallist sé á að bækur á mismunandi tungumálum hafi margvíslega sameiginlega áþreifanlega eiginleika heldur ríkisstjórn Noregs því fram að líta verði á tungumál sem hlutlægan eiginleika. Þegar bækur eigi í hlut sé tungumálið og innihaldið mikilvægast, ekki ytra útlit þeirra eða aðferð við framleiðslu. Bækur á tungumáli sem hugsanlegir lesendur geti ekki lesið hafa ekkert gildi fyrir þá. Bækur á mismunandi tungumálum fullnægi ekki sömu þörfum neytenda og verði ekki álitnar sams konar vörur í skilningi 1. mgr. 14. gr. EES.

88. Þegar hugað sé að 2. mgr. 14. gr. EES, telur ríkisstjórn Noregs að tvö samþætt atriði séu ákvarðandi um það hvort um brot sé að ræða. Í fyrsta lagi verði að liggja fyrir að bækur á ólíkum tungumálum séu framleiðsluvörur sem séu í samkeppni, og í öðru lagi að reglurnar um virðisaukaskatt leiði til óbeinnar verndar fyrir íslenskar bækur.

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34 Sjá nmgr. 22.

35 Mál C-27/67 *Fink-Frucht* gegn *Hauptzollamt München* [1968] ECR 223.

89. The Government of Norway submits that books in Icelandic and books in other languages are not in a competitive relationship. For many Icelandic consumers, language barriers prevent them from reading books in foreign languages. That fact distinguishes the present situation from the one in *Commission* v *Italy*.[36]

90. Based on *inter alia* the judgment in *Walker* v *Ministeriet for Skatter og avgifter*,[37] the Government of Norway submits, in essence, that EEA law, at the present stage of development, does not restrict the freedom of each EEA State to lay down a VAT system which differentiates between products on the basis of objective criteria.

91. The Icelandic VAT system is neutral as to the origin of books. Books printed in other EEA States are subject to the lowest VAT rate as long as they are written in Icelandic. Today, books in Icelandic are produced both in Iceland and abroad; Norwegian experience indicates that the proportion of domestic language books produced abroad may well increase.

92. The lowest VAT rate will be applicable to books written in a foreign language and translated into Icelandic. That would presumably be the case for a significant proportion of titles published. This implies that the system does not protect the Icelandic book industry.

93. The Government of Norway contends that a disparity in taxation rates must have a certain protective effect to be in breach of EEA law. In the judgment in *Commission* v *Belgium*,[38] it was held that a difference in taxation rates of six percentage points had no protective effect for the domestic product, which would still be considerably cheaper than the imported product. Final selling prices are relevant and perhaps decisive factors in determining whether a tax system has protective effect.

94. The disparity of 10 percentage points in applicable VAT rates is unlikely to have significant effect. Books in Icelandic remain more expensive than books in other languages. The lower VAT rate does not provide a protective effect for the Icelandic book industry.

95. The Government of Norway concludes that the contested VAT system on books is in conformity with both the first and second paragraphs of Article 14 EEA.

Question 3

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36 See footnote 24.

37 See footnote 22.

38 See footnote 27.

89. Ríkisstjórn Noregs heldur því fram að bækur á íslensku séu ekki í samkeppni við bækur á öðrum tungumálum. Fyrir marga íslenska neytendur komi tungumálaerfiðleikar í veg fyrir að þeir geti lesið bækur á erlendum málum. Að þessu leyti séu aðstæður í þessu máli frábrugðnar aðstæðum þeim sem voru fyrir hendi í máli *Framkvæmdastjórnarinnar* gegn *Ítalíu*.[36]

90. Með vísan til, m.a., dóms í máli *Walker* gegn *Ministeriet for Skatter og avgifter*,[37] heldur ríkisstjórn Noregs því fram, í stuttu máli, að EES-samningurinn, á því stigi samræmingar sem hann er nú, setji ekki hömlur á frelsi EES-ríkja til að setja reglur um virðisaukaskatt sem geri greinarmun á framleiðsluvörum á grundvelli hlutlægra viðmiðana.

91. Íslensku reglurnar um virðisaukaskatt geri ekki upp á milli bóka eftir uppruna þeirra. Lægsta hlutfall virðisaukaskatts eigi við um bækur sem prentaðar séu í öðrum EES-löndum, svo lengi sem þær séu á íslensku. Nú á dögum séu bækur á íslensku framleiddar bæði á Íslandi og í öðrum löndum. Miðað við reynsluna í Noregi megi gera ráð fyrir að hlutfall bóka á þjóðtungum sem framleiddar eru í öðrum löndum eigi eftir að hækka.

92. Lægsta hlutfall virðisaukaskatts muni eiga við um bækur sem frumsamdar séu á erlendu máli en þýddar á íslensku. Það gæti vissulega átt við um talsverðan hluta þeirra bóka sem gefnar eru út. Þetta bendir til þess að reglurnar verndi ekki bókaiðnaðinn á Íslandi sérstaklega.

93. Ríkisstjórn Noregs heldur því fram að mismunur í skattlagningu verði að hafa viss verndaráhrif til að hann geti talist í ósamræmi við EES-samninginn. Í dómi í máli *Framkvæmdastjórnarinnar* gegn *Belgíu*,[38] hafi verið talið að mismunur í skattlagningu upp á 6 prósentustig hefði engin verndaráhrif í þágu innlendrar framleiðslu, sem myndi hvort sem er vera mun ódýrari en innflutt framleiðsla. Endanlegt söluverð skipti máli og sé ef til vill ákvarðandi þegar metið sé hvort skattareglur hafi verndaráhrif.

94. Munur upp á 10 prósentustig í virðisaukaskatti er ólíklegur til að hafa veruleg áhrif. Bækur á íslensku séu eftir sem áður dýrari en bækur á öðrum tungumálum. Hið lægra hlutfall virðisaukaskatts hafi ekki áhrif til verndar bókaiðnaðinum á Íslandi.

95. Niðurstaða ríkisstjórnar Noregs er sú að hinar umdeildu reglur um virðisaukaskatt á bækur séu í samræmi við 1. og 2. mgr. 14. gr. EES.

Þriðja spurning

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36 Sjá nmgr. 24.

37 Sjá nmgr. 22.

38 Sjá nmgr. 27.

96. The Government of Norway argues that differential internal taxation may, in principle, be objectively justified. The Government of Norway finds support for this contention in the judgment in *Chemial Farmaceutici* v *DAF*.[39] Reference is also made to the judgments in *Commission* v *France*[40] and *Outokumpu*.[41] Since the concepts of objective justifications are generally the same in relation to all the fundamental freedoms under the EEA Agreement, case-law in those areas is also relevant when dealing with the question of objective justification under Article 14 EEA.

97. In considering whether cultural policies may be considered as grounds for objective justification, the Government of Norway notes that the significance of cultural policy in Community law has increased in recent years, and is now a factor to be taken into account in Community actions. This is reflected in Article 151(1) and (4) EC and Article 6 EU, read with the fifth paragraph of the Preamble to the Treaty on European Union.

98. The Government of Norway further notes that the intention stated in the Joint Declaration on the Co-operation in Cultural Affairs, attached to the Final Act, corresponds to the objectives of Article 151(4) EC. Article 6 EU is not mirrored in the EEA Agreement, but, in the light of the principle of homogeneity embodied therein, Article 6 EU will still be of relevance.

99. The Government of Norway recalls that cultural policy has been a key issue in several cases before the Court of Justice of the European Communities.[42]

100. The Government of Norway submits that the protection and promotion of the national language is an important part of cultural policy, capable of justifying discriminatory national measures. The Government of Norway finds support for this submission in Council Decision of 22 September 1997 on cross-border fixed book prices in European linguistic areas,[43] the judgments in *Groener* v *Minister for Education and the City of Dublin Vocational Educational Committee*[44] and *Échirolles Distribution*,[45] and the Decision of the Parliament and the Council of 14 February establishing the Culture 2000 program.[46]

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39 Case 140/79 *Chemial Farmaceutici* v *DAF* [1981] ECR 1.

40 Case 196/85 *Commission* v *France* [1987] ECR 1597.

41 Case C-213/96 *Outokumpu* [1998] ECR I-1777.

42 Case C-180/89 *Commission* v *Italy* [1991] ECR I-709; Case C-154/89 *Commission* v *France* [1991] ECR I-659; Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069; Case C-148/91 *Vereniging Veronica* v *Commissariaat voor de Media* [1993] ECR I-487.

43 Council Decision of 22 September 1997, 1997 OJ C 305, p. 2.

44 See footnote 31.

45 Case C-9/99 *Échirolles Distribution* [2000] ECR I-8207.

46 Decision 508/2000/EC of the European Parliament and the Council, 2000 OJ L 63, p. 1.

96. Ríkisstjórn Noregs færir rök fyrir því að mismunun í innlendri skattlagningu geti verið réttlætanleg á hlutlægum forsendum. Ríkisstjórn Noregs telur þetta styðjast við dóm í máli *Chemial Farmaceutici* gegn *DAF*.[39] Ennfremur er vísað til máls *Framkvæmdastjórnarinnar* gegn *Frakklandi*[40] og *Outokumpu.*[41] Þar sem hugtakið hlutlægar réttlætingarástæður merki almennt hið sama, óháð því hvaða fjórfrelsisreglur EES-samningsins eigi í hlut, skipti dómafordæmi á þessum sviðum einnig máli varðandi hlutlægar réttlætingarástæður í tengslum við 14. gr. EES.

97. Ríkisstjórn Noregs bendir á, þegar metið er hvort stefna í menningarmálum geti réttlætt frávik, að mikilvægi stefnumótunar í menningarmálum hafi aukist í bandalagsrétti á síðari árum, og sé nú mikilvægt atriði varðandi ákvarðanatöku innan bandalagsins. Þetta komi fram í 1. og 4. mgr. 151. gr. Rómarsamningsins, sbr. einnig fimmta lið inngangsorða samninganna um Evrópusambandið.

98. Ríkisstjórn Noregs bendir ennfremur á að markmiðið sem komi fram í sameiginlegri yfirlýsingu um samvinnu í menningarmálum og fylgi lokagerð EES-samningsins, samsvari markmiðum þeim sem fram komi í 4. mgr. 151. gr. Rómarsamningsins. Ákvæði 6. gr. samninganna um Evrópusambandið endurspeglist ekki í EES-samningnum, en í ljósi meginreglunnar um einsleitni sem í honum felist, skipti 6. gr. samninganna um Evrópusambandið máli.

99. Ríkisstjórn Noregs vekur athygli á að stefnumótun í menningarmálum hafi verið lykilatriði í nokkrum dómum dómstóls Evrópubandalaganna.[42]

100. Ríkisstjórn Noregs heldur því fram að vernd og efling þjóðtungunnar sé mikilvægt menningarlegt markmið sem geti réttlætt ráðstafanir að landsrétti sem feli í sér mismunun. Ríkisstjórn Noregs telur að finna megi stuðning fyrir þessu sjónarmiði í ákvörðun ráðsins frá 22. september 1997 um fast verð á bókum sem fluttar eru yfir landamæri á evrópskum málsvæðum,[43] dómunum í *Groener* gegn *Minister for Education and the City of Dublin Vocational Educational Committee*[44] og *Échirolles Distribution*,[45] og í ákvörðun þingsins og ráðsins frá 14. febrúar um menningaráætlun fyrir árið 2000.[46]

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39 Mál 140/79 *Chemial Farmaceutici* gegn *DAF* [1981] ECR 1.

40 Mál 196/85 *Framkvæmdastjórnin* gegn *Frakkalndi* [1987] ECR 1597.

41 Mál C-213/96 *Outokumpu* [1998] ECR I-1777.

42 Mál C-180/89 *Framkvæmdastjórnin* gegn Ítalíu [1991] ECR I-709; Mál C-154/89 *Framkvæmdastjórnin* gegn *Frakklandi* [1991] ECR I-659; Mál C-353/89 *Framkvæmdastjórnin* gegn *Hollandis* [1991] ECR I-4069; Mál C-148/91 *Vereniging Veronica* gegn *Commissariaat voor de Media* [1993] ECR I-487.

43 Ákvörðun ráðsins 22. september 1997, 1997 OJ C 305, p. 2.

44 Sjá nmgr. 31.

45 Mál C-9/99 *Échirolles Distribution* [2000] ECR I-8207.

46 Ákvörðun þingsins og ráðsins nr. 508/2000/EC, OJ L 63, p. 1.

101. Language is essential to preserve and promote national identity and is an important part of cultural heritage. In support of this, the Government of Norway refers to the European Charter for Regional or Minority Languages.[47] The purpose of a language policy is to implement measures that will ensure the continued existence of functional national languages.

102. Icelandic is a unique ancient language and an important part of European cultural heritage. The fact that Icelandic is used only by a small population of 280 000 people makes it important to have a strong, declaredpolicy on the protection of the language, especially in an era of globalisation.

103. Supporting literature is an important language policy measure. There is a broad range of measures available to ensure national book production. The Icelandic VAT system on books is one way of promoting the Icelandic language. The Government of Norway contends that most EEA States make use of their VAT systems to promote cultural objectives, such as national literature and language.

104. The Government of Norway concludes that the contested VAT system for books is objectively justified by the need to protect and promote the Icelandic language.

The EFTA Surveillance Authority

Questions 1 and 2

105. Referring to the judgment in *IGAV* v *ENCC*,[48] the EFTA Surveillance Authority contends that Articles 10 and 14 EEA cannot be applied simultaneously.

106. According to the EFTA Surveillance Authority, it follows from the case-law[49] of the Court of Justice of the European Communities that a pecuniary charge constitutes internal taxation within the meaning of Article 14 EEA if the charge is part of a general system of internal dues applicable systematically in accordance with the same criteria to domestic products and imported products alike. Even in cases where a pecuniary charge is levied on imported products but not on identical or similar domestic product, it constitutes internal taxation if it is a part of such a general system of internal dues.

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47 Council of Europe, European Charter for Regional or Minority Languages, Strasbourg, 5 November 1992 (ETS No. 148).

48 See footnote 30.

49 Joined Cases 2 and 3/69 *Diamantarbeiders* v *Brachfeld* [1969] ECR 211; Case 29/72 *Marimex* v *Amministrazione Funanziaria Italiana* [1972] ECR 1309; Case 15/81 *Schul* v *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409.

101. Tungumálið hefur úrslitaþýðingu varðandi vernd og eflingu þjóðernisvitundar og er mikilvægur hluti menningararfleifðar. Til stuðnings þessu vísar ríkisstjórn Noregs til Evrópusáttmála um svæðisbundin tungumál og tungumál minnihlutahópa.[47] Markmiðið með málverndarstefnu sé að grípa til ráðstafana sem tryggja áframhaldandi tilvist þeirra þjóðtungna sem séu í notkun.

102. Íslenska sé einstakt fornt tungumál og mikilvægur hluti af evrópskri menningararfleifð. Sú staðreynd að íslenska er notuð af aðeins 280 000 manns geri það að verkum að mjög mikilvægt er hafa ákveðna yfirlýsta stefnu sem miði að vernd tungunnar, sérstaklega á tímum hnattvæðingar.

103. Stuðningur við bókmenningu sé mikilvægur liður í framkvæmd málverndarstefnu. Unnt sé að grípa til margvíslegra ráðstafana til að tryggja innlenda bókaframleiðslu. Hinar íslensku reglur um virðisaukaskatt á bækur sé ein af þeim leiðum sem færar séu til að efla íslenska tungu. Ríkisstjórn Noregs heldur því fram að flest EES-ríki noti virðisaukaskattskerfið til að ná fram menningarlegum markmiðum, svo sem á sviði bókmennta og málræktar.

104. Niðurstaða ríkisstjórnar Noregs er sú að hinar umdeildu reglur um virðisaukaskatt á bækur sé unnt að réttlæta á hlutlægum forsendum með vísan til þeirrar þarfar að vernda og efla íslenska tungu.

Eftirlitsstofnun EFTA

Fyrsta og önnur spurning

105. Eftirlitsstofnun EFTA heldur því fram, með vísan til dómsins í máli *IGAV* gegn *ENCC*,[48] að 10. og 14. gr. EES verði ekki beitt saman.

106. Samkvæmt því sem Eftirlitsstofnun EFTA heldur fram, leiðir það af dómaframkvæmd dómstóls Evrópubandalaganna[49] að fégjald feli í sér innlenda skattlagningu í skilningi 14. gr. EES ef gjaldið er hluti af almennu kerfi innlendra gjalda sem kerfisbundið á við með sama hætti um innlenda sem innflutta framleiðslu. Jafnvel í tilfellum þar sem fégjald er lagt á innfluttar vörur en ekki innlendar vörur, er um innlenda skattlagningu að ræða, ef það er hluti af slíku almennu kerfi innlendra gjalda.

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47 Evrópusáttmáli um svæðisbundin tungumál og tungumál minnihlutahópa. Strassborg, 5. nóvember 1992 (ETS Nr. 148).

48 Sjá nmgr. 30.

49 Joined Máls 2 and 3/69 *Diamantarbeiders* gegn *Brachfeld* [1969] ECR 211; Mál 29/72 *Marimex* gegn *Amministrazione Funanziaria Italiana* [1972] ECR 1309; Mál 15/81 *Schul* gegn *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409.

107. The VAT system at issue is a general system of internal dues, applied to categories of products on objective criteria without regard to country of origin. Thus, the lower tax rate in respect of books in the Icelandic language must be examined on the basis of Article 14 EEA, not of Article 10 EEA.

108. In dealing with Article 14 EEA, the EFTA Surveillance Authority begins by recapitulating the interpretation applied to the corresponding Article 90 EC in case-law.[50] The Court of Justice of the European Communities has emphasised that the complete neutrality of internal taxation as regards competition between domestic and imported products must be guaranteed under that provision. Furthermore, it must be interpreted widely so as to cover all taxation procedures which conflict with the principle of equality of treatment of domestic and imported products. Moreover, the concept of "similar products" must be interpreted with flexibility. Products must be considered as similar if they have similar characteristics and meet the same needs from the point of view of the consumer.

109. As regards the question of whether books in Icelandic and books in foreign languages are "similar" products for the purposes of the first paragraph of Article 14 EEA, the EFTA Surveillance Authority states that books may be viewed as economic goods, but it is at least equally important that books are individual, artistic or intellectual creations. According to the EFTA Surveillance Authority, it is *prima facie* hard to claim that books in one language are similar to books in other languages. This observation is supported *inter alia* by the fact that book markets in Europe are generally segregated along language lines: trade in foreign-language books is often served by specialised bookshops. The EFTA Surveillance Authority concludes that, in general, language is an essential distinguishing feature of books.

110. It is further noted that cultural and linguistic diversity has been accorded greater importance by Community institutions.

111. The EFTA Surveillance Authority hesitates to conclude that VAT rates differentiated according to the language of books would *per se* fall under the first paragraph of Article 14 EEA. However, the tax at issue in the present case creates an obstacle to market access, which would be greater for a publisher of books in foreign languages than for a publisher of books in Icelandic. In this respect, the differentiated VAT appears to be discriminatory. One may also view this differentiation as an imposition of an unequal burden on consumers, based on their ability to read foreign languages.

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[50] Case 169/78 *Commission* v *Italy* [1980] ECR 385; Case 15/81 *Schul* v *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409; Case 148/77 *Hansen* v *Haubtzollamt de Flensburg* [1978] ECR 1787; Case 168/78 *Commission* v *France* [1980] ECR 347; Case 45/75 *Rewe* v *Hauptzollamt Landau* [1976] ECR 181; Case 106/84 *Commission* v *Denmark* [1986] ECR 833; Case C-265/99 *Commission* v *France*, judgment of 15 March 2001, not yet reported; Case 216/81 *COGIS* v *Amministrazione delle Finanze dello Stato* [1982] ECR 2701; Case 243/84 *Walker* v *Ministeriet for Skatter og avgifter* [1986] ECR 875.

107. Virðisaukaskattskerfi það sem um ræðir sé almennt kerfi innlendra gjalda sem eigi við um framleiðsluvörur sem flokkaðar séu á grundvelli hlutlægra viðmiðana, án tillits til upprunalands. Af þessu leiðir að meta verður hlutfall virðisaukaskatts á bækur á íslensku á grundvelli 14. gr. EES, en ekki 10. gr. EES.

108. Við skýringu á 14. gr. EES telur Eftirlitsstofnun EFTA rétt að tekið sé mið af túlkun sem fram kemur í dómaframkvæmd varðandi samsvarandi ákvæði í 90. gr. Rómarsamningsins.[50] Dómstóll Evrópubandalaganna hefur lagt áherslu á algjört hlutleysi innlendra skattreglna að því er varðar samkeppni milli innlendrar og innfluttrar framleiðslu. Jafnframt verði að túlka greinina rúmt þannig að hún taki til hvers konar skattlagningar sem sé í andstöðu við meginregluna um sams konar meðferð á innlendum vörum og innfluttum. Jafnframt verði að skýra orðin "sams konar framleiðsluvörur" með sveigjanlegum hætti. Líta verði svo á að framleiðsluvörur séu sams konar ef þær hafa sams konar eiginleika og mæta sams konar þörfum frá sjónarhóli neytandans.

109. Að því er snertir spurninguna um það hvort bækur á íslensku og bækur á öðrum málum séu "sams konar" vörur í skilningi 1. mgr. 14. gr. EES, telur Eftirlitsstofnun EFTA að líta megi á bækur sem fjárverðmæti, en að það sé að minnsta kosti jafn mikilvægt að bækur séu einnig sjálfstæð listræn og fræðileg sköpunarverk. Samkvæmt því sem Eftirlitsstofnun EFTA heldur fram er á yfirborðinu erfitt að halda því fram að bækur á einu tungumáli séu sams konar og bækur á öðrum tungumálum. Þetta styðjist m.a. við þá staðreynd að markaðir fyrir bækur í Evrópu skiptast almennt eftir tungumálum og að viðskipti með erlendar bækur eigi sér oft stað í sérhæfðum bókaverslunum. Niðurstaða Eftirlitsstofnunar EFTA er sú að tungumál sé almennt afgerandi einkenni á bók.

110. Ennfremur er bent á þá vaxandi áherslu sem lögð sé á fjölbreytni í tungumálum og menningarefnum af hálfu stofnana Evrópusambandsins.

111. Eftirlitsstofnun EFTA hikar við að staðhæfa að reglur um mismunandi virðisaukaskatt, eftir því á hvaða tungumáli bók er rituð á, falli sem slíkar undir 1. mgr. 14. gr. EES. Skatturinn sem um sé deilt í málinu feli á hinn bóginn í sér markaðshindrun sem komi sér verr fyrir útgefendur erlendra bóka í samanburði við útgefendur bóka á íslensku. Að þessu leyti sýnist mismunandi virðisaukaskattur fela í sér mismunun. Þá megi einnig líta á þennan mismun þannig að með honum séu lagðar ójafnar byrðar á neytendur eftir getu þeirra til að lesa erlend tungumál.

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50 Mál 169/78 *Framkvæmdastjórnin* gegn *Ítalíu* [1980] ECR 385; Mál 15/81 *Schul* gegn *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409; Mál 148/77 *Hansen* gegn *Haubtzollamt de Flensburg* [1978] ECR 1787; Mál 168/78 *Framkvæmdastjórnin* gegn *Frakklandi* [1980] ECR 347; Mál 45/75 *Rewe* gegn *Hauptzollamt Landau* [1976] ECR 181; Mál 106/84 *Framkvæmdastjórnin* gegn *Danmörku* [1986] ECR 833; Mál C-265/99 *Framkvæmdastjórnin* gegn *Frakklandi*, dómur 15. mars 2001, óprentaður; Mál 216/81 *COGIS* gegn *Amministrazione delle Finanze dello Stato* [1982] ECR 2701; Mál 243/84 *Walker* gegn *Ministeriet for Skatter og avgifter* [1986] ECR 875.

112. When looking at the market from the point of view of a multilingual consumer, there may be a likely preference to read literary works in their original language. In this respect, books in foreign languages and books in Icelandic may be considered as similar, or at least competing, products. As regards other types of books, such as textbooks used by professionals or popular fiction, the similarity of the products seems to be even more evident.

113. Against this background, the EFTA Surveillance Authority concludes that the first paragraph of Article 14 EEA should be interpreted as prohibiting the contested VAT system for books.

114. The EFTA Surveillance Authority notes that Article 4 EEA is not applicable in the case at hand, since the principle of non-discrimination has been given effect in the field of internal taxation by Article 14 EEA.

Question 3

115. Based on the case-law[51] of the Court of Justice of the European Communities, the EFTA Surveillance Authority contends that there are no available grounds for justification once a tax is caught by the prohibition contained in Article 14 EEA. This does not suggest that the aim of preserving a national language is contrary to the EEA Agreement, but that this aim must be pursued in conformity with its provisions.

Question 4

116. The EFTA Surveillance Authority observes that harmonisation of taxation falls outside the scope of the EEA Agreement. Referring to the case-law[52] of the Court of Justice of the European Communities, the EFTA Surveillance Authority submits that the prohibition on discriminatory internal taxation does not restrict the freedom of each EEA State to establish the system of taxation which it considers the most suitable in relation to each product. However, in exercising their powers in fields falling outside the scope of the EEA Agreement, EEA States must nevertheless respect EEA law.

Question 5

117. The EFTA Surveillance Authority refers to Article 3 EEA and Protocol 35 to the EEA Agreement.

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[51] Joined Cases 142 and 143/80 *Amministrazione delle Finanze dello Stato* v *Essevi and Salengo* [1981] ECR 1413; Case C-68/96 *Grundig Italiana* v *Ministero delle Finanze* [1998] ECR I-3775; Case C-228/98 *Dounias* [2000] I-577.

[52] Case 127/75 *Bobie* v *Hauptzollamt Aachen-Nord* [1976] ECR 1079; Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585; Case C-279/93 *Schumacker* [1995] ECR I-225; Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831.

112. Þegar litið sé á markaðinn frá sjónarhóli þeirra neytenda sem kunna fleiri en eitt tungumál kunni að vera til staðar tilhneiging hjá þeim til að lesa bókmenntaverk á frummálinu og til að líta á bækur á íslensku sem "sams konar" vörur eða a.m.k. sem vörur í samkeppni. Þegar kemur að annars konar bókum, svo sem fræðiritum eða handbókum fyrir sérfræðinga eða afþreyingarbókmenntum sýnast samkennin vera jafnvel enn augljósari.

113. Á grundvelli þess sem hér hefur komið fram er niðurstaða Eftirlitsstofnunar EFTA sú að skýra verði 1. mgr. 14. gr. EES þannig, að hún banni hinar umdeildu reglur um virðisaukaskatt á bækur.

114. Eftirlitsstofnun EFTA bendir á að 4. gr. EES eigi ekki við í málinu þar sem meginreglan um bann við mismunun verði virk á sviði innlendrar skattlagningar á grundvelli 14. gr. EES.

Þriðja spurning

115. Eftirlitsstofnun EFTA telur, á grundvelli dómaframkvæmdar[51] dómstóls Evrópubandalaganna, að ekki komi til greina neinar hlutlægar réttlætingarástæður þegar skattar falli undir bannið sem fram kemur í 14. gr. EES. Með því er ekki sagt að það markmið að vernda þjóðtungu sé andstætt EES-samningnum, heldur aðeins að vinna beri að því markmiði með þeim hætti að samræmist ákvæðum greinarinnar.

Fjórða spurning

116. Eftirlitsstofnun EFTA bendir á að samræming skattreglna falli utan við gildissvið EES-samningsins. Með vísan til dómaframkvæmdar[52] dómstóls Evrópubandalaganna telur Eftirlitsstofnun EFTA að bannið við innlendum skattareglum, sem feli í sér mismunun, takmarki ekki frelsi EES-ríkja til að koma á því skattakerfi sem það telur best eiga við einstakar framleiðsluvörur. Samt sem áður verði EES-ríki, þegar það beitir valdi sínu á sviðum sem falla utan samningsins, að virða reglur EES-samningsins.

Fimmta spurning

117. Eftirlitsstofnun EFTA vísar til 3. gr. EES og bókunar 35 við EES-

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51 Joined Máls 142 and 143/80 *Amministrazione delle Finanze dello Stato* gegn *Essevi and Salengo* [1981] ECR 1413; Mál C-68/96 *Grundig Italiana* gegn *Ministero delle Finanze* [1998] ECR I-3775; Mál C-228/98 *Dounias* [2000] I-577.

52 Mál 127/75 *Bobie* gegn *Hauptzollamt Aachen-Nord* [1976] ECR 1079; Mál C-246/89 *Framkvæmdastjórnin* gegn *Stóra-Bretlandi* [1991] ECR I-4585; Mál C-279/93 *Schumacker* [1995] ECR I-225; Mál C-120/95 *Decker* gegn *Caisse de Maladie des Employés Privés* [1998] ECR I-1831.

118. The EFTA Surveillance Authority further mentions the fourth and fifteenth recitals of the Preamble to the EEA Agreement, as well as the reference in the eighth recital to the role accorded to individuals and the exercise of rights conferred upon them, and the judicial defence of those rights.

119. The EFTA Surveillance Authority also refers to the findings of the EFTA Court in *Sveinbjörnsdóttir* v *Iceland*[53] and *Restamark*.[54]

120. Referring to the judgment in *Lütticke* v *Hauptzollamt Saarlouis*,[55] the EFTA Surveillance Authority contends that Article 14 EEA is sufficiently precise and unconditional so as to enable individuals to rely on it before national courts.

121. The EFTA Surveillance Authority concludes that it follows from Protocol 35 to the EEA Agreement that, in case of conflict between national law and implemented rules deriving from the EEA Agreement, the latter must prevail.

The Commission of the European Communities

Questions 1 and 2

122. As a preliminary point, the Commission of the European Communities (hereinafter, the "Commission"), referring to the case-law of the EFTA Court,[56] submits that Article 4 EEA is inapplicable in the present case.

123. Moreover, the Commission submits that Articles 10 and 14 EEA are mutually exclusive, and that, on the basis of the case-law[57] of the Court of Justice of the European Communities, the applicable provision in this case is Article 14 EEA alone.

124. The Commission adds that even where, in a system of internal taxation, certain imported goods bear a heavier tax burden than comparable national goods, the difference cannot be regarded as a tax having equivalent effect contrary to Article 10 EEA: there is simply a difference in taxation which may be contrary to Article 14 EEA. On this point, the Commission refers to the judgments in *Lütticke* v *Hauptzollamt Saarlouis*[58] and *Officier van Justitie* v

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53 See footnote 18.

54 Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 15.

55 Case 57/65 *Lütticke* v *Hauptzollamt Saarlouis* [1966] ECR 205.

56 Case E-5/98 *Fagtún* [1999] EFTA Court Report 51; Case E-1/00 *State Dept Management Agency* v *Íslandsbanki-FBA*, judgment of 14 July 2001, not yet reported.

57 Case 57/65 *Lütticke* v *Hauptzollamt Saarlouis* [1966] ECR 205; Case C-213/96 *Outokumpu* [1998] ECR I-1777; Case 7/67 *Wöhrmann* v *Hauptzollamt Bad Reichenhall* [1968] ECR 177; Case 31/67 *Stier* v *Hauptzollamt Hamburg* [1968] ECR 235.

58 See footnote 55.

samninginn.

118. Eftirlitsstofnun EFTA nefndir einnig 4. og 5. lið inngangsorða EES-samningsins. Ennfremur er vísað til 8. liðar þar sem nefnt sé hlutverk einstaklinga vegna beitingar þeirra réttinda sem þeir öðlist og þeirrar verndar dómstóla sem réttindi þessi eigi að njóta.

119. Þá vísar Eftirlitsstofnun EFTA einnig til niðurstöðu EFTA-dómstólsins í málunum *Erla María Sveinbjörnsdóttir* gegn *Íslandi*[53] og *Restamark*.[54]

120. Með vísan til dóms í máli *Lütticke* gegn *Hauptzollamt Saarlouis*,[55] heldur Eftirlitsstofnun EFTA því fram að 14. gr. sé nægilega skýr og óskilyrt til þess að einstaklingar geti byggt á henni fyrir dómstólum aðildarríkja.

121. Niðurstaða Eftirlitsstofnunar EFTA er sú að af bókun 35 leiði að í þeim tilfellum þegar ákvæði landsréttar og ákvæði EES-samningsins, sem komin séu til framkvæmda, rekist á, eigi hin síðarnefndu að ganga fyrir.

Framkvæmdastjórn Evrópusambandsins

Fyrsta og önnur spurning

122. Framkvæmdastjórn Evrópusambandsins (hér eftir Framkvæmdastjórnin) telur fyrst rétt að benda á að samkvæmt dómaframkvæmd EFTA-dómstólsins[56] verði 4. gr. EES ekki beitt í málinu.

123. Ennfremur heldur Framkvæmdastjórnin því fram að 10. og 14. gr. útiloki hvor aðra og að samkvæmt dómaframkvæmd[57] dómstóls Evrópubandalaganna sé það aðeins 14. gr. EES sem verði beitt í þessu máli.

124. Framkvæmdastjórnin bætir því við að jafnvel við þær aðstæður þegar innlendar skattreglur gera ráð fyrir að tilteknar innfluttar vörur sæti þyngri skattbyrði en sams konar innlendar vörur sé ekki unnt að líta svo á að mismurinn sem skattur sem hafi sambærileg áhrif andstætt 10. gr. EES. Einfaldlega sé um að ræða mismunandi skattlagningu sem geti verið andstæð 14. gr. EES. Um þetta atriði vísar Framkvæmdastjórnin til dóma í málunum *Lütticke* gegn *Hauptzollamt*

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53 Sjá nmgr. 18.

54 Mál E-1/94 *Restamark* [1994-1995] EFTA Court Report 15.

55 Mál 57/65 *Lütticke* gegn *Hauptzollamt Saarlouis* [1966] ECR 205.

56 Mál E-5/98 *Fagtún* [1999] EFTA Court Report 51; Mál E-1/00 *Lánasýsla ríkisins* gegn *Íslandsbanka-FBA*, judgment of 14 July 2000, not yet reported.

57 Mál 57/65 *Lütticke* gegn *Hauptzollamt Saarlouis* [1966] ECR 205; Mál C-213/96 *Outokumpu* [1998] ECR I-1777; Mál 7/67 *Wöhrmann* gegn *Hauptzollamt Bad Reichenhall* [1968] ECR 177; Mál 31/67 *Stier* gegn *Hauptzollamt Hamburg* [1968] ECR 235.

Kortmann.[59] According to the judgments in *Wöhrmann* v *Hauptzollamt Bad Reichenhall*[60] and *Outokumpu*,[61] that reasoning is not affected by the fact that, in the case of imported goods, the taxable event is their importation. Importation is simply the point at which they enter the national market.

125. The Commission does not agree with the Defendant that the contested provision of the VAT Act is neutral as regards the origin of books. Books in Icelandic are generally published in Iceland and measures in their favour may be regarded as discrimination in favour of domestic products. The Commission contends that publication in the Icelandic language cannot be regarded as a neutral criterion.

126. From the judgment in *Socridis* v *Receveur Principal des Douanes*,[62] the Commission observes that the general purpose of Article 14 EEA is to guarantee the free movement of goods under normal conditions of competition by eliminating all forms of protection which may result in the application of internal taxation which discriminates against products from other EEA States, and to guarantee that internal taxation is wholly neutral for the purposes of competition between domestic and imported products.

127. In considering whether the contested VAT system for books is contrary to the first paragraph of Article 14 EEA, the Commission refers to the definition of "similar" products found in *Rewe* v *Hauptzollamt Landau*[63] and *Commission* v *France*.[64] The Commission submits that books in Icelandic and books in other languages have similar characteristics, except for the language. They can be thought to meet the same consumer needs if they are used for the same purposes, that is to say, to read for information, diversion or intellectual enrichment.

128. The Commission disagrees with the Defendant that books in different languages cannot be regarded as similar products. That argument could be made where the population is largely monoglot, but seems untenable where people are highly educated, literate and competent in foreign languages.

129. The Commission therefore submits that, for the purposes of the first paragraph of Article 14 EEA, books in Icelandic and books in other languages –

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59 Case 32/80 *Officier van Justitie* v *Kortmann* [1981] ECR 251.

60 Case 7/67 *Wöhrmann* v *Hauptzollamt Bad Reichenhall* [1968] ECR 177.

61 See footnote 41.

62 Case C-166/98 *Socridis* v *Receveur Principal des Douanes* [1999] ECR I-3791.

63 See footnote 4.

64 Case C-265/99 *Commission* v *France*, judgment of 15 March 2001, not yet reported.

Saarlouis[58] og *Officier van Justitie* gegn *Kortmann*.[59] Samkvæmt dómunum í *Wöhrmann* gegn *Hauptzollamt Bad Reichenhall*[60] og *Outokumpu*,[61] hafi það ekki áhrif á þessar röksemdir að þegar um sé að ræða innfluttar vörur sé skatturinn lagður á þegar þær eru fluttar inn. Innflutningurinn sé einfaldlega það tímamark þegar þær eru settar á innlendan markað.

125. Framkvæmdastjórnin er ekki sammála stefnda um að hinar umdeildu reglur geri ekki upp á milli bóka eftir uppruna þeirra. Bækur á íslensku séu almennt gefnar út á Íslandi og að ráðstafanir þeim í hag megi líta á sem mismunun til hagsbóta fyrir innlenda framleiðslu. Framkvæmdastjórnin heldur því fram að ekki sé unnt að líta svo á að útgáfa á íslensku sé hlutlægt viðmið.

126. Af dóminum í *Socridis* gegn *Receveur Principal des Douanes*,[62] dregur Framkvæmdastjórnin þá ályktun að hin almenni tilgangur 14. gr. EES sé að tryggja frjálsa vöruflutninga við eðlileg samkeppnisskilyrði með afnámi hvers kyns verndar sem geti leitt af innlendum skattreglum sem feli í sér mismunun gagnvart framleiðsluvörum frá öðrum EES-ríkjum og að tryggja að innlendar skattreglur séu algjörlega hlutlausar að því er varðar samkeppni milli innlendrar og innfluttrar framleiðslu.

127. Við mat á því hvort hinar umdeildu virðisaukaskattsreglur séu andstæðar 1. mgr. 14. gr. EES vísar Framkvæmdastjórnin til skýringa á orðunum "sams konar" vörur sem fram komi í dómum í málunum *Rewe* gegn *Hauptzollamt Landau*[63] og *Framkvæmdastjórnin* gegn *Frakklandi*.[64] Framkvæmdastjórnin heldur því fram að bækur á íslensku og bækur á öðrum tungumálum hafi sameiginleg einkenni, að undanskyldu tungumálinu. Það megi hugsa sér að þær mæti sömu þörfum neytenda ef þær eru notaðar í sama tilgangi, þ.e. til lesturs til að afla upplýsinga, til afþreyingar eða til menntunar.

128. Framkvæmdastjórnin er ósammála stefnda um að ekki sé unnt að líta á bækur á mismunandi tungumálum sem "sams konar" framleiðsluvörur. Slíka röksemd sé hægt að nota þegar íbúarnir eru að stærstum hluta eintyngdir, en það sýnist ekki eiga við þar sem fólk sé almennt vel menntað, læst og búi yfir færni í erlendum tungumálum.

129. Framkvæmdastjórnin heldur því þess vegna fram að samkvæmt 1. mgr. 14. gr. EES verði að líta svo á að bækur á íslensku og bækur á erlendum málum –

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58 Sjá nmgr. 55.

59 Mál 32/80 *Officier van Justitie* gegn *Kortmann* [1981] ECR 251.

60 Mál 7/67 *Wöhrmann* gegn *Hauptzollamt Bad Reichenhall* [1968] ECR 177.

61 Sjá nmgr. 41.

62 Mál C-166/98 *Socridis* gegn *Receveur Principal des Douanes* [1999] ECR I-3791.

63 Sjá nmgr. 4.

64 Mál C-265/99 *Framkvæmdastjórnin* gegn *Frakklandi*, judgment of 15 March 2001, not yet reported.

in Iceland, at least books in the other Scandinavian languages and in English – must be regarded as similar products. Accordingly, to charge a higher rate of VAT on books in foreign languages is contrary to the first paragraph of Article 14 EEA.

130. In the alternative, the Commission contends that there is a sufficient relationship of substitution between books in Icelandic and books in other languages that the higher rate of VAT levied on the latter is capable of affording indirect protection to books in Icelandic, contrary to the second paragraph of Article 14 EEA. Referring to the judgments in *Socridis* v *Receveur Principal des Douanes*[65] and *COGIS* v *Amministrazione delle Finanze dello Stato*,[66] the Commission submits that the two categories of books are, if not similar, then certainly in competition with each other, be it partially, indirectly or potentially. They are an alternative choice for consumers in some circumstances. This is admitted, states the Commission, by the Defendant when it seeks to justify the application of a lower rate to books in Icelandic by the need to protect Icelandic culture and literature.

131. The Commission adds that the avowed object of the different treatment in the VAT Act is to have an effect on consumer behaviour. Therefore, the Defendant cannot rely on the judgment in *Commission* v *Belgium*[67] and claim that there is no protective effect since, even if the level of VAT were the same, books in some foreign languages would be cheaper than books in Icelandic.

132. The Commission concludes that the contested VAT system for books is incompatible with Article 14 EEA.

Question 3

133. The Commission submits that the VAT system at issue may not be objectively justified by the aim to enhance the position of the Icelandic language. It is established in Community law that Member States may maintain schemes of differential taxation, based on objective criteria, aimed at promoting legitimate objectives, so long as these schemes do not result in discrimination against imported goods. The provision at issue in the present case, on the contrary, creates precisely such discrimination. There is no exception to Article 14 EEA of the kind found, for example, in Article 13 EEA. On this point, the Commission refers to the judgment in *Grundig Italiana* v *Ministero delle Finanze*,[68] where the Court of Justice of the European Communities held that once discrimination has

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65 See footnote 62.

66 See footnote 26.

67 See footnote 27.

68 Case C-68/96 *Grundig Italiana* v *Ministero delle Finanze* [1998] ECR I-3775.

á Íslandi, a.m.k. bækur á öðrum norrænum tungumálum og ensku – séu sams konar framleiðsluvörur. Af því leiði að það sé andstætt 1. mgr. 14. gr. EES að leggja hærri virðisaukaskatt á bækur á erlendum tungumálum.

130. Til vara heldur Framkvæmdastjórnin því fram að sú staðreynd, að hærra hlutfall virðisaukaskatts sem lagt sé á bækur á erlendum málum geti haft í för með sér sérstaka vernd fyrir bækur á íslensku, sem andstæð sé 2. mgr. 14. gr. EES, sýni að samkenni bókar á íslensku og bókar á öðru máli séu nægileg til þess að þær geti komið í staðinn fyrir hvor aðra. Með vísan til dómana í *Socridis* gegn *Receveur Principal des Douanes*[65] og *COGIS* gegn *Amministrazione delle Finanze dello Stato*,[66] heldur Framkvæmdastjórnin því fram, að séu þessir tveir flokkar bóka ekki "sams konar" séu þeir a.m.k. í samkeppni, hvort sem það er að hluta til, óbeint eða mögulega. Fyrir marga neytendur séu þetta, við ákveðnar aðstæður raunverulegir valkostir. Þetta sé viðurkennt af stefnda þegar hann freisti þess að réttlæta hið lægra skatthlutfall á bækur á íslensku á grundvelli þess að verið sé að vernda íslenska menningu og íslenskar bókmenntir.

131. Framkvæmdastjórnin bætir því við að það sé viðurkennt markmið með umræddum reglum um virðisaukaskatt, að hafa áhrif á hegðun neytenda. Þess vegna geti stefndi ekki reitt sig á dóminn í máli *Framkvæmdastjórnarinnar* gegn *Belgíu*[67] og haldið því fram að ekki sé um nein verndaráhrif að ræða þar sem bækur á erlendum málum væru samt sem áður ódýrari þótt hlutfall virðisaukaskatts væri hið sama.

132. Niðurstaða Framkvæmdastjórnarinnar er sú, að hinar umdeildu reglur um virðisaukaskatt á bækur séu ósamrýmanlegar 14. gr. EES.

Þriðja spurning

133. Framkvæmdastjórnin heldur því fram að reglurnar um virðisaukaskatt sem fjallað sé um í málinu verði ekki réttlættar á hlutlæga vísu með tilvísun til þess markmiðs að styrkja stöðu íslenskrar tungu. Það sé viðurkennt í bandalagsrétti að aðildarríki geti sett skattareglur sem feli í sér mismunun séu þær byggðar á hlutlægum viðmiðunum og miði þær að eflingu lögmætra markmiða, og svo lengi sem reglurnar leiði ekki til mismununar gagnvart innfluttum vörum. Ákvæðin sem fjallað sé um í málinu leiði einmitt til slíkrar mismununar. Ekki sé að finna neina undantekningu frá 14. gr. EES, sambærilega þeirri sem fram komi t.d. í 13. gr. EES. Að því er þetta atriði varðar vísar Framkvæmdastjórnin til dómsins í málinu *Grundig Italiana* gegn *Ministero delle Finanze*,[68] þar sem dómstóll Evrópubandalaganna taldi, þegar um væri að ræða

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65 Sjá nmgr. 62.

66 Sjá nmgr. 26.

67 Sjá nmgr. 27.

68 Mál C-68/96 *Grundig Italiana* gegn *Ministero delle Finanze* [1998] ECR I-3775.

been established, Article 90 EC, corresponding to Article 14 EEA, does not provide any means of justification for the State concerned.

134. The Commission contends that the Defendant cannot rely on the judgment in *Groener* v *Minister for Education and the City of Dublin Vocational Educational Committee*[69] in the present case. In that case, the Court of Justice of the European Communities emphasised that the implementation of a language requirement must not be disproportionate to the aim pursued and must not result in discrimination. In the present case, by contrast, the avowed objective of the measure in question is discrimination against books in other languages.

Question 4

135. The Commission states that Iceland is at liberty to levy whatever taxes it wishes, be it VAT or other forms of taxation, but subject always to compliance with its obligations under the EEA Agreement. Thus, in formulating the detailed provisions of its VAT system, Iceland must have regard to the requirements of the EEA Agreement, in particular Article 14 EEA.

136. The Commission adds that, contrary to what is stated by the Defendant, Community law provides for refunds by Member States in cases where taxes or other charges levied have been found to be contrary to the provisions of the Treaty. Member States are required to take such measures as are necessary in order to cure the incompatibility of a national measure with the Community legal order. That includes repayment of charges levied contrary to Community law. In supporting that view, the Commission refers to the judgment in *Amministrazione delle Finanze dello Stato* v *San Giorgio*.[70]

Question 5

137. The Commission expresses the view that this question of the national court raises the issue of direct effect under the EEA Agreement and primacy of its provisions over national law. In the present case, it must be determined whether the provisions of the EEA Agreement itself should be considered to take precedence over inconsistent national law, whether previous or subsequent to the entry into force of the EEA Agreement. Viewed from another angle, the issue to be considered is whether the provisions of the EEA Agreement, in particular Article 14 EEA, are intended to give rights to individuals on which they can rely before the national courts.

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69 See footnote 31.

70 Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595.

mismunun fæli 90. gr. Rómarsamningsins, sem samsvarar 14. gr. EES, ekki í sér neitt svigrúm fyrir ríkið til að réttlæta hana.

134. Framkvæmdastjórnin heldur því fram að stefndi geti ekki byggt á dóminum í málinu *Groener* gegn *Minister for Education and the City of Dublin Vocational Educational Committee*[69] í þessu máli. Í því máli hafi dómstóll Evrópubandalaganna lagt áherslu á að skilyrði sem sett væru varðandi tungumál mættu ekki vera óhófleg miðað við það markmið sem að væri stefnt og mættu ekki leiða til mismununar. Í máli því sem hér um ræði sé hið viðurkennda markmið aftur á móti að mismuna gagnvart bókum á öðrum tungumálum.

Fjórða spurning

135. Framkvæmdastjórnin heldur því fram að íslenska ríkið hafi heimild til að leggja á sérhverja þá skatta sem því hugnast, hvort sem það er virðisaukaskattur eða annars konar skattar, enda séu þeir í samræmi við þær skyldur sem í EES-samningnum felast. Af því leiði að við nánari útfærslu reglna um virðisaukaskatt, verði íslenska ríkið að gæta að þeim kröfum sem gerðar séu í EES-samningnum, einkum 14. gr. hans.

136. Framkvæmdastjórnin bætir því við, andstætt því sem haldið sé fram af stefnda, að bandalagsréttur geri ráð fyrir endurgreiðslu af hálfu aðildarríkis þegar skattar og önnur gjöld sem lögð hafa verið á, teljast andstæð ákvæðum Rómarsamningsins. Aðildarríki séu skyldug til að grípa til þeirra ráðstafana sem nauðsynlegar teljast til að leiðrétta það ósamræmi sem kunni að vera milli innlendra ráðstafana og bandalagsréttar. Í því felst endurgreiðsla þeirra gjalda sem lögð hafa verið á andstætt reglum bandalagsréttar. Til stuðnings þessu sjónarmiði vísar Framkvæmdastjórnin til dómsins í málinu *Amministrazione delle Finanze dello Stato* gegn *San Giorgio*.[70]

Fimmta spurning

137. Framkvæmdastjórnin lýsir því sjónarmiði að þessi spurning varði álitaefnið um bein réttaráhrif EES-samningsins og forgang ákvæða hans gagnvart reglum landsréttar. Í þessu máli verði að taka afstöðu til þess hvort EES-samningurinn sjálfur skuli ganga framar reglum landsréttar sem ósamrýmanlegar séu honum, hvort sem þær eru til komnar fyrir eða eftir gildistöku EES-samningsins. Sé litið á álitaefnið frá öðru sjónarmiði verði spurningin sú hvort ákvæði EES-samningsins, einkum 14. gr. hans, miði að því að veita einstaklingum réttindi sem þeir geti byggt á fyrir dómstólum samningsríkjanna.

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69 Sjá nmgr. 31.

70 Mál 199/82 *Amministrazione delle Finanze dello Stato* gegn *San Giorgio* [1983] ECR 3595.

138. The Commission notes that the Court of First Instance of the European Communities has attributed direct effect, within the Community, to Article 10 EEA in its judgment in *Opel Austria* v *Council*.[71]

139. Furthermore, the Commission observes that, in Community law, the principle of direct effect was first established in the judgment in *Van Gend en Loos*.[72] In that case, the Court of Justice of the European Communities, when determining whether it had jurisdiction, held that it was not called upon to rule on the application of the EC Treaty according to the principles of national law, which remained the concern of the national courts, but only to interpret the scope of a provision of the EC Treaty within the context of Community law and with reference to its effect on individuals.

140. Moreover, the Commission notes that Article 90 EC, which corresponds to Article 14 EEA, was held to have direct effect in Community law in the judgment in *Lütticke* v *Hauptzollamt Saarlouis*.[73]

141. The Commission also observes that the concept of primacy of Community law was established in the judgment in *Costa* v *ENEL*,[74] where it was held that variations in the effect of Community law in deference to subsequent national laws would jeopardise the attainment of the objectives of the Treaty, contrary to the Member States' obligations under Article 10 EC, the equivalent of Article 3 EEA.

142. The Commission contends that the EFTA Court, in *Sveinbjörnsdóttir* v *Iceland*,[75] used reasoning similar to that in *Van Gend en Loos*[76] when arriving at the conclusion that an EEA State must be obliged to provide for compensation for loss caused to an individual by incorrect implementation of a directive. The Commission submits that the reasoning of the EFTA Court in that case applies *a fortiori* in a case such as the present one, which concerns not a provision of a directive but a provision of the main part of the EEA Agreement, not the granting of a secondary right to compensation, but a direct right to compliance with the EEA Agreement.

143. The Commission acknowledges that the EEA Agreement does not entail a transfer of powers of the kind which is an important part of the EC Treaty. Protocol 35 provides that the EEA Agreement does not require any Contracting Party to transfer legislative powers to any institution of the EEA. However, it states that the EFTA States undertake to introduce, if necessary, a statutory

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71 Case T-115/94 *Opel Austria* v *Council* [1997] ECR II-39.

72 Case 26/62 *Van Gend en Loos* [1963] ECR 1.

73 See footnote 55.

74 See footnote 20.

75 See footnote 18.

76 See footnote 72.

138. Framkvæmdastjórnin bendir á að dómstóll Evrópubandalaganna á fyrsta dómstigi hafi komist að þeirri niðurstöðu í dómi sínum í *Opel Austria* gegn *Ráðinu*[71] að 10. gr. EES hefði bein réttaráhrif innan bandalagsins.

139. Ennfremur bendir Framkvæmdastjórnin á að reglan um bein réttaráhrif hafi fyrst verið mótuð í dóminum í máli *Van Gend en Loos*.[72] Í því máli hafi dómstóll Evrópubandalaganna talið að við mat á því hvort hann hefði lögsögu í máli, að það væri ekki hans hlutverk að úrskurða um beitingu Rómarsamningsins samkvæmt reglum landsréttar, enda væri það hlutverk dómstóla aðildarríkja. Hlutverk hans væri aðeins að skýra gildissvið ákvæða Rómarsamningsins innan bandalagsréttarins og með vísan til áhrifa þeirra á réttarstöðu einstaklinga.

140. Ennfremur bendir Framkvæmdastjórnin á að 90. gr. Rómarsamningsins, sem samsvari 154. gr. EES, hafi í dóminum í máli *Lütticke* gegn Hauptzollamt *Saarlouis*[73] verið talinn hafa bein réttaráhrif í bandalagsrétti.

141. Framkvæmdastjórnin getur þess einnig að reglan um forgangsáhrif Evrópuréttarins hafi verið mótuð í dómi dómstóls Evrópubandalaganna í máli *Costa* gegn *ENEL*,[74] þar sem því hafi verið haldið fram að ósamræmi milli aðildarríkja, að því er varðar stöðu og gildi reglna bandalagsréttar sem væru í andstöðu við síðar tilkomnar reglur landsréttar, gæti stefnt í tvísýnu markmiðum Rómarsamningsins, andstætt þeim skuldbindingum sem felast í 10. gr. hans, en hún samsvari 3. gr EES.

142. Framkvæmdastjórnin heldur því fram að EFTA-dómstóllinn hafi í málinu *Erla María Sveinbjörnsdóttir* gegn *Íslandi*,[75] notað sambærilega röksemdarfærslu og þá sem fram kemur í dómi í máli *Van Gend en Loos*[76] þegar hann komst að þeirri niðurstöðu að EES-ríki væri skylt að gera ráð fyrir skaðabótum til þeirra einstaklinga sem yrðu fyrir tjóni vegna rangrar lögfestingar tilskipunar. Framkvæmdastjórnin heldur því fram að röksemdir EFTA-dómstólsins í því máli eigi sjálfkrafa við í máli eins og því sem hér er til meðferðar, sem ekki varði ákvæði í tilskipun, heldur ákvæði í meginmáli samningsins, sem mæli ekki beint fyrir um afleiddan rétt til skaðabóta, heldur beinan rétt til þess að ákvæðum EES-samningsins sé framfylgt.

143. Framkvæmdastjórnin fellst á að EES-samningurinn feli ekki í sér valdaframsal af því tagi sem Rómarsamningurinn mælir fyrir um og mikilvægt sé talið. Bókun 35 feli ekki í sér að í EES-samningnum sé gerð krafa til samningsríkjanna um að þau framselji löggjafarvald til stofnana EES. Þar komi

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71 Mál T-115/94 *Opel Austria* gegn *Ráðinu* [1997] ECR II-39.

72 Mál 26/62 *Van Gend en Loos* [1963] ECR 1.

73 Sjá nmgr. 55.

74 Sjá nmgr. 20.

75 Sjá nmgr. 18.

76 Sjá nmgr. 72.

provision to the effect that EEA rules prevail in case of conflict between implemented EEA rules and other statutory provisions. The protocol thus requires the EFTA States to give primacy to the provisions of the EEA Agreement, and may be taken to reinforce the obligations of EEA States under Article 3 EEA.

144. The Commission concludes that, without going so far as to import into the EEA Agreement a general principle of direct effect and primacy analogous to the position in Community law, the objectives and structure of the EEA Agreement require that its provisions, in particular those relating to the fundamental freedoms, be given precedence over inconsistent national law. That is the case in the absence of any specific and express derogation laid down in the EEA Agreement or in a provision of national law.

Per Tresselt
Judge-Rapporteur

aftur á móti fram, að EFTA-ríkin skuldbinda sig til að setja, ef þörf krefur, lagaákvæði þess efnis að EES-reglur gildi í tilvikum þar sem komið geti til árekstra á milli EES-reglna sem komnar séu til framkvæmda og annarra settra laga. Bókunin geri þannig kröfu um að EFTA-ríki veiti ákvæðum EES-samningsins forgang, og megi þannig líta svo á að bókunin styrki þær skuldbindingar sem felast í 3. gr. EES.

144. Framkvæmdastjórnin telur því, án þess þó að ganga svo langt að halda því fram að almenna reglan um bein réttaráhrif og forgangsáhrif séu hluti EES-samningsins hliðstætt því sem gildi í bandalagsrétti, að markmið og uppbygging EES-samningsins feli í sér þá á kröfu að ákvæði hans, einkum þau sem varða fjórfrelsisreglunar, gangi framar ósamrýmanlegum ákvæðum landsréttar. Þetta sé reglan þegar ekki sé sérstaklega mælt fyrir um sértæk og skýr frávik frá henni í EES-samningnum sjálfum eða ákvæðum landsréttar.

Per Tresselt
framsögumaður

Case E-2/01

Dr Franz Martin Pucher

(Right of establishment – Residence requirement for at least one board member of a domiciliary company)

Summary of the Judgment

1. The matter at issue concerns a requirement in the national law of an EEA State that at least one member of the board of directors of a domiciliary company, having authority to manage and represent that company, must be permanently residing in that State.

Article 31 EEA provides for the abolition of all restrictions on establishment between EEA States.

National rules under which a distinction is drawn on the basis of residence are liable to operate mainly to the detriment of nationals of other EEA States, as non-residents are, in the majority of cases, foreigners.

The residence requirement has the effect of placing nationals of other EEA States at a disadvantage compared with Liechtenstein nationals.

The contested residence requirement may also entail certain restrictions on nationals of other EEA States seeking to set up and manage a domiciliary company in Liechtenstein.

The residence requirement at issue constitutes indirect discrimination contrary to Article 31 EEA. It constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

2. Article 33 EEA provides for derogation from the fundamental principle of freedom of establishment in

Rechtssache E-2/01

Dr. Franz Martin Pucher

(Niederlassungsrecht – Wohnsitzerfordernis für mindestens ein Mitglied des Verwaltungsrats einer Sitzgesellschaft)

Zusammenfassung des Urteils

1. Der vorliegende Fall betrifft ein nach dem nationalen Recht eines EWR-Staates bestehendes Erfordernis, dass mindestens ein Mitglied der Verwaltung einer Sitzgesellschaft, das zu deren Geschäftsführung und Vertretung befugt ist, dauernd in diesem Staat wohnhaft ist.

Artikel 31 EWRA schreibt die Beseitigung aller Niederlassungsbeschränkungen zwischen den EWR-Staaten vor.

Nationale Regeln, die nach dem Wohnsitz unterscheiden, sind geeignet, sich zum Nachteil von Angehörigen anderer EWR-Staaten auszuwirken, da es sich bei Personen ohne Wohnsitz im Inland in der Mehrheit der Fälle um Ausländer handelt.

Das Wohnsitzerfordernis wirkt sich dahin gehend aus, dass Staatsangehörige anderer EWR-Staaten gegenüber in diesen Berufen tätigen liechtensteinischen Staatsangehörigen benachteiligt sind.

Das beanstandete Wohnsitzerfordernis kann auch bestimmte Beschränkungen für Staatsangehörige anderer EWR-Staaten, die eine Sitzgesellschaft in Liechtenstein errichten und verwalten wollen, zur Folge haben.

Ein Wohnsitzerfordernis, wie es im Ausgangsverfahren in Rede steht, stellt eine Artikel 31 EWRA zuwiderlaufende indirekte Diskriminierung dar. Es stellt eine Beschränkung der Niederlassungsfreiheit im Sinne des Artikels 31 EWRA dar.

2. Artikel 33 EWRA lässt Abweichungen vom fundamentalen Grundsatz der Niederlassungsfreiheit zu. Er ist daher bei seiner Anwendung eng auszulegen. Um von Artikel 33 EWRA gedeckt

Article 31 EEA and must be strictly interpreted. In order to fall within the scope of Article 33 EEA, and thereby escape the application of Article 31 EEA, the contested residence requirement must pursue an objective of public interest; be appropriate for securing the attainment of the objective pursued; and be objectively necessary and proportionate to that objective.

Protecting the functioning and good reputation of the financial services sector is a legitimate public policy objective. Securing compliance with national legislation, assisting the administration of justice, facilitating the execution of civil judgements, and enforcing administrative and criminal sanctions are important elements in achieving those objectives.

However, there seem to be less restrictive and more appropriate means than the residence requirement at issue to achieve those objectives. Justification of the residence requirement has not been sought on grounds of public policy and/or public security within the meaning of Article 33 EEA.

zu sein und so dem Verbot des Artikels 31 EWRA zu entgehen, muss das beanstandete Wohnsitzerfordernis folgende Voraussetzungen erfüllen: Es muss ein im Allgemeininteresse liegendes Ziel im Sinne von Artikel 33 EWRA verfolgen, es muss zur Erreichung des angestrebten Ziels geeignet sein, und es muss objektiv erforderlich sein und in einem angemessenen Verhältnis zu diesem Ziel stehen.

Der Schutz des Funktionierens und des guten Rufes des Finanzdienstleistungssektors ist ein legitimes, auf die öffentliche Ordnung bezogenes Ziel. Die Sicherstellung der Befolgung der nationalen Rechtsvorschriften, die Unterstützung der Rechtspflege, die Vereinfachung der Vollstreckung zivilrechtlicher Urteile und die Erleichterung der Durchsetzung administrativer und strafrechtlicher Sanktionen sind wichtige Elemente bei der Erreichung dieses Ziels.

Allerdings gibt es andere, weniger beschränkende Mittel zur Erreichung dieser Ziele als ein Wohnsitzerfordernis. Gerechtfertigung des Wohnsitzerfordernisses aus Gründen der öffentlichen Ordnung und/oder der öffentlichen Sicherheit im Sinne des Artikels 33 EWRA ist nicht ersucht.

JUDGMENT OF THE COURT

22 February 2002*

(Right of establishment – Residence requirement for at least one board member of a domiciliary company)

In Case E-2/01

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein) for an Advisory Opinion in the appeal against the decision of the Government of the Principality of Liechtenstein by

Dr Franz Martin Pucher

on the interpretation of Articles 4, 31 and 33 of the EEA Agreement.

THE COURT,

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

Registrar: Lucien Dedichen

having considered the written observations submitted on behalf of:

– the Complainant, Dr Franz Martin Pucher, representing himself;

– the Government of Liechtenstein, represented by Beatrice Hilti, Deputy Director, EEA Coordination Unit;

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* Language of the request: German.

URTEIL DES GERICHTSHOFS

22. Februar 2002*

(Niederlassungsrecht – Wohnsitzerfordernis für mindestens ein Mitglied des Verwaltungsrats einer Sitzgesellschaft)

In der Rechtssache E-2/01

betreffend einen ANTRAG der Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein an den Gerichtshof gemäss Artikel 34 des Abkommens der EFTA-Staaten über die Errichtung einer EFTA-Überwachungsbehörde und eines EFTA-Gerichtshofs auf Erstellung eines Gutachtens über die Auslegung des EWR-Abkommens im Verfahren über die gegen die Entscheidung der Regierung des Fürstentums Liechtenstein gerichtete Beschwerde von

Dr. Franz Martin Pucher

über die Auslegung der Artikel 4, 31 und 33 des EWR-Abkommens erlässt

DER GERICHTSHOF,

bestehend aus: Thór Vilhjálmsson, Präsident, Carl Baudenbacher und Per Tresselt (Berichterstatter), Richter,

Kanzler: Lucien Dedichen

Beteiligte, die schriftliche Erklärungen abgegeben haben:

– Beschwerdeführer, Dr. Franz Martin Pucher, vertreten durch sich selbst;

– Liechtensteinische Regierung, vertreten durch Beatrice Hilti, Stellvertretende Leiterin der Stabsstelle EWR;

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* Sprache des Antrags: Deutsch.

– the Government of Iceland, represented by Anna Jóhannsdóttir, Legal Officer, Ministry of Foreign Affairs, acting as Agent;

– the Government of Norway, represented by Helge Seland, Assistant Director General, Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Michael Sánchez Rydelski and Elisabethann Wright, Officers, Legal & Executive Affairs, acting as Agents;

– the Commission of the European Communities, represented by John Forman and Maria Patakia, Legal Advisers, Legal Service, acting as Agents.

having regard to the Report for the Hearing,

having heard the oral arguments of the Complainant, Dr Franz Martin Pucher, the Government of Liechtenstein, represented by Christoph Büchel, the EFTA Surveillance Authority and the Commission of the European Communities at the hearing on 16 November 2001,

gives the following

Judgment

I Facts and procedure

1 By an order dated 12 March 2001, registered at the Court on 14 March 2001, the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein made a Request for an Advisory Opinion in the appeal against the decision of the Government of the Principality of Liechtenstein by Dr Franz Martin Pucher (hereinafter, the "Complainant").

2 The Complainant is an Austrian national residing in Feldkirch, Austria. He is admitted to practise in Liechtenstein as a professional trustee; and is the manager of a Liechtenstein trust company with its seat in Liechtenstein. His application for a permanent residence permit in Liechtenstein was refused by Liechtenstein authorities in accordance with the EEA Joint Committee Decision 191/1999 Amending Annexes VIII (Right of establishment) and V (Free movement of workers) to the EEA Agreement (OJ 2001 L 74, p. 29).

3 On 29 September 1999, the Complainant applied to the Liechtenstein Amt für Finanzdienstleistungen (Financial Services Office) for an authorisation to serve

– Isländische Regierung, vertreten durch Anna Jóhannsdóttir, Rechtsabteilung, Aussenministerium, als Beauftragte;

– Norwegische Regierung, vertreten durch Helge Seland, Stellvertretender Generaldirektor, Aussenministerium, als Beauftragten;

– EFTA-Überwachungsbehörde, vertreten durch Michael Sánchez Rydelski und Elisabethann Wright, Rechtliche & Exekutive Angelegenheiten, als Beauftragte;

– Kommission der Europäischen Gemeinschaften, vertreten durch John Forman und Maria Patakia, Rechtsberater, Juristischer Dienst, als Beauftragte;

aufgrund des Sitzungsberichts,

nach Anhörung der mündlichen Stellungnahmen des Beschwerdeführers, Dr. Franz Martin Pucher, der liechtensteinischen Regierung, vertreten durch Christoph Büchel, der EFTA-Überwachungsbehörde und der Kommission der Europäischen Gemeinschaften in der Sitzung vom 16. November 2001,

folgendes

Urteil

I Sachverhalt und Verfahren

1 Mit Beschluss vom 12. März 2001, beim Gerichtshof eingegangen am 14. März 2001, hat die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein einen Antrag auf Erstellung eines Gutachtens über die Auslegung des EWR-Abkommens im Verfahren über die gegen die Entscheidung der Regierung des Fürstentums Liechtenstein gerichtete Beschwerde des Dr. Franz Martin Pucher (nachstehend: Beschwerdeführer) gestellt.

2 Der Beschwerdeführer ist ein österreichischer Staatsbürger mit Wohnsitz in Feldkirch, Österreich. Er besitzt in Liechtenstein die Berufszulassung als Treuhänder und ist Geschäftsführer einer liechtensteinischen Treuhandgesellschaft mit Sitz in Liechtenstein. Sein Antrag auf Erteilung einer dauerhaften Aufenthaltsbewilligung wurde von den liechtensteinischen Behörden gemäss dem Beschluss des Gemeinsamen EWR-Ausschusses Nr. 191/1999 über die Änderung der Anhänge VIII (Niederlassungsrecht) und V (Freizügigkeit der Arbeitnehmer) des EWR-Abkommens (ABl. 2001 L 74, S. 29) abgelehnt.

3 Am 29. September 1999 beantragte der Beschwerdeführer beim Amt für Finanzdienstleistungen des Fürstentums Liechtenstein die Erteilung einer

as the qualified member of the board of directors of a domiciliary company, as referred to in Article 180a of the *Personen- und Gesellschaftsrecht* (Act on Persons and Companies) of 20 January 1926, as amended (hereinafter, the "Persons and Companies Act"). The Amt für Finanzdienstleistungen refused to grant the authorisation applied for, essentially on the grounds that the Complainant, at that time, was residing in Austria, and therefore, did not fulfil the requirement of permanent residence in Liechtenstein, as set out in Article 180a of the Persons and Companies Act.

4 The Complainant lodged a complaint with the Government of Liechtenstein, requesting that the decision of the Amt für Finanzdienstleistungen be rescinded and the authorisation be granted. The Government of Liechtenstein dismissed the complaint by a decision of 19 September 2000.

5 The Complainant filed an appeal against that decision with the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein). In the proceedings pending before the Verwaltungsbeschwerdeinstanz, the Complainant has raised issues concerning the compatibility of the residence requirement in Article 180a of the Persons and Companies Act with the EEA Agreement.

6 The Verwaltungsbeschwerdeinstanz decided to request an Advisory Opinion from the EFTA Court on the following questions:

> *1. Does the residence requirement imposed by Article 180a(1) of the Persons and Companies Act constitute overt or covert discrimination on grounds of nationality within the meaning of Article 4 EEA, alternatively, does that residence requirement constitute a restriction on the freedom of establishment provided for by Article 31 EEA?*
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> *2. If the answer to question 1 is in the affirmative: is the discrimination or restriction justified on public-interest grounds, in particular those of public policy and/or public security (see Article 33 EEA)?*

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

II Legal background

EEA law

8 The questions submitted by the national court concern the interpretation of Articles 4, 31 and 33 EEA.

Bewilligung für die Ausübung der Tätigkeit eines qualifizierten Verwaltungsrats einer Sitzgesellschaft gemäss Artikel 180a des *Personen-und Gesellschaftsrechts* vom 20. Jänner 1926 in seiner geänderten Fassung (nachstehend: PGR). Das Amt für Finanzdienstleistungen lehnte die Erteilung der beantragten Bewilligung im wesentlichen mit der Begründung ab, der Beschwerdeführer habe zu dieser Zeit in Österreich gewohnt und daher nicht das Erfordernis des dauerhaften Wohnsitzes in Liechtenstein nach Artikel 180a PGR erfüllt.

4 Der Beschwerdeführer erhob Beschwerde an die Regierung des Fürstentums Liechtenstein mit dem Antrag, die Entscheidung des Amtes für Finanzdienstleistungen aufzuheben und ihm die Bewilligung zu erteilen. Die Regierung des Fürstentums Liechtenstein wies die Beschwerde mit Entscheidung vom 19. September 2000 ab.

5 Gegen diese Abweisung erhob der Beschwerdeführer Beschwerde an die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein. Im Verfahren vor der Verwaltungsbeschwerdeinstanz machte er geltend, das Wohnsitzerfordernis des Artikels 180a PGR sei unvereinbar mit dem EWR-Abkommen.

6 Die Verwaltungsbeschwerdeinstanz hat beschlossen, den EFTA-Gerichtshof um ein Gutachten über folgende Fragen zu ersuchen:

> *1. Stellt das Wohnsitzerfordernis von Artikel 180a Absatz 1 PGR eine offene oder versteckte Diskriminierung aus Gründen der Staatsangehörigkeit gemäss Artikel 4 EWR-Abkommen dar, oder stellt dieses Wohnsitzerfordernis eine Beschränkung des Rechts auf freie Niederlassung gemäss Artikel 31 EWR-Abkommen dar?*
>
> *2. Wenn die Frage 1 bejaht wird: Ist die Diskriminierung bzw. Beschränkung aus Gründen des Allgemeininteresses, insbesondere der öffentlichen Ordnung und Sicherheit (siehe Artikel 33 EWR-Abkommen), gerechtfertigt?*

7 Wegen weiterer Einzelheiten des Sachverhalts, des Verfahrens und der beim Gerichtshof eingereichten schriftlichen Erklärungen wird auf den Sitzungsbericht verwiesen. Der Akteninhalt ist im Folgenden nur insoweit wiedergegeben, als die Begründung des Urteils dies erfordert.

II Rechtlicher Rahmen

EWR-Recht

8 Die vom nationalen Gericht vorgelegten Fragen betreffen die Auslegung der Artikel 4, 31 und 33 EWR-Abkommens (nachstehend: EWRA).

9 Article 4 EEA reads as follows:

> "Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

10 Article 31 EEA reads as follows:

> "1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.
>
> 2. Annexes VIII to XI contain specific provisions on the right of establishment."

11 Article 33 EEA reads as follows:

> "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."

National law

12 Article 180a of the Persons and Companies Act reads as follows:

> "1. At least one board member of a legal entity, having authority to manage and represent the same, must be a national of an EEA State permanently residing in Liechtenstein and admitted to practise in Liechtenstein as a lawyer (Rechtsanwalt), legal agent (Rechtsagent), professional trustee (Treuhänder) or auditor (Wirtschaftsprüfer).
>
> 2. The same status shall be deemed to be held by persons residing in Liechtenstein who possess evidence of educational and/or training qualifications corresponding to the requirements laid down in paragraph (1) and recognised by the Government pursuant to statute or international treaty, whose fixed, main employment is with a lawyer, legal agent, professional trustee, accountant, trust company, firm of auditors or bank and who pursue their activities in such employment within the meaning of paragraph (1). Aliens who are not nationals of an EEA State shall be required to possess a permit allowing them to settle in Liechtenstein.
>
> 3. The obligation imposed in paragraph (1) shall not apply to legal entities which are required under the Gewerbegesetz (Law on Trades and Businesses) or some other special statute to have a qualified business manager."

9 Artikel 4 EWRA lautet:

> "Unbeschadet besonderer Bestimmungen dieses Abkommens ist in seinem Anwendungsbereich jede Diskriminierung aus Gründen der Staatsangehörigkeit verboten."

10 Artikel 31 EWRA lautet:

> "(1) Im Rahmen dieses Abkommens unterliegt die freie Niederlassung von Staatsangehörigen eines EG-Mitgliedstaates 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-Mitgliedstaates 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 Aufnahmestaates für seine eigenen Angehörigen.
>
> (2) Die besonderen Bestimmungen über das Niederlassungsrecht sind in den Anhängen VIII bis XI enthalten."

11 Artikel 33 EWRA lautet:

> "Dieses Kapitel und die aufgrund desselben getroffenen Maßnahmen beeinträchtigen nicht die Anwendbarkeit der Rechts- und Verwaltungsvorschriften, die eine besondere Regelung für Ausländer vorsehen und aus Gründen der öffentlichen Ordnung, Sicherheit oder Gesundheit gerechtfertigt sind."

Nationales Recht

12 Artikel 180a PGR lautet:

> "(1) Wenigstens ein zur Geschäftsführung und Vertretung befugtes Mitglied der Verwaltung einer Verbandsperson muss ein dauernd im Inland wohnhafter Staatsangehöriger eines EWR-Mitgliedstaates sein und die inländische Berufszulassung als Rechtsanwalt, Rechtsagent, Treuhänder oder Wirtschaftsprüfer besitzen.
>
> (2) Gleichgestellt sind im Inland wohnhafte Personen, die einen den Anforderungen von Abs. 1 entsprechenden, von der Regierung durch Gesetz oder Staatsvertrag anerkannten Ausbildungsnachweis besitzen, zu einem Rechtsanwalt, Rechtsagenten, Treuhänder oder Wirtschaftsprüfer, zu einer Treuhandgesellschaft oder Revisionsgesellschaft oder zu einer Bank in einem hauptberuflichen Dienstverhältnis stehen und ihre Tätigkeit im Sinne von Abs. 1 im Rahmen dieses Dienstverhältnisses ausüben. Für Ausländer, die nicht Staatsangehörige eines EWR-Mitgliedstaates sind, ist die Niederlassungsbewilligung erforderlich.
>
> (3) Von der Verpflichtung gemäss Abs. 1 sind Verbandspersonen ausgenommen, die aufgrund des Gewerbegesetzes oder eines anderen Spezialgesetzes einen befähigten Geschäftsführer besitzen müssen."

13 The member of the board of directors of a legal entity who fulfils the requirements in Article 180a(1) is often referred to as the qualified board member of that entity.

14 The Persons and Companies Act differentiates between two different types of companies incorporated under Liechtenstein law, namely Liechtenstein companies not carrying out business in Liechtenstein (domiciliary companies) and Liechtenstein companies doing business in Liechtenstein (active companies). Only the qualified board member of the former is subject to the residence requirement in Article 180a.

III Findings of the Court

The first question

15 By its first question, the national court essentially seeks to ascertain whether a requirement in the national law of an EEA State that at least one member of the board of directors of a domiciliary company, having authority to manage and represent that company, must be permanently residing in that State, constitutes discrimination within the meaning of Article 4 EEA, or a restriction on the freedom of establishment within the meaning of Article 31 EEA.

16 Article 31 EEA, which the Court finds must be examined first, provides for the abolition of all restrictions on establishment between the EEA States. The freedom of establishment includes, inter alia, the right of nationals of the EEA States to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as are laid down by the law of the EEA State of establishment with respect to its own nationals.

17 The contested residence requirement is formulated in general terms, and does not distinguish between Liechtenstein nationals and nationals of other EEA States. It applies to all domiciliary companies incorporated under Liechtenstein law, and to all EEA nationals admitted to practise one of the professions required to serve as the qualified board member, *viz.* a lawyer, legal agent, professional trustee, or auditor. There is no overt discrimination in this respect.

18 However, it is settled case-law that the rules of equal treatment prohibit not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, achieve in practice the same result (see Case E-3/98 *Rainford Towning* [1998] EFTA Court Report 205, at paragraph 27).

13 Das Mitglied der Verwaltung einer Verbandsperson, das die Anforderungen des Artikel 180a Absatz 1 erfüllt, wird oft als qualifizierter Verwaltungsrat dieser Verbandsperson bezeichnet.

14 Das Personen- und Gesellschaftsrecht unterscheidet zwischen zwei Arten von Gesellschaften liechtensteinischen Rechts, und zwar liechtensteinischen Gesellschaften, die keine Geschäftstätigkeit in Liechtenstein ausüben (Sitzgesellschaften), und solchen, die in Liechtenstein tätig sind (aktive Gesellschaften). Nur der qualifizierte Verwaltungsrat erstgenannter Gesellschaften unterliegt dem Wohnsitzerfordernis des Artikels 180a.

III Entscheidung des Gerichtshofs

Die erste Frage

15 Mit der ersten Frage möchte das nationale Gericht im Wesentlichen wissen, ob ein nach dem nationalen Recht eines EWR-Staates bestehendes Erfordernis, dass mindestens ein Mitglied der Verwaltung einer Sitzgesellschaft, das zu deren Geschäftsführung und Vertretung befugt ist, dauernd in diesem Staat wohnhaft ist, eine Diskriminierung im Sinne von Artikel 4 EWR oder eine Beschränkung der Niederlassungsfreiheit bewirkt.

16 Artikel 31 EWRA, der nach Ansicht des Gerichts zuerst zu prüfen ist, schreibt die Beseitigung aller Niederlassungsbeschränkungen zwischen den EWR-Staaten vor. Die Niederlassungsfreiheit umfasst u. a. das Recht der Staatsangehörigen der EWR-Staaten zur Aufnahme und Ausübung selbständiger Erwerbstätigkeiten sowie die Gründung und Leitung von Unternehmen nach den Bestimmungen des EWR-Aufnahmestaates für seine eigenen Angehörigen.

17 Das beanstandete Wohnsitzerfordernis ist allgemein formuliert und unterscheidet nicht zwischen liechtensteinischen Staatsangehörigen und Staatsangehörigen anderer EWR-Staaten. Es gilt für alle Sitzgesellschaften liechtensteinischen Rechts und für alle Staatsangehörigen eines EWR-Staates, die eine zur Tätigkeit eines qualifizierten Verwaltungsrats berechtigende Berufszulassung besitzen, d.h. eine Zulassung als Rechtsanwalt, Rechtsagent, Treuhänder oder Wirtschaftsprüfer. Insofern liegt keine offene Diskriminierung vor.

18 Nach ständiger Rechtsprechung verbietet der Grundsatz der Gleichbehandlung jedoch nicht nur offene Diskriminierungen aufgrund der Staatsangehörigkeit, sondern auch jede Form der versteckten Diskriminierung, die durch die Anwendung anderer Unterscheidungsmerkmale oder durch die Ausübung von Verwaltungsermessen in Bezug auf Ausnahmen und Befreiungen tatsächlich zum gleichen Ergebnis führen würde (vgl. u.a. Rechtssache E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205, Paragraph 27).

19 The EFTA Court and the Court of Justice of the European Communities have consistently held that national rules under which a distinction is drawn on the basis of residence are liable to operate mainly to the detriment of nationals of other EEA States, as non-residents are in the majority of cases foreigners (see *Rainford-Towning*, cited above, at paragraph 29 and Case C-279/93 *Schumacker* [1995] ECR I-225, at paragraph 28).

20 On that basis, the Court found in *Rainford-Towning*, cited above, at paragraph 30, that a requirement that a national of another EEA State must reside in the State concerned in order to be appointed managing director of a active company exercising trade, constitutes indirect discrimination contrary to Article 31 EEA. The residence requirement at issue in the present case requires one, unspecified, board member of a domiciliary company, having authority to manage and represent that company, to be permanently residing in Liechtenstein. No restrictions with regard to residence are placed on other members of the board.

21 However, the residence requirement for the qualified board member of a domiciliary companies has the corresponding effect of placing nationals of other EEA States engaged in the specified professions at a disadvantage compared with Liechtenstein nationals engaged in those professions.

22 The Court notes from the information presented to it, that an important part of the profession of trustees in Liechtenstein is their engagement in the administration of Liechtenstein companies, in particular as a board member. Lawyers, legal agents, professional trustees and auditors practising their professions in Liechtenstein, and having their permanent residence in another State, may not function as the qualified board member of a domiciliary company, and in that respect, the residence requirement constitutes a restriction on the ability to act as a trustee. That restriction appears more likely to be of consequence for nationals of other EEA States than for Liechtenstein nationals.

23 Furthermore, the Court considers that, in addition to the abovementioned restrictions on the exercise of the specified professions, the contested residence requirement may also entail certain restrictions on nationals of other EEA States seeking to set up and manage a domiciliary company in Liechtenstein.

24 It must therefore be concluded that a residence requirement such as the one at issue in the main proceedings, constitutes indirect discrimination contrary to Article 31 EEA.

19 Nach ständiger Rechtsprechung des EFTA-Gerichtshofs und des Gerichtshofs der Europäischen Gemeinschaften sind nationale Regeln, die nach dem Wohnsitz unterscheiden, geeignet, sich zum Nachteil von Angehörigen anderer EWR-Staaten auszuwirken, da es sich bei Personen ohne Wohnsitz im Inland in der Mehrheit der Fälle um Ausländer handelt (vgl. die oben erwähnte Rechtssache *Rainford-Towning*, Paragraph 29, und EuGH C-279/93 *Schumacker*, Slg. 1095, I-225, Randnr. 28).

20 Auf dieser Grundlage befand der Gerichtshof in der Rechtssache *Rainford-Towning*, Paragraph 30, dass ein Erfordernis, wonach ein Angehöriger eines anderen EWR-Staates im betreffenden Staat einen Wohnsitz haben muss, um zum Geschäftsführer einer aktiven Gesellschaft, die einen Geschäftsbetrieb führt, ernannt zu werden, eine durch Artikel 31 EWRA verbotene indirekte Diskriminierung darstellt. Das im vorliegenden Fall streitige Wohnsitzerfordernis besagt, dass ein – nicht näher bezeichneter – zur Geschäftsführung und Vertretung befugter Verwaltungsrat einer Sitzgesellschaft dauernd in Liechtenstein wohnhaft sein muss. Für andere Verwaltungsräte bestehen keine Beschränkungen hinsichtlich des Wohnsitzes.

21 Das für den qualifizierten Verwaltungsrat einer Sitzgesellschaft geltende Wohnsitzerfordernis wirkt sich jedoch zugleich dahin gehend aus, dass Staatsangehörige anderer EWR-Staaten, die in den genannten Berufen tätig sind, gegenüber in diesen Berufen tätigen liechtensteinischen Staatsangehörigen benachteiligt sind.

22 Der Gerichtshof entnimmt den ihm vorgelegten Informationen, dass ein wichtiger Teil des Berufes des Treuhänders in Liechtenstein in der Tätigkeit in der Verwaltung liechtensteinischer Gesellschaften, insbesondere als Verwaltungsrat, besteht. Rechtsanwälte, Rechtsagenten, Treuhänder und Wirtschaftsprüfer, die in Liechtenstein ihren Beruf ausüben und ihren ständigen Wohnsitz in einem anderen Staat haben, können nicht als qualifizierter Verwaltungsrat einer Sitzgesellschaft tätig sein, und in dieser Hinsicht stellt das Wohnsitzerfordernis eine Beschränkung der Fähigkeit, als Treuhänder tätig zu sein, dar. Diese Beschränkung wirkt sich ersichtlich stärker auf Angehörige anderer EWR-Staaten als auf liechtensteinische Staatsangehörige aus.

23 Darüber hinaus ist der Gerichtshof der Ansicht, dass das beanstandete Wohnsitzerfordernis zusätzlich zu der vorerwähnten Beschränkung der Ausübung der genannten Berufe auch bestimmte Beschränkungen für Staatsangehörige anderer EWR-Staaten, die eine Sitzgesellschaft in Liechtenstein errichten und verwalten wollen, zur Folge haben kann.

24 Daher ist zu folgern, dass ein Wohnsitzerfordernis, wie es im Ausgangsverfahren in Rede steht, eine Artikel 31 EWRA zuwiderlaufende indirekte Diskriminierung darstellt.

25 That being so, it is not necessary to examine whether a national provision such as that contested in the main proceedings, is contrary to the general prohibition of discrimination on grounds of nationality set out in Article 4 EEA; as that provision applies independently, only to situations governed by EEA law for which the EEA Agreement lays down no specific rules prohibiting discrimination (see Case E-1/00 *Íslandsbanki-FBA*, judgment of 14 July 2000, not yet reported, at paragraphs 35 and 36).

26 The answer to the first question must therefore be that a national provision such as that at issue in the main proceedings, requiring that at least one member of the board of directors of a domiciliary company, having authority to manage and represent same, must be permanently residing in that State, constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

The second question

27 By its second question, the national court asks whether the residence requirement at issue may be justified under Article 33 EEA on grounds of public interest, in particular those of public policy and/or public security.

28 The Government of Liechtenstein has argued that the contested residence requirement is objectively justified under Article 33 EEA, and therefore, not contrary to the freedom of establishment provided for in Article 31 EEA. According to the Government of Liechtenstein, the over-all public policy objective pursued is the maintenance of the functioning and good reputation of the Liechtenstein financial services sector. That sector is based inter alia on the liberal rules of the Persons and Companies Act with regard to the incorporation of domiciliary companies. By requiring the qualified board member to be permanently residing in Liechtenstein, the prevention of abuses of those liberal rules is facilitated. The Government of Liechtenstein has argued that the greater likelihood of the board member being present in Liechtenstein, ascribed to the residence requirement, will assist the administration of justice, simplify the execution of civil law judgments, and facilitate the enforcement of administrative and criminal sanctions.

29 In view of the rejection by the Court of similar arguments put forward in *Rainford-Towning*, cited above, the Government of Liechtenstein submits that there are relevant differences between the situation underlying that case and the present case. The former case concerned active companies, whereas the instant case relates exclusively to domiciliary companies. Due to the liberal rules of the Liechtenstein company law, domiciliary companies are particularly susceptible to abuses, and require more stringent control.

25 Demgemäss braucht nicht geprüft zu werden, ob eine nationale Bestimmung wie die im Ausgangsverfahren beanstandete dem in Artikel 4 EWRA aufgestellten allgemeinen Verbot der Diskriminierung aus Gründen der Staatsangehörigkeit zuwiderläuft; denn diese Bestimmung findet eigenständige Anwendung nur auf unter EWR-Recht fallende Sachverhalte, für die das EWR-Abkommen keine besonderen Regeln aufstellt, die eine Diskriminierung verbieten (vgl. Rechtssache E-1/00 *Íslandsbanki-FBA*, Urteil vom 14. Juli 2000, noch nicht in amtlicher Sammlung, Paragraphen 35 und 36).

26 Auf die erste Frage ist somit zu antworten, dass eine nationale Bestimmung, wonach mindestens ein Mitglied der Verwaltung einer Sitzgesellschaft, das zu deren Geschäftsführung und Vertretung befugt ist, dauernd in diesem Staat wohnhaft sein muss, eine Beschränkung der Niederlassungsfreiheit im Sinne des Artikels 31 EWRA darstellt.

Die zweite Frage

27 Mit seiner zweiten Frage möchte das nationale Gericht wissen, ob das in Rede stehende Wohnsitzerfordernis nach Artikel 33 EWRA aus Gründen des Allgemeininteresses, insbesondere der öffentlichen Ordnung und/oder der öffentlichen Sicherheit, gerechtfertigt sein kann.

28 Die liechtensteinische Regierung hat geltend gemacht, das beanstandete Wohnsitzerfordernis sei nach Artikel 33 EWRA objektiv gerechtfertigt und laufe daher der in Artikel 31 EWRA normierten Niederlassungsfreiheit nicht zuwider. Das damit verfolgte, auf die öffentliche Ordnung bezogene Gesamtziel sei die Gewährleistung des Funktionierens und des guten Rufes des liechtensteinischen Finanzdienstleistungssektors. Dieser Sektor beruhe u. a. auf den liberalen Regeln des Personen- und Gesellschaftsrechts betreffend die Eintragung von Sitzgesellschaften. Durch das Erfordernis, dass der qualifizierte Verwaltungsrat dauernd in Liechtenstein wohnhaft sein müsse, werde die Verhütung von Missbräuchen dieser liberalen Regeln erleichtert. Aufgrund des Wohnsitzerfordernisses bestehe eine grössere Wahrscheinlichkeit, dass der Verwaltungsrat in Liechtenstein anwesend sei; dies diene der Rechtspflege, vereinfache die Vollstreckung zivilrechtlicher Urteile und erleichtere die Durchsetzung administrativer und strafrechtlicher Sanktionen.

29 Mit Blick auf die Zurückweisung ähnlicher Argumente in der oben erwähnten Rechtssache *Rainford-Towning* durch den Gerichtshof trägt die liechtensteinische Regierung vor, es gebe relevante Unterschiede zwischen dem Sachverhalt in jener Rechtssache und dem vorliegenden Fall. Dort sei es um aktive Gesellschaften gegangen, während hier ausschliesslich Sitzgesellschaften betroffen seien. Wegen der liberalen Bestimmungen des liechtensteinischen Gesellschaftsrechts seien Sitzgesellschaften besonders anfällig für Missbrauch und bedürften strengerer Kontrolle.

30 As a preliminary point, the Court notes that there is, in principle, nothing in the EEA Agreement that prevents Liechtenstein from maintaining a liberal company law system. However, that system must operate within the limits of EEA law. It must be organised to function so as not to conflict with the rules of the EEA Agreement on the freedom of establishment, including Articles 31 and 33 EEA.

31 Article 33 EEA provides for derogation from the fundamental principle of freedom of establishment. Its application must therefore be strictly interpreted. In order to fall within the scope of Article 33 EEA, and thereby escape the application of Article 31 EEA, the contested residence requirement must fulfil the following conditions: it must pursue an objective of public interest as provided for in Article 33 EEA; it must be appropriate for securing the attainment of the objective pursued; and it must be objectively necessary and proportionate to that objective (see, Case 352/85 *Bond van Adverteerders* v *Netherlands State* [1988] ECR 2085, at paragraphs 33 and 36).

32 The Court acknowledges that protecting the functioning and good reputation of the financial services sector is a legitimate public policy objective (see, Case C-384/93 *Alpine Investments* [1995] ECR I-1141, at paragraph 44). The Court also acknowledges that securing compliance with national legislation, assisting the administration of justice, facilitating the execution of civil judgments, and enforcing administrative and criminal sanctions are important elements in order to achieve that objective. The Court has noted the argument that domiciliary companies may require other control measures than active companies. However, there is nothing in the information presented to the Court that supports the finding that the residence requirement for a qualified board member of a domiciliary company is a suitable and necessary measure to attain those objectives. There seem to be less restrictive and more appropriate means to achieve those goals.

33 In the view of the Court, the residence requirement is neither suitable nor necessary to ensure the compliance with national legislation by a company or a board member, or for the effective control of such compliance by the public authorities. The realisation of those objectives would not appear to be dependent on the physical presence or the place of residence of the board member. Similar observations were made in *Rainford-Towning*, cited above, at paragraph 34. Based on the information before it, the Court considers that the findings with regard to a managing director of active companies in that case are equally valid with regard to a qualified board member of domiciliary companies in the present case.

34 Even absent the contested residence requirement, the governing provision would continue to set strict standards for the representation of a domiciliary company in its relations with the Liechtenstein authorities. Only members of certain professions having been admitted to practise their profession in Liechtenstein, are

30 Der Gerichtshof weist vorab darauf hin, dass im Prinzip nichts im EWR-Abkommen Liechtenstein daran hindert, ein liberales Gesellschaftsrechtssystem beizubehalten. Dieses System muss jedoch in den Grenzen des EWR-Rechts gehandhabt werden. Es muss so gestaltet sein, dass seine Auswirkungen nicht mit den Regeln des EWR-Abkommens über die Niederlassungsfreiheit, darunter die Artikel 31 und 33 EWRA, in Konflikt geraten.

31 Artikel 33 EWRA lässt Abweichungen vom fundamentalen Grundsatz der Niederlassungsfreiheit zu. Er ist daher bei seiner Anwendung eng auszulegen. Um von Artikel 33 EWRA gedeckt zu sein und so dem Verbot des Artikels 31 EWRA zu entgehen, muss das beanstandete Wohnsitzerfordernis folgende Voraussetzungen erfüllen: Es muss ein im Allgemeininteresse liegendes Ziel im Sinne von Artikel 33 EWRA verfolgen, es muss zur Erreichung des angestrebten Ziels geeignet sein, und es muss objektiv erforderlich sein und in einem angemessenen Verhältnis zu diesem Ziel stehen (vgl. EuGH 352/85 *Bond van Adverteerders/Niederländischer Staat*, Slg. 1988, 2085, Randnrn. 33 und 36).

32 Der Gerichtshof anerkennt, dass der Schutz des Funktionierens und des guten Rufes des Finanzdienstleistungssektors ein legitimes, auf die öffentliche Ordnung bezogenes Ziel ist (vgl. EuGH C-384/93 *Alpine Investments*, Slg. 1995, I-1141, Randnr. 44). Der Gerichtshof anerkennt ebenfalls, dass die Sicherstellung der Befolgung der nationalen Rechtsvorschriften, die Unterstützung der Rechtspflege, die Vereinfachung der Vollstreckung zivilrechtlicher Urteile und die Erleichterung der Durchsetzung administrativer und strafrechtlicher Sanktionen wichtige Elemente bei der Erreichung dieses Ziels sind. Der Gerichtshof hat das Argument zur Kenntnis genommen, wonach Sitzgesellschaften anderer Kontrollmassnahmen bedürften als aktive Gesellschaften. Dem Gerichtshof ist jedoch nichts dafür vorgetragen worden, dass das Wohnsitzerfordernis für einen qualifizierten Verwaltungsrat einer Sitzgesellschaft ein geeignetes und erforderliches Mittel zur Erreichung dieser Ziele wäre. Hierfür scheint es weniger beschränkende und angemessenere Mittel zu geben.

33 Nach Ansicht des Gerichtshofs ist das Wohnsitzerfordernis weder geeignet noch erforderlich, um die Befolgung der nationalen Rechtsvorschriften durch eine Gesellschaft oder einen Verwaltungsrat oder ihre wirksame Kontrolle durch die Behörden sicherzustellen. Es ist nicht erkennbar, dass die Verwirklichung dieser Ziele von der physischen Anwesenheit oder dem Wohnsitz des Verwaltungsrats abhinge. Ähnliche Erwägungen wurden in der oben erwähnten Rechtssache *Rainford-Towning*, Paragraph 34, angestellt. Auf der Grundlage der ihm vorgelegten Informationen ist der Gerichtshof der Auffassung, dass die in jener Rechtssache in Bezug auf den Geschäftsführer einer aktiven Gesellschaft getroffenen Feststellungen auch für den qualifizierten Verwaltungsrat einer Sitzgesellschaft im vorliegenden Fall gelten.

34 Auch ohne das beanstandete Wohnsitzerfordernis würden nach der einschlägigen Bestimmung weiter strenge Anforderungen bezüglich der Vertretung von Sitzgesellschaften in ihren Beziehungen zu den liechtensteinischen Behörden gelten. Nur Angehörige bestimmter Berufe, die zur Ausübung ihres Berufs in Liechtenstein

eligible. The provision presupposes that a person so designated have broad powers. The professional qualifications of any such person will have been scrutinized by Liechtenstein authorities in connection with the initial admission to practise. The trust placed in those persons, both by the owners of a company and by the Liechtenstein authorities, requires them to carry out their duties with a high degree of professional competence and integrity. If this trust is abused, the Liechtenstein authorities will presumably have the possibility to take corrective measures.

35 In particular, as regards the control by public authorities, the Court notes that while, on the one hand, the physical presence or residence in Liechtenstein of a board member does not guarantee that public authorities are provided with the information they require, it is, on the other hand, possible for a board member to provide all necessary information without being physically present or resident there. More appropriate and less restrictive means of monitoring and controlling of the activities of domiciliary companies could, for example, comprise periodic reporting requirements, or an obligation to make available specified and relevant information at the registered office of the company.

36 For these reasons, the Court finds that considerations relating to the compliance with national legislation and the effective control of such compliance cannot be held to justify the imposition of a residence requirement in derogation of Article 31 EEA.

37 Furthermore, the Court considers that the residence requirement is neither suitable nor necessary to assist the administration of justice, ensure the execution of civil judgments or enforce administrative and criminal sanctions. In *Rainford-Towning*, cited above, at paragraph 35, the Court rejected the argument that the residence requirement was necessary to enforce criminal sanctions against a managing director of an active company. The Court considers that finding also to be applicable to a qualified board member of a domiciliary company.

38 As regards the formal aspects of the administration of justice, the Court notes that legislation could be enacted to ensure that any claim or writ instituting proceedings in civil or administrative matters, or any charge or indictment in criminal matters may be served at the registered office of a company.

39 As regards the execution of civil law judgments, the Court acknowledges that certain complications may arise since Liechtenstein is not party to the Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1988 L 319, p. 9). The Court observes that, if such complications were of vital concern in relation to the public policy objective pursued, accession to this instrument would constitute one

zugelassen worden sind, sind hierzu befugt. Die Bestimmung geht davon aus, dass eine in dieser Weise bestellte Person weitgehende Befugnisse hat. Die beruflichen Qualifikationen einer solchen Person dürften von den liechtensteinischen Behörden im Rahmen der ursprünglichen Zulassung zur Berufsausübung eingehend geprüft worden sein. Das von den Eigentümern wie auch von den liechtensteinischen Behörden in diese Personen gesetzte Vertrauen verlangt von ihnen, dass sie ihre Pflichten mit einem hohen Grad von beruflicher Kompetenz und Integrität erfüllen. Es ist anzunehmen, dass die liechtensteinischen Behörden über Abhilfemassnahmen verfügen, sollte dieses Vertrauen missbraucht werden.

35 Was insbesondere die Kontrolle durch die Behörden angeht, hält der Gerichtshof fest, dass einerseits die physische Anwesenheit oder der Wohnsitz eines Verwaltungsrats in Liechtenstein nicht gewährleistet, dass den Behörden die von ihnen verlangten Informationen vorgelegt werden, dass aber andererseits ein Verwaltungsrat alle nötigen Informationen vorlegen kann, ohne dort physisch anwesend oder wohnhaft zu sein. Angemessenere und weniger beschränkende Mittel der Überwachung und Kontrolle der Tätigkeiten von Sitzgesellschaften könnten etwa regelmässige Berichtspflichten oder eine Pflicht zur Bereithaltung bestimmter relevanter Informationen am eingetragenen Sitz der Gesellschaft umfassen.

36 Aus diesen Gründen befindet der Gerichtshof, dass auf die Befolgung der nationalen Rechtsvorschriften und ihre wirksame Kontrolle bezogene Erwägungen nicht als Rechtfertigung für die Aufstellung eines Wohnsitzerfordernisses in Abweichung von Artikel 31 EWRA dienen können.

37 Darüber hinaus ist das Wohnsitzerfordernis nach Auffassung des Gerichtshofs weder geeignet noch erforderlich, um der Rechtspflege zu dienen, die Vollstreckung von zivilrechtlichen Urteilen sicherzustellen oder administrative oder strafrechtliche Sanktionen durchzusetzen. In der oben erwähnten Rechtssache *Rainford-Towning*, Paragraph 35, hat der Gerichtshof das Argument verworfen, das Wohnsitzerfordernis sei notwendig, um strafrechtliche Sanktionen gegen den Geschäftsführer einer aktiven Gesellschaft durchzusetzen. Nach Ansicht des Gerichtshofs gilt dasselbe auch für einen qualifizierten Verwaltungsrat einer Sitzgesellschaft.

38 Was die formalen Aspekte der Rechtspflege angeht, weist der Gerichtshof darauf hin, dass durch den Erlass von Rechtsvorschriften sichergestellt werden könnte, dass Klageschriften oder Schriftstücke, mit denen ein zivil- oder ein verwaltungsrechtliches Verfahren eingeleitet wird, und Anzeigen oder Anklageschriften in Strafverfahren am eingetragenen Sitz einer Gesellschaft zugestellt werden können.

39 Mit Bezug auf die Vollstreckung von zivilrechtlichen Urteilen, anerkennt der Gerichtshof an, dass gewisse Schwierigkeiten dadurch entstehen können, dass Liechtenstein nicht Vertragsstaat des Übereinkommens von Lugano vom 16. September 1988 über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen (ABl.1988 L 319, S. 9) ist. Der Gerichtshof weist darauf hin, dass solchen Schwierigkeiten, sollten sie von

remedy. Moreover, the Court recognizes that litigation or execution in foreign jurisdictions often involves costs and complications that will not arise in the domestic jurisdiction. However, the encouragement of cross-border activity is a fundamental objective of the EEA Agreement; and, whenever such activity gives rise to litigation, the enforcement of judgments must often be sought within the jurisdiction of another EEA State. The situation with regard to claims relating to the operations of domiciliary companies in Liechtenstein is therefore not exceptional.

40 Likewise, a residence requirement does not in itself ensure that the qualified board member of a domiciliary company will be present for any civil proceedings instituted against him, or that his means, or those of the company, will be adequate to satisfy a judgment against him or the company.

41 For these reasons, the Court finds that considerations relating to the administration of justice in civil matters cannot be held to justify the imposition of a residence requirement in derogation of Article 31 EEA.

42 As regards the enforcement of administrative and criminal sanctions, the Court considers that there are other, less restrictive means of attaining that objective. Notice of fines may be served at the registered office of the company. The payment of such fines may be ensured by requiring that the company or the board member provide a guarantee beforehand (see *Rainford-Towning*, cited above, at paragraph 35 and Case C-350/96 *Clean Car Autoservice* [1998] ECR I-2521, at paragraph 36). Considering the relative size of the territory of Liechtenstein, it stands to reason that criminal proceedings against a domiciliary company or the qualified board member of such a company, as well as enforcement of any sanctions, will not infrequently depend on collaboration with other States within the framework of mutual assistance in criminal matters. The imposition of a residence requirement for a qualified board member of a domiciliary company would therefore, in the Court's view, not constitute an adequate, necessary or proportionate measure in furtherance of the objective pursued.

43 Since the specific considerations discussed above cannot be accepted as justifying derogation from Article 31 EEA, the overall objective of protecting the functioning and good reputation of the financial services sector must also be dismissed as justification. That objective was stated as the desired result of the practical effects resulting from each of the specific considerations, and not as a separate basis for justification.

entscheidender Bedeutung im Hinblick auf das verfolgte Ziel der öffentlichen Ordnung sein, durch den Beitritt zu diesem Übereinkommen begegnet werden könnte. Der Gerichtshof anerkennt auch, dass die Führung von Rechtsstreitigkeiten oder die Vollstreckung im Zuständigkeitsbereich einer ausländischen Gerichtsbarkeit oft mit Kosten und Schwierigkeiten verbunden sind, die im Bereich der inländischen Gerichtsbarkeit nicht entstehen. Die Förderung der grenzüberschreitenden Tätigkeit ist jedoch ein grundlegendes Ziel des EWR-Abkommens; führt diese Tätigkeit zu Rechtsstreitigkeiten, so muss die Vollstreckung oft im Bereich der Gerichtsbarkeit eines anderen EWR-Staates betrieben werden. Die Lage hinsichtlich der Geschäftstätigkeit von Sitzgesellschaften in Liechtenstein ist daher nicht aussergewöhnlich.

40 Ebenso wenig stellt auch ein Wohnsitzerfordernis als solches sicher, dass der qualifizierte Verwaltungsrat einer Sitzgesellschaft für die Zwecke eines gegen ihn eingeleiteten zivilrechtlichen Verfahrens zugegen sein wird oder dass sein Vermögen oder das der Gesellschaft für eine erfolgreiche Vollstreckung aus einem Titel gegen ihn oder die Gesellschaft ausreicht.

41 Aus diesen Gründen befindet der Gerichtshof, dass auf die Rechtspflege in Zivilsachen bezogene Erwägungen nicht als Rechtfertigung für die Aufstellung eines Wohnsitzerfordernisses in Abweichung von Artikel 31 EWRA dienen können.

42 Was die Durchsetzung administrativer und strafrechtlicher Sanktionen angeht, ist der Gerichtshof der Auffassung, dass es andere, weniger beschränkende Mittel zur Erreichung dieses Ziels gibt. Bussgeldbescheide können am eingetragenen Sitz der Gesellschaft zugestellt werden. Die Zahlung solcher Geldbussen kann dadurch sichergestellt werden, dass die Gesellschaft oder der qualifizierte Verwaltungsrat im Voraus eine Sicherheit stellt (vgl. die oben erwähnte Rechtssache *Rainford-Towning*, Paragraph 35, und EuGH C-350/96 *Clean Car Autoservice*, Slg. 1998, I-2521, Randnr. 36). Angesichts der relativen Grösse des liechtensteinischen Staatsgebiets liegt es auf der Hand, dass Strafverfahren gegen eine Sitzgesellschaft oder gegen den qualifizierten Verwaltungsrat einer solchen wie auch die Durchsetzung allfälliger Sanktionen nicht selten die Zusammenarbeit mit anderen Staaten im Rahmen der gegenseitigen Amtshilfe in Strafsachen erforderlich machen werden. Die Aufstellung eines Wohnsitzerfordernisses für einen qualifizierten Verwaltungsrat einer Sitzgesellschaft würde daher nach Ansicht des Gerichtshofs keine angemessene, erforderliche und verhältnismässige Massnahme zur Erreichung des verfolgten Ziels darstellen.

43 Da die vorstehend erörterten spezifischen Erwägungen nicht als Rechtfertigung für eine Abweichung von Artikel 31 EWRA anerkannt werden können, muss auch das allgemeine Ziel des Schutzes des Funktionierens und des guten Rufes des Finanzdienstleistungssektors als Rechtfertigung verworfen werden. Dieses Ziel ist als das erwünschte Ergebnis der praktischen Wirkung der einzelnen spezifischen Erwägungen geltend gemacht worden und nicht als ein gesonderter Rechtfertigungsgrund.

44 The Court notes that the Government of Liechtenstein has not invoked any grounds of public security, in an attempt to justify the contested residence requirement.

45 The Court concludes from the foregoing that the residence requirement at issue cannot be justified under Article 33 EEA.

46 The answer to the second question must therefore be that a provision of the national law of an EEA State, such as that at issue in the main proceedings, requiring that at least one member of the board of directors of a domiciliary company, having authority to manage and represent same, must be permanently residing in that State, is not justified on grounds of public policy and/or public security within the meaning of Article 33 EEA.

IV Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein by an order of 12 March 2001, hereby gives the following Advisory Opinion:

1. **A provision of the national law of an EEA State, such as that at issue in the main proceedings, requiring that at least one member of the board of directors of a domiciliary company, having authority to manage and represent same, must be permanently residing in that State, constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.**

2. **Such a national provision cannot be justified on grounds of public policy and/or public security within the meaning of Article 33 EEA.**

44 Der Gerichtshof stellt fest, dass die liechtensteinische Regierung keine Gründe der öffentlichen Sicherheit zur Rechtfertigung des beanstandeten Wohnsitzerfordernisses angeführt hat.

45 Der Gerichtshof kommt aus den vorstehend dargelegten Gründen zu dem Ergebnis, dass das in Rede stehende Wohnsitzerfordernis nicht nach Artikel 33 EWRA gerechtfertigt werden kann.

46 Auf die zweite Frage ist somit zu antworten, dass eine Bestimmung des nationalen Rechts eines EWR-Staates, wonach mindestens ein Mitglied der Verwaltung einer Sitzgesellschaft, das zu deren Geschäftsführung und Vertretung befugt ist, dauernd in diesem Staat wohnhaft sein muss, nicht aus Gründen der öffentlichen Ordnung und/oder der öffentlichen Sicherheit im Sinne des Artikels 33 EWRA gerechtfertigt ist.

IV Kosten

47 Die Auslagen der liechtensteinischen Regierung, der isländischen Regierung, der norwegischen Regierung, der EFTA-Überwachungsbehörde und der Kommission der Europäischen Gemeinschaften, die vor dem Gerichtshof Erklärungen abgegeben haben, sind nicht erstattungsfähig. Für die Parteien des Ausgangsverfahrens ist das Verfahren ein Zwischenstreit in dem bei dem vorlegenden Gericht anhängigen Rechtsstreit; die Kostenentscheidung ist daher Sache dieses Gerichts.

Aus diesen Gründen erstellt

DER GERICHTSHOF

in Beantwortung der Fragen, die ihm die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein mit Beschluss vom 12. März 2001 vorgelegt hat, folgendes Gutachten über die Auslegung des EWR-Abkommens:

1. **Eine Bestimmung des nationalen Rechts eines EWR-Staates, wie die, welche im Hauptverfahren in Frage steht, wonach mindestens ein Mitglied der Verwaltung einer Sitzgesellschaft, das zu deren Geschäftsführung und Vertretung befugt ist, dauernd in diesem Staat wohnhaft sein muss, stellt eine Beschränkung der Niederlassungsfreiheit im Sinne des Artikels 31 EWRA dar.**

2. **Eine solche Bestimmung kann nicht aus Gründen der öffentlichen Ordnung und/oder der öffentlichen Sicherheit im Sinne des Artikels 33 EWRA gerechtfertigt werden.**

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 22 February 2002.

Lucien Dedichen
Registrar

Thór Vilhjálmsson
President

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Verkündet in öffentlicher Sitzung in Luxemburg am 22. Februar 2002.

Lucien Dedichen
Kanzler

Thór Vilhjálmsson
Präsident

REPORT FOR THE HEARING
in Case E-2/01

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein) for an Advisory Opinion in the appeal against the decision of the Government of the Principality of Liechtenstein by

Dr Martin Franz Pucher

on the interpretation of Articles 4, 31 and 33 of the EEA Agreement.

I. Introduction

1. By an order dated 12 March 2001, registered at the Court on 14 May 2001, the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein) made a Request for an Advisory Opinion in the appeal against the decision of the Government of the Principality of Liechtenstein by Dr Martin Franz Pucher (hereinafter the "Complainant").

2. The dispute before the Verwaltungsbeschwerdeinstanz concerns the compatibility with the EEA Agreement of a Liechtenstein provision requiring that at least one board member of a legal entity must be permanently residing in Liechtenstein.

II. Legal background

EEA law

3. The questions submitted by the national court concern the interpretation of Articles 4, 31 and 33 EEA.

4. Article 4 EEA reads as follows:

SITZUNGSBERICHT
in der Rechtssache E-2/01

betreffend einen ANTRAG der Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein an den Gerichtshof gemäss Artikel 34 des Abkommens der EFTA-Staaten über die Errichtung einer EFTA-Überwachungsbehörde und eines EFTA-Gerichtshofs auf Erlass einer Vorlageentscheidung im Verfahren über die gegen die Entscheidung der Regierung des Fürstentums Liechtenstein gerichtete Beschwerde von

Dr. Martin Franz Pucher

über die Auslegung der Artikel 4, 31 und 33 des EWR-Abkommens.

I. Einleitung

1. Mit Beschluss vom 12. März 2001, beim Gerichtshof eingegangen am 14. März 2001, hat die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein einen Antrag auf Erlass einer Vorlageentscheidung im Verfahren über die gegen die Entscheidung der Regierung des Fürstentums Liechtenstein gerichtete Beschwerde des Dr. Martin Franz Pucher (nachstehend: Beschwerdeführer) gestellt.

2. Der Rechtsstreit vor der Verwaltungsbeschwerdeinstanz betrifft die Frage, ob eine liechtensteinische Rechtsvorschrift, nach der wenigstens ein Mitglied der Verwaltung einer Verbandsperson dauernd in Liechtenstein wohnhaft sein muss, mit dem EWR-Abkommen vereinbar ist.

II. Rechtlicher Hintergrund

EWR-Recht

3. Die Fragen des nationalen Gerichts betreffen die Auslegung der Artikel 4, 31 und 33 des EWR-Abkommens (EWRA).

4. Artikel 4 EWRA lautet:

"Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

5. Article 31 EEA reads as follows:

"1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

2. Annexes VIII to XI contain specific provisions on the right of establishment."

6. Article 33 EEA reads as follows:

"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."

National law

7. The national legislation contested before the Verwaltungsbeschwerdeinstanz is the *Personen- und Gesellschaftsrecht vom 20. Jänner 1926* (Act on Persons and Companies of 20 January 1926, hereinafter the "Persons and Companies Act"), as amended.

8. Article 180a of the Persons and Companies Act reads as follows:

"1) At least one board member of a legal entity, having authority to manage and represent the same, must be a national of an EEA State permanently residing in Liechtenstein and admitted to practise in Liechtenstein as a lawyer (Rechtsanwalt), legal agent (Rechtsagent), professional trustee (Treuhänder) or auditor (Wirtschaftsprüfer).

2) The same status shall be deemed to be held by persons residing in Liechtenstein who possess evidence of educational and/or training qualifications corresponding to the requirements laid down in paragraph (1) and recognised by the Government pursuant to statute or international treaty, whose fixed, main employment is with a lawyer, legal agent, professional trustee, accountant, trust company, firm of auditors or bank and who pursue their activities in such

"Unbeschadet besonderer Bestimmungen dieses Abkommens ist in seinem Anwendungsbereich jede Diskriminierung aus Gründen der Staatsangehörigkeit verboten."

5. Artikel 31 EWRA lautet:

"(1) 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) Die besonderen Bestimmungen über das Niederlassungsrecht sind in den Anhängen VIII bis XI enthalten."

6. Artikel 33 EWRA lautet:

"Dieses Kapitel und die aufgrund desselben getroffenen Maßnahmen beeinträchtigen nicht die Anwendbarkeit der Rechts- und Verwaltungsvorschriften, die eine besondere Regelung für Ausländer vorsehen und aus Gründen der öffentlichen Ordnung, Sicherheit oder Gesundheit gerechtfertigt sind."

Nationales Recht

7. Das vor der Verwaltungsbeschwerdeinstanz beanstandete nationale Recht ist das Personen- und Gesellschaftsrecht vom 20. Jänner 1926 in seiner geänderten Fassung (nachstehend: PGR).

8. Artikel 180a PGR lautet:

"(1) Wenigstens ein zur Geschäftsführung und Vertretung befugtes Mitglied der Verwaltung einer Verbandsperson muss ein dauernd im Inland wohnhafter Staatsangehöriger eines EWR-Mitgliedstaats sein und die inländische Berufszulassung als Rechtsanwalt, Rechtsagent, Treuhänder oder Wirtschaftsprüfer besitzen.

(2) Gleichgestellt sind im Inland wohnhafte Personen, die einen den Anforderungen von Abs. 1 entsprechenden, von der Regierung durch Gesetz oder Staatsvertrag anerkannten Ausbildungsnachweis besitzen, zu einem Rechtsanwalt, Rechtsagenten, Treuhänder oder Wirtschaftsprüfer, zu einer Treuhandgesellschaft oder Revisionsgesellschaft oder zu einer Bank in einem hauptberuflichen Dienstverhältnis stehen und ihre Tätigkeit im Sinne von Abs. 1 im Rahmen dieses Dienstverhältnisses ausüben. Für Ausländer, die nicht

employment within the meaning of paragraph (1). Aliens who are not nationals of an EEA State shall be required to possess a permit allowing them to settle in Liechtenstein.

3) The obligation imposed in paragraph (1) shall not apply to legal entities which are required under the Gewerbegesetz (Law on Trades and Businesses) or some other special statute to have a qualified business manager." [1]

III. Facts and procedure

9. The Complainant, Dr Martin Franz Pucher, is an Austrian national residing in Feldkirch, Austria. It appears from the Request for an Advisory Opinion from the Verwaltungsbeschwerdeinstanz that the Complainant is admitted to practise in Liechtenstein as a trustee, and that he is the manager of a Liechtenstein trust company with its seat in Liechtenstein. Liechtenstein authorities have refused to grant the Complainant a permanent residence permit in Liechtenstein.

10. As stated in the Request for an Advisory Opinion, the Complainant, on 29 September 1999, applied to the Liechtenstein Amt für Finanzdienstleistungen (Financial Services Office) for an authorisation pursuant to Article 180a of the Persons and Companies Act. The Financial Services Office refused to grant the authorisation applied for, essentially on the grounds that the Complainant, at that time, was residing in Austria and, therefore, did not fulfil the requirement of permanent residence in Liechtenstein as set out in Article 180a.

11. The Complainant filed a complaint with the Government of Liechtenstein, asking for the decision of the Financial Services Office to be rescinded and for the authorisation to be granted. The Government of Liechtenstein rejected the complaint by a decision of 19 September 2000.

12. The Complainant lodged an appeal against that rejection before the Verwaltungsbeschwerdeinstanz. In the proceedings pending before the Verwaltungsbeschwerdeinstanz, the Complainant has raised issues concerning the compatibility of the residence requirement in Article 180a of the Persons and Companies Act with the EEA Agreement.

13. The Verwaltungsbeschwerdeinstanz decided to submit a Request for an Advisory Opinion to the EFTA Court.

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[1] The translation has been adjusted from the text that appears in the translation of the Request for an Advisory Opinion from the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein.

Staatsangehörige eines EWR-Mitgliedstaats sind, ist die Niederlassungsbewilligung erforderlich.

(3) Von der Verpflichtung gemäss Abs. 1 sind Verbandspersonen ausgenommen, die aufgrund des Gewerbegesetzes oder eines anderen Spezialgesetzes einen befähigten Geschäftsführer besitzen müssen."[1]

III. Sachverhalt und Verfahren

9. Der Beschwerdeführer, Dr. Martin Franz Pucher, ist ein österreichischer Staatsbürger mit Wohnsitz in Feldkirch, Österreich. Wie aus dem Antrag der Verwaltungsbeschwerdeinstanz auf Vorlageentscheidung hervorgeht, besitzt der Beschwerdeführer in Liechtenstein die Berufszulassung als Treuhänder und ist Geschäftsführer einer liechtensteinischen Treuhandgesellschaft mit Sitz in Liechtenstein. Die liechtensteinischen Behörden haben es abgelehnt, ihm eine dauerhafte Aufenthaltsbewilligung zu erteilen.

10. Am 29. September 1999 beantragte der Beschwerdeführer beim Amt für Finanzdienstleistungen des Fürstentums Liechtenstein die Erteilung einer Bewilligung gemäss Artikel 180a PGR. Das Amt für Finanzdienstleistungen lehnte die Erteilung der beantragten Bewilligung im Wesentlichen mit der Begründung ab, der Beschwerdeführer habe zu dieser Zeit in Österreich gewohnt und daher nicht das Erfordernis des dauerhaften Wohnsitzes in Liechtenstein nach Artikel 180a erfüllt.

11. Der Beschwerdeführer erhob Beschwerde an die Regierung des Fürstentums Liechtenstein mit dem Antrag, die Entscheidung des Amtes für Finanzdienstleistungen aufzuheben und ihm die Bewilligung zu erteilen. Die Regierung des Fürstentums Liechtenstein wies die Beschwerde mit Entscheidung vom 19. September 2000 ab.

12. Gegen diese Entscheidung erhob der Beschwerdeführer Beschwerde an die Verwaltungsbeschwerdeinstanz. Im Verfahren vor der Verwaltungsbeschwerdeinstanz macht er geltend, das Wohnsitzerfordernis des Artikels 180a PGR sei unvereinbar mit dem EWR-Abkommen.

13. Die Verwaltungsbeschwerdeinstanz hat beschlossen, einen Antrag auf Vorlageentscheidung an den EFTA-Gerichtshof zu richten.

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[1] Der Text der Fussnote im englischen Text ist nicht relevant für die deutsche Übersetzung.

IV. Questions

14. The following questions were referred to the EFTA Court:

> **1. Does the residence requirement imposed by Article 180a(1) of the Persons and Companies Act constitute overt or covert discrimination on grounds of nationality within the meaning of Article 4 EEA, alternatively, does that residence requirement constitute a restriction on the freedom of establishment provided for by Article 31 EEA?** [2]
>
> **2. If the answer to question 1 is in the affirmative: is the discrimination or restriction justified on public-interest grounds, in particular those of public policy and/or public security (see Article 33 EEA)?**

V. Written Observations

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

– the Complainant, Dr Martin Franz Pucher, representing himself;

– the Government of Liechtenstein, represented by Beatrice Hilti, Deputy Director, EEA Coordination Unit;

– the Government of Iceland, represented by Anna Jóhannsdóttir, Legal Officer, Ministry of Foreign Affairs, acting as Agent;

– the Government of Norway, represented by Helge Seland, Assistant Director General, Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Michael Sánchez Rydelski and Elisabethann Wright, Officers, Legal & Executive Affairs, acting as Agents;

– the Commission of the European Communities, represented by John Forman and Maria Patakia, Legal Advisers, Legal Service, acting as Agents.

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[2] The translation has been adjusted from the text that appears in the translation of the Request for an Advisory Opinion from the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein.

IV. Fragen

14. Folgende Fragen sind dem EFTA-Gerichtshof vorgelegt worden:

Stellt das Wohnsitzerfordernis von Artikel 180a Absatz 1 PGR eine offene oder versteckte Diskriminierung aus Gründen der Staatsangehörigkeit gemäss Artikel 4 EWR-Abkommen dar, oder stellt dieses Wohnsitzerfordernis eine Beschränkung des Rechts auf freie Niederlassung gemäss Artikel 31 EWR-Abkommen dar?[2]

Wenn die Frage 1 bejaht wird: Ist die Diskriminierung bzw. Beschränkung aus Gründen des Allgemeininteresses, insbesondere der öffentlichen Ordnung und Sicherheit (siehe Artikel 33 EWR-Abkommen), gerechtfertigt?

V. Schriftliche Erklärungen

15. Gemäss Artikel 20 der Satzung des EFTA-Gerichtshofs und Artikel 97 der Verfahrensordnung haben schriftliche Erklärungen abgegeben:

- der Beschwerdeführer, Dr. Martin Franz Pucher, in eigener Person;

- die Regierung des Fürstentums Liechtenstein, vertreten durch Beatrice Hill, Stellvertretende Leiterin der Stabsstelle EWR-Abkommen der Regierung des Fürstentums Liechtenstein;

- die Regierung von Island, vertreten durch Anna Jóhannsdóttir, Beamtin der Rechtsabteilung des Ministeriums für auswärtige Angelegenheiten, als Bevollmächtigte;

- die Regierung von Norwegen, vertreten durch Helge Seland, Stellvertretender Generaldirektor, Ministerium für auswärtige Angelegenheiten, als Bevollmächtigten;

- die EFTA-Überwachungsbehörde, vertreten durch Michael Sánchez Rydelski und Elisabethann Wright, Beamte der Abteilung Rechtliche und exekutive Angelegenheiten, als Bevollmächtigte;

- die Kommission der Europäischen Gemeinschaften, vertreten durch John Forman und Maria Patakia, Rechtsberater, Juristischer Dienst, als Bevollmächtigte.

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[2] Der Text der Fussnote im englischen Text ist nicht relevant für die deutsche Übersetzung.

Dr Martin Franz Pucher

16. In considering whether the contested residence requirement is contrary to Article 31 EEA, the Complainant, Dr Martin Franz Pucher, begins by stating that the corresponding provision of the EC Treaty has been construed by the Court of Justice of the European Communities as entailing a general prohibition of discrimination and restrictions on the freedom of establishment.

17. In the view of the Complainant, the residence requirement entails covert discrimination within the meaning of the judgments in *Clean Car Autoservice* v *Landeshauptmann von Wien*[3] and *Rainford-Towning*.[4] The requirement is a national measure liable to hinder or make less attractive the exercise of the fundamental freedom of establishment guaranteed by the EEA Agreement, but does not fulfil any of the criteria laid down in *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[5] in order for such measures to be upheld.

18. The Complainant submits that the contested national provision is not justified on any of the grounds of public interest set out in Article 33 EEA. Contrary to the conclusion arrived at by the Government of Liechtenstein, the Complainant is of the opinion that the residence requirement is not appropriate for the attainment of the objective allegedly pursued, namely that, at all times, at least one responsible board member of a legal entity is to be contactable, and that it should be possible to have recourse against him.

19. The Complainant views the residence requirement as a purely formal requirement that affords no guarantee that the board member will be contactable or that recourse may be had against him, since it does not require him to stay in Liechtenstein at all times.

20. The residence requirement does not make it easier to take enforcement measures in respect of established liability claims against the legal entity. In order to ensure that effective steps can in practice be taken to enforce any such claims, the residence requirement lacks additional criteria, such as measures to ensure the actual presence of the board member, or the existence of any assets that can be seized.

21. The Complainant disagrees with the argument of the Government of Liechtenstein regarding the problems of enforcing judgments abroad due to the non-accession of Liechtenstein to the Lugano Convention.[6] The Complainant contends, in essence, that the enforcement of a judgment against a board member

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3 Case C-350/96 *Clean Car Autoservice* v *Landeshauptmann von Wien* [1998] ECR I-2521.

4 Case E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205.

5 Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

6 Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1988 L 319, p. 9).

Dr. Martin Franz Pucher

16. Der Beschwerdeführer, Dr. Martin Franz Pucher, leitet seine Erörterung der Frage, ob das beanstandete Wohnsitzerfordernis gegen Artikel 31 EWR-Abkommen verstösst, mit der Feststellung ein, der Gerichtshof der Europäischen Gemeinschaften interpretiere die entsprechende Bestimmung des EG-Vertrags als allgemeines Verbot der Diskriminierung und von Beschränkungen der Niederlassungsfreiheit.

17. Das Wohnsitzerfordernis bewirke eine versteckte Diskriminierung im Sinne der Urteile *Clean Car Autoservice./.Landeshauptmann von Wien*[3] und *Rainford-Towning*[4]. Das Erfordernis sei eine nationale Massnahme, die die Ausübung der durch das EWR-Abkommen garantierten grundlegenden Freiheit der Niederlassung behindern oder weniger attraktiv machen könne, aber keine einzige der im Urteil *Gebhard./.Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[5] aufgestellten Voraussetzungen für ihren Bestand erfülle.

18. Die beanstandete nationale Bestimmung sei durch keinen der in Artikel 33 EWR-Abkommen genannten Gründe des Allgemeininteresses gerechtfertigt. Entgegen der Auffassung der liechtensteinischen Regierung sei das Wohnsitzerfordernis nicht geeignet, dem angeblich verfolgten Zweck zu dienen, dass wenigstens ein verantwortliches Mitglied der Verwaltung jederzeit ansprechbar und notfalls auch greifbar sein müsse.

19. Das Wohnsitzerfordernis sei rein formalrechtlicher Natur und gewährleiste nicht, dass ein Mitglied der Verwaltung erreichbar oder greifbar sei, da es dieses nicht zu ständiger Anwesenheit in Liechtenstein verpflichte.

20. Auch eine allenfalls entstandene Haftung der juristischen Person werde durch das Wohnsitzerfordernis nicht leichter exekutierbar. Zur effektiven Durchsetzbarkeit einer solchen Haftung fehle es dem Wohnsitzerfordernis an Zusatzkriterien, wie etwa Massnahmen zur Sicherstellung der tatsächlichen Anwesenheit des Mitglieds der Verwaltung oder dem Vorhandensein greifbarer Vermögenswerte.

21. Der Verweis der liechtensteinischen Regierung darauf, dass Liechtenstein dem Übereinkommen von Lugano[6] nicht beigetreten sei, gehe fehl. Die Durchsetzung einer gerichtlichen Entscheidung gegen ein Mitglied der Verwaltung, das sich dem durch Flucht entziehen wolle, sei gleich schwierig, ob

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3 EuGH C-350/96 *Clean Car Autoservice./.Landeshauptmann von Wien*, Slg. 1998, I-2521.

4 E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205.

5 EuGH C-55/94 *Gebhard./.*Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Slg. 1995, I-4165.

6 Übereinkommen vom 16. September 1988 über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen (ABl.1988 L 319, S. 9).

who tries to escape such enforcement is equally difficult, regardless of whether that person fulfils the formal requirement of residence in Liechtenstein.

22. The Complainant also disagrees with the argument of the Government of Liechtenstein to the effect that a board member residing in Liechtenstein cannot evade mandatory legal rules as easily as a board member residing abroad, since mandatory legal rules apply with equal force to persons residing abroad.

23. Moreover, the Complainant contests the conclusion arrived at by the Government of Liechtenstein to the effect that the residence requirement is an appropriate measure for maintaining the good reputation of Liechtenstein as a financial centre. The Complainant contends, essentially for the reasons set out above, that such a formal requirement constitutes an unsuitable means of protecting creditors.

24. In the view of the Complainant, the contested national provision prevents him from pursuing his profession as a trustee freely and without restriction. In order to engage in the administration of Liechtenstein companies, the Complainant is required to engage a professional board member residing in Liechtenstein. That constitutes an obstacle to the exercise of his profession.

25. The Complainant states that, under Community law, a person is resident in the place where he maintains permanent premises with the intention of returning there on a regular basis. The Complainant contends that he fulfils those requirements, and that he must, therefore, also be regarded as being permanently resident in Liechtenstein for the purposes of the contested national provision. The Complainant is a qualified and registered Liechtenstein trustee. He has an office in Liechtenstein which fulfils all the requirements of residential premises, and holds an authorisation to exercise his profession in Liechtenstein and stay in that country for a continuous period of at least 5 days a week.

The Government of Liechtenstein

26. The Government of Liechtenstein submits that the compatibility of the residence requirement in Article 180a of the Persons and Companies Act with Article 31 EEA must be assessed taking into consideration the legal and factual context of that provision in Liechtenstein, *inter alia*, the importance of the functioning of the financial services sector for the Liechtenstein economy, and the liberal approach followed by Liechtenstein with regard to regulating the financial services sector in order to create favourable conditions for activities in that sector.

27. The Government of Liechtenstein points out that Liechtenstein follows the incorporation approach, according to which the determining factor for application of the Persons and Companies Act is where the legal entity has been registered, and not the location of the central administration or principal place of business.

dieses nun das formale Erfordernis eines Wohnsitzes in Liechtenstein erfülle oder nicht.

22. Auch das Argument der liechtensteinischen Regierung, ein Mitglied der Verwaltung mit Wohnsitz in Liechtenstein könne sich zwingenden Rechtsvorschriften schwerer entziehen als ein solches mit Wohnsitz im Ausland, sei zurückzuweisen, da derartige Rechtsvorschriften die gleiche zwingende Geltung für Personen mit Wohnsitz im Ausland hätten.

23. Überdies sei – entgegen der von der liechtensteinischen Regierung vertretenen Ansicht – das Wohnsitzerfordernis zur Stärkung des Ansehens des Finanzplatzes Liechtenstein nicht geeignet. Aus den bereits genannten Gründen sei ein solches formales Wohnsitzerfordernis ein für den Gläubigerschutz ungeeignetes Mittel.

24. Der Beschwerdeführer sieht sich durch die beanstandete nationale Bestimmung gehindert, seinen Beruf als Treuhänder frei und ohne Beschränkung auszuüben. Um als Mitglied der Verwaltung einer liechtensteinischen Verbandsperson agieren zu können, müsse er einen dafür zu entlohnenden Berufskollegen mit Wohnsitz in Liechtenstein beiziehen. Dies behindere ihn in der Ausübung seines Berufs.

25. Nach Gemeinschaftsrecht sei eine Person dort wohnhaft, wo sie dauernd Räumlichkeiten innehabe mit der Absicht, regelmässig dorthin wiederzukehren. Er, der Beschwerdeführer, erfülle diese Voraussetzungen und sei daher für die Zwecke der beanstandeten Bestimmung auch als dauernd in Liechtenstein wohnhaft anzusehen. Er sei geprüfter und eingetragener liechtensteinischer Treuhänder. Er habe eine Kanzlei in Liechtenstein, die die Anforderungen an eine Wohnung erfülle, und verfüge über eine Bewilligung zur Ausübung seines Berufs in Liechtenstein und zum durchgehenden Aufenthalt dort an mindestens fünf Tagen pro Woche.

Die Regierung des Fürstentums Liechtenstein

26. Die liechtensteinische Regierung trägt vor, die Frage der Vereinbarkeit des Wohnsitzerfordernisses des Artikels 180a PGR mit Artikel 31 EWRA müsse unter Berücksichtigung des rechtlichen und tatsächlichen Kontexts dieser Bestimmung in Liechtenstein geprüft werden, namentlich der Bedeutung des Funktionierens des Sektors der Finanzdienstleistungen für die liechtensteinische Wirtschaft und der liberalen Haltung Liechtensteins in Bezug auf die Regelung dieses Sektors, durch die günstige Bedingungen für dessen Tätigkeit geschaffen werden sollten.

27. Liechtenstein folge dabei der Inkorporationstheorie, wonach für die Anwendung des PGR der Ort der Eintragung einer Gesellschaft entscheidend sei und nicht der Ort des Sitzes der zentralen Verwaltung oder der

The liberal rules of the Persons and Companies Act apply to all legal entities incorporated in Liechtenstein.

28. According to the Government of Liechtenstein, the majority of companies incorporated in Liechtenstein are companies not carrying out business in Liechtenstein (*Sitzgesellschaften*, domiciliary companies). The Persons and Companies Act differentiates between such companies and companies doing business in Liechtenstein (active companies), in that only board members of the former are subject to the residence requirement.

29. The Government of Liechtenstein states that the residence requirement for a board member in companies incorporated in Liechtenstein must be seen in connection with the rule providing that all board members of such a company are entitled to manage it.

30. The Government of Liechtenstein submits that it is necessary to have certain minimum mandatory requirements in the Persons and Companies Act, including the residence requirement, in order to prevent abuse of the liberal rules provided for in that Act. The objective of the contested residence requirement is to maintain the functioning and good reputation of the Liechtenstein financial services sector, *inter alia* by ensuring the administration of justice.

31. The Government of Liechtenstein contends that the Persons and Companies Act entails no restrictions on the access to, or the exercise of, the profession of trustees. It merely sets out the minimum requirements to be met by one of the board members of a domiciliary company. In support of this contention, the Government of Liechtenstein points out that the Liechtenstein authorities have granted a licence allowing the Complainant to act as a trustee in Liechtenstein. The rules governing the access to, and the exercise of, the profession of trustees is set out in the Act on Trustees.

32. The Government of Liechtenstein states that the contested national provision applies equally to Liechtenstein nationals and nationals of other EEA States, and contends that there is no overt discrimination on grounds of nationality leading to a restriction of freedom of establishment contrary to Article 31 EEA. The Government of Liechtenstein adds that the refusal to grant a residence permit to the Complainant is in conformity with EEA Joint Committee Decision 191/1999,[7] which only requires Liechtenstein to grant a limited number of residence permits each year.

33. The Government of Liechtenstein acknowledges that it follows from the case-law[8] of the Court of Justice of the European Communities and the EFTA

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[7] EEA Joint Committee Decision 191/1999 Amending Annexes VIII (Right of establishment) and V (Free movement of workers) to the EEA Agreement (OJ 2001 L 74, p. 29)

[8] Case C-279/93 S*chumacker* [1995] ECR I-225; Case C-221/89 *Factortame and Others* [1991] ECR I-3905; Case E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205.

Hauptgeschäftsort. Die liberalen Regeln des PGR gälten für alle in Liechtenstein eingetragenen juristischen Personen.

28. Die meisten in Liechtenstein eingetragenen Gesellschaften seien solche, die keine Geschäftstätigkeit in Liechtenstein ausübten (Sitzgesellschaften). Das PGR unterscheide zwischen solchen Gesellschaften und Gesellschaften, die in Liechtenstein tätig seien (aktive Gesellschaften), in der Weise, dass nur die erstgenannten dem Wohnsitzerfordernis unterlägen.

29. Das Wohnsitzerfordernis für Mitglieder der Verwaltung von in Liechtenstein eingetragenen Gesellschaften müsse im Zusammenhang mit der Bestimmung gesehen werden, wonach alle Mitglieder der Verwaltung einer solchen Gesellschaft zur Geschäftsführung befugt seien.

30. Bestimmte Mindesterfordernisse, darunter das Wohnsitzerfordernis nach dem PGR, seien notwendig, um den Missbrauch der in diesem Gesetz vorgesehenen liberalen Regeln zu verhindern. Zweck des beanstandeten Wohnsitzerfordernisses sei es, das Funktionieren und den guten Ruf des liechtensteinischen Sektors der Finanzdienstleistungen zu gewährleisten, unter anderem durch die Sicherstellung der Durchsetzung des geltenden Rechts.

31. Das PGR bewirke keine Beschränkung des Zugangs zum Beruf des Treuhänders oder der Ausübung dieses Berufes. Es stelle nur die Mindestanforderungen auf, denen ein Mitglied der Verwaltung einer Sitzgesellschaft genügen müsse. Zur Stützung dieses Vorbringens weist die liechtensteinische Regierung darauf hin, dass die liechtensteinischen Behörden dem Beschwerdeführer die Bewilligung erteilt hätten, als Treuhänder in Liechtenstein tätig zu sein. Der Zugang zum Beruf des Treuhänders und dessen Ausübung seien im Treuhändersgesetz geregelt.

32. Die beanstandete nationale Bestimmung gelte für liechtensteinische Staatsangehörige und Angehörige anderer EWR-Mitgliedstaaten gleichermassen, es gebe keine offene Diskriminierung aus Gründen der Staatsangehörigkeit, die zu einer Artikel 31 EWRA zuwiderlaufenden Beschränkung führte. Zudem stehe die Verweigerung der Aufenthaltsbewilligung an den Beschwerdeführer im Einklang mit dem Beschluss des Gemeinsamen EWR-Ausschusses Nr. 191/1999[7], nach dem Liechtenstein jährlich nur eine begrenzte Zahl von Aufenthaltsbewilligungen zu erteilen brauche.

33. Zwar folge aus der Rechtsprechung[8] des Gerichtshofs der Europäischen Gemeinschaften und des EFTA-Gerichtshofs, das nationale Bestimmungen, die eine Unterscheidung nach dem Wohnsitz träfen, geeignet seien, vor allem zum

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[7] Beschluss des Gemeinsamen EWR-Ausschusses Nr. 191/1999 über die Änderung der Anhänge VIII (Niederlassungsrecht) und V (Freizügigkeit der Arbeitnehmer) des EWR-Abkommens (ABl.2001 L 74, S. 29).

[8] EuGH C-279/93 *Schumacker*, Slg. 1995, I-225; EuGH C-221/89 *Factortame u. a.*, Slg. 1991, I-3905; E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205.

Court that national provisions under which a distinction is drawn on the basis of residence are liable to operate mainly to the detriment of nationals of other EEA States, as non-residents are in the majority of cases foreigners. However, referring again to the case-law[9] of the Court of Justice of the European Communities, the Government of Liechtenstein states that the residence requirement is objectively justified.

34. The Government of Liechtenstein points out that the Liechtenstein economy depends largely on the financial services sector. When considering the importance of the financial services sector in Liechtenstein, one must take into account the specific situation of Liechtenstein in general, as recognised by the EEA Council[10] and in the case-law[11] of the EFTA Court. Moreover, the financial services sector of Liechtenstein is different from other financial services sectors, in that it is limited to a very narrow set of specialised services.

35. Measures for the protection from abuse of the financial services sector must be seen in the light of the particular importance of the sector in Liechtenstein. Liechtenstein has a reputation as a leading financial centre. The Government of Liechtenstein suggests that, if the financial services sector were to acquire a negative reputation, the image of the country as a whole would thereby be tarnished. Under the liberal rules of the Liechtenstein financial services sector, the observance of the minimum requirements is essential in order to keep the system free from abuses.

36. The main objective of the residence requirement is to guarantee the continuous presence of at least one board member of legal entities in Liechtenstein. The Government of Liechtenstein claims that such a permanent link to Liechtenstein is indispensable for the administration of justice. In order to ensure effective control of the activities in the financial sector, minimise the risk of abuse of domiciliary companies to the detriment of investors, and avoid violations of other laws, including criminal and tax law provisions, the Liechtenstein legislator enacted the residence requirement. The residence requirement was regarded as the least restrictive measure available.

37. The Government of Liechtenstein argues that it follows from the judgment in *Bachmann*[12] that the need to preserve an effective administration of justice may justify restrictions on the freedom of establishment. The objectives pursued by Liechtenstein in adopting the residence requirement were also recognised by

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9 Case C-237/94 *O'Flynn* v *Adjudication Officer* [1996] ECR I-2617; Case C-204/90 *Bachmann* [1992] ECR I-249; Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817; Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Others* [1993] ECR I-4309.

10 Declaration on free movement of persons (OJ 1995 L 86, p. 80).

11 Case E-4/00 *Brändle*, judgment of 14 June 2001, not yet reported; Case E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205.

12 Case C-204/90 *Bachmann* [1992] ECR I-249.

Nachteil von Angehörigen anderer EFTA-Staaten zu wirken, da Personen ohne Wohnsitz im Inland in ihrer Mehrheit Ausländer seien. Nach der Rechtsprechung[9] des Gerichtshofes der Europäischen Gemeinschaften sei das Wohnsitzerfordernis jedoch objektiv gerechtfertigt.

34. Die Wirtschaft Liechtensteins hänge in erheblichem Masse vom Sektor der Finanzdienstleistungen ab. Bei der Beurteilung der Bedeutung dieses Sektors für Liechtenstein müsse die besondere Situation des Landes im Allgemeinen berücksichtigt werden, wie sie vom EWR-Rat[10] und in der Rechtsprechung des EFTA-Gerichtshofs[11] anerkannt worden sei. Zudem unterscheide sich der liechtensteinische Sektor der Finanzdienstleistungen von anderen Finanzdienstleistungssektoren dadurch, dass er auf einen sehr engen Bereich von Spezialdienstleistungen beschränkt sei.

35. Massnahmen zum Schutz gegen Missbrauch des Sektors der Finanzdienstleistungen müssten vor dem Hintergrund der besonderen Bedeutung dieses Sektors in Liechtenstein gesehen werden. Das Land habe einen Ruf als führendes Finanzzentrum. Wenn der Sektor der Finanzdienstleistungen in Verruf gerate, werde dadurch das Ansehen des Landes insgesamt geschädigt. Im Rahmen der liberalen Regeln des liechtensteinischen Finanzdienstleistungssektors sei die Beachtung der Mindesterfordernisse wesentlich, um Missbräuche des Systems zu verhindern.

36. Der Hauptzweck des Wohnsitzerfordernisses sei es, die ständige Präsenz mindestens eines der Mitglieder der Verwaltung juristischer Personen in Liechtenstein sicherzustellen. Eine solche ständige Verbindung mit Liechtenstein sei unerlässlich für die Durchsetzung des geltenden Rechts. Der liechtensteinische Gesetzgeber habe das Wohnsitzerfordernis aufgestellt, um die effektive Kontrolle der Tätigkeit des Finanzsektors sicherzustellen, die Gefahr des Missbrauchs von Sitzgesellschaften zum Nachteil der Investoren zu minimieren und die Verletzung anderer Rechtsvorschriften, darunter solcher des Straf- und des Steuerrechts, zu verhindern. Unter den in Betracht kommenden Massnahmen sei das Wohnsitzerfordernis als die am wenigstens restriktive angesehen worden.

37. Wie sich aus dem Urteil *Bachmann*[12] ergebe, könne die Notwendigkeit, die effektive Durchsetzung des geltenden Rechts zu sichern, Beschränkungen der Niederlassungsfreiheit rechtfertigen. Die von Liechtenstein mit dem Erlass des Wohnsitzerfordernisses verfolgten Ziele seien auch vom Generalanwalt in seinen

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9 EuGH C-237/94 *O'Flynn./.Adjucation Officer*, Slg. 1996, I-2617; EuGH C-204/90 *Bachmann*, Slg. 1992, I-249; EuGH C-111/91 *Kommission./.Luxemburg*, Slg. 1993, I-817; EuGH C-259/91, C-331/91 und C-332/91 *Allué u. a.*, Slg. 1993, I-4309.

10 Erklärung über die Freizügigkeit (ABl.1995 L 86, S. 80).

11 E-4/00 *Brändle*, Urteil vom 14. Juni 2001, noch nicht veröffentlicht; E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205.

12 EuGH C-204/90 *Bachmann*, Slg. 1992, I-249.

the Advocate General in his Opinion in *Clean Car Autoservice* v *Landeshauptmann von Wien*.[13]

38. The Government of Liechtenstein refers to the judgment in *Centros*,[14] where, it contends, the Court of Justice of the European Communities seems to give preference to the incorporation approach followed by Liechtenstein in the Persons and Companies Act, and goes on to maintain that, when one is following such a liberal approach, it is necessary to establish measures in order to control, correct and intervene when necessary.

39. The Government of Liechtenstein refers to the judgment in *Alpine Investments*,[15] in which the Court of Justice of the European Communities held that maintaining the good reputation of the national financial services sector may constitute an imperative reason of public interest capable of justifying restrictions on the freedom to provide financial services. Since the contested residence requirement is guided by the same objective considerations, the Government of Liechtenstein claims that it is justified. The Government of Liechtenstein also refers to the judgment in *Pastoors and Trans-Cap*.[16]

40. The Government of Liechtenstein contends that the residence requirement is a suitable, necessary and proportionate means of protecting the good reputation of the financial services sector.

41. The maintenance of the good reputation of the national financial services sector may be a common objective of all States, but the means which are suitable and necessary to achieve that objective may vary, due to inherent and systemic differences.

42. In Liechtenstein, the majority of the companies are domiciliary companies, the activities of which take place abroad, where Liechtenstein authorities have only limited influence and control. Apart from the required residence in Liechtenstein of one of the board members, the only link between a domiciliary company and Liechtenstein may be the registration.

43. The Government of Liechtenstein argues that there are material differences in fact and in law between the situation in the present case and those in *Rainford-Towning*[17] and *Clean Car Autoservice* v *Landeshauptmann von Wien*.[18] The residence requirements dealt with in those cases applied to active companies, while the residence requirement in the present case only applies to

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13 See footnote 3.

14 Case C-212/97 *Centros* [1999] ECR I-1459.

15 Case C-384/93 *Alpine Investments* [1995] ECR I-1141.

16 Case C-29/95 *Pastoors and Trans-Cap* [1997] ECR I-285.

17 See footnote 4.

18 See footnote 3.

Schlussanträgen in der Rechtssache *Clean Car Autoservice./.Landeshauptmann von Wien*[13] anerkannt worden.

38. Im Urteil *Centros*[14] scheine der Gerichtshof der Europäischen Gemeinschaften der von Liechtenstein im PGR umgesetzten Inkorporationstheorie den Vorzug zu geben. Wenn man aber diesem liberalen Ansatz folge, sei es erforderlich, Massnahmen zur Beobachtung der Gechäftstätigkeit zu erlassen, Korrekturmassnahmen zu ergreifen und im Bedarfsfall einzuschreiten.

39. Im Urteil *Alpine Investments*[15] habe der Gerichtshof der Europäischen Gemeinschaften ausgeführt, dass der gute Ruf des nationalen Sektors der Finanzdienstleistungen ein zwingender Grund des Allgemeininteresses sein könne, der Beschränkungen der Finanzdienstleistungsfreiheit zu rechtfertigen vermöge. Da das beanstandete Wohnsitzerfordernis auf den gleichen objektiven Erwägungen beruhe, sei es gerechtfertigt. Insoweit sei auch auf das Urteil *Pastoors und Trans-Cap*[16] zu verweisen.

40. Das Wohnsitzerfordernis sei ein geeignetes, erforderliches und angemessenes Mittel zum Schutz des guten Rufes des Sektors der Finanzdienstleistungen.

41. Die Wahrung des guten Rufes des nationalen Finanzdienstleistungssektors möge ein allen Staaten gemeinsames Ziel sein, doch könnten je nach den besonderen, systembedingten Umständen unterschiedliche Mittel zur Erreichung dieses Zieles geeignet und erforderlich sein.

42. In Liechtenstein seien die meisten Gesellschaften Sitzgesellschaften, deren Geschäftstätigkeit im Ausland liege, wo die liechtensteinischen Behörden nur begrenzten Einfluss und begrenzte Kontrollmöglichkeiten hätten. Abgesehen von dem geforderten Wohnsitz eines Mitglieds der Verwaltung in Liechtenstein könne die einzige Verbindung zwischen einer Sitzgesellschaft und Liechtenstein die Eintragung sein.

43. Es bestünden wesentliche rechtliche und tatsächliche Unterschiede zwischen der vorliegenden Rechtssache und den Rechtssachen *Rainford-Towning*[17] und *Clean Car Autoservice./.Landeshauptmann von Wien*[18]. Die Wohnsitzerfordernisse, um die es in jenen Rechtssachen gegangen sei, hätten für im Inland aktive Gesellschaften gegolten, während das Wohnsitzerfordernis im vorliegenden Fall nur für Sitzgesellschaften gelte. Sitzgesellschaften bedürften

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13 Vgl. FN 3.

14 EuGH C-212/97 *Centros*, Slg. 1999, I-1459.

15 EuGH C-384/93 *Alpine Investments*, Slg. 1995, I-1141.

16 EuGH C-29/95 *Pastoors und Trans-Cap*, Slg. 1997, I-285.

17 Vgl. FN 4.

18 Vgl. FN 3.

domiciliary companies. Domiciliary companies require more stringent control. On this point, the Government of Liechtenstein refers to the judgment in *Arblade and Others*.[19]

44. Under Liechtenstein law, board members are, in principle, liable for any damage suffered as a result of their intentional or negligent acts or failures to act. In order to ensure the proper functioning of the financial services sector, it is not sufficient merely to provide theoretically for the liability of board members. It must also be effectively enforceable. Enforcement requires a sufficient link between the relevant companies and Liechtenstein.

45. The residence requirement is necessary for the protection of investors and consumers. In the area of civil law, enforcement of judgments is difficult, since Liechtenstein is not a party to the Brussels Convention[20] or the Lugano Convention.[21] Recognition of claims for liability against a board member not residing in Liechtenstein is not guaranteed. In the area of criminal law, the only way to execute a judgement is through mutual assistance under the European Convention on Mutual Assistance in Criminal Matters, which involves a complicated and time-consuming procedure. The residence requirement ensures that at least one board member is aware of the risk of personal liability or criminal sanctions, and will increase the qualitative involvement of board members in the management of companies registered in Liechtenstein.

46. The Government of Liechtenstein argues that effective supervision, as acknowledged by the Advocate General in his opinion in *Clean Car Autoservice* v *Landeshauptmann von Wien*,[22] requires that all documents relating to domiciliary companies are accessible for Liechtenstein administrative authorities. The Government of Liechtenstein also refers to the judgment in *Arblade and Others*.[23]

47. The Government of Liechtenstein claims that, unlike the situation in *Clean Car Autoservice* v *Landeshauptmann von Wien*,[24] in the present case the possibility of serving a notice of fines at the location of the domiciliary company is not a suitable alternative means. Only the board member who is resident in Liechtenstein is within reach of the Liechtenstein authorities.

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19 Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453.

20 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1972 L 299, p. 32).

21 See footnote 6.

22 See footnote 3.

23 See footnote 19.

24 See footnote 3.

einer strengeren Kontrolle. Insoweit sei auf das Urteil *Arblade u. a.*[19] zu verweisen.

44. Nach liechtensteinischem Recht hafteten Mitglieder der Verwaltung grundsätzlich für alle Schäden, die aus ihrem vorsätzlichen oder fahrlässigen Handeln oder Unterlassen entstünden. Um das ordnungsgemässe Funktionieren des Sektors der Finanzdienstleistungen sicherzustellen, genüge es nicht, die Haftung der Mitglieder der Verwaltung theoretisch vorzusehen. Haftungsansprüche müssten auch wirksam durchgesetzt werden können. Die Durchsetzung setze eine hinreichende Verbindung zwischen der betroffenen Gesellschaft und Liechtenstein voraus.

45. Das Wohnsitzerfordernis sei zum Schutz der Investoren und Verbraucher notwendig. Auf dem Gebiet des Zivilrechts sei die Vollstreckung von Urteilen schwierig, da Liechtenstein dem Brüsseler Übereinkommen[20] und dem Übereinkommen von Lugano[21] nicht beigetreten sei. Die Anerkennung von Haftungsansprüchen gegen ein nicht in Liechtenstein wohnhaftes Mitglied der Verwaltung sei nicht gewährleistet. Auf dem Gebiet des Strafrechts könne ein Urteil nur auf dem Wege der Rechtshilfe im Rahmen des Europäischen Übereinkommens über Rechtshilfe in Strafsachen vollstreckt werden, was ein kompliziertes und zeitaufwendiges Verfahren bedeute. Das Wohnsitzerfordernis stelle sicher, dass wenigstens einem der Mitglieder der Verwaltung das Risiko persönlicher Haftung oder strafrechtlicher Verantwortlichkeit bewusst sei, und fördere so deren qualitatives Engagement in der Geschäftsführung von in Liechtenstein eingetragenen Gesellschaften.

46. Eine wirksame Überwachung setze voraus, wie der Generalanwalt in seinen Schlussanträgen in *Clean Car Autoservice./.Landeshauptmann von Wien*[22] anerkannt habe, dass alle Unterlagen betreffend eine Sitzgesellschaft den liechtensteinischen Verwaltungsbehörden zugänglich sein müssten. Insoweit sei auch auf das Urteil *Arblade u. a.*[23] zu verweisen.

47. Anders als in der Rechtssache *Clean Car Autoservice./.Landeshauptmann von Wien*[24] stelle im vorliegenden Fall die Möglichkeit der Zustellung eines Strafbescheids am Ort der Sitzgesellschaft keine gangbare Alternative dar. Nur das in Liechtenstein wohnhafte Mitglied der Verwaltung sei für die liechtensteinischen Behörden greifbar.

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19 EuGH C-369/96 und C-376/96 *Arblade u. a.*, Slg. 1999, I-8453.

20 Übereinkommen vom 27. September 1968 über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen (ABl.1972 L 299, S. 32).

21 Vgl. FN 6.

22 Vgl. FN 3.

23 Vgl. FN 19.

24 Vgl. FN 3.

48. The Government of Liechtenstein adds that the situation in the present case is also different from that in *Clean Car Autoservice* v *Landeshauptmann von Wien*[25] in that a requirement of a security deposit to ensure enforcement of liability claims or fines against board members is very problematic, since the possible claims may greatly exceed the security deposited.

49. The Government of Liechtenstein adds that liability insurance is not a suitable measure to guarantee enforcement of liability claims against board members, since such insurance, as a rule, does not cover gross negligence or intentional acts, and excludes direct claims from third parties.

50. Based on the above considerations, the Government of Liechtenstein concludes that the residence requirement at issue in the main proceedings is objectively justified and, therefore, not contrary to the freedom of establishment provided for in Article 31 EEA.

The Government of Iceland

51. The Government of Iceland submits that the contested national provision is contrary to Article 31 EEA on the freedom of establishment in so far as it requires a board member of a company to give up his former residence, and take up residence in the country in question, solely to be able to establish a company there.

52. Referring to the judgments in *Clean Car Autoservice* v *Landeshauptmann von Wien*[26] and *Rainford-Towning*,[27] the Government of Iceland contends that the residence requirement constitutes indirect discrimination, because there are also restrictions on the right to obtain a residence permit. Reference is also made to the judgments in *Merino García* v *Bundesanstalt für Arbeit*,[28] S*chumacker*[29] and *Commission* v *Belgium*.[30]

53. The Government of Iceland contends that the national provision at issue cannot be justified on grounds of public policy or public security under Article 33 EEA, and refers to the judgments in *Rainford-Towning*,[31] *Clean Car Autoservice* v *Landeshauptmann von Wien*[32] and *Regina* v *Bouchereau*.[33] The

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25 See footnote 3.

26 See footnote 3.

27 See footnote 4.

28 Case C-266/95 *Merino García* v *Bundesanstalt für Arbeit* [1997] ECR I-3279.

29 Case C-279/93 S*chumacker* [1995] ECR I-225.

30 Case C-203/98 *Commission* v *Belgium* [1999] ECR I-4899.

31 See footnote 4.

32 See footnote 3.

33 Case 30/77 *Regina* v *Boucherau* [1977] ECR 1999.

48. Der vorliegende Fall unterscheide sich auch insofern vom Sachverhalt in der Rechtssache *Clean Car Autoservice./.Landeshauptmann von Wien*[25], als das Erfordernis einer Sicherheitsleistung, um die Vollstreckung von Haftungsansprüchen oder Geldstrafen gegen Mitglieder der Verwaltung zu sichern, in der hier in Rede stehenden Situation höchst problematisch sei, da die möglichen Ansprüche die hinterlegte Sicherheit um ein Vielfaches übersteigen könnten.

49. Auch eine Haftpflichtversicherung sei kein geeignetes Mittel, um die Durchsetzung von Haftungsansprüchen gegen Verwaltungsräte sicherzustellen, da eine solche Versicherung in der Regel grob fahrlässiges oder vorsätzliches Handeln nicht decke und direkte Ansprüche Dritter ausschliesse.

50. Gestützt auf die vorstehenden Erwägungen kommt die liechtensteinische Regierung zu dem Schluss, dass das im Ausgangsverfahren streitige Wohnsitzerfordernis objektiv gerechtfertigt sei und deshalb nicht der in Artikel 31 EWRA normierten Niederlassungsfreiheit zuwiderlaufe.

Die isländische Regierung

51. Die isländische Regierung trägt vor, die beanstandete nationale Bestimmung laufe Artikel 31 EWRA über die Niederlassungsfreiheit insofern zuwider, als sie verlange, dass ein Mitglied der Verwaltung einer Gesellschaft seinen bisherigen Wohnsitz aufgeben und einen Wohnsitz im fraglichen Land begründen müsse, nur um dort eine Gesellschaft gründen zu können.

52. Unter Hinweis auf die Urteile *Clean Car Autoservice./.Landeshauptmann von Wien*[26] und *Rainford-Towning*[27] macht die isländische Regierung geltend, das Wohnsitzerfordernis stelle eine mittelbare Diskriminierung dar, da es auch Beschränkungen des Rechts auf Erlangung einer Aufenthaltsbewilligung gebe. Insoweit sei auch auf die Urteile *Merino García./.Bundesanstalt für Arbeit*[28], *Schumacker*[29] und *Kommission ./. Belgien*[30] zu verweisen.

53. Die streitige nationale Bestimmung könne auch nicht aus Gründen der öffentlichen Ordnung oder Sicherheit nach Artikel 33 EWRA gerechtfertigt werden, wie die Urteile *Rainford-Towning*[31], *Clean Car Autoservice./.Landeshauptmann von Wien*[32] und *Regina./.Bouchereau*[33] zeigten.

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25 Vgl. FN 3.

26 Vgl. FN 3.

27 Vgl. FN 4.

28 EuGH C-266/95 *Merino García./.Bundesanstalt für Arbeit*, Slg. 1997, I-3279.

29 EuGH C-279/93 *Schumacker*, Slg. 1995, I-225.

30 EuGH C-203/98 *Kommission./.Belgien*, Slg. 1999, I-4899.

31 Vgl. FN 4.

32 Vgl. FN 3.

information available does not indicate that a serious threat affecting one of the fundamental interests of society would arise in the absence of such a residence requirement.

The Government of Norway

54. The Government of Norway is of the view that the permanent residence requirement at issue is incompatible with the freedom of establishment set out in Article 31 EEA. While acknowledging that the requirement applies equally to Liechtenstein nationals and nationals of other EEA States, the Government of Norway contends that it amounts to covert discrimination. To support that contention, the Government of Norway refers to case-law[34] of the Court of Justice of the European Communities and the EFTA Court. The Government of Norway states that no objective considerations independent of nationality have been presented in support of the contested national rule.

55. Referring to the judgment in *Bond van Adverteerders* v *Netherlands State*,[35] the Government of Norway states that Article 33 EEA regulates exhaustively the grounds which may justify a discriminatory national measure. That provision must be interpreted narrowly.

56. According to the Government of Norway, there is nothing in the facts which demonstrates that any fundamental public interest will be affected if not at least one board member of a company is a permanent resident of Liechtenstein. No convincing arguments have been presented to substantiate the arguments concerning the need to improve the quality of Liechtenstein companies.

57. The Government of Norway concludes that the contested national provision cannot be justified on grounds of public policy, public security or public health as set out in Article 33 EEA.

The EFTA Surveillance Authority

58. In considering whether the contested national provision is contrary to Article 31 EEA, the EFTA Surveillance Authority begins by noting that the residence requirement does not entail any direct discrimination. The grant of an authorisation is not made conditional upon the applicant being of Liechtenstein nationality. However, the EFTA Surveillance Authority suggests that, in the absence of any indications to the contrary, the residence requirement involves

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34 Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153; Case C-3/88 Commission v Italy [1989] ECR 4035; Case C-266/95 *Merino García* v *Bundesanstalt für Arbeit* [1997] ECR I-3279; Case C-350/96 *Clean Car Autoservice* v *Landeshauptmann von Wien* [1998] ECR I-2521; Case E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205.

35 Case 352/85 *Bond van Adverteerders* v *Netherlands State* [1988] ECR 2085.

Die hier vorliegenden Angaben liessen nicht erkennen, dass ohne ein solches Wohnsitzerfordernis grundlegende gesellschaftliche Belange ernsthaft gefährdet wären.

Die norwegische Regierung

54. Die norwegische Regierung ist der Ansicht, dass das streitige Erfordernis des dauernden Wohnsitzes mit der in Artikel 31 EWRA normierten Niederlassungsfreiheit unvereinbar sei. Das Erfordernis gelte zwar für liechtensteinische Staatsbürger und Staatsangehörige anderer EFTA-Staaten gleichermassen, doch laufe es auf eine versteckte Diskriminierung hinaus. Dies ergebe sich aus der Rechtsprechung[34] des Gerichtshofs der Europäischen Gemeinschaften und des EFTA-Gerichtshofs. Zur Rechtfertigung der beanstandeten nationalen Bestimmung seien keine objektiven, von der Staatsangehörigkeit unabhängigen Erwägungen vorgetragen worden.

55. Unter Bezugnahme auf das Urteil *Bond van Adverteeders u.a./.Niederländischer Staat*[35] macht die norwegische Regierung geltend, die möglichen Gründe für die Rechtfertigung einer diskriminierenden nationalen Massnahme seien in Artikel 33 EWRA abschliessend aufgeführt. Diese Gründe müssten eng ausgelegt werden.

56. Der Sachverhalt biete keinen Anhaltspunkt dafür, dass irgendein grundlegendes öffentliches Interesse beeinträchtigt wäre, wenn nicht wenigstens ein Mitglied derVerwaltung einer Gesellschaft dauernd in Liechtenstein wohnhaft wäre. Zur Substantiierung des Vorbringens, die Qualität der liechtensteinischen Gesellschaften müsse verbessert werden, seien keine überzeugenden Argumente vorgetragen worden.

57. Die norwegische Regierung kommt zu dem Ergebnis, dass die beanstandete nationale Bestimmung nicht durch Gründe der öffentlichen Ordnung, Sicherheit oder Gesundheit im Sinne des Artikels 33 EWRA gerechtfertigt werden könne.

Die EFTA-Überwachungsbehörde

58. Ihre Erörterung der Frage, ob die beanstandete nationale Bestimmung Artikel zuwiderlaufe, leitet die EFTA-Überwachungsbehörde mit der Bemerkung ein, dass das Wohnsitzerfordernis keine unmittelbare Diskriminierung bewirke.

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33 EuGH 30/77 *Regina./.Bouchereau* ,Slg. 1977, 1999.

34 EuGH 152/73 *Sotgiu./.Deutsche Bundespost*, Slg. 1974, 153; EuGH C-3/88 *Kommission./. Italien*, Slg. 1989, 4035; EuGH C-266/95 *Merino García./.Bundesanstalt für Arbeit*, Slg. 1997, I-3279; EuGH C-350/96 *Clean Car Autoservice./.Landeshauptmann von Wien,* Slg. 1998, I-2521; E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205.

35 EuGH 352/85 *Bond van Adverteeders u.a./.Niederländischer Staat*, Slg. 1988, 2085

indirect discrimination similar to that found in *Rainford-Towning*.[36] The EFTA Surveillance Authority points out that the burden of proof that the national provision is based on objective considerations independent of nationality lies with the party invoking it.

59. According to the EFTA Surveillance Authority, the information available does not indicate that the residence requirement is justified on grounds of public policy under Article 33 EEA. The concept of public policy presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society. The only consideration that has been put forward as underlying the residence requirement is the need to improve the quality of Liechtenstein holding companies and head offices. The EFTA Surveillance Authority submits, in essence, that, in the absence of other arguments in support of the contested residence requirement or information showing that there are decisive differences between managing directors and board members, the EFTA Court may reject justification simply by referring to the judgment in *Rainford-Towning*.[37] If there are other, legitimate, concerns than those rejected in that case, the EFTA Surveillance Authority indicates the possibility that such possible concerns may be met by a less restrictive requirement of professional presence in Liechtenstein, a requirement that the Complainant already fulfils.

60. In further support of its view, the EFTA Surveillance Authority refers to the judgments by the Court of Justice of the European Communities in *Factortame*[38] and *Ramrath* v *Ministre de la Justice*.[39]

The Commission of the European Communities

61. The Commission of the European Communities contends that the permanent residence requirement at issue constitutes a restriction on the freedom of establishment set out in Article 31 EEA. The Commission recalls the judgment by the EFTA Court in *Rainford-Towning*,[40] and contends that the reasoning in that judgment applies similarly to the present case. In addition to the case-law of the Court of Justice of the European Communities referred to by the EFTA Court in that judgment, the Commission mentions the recent judgments in *Commission* v *Italy*[41] and *Commission* v *Italy*.[42]

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36 See footnote 4.

37 See footnote 4.

38 Case C-221/89 *Factortame and Others* [1991] ECR I-3905.

39 Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351.

40 See footnote 4.

41 Case C-162/99 *Commission* v *Italy*, judgment of 18 January 2001 (not yet reported).

42 Case C-263/99 *Commission* v *Italy*, judgment of 29 May 2001 (not yet reported).

Die Erteilung einer Bewilligung hänge nicht davon ab, dass der Antragsteller die liechtensteinische Staatsangehörigkeit besitze. In Ermangelung von Anhaltspunkten für das Gegenteil bewirke das Wohnsitzerfordernis aber eine mittelbare Diskriminierung ähnlich derjenigen in der Rechtssache *Rainford-Towning*[36]. Die Beweislast dafür, dass die nationale Bestimmung auf objektiven Erwägungen beruhe, die nichts mit der Staatsangehörigkeit zu tun hätten, trage die Partei, die dies geltend mache.

59. Die hier vorliegenden Angaben liessen nicht erkennen, dass das Wohnsitzerfordernis aus Gründen der öffentlichen Ordnung im Sinne von Artikel 33 EWRA gerechtfertigt wäre. Der Begriff der öffentlichen Ordnung setze das Bestehen einer wirklichen, hinreichend schwerwiegenden Gefährdung eines grundlegenden gesellschaftlichen Interesses voraus. Die einzige Erwägung, die zur Begründung des Wohnsitzerfordernisses vorgetragen worden sei, sei die Notwendigkeit, die Qualität der liechtensteinischen Holding-Gesellschaften und Hauptverwaltungen zu verbessern. In Ermangelung anderer Argumente für das beanstandete Wohnsitzerfordernis und von Angaben, aus denen hervorginge, dass zwischen Geschäftsführern und Mitgliedern der Verwaltung entscheidende Unterschiede bestünden, könne der EFTA-Gerichtshof die Rechtfertigung durch schlichte Bezugnahme auf das Urteil *Rainford-Towning*[37] verneinen. Wenn es andere, legitime Belange als diejenigen gebe, die in jener Rechtssache verworfen worden seien, so könne ihnen mit einem weniger restriktiven Erfordernis beruflicher Anwesenheit in Liechtenstein Rechnung getragen werden, einem Erfordernis, das der Beschwerdeführer bereits erfülle.

60. Zur weiteren Stützung ihrer Auffassung beruft sich die EFTA-Überwachungsbehörde auf die Urteile des Gerichtshofs der Europäischen Gemeinschaften in den Rechtssachen *Factortame*[38] und *Ramrath./.Ministre de la Justice*[39].

Die Kommission der Europäischen Gemeinschaften

61. Die der Kommission der Europäischen Gemeinschaften sieht in dem streitigen Wohnsitzerfordernis eine Beschränkung der in Artikel 31 EWRA normierten Niederlassungsfreiheit. Die Ausführungen des EFTA-Gerichtshofs im Urteil *Rainford-Towning*[40] hätten auch für den vorliegenden Fall Geltung. Über die vom EFTA-Gerichtshof in jener Rechtssache angezogenen Urteile des Gerichtshofs der Europäischen Gemeinschaften hinaus verweist die Kommission

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36 Vgl. FN 4.

37 Vgl. FN 4.

38 EuGH C-221/89 *Factortame u. a.*, Slg. 1991, I-3905.

39 EuGH C-106/91 *Ramrath./.Ministre de la Justice*, Slg. 1992, I-3351.

40 Vgl. FN 4.

62. In the view of the Commission, such a restriction is not justified on grounds of public interest as provided for in Article 33 EEA. On this point, the Commission limits itself to referring to the reasoning in *Rainford-Towning*.[43]

Per Tresselt
Judge-Rapporteur

[43] See footnote 4.

auf die kürzlich ergangenen Urteile *Kommission./.Italien*[41] und *Kommission./.Italien*[42].

62. Nach Ansicht der Kommission ist eine solche Beschränkung nicht aus Gründen des Allgemeininteresses im Sinne von Artikel 33 EWRA gerechtfertigt. Insoweit genüge der Hinweis auf die Begründung des Urteils *Rainford-Towning*[43].

Per Tresselt
Berichterstatter

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41 EuGH C-162/99 *Kommission./.Italien*, Urteil vom 18. Januar 2001 (noch nicht veröffentlicht).

42 EuGH C-263/*99 Kommission./.Italien*, Urteil vom 29. Mai 2001 (noch nicht veröffentlicht).

43 Vgl. FN 4.

Case E-9/00

EFTA Surveillance Authority
v
Kingdom of Norway

(Failure of a Contracting Party to fulfil its obligations – State retail alcohol monopoly – licensed serving of alcoholic beverages – discrimination)

Summary of the Judgment

1. Article 11 and Article 16 EEA both apply to beer, whereas only the latter Article applies to wine. Both Articles 11 and 16 EEA also apply to spirits. Beverages known as "alcopops" fall within the material scope of Articles 11 and 16 EEA when beer or spirits based. "Alcopops" based on wine fall only within the material scope of Article 16 EEA.

There is, in principle, nothing in the EEA Agreement that prevents Norway from maintaining a strict alcohol policy. However, that alcohol policy must operate within the limits of EEA law. It must be implemented so as not to conflict with the rules of the EEA Agreement on the free movement of goods.

2. Provisions relating to the retail sale of alcoholic beverages are subject to examination under Article 16 EEA.

The EEA States have the right to pursue their alcohol policies by operating a State retail alcohol monopoly. According to Article 16 EEA, they are, however, required to ensure that such a monopoly is organised and operated so that no discrimination regarding conditions under which goods are produced or marketed will exist between nationals of the EEA States. Trade in goods from other EEA States must not be put at a disadvantage, in law or in fact, as compared to trade in domestic goods.

Beer and the alcoholic beverages known as "alcopops" are to some extent bought and consumed for the same purpose. At least for some groups of consumers, beer, and wine and spirit based

alcoholic beverages, may meet the same needs. Therefore, medium-strength beer and other beverages with the same alcohol content are, at least partially and potentially, in a competitive relationship.

Maintaining two forms of retail sale, whereby beer with an alcohol content of between 2.5% and 4.75% by volume may be sold outside the State retail alcohol monopoly, while other beverages with the same alcohol content may only be sold through the monopoly, constitutes discrimination within the meaning of Article 16 EEA as trade in products from other EEA States is put at a disadvantage as compared to trade in domestically produced products.

Combating alcohol abuse constitutes a public health concern of high priority. However, Article 13 EEA is only applicable as justification for derogations from Articles 11 and 12 EEA. It provides no direct basis for derogations from Article 16 EEA. Justification on grounds of public health has in any case to meet the conditions of being necessary to protect the objective pursued and proportionate to that objective.

3. Provisions concerning the serving of alcoholic beverages must be dealt with under Article 11 EEA.

Maintaining more stringent rules for the serving of alcoholic beverages with an alcohol content of between 2.5% and 4.75% by volume, such as "alcopops," compared to beer with the same alcohol content is capable of hindering intra-EEA trade. Such legislation does not affect in the same manner the sale of domestic products and products of other EEA States. It discriminates between the sale of beer, a product mainly produced domestically, and other alcoholic beverages with the same alcohol content, which are mainly produced abroad.

It is sufficient to establish a breach of Article 11 EEA that the contested rules relating to the serving of alcoholic beverages may potentially hinder intra-EEA trade. There is no requirement that an appreciable effect on the cross-border sale of goods be demonstrated.

The combating of alcohol abuse constitutes a public interest ground under Article 13 EEA that may justify a restriction on the free movement of goods provided for in Article 11 EEA. However, the different treatment of beer and other beverages with the same alcohol content is neither necessary nor proportionate in relation to the health objectives pursued.

The burden of proof for possible justification rests with the EFTA State invoking public interest grounds in order to justify national measures that would otherwise be contrary to the rules governing the fundamental freedoms of the EEA Agreement.

JUDGMENT OF THE COURT

15 March 2002

(Failure of a Contracting Party to fulfil its obligations – State retail alcohol monopoly – licensed serving of alcoholic beverages – discrimination)

In Case E-9/00,

EFTA Surveillance Authority, represented by Peter Dyrberg, Director, Legal and Executive Affairs, acting as Agent, assisted by Michael Sanchez Rydelski, Officer, Legal and Executive Affairs, 74 Rue de Trèves, Brussels, Belgium;

applicant,

v

The Kingdom of Norway, represented by Thomas Nordby, Advokat, Office of the Attorney General (Civil Affairs), acting as Agent, and Fanny Platou Amble, Advokat, Office of the Attorney General (Civil Affairs), acting as Co-Agent, P.O. Box 8012 Dep., 0030 Oslo, Norway,

defendant,

APPLICATION for a declaration that the Kingdom of Norway has failed to comply with the following provisions of the EEA Agreement:

- Article 16, by applying two forms of sale at the retail level where beer with an alcohol content of between 2.5% and 4.75% by volume, mainly produced domestically, may be sold outside the stores of the State retail alcohol monopoly ("Vinmonopolet"), while other beverages with the same alcohol content, mostly imported from other EEA States, may only be sold through the monopoly; and

- Article 11, by applying more restrictive measures regarding licences to serve beverages with an alcohol content of between 2.5% and 4.75% by volume, mostly imported from other EEA States, compared to beer with the same alcohol content, mainly produced domestically, these measures not being necessary and proportionate in relation to the objective of safeguarding public health under Article 13.

THE COURT,

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

Registrar: Lucien Dedichen,

having regard to the written pleadings of the parties, the written observations of the Government of Iceland, represented by Magnús Hannesson, Legal Advisor, Ministry of Foreign Affairs, acting as Agent and the Commission of the European Communities, represented by Lena Ström, member of its Legal Service, acting as Agent.

having regard to the Report for the Hearing,

having heard oral argument from the applicant, the defendant, the Government of Iceland, and the Commission of the European Communities, all represented by their agents, at the hearing on 19 October 2001,

gives the following

Judgment

I Facts and procedure

1 By an application lodged with the Registry of the Court on 21 December 2000, the EFTA Surveillance Authority submitted a request for a declaration that the Kingdom of Norway has failed to comply with the following provisions of the EEA Agreement:

- Article 16, by applying two forms of sale at the retail level where beer with an alcohol content of between 2.5% and 4.75% by volume, mainly produced domestically, may be sold outside Vinmonopolet, while other beverages with the same alcohol content, mostly imported from other EEA States, may only be sold through the monopoly; and

- Article 11, by applying more restrictive measures regarding licences to serve beverages with an alcohol content of between 2.5% and 4.75% by volume, mostly imported from other EEA States, compared to beer with the same alcohol content, mainly produced domestically, these measures not being necessary and proportionate in relation to the objective of safeguarding public health under Article 13.

2 The Norwegian Act No. 27 of 2 June 1989 on the sale of alcoholic beverages (the "Alcohol Act"), Chapter 1, defines alcoholic beverages as beverages that contain

more than 2.5% alcohol by volume. Alcoholic beverages are furthermore divided into beer, wine and spirits. Beverages containing between 2.5% and 4.75% alcohol by volume that cannot be considered beer, are to be regarded as wine or spirits. Chapter 3 of the Alcohol Act provides that Vinmonopolet has the exclusive right to carry on the retail sale of all alcoholic beverages, with the exception of beer containing between 2.5% and 4.75% alcohol by volume, which may be sold by grocery stores pursuant to a municipal licence. The number of Vinmonopolet stores is said to be around 150, whilst the number of grocery stores selling beer is around 4 400.

3 According to Chapter 4 of the Alcohol Act, alcoholic beverages may only be served by a holder of a municipal licence granted for that purpose. A licence may cover different types of alcoholic beverages, i.e., beer, wine or spirits. A licence to serve beer containing 2.5% to 4.75% alcohol by volume does not give the right to serve other beverages with the same alcohol content.

4 Chapter 1 of the Alcohol Act states that beer can be served to persons of at least 18 years of age, whilst spirits may be served only to persons of 20 years of age or older.

5 On 3 December 1997 the EFTA Court held in Case E-1/97 *Gundersen* v *Oslo kommune* [1997] EFTA Court Report 110, that the system of maintaining two standards for the sale of alcoholic beverages, whereby wine or wine products with between 2.5% and 4.75% alcohol by volume may only be sold through Vinmonopolet, while beer with the same alcohol content may be sold outside that monopoly, may lead to discrimination contrary to Article 16 EEA. Notwithstanding that ruling, Norway did not amend the alcohol legislation in question.

6 After having received a complaint and after having initiated informal communication with the Norwegian authorities, the EFTA Surveillance Authority issued a letter of formal notice to Norway on 10 September 1998, in which it expressed the view that the Norwegian legislation was contrary to the EEA Agreement on two points: (1) discriminatory treatment as regards the retail sale of beverages containing between 2.5% and 4.75% alcohol by volume; and (2) discriminatory treatment as regards licences to serve such alcoholic beverages.

7 In their reply of 13 November 1998, the Norwegian authorities introduced the concept of alcopops referring to certain types of beverages containing between 2.5% and 4.75% alcohol by volume. There is no common definition or understanding of alcopops in Norway or elsewhere in the European Economic Area. They may be described as beverages that, by their taste, presentation, and name, appear to appeal particularly to young people.

8 The Norwegian authorities stated that, in the light of the need to protect young people from the harmful effects of such alcoholic beverages, neither of the two

points raised by the EFTA Surveillance Authority in the letter of formal notice gave rise to concern in relation to Articles 11 and 16 EEA.

9 The EFTA Surveillance Authority found the research documentation presented by the Norwegian authorities unpersuasive, and issued a reasoned opinion to Norway on 11 October 1999.

10 The Norwegian authorities did not take any measures to comply with the reasoned opinion. Therefore, the EFTA Surveillance Authority filed the application that has given rise to the present case.

II Arguments of the parties

11 With regard to the provisions of the Norwegian legislation concerning the retail sale of alcoholic beverages, the applicant submits that it follows from the EFTA Court's ruling in *Gundersen*, cited above, that in principle, all beverages containing between 2.5% and 4.75% alcohol by volume must be treated equally as long as the products are covered by the EEA Agreement.

12 With respect to the question of whether there is a competitive relationship between beer and other beverages with an alcohol content of between 2.5% and 4.75%, the applicant argues that it follows from *Gundersen*, cited above, that the Norwegian legislation constitutes discrimination between beer, and other alcoholic beverages, including wine and wine products.

13 Alcohol is, to a very large degree, associated or connected with social situations. If beer is the only alcoholic beverage readily available for this purpose, then the consumers' choice will obviously be beer. If other alcoholic beverages are as readily available, then they may be just as likely choices.

14 The majority of beer sold in Norway is domestically produced, whilst other beverages with the same alcohol content are mostly imported. The more restricted availability at the retail level for the latter products compared to beer constitutes discrimination, since trade in products from other EEA States is put at a disadvantage as compared to trade in domestically produced products. The national measures are, therefore, according to the EFTA Surveillance Authority, contrary to Article 16 EEA.

15 The applicant adds that the case law of the Court of Justice of the European Communities indicates that national measures contrary to Article 16 EEA cannot be justified under Article 13 EEA on grounds relating to public health.

16 The defendant is of the view that the judgment in *Gundersen*, cited above, permits the different treatment of beer and other beverages with the same alcohol content.

17 The defendant contends that there is no competitive relationship between beer, on the one hand, and spirits or wine-based beverages with the same alcohol content, on the other. In support of its contention, the defendant argues that young people consume alcopops in addition to beer, and not as an alternative thereto. All the products in question, whether produced domestically or imported from other EEA States, are treated in the same manner. The Norwegian rules for the retail sale of alcoholic beverages are indistinctly applicable and do not lead to any discrimination.

18 The defendant submits that a finding of different treatment would in any event be justified on grounds relating to public health. In this context, the defendant argues that it would be self-contradictory if health considerations, which are a fundamental concern of Article 13 EEA, were not to be considered an inherent part of Article 16 EEA.

19 The Government of Iceland submits that the Norwegian legislation concerning the retail sale of beer and alcopops must be regarded as governing selling arrangements, because it does not impede the access of the products in question to the market.

20 In any event, it is argued that the Norwegian legislation should be deemed lawful by virtue of Article 13 EEA. Like all other alcoholic beverages except beer, alcopops are sold in Vinmonopolet, so as to make it more difficult for young people to obtain them. The rule of proportionality has been fully respected.

21 The Commission of the European Communities is of the view that, as compared with beer, wine-based and spirits-based products are subject to substantially different treatment under the law, as long as beer may be sold outside the monopoly stores, which is not possible for other alcoholic beverages with the same alcohol content.

22 Alcopops would tend to be consumed instead of beer or, more precisely, in a given situation, the total amount of alcohol consumed would not increase, but rather, one beverage would be replaced with another. This also tends to show the competitive interaction between the two products. From a consumer standpoint, the different beverages at issue meet the same needs and are interchangeable.

23 As to the defendant's attempts to justify the different treatment of beer and alcopops, the Commission of the European Communities argues that since beer is the most commonly consumed alcoholic beverage in Norway, it would seem to be the prime source of any health or social problems which might result from the consumption of alcohol. Based on the relevant data, it would appear logical, from a health viewpoint, to keep beer out of the grocery stores.

24 The Norwegian system of different treatment between beer containing between 2.5% and 4.75% alcohol by volume and other beverages with the same alcohol content appears to constitute arbitrary discrimination that does not seem to be

justified as being inherent in the existence or operation of the monopoly, and therefore, is contrary to Article16 EEA.

25 With regard to the provisions of the Norwegian legislation concerning the serving of alcoholic beverages, the applicant submits that it is not related to Vinmonopolet's exclusive right to sell alcoholic beverages. Therefore, this issue must be assessed under Article 11 EEA.

26 The applicant refers to the ruling in *Gundersen*, cited above, where the EFTA Court held that the therein contested provisions of Norwegian legislation favoured the marketing of beer containing between 2.5 and 4.75% alcohol as opposed to other beverages with the same alcohol content. Therefore, the principle laid down by the Court of Justice of the European Communities in Joined Cases C-267/91 and 268/91 *Keck and Mithouard* [1993] ECR I-6097, may not be applied to the case at hand. Accordingly, the Norwegian measures fall within the scope of the prohibition of Article 11 EEA. The applicant submits that the Norwegian measures can not be justified under Article 13 EEA.

27 The defendant argues that the contested rules relating to the serving of alcoholic beverages establish a selling arrangement that falls outside the scope of Article 11 EEA, as set out in *Keck and Mithouard*, cited above.

28 In the event that the EFTA Court were to find that the rules relating to the serving of alcoholic beverages constitute different treatment in law or in fact, the defendant submits that this treatment is justified on grounds relating to public health under Article 13 EEA.

29 The Commission of the European Communities shares the view of the applicant that the application of more restrictive measures regarding licences to serve beverages with an alcohol content of between 2.5% and 4.75% by volume, mostly imported from other EEA States, as compared to beer with the same alcohol content, mainly produced domestically, amounts to a breach of Article 11 EEA.

III Findings of the Court

Introductory remarks

30 The Court finds it appropriate first to consider to what extent the products at issue in the present case fall within the material scope of the EEA Agreement. The Court has previously found that both Article 11 and Article 16 EEA apply to beer, whereas only the latter Article applies to wine (see Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 15, at paragraph 41, and Case E-6/96 *Wilhelmsen* [1997] EFTA Court Report 56, at paragraph 33). Article 8(3)(b) EEA provides that the provisions of the EEA Agreement apply to products specified in

Protocol 3. Spirits are listed under heading 22.08 in Table II of Protocol 3. It follows that both Articles 11 and 16 EEA also apply to spirits.

31 There is no established definition of the product category at issue in the instant case, but a common trade term describes a widely marketed group of products as "alcopops". That appears to be a term most generally applied in a marketing context, indicating products aimed at young consumers, generally comprising pre-packaged beverages consisting of a mixture of spirits, wine or beer and a mixer, mainly flavoured sodas or fruit juices. Basing itself on the classification of their alcohol source, the Court concludes that such beer or spirits based beverages fall within the material scope of Articles 11 and 16 EEA. Beverages based on wine fall only within the material scope of Article 16 EEA. The reasoning of the Court in the present case must be read with this limitation in mind. The considerations and conclusions of the Court are restricted to pre-packaged products that are marketed or served in closed containers.

32 In its written and oral submissions before the Court, the defendant has described the Norwegian alcohol policy and emphasized its importance from the point of view of the protection of health. The Norwegian Alcohol Act is a comprehensive strategy whose aim is to "curb to the greatest possible extent the harm to society and the individual that may result from the consumption of alcoholic beverages." In pursuit of this goal, numerous measures to limit the total consumption of alcohol have been undertaken, such as preventive work, information strategies, prohibition of advertisement of alcoholic beverages, high taxes and restrictions on the availability of alcoholic beverages through the retail monopoly and licensing schemes. The defendant also maintains that the classification of alcoholic beverages into different categories, and the different treatment according to this classification with regard to age limits, retail sale and serving licences, form the foundation of this comprehensive strategy. The Norwegian alcohol policy is based on considerations and legislation with a long history. The retail monopoly has been part of Norwegian society for nearly 80 years. As part of its submission, the defendant refers to two reports published in 2001 at a World Health Organization European Ministerial Conference on Young People and Alcohol. By reference to these reports, the defendant submits that it is generally accepted, and supported by considerable research, that there is a link between availability, consumption, and alcohol-related problems in the population.

33 In particular, as regards the products referred to as "alcopops", the defendant stresses their popularity among young people and quotes several studies, including those by the World Health Organization, and a proposal drafted by the Commission of the European Communities for a Council Recommendation on "Drinking of Alcohol by Children and Adolescents." The defendant expresses the opinion that allowing all alcoholic beverages containing between 2.5% and 4.75% alcohol by volume to be sold in grocery stores or served under the same license as beer, will create a whole new market situation in Norway. Since both domestic and foreign producers are likely to respond to new profit potential, this could lead to a dramatic increase in the range of products offered.

34 The Court notes that the concerns reflected in the Norwegian alcohol policy are serious and important. There is, in principle, nothing in the EEA Agreement that prevents Norway from maintaining a strict alcohol policy. However, that alcohol policy must operate within the limits of EEA law. It must be implemented so as not to conflict with the rules of the EEA Agreement on the free movement of goods, including Article 11, and Article 16 EEA.

The rules relating to the retail sale of alcoholic beverages

35 The provisions of the Norwegian legislation relating to the retail sale of alcoholic beverages define the scope and product coverage of Vinmonopolet's exclusive right to sell alcoholic beverages. Therefore, those provisions are subject to examination under Article 16 EEA.

36 It follows from the Court's case law that the EEA States have the right to pursue their alcohol policies by operating a State retail alcohol monopoly. According to Article 16 EEA, they are, however, required to ensure that such a monopoly is organised and operated so that no discrimination regarding conditions under which goods are produced or marketed will exist between nationals of the EEA States. Trade in goods from other EEA States must not be put at a disadvantage, in law or in fact, as compared to trade in domestic goods (see *Restamark*, cited above, at paragraph 63 et seq.; *Wilhelmsen,* cited above, at paragraphs 96 and 97; and *Gundersen*, cited above, at paragraph 21).

37 The Court held in *Gundersen*, cited above, that the therein contested Norwegian legislation leads to a situation where wine producers are adversely affected compared to beer producers. Since almost all of the wine sold in Norway is imported, a large portion from other EEA States, while beer is mostly domestically produced, economic operators from other EEA States are put at a competitive disadvantage compared to Norwegian operators. In this context, the Court found that a competitive relationship exists between wine and medium-strength beer, warranting their equal treatment.

38 The question is then whether such a competitive relationship also exists between medium-strength beer and other beverages with a content of between 2.5% and 4.75 % alcohol by volume, in particular alcopops. It is clear from the Court's ruling in *Gundersen*, cited above, that for Article 16 EEA to apply, it is sufficient that two products are to some extent capable of meeting the same consumer needs and therefore are at least in partial competition with each other in the market.

39 The defendant argues that there is little or no competitive relationship between beer and the alcoholic beverages in dispute in the present case. The Court notes that these beverages are to some extent bought and consumed for the same purpose. At least for some groups of consumers, beer, and wine and spirit based alcoholic beverages, may meet the same needs. Furthermore, one cannot

conclude from an alleged increase in alcohol consumption that beer and other beverages with the same alcohol content are not in a competitive relationship. It must therefore be concluded that medium-strength beer and other beverages with the same alcohol content are, at least partially and potentially, in a competitive relationship.

40 In Norway, beer accounts for over half of the total alcohol consumption, calculated in litres of pure alcohol, and about 83%, calculated in litres of product. Beer containing less than 4.75% alcohol by volume accounts for roughly 95% of all beer consumed. Virtually all beer consumed is domestically produced, and 68% reaches the consumers through grocery stores. Statistics indicate that beer is by far the alcoholic beverage most consumed by young people.

41 Under the current system, beer containing between 2.5 % and 4.75 % alcohol by volume is available in about 4 400 retail stores, whereas other beverages having the same alcohol content, are sold in about 150 monopoly stores. The more limited availability of these other beverages compared to beer constitutes discrimination. Trade in products from other EEA States is put at a disadvantage as compared to trade in domestically produced products.

42 Maintaining two forms of retail sale, whereby beer with an alcohol content of between 2.5% and 4.75% by volume may be sold outside the State retail alcohol monopoly, while other beverages with the same alcohol content may only be sold through the monopoly, constitutes discrimination within the meaning of Article 16 EEA.

43 The defendant has argued that the contested rules on the sale of alcoholic beverages may be justified on grounds of public health, in particular the need to prevent an increase in the consumption of alcohol among young people, and in general to combat alcohol abuse. The defendant has argued that the principles underlying Article 13 EEA can be seen as forming an inherent part of Article 16 EEA.

44 The Court also finds it appropriate to recall that combating alcohol abuse constitutes a public health concern of high priority (see *Wilhelmsen*, cited above, at paragraph 85). Moreover, the Court acknowledges that the rules on the sale of alcoholic beverages are motivated by social and health considerations.

45 It follows from the wording and from the purpose of Article 13 EEA that it is only applicable as justification for derogations from Articles 11 and 12 EEA, relating to quantitative restrictions on imports and exports and measures having equivalent effect. It provides no direct basis for derogations from Article 16 EEA.

46 It is not necessary to consider whether there is a sufficient basis in the EEA Agreement for establishing the possibility of justifying national measures contrary to Article 16 EEA on grounds of public health. Justification would in any case not be possible if the national measure do not meet the conditions of

being necessary to protect the objective pursued and proportionate to that objective. The defendant has not been able to prove that the contested rules on the retail sale of alcoholic beverages fulfil those conditions. The Court refers to paragraphs 54 et seq. below.

47 The Court concludes that the Kingdom of Norway has failed to comply with Article 16 EEA, by maintaining two forms of retail sale, whereby beer with an alcohol content of between 2.5% and 4.75% by volume, mainly produced domestically, may be sold outside Vinmonopolet, while other pre-packaged beverages with the same alcohol content, mostly imported from other EEA States, may only be sold through the monopoly.

The rules relating to the serving of alcoholic beverages

48 The provisions of the Norwegian legislation concerning the serving of alcoholic beverages are not related to Vinmonopolet's exclusive right to sell alcoholic beverages. This issue must be dealt with under Article 11 EEA.

49 Article 11 EEA provides that quantitative restrictions on imports and all measures having equivalent effect are prohibited between the Contracting Parties. It is settled case law that all trading rules enacted by EEA States which are capable of hindering, directly or indirectly, actually or potentially, intra-EEA trade are to be considered as measures having an effect equivalent to quantitative restrictions and are thus prohibited by Article 11 EEA (see, to that effect, Case 8/74 *Dassonville* [1974] ECR 837, at paragraph 5).

50 However, the application to products from other EEA States of national provisions restricting or prohibiting certain selling arrangements in the territory of the EEA State concerned does not fall within Article 11 EEA so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other EEA States (see, to that effect, *Keck and Mithouard*, cited above, at paragraph 16).

51 The Norwegian legislation concerning the serving of alcoholic beverages contains more stringent rules for the serving of alcoholic beverages with an alcohol content of between 2.5% and 4.75% by volume, such as alcopops, compared to beer with the same alcohol content. This different treatment is clearly capable of hindering intra-EEA trade. The contested legislation does not affect in the same manner the sale of domestic products and products of other EEA States. It discriminates between the sale of beer, a product mainly produced domestically, and other alcoholic beverages with the same alcohol content, which are mainly produced abroad.

52 According to the defendant, only one of the products presently on the Norwegian market that may be categorised as alcopops has an alcohol content within the

range established for medium strength beer. The Court notes that it is sufficient to establish a breach of Article 11 EEA that the contested rules relating to the serving of alcoholic beverages may potentially hinder intra-EEA trade. There is no requirement that an appreciable effect on the cross-border sale of goods be demonstrated.

53 The Court therefore concludes that the contested provisions of the Norwegian legislation on the serving of alcoholic beverages constitute a measure having equivalent effect to a quantitative restriction within the meaning of Article 11 EEA.

54 Based on the above finding, it is necessary to consider whether that restriction on the free movement of goods may be justified on grounds of public health under Article 13 EEA. In making this determination, it must be remembered that the burden of proof rests with the EFTA State invoking public interest grounds in order to justify national measures that would otherwise be contrary to the rules governing the fundamental freedoms of the EEA Agreement.

55 The combating of alcohol abuse constitutes a public interest ground under Article 13 EEA that may justify a restriction on the free movement of goods provided for in Article 11 EEA. However, in order for the contested national rules relating to the serving of alcohol to be justified under Article 13 EEA, that measure must also be necessary to protect the objective pursued and proportionate to that objective.

56 Excessive alcohol consumption causes health problems, as well as considerable social problems, and there is a link between availability and the harmful effects caused by the consumption of alcohol. However, the Court finds that the defendant has not been able to show that the above-mentioned conditions for justification under Article 13 EEA have been fulfilled. The different treatment of beer and other beverages with the same alcohol content appears to be neither necessary nor proportionate in relation to the health objectives pursued. In this context the Court notes that the Norwegian Alcohol Act prevents the serving of any form of alcoholic beverage to anyone under the age of 18 in establishments with a license to serve alcohol. To the extent that the defendant's concerns for an increase in the consumption of alcohol among people younger than 18, the adoption of measures to ensure the compliance with this requirement and the enforcement thereof, may constitute a more appropriate and less restrictive measure. In this context, the Court also notes that the advertising of alcoholic beverages is prohibited in Norway.

57 The Court has not, in that regard, been convinced by the argument of the defendant that the consumption of alcopops or other pre-packaged alcoholic beverages containing less that 4.75% alcohol, is merely additional to the consumption of beer. As set out above in paragraphs 37 et seq., these products constitute, at least partially and potentially, alternative choices for certain groups of consumers. The Court accepts that alcopops are products that appeal in particular to young people, but this can not affect the finding of fact that beer and

alcopops with the same alcohol content are to a certain extent competing products. Moreover, the appeal to young consumers cannot justify the different treatment of those products. The Court notes that measures necessary for the protection of the health and life of humans may be adopted, as long as those measures apply equally, in law and in fact, to beer and other beverages with the same alcohol content.

58 The Court concludes that the Kingdom of Norway has failed to comply with Article 11 EEA, by applying more restrictive measures regarding licences to serve pre-packaged beverages with an alcohol content of between 2.5% and 4.75% by volume, mostly imported from other EEA States, compared to beer with the same alcohol content, mainly produced domestically, which measures are not necessary and proportionate in relation to the objective of safeguarding public health under Article 13 EEA.

59 The Court is aware of the distinctions in Norwegian alcohol legislation between licences to serve beer, or wine or spirits. When traditional spirits are packaged in a closed container with a mixer, to produce a drink with an alcohol content not exceeding 4.75% by volume, it is acknowledged that the conclusion in the preceding paragraph may lead to apparent inconsistencies with regard to terminology. The Court has in previous judgments accepted that the alcohol content of beverages may be used as a criterion for the different treatment of products. Inconsistencies in relation to terminology in national legislation cannot preclude that finding.

IV Costs

60 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The EFTA Surveillance Authority has not asked that the Kingdom of Norway be ordered to pay costs. Therefore, although the latter has been unsuccessful in its defence, it is not ordered to pay costs. The costs incurred by the Government of Iceland and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

On those grounds,

THE COURT

hereby:

declares that the Kingdom of Norway has failed to comply with:

> **Article 16 of the EEA Agreement, by maintaining two forms of retail sale, whereby beer with an alcohol content of between 2.5% and 4.75% by volume, mainly produced domestically, may be sold outside**

Vinmonopolet, while other pre-packaged beverages with the same alcohol content, mostly imported from other EEA States, may only be sold through the monopoly; and,

Article 11 of the EEA Agreement, by applying more restrictive measures regarding licences to serve pre-packaged beverages with an alcohol content of between 2.5% and 4.75% by volume, mostly imported from other EEA States, compared to beer with the same alcohol content, mainly produced domestically, which measures are not necessary and proportionate in relation to the objective of safeguarding public health under Article 13 of the EEA Agreement.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 15 March 2002.

Lucien Dedichen
Registrar

Thór Vilhjálmsson
President

REPORT FOR THE HEARING
in Case E-9/00

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

EFTA Surveillance Authority

and

The Kingdom of Norway

seeking a declaration that, that the Kingdom of Norway has failed to comply with the following provisions of the EEA Agreement:

– Article 16, by applying two forms of sale at the retail level where beer with an alcohol content [of] between 2.5% and 4.75% by volume, mainly produced domestically, may be sold outside the outlets of the State-controlled wine and spirits monopoly ("Vinmonopolet"), while other alcoholic beverages with the same alcohol content, mostly imported from other EEA States, may only be sold through the monopoly; and

– Article 11, by applying more restrictive measures regarding licences to serve alcoholic beverages with an alcoholic content [of] between 2.5% and 4.75% by volume, mostly imported from other EEA States, compared to beer with the same alcohol content, mainly produced domestically, these measures not being necessary and proportionate in relation to the objective of safeguarding public health under Article 13 EEA.

I. Introduction

1. The EFTA Surveillance Authority and the Norwegian authorities are in disagreement as to the scope of the *Gundersen* ruling of the EFTA Court.[1] In the view of the EFTA Surveillance Authority, that ruling implies that, in principle, there must be equal treatment of alcoholic beverages containing between 2.5% and 4.75% alcohol by volume.[2] The view of the Norwegian authorities is that the ruling allows for differential treatment of beer with the same alcohol content, on the one hand, and other beverages with the same alcohol content, on the other.

II. Legal background, pre-litigation procedure and procedure before the Court

Legal background

EEA law

2. As regards licences for sale at the retail level, the plea in law of the EFTA Surveillance Authority is that there is discriminatory treatment between beer with an alcoholic content of between 2.5% and 4.75%, mostly produced domestically, and other alcoholic beverages with the same alcohol content, mostly imported, and that this discrimination is contrary to Article 16 EEA.

3. As regards licences to serve, the plea is that there is discrimination between beer with an alcohol content of up to 4.75%, mostly produced domestically, and other alcoholic beverages with the same alcohol content, contrary to Article 11 EEA, and that this discrimination cannot be justified under Article 13 EEA and the according to the judgment in *Cassis de Dijon*.[3]

4. Article 11 EEA provides that quantitative restrictions on imports and all measures having equivalent effect are to be prohibited between the Contracting Parties.

5. Article 13 EEA provides *inter alia* that Article 11 EEA does not preclude prohibitions justified on grounds of protection of human health, as long as they do not constitute a means of arbitrary discrimination or a disguised restriction on trade.

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1 Case E-1/97 *Gundersen* v *Oslo kommune* [1997] EFTA Court Report 110 (hereinafter "*Gundersen*").

2 The pleas of the EFTA Surveillance Authority relate only to products which are covered by the EEA Agreement.

3 See *inter alia* Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (hereinafter "*Cassis de Dijon*").

6. Under Article 16 EEA, the Contracting Parties are to ensure that any State monopoly of a commercial character is adjusted so that no discrimination regarding the conditions under which goods are procured and marketed will exist between nationals of EC Member States and EFTA States.

The contested national provisions

7. The Norwegian Act No. 27 of 2 June 1989 on the sale of alcoholic beverages (the "Alcohol Act"), in Chapter 1, defines alcoholic beverages as beverages which contain more than 2.5% alcohol by volume. Alcoholic beverages are furthermore divided into beer, wines and spirits. Alcoholic beverages containing between 2.5% and 4.75% alcohol by volume which cannot be considered as beer, i.e., which are not produced from malt, are to be regarded as wine or spirits. Chapter 3 of the Act provides that the State alcohol retail monopoly (hereinafter variously "Vinmonopolet" or the "monopoly") has the exclusive right to carry on the retail sale of all alcoholic beverages, except for beer containing between 2.5% and 4.75% alcohol by volume, which may be sold by grocery stores under a municipal licence. The number of Vinmonopolet outlets is said to be around 120, whilst the number of grocery stores selling beer is around 4 400.

8. Chapter 4 of the Alcohol Act regulates permission to serve alcoholic beverages. Alcoholic beverages may only be served by a holder of a municipal licence granted for that purpose. A licence may cover different types of alcoholic beverages, i.e., beer, wine or spirits, and is not a function of the alcoholic content of the beverage. A licence to serve beer containing 2.5% to 4.75% alcohol by volume does not give the right to serve other alcoholic beverages with the same alcohol content.

9. Chapter 1 of the Alcohol Act states that beer can be served to persons of 18 years of age, whilst spirits may be served only to persons of 20 years of age or older.

10. The consumption of beer in Norway accounts for over half of the total alcohol consumption, calculated in litres of pure alcohol, and about 83%, calculated in litres of the product. Beer containing between 3.75% and 4.75% alcohol by volume accounts for roughly 95% of all beer consumed. Virtually all of the beer consumed is domestically produced, and 68% reaches the consumers through grocers' shops. Statistics indicate that beer is by far the alcoholic beverage most consumed by young people.

11. Certain types of beverages containing between 2.5% and 4.75% alcohol by volume are the so-called alcopops. There is not a common definition or understanding of alcopops in Norway or in the European Community. They may be described as beverages which, by their taste, presentation and name, may appeal in particular to young people.

12. There are no statistics on the consumption of alcopops in Norway, due to the lack of definition of that kind of beverage, and to the fact that the Norwegian term "rusbrus"[4] covers alcoholic beverages containing 2.5% to 4.75% by volume, regardless of whether they appeal to young people or not, and due to the fact that "rusbrus" may also cover cider, which is not the subject of the Application of the EFTA Surveillance Authority.[5]

Pre-litigation procedure

13. After the *Gundersen* ruling was handed down by the EFTA Court and a complaint was received by the EFTA Surveillance Authority, informal contacts were instituted between the EFTA Surveillance Authority and the Norwegian authorities. On 10 September 1998, the EFTA Surveillance Authority issued a letter of formal notice to Norway.

14. In the letter of formal notice, the EFTA Surveillance Authority expressed the view that the Norwegian legislation was contrary to the EEA Agreement on two points: (1) discriminatory treatment at the retail level for alcoholic beverages containing between 2.5% and 4.75% alcohol by volume; and (2) discriminatory treatment as regards licences to serve such alcoholic beverages.

15. The Norwegian authorities replied to the EFTA Surveillance Authority in a letter of 13 November 1998. In its reply, the Norwegian authorities introduced the notion of alcopops,[6] which have since been reappearing in the course of the administrative procedure. The Norwegian authorities stated that, in the light of the need to protect youth against such drinks, their conclusion was that neither of the two points raised by the EFTA Surveillance Authority in its letter of formal notice gave rise to concerns in relation to Articles 11, 13 and 16 EEA.

16. As the Norwegian authorities had stated in their reply that their position was corroborated by research, the EFTA Surveillance Authority sent a letter on 7 December 1998, requesting the relevant documentation. The Norwegian authorities sent the documentation by letter dated 18 December 1998.

17. The documentation did not convince the EFTA Surveillance Authority, however, who issued a reasoned opinion to Norway on 11 October 1999.

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4 A product type which consists of alcoholic beverages with an alcohol content identical or close to that of beer and which is the subject of the Norwegian surveys (footnote 8 in the Application of the EFTA Surveillance Authority)

5 Information submitted by the Government of Norway refers, however, to a calculated average per capita consumption measured in litres of pure alcohol for youth aged 15-20 years, which in 1999 was 3.96 litres, 0.35 litres of which were "rusbrus".

6 "An important share of the beverages covered by the EEA Agreement, and with a content of alcohol between 2.5% and 4.75% by volume, is the so-called 'alcopops'. This product group is both by appearance and taste designed to attract young people." See letter of 13 November 1998, p. 3, Annex 4 to the Application of the EFTA Surveillance Authority.

18. The Norwegian authorities reacted to the reasoned opinion by letter of 10 December 1999. In their reply, the Norwegian authorities stated that there was no competitive relationship between beer, on the one hand, and spirits or wine-based beverages with the same alcoholic content, on the other. According to the Norwegian authorities, proof of this was to be found in the fact that young people consumed alcopops in addition to beer. The Norwegian authorities contended that it would be difficult to accept that a gin and tonic ready made by the producer should be treated differently than a gin and tonic mixed by the consumer himself or on the premises of a bar. The Norwegian authorities further stated that, following the *Gundersen*[7] ruling, they had considered different criteria carefully to find the most transparent and objective dividing lines between drinks to be sold within or outside Vinmonopolet. However, it had turned out to be difficult to draw lines other than the existing ones. The Norwegian authorities added that, in Sweden, all alcoholic beverages above 2.25% are sold through the Swedish alcohol retail monopoly (Systembolaget), whilst beer with an alcoholic content of between 2.25% and 3.5% may also be sold outside that monopoly. Lastly, the Norwegian authorities stated that they considered the issue of licences to serve alcoholic beverages to be outside the scope of Article 11 EEA.[8]

19. After the expiry of the time-limit set by the EFTA Surveillance Authority in the reasoned opinion, there were again informal contacts between the EFTA Surveillance Authority and representatives of the Norwegian authorities.

Procedure before the Court

20. Since measures had not been taken to comply with the reasoned opinion, the EFTA Surveillance Authority filed the Application in question here, which was lodged at the Court Registry on 21 December 2000.

III. Forms of order sought by the parties

21. The EFTA Surveillance Authority claims that the Court should:

> declare that Norway has failed to comply with the following provisions of the EEA Agreement:
>
> (i) Article 16, by applying two forms of sale at the retail level where beer with an alcohol content [of] between 2.5% and 4.75% by volume, mainly produced domestically, may be sold outside the outlets of the State-controlled wine and spirits monopoly ("Vinmonopolet"), while other alcoholic beverages with the same

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7 See footnote 1, *Gundersen*.

8 See *inter alia* Joined Cases C-267/91 and 268/91 *Keck and Mithouard* [1993] ECR I-6097 (hereinafter "*Keck and Mithouard*").

alcohol content, mostly imported from other EEA States, may only be sold through the monopoly, and

(ii) Article 11, by applying more restrictive measures regarding licences to serve alcoholic beverages with an alcoholic content [of] between 2.5% and 4.75% by volume, mostly imported from other EEA States, compared to beer with the same alcohol content, mainly produced domestically, these measures not being necessary and proportionate in relation to the objective of safeguarding public health under Article 13 EEA.

22. The Kingdom of Norway contends that the Court should:

(i) dismiss the application as unfounded;

(ii) order the EFTA Surveillance Authority to bear the costs.

IV. Written procedure

23. Written arguments have been received from the parties:

– the EFTA Surveillance Authority, represented by Peter Dyrberg, Director, Legal and Executive Affairs Department, acting as Agent, assisted by Michael Sanchez Rydelski, Officer, Legal and Executive Affairs Department, acting as Agent;
– the Government of Norway, represented by Thomas Nordby, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent, and Fanny Platou Amble, Advocate, Office of the Attorney General (Civil Affairs), acting as Co-Agent.

24. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

– the Government of Iceland, represented by Dr Magnús Hannesson, Legal Adviser, Trade Department, Ministry of Foreign Affairs, acting as Agent;
– the Commission of the European Communities, represented by Lena Ström, Member of its Legal Service, acting as Agent.

V. Summary of the pleas in law and arguments

The EFTA Surveillance Authority

25. The plea in law of the EFTA Surveillance Authority is that, as regards sales at the retail level, there is discriminatory treatment between beer with an alcoholic content of between 2.5% and 4.75%, mostly produced domestically,

and other alcoholic beverages with the same alcohol content, mostly imported, and that this discrimination is contrary to Article 16 EEA.

26. As concerns licences to serve, the plea is that there is discrimination between beer with an alcohol content of up to 4.75%, mostly produced domestically, and other alcoholic beverages with the same alcohol content, contrary to Article 11 EEA, and that this discrimination cannot be justified under Article 13 EEA and according to the judgment in *Cassis de Dijon*.[9]

27. The pleas of the EFTA Surveillance Authority relate only to products which are covered by the EEA Agreement. It follows from Article 8(3) EEA and the case-law of the EFTA Court that products listed in Protocol 3 to the EEA Agreement are covered by the Agreement.

28. Spirits-based drinks are covered under heading no. 2208 of the Harmonized Commodity Description and Coding System, which is part of Protocol 3 to the EEA Agreement, whilst vermouth and other wine of fresh grapes flavoured with plants or aromatic substances are covered under heading no. 2205 of the same system.

29. It follows from the case-law of the EFTA Court that Article 16 EEA also covers products not originating from within the EEA which are traded between the EEA States.[10] It follows directly from Protocol 8 to the EEA Agreement that Article 16 EEA applies to wine (heading no. 2204 of the Harmonized Commodity Description and Coding System). Article 16 EEA also applies to beer, spirits and other alcoholic beverages.

30. Beverages with an alcoholic content of between 2.5% and 4.75% which fall under heading no. 2206 of the Harmonized Commodity Description and Coding System, such as cider, do not come within the scope of the EEA Agreement.

31. With respect to the question of whether there is a competitive relationship between the products, the EFTA Surveillance Authority observes that, in *Gundersen*, the EFTA Court stated that the Norwegian legislation institutes discriminatory measures between beer, on the one hand, and wine and wine products, as well as other products with an alcoholic content, on the other.[11] The assumption appears to be that the products discriminated against are identical or similar to each other.

32. However, in case the EFTA Surveillance Authority should be wrong in its reading of the case-law, it should be observed, firstly, that drinks mixed and produced industrially are not identical to what the end consumer may mix.

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9 See footnote 3, *Cassis de Dijon*.

10 Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 17, at paragraph 37.

11 See footnote 1, *Gundersen*, at paragraph 29.

33. The category of beverages concerned is extremely broad and contains a wide variety of drinks with different characteristics and flavours. Moreover, most of the spirits-based products at issue are based on distilled ethyl spirits.

34. Secondly, it is common ground that alcohol is, to a very large extent, associated or connected with social situations. If beer is the only alcoholic drink easily available for this purpose, then the choice will evidently fall on beer. If other beverages are available, the choice may fall upon them.

35. Thirdly, the reasons which have led the EFTA Court and the Court of Justice of the European Communities[12] to consider that there is a competitive relationship between beer and low-grade wine are equally valid in this context.

36. The Norwegian authorities have also argued that the fact that young people's consumption of other alcoholic beverages is additional to beer consumption is evidence of the absence of a competitive relationship. The EFTA Surveillance Authority replies to this argument by observing that there is no evidence to support this assertion. Even if there were, the EFTA Surveillance Authority submits that the material produced in the reply of the Norwegian authorities to the reasoned opinion shows that overall consumption of alcohol has increased among youth.[13] That alcohol consumption is growing appears to be common knowledge.[14] Furthermore, it appears that, in periods of increasing consumption, new products are consumed in addition to traditional ones.[15] Thus, one cannot conclude from a possible additional consumption that beer and other alcoholic beverages with the same alcohol content as beer are not in a competitive relationship.

37. Furthermore, if the argument of the Norwegian authorities were accepted, it would lead to a freezing of consumer habits. Thus, the EFTA Surveillance Authority fails to see that a possible preference of young people for other

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12 See Case 171/78 *Commission* v *Denmark* [1980] ECR 447, at paragraph 6, where the Court stated: "(…) it is sufficient for the imported product to be in competition with the protected domestic production by reason of one or several economic uses to which it may be put." See also Case 169/78 *Commission* v *Italy* [1980] ECR 385, at paragraph 5, where the Court stated: "(…) it is necessary to consider as similar products which have similar characteristics and meet the same needs from the point of view of the consumer."

13 According to the material submitted, the calculated average consumption measured in pure alcohol for the age group 15-20 years has increased from 2.90 litres in 1990 to 3.96 litres in 1999.

14 In the Nordic Review for Alcohol Studies (*Nordisk Alkohol- & Narkotikatidsskrift*) (hereinafter "NAN") and its English Supplement, NSAD, articles testify to this development, see, for instance, Astrid Skretting, "Where does the responsibility lie for youth drinking?" (Hvor ligger ansvaret for at ungdom drikker?), NAN 1999, at p. 333, and Gestur Guðmundsson, "The required meeting of youth research and alcohol and drug research", NSAD 2000, at p. 6. On the website of the Norwegian Directorate for the Prevention of Alcohol and Drug Problems, quoted previously, it is indicated that consumption amongst youth in the beginning of the 1990s was around 3 litres, measured in pure alcohol, and, in 1999, 4 litres.

15 Jussi Simpura, "Drinking patterns and alcohol policy: Prospects and limitations of a policy approach", NSAD 1999, at pp. 42-3.

alcoholic beverages, if they have the choice between beer and those beverages, should indicate that there is no competitive relationship between beer and the beverages.

38. The provisions of the Norwegian legislation at issue relating to sales at the retail level define the scope and product coverage of Vinmonopolet's exclusive right for the sale of alcoholic beverages. Consequently, those provisions fall to be examined under Article 16 EEA.[16]

39. The EFTA Surveillance Authority does not contest the wide freedom that EFTA States have in the implementation of their respective alcohol policies. However, the issue here is whether the two different dividing lines chosen to determine which alcohol beverages are to be sold through Vinmonopolet give rise to discrimination contrary to Article 16 EEA. It follows from the *Gundersen* ruling that, in so far as the chosen dividing line, i.e., 4.75% alcohol by volume, is intended to ensure equal treatment between beer and wine with a higher alcohol content which is in competition with beer, that dividing line must be strictly applied.

40. Beer containing between 2.5% and 4.75% alcohol by volume may be sold by any holder of a valid municipal licence who is entitled to trade in Norway. All other alcoholic beverages, even if they contain identical percentages of alcohol by volume, can only be sold by Vinmonopolet. The importance for sales volumes of a product of not being in Vinmonopolet is clearly seen from the decline of sales suffered by so-called "strong beer" after being placed in Vinmonopolet.

41. Beer sold in Norway is overwhelmingly domestically produced, whilst other alcoholic beverages with the same alcoholic content are mostly imported.

42. The more limited availability at the retail level for those products compared to beer constitutes discrimination, since trade in goods from other EEA States is put at a disadvantage as compared to trade in domestically-produced goods. The national arrangements are, therefore, contrary to Article 16 EEA.

43. The case-law of the Court of Justice of the European Communities would indicate that national measures contrary to Article 16 EEA cannot be justified under Article 13 EEA.[17]

44. Difficulties in finding a non-discriminatory dividing line for sales to be within or outside Vinmonopolet do not justify non-compliance with the EEA Agreement. As to the Norwegian authorities' remarks concerning the situation in Sweden, the EFTA Surveillance Authority observes that the applicable limits in Sweden are different, as beer containing 3.5% alcohol by volume and other

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16 See footnote 1, *Gundersen*, at paragraph 19.

17 See Case C-159/94 *Commission* v *France* [1997] ECR I-5815, at paragraph 41; and Case C-158/94 *Commission* v *Italy* [1997] ECR I-5789, at paragraph 33.

beverages containing more than 2.25% alcohol by volume are sold in the Swedish alcohol retail monopoly, and the beverages at issue in this case in practice contain around 4.0% or more alcohol by volume. Furthermore, it is settled case-law that possible non-compliance by one EEA State does not justify non-compliance by another EEA State.

45. The provisions of the Norwegian legislation concerning the serving of alcoholic beverages are not related to Vinmonopolet's exclusive right to sell alcoholic beverages. Consequently, this issue must be assessed under Article 11 EEA.

46. The principles laid down by the Court of Justice of the European Communities in *Keck and Mithouard* lead to the conclusion that the national "selling arrangement" in question is contrary to Article 11 EEA, since the national legislation discriminates between the marketing of domestic products (beer) and products from other EEA States. The EFTA Court established in the *Gundersen* ruling that the relevant provisions of the Norwegian legislation favour the marketing of beer with an alcohol content of between 2.5 and 4.75% as compared to other alcoholic beverages with the same alcohol content. Therefore, the assertion that the ruling in *Keck and Mithouard* on "selling arrangements" applies to the case at hand cannot be accepted.

47. The Court of Justice of the European Communities has held that the legislation of a Member State must not crystallise or favour given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them.[18]

48. The EFTA Surveillance Authority submits that the Norwegian measures at issue fall within the scope of the prohibition set out in Article 11 EEA.

49. If one is considering a possible justification under Article 13 EEA, the issue is whether the measures taken by the Norwegian authorities are justified and necessary for the attainment of the objective pursued and whether the objective is not capable of being achieved by measures which are less restrictive of intra-EEA trade.

50. The EFTA Surveillance Authority remarks that the Norwegian authorities seem to operate with a very broad notion of "youth". Furthermore, not all alcoholic beverages containing between 2.5% and 4.75% alcohol by volume may be considered as alcopops which appeal in particular to youth. If one were to prevent young people from consuming alcohol, it would seem more appropriate to target the consumption of beer, which is the alcoholic beverage most consumed by youth. Lastly, the EFTA Surveillance Authority points out that Norwegian legislation does not allow alcoholic beverages to be served or passed

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18 See Case 178/84 *Commission* v *Germany* [1987] ECR 1227, at paragraph 32.

on by the licensees to anyone under the age of 18.[19] Thus, in establishments with a licence to serve alcohol, Norwegian law does not allow any form of alcohol to be served to minors. Consequently, enforcing the national legal provisions within the framework of the EEA Agreement would be one alternative and proportionate measure for achieving the desired goals.

51. Lastly, the Norwegian authorities may invoke restrictions for certain products if they can be justified and are proportionate under Article 13 EEA in individual cases. However, the ruling of the EFTA Court in *Gundersen* must be respected. The point of departure must, therefore, be that imported beverages containing between 2.5% and 4.75% alcohol by volume are to receive the same treatment as domestically-produced beer.

The Government of Norway

52. The Government of Norway requests the Court to declare the application as unfounded. To begin with, there is no competitive relationship between beer and the products in question which would entitle them to equal treatment. The only common feature between the two groups is their alcohol content. Reference is made to the case-law of the EFTA Court[20] and the Court of Justice of the European Communities.[21] The latter Court has never found potential competition or substitution to be sufficient. The competition or substitution between the products in question in the present case is not present and real.

53. The crucial question is whether beer and the products in question are substitutes for each other in a situation where the relative availability of the beverages changes. More specifically, the question is whether the consumer will switch from beer to the products in question if they become more available in places where beer is available, i.e., outside the retail monopoly.

54. In the present case, it is the EFTA Surveillance Authority, in submitting an application pursuant to Article 31(2) of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, which has the burden of proving the existence of a competitive relationship and possible differential treatment, whilst it is for the Government of Norway to establish justification for such differential treatment on grounds of health.

55. A great deal of research has been carried out on the effects on alcohol consumption of liberalisation of the selling arrangements for table wine and beer. The main conclusion from the research is that consumption of table wine

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19 For spirits, the minimum age is 20.

20 See Case E-6/96 *Wilhelmsen* v *Oslo kommune*, [1997] EFTA Court Report 53 (hereinafter "*Wilhelmsen*"); and footnote 1, *Gundersen*.

21 Case 91/78 *Hansen* v *Hauptzollamt Flensburg* [1979] ECR 935; Case 59/75 *Pubblico Ministero* v *Manghera* [1976] ECR 91; Case C-391/92 *Commission* v *Greece* [1995] ECR I-162; Case C-171/78 *Commission* v *Denmark* [1980] ECR 447.

increases, in some cases considerably, when the product is moved to grocers' shops. Moreover, none of the reports indicate any switch from beer to wine. The consumption of beer was not significantly affected by the liberalisation of selling arrangements for wine. The research indicates that substitution from one major beverage category to another is not a predominant occurrence when new beverages are introduced or made more available.

56. Consequently, relative changes in the availability of wine and beer have no effect, or at least no more than a marginal effect, on the distribution of alcohol consumption in a particular society. More specifically, if the selling arrangements for wine become equivalent to the selling arrangements for medium-strength beer, a switch from beer to wine will most likely not occur.

57. Furthermore, the patterns of use seen today in relation to alcopops provide further indication of what to expect if their availability is greatly increased. From the research in Norway and the comparative studies carried out in other countries, it appears clear that the consumption of alcopops is additional to beer or other types of alcoholic beverages.[22]

58. Secondly, by applying two forms of sale at the retail level where beer with an alcohol content of between 2.5% and 4.75% alcohol by volume may be sold outside the outlets of the retail monopoly, while all other alcoholic beverages with the same alcohol content may only be sold through the retail monopoly, the Government has based itself on a non-discriminatory and indistinctly applicable rule.[23] All the products in question, whether produced domestically or imported from other EEA States, are treated in the same manner. No differential treatment, in law or in fact, can be established.

59. Should the EFTA Court come to the conclusion that there exists a competitive relationship between the products in question and beer with the same alcohol content, the products are, as described by the Court in *Gundersen*,[24] entitled to equal treatment.

60. The Government of Norway contends that the system does not give rise to any discrimination, in law or in fact,[25] and is – if the Court should find differential treatment – in any event justified on grounds of health.

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22 The most recent summary of national research shows that the consumption of alcopops has gained a certain degree of popularity without resulting in any decrease in the consumption of either beer or other types of alcohol beverages. (See Astrid Skretting, "Youth and intoxicating substances" (*Ungdom og Rusmidler*) 2000 and "Alcohol and Drugs in Norway" 2000).

23 A system of treating beverage categories differently is common and accepted in many other countries.

24 See footnote 1, *Gundersen*, at paragraph 25.

25 The current market situation shows that only one brand, Scanavino Moscato d'Asti, from Italy, contains less than 4.76% alcohol.

61. The Court of Justice of the European Communities and the EFTA Court have held that the rules relating to the existence and operation of a monopoly must be examined with reference to Article 31 EC/Article 16 EEA, which are specifically applicable to the exercise by a domestic commercial monopoly of its exclusive right. On the other hand, the effect on intra-Community trade of the other provisions of the domestic legislation, which are separable from the operation of the retail monopoly although they have a bearing upon it, fall to be examined under Article 28 EC.[26]

62. The Court of Justice of the European Communities and the EFTA Court have furthermore stated that the purpose of these provisions is to reconcile the possibility for EEA States to maintain certain monopolies of a commercial character as instruments for the pursuit of public interest aims with the requirements of the establishment and functioning of the common market. Article 31 EC/Article 16 EEA aim at eliminating obstacles to the free movement of goods, save for restrictions on trade which are inherent in the existence of the monopolies in question.[27]

63. Thus, Article 31 EC/Article 16 EEA require that the organisation and operation of the retail monopoly be arranged so as to exclude any discrimination between nationals of EEA States as regards conditions of supply and outlets, so that trade in goods from other EEA States is not put at a disadvantage, in law or in fact, and that competition between the economies of the EEA States is not distorted.[28]

64. The selling arrangements through the retail monopoly are not based on the place of origin of the goods. It applies to all products and all traders and, thus, the legislation applies without distinction as to place of origin.

65. The Alcohol Act prescribes a dividing line at 4.75% alcohol by volume for beer and 2.5% alcohol by volume for other alcoholic beverages. This line applies to both domestic products and imported products in the sense that imported as well as domestic medium-strength beer with less than 4.75% alcohol by volume may be sold outside the retail monopoly, and domestic as well as imported alcopops which contain more than 2.5% alcohol by volume, are sold through the retail monopoly. Thus, the criteria set out in the legislation are completely neutral and objective. The legislation is not designed to regulate trade in goods between the EEA States.[29] On the contrary, the sole purpose is to

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26 See Case C-189/95 *Franzén* [1997] ECR I-5909 (hereinafter "*Franzén*"), at paragraphs 35 and 36; and footnote 1, *Gundersen*.

27 See footnote 26, *Franzén*, at paragraph 39.

28 See footnote 26, *Franzén*, at paragraph 40.

29 See Case C-391/92 *Commission* v *Greece*, [1995] ECR I-1621, at paragraph 11; and footnote 8, *Keck and Mithouard*.

achieve a public interest aimed at protecting public health against the harm caused by alcohol.[30]

66. The Government of Norway agrees that the Alcohol Act limits the commercial freedom for producers as products are channelled to the retail monopoly. As held by the Court of Justice of the European Communities in *Commission* v *Greece*,[31] such legislation may restrict the volume of sales of alcopops in general and hence the volume of sales of alcopops originating in other EEA States. Thus, the mere fact that the sales volume decreases (or does not reach is full potential) does not imply that there is differential treatment in fact.

67. The Government of Norway acknowledges that virtually all of the beer sold in Norway is produced domestically, whilst wine and other products are, to a large extent, imported. It argues, however, that a mere reference to this truism is not sufficient to establish differential treatment in fact.

68. Due to climatic and historical factors, there is no wine production in Norway. Furthermore, there is presently no domestic production of the products in question. Moreover, it is no coincidence that there is no domestic production in Norway of the products in question. As the Court of Justice of the European Communities has held, national legislation for retail sale which concerns all the products at stake without distinction cannot depend on such a purely fortuitous factual circumstance, which may, moreover, change with the passage of time.[32]

69. The dividing lines for sale at the retail level are exclusively based on alcohol policy. The dividing lines do not change based on what products domestic and foreign manufacturers may produce. The Government of Norway notes, as the European Court of Justice held in *Commission* v *Greece*,[33] that this would have the illogical consequence that the same legislation for retail sale would fall under Article 16 EEA in certain EEA States, but fall outside the scope of that provision in other EEA States.

70. In conclusion, the Government of Norway is of the view that there is equal treatment in fact.

71. If the EFTA Court were nevertheless to find that the retail monopoly gives rise to differential treatment in law or in fact of nationals of EC and EFTA States, the Government of Norway submits that this treatment is, in any event, justified on grounds of public health and is thus not contrary to Article 16 EEA.

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30 See footnote 26, *Franzén*, at paragraph 41.

31 See footnote 29, Case C-391/92 *Commission* v *Greece*.

32 See footnote 29, Case C-391/92 *Commission* v *Greece,* at paragraph 17.

33 See footnote 29, *Commission* v *Greece*, at paragraph 17.

72. The Government of Norway argues that it would be self-contradictory if the health considerations which form a fundamental part of Article 13 EEA were not to be considered an inherent part of Article 16 EEA. Thus, it is not a question of whether a breach of Article 16 EEA can be justified by reference to Article 13 EEA, but rather whether the principles underlying Article 13 EEA can be seen as forming an inherent part of Article 16 EEA. It must be emphasised that the retail monopoly in question in this case has been established with the sole purpose of protecting public health.

73. This interpretation has been confirmed by the EFTA Court in the *Gundersen* ruling,[34] in which the Court held that the system of two dividing lines, in the absence of any grounds for the differential treatment, must be considered to be contrary to Article 16 EEA. One of those grounds is justification on grounds of public health.

74. In addition, the Government of Norway refers to the judgment of the Court of Justice of the European Communities in *Chemical Farmaceutici*.[35] The reasoning of that Court in that case is based on a willingness to accept objective justifications where the national policy is acceptable from the Community's standpoint, even if it benefits domestic traders more than importers.

75. For these reasons, the health considerations which form a fundamental part of Article 13 EEA should be considered as forming an inherent part of Article 16 EEA.

76. Furthermore, the Government of Norway refers to the *Wilhelmsen* ruling,[36] in which the EFTA Court held that combating alcohol abuse constitutes a public health concern which, if necessary and proportionate, may justify a measure restricting the free movement of goods.

77. There is reason to expect that increased availability of the products in question will lead to an increase in consumption among young people.[37] Consumers accustomed to drinking beer will enjoy the additional and experimental alcopop or pre-mixed drinks. Consumers who are not yet accustomed to the distinct taste of beer, and therefore the lack of alternatives, might abstain or moderate their intake, or would most likely increase their consumption if sweet-tasting alcoholic beverages were to be made available in grocers' shops. Those consumers include girls and the youngest age group.[38] In

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34 See footnote 1, *Gundersen*, at paragraph 31.

35 Case C- 140/79 *Chemical Farmaceutici SpA* v *DAF SpA,* [1981] ECR 1.

36 See footnote 20, *Wilhelmsen.*

37 See 1999 ESPAD Report.

38 In this connection, the Government of Norway notes that Advocate General Jacobs in Case C-405/98 *Konsumentombudsmannen* v *Gourmet International Products Aktiebolag* (hereinafter "*Konsumentombudsmannen*"), in his Opinion of 14 December 2000 concluded that the Swedish advertising restrictions on alcohol ran contrary to Article 30 of the EC Treaty (now, after amendment, Article 28 EC) . In the discussion of a possible justification, however, he stated at

its Recommendation on Young People and Alcohol, the Commission of the European Communities emphasises that females are generally more vulnerable to alcohol than are males, and experience more problems over a shorter time-span from the same quantities.[39] Furthermore, it is now common knowledge that earlier onset of drinking leads to a relatively larger intake of alcohol later on.

78. It is generally recognised in the recent ECAS[40] and the WHO reports[41] that excessive alcohol consumption causes health problems, as well as considerable social problems, and that the cost to the individual and to society from the misuse of alcohol is high.

79. Furthermore, it is generally accepted and confirmed by considerable research that there is a direct link between availability and the harmful effects caused by the consumption of alcohol.

80. In 1996, annual sales of alcohol in Norway amounted to 4.93 litres of pure alcohol per inhabitant aged 15 years and over. In 1997 and 1998, that figure was 5.35 litres. The corresponding figure for 1999 is estimated at 5.47 litres. The Government of Norway thus observes a clear trend towards increased consumption among the population in general. Furthermore, the estimated average consumption in recent years among young people aged 15-20 years has risen significantly, from 2.8 litres of pure alcohol in 1995 to 4.8 litres in 2000. At the same time, there is growing evidence of changing drinking patterns among young people in all European countries.

81. On the basis of the 1999 ESPAD Report, the most intoxication-oriented drinking pattern among 15-16 year-olds was found in Finland, Sweden and Norway.[42] Later research shows that the proportion of students who report to have had at least five drinks in a row (binge drinking) is increasing in Norway.

82. Most European countries are now struggling to come up with measures to address "the alarming increase in binge and heavy drinking by minors", as the Commission expresses it. Beer consumption among the young population is a major problem that the Government of Norway needs to address, as do many other countries.

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paragraph 54: "With a view to discouraging the recruitment to alcohol of those who would not otherwise be inclined to drink it, I can also see a possible justification for a ban on the advertising of, for instance, alcopops – alcoholic drinks designed specifically to appeal to those (including no doubt young people and even children) whose preferred beverage is sweet and carbonated."

39 Annex 17 to the Written Observations of the Government of Norway, at page 4.

40 The ECAS Report 2000.

41 The WHO Report.

42 The ECAS Report 2000, at page 90.

83. The EFTA Court must not however, be under the impression that moving medium-strength beer to the alcohol retail monopoly is a real option for the Government. The reason for this is that there is not the public support necessary to further restrict the availability of beer which traditionally is widely consumed by adults.

84. With respect to the new category of alcoholic beverages, especially those targeting young people and creating considerable international frustration, however, Norway has chosen the single most effective way of reducing consumption. Placing such products in the alcohol retail monopoly is strongly supported by the Norwegian Parliament, which has twice rejected private bills calling for equal treatment of beer and "wine" containing between 2.5% and 4.75% alcohol by volume.[43]

85. Based on the foregoing, the conclusion is that the retail monopoly scheme for the products in question is an appropriate means of pursuing health and social aims.

86. The aim of the Norwegian alcohol policy is to curb to the greatest possible extent the harm to society and the individual that may result from the consumption of alcoholic beverages. The means used to achieve that aim are implemented through a number of comprehensive measures designed to limit the overall consumption of alcohol in the population. Such measures are: preventive work, information strategies, prohibition of advertisement of alcoholic beverages, high taxes and restrictions on the availability of alcoholic beverages through the alcohol retail monopoly, and licensing schemes. The classification of alcoholic beverages into different categories, and the different treatment according to classification with regard to age limits, retail sale and serving licences form the basis of this comprehensive strategy.

87. As a consequence of this policy, consumption of alcohol in Norway is low compared to other European countries, and health problems are fewer. The alcohol retail monopoly is second only to taxation among the Government's most important instruments for reducing overall consumption of alcohol among the population. The Government of Norway adds that there appears to be no other means than those already being implemented in Norway which are capable of achieving the aim of reducing alcohol consumption to the same extent as the alcohol retail monopoly.

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43 2 June 1998 and 28 March 2000, respectively.

88. European integration has inspired considerable changes in the operation of the alcohol retail monopoly. However, the essence of the monopoly has not been compromised as regards product selection and the elimination of point-of-sale marketing. Considering the characteristics of the products at stake,[44] this is of vital importance.

89. Channelling the products to the alcohol retail monopoly furthermore eliminates purchases made on impulse, and fosters social awareness of the harmful effects of alcohol.

90. The Government of Norway adds that the shop assistants of the alcohol retail monopoly are in direct contact with their customers, creating optimal conditions for exercising social and formal control. The company runs constant campaigns to check the age of purchasers, and its staff are very aware of this requirement. A large number of young people are refused service every year because they cannot show valid proof of age. The same applies to people who are visibly drunk. Thus, the retail monopoly is particularly suited to controlling drinking among young and under-aged people. Another important factor in this context is the fact that monopoly employees are typically unionised career employees, compared with the employees of corner stores and supermarkets, who are paid much less and are often younger and more transient people. Rules concerning under-age purchasers and other conditions of sale are more likely to be adhered to in a unitary system with permanent employees.[45]

91. In addition, the Government of Norway points to the fact that the alcohol retail monopoly, unlike the grocery stores, is based on a policy which eliminates private profit interests.

92. The Government of Norway concludes from the foregoing that the alcohol retail monopoly is more effective than licensing schemes in enforcing the aim of pursuing health and social objectives by restricting the availability of alcopops and other beverages based on wine and spirits, and is, therefore, proportional.

93. The Government of Norway shares the view of the EFTA Surveillance Authority when stating that the provisions of the Norwegian legislation concerning the serving of alcoholic beverages are not related to the alcohol retail monopoly's exclusive right to sell alcoholic beverages other than beer, and thus must be examined separately under Article 11 EEA.

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44 See Margaret C. Jackson, Gerard Hastings, Colin Wheeler, Douglas Eadie & Anne Marie MacKintosh, "Marketing alcohol to young people: implication for industry regulation and research policy", published in Addition (2000).

45 This observation also applies with regard to sales made through the postal services.

94. With regard to Article 28 EC, the Court of Justice of the European Communities has consistently held that any measure which is capable of, directly or indirectly, actually or potentially, hindering intra-Community trade constitutes a measure having equivalent effect to a quantitative restriction within the meaning of that provision.[46]

95. The Court of Justice of the European Communities and the EFTA Court have further held that trade between EEA States is not likely to be impeded within the meaning of the *Dassonville* judgment by the application to products from other EEA States of national provisions restricting or prohibiting certain selling arrangements, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other EEA States. Where those conditions are fulfilled, the application of such rules to the sale of products from other EEA States which meet the rules laid down by that State is not by nature such as to prevent access to the market or to impede access any more than it impedes the access of domestic products. Such rules, therefore, fall outside the scope of Article 11 EEA.[47]

96. The licence to serve is a "selling arrangement" and falls outside the scope of Article 11 EEA.

97. The Government of Norway argues that the licensing scheme in the case at hand does not entail any requirement to be met by the products themselves.[48] On the contrary, the system only channels the sale of the products in question to those entitled to a licence. Therefore, the licensing scheme must be viewed as a marketing regulation and not a regulation of alcohol as a product.

98. In the case at hand, the crucial question is whether the provisions on the licensing scheme affect in the same manner, in law and in fact, the marketing of domestic products and of those from other EEA States.

99. The Government of Norway submits that the assessment of whether the provisions affect the different products in the same matter, in law or in fact, must be carried out in parallel with the assessment of whether the channelling through the alcohol retail monopoly constitutes differential treatment, in law or in fact. Reference is made to the discussion above, in which the conclusion was that there is equal treatment in law and in fact. Accordingly, the Norwegian legislation for licences to serve alcohol is compatible with Article 11 EEA.

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46 See, in particular, Case 8/74 *Dassonville* [1974] ECR 837 (hereinafter "*Dassonville*").

47 See footnote 8, *Keck and Mithouard*, at paragraphs 16 and 17; Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, at paragraph 21 and Case C-387/93 *Banchero* [1995] ECR I-4663 (hereinafter "*Banchero*").

48 These include requirements as to designation, form, size, weight, composition, presentation, labelling and packaging.

100. If the Court were nevertheless to consider that the licence to serve constitutes differential treatment in law or in fact, the Government of Norway submits that this treatment is, in any event, justified on grounds of public health under Article 13 EEA.

101. In accordance with settled case-law, the national provisions in question must be proportionate to the aim pursued and not attainable by measures less restrictive of intra-EEA trade. Furthermore, the Court of Justice of the European Communities and the EFTA Court have held that Article 30 EC/Article 13 EEA must be interpreted strictly, since they constitute a derogation from the fundamental principle of the elimination of all obstacles to the free movement of goods between EEA States.[49] The Court of Justice of the European Communities and the EFTA Court have also held that, in order for the exemption to apply, the competent national authorities have the burden of proving that the measure is justified.[50]

102. The Government of Norway submits that, like the alcohol retail monopoly, the licence-to-serve scheme for the products at stake is necessary to pursue the aim of reducing alcohol-related public health and social problems. The Government of Norway emphasises that different legislation providing for the equal treatment of beer and spirits-based beverages would pave the way for the eradication of the distinction between beer and spirits.[51]

103. The question in the case at hand is not whether it would be more appropriate to target beer consumption. The case at hand relates to a new category of alcoholic beverages targeting especially young people and creating considerable international frustration. The main point is that the licensing scheme reduces the availability of those products, which in turn results in lower alcohol consumption, thereby ultimately reducing public health and social problems.[52]

The Government of Iceland

104. The Government of Iceland refers to the case-law of the Court of Justice of the European Communities and the EFTA Court.[53] Following those judgments, a distinction may be drawn between rules relating to the movement of goods which set conditions on how the goods can reach the market in terms of their

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49 Case 46/76 *W. J. G. Bauhuis* v *The Netherlands State* [1977] ECR 5; and Case E-5/96, *Ullensaker kommune and Others* v *Nille AS* [1997] EFTA Court Report 30 (hereinafter "*Nille*").

50 Case 304/84 *Ministère public* v *Muller* [1986] ECR 1521; and footnote 49, *Nille*.

51 Of a total of 6252 licences to serve in 1999, 2327 did not encompass the serving of spirits and spirits-based beverages. If all 6252 licences to serve encompassed the serving of spirits-based beverages, a significant increase in availability and consumption would result.

52 Enforcing age-limit regulations are one of many important factors in place for achieving the aim of the Norwegian alcohol policy. However, such regulations alone are far from sufficient in order to attain that goal.

53 See footnote 1, *Gundersen*.

nature, composition, packing, presentation and advertisement,[54] and rules which have been described as governing "selling arrangements". The latter do not contain measures which hamper or hinder the access of the goods, but rather regulate or decide through which channels they must go in order to enter the retail market.[55]

105. The Government of Iceland submits that the Norwegian legislation concerning the retail sale of beer and alcopops must be regarded as governing selling arrangements, because it does not impede the access of the products in question to the market.

106. Beer and alcopops are different goods under the international system of classification of goods.[56] Alcopops may be described as "end products", because they are not used as a basis for making other drinks. Consequently, alcopops can be distinguished from beer and wine. It is also questionable whether alcopops and beer meet the same need.[57] Reference is made to the *United Brands* case,[58] in which the Court of Justice of the European Communities held that bananas could not be regarded as substitutes for other fruits.

107. The Government of Iceland refers to the differences between the present case and the *Banchero* and *Commission* v *Greece* judgments.[59] The case at hand involves the question of whether to apply the same set of rules to alcopops as to other types of alcoholic beverages, while those two other cases concerned different selling arrangements. In this light, the Norwegian rules are less likely to be at variance with Article 28 EC than the Italian and Greek selling arrangements in the two aforementioned cases.

108. In any event, the Government of Iceland is of the view that the Norwegian legislation should be deemed lawful by virtue of Article 13 EEA. It is well recognised that it is up to the EEA States to combat alcohol abuse. Selling arrangements for alcohol come within that policy.[60]

109. Reference is made to the Opinion of Advocate General *Jacobs* in the *Konsumentombudsmannen* case.[61]

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54 See footnote 46, *Dassonville* and footnote 3, *Cassis de Dijon*.

55 See footnote 47, *Banchero*; and footnote 29, Case C-391/92 *Commission* v *Greece*.

56 Beer is classified under heading no. 2203 of the Harmonized Commodity Description and Coding System, whilst alcopops are classified under heading no. 2208.

57 Case 169/78 *Commission* v *Italy* [1980] ECR 385.

58 Case 27/76 *United Brands Co. and United Brands Continental BV* v *Commission* [1978] ECR 207.

59 See footnote 47, *Banchero*, and footnote 29, *Commission* v *Greece.*

60 See footnote 20, *Wilhelmsen*.

61 See footnote 38, *Konsumentombudsmannen*.

110. Like all other alcoholic beverages except beer, alcopops are sold in Vinmonopolet, so as to make it more difficult for young people to obtain them. The rule of proportionality has been fully respected.

111. Lastly, the Government of Norway was not in a position to take any other reasonable measures to limit the opportunities for young people to obtain alcopops without impeding that product's access to the market. The most sensible and practical means were adopted in this respect.

The Commission of the European Communities

112. The Commission of the European Communities is of the view that the application to the Court submitted by the EFTA Surveillance Authority would fall into the category of proceedings under Article 228 EC.

113. As regards product coverage, the Commission of the European Communities shares the view of the EFTA Surveillance Authority. Essentially two types of alcoholic beverages are at stake: the so-called "alcopops", i.e., low-alcohol mixed drinks, whether fermented or spirits-based, and the mild wines of the sort falling under heading no. 2205.

114. Reference is made to *Franzén*[62] and *Gundersen*[63] rulings. Applying the approach taken by the EFTA Court, the Commission of the European Communities is of the view that wine-based and spirits-based products are subject to "substantially different treatment by law", as compared to beer, as long as beer can be licensed to be sold outside the monopoly outlets, which is not possible for other alcoholic beverages of the same alcohol content.

115. As regards the competitive relationship, the Commission of the European Communities is of the view that it is not the criterion of the strictly identical nature of the products but of the similar and comparable use that is relevant.[64]

116. The Commission of the European Communities disagrees with the contention of the Government of Norway to the effect that alcopops, if made more readily available, would be consumed in addition to beer, and thus increase overall alcohol consumption among young people. Nothing has been put forth to indicate that young people would have more money to spend on drinks. The Commission submits that alcopops would tend to be consumed instead of beer or, more precisely, in a given situation, the absolute amount of alcohol consumed would not increase but, rather, one drink would be replaced with another. This also would tend to show the competitive interaction between the two products.

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62 See footnote 26, *Franzén*.

63 See footnote 1, *Gundersen*.

64 In a judgment in Case 169/78 *Commission* v *Italy* [1980] ECR 385, the Court of Justice of the European Communities considered as similar products those "which have similar characteristics and meet the same needs from the point of view of consumers".

The Commission of the European Communities takes the position that, from a consumer point of view, the different beverages, beer and wine and spirits-based alcoholic beverages, do "meet the same needs" and are interchangeable.

117. The EFTA Court has already found that medium-strength beer and wine are capable of meeting identical needs. This would also be the case regardless of whether those two types of beverages are intended to be consumed at the table or in socialising, particularly if the wine is a mild wine. The wine and spirits-based alcoholic beverages, including alcopops, would compete as social drinks. Consequently, the Commission of the European Communities takes the view that there is a competitive relationship between beer, mild wine and spirits- and wine-based alcoholic beverages as social drinks, and that they therefore warrant equal treatment.

118. The EC Treaty provision on monopolies reconciles the possibility for Member States to maintain certain monopolies of a commercial character as instruments for the pursuit of an aim of public interest, in this case the protection of health. The Commission of the European Communities maintains that a commercial monopoly must be operated so that trade in goods from other Member States is not put at a disadvantage, in law or in fact. Wine- and spirits-based beverages, mild wines and alcopops, all products covered by Article 16 EEA, seem to be mostly imported.

119. The characteristics of the wine- and spirits-based beverages, as a product type, hardly seem to be an objectively distinguishable product group because there is no common definition of those drinks, and particularly not of alcopops.

120. The Norwegian authorities have not given reasons for the exclusion of mild wines from the sphere of the exception to the retail monopoly. Even if those products should prove to be rather rare in the inventory of the monopoly, the availability of a grocery channel would serve as a catalyst to bring such products on the market.

121. As to the arguments put forward by the Government of Norway to justify why alcopops are subject to differential treatment, the Commission argues as follows. Leaving aside the difficulties of defining this product group, it is clear from the data in the Application of the EFTA Surveillance Authority relating to alcohol consumption in Norway that beer is the most commonly consumed alcoholic beverage. Almost all (95%) of the beer consumed in Norway have an alcohol content of less than 4.75% and, accordingly, benefit from the possibility of being sold in the grocers' shops, in addition to the outlets of the monopoly. The data further show that alcopops account for no more than 9% of alcohol consumption for young people between 15 and 20 years of age. It follows that beer seems to be the prime source of any health or social problems which might result from the consumption of alcohol. At any rate, because of the huge difference in consumption in absolute and relative terms between beer and alcopops, the possibility that alcopops would contribute to such problems to a

lesser degree than beer, even if they were allowed to be sold in grocers' shops on the same footing as beer, should not be excluded. Based on the relevant data, it would appear more expedient, from a health viewpoint, to keep beer out of the grocers' shops.

122. The ready-mixed drinks of gin and tonic are presumably sold in bottles with another content (for instance 33 cl) than pure gin (for instance 70 cl). Gin will be mixed with other alcoholic beverages, bought in the monopoly outlets, or with different kinds of soft beverages, tonic waters, which can be purchased in any grocery shop. A ready-mixed gin and tonic drink has the same alcohol content, unlike self-mixed drinks, which can vary depending on the brand of gin, the brand of tonic water, and the volume of spirits. These different products cannot be considered as interchangeable and, therefore, do not warrant the same treatment.

123. In the view of the Commission of the European Communities, the argument of the Government of Norway to the effect that they have not been able to find other dividing lines for drinks to be sold within or outside the monopoly cannot be accepted.

124. The last argument submitted by the Government of Norway to the effect that another EEA State, Sweden, may be in breach of an EC Treaty provision does not justify a violation of the EEA Agreement by Norway. Each case must be assessed on its own merits. The Court of Justice of the European Communities has ruled that "[a] Member State cannot justify its failure to fulfil obligations under the [EC Treaty] by pointing to the fact that other Member States have also failed, and continue to fail, to fulfil their own obligations".[65] In addition, as far as the Commission is aware of the situation in Sweden, all beverages containing up to 3.5% alcohol by volume may be sold outside the Swedish retail monopoly.

125. The Commission of the European Communities is of the view that, in general, it seems difficult to maintain that it would be "inherent in the existence of the monopoly", a monopoly upheld on grounds of the protection of health from adverse effects of alcohol, to establish the dividing line based on product type and not on the level of alcohol content. Alcopops are not the only products which seem to be affected by the Norwegian system; there are also mild wines and other spirits-based beverages which are subject to the same differential treatment.

126. In the light of the foregoing, the Commission of the European Communities is of the view that the Norwegian system of differential treatment between beer containing between 2.5% and 4.75% of alcohol by volume and other beverages with the same content of alcohol indicates arbitrary discrimination which does not seem to be justified as being inherent in the

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[65] Case C-146/89 *Commission* v *UK* [1991] ECR I-3533; Case 52/75, *Commission* v *Italy* [1976] ECR 277.

existence or operation of the monopoly and, therefore, is contrary to Article16 EEA.

127. As regards possible breach of Article 11 EEA by the application of more restrictive measures regarding licences to serve alcoholic beverages with an alcohol content of between 2.5% and 4.75% by volume, mostly imported from other EEA States, as compared to beer with the same alcohol content, mainly produced domestically, the Commission shares the view of the EFTA Surveillance Authority, on reasons put forward above, that the domestically-produced beer products containing between 2.5% and 4.75% alcohol by volume are treated differently from mostly foreign-produced spirits-based beverages, which renders access to the Norwegian market more difficult for the latter. In other words, the Norwegian licensing system does not affect the marketing of domestic products and products from other EEA States in the same manner. Hence, the Commission of the European Communities is of the view that the Norwegian licensing system is contrary to Article 11 EEA and, therefore, must be assessed under Article 13 EEA if justification is to be found.

128. The grounds for justification under Article 13 EEA are not the subject of dispute between the parties to the present case. Rather, the dispute relates to the protection of health. Accordingly, the assessment of whether the Norwegian measures are in violation of Article 11 EEA must focus on whether the measures are necessary and proportionate for attaining the objective of health protection.

129. The Commission of the European Communities notes that, according to the Application of the EFTA Surveillance Authority, beer is by far the beverage most consumed by young people.[66] Under the licensing system, beer may only be served to persons of 18 years of age or older, and spirits may only be served to persons of 20 years of age or more.

130. The Norwegian concerns are mainly focused on alcopops, which, as asserted, by taste, name and bottle are designed to attract young people. If these are spirits-based beverages, they will fall under the licensing condition to be served only to persons of 20 years and more. The Commission of the European Communities does not know what age restriction applies to the serving of wines (in the product coverage) and whether the approximately 2 500 more licences which permit the serving of beer but not of spirits are related to establishments frequented particularly by teenagers. Such a differentiation related to the establishments would be acceptable, but the licensing would, in that case, be linked to the granting of the licence and the target group visiting the restaurant/establishment, rather than the alcohol content of the beverages.

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66 62.3% for boys 15-20 years of age, and 55% for girls 15-20 years of age.

131. The Commission of the European Communities takes the position that the licensing for the serving of alcoholic beverages containing between 2.5% and 4.75% alcohol by volume is a selling arrangement which, due to the differential treatment of domestic and foreign products with the same alcohol content, falls under the prohibition laid down in Article 11 EEA, and does not appear to be justified under Article 13 EEA.

Carl Baudenbacher
Judge-Rapporteur

Case E-8/00

Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions) with Norsk Kommuneforbund (Norwegian Union of Municipal Employees)
v
Kommunenes Sentralforbund (Norwegian Association of Local and Regional Authorities) and Others

(Competition rules - Collective agreements - Transfer of occupational pension scheme)

Summary of the Judgment

1. The legal foundation for dealing with a collective agreement is to be found in national law. However, both national law and collective agreements must operate within the framework of EEA law.

2. The elements to be satisfied in order to warrant a finding that a collective agreement must be regarded as falling outside the scope of the prohibition contained in Article 53(1) EEA are: first, the requirement that an agreement has been entered into in the framework of collective bargaining between employers and employees, and second, the requirement that the agreement is concluded in pursuit of the objective of improving conditions of work and employment.

The examination must include an assessment of whether the purpose of any provisions concerning a supplementary pension insurance scheme and its operation, is to improve remuneration, or is extraneous to the improvement of conditions of work and employment. Where it is clear that the intended, immediate and practical effect of any such clause is to improve conditions of work and employment, inherent restrictions on competition must be accepted.

Where, on the face of it, an element of a collective agreement pursues the improvement of conditions of work and employment, but its practical implementation is actually intended to further other interests, the protection of the agreement from Article 53 EEA can not be upheld.

When examining the several elements of a collective agreement, the national court must consider the aggregate effect of the provisions.

Sak E-8/00

Landsorganisasjonen i Norge
med Norsk Kommuneforbund
mot
Kommunenes Sentralforbund med flere

(Konkurransregler – Tariffavtaler – Overføring av tjenestepensjonsordninger)

Sammendrag av avgjørelsen

1. Det rettslige grunnlaget for behandlingen av tariffavtaler må finnes i nasjonal rett. Både nasjonal rett og tariffavtaler må imidlertid virke innenfor rammen av EØS-retten.

2. Følgende krav må være oppfylt for at en tariffavtale kan anses å falle utenfor anvendelsesområdet for forbudet i artikkel 53 EØS: For det første kravet om at en avtale er inngått etter kollektive forhandlinger mellom arbeidsgivere og arbeidstakere, og for det andre, kravet om at avtalen er inngått for å forfølge det formål å forbedre arbeids- og ansettelsesvilkår.

Vurderingen må omfatte en bedømmelse av hvorvidt formålet med bestemmelsene om supplerende pensjonsordninger, og om driften av disse, er å forbedre arbeidsvederlaget, eller om formålet ligger utenfor området for forbedring av arbeids- og ansettelsesvilkår. Hvis det er klart at den tilsiktede, umiddelbare og praktiske virkningen av slike bestemmelser er å forbedre arbeids- og ansettelsesvilkår må derav følgende konkurranse-begrensninger aksepteres.

Hvor et element i en tariffavtale tilsynelatende tar sikte på å forbedre arbeids- og ansettelsesvilkår, mens måten det praktiseres på viser at det egentlig er ment å fremme andre interesser, kan avtalens beskyttelse mot artikkel 53 EØS ikke opprettholdes.

Ved vurderingen av de ulike elementene i en tariffavtale må den nasjonale domstolen ta i betraktning den samlede virkningen av bestemmelsene.

3. Med hensyn til den mulige anvendelsen av EØS-avtalens

3. 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 carries on economic activities of an industrial or commercial nature by offering or demanding goods or services in the market. Article 53 EEA may only apply to the latter.

Article 53 EEA does not apply to municipalities acting in their capacity as public authorities. However, when a municipality engages in economic activity, it may, in that capacity, be an undertaking within the meaning of Article 53 EEA.

If an organisation of municipalities engages in collective bargaining in respect of employees that are engaged exclusively in the realm of public administration, neither the organisation nor its members could in that respect be considered an undertaking within the meaning of Article 53 EEA. However, a municipality that, as a member of an organisation of employers, is protecting its interests as an employer engaged in economic activities, may, within that organisation, act as an undertaking within the meaning of Article 53 EEA.

A municipality may constitute an undertaking when, in its capacity as employer, it becomes bound by a collective agreement without being party thereto.

Provisions of a collective agreement may be regarded as implying a decision by an association of undertakings. Such provisions may also be regarded as an agreement between undertakings.

4. As long as the contested provisions actually pursue the objectives that place them outside the scope of Article 53 EEA, any resulting restriction of competition is accepted.

If provisions of a collective agreement fall within the scope of Article 53 EEA, and it is found that these provisions in effect require that municipalities obtain supplementary pension insurance services from specific insurers, thereby excluding or severely limiting their possibility of selecting other qualified service providers, these provisions may, depending on the factual, economic and legal circumstances, constitute a restriction of competition within the meaning of Article 53 EEA.

5. Whether an agreement restricts competition, and thereby infringes Article 53 EEA, is a legal question that must be examined in the light of economic considerations. In this assessment, account must be taken of the actual conditions in which the agreement functions. The individual provisions of the agreement should not only be examined separately, but must also be viewed in connection with other provisions of the agreement and the agreement as a whole. Separate provisions functioning together may in aggregate have as their object or effect the restriction of competition within the meaning of Article 53 EEA, even though none of those provisions, viewed separately, would be contrary thereto.

6. An association of municipalities, which is an interest and employer organisation, may be regarded as an undertaking under Article 54 EEA when negotiating a collective agreement.

7. It is for the national court to decide, on the basis of all relevant factual, economic and legal circumstances, whether it is compatible with Article 54 EEA for an undertaking in a dominant position to conclude or to practise the provisions of the Basic Collective Agreement at issue.

konkurranseregler på en offentligrettslig enhet, må det skilles mellom situasjoner hvor enheten utøver offentlig myndighet, og situasjoner hvor den utøver økonomisk virksomhet av en industriell eller kommersiell art gjennom tilbud eller etterspørsel av varer eller tjenester i markedet. Artikkel 53 EØS kan bare anvendes i det sistnevnte tilfellet.

Artikkel 53 EØS kan ikke anvendes på kommuner når de opptrer i sin egenskap av å være offentlig myndighet. Når en kommune deltar i økonomisk virksomhet, for eksempel tilbyr varer og tjenester i markedet mot vederlag, kan den imidlertid, i denne egenskap, være et foretak etter artikkel 53 EØS.

Hvis en sammenslutning av kommuner deltar i kollektive forhandlinger som gjelder arbeidstakere som er beskjeftiget utelukkende innen offentlig administrasjon, kan verken organisasjonen eller dens medlemmer i dette henseendet anses som et foretak i henhold til artikkel 53 EØS. En kommune som i egenskap av å være medlem av en arbeidsgiverorganisasjon beskytter sine interesser som arbeidsgiver engasjert i økonomisk virksomhet, kan imidlertid, innenfor denne organisasjonen, opptre som et foretak etter artikkel 53 EØS.

En kommune kan anses som et foretak når den i egenskap av å være arbeidsgiver blir bundet av en tariffavtale uten å være part i denne.

Bestemmelser i en tariffavtale kan bli ansett å innebære en beslutning av en sammenslutning av foretak. Slike bestemmelser kan også bli ansett som en avtale mellom foretak.

4. Så lenge de omstridte bestemmelsene faktisk forfølger de formålene som plasserer dem utenfor anvendelsesområdet for artikkel 53 EØS, må derav følgende konkurransebegrensninger aksepteres.

Dersom bestemmelsene i en tariffavtale faller innenfor artikkel 53 EØS og en finner at virkningen av disse bestemmelsene er at kommunene må anskaffe supplerende pensjonsordninger fra bestemte forsikringsleverandører, og derved fratar, eller sterkt begrenser, kommunenes mulighet til å velge andre kvalifiserte leverandører, kan disse bestemmelsene avhengig av de faktiske, økonomiske og rettslige omstendigheten, utgjøre en begrensning av konkurransen som påvirker handelen mellom EØS-statene i henhold til artikkel 53 EØS.

5. Hvorvidt en avtale begrenser konkurransen, og derfor er i strid med artikkel 53 EØS, er et rettslig spørsmål som må vurderes på bakgrunn av økonomiske betraktninger. I denne vurderingen må det tas hensyn til under hvilke faktiske omstendigheter avtalen fungerer. Avtalens enkelte bestemmelser må ikke bare vurderes separat, men må også ses i sammenheng med andre bestemmelser i avtalen og avtalen i sin helhet. Enkeltbestemmelser kan samlet ha som formål eller virkning å begrense konkurransen i henhold til artikkel 53 EØS. Det er uten betydning at det ikke kan påvises at noen av bestemmelsene enkeltvis har slik virkning.

6. En sammenslutning av kommuner, som er en interesse- og arbeidsgiverorganisasjon, kan anses som et foretak etter artikkel 54 EØS ved forhandlingen av en tariffavtale.

7. Det er den nasjonale domstolens oppgave å avgjøre, på grunnlag av alle relevante faktiske, økonomiske og rettslige omstendigheter i saken, om det er forenlig med artikkel 54 EØS at et foretak med dominerende stilling inngår eller praktiserer de omstridte bestemmelsene i hovedtariffavtalen.

JUDGMENT OF THE COURT

22 March 2002*

(Competition rules - Collective agreements - Transfer of occupational pension scheme)

In Case E-8/00

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 Arbeidsretten (Labour Court) of Norway for an Advisory Opinion in a case pending before it between

Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions) with Norsk Kommuneforbund (Norwegian Union of Municipal Employees)

supported by

Kommunalansattes Fellesorganisasjon (Norwegian Confederation of Municipal Employees),

and

Kommunenes Sentralforbund (Norwegian Association of Local and Regional Authorities)

Hamarøy kommune and Tysfjord kommune

Steigen kommune and Hitra kommune

Tana kommune

Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune

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* Language of the Request: Norwegian.

DOMSTOLENS DOM

22 mars 2002*

(Konkurransregler – Tariffavtaler – Overføring av tjenestepensjonsordninger)

I sak E-8/00

ANMODNING til EFTA-domstolen om rådgivende uttalelse i medhold av artikkel 34 i Avtale mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol fra Arbeidsretten i saken for denne domstol mellom

Landsorganisasjonen i Norge,
med Norsk Kommuneforbund

støttet av

Kommunalansattes Fellesorganisasjon

og

Kommunenes Sentralforbund

Hamarøy kommune og Tysfjord kommune

Steigen kommune og Hitra kommune

Tana kommune

Kvam Kommune, Kvinnherad Kommune, Lørenskog Kommune, Os Kommune, Vikna Kommune og Volda Kommune

* Språket i anmodningen om en rådgivende uttalelse: Norsk.

on the interpretation of Articles 53 and 54 of the EEA Agreement.

THE COURT,

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

Registrar: Lucien Dedichen

having considered the written observations submitted on behalf of:

– the Plaintiff, the Norwegian Federation of Trade Unions, represented by Advokat Atle Sønsteli Johansen and Advokat Håkon Angell, together with the Norwegian Union of Municipal Employees, represented by Advokat Geir Høin;

– the Intervener, the Norwegian Confederation of Municipal Employees, represented by Advokat Vegard Veggeland;

– the Defendant, the Norwegian Association of Local and Regional Authorities, represented by Advokat Per Kristian Knutsen and Advokat Astrid Merethe Svele;

– the Defendants, Hamarøy kommune and Tysfjord kommune, represented by Advokat Haakon Blaauw and Advokat Dag Steinfeld;

– the Defendants, Hitra kommune and Steigen kommune, represented by Advokat Siri Teigum and Advokat Svein Aage Valen;

– the Defendant, Tana kommune, represented by Advokat Tarjei Thorkildsen, Advokat Kari B. Andersen, and Advokat Jan Magne Langseth;

– the Defendants, Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune, represented by Advokat Wilhelm Matheson and Advokat Jan Fougner;

– the Government of Norway, represented by Marianne Djupesland, Adviser, Royal Ministry of Foreign Affairs, acting as Agent;

– the Government of Iceland, represented by Magnús Kjartan Hannesson, Legal Adviser, Ministry of Foreign Affairs, acting as Agent;

om tolkningen av EØS-avtalens artikkel 53 og 54.

DOMSTOLEN,

sammensatt av: President Thór Vilhjálmsson (saksforberedende dommer) og dommerne Carl Baudenbacher og Per Tresselt

Justissekretær: Lucien Dedichen

etter å ha vurdert de skriftlige saksfremstillinger inngitt av:

– saksøker, Landsorganisasjonen i Norge, representert ved advokatene Atle Sønsteli Johansen og Håkon Angell, med Norsk Kommuneforbund, representert ved advokat Geir Høin;

– intervenienten, Kommunalansattes Fellesorganisasjon, representert ved advokat Vegard Veggeland;

– saksøkte, Kommunenes Sentralforbund, representert ved advokatene Per Kristian Knutsen og Astrid Merethe Svele;

– saksøkte, Hamarøy kommune og Tysfjord kommune, representert ved advokatene Haakon Blaauw og Dag Steinfeld;

– saksøkte, Hitra kommune og Steigen kommune, representert ved advokatene Siri Teigum og Svein Aage Valen;

– saksøkte, Tana kommune, representert ved advokatene Tarjei Thorkildsen, Kari B. Andersen og Jan Magne Langseth;

– saksøkte, Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune og Volda kommune, representert ved advokatene Wilhelm Matheson og Jan Fougner;

– Den norske regjering, representert ved Marianne Djupesland, rådgiver, Utenriksdepartementet, som partsrepresentant;

– Den islandske regjering, representert ved Magnús Kjartan Hannesson, juridisk rådgiver, Utenriksdepartementet, som partsrepresentant;

– the Government of Sweden, represented by Anders Kruse, Director-General for Legal Affairs, Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Per Andreas Bjørgan, Officer, Legal and Executive Affairs Department, acting as Agent;

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

having regard to the Report for the Hearing,

having heard the oral observations of the Plaintiff, represented by Atle Sønsteli Johansen; the Defendant, the Norwegian Association of Local and Regional Authorities, represented by Per Kristian Knutsen; the Defendants, Hitra kommune and Steigen kommune, represented by Siri Teigum; the Defendants Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune, represented by Wilhelm Matheson; the Defendants Hamarøy kommune and Tysfjord kommune, represented by Haakon Blaauw; the Government of Norway, represented by Beate Berglund Ekeberg; the EFTA Surveillance Authority, represented by Per Andreas Bjørgan; and the Commission of the European Communities, represented by Wouter Wils, at the hearing on 30 and 31 October 2001,

gives the following

Judgment

I Facts and procedure

1 By a reference dated 27 September 2000, registered at the Court on 2 October 2000, Arbeidsretten (Labour Court of Norway), submitted a Request for an Advisory Opinion in connection with a case brought before it by the Plaintiff, Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions, hereinafter "LO"), with Norsk Kommuneforbund (Norwegian Union of Municipal Employees, hereinafter "NKF"), supported by Kommunalansattes Fellesorganisasjon (Norwegian Confederation of Municipal Employees, hereinafter "KFO") and Akademikernes Fellesorganisasjon (Confederation of Academic and Professional Unions in Norway) as interveners, against Defendants: Kommunenes Sentralforbund (Norwegian Association of Local and Regional Authorities, hereinafter "KS"); Hamarøy kommune and Tysfjord kommune; Steigen kommune and Hitra kommune; Alta kommune and Tana kommune; Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune (hereinafter collectively the "Defendants").

– Den svenske regjering, representert ved Anders Kruse, departementsråd, Utenriksdepartementet, som partsrepresentant;

– EFTAs overvåkningsorgan, representert ved Per Andreas Bjørgan, saksbehandler, avdelingen for juridiske saker og eksekutivsaker, som partsrepresentant;

– Kommisjonen for De europeiske fellesskap, representert ved Anthony Whelan og Wouter Wils, ansatt i rettsavdelingen, som partsrepresentanter,

med henvisning til rettsmøterapporten,

og etter å ha hørt de muntlige innleggene fra saksøker, Landsorganisasjonen i Norge, representert ved Atle Sønsteli Johansen; saksøkte, Kommunenes Sentralforbund**,** representert ved Per Kristian Knutsen; Hitra kommune og Steigen kommune, representert ved Siri Teigum; Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune og Volda kommune, representert ved Wilhelm Matheson; Hamarøy kommune og Tysfjord kommune, representert ved Haakon Blaauw; Den norske regjering, representert ved Beate Berglund Ekeberg; EFTAs Overvåkningsorgan, representert ved Per Andreas Bjørgan; og Kommisjonen for De europeiske fellesskap, representert ved Wouter Wils, under høringen den 30 og 31 oktober 2001,

avsier slik

Dom

I Faktum og prosedyre

1 Ved en beslutning datert 27 september 2000, registrert ved EFTA-domstolen 2 oktober 2000, anmodet Arbeidsretten om en rådgivende uttalelse i en sak innbrakt for denne mellom saksøker Landsorganisasjonen i Norge (heretter "LO"), med Norsk kommuneforbund (heretter "NKF"), støttet av Kommunalansattes Fellesorganisasjon, (heretter "KFO") som hjelpeintervenient, mot de saksøkte: Kommunenes Sentralforbund (heretter "KS"); Hamarøy kommune og Tysfjord kommune; Steigen kommune og Hitra kommune; Alta kommune og Tana kommune; Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune og Volda kommune, (heretter i fellesskap "saksøkte").

2 The dispute before Arbeidsretten concerns the Basic Collective Agreement for Municipalities, etc., for the Contract Period 1 May 1998 to 30 April 2000 (*Hovedtariffavtalen for kommuner, m.v. for tariffperioden 1. mai 1998 – 30. April 2000)* (hereinafter the "Basic Collective Agreement"), between, on the one hand, various bodies representing municipal employees and, on the other hand, KS. More precisely it is disputed whether the defendant municipalities had breached certain provisions contained in chapter 2 of the Basic Collective Agreement, in particular paragraphs 2, 3 and 4 in Section 2.1.8, when they transferred their occupational pension insurance scheme from one supplier, Kommunal Landspensjonskasse (hereinafter "KLP"), a private mutual life insurance company, to other insurance companies. There is also the issue of the legal consequences of any such breach.

3 The Plaintiff argues that the municipalities, in transferring their occupational pension insurance scheme, breached several of the provisions of the Basic Collective Agreement. The defendant municipalities have submitted that the claims must be rejected and argue *inter alia* that several of the provisions in the Basic Collective Agreement invoked by the Plaintiff are void because they are contrary to Articles 53 and 54 EEA and are therefore not legally binding.

The Municipalities and their status as employers

4 The municipalities and county municipalities in Norway are established and regulated by Act No. 107 of 25 September 1992 Concerning Municipalities and County Municipalities (*kommuneloven*, hereinafter the "Local Government Act"). In the municipal sector, there are roughly 550 000 employees. Of these, about 100 000 are teachers, who are municipal employees but who are covered by collective agreements with the State. Thus, in the rest of the municipal sector there are around 450 000 employees. Of these, roughly 430 000 are directly employed by the municipalities, of whom approximately 60 000 in the municipality of Oslo. The aforementioned figures are estimates based on available statistical sources with reference to the labour market situation in late 1998/early 1999.

5 The principal Defendant, KS, is a membership organisation and interest group, and is also an employers' association. All municipalities and county municipalities are currently members of KS and are affiliated with KS's employer activity. Oslo municipality is, however, exempt from following KS collective agreements. Thus, as an employers' association KS has 434 municipalities and 18 county municipalities as members. These have a total of around 370 000 employees (excluding teachers). Of these, some – such as those filling temporary vacancies and positions, etc. – fall outside the scope of application of the basic collective agreements for municipalities, and it is uncertain exactly how many employees are covered by the provisions on occupational pensions.

2 Saken for Arbeidsretten gjelder hovedtariffavtalen for kommuner, mv for tariffperioden 1 mai 1998 - 30 april 2000 (heretter "hovedtariffavtalen") mellom, på den ene siden, ulike organer som representerer kommunalt ansatte, og på den andre siden, KS. Det omtvistede spørsmålet er om de saksøkte kommunene, ved å overføre sine forsikringsordninger for tjenestepensjon fra en leverandør, Kommunal Landspensjonskasse (heretter "KLP"), et privat gjensidig livsforsikringsselskap, til andre forsikringsselskaper, har misligholdt visse bestemmelser i hovedtariffavtalens kapittel 2, særlig avsnittene 2, 3 og 4 i punkt 2.1.8. Tvisten gjelder også spørsmålet om rettsvirkningene av eventuelle slike brudd.

3 Saksøkeren hevder at kommunene, ved å overføre sine forsikringsordninger for tjenestepensjon, har misligholdt flere av bestemmelsene i hovedtariffavtalen. De saksøkte kommunene har påstått seg frifunnet, og har blant annet anført at flere av bestemmelsene i hovedtariffavtalen som er påberopt av saksøkeren er ugyldige fordi de er i strid med artikkel 53 og 54 EØS, og derfor ikke er rettslig bindende.

Kommunene og deres status som arbeidsgivere

4 Kommunene og fylkeskommunene i Norge er etablert og regulert av lov av 25 september 1992 nr 107 om kommuner og fylkeskommuner (heretter "kommuneloven"). I kommunal sektor er det totalt sett omlag 550 000 arbeidstakere. Av disse er ca 100 000 lærere, som er kommunalt ansatte, men som omfattes av tariffavtaler med staten. I kommunal sektor for øvrig er det således ca 450 000 arbeidstakere. Av disse er omlag 430 000 ansatt i kommunene, herav ca 60 000 i Oslo kommune. Tallene foran er anslag som er basert på tilgjengelige statistiske kilder med referanse til arbeidsmarkedssituasjonen ved utgangen av 1998/tidlig 1999.

5 Hovedsaksøkte, KS, er en medlems- og interesseorganisasjon, og er også en arbeidsgiverforening. Samtlige kommuner og fylkeskommuner er i dag medlemmer av KS, og alle er tilknyttet KS' arbeidsgivervirksomhet. Oslo kommune er imidlertid fritatt fra å følge KS' tariffområde. Som arbeidsgiverforening har KS således 434 kommuner og 18 fylkeskommuner som medlemmer. Disse har til sammen ca 370 000 ansatte (lærere unntatt). Av disse faller noen - som endel vikarer, ekstrahjelper ol - utenfor anvendelsesområdet for hovedtariffavtalene for kommuner, og det er usikkert hvor mange som for øvrig omfattes av deres bestemmelser om tjenestepensjon.

6 KS, as an employer association, can enter into collective agreements with binding effect for its members. , Section 28 of the Local Government Act allows municipalities and county municipalities to delegate the power to conclude such agreements to "an association of municipalities and county municipalities." This has been done by all of the municipalities/county municipalities who are affiliated with KS' employer activities. The power of KS to conclude collective agreements is stated in its Articles of Association.

Trade Unions

7 There are in all 39 "unions" ("*forbund*") or "trade unions" ("*fagforbund*") representing employees in the municipal sector in Norway. In negotiations with KS for the establishment and revision of collective agreements, the 39 unions are represented through their "joint negotiations bodies" ("*forhandlingssammenslutninger*"). The collective agreements are generally concluded between KS and the individual union as parties.

8 Consequently, the Basic Collective Agreement is not just one agreement for municipalities, etc., but rather consists of several basic collective agreements, with the relevant union as party on the employee side in the individual agreements and KS as party on the employer side in all of the agreements. For the contract period 1998-2000 there were 39 different basic collective agreements for employees in municipalities and county municipalities. In practice, however, these basic collective agreements are identical in content in so far as it has any relevance to the present case. The Basic Collective Agreement covers, in the main, all employees who are employed by municipalities and county municipalities. However, for certain activities and for enterprise members, KS has separate collective agreements containing different regulations on certain points, *inter alia* on pension matters.

Collective agreements as legal instruments

9 Under the Norwegian Act No. 1 of 5 May 1927 Relating to Labour Disputes (*arbeidstvistloven*, hereinafter the "Labour Disputes Act"), a collective agreement is understood to mean an agreement "respecting conditions of employment and salary or other matters relating to employment." It must be concluded between an employer or employers' association on the one hand and a "trade union" on the other, see section 1(8) of the Act. A collective agreement is, under Norwegian law, an agreement that is legally binding. Firstly, as such, it creates obligations for all parties to the collective agreement. Next, it also binds the members of the parties to the collective agreement. The individual employers (in this case, the municipalities) and the individual employees who are employed by the employers in question, and who are members of the organisations that are party to the collective agreement, are legally bound by the collective agreement.

6 KS som arbeidsgiverforening kan inngå tariffavtaler med bindende virkning for sine medlemmer. Kommunelovens §28 gir kommuner og fylkeskommuner adgang til å overdra kompetansen til å inngå slike avtaler til "en sammenslutning av kommuner og fylkeskommuner". Dette er gjennomført av alle de kommuner/fylkeskommuner som er tilsluttet arbeidsgivervirksomheten til KS. KS' kompetanse til å inngå tariffavtaler fremgår av dets vedtekter.

Fagforeninger

7 Det er i alt 39 "forbund" eller "fagforbund" som representerer arbeidstakere i kommunal sektor i Norge. Ved forhandlinger med KS om inngåelse og endring av tariffavtaler er de 39 forbundene representert gjennom sine "forhandlingssammenslutninger". Tariffavtalene inngås vanligvis med KS og den enkelte fagforening som parter.

8 Hovedtariffavtalen er derfor ikke bare én avtale for kommuner, men består av flere hovedtariffavtaler, med vedkommende forbund som part på arbeidstakersiden i den enkelte avtale, og KS som part på arbeidsgiversiden i alle avtalene. For tariffperioden 1998-2000 var det i alt 39 forskjellige hovedtariffavtaler for arbeidstakere i kommuner og fylkeskommuner. I praksis er imidlertid disse hovedtariffavtalene innholdsmessig like så langt det har noen betydning her. Hovedtariffavtalen omfatter i hovedsak alle arbeidstakere som er ansatt i kommuner og fylkeskommuner. For visse virksomheter og bedriftsmedlemmer har imidlertid KS særskilte tariffavtaler som inneholder avvikende bestemmelser på enkelte punkter, blant annet om pensjonsforhold.

Tariffavtalens rettslige stilling

9 Som tariffavtale regnes etter den norske lov av 5 mai 1927 nr 1 om arbeidstvister, (heretter "arbeidstvistloven"), en avtale om "arbeids- og lønnsvilkår eller andre arbeidsforhold". Den må inngås mellom en arbeidsgiver eller en arbeidsgiverforening på den ene siden og en fagforening på den andre siden, se lovens § 1(8). En tariffavtale er i henhold til norsk rett en rettslig bindende avtale. For det første er en tariffavtale, som avtale, forpliktende for alle avtalepartene. Dernest er den bindende også for avtalepartenes medlemmer. De enkelte arbeidsgiverene (som her kommunene) og de enkelte arbeidstakerene som er ansatt hos de berørte arbeidsgiverene, og som er medlemmer av de organisasjonene som er parter i tariffavtalen, er rettslig bundet av tariffavtalen.

Furthermore, a collective agreement binds only those employers and employees who are members of the organisations concerned. Thus, under Norwegian law, a collective agreement has no general validity ("universal application" or *erga omnes* effect). Nor is there any Norwegian legislation of relevance to the present case giving public authorities the power to stipulate that a collective agreement is to be "with effect for everyone" and binding for all employers (or employees) in a branch, sector, or the like. Who is legally bound by or has rights under a collective agreement depends on the individual collective agreement and the membership in the organisations participating in the agreement.

10 Furthermore, the parties to the collective agreement have full control over the collective agreement in that they may modify it, even during the course of the contract period. The parties also control the interpretation of the collective agreement, in that, if the parties agree on a particular interpretation of a provision, that interpretation will, as a rule, be the one applied. The interpretation agreed on by the parties is also binding for the members in the same manner as the agreement itself.

The Norwegian pension system

11 Briefly, the Norwegian pension system is based on: a) benefits under the National Insurance Scheme, which are statutory pension benefits pursuant to Act No. 19 of 28 February 1997 Relating to National Insurance Pension Benefits (*Folketrygdloven*); b) group occupational pension schemes for supplementary pensions in addition to benefits under the National Insurance Scheme; and, c) individual pension and life insurance contracts, which may be entered into on a voluntary basis. Only group occupational pension schemes for supplementary pensions are considered in the case at hand.

12 Supplementary occupational pension schemes are characterised by the fact that they are related to work and they are collective. Such schemes may be founded in law and be compulsory; otherwise, they are, in principle, voluntary. Such pension schemes are to be found in both the public sector – including in the municipal sector – and in the private sector. A common trait of occupational pension schemes is that they are benefit-based. Otherwise, the content, scope, etc. of the schemes vary.

13 Presently, all municipalities and county municipalities have occupational pension schemes. The authority to establish or join occupational pension schemes follows expressly from section 24, fourth paragraph of the Local Government Act. The purpose of that provision was first and foremost to provide a more definitive basis of authority for State regulation, control and supervision of occupational pension schemes. Section 24, paragraph 4, second sentence of the Local Government Act authorises the promulgation of detailed provisions on the material framework for municipal occupational pension schemes, their content and scope. The present rules are contained in Regulation No. 374 of 22 April

Videre binder tariffavtalen bare de arbeidsgiverene og arbeidstakerene som er medlemmer av vedkommende organisasjoner. Etter norsk rett har en tariffavtale således ikke noen generell gyldighet ("allmenngyldighet", eller *"erga omnes"*-virkning). I norsk rett er det heller ingen lovbestemmelser av betydning for saken her som gir offentlige myndigheter adgang til å bestemme at en tariffavtale skal gjøres allmenngyldig og forpliktende for alle arbeidsgivere (eller arbeidstakere) i en bransje, sektor el. Hvem som er rettslig bundet eller har rettigheter i henhold til en tariffavtale, beror på tariffavtalen og medlemskapet i de avtalesluttende organisasjonene.

10 Videre må det nevnes at tariffpartene råder over tariffavtalen på den måten at de kan modifisere den, selv i kontraktperiodens løp. Avtalepartene har også kontroll med fortolkningen av tariffavtalen i den forstand at dersom partene er enige om en viss forståelse av en bestemmelse, skal, som alminnelig regel, denne forståelsen av bestemmelsen legges til grunn. Partenes felles forståelse er også bindende for deres medlemmer, på samme måte som tariffavtalen selv.

Det norske pensjonssystemet

11 I korthet er det norske pensjonssystemet basert på: a) Folketrygdens pensjonsytelser, som er lovbaserte pensjonsytelser i henhold til lov om folketrygd av 28 februar 1997 nr 19 (folketrygdloven); b) kollektive "tjenestepensjonsordninger" for supplerende pensjon i tillegg til folketrygdens ytelser og c) individuelle pensjons- og livsforsikringsavtaler, som kan tegnes på frivillig basis. I den foreliggende saken vurderes bare kollektive tjenestepensjonsordninger for supplerende pensjon.

12 Supplerende tjenestepensjonsordninger er karakterisert ved at de er knyttet til arbeid og at de er kollektive. Slike ordninger kan være basert på lov og være obligatoriske, ellers er de, prinsipielt sett, frivillige. Slike pensjonsordninger finnes både i offentlig sektor - herunder i kommunesektoren - og i privat sektor. Et felles trekk for tjenestepensjonsordninger er at de er ytelsesbaserte. Ordningenes innhold, omfang mv er ellers forskjellige.

13 Samtlige kommuner og fylkeskommuner har i dag tjenestepensjonsordninger. Adgangen til å etablere eller tilslutte seg tjenestepensjonsordninger følger uttrykkelig av kommunelovens § 24 nr 4. Formålet med denne bestemmelsen var først og fremst å gi et klarere hjemmelsgrunnlag for statlig regulering, kontroll og tilsyn med kommunale tjenestepensjonsordninger. Kommunelovens § 24 nr 4 annet punktum hjemler adgang til å gi nærmere bestemmelser om materielle rammer for kommunale tjenestepensjonsordninger, deres innhold og omfang. De gjeldende bestemmelsene finnes i forskrift av 22 april 1997 nr 374 om

1997 on Pension Schemes for Municipal or County Municipal Employees (*forskrift av 22. april 1997 nr. 374 om pensjonsordninger for kommunalt eller fylkeskommunalt ansatte*, hereinafter the "Regulation on Pension Schemes for Municipal or County Municipal Employees"). That Regulation sets out, in the main, that:

> – pension benefits in municipal pension schemes must not be higher than in the Norwegian Public Service Pension Fund (section 2, first paragraph);
>
> – age limits must not be lower than for equivalent positions in the State system (section 2, second paragraph); and
>
> – as a rule, all employees in municipalities/county municipalities are to be covered; however, the pension scheme may contain general conditions which limit membership in the scheme due to the scope of the employment situation, length of service and so on (section 3).

14 A municipality may organise its occupational pension scheme in various ways: through its own pension institution, through participation in a collective pension institution or through a life insurance company. In 1998, the total number of 453 municipalities and county municipalities had organised their occupational pension schemes as follows:

> – 21 municipalities/county municipalities had their own pension institutions;
>
> – 422 municipalities/county municipalities were members of the Felles kommunal pensjonsordning (Joint municipal pension scheme, hereinafter, "FKP") in KLP;
>
> – 10 municipalities had group pension insurance contracts with insurance companies other than KLP.

15 These figures show that 93% (422 of 453) of the municipalities were party to FKP in 1998. The municipalities are of different sizes and have different numbers of employees. It is estimated that occupational pension schemes for about 65% of all municipal employees are entered with KLP; the estimate and the basis therefor are, however, uncertain.

16 KLP is a private mutual life insurance company. KLP had received a licence to provide group pension insurance, etc., effective 1 January 1974, under the insurance companies legislation then in force. The licence was most recently renewed in 1998by Act No. 39 of 10 June 1988 on Insurance Activity (*forsikringsvirksomhetsloven*, hereinafter the "Insurance Activity Act") . KLP's members (company partners) are the policyholders, i.e. those employers who have signed an insurance contract with the company. KLP is authorised to have members other than municipalities/county municipalities, but with certain

pensjonsordninger for kommunalt eller fylkeskommunalt ansatte, heretter "forskrift om pensjonsordninger for kommunalt eller fylkeskommunalt ansatte". Denne forskriften fastsetter i hovedsak at:

- pensjonsytelsene i kommunale pensjonsordninger ikke må være høyere enn i Statens Pensjonskasse (§ 2 første ledd),

- aldersgrenser ikke må være lavere enn for tilsvarende stillinger i staten (§ 2 annet ledd), og

- som utgangspunkt skal alle ansatte i kommunen/fylkeskommunen være omfattet; pensjonsordningen kan imidlertid inneholde alminnelige vilkår som begrenser medlemskap i ordningen på grunnlag av arbeidsforholdets omfang, tjenestetid, oa (§ 3).

14 En kommune kan organisere sin tjenestepensjonsordning på ulike måter: Gjennom en egen pensjonskasse, gjennom deltagelse i en felles pensjonskasse, eller gjennom et livsforsikringsselskap. De til sammen 453 kommuner og fylkeskommuner hadde per november 1998 organisert sine tjenestepensjonsordninger slik:

- 21 kommuner/fylkeskommuner hadde egne pensjonskasser;

- 422 kommuner/fylkeskommuner var tilsluttet "Felles kommunal pensjonsordning" (heretter "FKP") i KLP;

- 10 kommuner hadde kollektive pensjonsforsikringsavtaler i andre forsikringsselskaper enn KLP.

15 Ut fra tallene foran var 93 % (422 av 453) av kommunene tilsluttet FKP per 1 januar 1998. Kommunene er forskjellige i størrelse og antall ansatte. Det er anslått at tjenestepensjonsordninger for ca 65 % av alle kommunalt ansatte er inngått med KLP. Anslaget og grunnlaget for dette er imidlertid usikkert.

16 KLP er et privat gjensidig livsforsikringsselskap. KLP fikk fra 1 januar 1974 konsesjon til å tilby blant annet kollektiv pensjonsforsikring etter den dagjeldende forsikringsselskapslov. Konsesjonen ble fornyet senest i 1998 ved lov av 10 juni 1988 nr 39 om forsikringsvirksomhet (heretter "forsikringsvirksomhetsloven"). KLPs medlemmer (selskapsdeltakerne) er forsikringstakerne, dvs de arbeidsgiverene som har tegnet en forsikringsavtale med selskapet. KLP er gitt tillatelse til å ha andre medlemmer enn kommuner/fylkeskommuner, men med visse begrensninger. I KLPs vedtekter §

limitations. Section 1-3, second paragraph of KLP's Articles of Association, which is incorporated in the licensing conditions, reads as follows:

> "The proportion of policyholders which are not municipalities, county municipalities, undertakings, independent enterprises (undertakings), institutions or organisations in which municipalities or county municipalities have a majority interest (ownership) shall be limited so that together they cannot have premium reserves which equal more than 10 percent of the total premium reserves in the company. Majority interest means more than 50 percent of both the ownership shares and the voting rights or equivalent interest in relation to the purpose of the enterprise, institution or organisation."

17 KLP's main product is group pension insurance, which is the most important and most far-reaching scheme. Furthermore, municipalities and county municipalities may be members of KLP, regardless of whether they are affiliated to FKP. As at September 1999, all 453 municipalities and county municipalities were members of KLP. At the same time, KLP had about 2 150 other members (enterprises). Their share of annual premium payments accounted for roughly 14.5% of a total premium volume of around NOK 5 billion.

18 KLP's highest decision-making body is the general meeting (section 3-8 Articles of Association, section 3-2 1999 Articles of Association). According to the current Articles of Association, the general meeting is to consist of representatives of the company's members, elected in 19 constituencies. The municipalities/county municipalities make up 18 constituencies and the enterprises make up one constituency. An individual constituency "elects between 4 and 17 representatives, depending on the total premium volume in the company's pension schemes paid by that constituency's members," see sections 3-2 and 3-3 of the 1999 Articles of Association.

19 Various "cooperation agreements" have been entered into between KLP and KS. Two of these are relevant to this case: one agreement of 14 December 1994, and an agreement of 30 August 1999, which replaced the earlier agreement. Both agreements contain provisions on regular contact between KS and KLP, the right of KLP to participate at certain meetings and events in KS, the exchange of information and benefits (including compensation for marketing of KLP's products), etc. The agreement of 1999 is more detailed than the one from 1994.

20 The Norwegian Ministry of Finance has given KLP a dispensation from certain provisions of the Insurance Activity Act, including section 7-6 on premiums. As a mutual insurance company, KLP may, pursuant to its Articles of Association and section 4-8 of the Insurance Activity Act, conduct a retroactive assessment of premiums – by which it is meant that "all policyholders shall pay further premiums when it turns out, after the fact, that not enough premiums have been paid in advance, and the premium calculation system presupposes that adjustments, defined benefit guarantees, etc., are insured," see the Banking, Insurance and Securities Commission's letter of 16 December 1998 to the Norwegian Public Service Pension Fund.

1-3 annet ledd, som er inntattt i konsesjonsvilkårene, heter det:

> "Andelen forsikringstakere som ikke er kommuner, fylkeskommuner, foretak, selvstendige virksomheter, institusjoner eller organisasjoner der kommuner eller fylkeskommuner har en majoritetsinteresse skal være begrenset slik at de til sammen ikke kan ha en premiereserve som utgjør mer enn 10 prosent av de totale premiereserver i selskapet. Med majoritetsinteresser menes mer enn 50 prosent av både eierandelene og stemmerettighetene, eller tilsvarende interesse i forhold til virksomhetens, institusjonens eller organisasjonens formål."

17 KLPs hovedprodukt er kollektiv pensjonsforsikring, som er den viktigste og mest omfattende ordningen. Videre kan kommuner og fylkeskommuner være medlemmer av KLP, uavhengig av om de er tilknyttet FKP. Per september 1999 var alle 453 kommuner og fylkeskommuner medlemmer i KLP. På samme tidspunkt hadde KLP ca 2 150 andre medlemmer (bedriftsmedlemmer). Deres andel av årlige premieinnbetalinger utgjorde ca 14,5 % av et samlet premievolum på omlag 5 milliarder NOK.

18 KLPs høyeste beslutningstakerorgan er generalforsamlingen (vedtektenes § 3-8, vedtektene av 1999 § 3-2). Etter vedtektene av 1999 skal generalforsamlingen bestå av representanter for selskapets medlemmer, valgt i 19 valgkretser. Kommunene/fylkeskommunene utgjør 18 valgkretser, og bedriftsmedlemmene utgjør én valgkrets. Den enkelte valgkrets "velger fra 4 til 17 representanter avhengig av det samlede premievolum i selskapets pensjonsordninger som betales av valgkretsens medlemmer", jf vedtektene av 1999 §§ 3-2 og 3-3.

19 Det er inngått flere "samarbeidsavtaler" mellom KLP og KS. To av disse er relevante for denne saken: En avtale av 14 desember 1994, og en av 30 august 1999 som erstattet den tidligere avtalen. Begge avtalene har bestemmelser om regelmessig kontakt mellom KS og KLP, rett for KLP til blant annet å delta i visse møter og arrangementer i KS, utveksling av informasjon og ytelser (herunder vederlag for markedsføring av KLPs produkter). Avtalen fra 1999 er mer detaljert enn den fra 1994.

20 Finansdepartementet har gitt KLP dispensasjon fra enkelte av forsikringsvirksomhetslovens bestemmelser, herunder fra lovens § 7-6 om premier. Som gjensidig livsforsikringsselskap kan KLP, i henhold til selskapets vedtekter og forsikringsvirksomhetslovens § 4-8, foreta en etterutligning av premie - med hvilket her forstås at "alle forsikringstakere må innbetale ytterligere premie når det i ettertid viser seg at det er betalt for lite premie på forskudd, og premieberegningssystemet forutsetter at reguleringer, bruttogaranti mv. skal være forsikret", jf Kredittilsynets brev av 16 desember 1998 til Statens Pensjonskasse.

21 KLP has entered into a transfer agreement with the Norwegian Public Service Pension Fund. Through this transfer agreement, policyholders of occupational pension schemes with KLP are affiliated with the transfer system.

22 FKP is an occupational pension insurance scheme with KLP. It was established as of 1 January 1974, at the same time as KLP was established as an independent insurance company, and is regulated by its own articles of association. FKP has been the object of amendments over the years. The relevant Articles of Association are from 1 January 1999.

23 FKP is a joint group pension insurance scheme. Section 1-2 of their Articles of Association, concerning contracts of affiliation, reads:

> "Municipalities, county municipalities as well as undertakings, independent enterprises, institutions or organisations in which municipalities or county municipalities have a majority interest may enter into contracts with KLP on membership in and affiliation to the Joint municipal pension scheme."

24 FKP is subject to the Regulation on Pension Schemes for Municipal or County Municipal Employees and to Act No. 26 of 6 July 1957 Relating to the Coordination of Pension and Insurance Benefits (*samordningsloven*, the "Pension and Insurance Coordination Act"), and is a party to the transfer system.

25 With respect to benefits, FKP corresponds largely to the occupational pension scheme under the Public Service Pension Fund Act, see on this point section 1-1, second sentence of the FKP Articles of Association. FKP is thus a defined benefit scheme and includes the same benefits as the Norwegian Public Service Pension Fund, with the same pension coverage and rules on accrual time.

26 The system of financing of FKP is based on insurance principles with advance payment of premiums. The premium consists of the employer's share and "membership contributions," see section 12-1 of the FKP Articles of Association. "Membership contributions" are paid by the covered employees, at a rate of 2% of their salary. Remaining premiums are to be covered by those employers who participate in FKP.

II Questions

27 The following questions were referred to the EFTA Court:

> *Scope of application of Article 53 EEA*
>
> *1a. Does a collective agreement generally entail binding legal effects mutually between the participating members on the employer side which can be regarded as an "agreement[ ] between undertakings" under Article 53 EEA?*

21 KLP har inngått overføringsavtale med Statens Pensjonskasse. Gjennom denne overføringsavtalen er forsikringstakere med tjenestepensjonsordninger i KLP, tilsluttet overføringssystemet.

22 FKP er en tjenestepensjonsforsikringsordning i KLP. Den ble etablert 1 januar 1974, samtidig som KLP ble etablert som selvstendig forsikringsselskap, og er regulert av egne vedtekter. FKP har vært gjenstand for endringer gjennom årene. De relevante vedtekter er fra 1 januar 1999.

23 FKP er en felles kollektiv pensjonsforsikringsordning. Dens vedtekters § 1-2 om "avtale om tilslutning" lyder som følger:

> "Kommuner, fylkeskommuner samt foretak, selvstendige virksomheter, institusjoner eller organisasjoner der kommuner eller fylkeskommuner har en majoritetsinteresse kan inngå avtale med KLP om medlemskap og om tilslutning til Felles kommunal pensjonsordning."

24 FKP er undergitt forskrift av 22 april 1975 nr 1 om pensjonsordninger for kommunalt og fylkeskommunalt ansatte og lov av 6 juli 1957 nr 26 om samordning av pensjons- og trygdeytelser (samordningsloven), og inngår i overføringssystemet.

25 Forsåvidt gjelder ytelser svarer FKP i hovedsak til tjenestepensjonsordningen etter pensjonskasseloven, jf her FKP-vedtektenes § 1-1 annet punktum. FKP er således en bruttoordning og omfatter de samme ytelsene som Statens Pensjonskasse, med samme pensjonsdekning og regler om opptjeningstid.

26 Finansieringen av FKP er basert på et forsikringsteknisk system med forhåndsinnbetaling av premie. Premien består av arbeidsgivers andel og "medlemsinnskudd", jf FKP-vedtektenes § 12-1. Medlemsinnskudd betales av de arbeidstakerene som omfattes, med 2 % av deres lønn. Øvrig premie skal dekkes av de arbeidsgivere som er med i FKP.

II Spørsmål

27 Følgende spørsmål er forelagt EFTA-domstolen:

> *"Om virkeområdet for artikkel 53 EØS*
>
> *1a. Medfører en tariffavtale i alminnelighet bindende rettsvirkninger innbyrdes mellom de deltakende medlemmene på arbeidsgiversiden som kan regnes som "avtale mellom foretak" etter artikkel 53 EØS?*

1b. If an employer organisation concludes a collective agreement, is this a "decision[] by [an] association[] of undertakings" under Article 53 EEA?

1c. Is a municipality an "undertaking" under Article 53 EEA when, in its capacity as employer, it becomes bound by a collective agreement without being a party thereto?

2a. Can a collective agreement provision which has objectives other than to improve salary and working conditions come within the scope of Article 53 EEA?

2b. If question 2a is answered in the affirmative: which conditions must then be met?

3. Do collective agreement provisions on group occupational pension schemes, such as the provisions in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-2000 fall within the scope of application of Article 53 EEA?

Prohibition in Article 53 EEA

4. Is it compatible with Article 53 EEA for a collective agreement condition to require that a group occupational pension scheme be based on a gender-neutral financing system which can only be satisfied by one supplier?

5a. Is it compatible with Article 53 EEA for a collective agreement provision to provide that an offer concerning occupational pension schemes made by an insurance company to an employer must be approved by representatives for the parties to a collective agreement?

5b. If question 5a is answered in the affirmative: will the assessment be otherwise if approval can only take place through unanimity amongst the parties?

6. Is it compatible with Article 53 EEA for a collective agreement provision to provide that it is a condition for transfer of an occupational pension scheme that the new insurance product must have been tacitly or expressly accepted by a public body?

7a. Is it compatible with Article 53 EEA for collective agreement provisions to provide that a change of supplier of an occupational pension scheme is subject to the condition that the employer, before a decision on change can be made, must have entered into a separate agreement on mutual transfer of pension schemes through approval by the public body which administers the transfer scheme?

1b. Innebærer en arbeidsgiverorganisasjons inngåelse av en tariffavtale en "beslutning truffet av sammenslutninger av foretak" etter artikkel 53 EØS?

1c. Er en kommune et "foretak" etter artikkel 53 EØS når den i egenskap av arbeidsgiver blir bundet av en tariffavtale uten å være part i den?

2a. Kan en tariffavtalebestemmelse som har andre formål enn å forbedre lønns- og arbeidsvilkår, omfattes av artikkel 53 EØS?

2b. Hvis svaret på spørsmål 2a er bekreftende: Hvilke vilkår må i så fall være oppfylt?

3. Er tariffavtalebestemmelser om kollektive tjenestepensjonsordninger, slik som bestemmelsene i hovedtariffavtalen for kommuner mv for perioden 1998-2000 pkt. 2.1.8 annet, tredje og fjerde ledd, omfattet av virkeområdet for artikkel 53 EØS?

Om forbudsbestemmelsen i artikkel 53 EØS

4. Er et tariffavtalevilkår som går ut på at en kollektiv tjenestepensjonsordning skal være basert på et kjønnsnøytralt finansieringssystem, og som bare kan oppfylles av én leverandør, forenlig med artikkel 53 EØS?

5a. Er en tariffavtalebestemmelse om at et tilbud fra et forsikringsselskap til en arbeidsgiver om tjenestepensjonsordning må godkjennes av representanter for tariffavtalens parter, forenlig med artikkel 53 EØS?

5b. Hvis svaret på spørsmål 5a er bekreftende: Vil bedømmelsen være annerledes dersom godkjennelse bare kan skje ved enstemmighet mellom partene?

6. Er en tariffavtalebestemmelse som innebærer at det er et vilkår for flytting av en tjenestepensjonsordning, at det nye forsikringsproduktet må være stilltiende eller uttrykkelig akseptert av et offentlig organ, forenlig med artikkel 53 EØS?

7a. Er tariffavtalebestemmelser som innebærer at skifte av leverandør av tjenestepensjonsordning er betinget av at arbeidsgiveren, før beslutning om skifte kan treffes, har inngått en egen avtale om gjensidig overføring av pensjonsordninger gjennom godkjenning av det offentlige organ som administrerer overføringsordningen, forenlig med artikkel 53 EØS?

7b. If question 7a is answered in the affirmative: will the assessment be otherwise if inclusion in the transfer agreements cannot take place before a decision on change has been made?

8. Can the sum of provisions in a collective agreement, such as the provisions in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-2000, be held to be contrary to Article 53 EEA even though none of the provisions, viewed in isolation, come under the prohibition therein?

Interpretation of Article 54 EEA

9. Can an association of municipalities which is an interest and an employer organisation, such as the Norwegian Association of Local and Regional Authorities, be regarded as an "undertaking" under Article 54 EEA in the negotiation of collective agreements?

10. Can an undertaking, assuming that it has a "dominant position", conclude an agreement for or practise conditions for change of supplier of occupational pension schemes such as those laid down in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc., for the period 1998-2000, regardless of Article 54 EEA?

III Legal background

28 The questions submitted to the Court concern the compatibility of certain provisions of the Basic Collective Agreement with Article 53 and 54 EEA.

29 Article 53 EEA reads as follows:

> "1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

7b. Hvis svaret på spørsmål 7a er bekreftende: Vil bedømmelsen være annerledes dersom opptak i overføringsavtalen ikke kan finne sted før det er truffet beslutning om skifte?

8. Kan summen av bestemmelser i en tariffavtale, slik som bestemmelsene i hovedtariffavtalen for kommuner m.v. for perioden 1998-2000 pkt. 2.1.8 annet, tredje og fjerde ledd, bedømmes som stridende mot artikkel 53 EØS selv om ingen av bestemmelsene isolert sett rammes av forbudet der?

Om forståelsen av artikkel 54 EØS

9. Kan en sammenslutning av kommuner, som er en interesse- og arbeidsgiverorganisasjon slik som Kommunenes Sentralforbund, ved fremforhandling av tariffavtaler anses som et "foretak" etter artikkel 54 EØS?

10. Kan et foretak, forutsatt at det har "dominerende stilling", uten hinder av artikkel 54 EØS avtale eller praktisere slike vilkår for skifte av leverandør av tjenestepensjonsordninger som er fastsatt i hovedtariffavtalen for kommuner mv for perioden 1998-2000 pkt. 2.1.8 annet, tredje og fjerde ledd?"

III Rettslig bakgrunn

28 Spørsmålene som er forelagt EFTA-domstolen gjelder visse bestemmelser i hovedtariffavtalens forenlighet med artikkel 53 og 54 EØS.

29 Artikkel 53 EØS lyder:

> "1. Enhver avtale mellom foretak, enhver beslutning truffet av sammenslutninger av foretak og enhver form for samordnet opptreden som kan påvirke handelen mellom avtalepartene, og som har til formål eller virkning å hindre, innskrenke eller vri konkurransen innen det territorium som er omfattet av denne avtale, skal være uforenlige med denne avtales funksjon og forbudt, særlig slike som består i
>
> (a) å fastsette på direkte eller indirekte måte innkjøps- eller utsalgspriser eller andre forretningsvilkår,
>
> (b) å begrense eller kontrollere produksjon, avsetning, teknisk utvikling eller investeringer,
>
> (c) å dele opp markeder eller forsyningskilder,
>
> d) å anvende overfor handelspartnere ulike vilkår for likeverdige ytelser og derved stille dem ugunstigere i konkurransen,

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;

- any decision or category of decisions by associations of undertakings;

- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

30 Article 54 EEA reads as follows:

"Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

31 The relevant provisions of the Basic Collective Agreement, in the case presented to the EFTA Court, are to be found in chapter 2 thereof. They read as follows:

"**2.0 Definition**

Occupational pension scheme means that pension to which an employee is entitled in accordance with the present collective agreement and corresponding to the articles of

(e) å gjøre inngåelsen av kontrakter avhengig av at medkontrahentene godtar tilleggsytelser som etter sin art eller etter vanlig forretningspraksis ikke har noen sammenheng med kontraktsgjenstanden.

2. Avtaler eller beslutninger som er forbudt i henhold til denne artikkel, skal ikke ha noen rettsvirkning.

3. Det kan imidlertid erklæres at bestemmelsene i nr 1 ikke skal anvendes på

- avtaler eller grupper av avtaler mellom foretak,

- beslutninger eller grupper av beslutninger truffet av sammenslutninger av foretak, og

- samordnet opptreden eller grupper av slik opptreden,

som bidrar til å bedre produksjonen eller fordelingen av varene eller til å fremme den tekniske eller økonomiske utvikling, samtidig som de sikrer forbrukerne en rimelig andel av de fordeler som er oppnådd, og uten

a) å pålegge vedkommende foretak restriksjoner som ikke er absolutt nødvendige for å nå disse mål, eller

b) å gi disse foretak mulighet til å utelukke konkurranse for en vesentlig del av de varer det gjelder."

30 Artikkel 54 EØS lyder:

"Et eller flere foretaks utilbørlige utnyttelse av sin dominerende stilling innen det territorium som er omfattet av denne avtale, eller i en vesentlig del av det, skal være forbudt og uforenlig med denne avtales funksjon i den utstrekning den kan påvirke handelen mellom avtalepartene.

Slik utilbørlig utnyttelse kan særlig bestå i

(a) å påtvinge, direkte eller indirekte, urimelige innkjøps- eller utsalgspriser eller andre urimelige forretningsvilkår,

(b) å begrense produksjon, avsetning eller teknisk utvikling til skade for forbrukerne,

(c) å anvende overfor handelspartnere ulike vilkår for likeverdige ytelser og derved stille dem ugunstigere i konkurransen,

(d) å gjøre inngåelsen av kontrakter avhengig av at medkontrahentene godtar tilleggsytelser som etter sin art eller etter vanlig forretningspraksis ikke har noen sammenheng med kontraktsgjenstanden."

31 De bestemmelser i hovedtariffavtalen som er relevante i saken finnes i dens kapittel 2. De lyder som følger:

"**2.0 Definisjon**

Med tjenestepensjonsordning menes den pensjon en arbeidstaker har rett til i samsvar med denne tariffavtale og tilsvarende de til enhver tid gjeldende vedtekter for Felles Kommunal Pensjonsordning i KLP.

association as may be in force at any time for the joint municipal pension scheme with KLP.

2.1 Occupational pension scheme

By 1 January 1997, all employers shall have established a pension scheme for their employees which meets the following requirements:

2.1.1 The pension scheme shall cover all permanent employees who have working hours corresponding to at least 14 hours per week. Temporary employees shall be covered after 6 months' consecutive employment, provided that the working hours correspond to at least 14 hours per week.

As of 1 January 1999, the pension scheme shall cover all employees who have average working hours which correspond to the minimum requirement.

2.1.2 The pension scheme shall guarantee the members an aggregate retirement/disability pension of at least 66% of the fixed basis for calculating benefits at full accrual. The pension scheme shall also give entitlement to spouse and children's pensions.

The accrual of pension shall take place in a linear fashion, i.e. equally great portions of full pension shall accrue for each year one is a member. The requirement for full accrual is set at 30 years. For those who cease employment with deferred pension, the requirement for full accrual is set at maximum 40 years.

The fixed basis for calculating benefits is calculated in accordance with clause 2.1.7, cf. 2.3.

2.1.3 The setting of age limits and rules on the right to withdraw retirement pension before the age limit is reached shall follow the same principles as are in force in the Norwegian Public Service Pension Fund. The parties to the collective agreement shall make the necessary adaptations in the municipal sector.

2.1.4 The pensions shall be adjusted in accordance with the adjustment of the basic amount under the National Insurance Scheme. The same applies for the fixed basis for calculating benefits for those who cease employment before they are entitled to pension.

2.1.5 The pension rights shall be covered by a transfer agreement with the Norwegian Public Service Pension Fund and other municipal pension schemes, so that the aggregate pension is calculated as if it had accrued in the last scheme in which one was a member.

2.1.6 The pension rights, including linearly calculated and adjusted, deferred pension rights, shall, with respect to all benefits, be covered by insurance with an insurance company or a pension institution based on insurance products which are taken note of by the Banking, Insurance and Securities Commission.

2.1.7 The fixed basis for calculating benefits shall be set based on regular salary fixed salary and pension-generating supplements. Account shall not be taken of salary including supplements which exceed 12 G.

2.1.8 In the event of a change of company/pension institution, this shall be discussed with union representatives, cf. chapter 3 of the Transfer Regulation. Minutes of the discussions shall accompany the file through to the decision in the municipal council/county council/board.

2.1 Tjenestepensjonsordning

Fra 01.01.97 skal alle arbeidsgivere ha opprettet pensjonsordning for sine tilsatte som tilfredsstiller følgende krav:

2.1.1 Pensjonsordningen skal omfatte alle fast tilsatte med en arbeidstid som tilsvarer minst 14 timer per uke. Midlertidig tilsatte skal omfattes etter 6 måneders sammenhengende tilsetting, forutsatt at arbeidstiden tilsvarer minst 14 timer per uke.

Pensjonsordningen skal fra 01.01.99 omfatte alle tilsatte med en gjennomsnittlig arbeidstid som tilsvarer minstekravet.

2.1.2 Pensjonsordningen skal garantere medlemmene en samlet alders-/uførepensjon på minst 66 % av pensjonsgrunnlaget ved full opptjening. Pensjonsordningen skal også gi rett til ektefelle- og barnepensjon.

Pensjonsopptjeningen skal skje lineært, dvs. at man skal opptjene like store deler av full pensjon for hvert år man er medlem. Kravet til full opptjening settes til 30 år. For de som fratrer med oppsatt pensjon settes kravet til full opptjening til maksimalt 40 år.

Pensjonsgrunnlaget beregnes i samsvar med pkt. 2.1.7, jf.

2.1.3 Fastsettelse av aldersgrenser og regler om rett til å ta ut alderspensjon før nådd aldersgrense skal følge de samme prinsipper som gjelder i Statens Pensjonskasse. Tariffpartene foretar nødvendige tilpasninger til kommunal sektor.

2.1.4 Pensjonene skal reguleres i samsvar med reguleringen av folketrygdens grunnbeløp. Det samme gjelder pensjonsgrunnlaget for de som fratrer før de har rett til pensjon.

2.1.5 Pensjonsrettighetene skal være omfattet av overføringsavtale med Statens Pensjonskasse og øvrige kommunale pensjonsordninger, slik at samlet pensjon regnes som om den var opptjent i den ordning man sist er medlem av.

2.1.6 Pensjonsrettighetene, herunder lineært beregnede og regulerte oppsatte pensjonsrettigheter, skal for alle ytelsers vedkommende være forsikringsmessig dekket i et forsikringsselskap eller en pensjonskasse basert på forsikringsprodukter som er tatt til etterretning av Kredittilsynet.

2.1.7 Pensjonsgrunnlaget fastsettes ut fra fast lønn og pensjonsgivende tillegg. Det tas ikke hensyn til lønn inklusive tillegg som overstiger 12 G.

2.1.8 Ved skifte av selskap/pensjonskasse skal dette drøftes med de tillitsvalgte, jf. flytteforskriften kapittel 3. Referat fra drøftingene skal følge saken fram til avgjørelsen i kommunestyret/fylkestinget/styret.

> Before the decision-making body may begin to deal with a possible change of company, relevant offers for a new occupational pension scheme shall be put before those members of the Pension Committee who represent the parties to the collective agreement, who shall attest whether the various pension insurance products satisfy the aforementioned requirements in the collective agreement.
>
> In addition, the occupational pension scheme must be based on a financing system which is gender-neutral and does not have the effect of excluding older employees.
>
> Before the matter may be decided upon by the municipal council/county council/board, there must be approval from the Norwegian Public Service Pension Fund, relating to inclusion in the transfer agreement, and the pension scheme must be taken note of by the Banking, Insurance and Securities Commission, cf. clauses 2.1.5 and 2.1.6."

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

IV Findings of the Court

General remarks on the relationship between collective agreements and EEA competition law

33 The law governing the conclusion, application and interpretation of agreements concluded in the process of collective bargaining between management and labour has not been the subject of harmonization within the European Economic Area. The legal foundation for dealing with a collective agreement is therefore to be found in national law. However, both national law and collective agreements must operate within the framework of EEA law.

34 Fundamental differences distinguish the labour market from the goods, service and capital markets. Industrial societies have recognised the need to establish a balance between employers and individual workers by enacting labour laws that authorise unions of workers to negotiate collective agreements with employers or associations of employers that have as an inevitable effect the restriction of competition in the labour market.

35 On that background, legislatures and courts in most market economy oriented jurisdictions have drawn the conclusion that collective agreements between management and labour must to some extent be sheltered from the competition rules, without making that immunity unlimited (see the analysis in the Opinion of Advocate-General Jacobs in Case C-67/96 *Albany*, Joined Cases C-115/97 to C-117/97 *Brentjens'* and Case C-219/97 *Drijvende Bokken*, reported in [1999] ECR I-5751, at paragraph 109).

> Før behandling i besluttende organ knyttet til eventuelt skifte av selskap kan begynnes, skal aktuelle tilbud på ny tjenestepensjonsordning forelegges for Pensjonsutvalgets tariffparter, som skal godkjenne om de ulike pensjonsforsikringsproduktene tilfredsstiller de forannevnte tariffkravene.
>
> Tjenestepensjonsordningen må i tillegg være basert på et finansieringssystem som er kjønnsnøytralt og som ikke virker utstøtende på eldre arbeidstakere.
>
> Før saken kan avgjøres av kommunestyret/fylkestinget/styret, må godkjenning av Statens Pensjonskasse foreligge, knyttet til opptak i overføringsavtalen, og pensjonsordningen må være tatt til etterretning av Kredittilsynet, jf. pkt. 2.1.5 og 2.1.6."

32 Det vises til rettsmøterapporten for en fyldigere beskrivelse av den rettslige rammen, de faktiske forhold, saksgangen og de skriftlige saksfremstillingene fremlagt for EFTA-domstolen, som i det følgende bare vil bli omtalt og drøftet så langt det er nødvendig for domstolens begrunnelse.

IV Domstolens bemerkninger

Generelle bemerkninger om forholdet mellom tariffavtaler og EØS-avtalens konkurranseregler

33 Rettsreglene som regulerer inngåelsen, håndhevelsen og tolkningen av avtaler inngått etter kollektive forhandlinger mellom arbeidsgivere og arbeidstakere har ikke vært gjenstand for harmonisering innenfor Det europeiske økonomiske samarbeidsområde. Det rettslige grunnlaget for behandlingen av tariffavtaler må derfor finnes i nasjonal rett. Både nasjonal rett og tariffavtaler må imidlertid virke innenfor rammen av EØS-retten.

34 Det er grunnleggende forskjeller mellom arbeidsmarkedet og markedene for varer, tjenester og kapital. Industrialiserte samfunn har erkjent behovet for å etablere en balanse mellom arbeidsgivere og individuelle arbeidstakere ved å vedta arbeidsrettslige regler som gir fagforeninger kompetanse til å inngå tariffavtaler med arbeidsgivere eller arbeidsgiverorganisasjoner. Slike avtaler vil nødvendigvis begrense konkurransen i arbeidsmarkedet.

35 På denne bakgrunn har lovgivere og domstoler i de fleste markedsorienterte rettsordninger kommet til at tariffavtaler mellom arbeidsgivere og arbeidstakere til en viss grad må skjermes fra konkurransereglene. Denne immuniteten kan imidlertid ikke gjøres ubegrenset (se analysen i forslaget til avgjørelse fra generaladvokat Jacobs i sak C-67/96 *Albany*, sakene C-115/97 til C-117/97 *Brentjens'* og sak C-219/97 *Drijvende Bokken*, publisert i [1999] ECR I-5751, avsnitt 109).

36 The Court of Justice of the European Communities has acknowledged that certain restrictions on competition are inherent in collective agreements between organisations representing employers and workers. The social policy objectives of such agreements would be seriously undermined if made subject to Article 81(1) EC when management and labour are seeking jointly to adopt measures to improve conditions of work and employment. It follows from an interpretation of the provisions of the EC Treaty as a whole that agreements concluded in the context of collective negotiations between management and labour aiming at improving conditions of work and employment must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 81(1) EC (see Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 59 and 60). The Court of Justice of the European Communities confirmed this conclusion in a series of judgments (see Joined cases C-115/97 to C-117/97 *Brentjens'* [1999] ECR I-6025; Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121; Joined cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-645; and Case C-222/98 *van der Woude* [2000] ECR I-7111).

37 The result arrived at in the above mentioned judgments of the Court of Justice of the European Communities is based on the balancing of concerns relating to the effective functioning of the market with the pursuit of social policy objectives such as the importance of promoting a harmonious and balanced development of economic activities, and a high level of employment and of social protection.

38 The Court must examine whether the social policy objectives limiting the applicability of Article 81 EC have a sufficient basis in the EEA Agreement to limit the applicability of the corresponding Article 53 EEA.

39 As a preliminary point, the Court recalls that Article 53 EEA is identical in substance to Article 81 EC. According to Articles 6 EEA and 3(2) SCA, the case-law of the Court of Justice of the European Communities is therefore relevant for the Court in its interpretation of Article 53 EEA. It is a fundamental objective of the EEA Agreement to achieve and maintain uniform interpretation and application of those provisions of the EEA Agreement that corresponding to provisions of the EC Treaty, and to arrive at equal treatment of individuals and economic operators as regards conditions of competition in the whole European Economic Area.

40 Article 53 EEA must be read with Article 1(2)(e) EEA, in which the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected, are defined as being necessary means to attain the objectives of the EEA Agreement. The Court also recalls that the second paragraph of Article 3 EEA requires that each Contracting Party shall abstain from any measure which could jeopardize the attainment of the objectives of the EEA Agreement.

41 The EEA Agreement contains various statements on the significance of social policy objectives. The Court observes that the seventh recital of the preamble to the EEA Agreement refers to the desire to strengthen the cooperation between the

36 Domstolen for De europeiske fellesskap har erkjent at det er visse iboende konkurransebegrensninger knyttet til tariffavtaler mellom organisasjoner som representerer arbeidsgivere og arbeidstakere. Det sosialpolitiske formålet med slike avtaler ville bli alvorlig svekket dersom avtalene skulle omfattes av artikkel 81(1) EF når arbeidsgivere og arbeidstakere i fellesskap søker å vedta tiltak for å forbedre arbeids- og ansettelsesvilkår. Det følger av en tolkning av bestemmelsene i EF-traktaten som helhet at avtaler inngått i forbindelse med kollektive forhandlinger mellom arbeidsgivere og arbeidstakere med sikte på å forbedre arbeids- og ansettelsesvilkår, etter deres art og formål må anses å falle utenfor anvendelsesområdet for artikkel 81(1) EF (se sak C-67/96 *Albany* [1999] ECR I 5751, avsnitt 59 og 60). Domstolen for De europeiske fellesskap har stadfestet dette resultatet i flere avgjørelser (se forenede saker C-115/97 til C-117/97 *Brentjens'* [1999] ECR I-6025, sak C-219/97 *Drijvende Bokken* [1999] ECR I-6121, forenede saker C-180/98 til C-184/98 *Pavlov* [2000] ECR I-645, og sak C-222/98 *van der Woude* [2000] ECR I-7111).

37 Resultatene i de ovennevnte avgjørelsene av Domstolen for De europeiske fellesskap er basert på en avveining mellom hensynet til et effektivt fungerende marked og gjenommføringen av sosialpolitiske målsettinger, slik som betydningen av å fremme en harmonisk og likevektig utvikling av økonomisk virksomhet, og et høyt nivå for sysselsetting og sosial trygghet.

38 EFTA-domstolen må vurdere hvorvidt de sosialpolitiske hensynene som begrenser anvendelsen av artikkel 81 EF har tilstrekkelig grunnlag i EØS-avtalen til å begrense anvendelsen av den tilsvarende artikkel 53 EØS.

39 Innledningsvis vil EFTA-domstolen nevne at artikkel 53 EØS i sitt innhold er identisk med artikkel 81 EF. Etter artikkel 6 EØS og artikkel 3(2) ODA er praksis fra Domstolen for De europeiske fellesskap derfor relevant for EFTA-domstolen ved fortolkningen av artikkel 53 EØS. Det er et grunnleggende formål for EØS-avtalen å nå frem til og opprettholde lik fortolkning og anvendelse av de bestemmelsene i EØS-avtalen som samsvarer med bestemmelser i EF-traktaten, og å nå frem til lik behandling av enkeltpersoner og markedsdeltakere med hensyn til konkurransevilkårene i hele Det europeiske økonomiske samarbeidsområde.

40 Artikkel 53 EØS må leses i sammenheng med artikkel 1(2)(e) EØS, hvor opprettelsen av et system som sikrer at konkurransen ikke vris, og at reglene om dette overholdes på samme måte, er definert som nødvendige virkemidler for å nå EØS-avtalens mål. EFTA-domstolen finner også grunn til å nevne at andre ledd i artikkel 3 EØS krever at avtalepartene skal avholde seg fra alle tiltak som kan sette virkeliggjøringen av EØS-avtalens mål i fare.

41 EØS-avtalen omtaler på flere steder betydningen av sosialpolitiske hensyn. EFTA-domstolen bemerker at syvende ledd i EØS-avtalens fortale viser til ønsket om å styrke samarbeidet mellom arbeidslivets parter i De europeiske

social partners in the European Community and the EFTA States. The eleventh recital of the preamble refers to the importance of the development of the social dimension in the European Economic Area and to the wish to ensure economic and social progress and to promote conditions for full employment, and for an improved standard of living and improved working conditions within the European Economic Area.

42 These considerations are further reflected in the Main Part of the EEA Agreement. Article 1(2)(f) EEA specifically refers to closer co-operation in the field of social policy. Furthermore, Part V, Chapter 1 of the EEA Agreement (Articles 66 to 71) contains provisions on social policy. Article 66 EEA states that the Contracting Parties agree upon the need to promote improved working conditions and an improved standard of living for workers. Article 67 EEA provides that the Contracting Parties shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers. Article 71 EEA provides that the Contracting Parties shall endeavour to promote the dialogue between management and labour at the European level. Moreover, Article 78 EEA states that the Contracting Parties shall strengthen and broaden cooperation in the framework of the Community's activities in the field of social policy. In addition, Article 96 EEA makes provision for co-operation between economic and social partners.

43 Furthermore, the Declaration by the Governments of the EFTA States on the Charter of the Fundamental Social Rights of Workers, annexed to the Final Act to the EEA Agreement must be mentioned, where the EFTA States emphasise their commitment to the policy objectives laid down in the Charter. In the terms of that Declaration, the EFTA States share the view that an enlarged economic cooperation must be accompanied by progress in the social dimension of integration, to be achieved in full cooperation with the social partners. It is also stated that the EFTA States welcome the strengthened cooperation in the social field with the Community and its Member States established by the EEA Agreement.

44 This leads the Court to the conclusion that the test identified by the Court of Justice of the European Communities for defining the scope of Article 81 EC in relation to collective agreements must likewise be applied with respect to the scope of Article 53 EEA. Agreements entered into in the framework of collective bargaining between employers and employees and intended to improve conditions of work and employment must, by virtue of their nature and purpose, be regarded as falling outside the scope of the prohibition contained in Article 53(1) EEA.

45 The factual circumstances and the various issues in dispute between the parties in the main proceedings demonstrate a considerable complexity. The written pleadings and oral arguments have not led to clarity on all points. Therefore, the factual situations in the above-cited judgments of the Court of Justice of the European Communities may be distinguishable from the one in the present case.

fellesskap og EFTA-statene. Ellevte ledd i fortalen viser til betydningen av utviklingen av den sosiale dimensjon i Det europeiske økonomiske samarbeidsområde og til ønsket om å sikre økonomisk og sosialt fremskritt og å legge forholdene til rette for full sysselsetting, en bedret levestandard og bedrede arbeidsvilkår innen Det europeiske økonomiske samarbeidsområde.

42 Disse hensyn gjenspeiles også i EØS-avtalens hoveddel. Artikkel 1(2)(f) EØS viser særlig til nærmere samarbeid på området for sosialpolitikk. Videre inneholder EØS-avtalens del V kapittel 1 (artiklene 66-71) bestemmelser om sosialpolitikk. Artikkel 66 EØS uttaler at avtalepartene er enige om at det er nødvendig å arbeide for en bedring av arbeidstakernes leve- og arbeidsvilkår. Det fremgår av artikkel 67 EØS at avtalepartene skal bestrebe seg på å forbedre arbeidsmiljøet for å beskytte arbeidstakernes helse og sikkerhet. Det følger av artikkel 71 EØS at avtalepartene skal bestrebe seg på å fremme dialogen mellom arbeidsgivere og arbeidstakere på europeisk nivå. Videre bestemmer artikkel 78 EØS at avtalepartene skal styrke og utvide samarbeidet innen rammen av Fellesskapets virksomhet på området for sosialpolitikk. I tillegg inneholder artikkel 96 EØS bestemmelser om samarbeidet mellom partene i arbeidslivet.

43 Videre må nevnes erklæringen fra EFTA-statenes regjeringer om pakten om grunnleggende sosiale rettigheter for arbeidstakere, vedlagt EØS-avtalens sluttakt, hvor EFTA-statene understreker deres støtte til de politiske målene som er fastsatt i pakten. Det følger av denne erklæringen at EFTA-statene deler det syn at et utvidet økonomisk samarbeid må ledsages av fremskritt for integrasjonsprosessens sosiale dimensjon, som skal oppnås i fullt samarbeid med partene i arbeidslivet. Det uttaleles også at EFTA-statene imøteser det styrkede samarbeidet på det sosiale området som er opprettet med Fellesskapet og dets medlemsstater ved EØS-avtalen.

44 Dette leder EFTA-domstolen til den konklusjon at de kriteriene som anvendes av Domstolen for De europeiske fellesskap for å definere anvendelsesområdet for artikkel 81 EF i forhold til tariffavtaler, må anvendes på tilsvarende måte ved vurderingen av anvendelsesområdet for artikkel 53 EØS. Avtaler som er inngått etter kollektive forhandlinger mellom arbeidsgivere og arbeidstakere, og som søker å forbedre arbeids- og ansettelsesvilkår må, etter sin art og sitt formål, anses å falle utenfor anvendelsesområdet for forbudet i artkkel 53(1) EØS.

45 Den uenigheten som foreligger mellom partene om sakens faktiske forhold og ulike problemstillinger fremviser en betydelig kompleksitet. De skriftlige saksfremstillinger og den muntlige forhandling har ikke ført til klarhet på alle punkter. Det kan derfor være at de faktiske omstendigheter i de foran nevnte sakene fra Domstolen for De europeiske fellesskap og den foreliggende saken kan gi grunnlag for sondring.

46 The Court also observes that the several jurisdictions of the European Economic Area have employed differing legislative techniques in demarcating the interface between the law of collective agreements between management and labour, and other areas of law, such as the general law of contract and competition law. National legislatures must have a measure of appreciation for balancing rules of national competition law with the law of collective labour agreements.

Questions 2a, 2b and 3

47 By its questions 2a, 2b and 3, which the Court finds must be examined first, the national court essentially seeks to ascertain whether a provision of a collective agreement may come within the scope of Article 53 EEA, and, if so, under what conditions.

48 The Court finds it appropriate at this stage to recall that the procedure provided for in Article 34 SCA is an instrument of cooperation between the EFTA Court and the national courts. It is the function of the EFTA Court to provide the national court with guidelines for the interpretation of EEA law that are required for the decision of the matter before it. It is for the national court to examine and evaluate evidence and to make factual findings, and then apply the EEA law to the facts of the case.

49 The answers to the questions from the national court require a detailed consideration of all the elements of the test first developed by the Court of Justice of the European Communities in *Albany*, cited above, paragraphs 59 and 60. As indicated in paragraph 44 above, the elements to be satisfied comprise: first, the requirement that an agreement has been entered into in the framework of collective bargaining between employers and employees, and second, the requirement that the agreement is concluded in pursuit of the objective of improving conditions of work and employment.

50 In the view of the Court, the two elements must both be satisfied in order to warrant a finding that a collective agreement must be regarded as falling outside the scope of the prohibition contained in Article 53(1) EEA. The fulfilment of a single element alone does not place that agreement outside the scope of Article 53 EEA. It is not sufficient to verify that the parties to the agreement are, respectively, a labour union and an employer or an association of employers, or that a collective bargaining agreement can generally be characterised as having the nature and purpose of a typical collective agreement.

51 The Court also notes that even where the broad objective of a collective agreement is recognised as seeking to improve conditions of work and employment, this is not by itself a sufficient premise for the conclusion that the agreement in its entirety falls outside the scope of Article 53 EEA, when individual provisions of that agreement may be directed towards other purposes.

46 EFTA-domstolen bemerker at statene innen Det europeiske økonomiske samarbeidsområde har tatt i bruk forskjellige lovgivningsteknikker når de har trukket grensen mellom tariffavtalers rettsforhold og andre rettsområder, som for eksempel avtaleretten og konkurranseretten. Det er opp til nasjonale lovgivere å foreta avveiningen av nasjonal konkurranselovgivning og lovgivningen for kollektive arbeidsavtaler.

Spørsmål 2a, 2b og 3

47 Ved spørsmål 2a, 2b og 3, som domstolen mener må vurderes først, søker den nasjonale domstolen i hovedsak å bringe på det rene om en bestemmelse i en tariffavtale kan falle inn under anvendelsesområdet for artikkel 53 EØS, og i så fall, på hvilke vilkår.

48 Innledningsvis finner EFTA-domstolen det hensiktsmessig å nevne at foreleggelsesprosedyren fastlagt i artikkel 34 ODA er et middel for samarbeid mellom EFTA-domstolen og nasjonale domstoler. Det er EFTA-domstolens oppgave å gi den nasjonale domstolen veiledning om tolkningen av de EØS-bestemmelsene som er relevante for dens avgjørelse av den verserende saken. Det er den nasjonale domstolens oppgave å bedømme bevisene i saken og avgjøre de faktiske omstendighetene som skal legges til grunn, og så anvende EØS-retten på sakens faktum.

49 Svarene på spørsmålene fra den nasjonale domstolen krever en inngående vurdering av de kriteriene som først ble utviklet av Domstolen for De europeiske fellesskap i *Albany*, referert ovenfor, avsnittene 59 og 60. Som angitt i avsnitt 44 ovenfor, omfatter disse for det første kravet om at en avtale er inngått etter kollektive forhandlinger mellom arbeidsgivere og arbeidstakere, og for det andre, kravet om at avtalen er inngått for å forfølge det formål å forbedre arbeids- og ansettelsesvilkår.

50 Etter EFTA-domstolens oppfatning må begge kravene være oppfylt for at en tariffavtale kan anses å falle utenfor anvendelsesområdet for forbudet i artikkel 53 EØS. Oppfyllelsen av ett av vilkårene alene vil ikke innebære at avtalen faller utenfor anvendelsesområdet for artikkel 53 EØS. Det er ikke tilstrekkelig å påvise at avtalepartene er henholdsvis en arbeidstakerorganisasjon og en arbeidsgiver eller arbeidsgiverorganisasjon, eller at en tariffavtale generelt kan sies å være av en slik art og ha et slikt formål som er typisk for tariffavtaler.

51 EFTA-domstolen bemerker også at selv om det overordnede formålet med tariffavtalen erkjennes å være forbedring av arbeids- og ansettelsesvilkår, er ikke dette i seg selv en tilstrekkelig premiss for den slutning at avtalen i sin helhet faller utenfor anvendelsesområdet for artikkel 53 EØS, dersom enkeltbestemmelser i tariffavtalen kan anses å ha andre formål.

52 In determining whether provisions of a collective agreement pursue the objective of improving conditions of work and employment, account must also be taken of the form and content of the agreement and of its various provisions, and of the circumstances under which they were negotiated. The subsequent practice of the parties to the agreement may be of importance, as may the effect, in practice, of its provisions.

53 The term "conditions of work and employment" must be interpreted broadly. As a point of departure, the term includes provisions relating to the core elements of collective agreements, such as wages, working hours and other working conditions. Those broad categories may include, *inter alia*, such matters as safety, the workplace environment, holidays, training and continuing education, and consultation and co-determination between workers and management. Provisions relating to the total remuneration are comprised within the term, such as the assumption by an employer of an obligation to establish and contribute to an occupational pension scheme (see *Albany*, cited above, paragraph 63).

54 At present, there may appear to be a tendency to include in collective agreements elements that reflect changing needs and interests of the parties. Such novel elements of a collective agreement may require particular scrutiny as to whether they aim to improve conditions of work and employment.

55 The examination by the national court of the issues under consideration must therefore include an assessment of whether the purpose of any provisions concerning a supplementary pension insurance scheme and its operation, is to improve remuneration, or is extraneous to the improvement of conditions of work and employment. In the Court's view, it would fall within the privileged scope of a collective agreement to establish certain criteria for the quality of an insurance product, or to specify requirements with regard to the business practices or the financial soundness of an insurance provider. However, the more circumstantial detail encompassed in a provision of a collective agreement, the further it may deviate from the pursuit of the objective of improving conditions of work and employment. A certain margin of discretion must be allowed for the parties to a collective agreement in this regard. Where it is clear that the intended, immediate and practical effect of any such clause is to improve conditions of work and employment, inherent restrictions on competition must be accepted.

56 The good faith of the parties in concluding and implementing a collective agreement must also be taken into account. Where, on the face of it, an element of a collective agreement pursues the improvement of conditions of work and employment, but its practical implementation is actually intended to further other interests, the protection of the agreement from Article 53 EEA can not be upheld. In this respect, it is immaterial whether the principal underlying objective pursued might be laudatory in and of itself.

57 When examining the several elements of a collective agreement, the national court must consider the aggregate effect of the provisions. Even if individually, the provisions would not lead to any certain resolution of the status of the

52 Ved avgjørelsen av om bestemmelser i en tariffavtale forfølger det formål å forbedre arbeids- og ansettelsesvilkår må det også tas hensyn til form og innhold, for såvidt gjelder avtalen og dens enkeltbestemmelser, og under hvilke omstendigheter avtalen ble fremforhandlet. Avtalepartenes etterfølgende praktisering av avtalebestemmelsene kan også være av betydning. Det samme gjelder virkningen av disse bestemmelsene i praksis.

53 Begrepet "arbeids- og ansettelsesvilkår" må tolkes vidt. Som et utgangspunkt omfatter begrepet bestemmelser som relaterer seg til kjerneområdene for tariffavtaler, slik som lønn, arbeidstid og andre arbeidsvilkår. Disse vide kategoriene kan omfatte forhold som for eksempel sikkerhet, arbeidsmiljø, ferie, opplæring og videreutdanning, medbestemmelse og innflytelse for arbeidstakere. Bestemmelser som gjelder det totale arbeidsvederlaget omfattes også av begrepet, slik som at en arbeidsgiver påtar seg en forpliktelse til å etablere og bidra til en tjenestepensjonsordning (se *Albany*, referert ovenfor, avsnitt 63).

54 Det synes å være en tendens til å innta i tariffavtaler elementer som reflekterer endrede behov og interesseområder for partene. Slike nye elementer i en tariffavtale kan kreve særlig nøye undersøkelser med hensyn til hvorvidt de har som siktemål å forbedre arbeids- og ansettelsesvilkår.

55 Den nasjonale domstolens vurdering av de forhold som foreligger i denne saken må derfor også omfatte en bedømmelse av hvorvidt formålet med bestemmelsene om supplerende pensjonsordninger, og om driften av disse, er å forbedre arbeidsvederlaget, eller om formålet ligger utenfor området for forbedring av arbeids- og ansettelsesvilkår. Etter EFTA-domstolens syn ville det falle innenfor det beskyttede området for tariffavtaler å fastsette bestemte kriterier for kvaliteten på forsikringsprodukter, eller å spesifisere krav til forsikringsleverandørers forretningsskikk eller deres soliditet. Jo flere vidløftige enkeltheter som er inntatt i en tariffavtalebestemmelse, desto lengre vil den kunne fjerne seg fra formålet om å forbedre arbeids- og ansettelsesvilkår. Partene i en tariffavtale må gis et visst spillerom på dette området. Hvis det er klart at den tilsiktede, umiddelbare og praktiske virkningen av slike bestemmelser er å forbedre arbeids- og ansettelsesvilkår må derav følgende konkurransebegrensninger aksepteres.

56 Partenes *bona fides* ved inngåelsen og praktiseringen av tariffavtalen må også tas i betraktning. Hvor et element i en tariffavtale tilsynelatende tar sikte på å forbedre arbeids- og ansettelsesvilkår, mens måten det praktiseres på viser at det egentlig er ment å fremme andre interesser, kan avtalens beskyttelse mot artikkel 53 EØS ikke opprettholdes. Det er uvesentlig om det underliggende tilsiktede hovedformålet i seg selv kan være prisverdig.

57 Ved vurderingen av de ulike elementene i en tariffavtale må den nasjonale domstolen ta i betraktning den samlede virkningen av bestemmelsene. Selv om bestemmelsene enkeltvis ikke ville medføre noen sikker løsning på tariffavtalens

collective agreement in relation to the applicability of Article 53 EEA, their aggregate effect may bring the agreement within the scope of that Article.

58 In the case at hand, the Court cannot, by abstract deduction from the rules and principles of EEA law, determine if the provisions of the Basic Collective Agreement fall outside the scope of Article 53 EEA. It does not fall within its competence to embark upon an assessment of the conflicting views of the parties with regard to the factual circumstances. In this situation, the Court is bound to hold that the national court must undertake that examination, on the basis of its assessment of the facts of the case and of the criteria set out above.

59 The answer to questions 2a, 2b and 3 of the national court must therefore be that provisions of a collective agreement that pursue the objective of improving conditions of work and employment fall outside the scope of Article 53 EEA. Provisions of a collective agreement that pursue objectives extraneous to that of improving conditions of work and employment, or that do not, in practice, operate to improve conditions of work and employment, may come within the scope of Article 53 EEA.

Questions 1a, 1b and 1c

60 By its questions 1a, 1b and 1c, the national court essentially seeks to ascertain whether a collective agreement entered into by an organisation of municipal employers may be regarded as an agreement between undertakings or a decision by an association of undertakings within the meaning of Article 53 EEA.

61 Those questions become relevant only if the national court finds that provisions of the contested collective agreement come within the scope of Article 53 EEA.

62 Pursuant to Article 1 of Protocol 22 to the EEA Agreement, an undertaking is an entity carrying out activities of a commercial or economic nature. This definition follows the established case law of the Court of Justice of the European Communities, according to which the concept of an undertaking in the context of the competition rules covers all entities engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed (see, in particular, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, at paragraph 21; Case C-160/91 *Poucet and Pistre* [1993] ECR I-637, at paragraph 17; Case C-244/94 *Fédération Française des Sociétés d´Assurance* [1995] ECR I-4013, at paragraph 14; and *Albany*, cited above, at paragraph 77).

63 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 carries on economic activities of an industrial or commercial nature by offering or demanding goods or services in the market (see, to that effect, Case C-343/95 *Calì & Figli* v *SEPG* [1997] ECR I-1547, paragraph 16). Article 53 EEA may only apply to the latter.

status i forhold til anvendelsen av artikkel 53 EØS, kan deres samlede virkning bringe avtalen innenfor denne artikkelens anvendelsesområde.

58 I den foreliggende saken kan EFTA-domstolen ikke ved abstrakt utledning fra EØS-rettens regler og prinsipper avgjøre om hovedtariffavtalen faller utenfor anvendelsesområdet for artikkel 53 EØS. Det hører ikke under EFTA-domstolens kompetanse å foreta en bedømmelse av partenes ulike oppfatninger om sakens faktiske forhold. I denne situasjonen må EFTA-domstolen komme til at det er for den nasjonale domstolen å foreta denne vurderingen på grunnlag av sin bedømmelse av sakens faktum og av de kriteriene som er anvist ovenfor.

59 Svaret på den nasjonale domstolens spørsmål 2a, 2b og 3 må derfor være at bestemmelser i en tariffavtale som forfølger det formål å forbedre arbeids- og ansettelsesvilkår faller utenfor anvendelsesområdet for artikkel 53 EØS. Bestemmelser i en tariffavtale som forfølger formål som ligger utenfor området for forbedring av arbeids- og ansettelsesvilkår, eller som i praksis ikke virker slik at det fører til forbedring av arbeids- og ansettelsesvilkår, kan falle innenfor anvendelsesområdet for artikkel 53 EØS.

Spørsmål 1a, 1b og 1c

60 Ved spørsmål 1a, 1b og 1c søker den nasjonale domstolen i hovedsak å bringe på det rene om en tariffavtale inngått av en sammenslutning av kommunale arbeidsgivere kan anses som en avtale mellom foretak eller en beslutning truffet av en sammenslutning av foretak i henhold til artikkel 53 EØS.

61 Disse spørsmålene er relevante bare dersom den nasjonale domstolen kommer til at bestemmelser i den omtvistede tariffavtalen faller innenfor anvendelsesområdet for artikkel 53 EØS.

62 I henhold til artikkel 1 i EØS-avtalens protokoll 22 er et foretak en enhet som utøver virksomhet av en handelsmessig eller økonomisk art. Denne definisjonen er i samsvar med EF-domstolens etablerte rettspraksis, hvor foretaksbegrepet i konkurranserettslig sammenheng omfatter alle enheter som deltar i virksomhet av økonomisk art, uten hensyn til enhetens rettslige status og hvordan den er finansiert (se særlig sak C-41/90 *Höfner and Elser* [1991] ECR I-1979, avsnitt 21; sak C-160/91 *Poucet and Pistre* [1993] ECR I-637, avsnitt 17; sak C-244/94 *Fédération Française des Sociétés d´Assurance* [1995] ECR I-4013, avsnitt 14; og *Albany*, referert ovenfor, avsnitt 77).

63 Med hensyn til den mulige anvendelsen av EØS-avtalens konkurranseregler på en offentligrettslig enhet, må det skilles mellom situasjoner hvor enheten utøver offentlig myndighet, og situasjoner hvor den utøver økonomisk virksomhet av en industriell eller kommersiell art gjennom tilbud eller etterspørsel av varer eller tjenester i markedet (se sak C-343/95 *Calì & Figli* v *SEPG* [1997] ECR I-1547, avsnitt 16). Artikkel 53 EØS kan bare anvendes i det sistnevnte tilfellet.

64 Municipalities are entities of public law. Article 53 EEA does not apply to municipalities acting in their capacity as public authorities (see Case 30/87 *Bodson* v *Pompes funèbres des règions libèrèes* [1988] ECR 2479, paragraph 18). To the extent that the activities of a municipality consist of political decision-making or public administration, it will not in that capacity be an undertaking. However, when a municipality engages in economic activity, such as the offering of goods and services on the market for payment , it may, in that capacity, be an undertaking within the meaning of Article 53 EEA.

65 If an organisation of municipalities engages in collective bargaining in respect of employees that are engaged exclusively in the realm of public administration, neither the organisation nor its members could in that respect be considered an undertaking within the meaning of Article 53 EEA.

66 The Court notes that the collective agreement at issue in the main proceedings covers municipal employees of all groups, not only employees engaged in the realm of public administration. A municipality that, as a member of an organisation of employers, is protecting its interests as an employer engaged in economic activities, may, within that organisation, act as an undertaking within the meaning of Article 53 EEA.

67 It follows from the foregoing, that a municipality may constitute an undertaking when, in its capacity as employer, it becomes bound by a collective agreement without being party thereto.

68 The issues relating to the legal position of a municipality, as a member of an organisation of employers, in relation to a collective agreement, is a matter of national law, to be determined by the national court.

69 If the national court finds, based on the above considerations of EEA law, that provisions of the collective agreement at issue fall within the scope of Article 53 EEA, and that the municipalities are undertakings within the meaning of that Article, such provisions may be regarded as implying a decision by an association of undertakings. Depending on the national court's findings with regard to the issues referred to in paragraph 68 above, the provisions of the collective agreement may also be regarded as an agreement between undertakings.

70 The answer to questions 1a, 1b and 1c, must therefore be that a collective agreement entered into by an organisation of municipal employers may be regarded as an agreement between undertakings or a decision by an association of undertakings within the meaning of Article 53 EEA.

64 Kommuner er offentligrettslige enheter. Artikkel 53 EØS kan ikke anvendes på kommuner når de opptrer i sin egenskap av å være offentlig myndighet (se sak 30/87 *Bodson* v *Pompes funèbres des règions libèrèes* [1988] ECR 2479, avsnitt 18). I den grad kommunens virksomhet består i å treffe politiske beslutninger eller offentlig administrasjon vil den ikke anses som et foretak. Når en kommune deltar i økonomisk virksomhet, for eksempel tilbyr varer og tjenester i markedet mot vederlag, kan den imidlertid, i denne egenskap, være et foretak etter artikkel 53 EØS.

65 Hvis en sammenslutning av kommuner deltar i kollektive forhandlinger som gjelder arbeidstakere som er beskjeftiget utelukkende innen offentlig administrasjon, kan verken organisasjonen eller dens medlemmer i dette henseendet anses som et foretak i henhold til artikkel 53 EØS.

66 EFTA-domstolen bemerker at hovedtariffavtalen omfatter alle grupper av kommuneansatte, ikke bare ansatte innen offentlig administrasjon. En kommune som i egenskap av å være medlem av en arbeidsgiverorganisasjon beskytter sine interesser som arbeidsgiver engasjert i økonomisk virksomhet, kan, innenfor denne organisasjonen, opptre som et foretak etter artikkel 53 EØS.

67 Det følger herav at en kommune kan anses som et foretak når den i egenskap av å være arbeidsgiver blir bundet av en tariffavtale uten å være part i denne.

68 Spørsmål vedrørende en kommunes rettslige stilling som medlem av en arbeidsgiverorganisasjon i forhold til en tariffavtale, må avgjøres av den nasjonale domstolen i henhold til nasjonal rett.

69 Dersom den nasjonale domstolen, på grunnlag av de ovennevnte EØS-rettslige betraktninger kommer til at bestemmelser i den aktuelle tariffavtalen faller inn under anvendelsesområdet for artikkel 53 EØS, og at kommunene er foretak i henhold til samme artikkel, kan disse bestemmelsene bli ansett å innebære en beslutning av en sammenslutning av foretak. Avhengig av den nasjonale domstolens konklusjoner med hensyn til det forhold som er nevnt i avsnitt 68 ovenfor, kan tariffavtalens bestemmelser også bli ansett som en avtale mellom foretak.

70 Svaret på spørsmål 1a, 1b og 1c må derfor være at en tariffavtale inngått av en sammenslutning av kommunale arbeidsgivere kan anses som en avtale mellom foretak eller en beslutning truffet av en sammenslutning av foretak i henhold til artikkel 53 EØS.

Questions 4, 5a, 5b, 6, 7a and 7b

71 By questions 4, 5a, 5b, 6, 7a and 7b, the national court essentially seeks to ascertain whether the contested provisions of the Basic Collective Agreement are incompatible with Article 53 EEA.

72 The contested provisions set forth certain substantive requirements with regard to the contents of a pension scheme, and some procedural conditions. On their face, the substantive provisions appear directed towards securing that pension schemes will satisfy certain *desiderata* of a social policy nature, and the procedural rules towards securing the quality of a pension scheme, or securing that the parties to the collective agreement maintain control of any transfer of a pension scheme from one supplier to another. These objectives appear to be directed towards the improvement of conditions of work and employment. It follows that *prima facie,* the contested provisions fall outside the scope of Article 53 EEA.

73 In this context, it is not material whether these provisions will have the effect that only one, or a restricted number, of potential insurance providers may in practice be able to qualify as insurance suppliers when a transfer is sought. As long as the contested provisions actually pursue the objectives that place them outside the scope of Article 53 EEA, any resulting restriction of competition is accepted.

74 If, however, the national court, in the assessment described in paragraphs 55 and 56 above, finds that the contested provisions do not, in fact, pursue those objectives, they may, depending on the objectives actually pursued, fall within the scope of Article 53 EEA. If that is the case, and it is found that these provisions in effect require that municipalities obtain supplementary pension insurance services from specific insurers, thereby excluding or severely limiting their possibility of selecting other qualified service providers, these provisions may, depending on the factual, economic and legal circumstances, constitute a restriction of competition, in a manner affecting trade between EEA States, within the meaning of Article 53 EEA.

75 The answer to questions 4, 5a, 5b, 6, 7a and 7b, must therefore be that *prima facie*, the contested provisions of the Basic Collective Agreement fall outside the scope of Article 53 EEA. If, however, the national court finds that the contested provisions do not, in fact, pursue the apparent objectives, they may, in light of the objectives actually pursued, fall within the scope of Article 53 EEA. If so, and if it is found that these provisions in effect require the municipalities to obtain supplementary pension insurance services from specific insurers, thereby excluding or severely limiting their possibility of selecting other qualified service providers, these provisions may constitute a restriction of competition within the meaning of Article 53 EEA.

Spørsmål 4, 5a, 5b, 6, 7a og 7b

71 Ved spørsmål 4, 5a, 5b, 6, 7a og 7b søker den nasjonale domstolen i hovedsak å bringe på det rene hvorvidt de omstridte bestemmelsene i hovedtariffavtalen er uforenlig med artikkel 53 EØS.

72 De omstridte bestemmelsene oppstiller visse materielle krav til innholdet av en pensjonsordning, og enkelte prosessuelle vilkår. Formålet med de materielle bestemmelsene synes i utgangspunktet å være rettet mot å sikre at pensjonsordningene oppfyller visse sosialpolitiske ønskemål, og formålet med de prosessuelle reglene synes å være å sikre pensjonsordningens kvalitet, eller å sikre at tariffavtalens parter beholder kontrollen over en eventuell overføring av en pensjonsordning fra en leverandør til en annen. Disse formålene synes å være egnet til å bidra til en forbedring av arbeids- og ansettelsesvilkår. Det er derfor en presumsjon for at de omstridte bestemmelsene faller utenfor anvendelsesområdet for artikkel 53 EØS.

73 I denne sammenhengen er det ikke avgjørende hvorvidt effekten av disse bestemmelsene er at bare én eller et begrenset antall av potensielle forsikringsleverandører i praksis vil være kvalifisert som forsikringsleverandør ved en eventuell overføring. Så lenge de omstridte bestemmelsene faktisk forfølger de formålene som plasserer dem utenfor anvendelsesområdet for artikkel 53 EØS, må derav følgende konkurransebegrensninger aksepteres.

74 Dersom den nasjonale domstolen, i vurderingen beskrevet ovenfor i avsnittene 55 og 56, motsetningsvis skulle komme til at de omstridte bestemmelsene i realiteten ikke forfølger disse formålene, kan bestemmelsene, avhengig av hvilke formål som faktisk forfølges, falle innenfor anvendelsesområdet for artikkel 53 EØS. Dersom dette er tilfellet, og den nasjonale domstolen finner at virkningen av disse bestemmelsene er at kommunene må anskaffe supplerende pensjonsordninger fra bestemte forsikringsleverandører, og derved fratar, eller sterkt begrenser, kommunenes mulighet til å velge andre kvalifiserte leverandører, kan disse bestemmelsene avhengig av de faktiske, økonomiske og rettslige omstendighetene, utgjøre en begrensning av konkurransen som påvirker handelen mellom EØS-statene i henhold til artikkel 53 EØS.

75 Svaret på spørsmål 4, 5a, 5b, 6, 7a og 7b må derfor være at det er en presumsjon for at de omstridte bestemmelsene i hovedtariffavtalen faller utenfor anvendelsesområdet for artikkel 53 EØS. Dersom den nasjonale domstolen imidlertid kommer til at de omstridte bestemmelsene i realiteten ikke forfølger de tilsynelatende formålene, kan besemmelsene, i lys av de formålene som faktisk forfølges, falle innenfor anvendelsesområdet for artikkel 53 EØS. Dersom den nasjonale domstolen i tillegg finner at virkningen av disse bestemmelsene er at kommunene må anskaffe supplerende pensjonsordninger fra bestemte leverandører, og derved fratar, eller sterkt begrenser, kommunenes mulighet til å velge andre leverandører, kan disse bestemmelsene innebære en begrensning av konkurransen i henhold til artikkel 53 EØS.

Question 8

76 By question 8, the national court essentially seeks to ascertain whether the aggregate effect of the contested provisions of the Basic Collective Agreement may be contrary to Article 53 EEA, even though none of those provisions, viewed separately, would be contrary to that Article.

77 Whether an agreement restricts competition, and thereby infringes Article 53 EEA, is a legal question that must be examined in the light of economic considerations. In this assessment, account must be taken of the actual conditions in which the agreement functions (see Joined Cases T-374/94, T-384/94 and T-388/94 *ENS and Others* v *Commission* [1998] ECR II-3141, at paragraph 136). The individual provisions of the agreement should not only be examined separately, but must also be viewed in connection with other provisions of the agreement and the agreement as a whole. Separate provisions functioning together may in aggregate have as their object or effect the restriction of competition within the meaning of Article 53 EEA. It is immaterial that it can not be established that any individual provision has that effect.

78 The same must apply with regard to collective agreements, provided that the nature and purpose of the agreement is not such as to warrant its exclusion from the scope of Article 53 EEA pursuant to the criteria set out in paragraphs 49 - 57 above.

79 The answer to question 8 must therefore be that the aggregate effect of individual provisions of a collective agreement may be contrary to Article 53 EEA, even though none of those provisions, viewed separately, would be contrary thereto.

Questions 9 and 10

80 By its question 9, the national court seeks to ascertain whether an association of municipalities, which is an interest and employer organisation, may be regarded as an undertaking under Article 54 EEA when negotiating a collective agreement.

81 As found in paragraphs 62 - 64 above, a municipality may be regarded as an undertaking within the meaning of Article 53 EEA when it is engaged in economic activities. The same line of reasoning must apply with regard to the question of whether an association of municipalities may be regarded as an undertaking within the meaning of Article 54 EEA.

82 A municipality that, as a member of an organisation of employers, is protecting its interests as an employer engaged in economic activities, may, within that organisation, act as an undertaking. To the extent that an organisation of employers engaged in economic activities is protecting the interests of its members in the negotiation of an agreement regarding those activities, the organisation of employers may be deemed to be an undertaking within the meaning of Article 54 EEA.

Spørsmål 8

76 Ved spørsmål 8 søker den nasjonale domstolen i hovedsak å bringe på det rene hvorvidt den samlede virkningen av de omstridte bestemmelsene i hovedtariffavtalen kan være i strid med artikkel 53 EØS, selv om ingen av disse bestemmelsene enkeltvis ville være i strid med denne artikkelen.

77 Spørsmålet om hvorvidt en avtale begrenser konkurransen, og derfor er i strid med artikkel 53 EØS, er et rettslig spørsmål som må vurderes på bakgrunn av økonomiske betraktninger. I denne vurderingen må det tas hensyn til under hvilke faktiske omstendigheter avtalen fungerer (se forende saker T-374/94, T-384/94 og T-388/94 *ENS and Others* v *Commission* [1998] ECR II-3141, avsnitt 136). Avtalens enkelte bestemmelser må ikke bare vurderes separat, men må også ses i sammenheng med andre bestemmelser i avtalen og avtalen i sin helhet. Enkeltbestemmelser kan samlet ha som formål eller virkning å begrense konkurransen i henhold til artikkel 53 EØS. Det er uten betydning at det ikke kan påvises at noen av bestemmelsene enkeltvis har slik virkning.

78 Det samme må gjelde for tariffavtaler, forutsatt at avtalens art og formål ikke begrunner at avtalen faller utenfor anvendelsesområdet for artikkel 53 EØS i overensstemmelse med kriteriene anvist i avsnitt 49-57 ovenfor.

79 Svaret på spørsmål 8 må derfor være at den samlede virkningen av enkelte bestemmelser i en tariffavtale kan være i strid med artikkel 53 EØS, selv om ingen av disse bestemmelsene alene ville være i strid med denne artikkelen.

Spørsmål 9 og 10

80 Ved sitt spørsmål 9 søker den nasjonale domstolen å fastslå om en sammenslutning av kommuner, som er en interesse- og arbeidsgiverorganisasjon, kan anses som et foretak etter artikkel 54 EØS ved forhandlingen av en tariffavtale.

81 Det følger av avsnittene 62-64 ovenfor at en kommune kan anses som et foretak etter artikkel 53 EØS når den er engasjert i økonomisk virksomhet. Det samme resonnemtet må gjelde med hensyn til spørsmålet om en sammenslutning av kommuner kan anses som et foretak etter artikkel 54 EØS.

82 En kommune som i egenskap av å være medlem av en arbeidsgiverorganisasjon beskytter sine interesser som en arbeidsgiver engasjert i økonomisk virksomhet, kan, innenfor denne organisasjonen, opptre som et foretak. I den utstrekning en sammenslutning av arbeidsgivere engasjert i økonomisk virksomhet beskytter sine medlemmers interesser ved forhandlingen av en avtale som gjelder denne virksomheten, kan sammenslutningen av arbeidsgivere anses å være et foretak i henhold til artikkel 54 EØS.

83 The answer to question 9 must therefore be that an association of municipalities, which is an interest and employer organisation, may be regarded as an undertaking under Article 54 EEA when negotiating a collective agreement.

84 By its question 10, the national court essentially seeks to ascertain whether it is compatible with Article 54 EEA for an undertaking in a dominant position to conclude an agreement containing the contested provisions of the Basic Collective Agreement, or to practise such provisions.

85 The question is based on the assumption of a finding that the economic strength enjoyed by the undertaking in the relevant market is sufficient to conclude that the undertaking has a dominant position.

86 The Court refers to what is stated in paragraphs 48 and 58 above. It falls outside the competence of the EFTA Court to provide the national court with an answer to a question that requires an evaluation of the evidence of the case and an application of the law to the facts of the case.

87 It does not appear from the papers provided by the national court or from the uncontested written and oral observations of the parties that the system set forth in the Basic Collective Agreement or its implementation amounts to an abuse of any existing dominant position. However, this may be otherwise if the national court were to find that KLP enjoys a dominant position in the relevant market, that an identification may be made between KS and KLP, and that their conduct in relation to the conclusion of the contested provisions of the Basic Collective Agreement, or the implementation of those provisions, have, in practice, prevented transfers of supplementary pension insurance schemes from KLP to other insurance companies, in order to protect the position of KLP. Whether this constitutes an abuse of a dominant position must be decided by the national court on the basis of the factual, economic and legal circumstances.

88 The answer to question 10 must therefore be that it is for the national court to decide, on the basis of all relevant factual, economic and legal circumstances, whether it is compatible with Article 54 EEA for an undertaking in a dominant position to conclude or to practise the contested provisions of the Basic Collective Agreement.

V Costs

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

83 Svaret på spørsmål 9 må derfor være at en sammenslutning av kommuner, som er en interesse- og arbeidsgiverorganisasjon, kan anses som et foretak etter artikkel 54 EØS ved forhandlingen av en tariffavtale.

84 Med sitt spørsmål 10 søker den nasjonale domstolen i hovedsak å bringe på det rene om det er forenlig med artikkel 54 EØS at et foretak med dominerende stilling inngår eller praktiserer en avtale som inneholder de omtvistede bestemmelsene i hovedtariffavtalen.

85 Spørsmålet er basert på en forutsetning om at foretakets økonomiske styrke i det relevante markedet er tilstrekkelig til å konstatere at foretaket har en dominerende stilling.

86 EFTA-domstolen henviser til det som er uttalt i avsnittene 48 og 58 ovenfor. Det faller utenfor EFTA-domstolens kompetanse å gi den nasjonale domstolen svar på et spørsmål som krever en bedømmelse av bevisene i saken og en anvendelse av retten på sakens faktum.

87 Det fremgår ikke av dokumentene mottatt fra den nasjonale domstolen eller av de ubestridte delene av partenes skriftlige og muntlige saksfremstillinger at ordningen som beskrives i hovedtariffavtalen eller praktiseringen av denne utgjør utilbørlig utnyttelse av noen antatt eksisterende dominerende stilling. Dette kan imidlertid være annerledes dersom den nasjonale domstolen skulle finne at KLP innehar en dominerende stilling i det relevante markedet, at KS og KLP kan identifiseres med hverandre, og at deres opptreden i forbindelse med inngåelsen av de omtvistede bestemmelsene i hovedtariffavtalen, eller ved praktiseringen av disse bestemmelsene, i praksis har forhindret overføringer av supplerende pensjonsordninger fra KLP til andre forsikringsselskaper, med sikte på å beskytte KLPs stilling. Om dette innebærer utilbørlig utnyttelse av en dominerende stilling må avgjøres av den nasjonale domstolen på grunnlag av de faktiske, økonomiske og rettslige omstendighetene i saken.

88 Svaret på spørsmål 10 må derfor være at det er den nasjonale domstolens oppgave å avgjøre, på grunnlag av alle relevante faktiske, økonomiske og rettslige omstendigheter i saken, om det er forenlig med artikkel 54 EØS at et foretak med dominerende stilling inngår eller praktiserer de omstridte bestemmelsene i hovedtariffavtalen.

V Saksomkostninger

89 Omkostninger som er påløpt for Den islandske regjering, Den norske regjering, Den svenske regjering, EFTAs overvåkningsorgan og Kommisjonen for De europeiske fellesskap, som har gitt saksfremstillinger for EFTA-domstolen, kan ikke kreves dekket. Siden rettergangen her, for partene i hovedsaken, utgjør en del av rettergangen for den nasjonale domstolen, er avgjørelsen av saksomkostninger en sak for den nasjonale domstolen.

On those grounds,

THE COURT,

in answer to the questions referred to it by Arbeidsretten in Norway by an order of 27 September 2000, hereby gives the following Advisory Opinion:

1. **Provisions of a collective agreement that pursue the objective of improving conditions of work and employment fall outside the scope of Article 53 EEA. Provisions of a collective agreement that pursue objectives extraneous to that of improving conditions of work and employment or that do not, in practice, operate to improve conditions of work and employment may come within the scope of Article 53 EEA.**

2. **A collective agreement entered into by an organisation of municipal employers may be regarded as an agreement between undertakings or a decision by an association of undertakings within the meaning of Article 53 EEA.**

3. **Provisions such as those contested in the Basic Collective Agreement *prima facie* fall outside the scope of Article 53 EEA. If, however, the national court finds that the contested provisions do not, in fact, pursue the apparent objectives, they may, in the light of the objectives actually pursued, fall within the scope of Article 53 EEA. If so, and if it is found that these provisions in effect require the municipalities to obtain supplementary pension insurance services from specific insurers, thereby excluding or severely limiting, their possibility of selecting other qualified service providers, these provisions may constitute a restriction of competition within the meaning of Article 53 EEA.**

4. **The aggregate effect of individual provisions of a collective agreement may be contrary to Article 53 EEA, even though none of those provisions, viewed separately, would be contrary thereto.**

5. **An association of municipalities, which is an interest and employer organisation, may be regarded as an undertaking under Article 54 EEA when negotiating a collective agreement.**

6. **It is for the national court to decide, on the basis of all relevant factual, economic and legal circumstances, whether it is compatible with Article 54 EEA for an undertaking in a dominant**

På dette grunnlag avgir

DOMSTOLEN,

som svar på spørsmålene som er forelagt av Arbeidsretten i Norge ved beslutning av 27 september 2000, følgende rådgivende uttalelse:

1. **Bestemmelser i en tariffavtale som forfølger det formål å forbedre arbeids- og ansettelsesvilkår faller utenfor anvendelsesområdet for artikkel 53 EØS. Bestemmelser i en tariffavtale som forfølger formål som ligger utenfor området for forbedring av arbeids- og ansettelsesvilkår, eller som i praksis ikke virker slik at det fører til forbedring av arbeids- og ansettelsesvilkår, kan falle innenfor anvendelsesområdet for artikkel 53 EØS.**

2. **En tariffavtale inngått av en sammenslutning av kommunale arbeidsgivere kan anses som en avtale mellom foretak eller en beslutning truffet av en sammenslutning av foretak i henhold til artikkel 53 EØS.**

3. **Det er en presumsjon for at de omstridte bestemmelsene i hovedtariffavtalen faller utenfor anvendelsesområdet for artikkel 53 EØS. Dersom den nasjonale domstolen imidlertid kommer til at de omstridte bestemmelsene i realiteten ikke forfølger de tilsynelatende formålene, kan bestemmelsene, i lys av de formålene som faktisk forfølges, falle innenfor anvendelsesområdet for artikkel 53 EØS. Dersom den nasjonale domstolen i tillegg finner at virkningen av disse bestemmelsene er at kommunene må anskaffe supplerende pensjonsordninger fra bestemte leverandører, og derved fratar, eller sterkt begrenser, kommunenes mulighet til å velge andre leverandører, kan disse bestemmelsene innebære en begrensning av konkurransen i henhold til artikkel 53 EØS.**

4. **Den samlede virkningen av enkelte bestemmelser i en tariffavtale kan være i strid med artikkel 53 EØS, selv om ingen av disse bestemmelsene alene ville være i strid med denne artikkelen.**

5. **En sammenslutning av kommuner, som er en interesse- og arbeidsgiverorganisasjon, kan anses som et foretak etter artikkel 54 EØS ved forhandlingen av en tariffavtale.**

6. **Det er den nasjonale domstolens oppgave å avgjøre, på grunnlag av alle relevante faktiske, økonomiske og rettslige omstendigheter i**

position to conclude or to practise the contested provisions of the Basic Collective Agreement.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 22 March 2002.

Lucien Dedichen
Registrar

Thór Vilhjálmsson
President

saken, om det er forenlig med artikkel 54 EØS at et foretak med dominerende stilling inngår eller praktiserer de omstridte bestemmelsene i hovedtariffavtalen.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Avsagt i åpen rett i Luxembourg den 22 mars 2002.

Lucien Dedichen
Justissekretær

Thór Vilhjálmsson
President

REPORT FOR THE HEARING
in Case E-8/00
– revised[*] –

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 Arbeidsretten (Labour Court of Norway) in a case between

Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions) with Norsk Kommuneforbund (Norwegian Union of Municipal Employees)

supported by
Kommunalansattes Fellesorganisasjon (Norwegian Confederation of Municipal Employees)

and

Kommunenes Sentralforbund (Norwegian Association of Local and Regional Authorities)

Hamarøy kommune and Tysfjord kommune

Steigen kommune and Hitra kommune

Tana kommune

Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune

on the interpretation of Articles 53 and 54 of the EEA Agreement.

[*] Amendments to the list of Defendants, and to paragraphs 1, 53, 86, and 217.

RETTSMØTERAPPORT
I sak E-8/00
- revidert[*] -

ANMODNING til Domstolen om rådgivende uttalelse i medhold av artikkel 34 i Avtalen mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol fra Arbeidsretten i saken for denne domstol mellom

Landsorganisasjonen i Norge
med Norsk Kommuneforbund

støttet av
Kommunalansattes Fellesorganisasjon

og

Kommunenes Sentralforbund

Hamarøy kommune og Tysfjord kommune

Steigen kommune og Hitra kommune

Tana kommune

Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune og Volda kommune

om tolkningen av EØS-avtalens artikkel 53 og 54.

[*] Endringer i oversikten over saksøkte og i avsnittene 1, 53, 86, og 217.

I. Introduction

1. By a reference dated 27 September 2000, registered at the Court on 2 October 2000, Arbeidsretten (Labour Court of Norway), submitted a Request for an Advisory Opinion in connection with a case brought before it by the Plaintiffs, Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions, hereinafter "LO"), with Norsk kommuneforbund (Norwegian Union of Municipal Employees), (hereinafter "NKF"), supported by Kommunalansattes Fellesorganisasjon (Norwegian Confederation of Municipal Employees, hereinafter "KFO") and Akademikernes Fellesorganisasjon (Confederation of Academic and Professional Unions in Norway) as interveners, against Defendants: (1) Kommunenes Sentralforbund (Norwegian Association of Local and Regional Authorities), (hereinafter "KS"); (2-3) Hamarøy kommune and Tysfjord kommune; (4-5) Steigen kommune and Hitra kommune; (6-7) Alta kommune and Tana kommune; (8-13) Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune (hereinafter collectively the "Defendants"). By a letter dated 27 September 2001, the President of the Labour Court notified the Registrar of the EFTA Court that the Confederation of Academic and Professional Unions in Norway had withdrawn as intervener in the case. By a further letter dated 11 October 2001, the Labour Court notified the Registrar of the EFTA Court that Alta kommune was no longer a party to the case.

2. The dispute before Arbeidsretten concerns the Basic Collective Agreement for Municipalities, etc., for the Contract Period 1 May 1998 to 30 April 2000 (*Hovedtariffavtalen for kommuner, m.v. for tariffperioden 1. mai 1998 – 30. April 2000*, hereinafter referred to variously as the "Basic Collective Agreement" or by its Norwegian acronym "HTA") between, on the one hand, various bodies representative of municipal employees and, on the other hand, bodies representative of municipalities and individual municipalities acting in their capacity as employers. It is *inter alia* alleged by the Defendants that certain provisions of the Basic Collective Agreement relating to pension matters are incompatible with Article 53 and 54 EEA.

II. Legal background

EEA law

3. The questions submitted to the Court concern the interpretation of Article 53 and 54 EEA.

4. Article 53 EEA reads as follows:

I. Introduksjon

1. Ved en beslutning datert 27 september 2000, registrert ved domstolen 2 oktober 2000, anmodet Arbeidsretten om en rådgivende uttalelse i en sak innbrakt for denne mellom saksøkerne Landsorganisasjonen i Norge, (heretter "LO"), med Norsk kommuneforbund, (heretter "NKF"), støttet av Kommunalansattes Fellesorganisasjon, (heretter "KFO") som hjelpeintervenient, mot de saksøkte: (1) Kommunenes Sentralforbund, (heretter "KS"); (2-3) Hamarøy kommune og Tysfjord kommune; (4-5) Steigen kommune og Hitra kommune; (6-7) Alta kommune og Tana kommune; (8-13) Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune og Volda kommune (heretter i fellesskap "saksøkte"). Ved et brev av 27 september 2001 informerte Arbeidsrettens formann EFTA-domstolen om at Akademikernes Fellesorganisasjon har trukket sin intervensjonserklæring i saken. Ved et nytt brev datert 11 oktober 2001, informerte Arbeidsretten EFTA-domstolens justissekretær om at Alta kommune ikke lenger er part i saken.

2. Saken for Arbeidsretten gjelder hovedtariffavtalen for kommuner, m.v. for tariffperioden 1. mai 1998 - 30. april, (heretter omtalt som "hovedtariffavtalen" eller ved forkortelsen "HTA") mellom, på den ene siden ulike organer som representerer kommunalt ansatte, og på den andre siden, organer som representerer kommunene, og de enkelte kommuner som arbeidsgivere. Det er blant annet påstått av de saksøkte at visse bestemmelser i hovedtariffavtalen om pensjonsforhold er uforenlige med artikkel 53 og 54 EØS.

II. Rettslig bakgrunn

EØS-retten

3. Spørsmålene som er stilt til domstolen gjelder tolkningen av artikkel 53 og artikkel 54 EØS.

4. Artikkel 53 EØS lyder:

"1.The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

– *any agreement or category of agreements between undertakings;*

– *any decision or category of decisions by associations of undertakings;*

– *any concerted practice or category of concerted practices;*

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

5. Article 54 EEA reads as follows:

"Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

"1. Enhver avtale mellom foretak, enhver beslutning truffet av sammenslutninger av foretak og enhver form for samordnet opptreden som kan påvirke handelen mellom avtalepartene, og som har til formål eller virkning å hindre, innskrenke eller vri konkurransen innen det territorium som er omfattet av denne avtale, skal være uforenlige med denne avtales funksjon og forbudt, særlig slike som består i

a) å fastsette på direkte eller indirekte måte innkjøps- eller utsalgspriser eller andre forretningsvilkår,

b) å begrense eller kontrollere produksjon, avsetning, teknisk utvikling eller investeringer,

c) å dele opp markeder eller forsyningskilder,

d) å anvende overfor handelspartnere ulike vilkår for likeverdige ytelser og derved stille dem ugunstigere i konkurransen,

e) å gjøre inngåelsen av kontrakter avhengig av at medkontrahentene godtar tilleggsytelser som etter sin art eller etter vanlig forretningspraksis ikke har noen sammenheng med kontraktsgjenstanden.

2. Avtaler eller beslutninger som er forbudt i henhold til denne artikkel, skal ikke ha noen rettsvirkning.

3. Det kan imidlertid erklæres at bestemmelsene i nr 1 ikke skal anvendes på

– avtaler eller grupper av avtaler mellom foretak,

– beslutninger eller grupper av beslutninger truffet av sammenslutninger av foretak, og

– samordnet opptreden eller grupper av slik opptreden,

som bidrar til å bedre produksjonen eller fordelingen av varene eller til å fremme den tekniske eller økonomiske utvikling, samtidig som de sikrer forbrukerne en rimelig andel av de fordeler som er oppnådd, og uten

a) å pålegge vedkommende foretak restriksjoner som ikke er absolutt nødvendige for å nå disse mål, eller

b) å gi disse foretak mulighet til å utelukke konkurranse for en vesentlig del av de varer det gjelder."

5. Artikkel 54 EØS lyder:

"Et eller flere foretaks utilbørlige utnyttelse av sin dominerende stilling innen det territorium som er omfattet av denne avtale, eller i en vesentlig del av det, skal være forbudt og uforenlig med denne avtales funksjon i den utstrekning den kan påvirke handelen mellom avtalepartene.

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."

National provisions – the Basic Collective Agreement

6. The relevant provisions of the HTA as this case is presented before the EFTA Court are to be found in chapter 2 thereof. They read as follows:

"2.0 Definition

Occupational pension scheme means that pension to which an employee is entitled in accordance with the present collective agreement and corresponding to the articles of association as may be in force at any time for the joint municipal pension scheme with KLP.

2.1 Occupational pension scheme

By 1 January 1997, all employers shall have established a pension scheme for their employees which meets the following requirements:

2.1.1 The pension scheme shall cover all permanent employees who have working hours corresponding to at least 14 hours per week. Temporary employees shall be covered after 6 months' consecutive employment, provided that the working hours correspond to at least 14 hours per week.

As of 1 January 1999, the pension scheme shall cover all employees who have average working hours which correspond to the minimum requirement.

2.1.2 The pension scheme shall guarantee the members an aggregate retirement/disability pension of at least 66% of the fixed basis for calculating benefits at full accrual. The pension scheme shall also give entitlement to spouse and children's pensions.

The accrual of pension shall take place in a linear fashion, i.e. equally great portions of full pension shall accrue for each year one is a member. The requirement for full accrual is set at 30 years. For those who cease employment

Slik utilbørlig utnyttelse kan særlig bestå i

a) å påtvinge, direkte eller indirekte, urimelige innkjøps- eller utsalgspriser eller andre urimelige forretningsvilkår,

b) å begrense produksjon, avsetning eller teknisk utvikling til skade for forbrukerne,

c) å anvende overfor handelspartnere ulike vilkår for likeverdige ytelser og derved stille dem ugunstigere i konkurransen,

d) å gjøre inngåelsen av kontrakter avhengig av at medkontrahentene godtar tilleggsytelser som etter sin art eller etter vanlig forretningspraksis ikke har noen sammenheng med kontraktsgjenstanden."

Nasjonale bestemmelser - hovedtariffavtalen

6. De relevante bestemmelser fra HTA slik denne saken er forelagt EFTA domstolen finnes i dens kapittel 2. De lyder som følger:

"2.0 Definisjon

Med tjenestepensjonsordning menes den pensjon en arbeidstaker har rett til i samsvar med denne tariffavtale og tilsvarende de til enhver tid gjeldende vedtekter for Felles Kommunal Pensjonsordning i KLP.

2.1 Tjenestepensjonsordning

Fra 01.01.97 skal alle arbeidsgivere ha opprettet pensjonsordning for sine tilsatte som tilfredsstiller følgende krav:

2.1.1 Pensjonsordningen skal omfatte alle fast tilsatte med en arbeidstid som tilsvarer minst 14 timer per uke. Midlertidig tilsatte skal omfattes etter 6 måneders sammenhengende tilsetting, forutsatt at arbeidstiden tilsvarer minst 14 timer per uke.

Pensjonsordningen skal fra 01.01.99 omfatte alle tilsatte med en gjennomsnittlig arbeidstid som tilsvarer minstekravet.

2.1.2 Pensjonsordningen skal garantere medlemmene en samlet alders-/uførepensjon på minst 66 % av pensjonsgrunnlaget ved full opptjening. Pensjonsordningen skal også gi rett til ektefelle- og barnepensjon.

Pensjonsopptjeningen skal skje lineært, dvs. at man skal opptjene like store deler av full pensjon for hvert år man er medlem. Kravet til full opptjening settes til 30 år. For de som fratrer med oppsatt pensjon settes kravet til full opptjening til maksimalt 40 år.

with deferred pension, the requirement for full accrual is set at maximum 40 years.

The fixed basis for calculating benefits is calculated in accordance with clause 2.1.7, cf. 2.3.

2.1.3 The setting of age limits and rules on the right to withdraw retirement pension before the age limit is reached shall follow the same principles as are in force in the Norwegian Public Service Pension Fund. The parties to the collective agreement shall make the necessary adaptations in the municipal sector.

2.1.4 The pensions shall be adjusted in accordance with the adjustment of the basic amount under the National Insurance Scheme. The same applies for the fixed basis for calculating benefits for those who cease employment before they are entitled to pension.

2.1.5 The pension rights shall be covered by a transfer agreement with the Norwegian Public Service Pension Fund and other municipal pension schemes, so that the aggregate pension is calculated as if it had accrued in the last scheme in which one was a member.

2.1.6 The pension rights, including linearly calculated and adjusted, deferred pension rights, shall, with respect to all benefits, be covered by insurance with an insurance company or a pension institution based on insurance products which are taken note of by the Banking, Insurance and Securities Commission.

2.1.7 The fixed basis for calculating benefits shall be set based on regular salary fixed salary and pension-generating supplements. Account shall not be taken of salary including supplements which exceed 12 G.

2.1.8 In the event of a change of company/pension institution, this shall be discussed with union representatives, cf. chapter 3 of the Transfer Regulation. Minutes of the discussions shall accompany the file through to the decision in the municipal council/county council/board.

Before the decision-making body may begin to deal with a possible change of company, relevant offers for a new occupational pension scheme shall be put before those members of the Pension Committee who represent the parties to the collective agreement, who shall attest whether the various pension insurance products satisfy the aforementioned requirements in the collective agreement.

In addition, the occupational pension scheme must be based on a financing system which is gender-neutral and does not have the effect of excluding older employees.

Before the matter may be decided upon by the municipal council/county council/board, there must be approval from the Norwegian Public Service Pension Fund, relating to inclusion in the transfer agreement, and the pension scheme must be taken note of by the Banking, Insurance and Securities Commission, cf. clauses 2.1.5 and 2.1.6."

Pensjonsgrunnlaget beregnes i samsvar med pkt. 2.1.7, jf. 2.3.

2.1.3 Fastsettelse av aldersgrenser og regler om rett til å ta ut alderspensjon før nådd aldersgrense skal følge de samme prinsipper som gjelder i Statens Pensjonskasse. Tariffpartene foretar nødvendige tilpasninger til kommunal sektor.

2.1.4 Pensjonene skal reguleres i samsvar med reguleringen av folketrygdens grunnbeløp. Det samme gjelder pensjonsgrunnlaget for de som fratrer før de har rett til pensjon.

2.1.5 Pensjonsrettighetene skal være omfattet av overføringsavtale med Statens Pensjonskasse og øvrige kommunale pensjonsordninger, slik at samlet pensjon regnes som om den var opptjent i den ordning man sist er medlem av.

2.1.6 Pensjonsrettighetene, herunder lineært beregnede og regulerte oppsatte pensjonsrettigheter, skal for alle ytelsers vedkommende være forsikringsmessig dekket i et forsikringsselskap eller en pensjonskasse basert på forsikringsprodukter som er tatt til etterretning av Kredittilsynet.

2.1.7 Pensjonsgrunnlaget fastsettes ut fra fast lønn og pensjonsgivende tillegg. Det tas ikke hensyn til lønn inklusive tillegg som overstiger 12 G.

2.1.8 Ved skifte av selskap/pensjonskasse skal dette drøftes med de tillitsvalgte, jf. flytteforskriften kapittel 3. Referat fra drøftingene skal følge saken fram til avgjørelsen i kommunestyret/fylkestinget/styret.

Før behandling i besluttende organ knyttet til eventuelt skifte av selskap kan begynnes, skal aktuelle tilbud på ny tjenestepensjonsordning forelegges for Pensjonsutvalgets tariffparter, som skal godkjenne om de ulike pensjonsforsikringsproduktene tilfredsstiller de forannevnte tariffkravene.

Tjenestepensjonsordningen må i tillegg være basert på et finansieringssystem som er kjønnsnøytralt og som ikke virker utstøtende på eldre arbeidstakere.

Før saken kan avgjøres av kommunestyret/fylkestinget/styret, må godkjenning av Statens Pensjonskasse foreligge, knyttet til opptak i overføringsavtalen, og pensjonsordningen må være tatt til etterretning av Kredittilsynet, jf. pkt. 2.1.5 og 2.1.6."

7. After a revision in the spring of 2000, the above provisions were amended on essential points, following which clauses 2.1.6 – 2.1.8 read as follows:

> *"2.1.6 The pension rights, including linearly calculated and adjusted, deferred pension rights, shall, with respect to all benefits, be covered by insurance with an insurance company or a pension institution. If the members of KS do not have, or cannot have, full insurance cover for the pension obligations, the municipality/county municipality shall be liable for the balance of cost as a self-insurer.*
>
> *2.1.7 The fixed basis for calculating benefits shall be set based on fixed salary and pension-generating supplements. Account shall not be taken of salary including supplements which exceed 12 G.*
>
> *2.1.8 In the event of a change of company/pension institution, this shall be discussed with union representatives, cf. chapter 3 of the Transfer Regulation. The obligation to enter into discussion applies at the earliest possible point in time, and at the latest before the notice of termination has been adopted and given to the current supplier of occupational pension insurance.*
>
> *The occupational pension scheme shall be based on a financing system which is gender-neutral and does not have the effect of excluding older employees.*
>
> *An expert group is set up with an advisory function, consisting of*
>
> *1 representative appointed by the joint negotiations bodies;*
>
> *1 representative appointed by KS; and*
>
> *1 neutral chairperson appointed by those members of the Pension Committee who represent the parties to the collective agreement. Any dispute as to the appointments shall be settled pursuant to clause 4, 4-1, third paragraph HTA.*
>
> *The expert group shall give a reasoned opinion to those members of the Pension Committee who represent the parties to the collective agreement as to whether the offers received for new pension products comply with the Insurance Activity Act, the Insurance Contracts Act, and whether all risks and benefits, cf. clause 2.1.6, have insurance coverage with the company, and whether the product meets the other requirements set out in the collective agreement. Any assessment by those members of the Pension Committee who represent the parties to the collective agreement shall be forwarded to the municipality/county municipality together with the opinion of the expert group.*
>
> *Before the matter may be decided upon by the municipal council/county council, an application for approval under the transfer agreement between public pension institutions shall be sent to the Public Service Pension Fund, and the opinion of union representatives who represent the active employees covered by the pension scheme shall accompany the file through to final decision by the municipal council/county council."*

7. Etter en revisjon våren 2000, ble bestemmelsene ovenfor endret på vesentlige punkter, hvoretter bestemmelsene 2.1.6 - 2.1.8 lyder som følger:

> *"2.1.6 Pensjonsrettighetene, herunder lineært beregnede og regulerte oppsatte pensjonsrettigheter, skal for alle ytelsers vedkommende være forsikringsmessig dekket i et forsikringsselskap eller en pensjonskasse. Dersom KS' medlemmer ikke har, eller kan ha full forsikringsdekning for pensjonsforpliktelsene, står kommunen/fylkeskommunen ansvarlig for eventuelle differanseytelser som selvassurandør.*
>
> *2.1.7 Pensjonsgrunnlaget fastsettes ut fra fast lønn og pensjonsgivende tillegg. Det tas ikke hensyn til lønn inklusive tillegg som overstiger 12 G.*
>
> *2.1.8 Ved skifte av selskap/pensjonskasse skal dette drøftes med de tillitsvalgte, jf. flytteforskriften kapittel 3. Drøftingsplikten inntrer tidligst mulig og senest før oppsigelse er vedtatt og levert dagens leverandør av tjenestepensjonsforsikring.*
>
> *Tjenestepensjonsordningen skal være basert på et finansieringssystem som er kjønnsnøytralt og som ikke virker utstøtende på eldre arbeidstakere.*
>
> *Det opprettes en faggruppe med rådgivende funksjon, bestående av*
>
> *1 representant oppnevnt av Forhandlingssammenslutningene,*
>
> *1 representant oppnevnt av KS og*
>
> *1 nøytral leder oppnevnt av pensjonsutvalgets tariffparter. Eventuell tvist om oppnevningen avgjøres etter Hovedavtalen § 4, punkt 4-1, tredje ledd.*
>
> *Faggruppen skal avgi begrunnet uttalelse til pensjonsutvalgets tariffparter om de innhentede tilbud på nye pensjonsprodukter er i samsvar med forsikringsvirksomhetsloven, forsikringsavtaleloven, at alle risiki og ytelser jfr. punkt 2.1.6, har forsikringsmessig dekning i selskapet og om produktet oppfyller tariffavtalens øvrige krav. Eventuelle vurderinger fra pensjonsutvalgets tariffparter oversendes kommunen/fylkeskommunen sammen med faggruppens uttalelse.*
>
> *Før saken kan avgjøres av kommunestyret/fylkestinget skal søknad om godkjenning inn under overføringsavtalen mellom offentlige pensjonskasser være sendt til Statens Pensjonskasse og uttalelse fra tillitsvalgte som representerer de aktive arbeidstakere som er omfattet av pensjonsordningen, skal følge saken frem til endelig avgjørelse i kommunestyret/fylkestinget."*

III. Facts and procedure

Procedure and matters in dispute

8. As stated above, the case before Arbeidsretten concerns certain provisions of the HTA relating to pension schemes. The relevant provisions are reproduced above. The case concerns whether the defendant municipalities breached the abovementioned provisions contained in chapter 2 of the HTA, in particular clause 2.1.8, when they moved their occupational pension insurance from one supplier, Kommunal Landspensjonskasse (hereinafter "KLP"), to other insurance companies. There is also the issue of the legal consequences of any such breach.

9. LO/NKF argue that the municipalities, in moving their occupational pension insurance, breached several of the provisions of the HTA by which they are bound. The defendant municipalities have submitted that the claims be rejected. They argue *inter alia* that several of the provisions in the HTA invoked by LO/NKF are not legally binding because they are contrary to Articles 53 and 54 EEA, see Norwegian Act No. 109 of 27 November 1992 relating to Implementation in Norwegian Law of the Main Agreement on the European Economic Area (EEA), etc. – (*EØS-loven*).

Municipalities and their status as employers

10. The municipalities and county municipalities in Norway are established and regulated by Act No. 107 of 25 September 1992 Concerning Municipalities and County Municipalities (*kommuneloven*, hereinafter the "Local Government Act"). In the municipal sector, there are roughly 550 000 employees. Of these, about 100 000 are teachers, who are municipal employees but who are covered by collective agreements with the State. Thus in the rest of the municipal sector there are around 450 000 employees. Of these, roughly 430 000 are employed by the municipalities, of whom approximately 60 000 in Oslo. The aforementioned figures are estimates based on available statistical sources with reference to the labour market situation at the end of 1998/early 1999.

11. The principal Defendant, KS, is a membership organisation and interest group, and is also an employers' association. All municipalities and county municipalities are currently members of KS and all are affiliated with KS's employer activity. Oslo municipality is, however, exempt from following KS collective agreements. Thus, as an employers' association KS has 434 municipalities and 18 county municipalities as members. These have a total of around 370 000 employees (excluding teachers). Of these, some – such as those filling temporary vacancies, extra staff, etc. – fall outside the scope of application of the basic collective agreements for municipalities and it is uncertain how many others are covered by their provisions on occupational pensions.

III. Faktum og prosedyre

Prosedyre og tvistespørsmål

8. Som nevnt ovenfor, gjelder saken for Arbeidsretten visse bestemmelser i HTA om pensjonsordninger. De relevante bestemmelser er gjengitt ovenfor. Saken gjelder hvorvidt de saksøkte kommunene kommune brøt de ovennevnte bestemmelsene i HTA kapittel 2, særlig punkt 2.1.8, da de flyttet tjenestepensjonsforsikringene fra en tilbyder, Kommunal Landspensjonskasse, (heretter "KLP"), til andre forsikringsselskaper. Videre gjelder tvisten også spørsmål om rettsvirkninger av slike eventuelle brudd.

9. LO/NKF gjør gjeldende at kommunene ved flytting av sine tjenestepensjonsforsikringer har brutt flere av de bestemmelser i HTA som kommunene er bundet av. De saksøkte kommunene påstår seg frifunnet. De har blant annet anført at flere av de bestemmelsene i HTA som saksøkerne har påberopt, ikke er rettslig bindende fordi de strider mot artikkel 53 og 54 EØS, jf lov av 27 november 1992 nr 109 om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS) m.v. (EØS-loven).

Kommunene og deres status som arbeidsgivere

10. Kommunene og fylkeskommunene i Norge er etablerte og regulerte av lov av 25 september 1992 nr 107 om kommuner og fylkeskommuner, (heretter "kommuneloven"). I kommunal sektor er det totalt sett omlag 550 000 arbeidstakere. Av disse er ca 100 000 lærere, som er kommunalt ansatte, men som omfattes av tariffavtaler med staten. I kommunal sektor for øvrig er det således ca 450 000 arbeidstakere. Av disse er omlag 430 000 ansatt i kommunene, herav ca 60 000 i Oslo. Tallene foran er anslag som er basert på tilgjengelige statistiske kilder med referanse til arbeidsmarkedssituasjonen pr utgangen av 1998/primo 1999.

11. Hovedsaksøkte, KS, er en medlems- og interesseorganisasjon, og er også en arbeidsgiverforening. Samtlige kommuner og fylkeskommuner er i dag medlemmer av KS, og alle er tilknyttet KS' arbeidsgivervirksomhet. Oslo kommune er imidlertid fritatt fra å følge KS' tariffområde. Som arbeidsgiverforening har KS således 434 kommuner og 18 fylkeskommuner som medlemmer. Disse har til sammen ca 370 000 ansatte (eksklusive lærere). Av disse faller noen - som endel vikarer, ekstrahjelper ol - utenfor anvendelsesområdet for hovedtariffavtalene for kommuner, og det er usikkert hvor mange som for øvrig omfattes av deres bestemmelser om tjenestepensjon.

12. KS, as an employer association, can enter into collective agreements with binding effect for its members. For municipalities and county municipalities, section 28 of the Local Government Act allows them to delegate competency to conclude such agreements to "an association of municipalities and county municipalities". This has been done by all of the municipalities/county municipalities who are affiliated with KS's employer activity. KS's competency to conclude agreements also follows from membership in KS and its Articles of Association, and this applies for "enterprises" as well.

Trade unions

13. There are in all 39 "unions" ("*forbund*") or "trade unions" ("*fagforbund*") representing employees in the municipal sector in Norway. In negotiations with KS for the establishment and revision of collective agreements, the 39 unions are represented through their "joint negotiations bodies" ("*forhandlingssammenslutninger*"). The formal conclusion of collective agreements generally takes place directly between KS and the individual union.

14. Consequently, formally speaking, there is not just one basic collective agreement for municipalities, etc., but rather several basic collective agreements, with the union concerned as party for the employee side in the individual agreements and KS as party on the employer side in all of the agreements. For the contract period 1998-2000 there were in all 39 basic collective agreements for employees in municipalities and county municipalities. In practice, however, these basic collective agreements are identical in content in so far as it has any relevance to the present case. For the sake of simplicity, they will all be referred to below as HTA, unless otherwise indicated by the context. The HTA comprises in the main all employees who are employed by municipalities and county municipalities. However, for certain types of activities and for enterprise members, KS has separate collective agreements which contain different regulation on some points, *inter alia* on pension matters. The further details pertaining thereto are not relevant for the present case.

Collective agreements as legal instruments

15. Under the Norwegian Act No. 1 of 5 May 1927 Relating to Labour Disputes (*arbeidstvistloven*, hereinafter the "Labour Disputes Act"), a collective agreement is understood to mean an agreement "respecting conditions of employment and salary or other matters relating to employment". It must be concluded between an employer or employers' association on the one hand and a "trade union" on the other, see section 1(8) of the Act. A collective agreement is, according to Norwegian law, an agreement which is legally binding and creates mutual obligations. Firstly, as such, it is binding and creates obligations for the parties to the collective agreement. Next, it is also binding for the members of the

12. KS som arbeidsgiverforening kan inngå tariffavtaler med bindende virkning for sine medlemmer. For kommuner og fylkeskommuner er det etter kommunelovens §28 adgang til å overdra slik avtalekompetanse til "en sammenslutning av kommuner og fylkeskommuner". Dette er gjennomført av alle de kommuner/fylkeskommuner som er tilsluttet KS' arbeidsgivervirksomhet. Avtalekompetansen for KS følger videre, også for "bedriftsmedlemmer", av medlemskapet i KS og organisasjonens vedtekter.

Fagforeninger

13. Det er i alt 39 "forbund" eller "fagforbund" som representerer arbeidstakere i kommunal sektor i Norge. Ved forhandlinger med KS om opprettelse og revisjon av tariffavtaler er de 39 forbundene representert gjennom sine "forhandlingssammenslutninger". Den formelle inngåelse av tariffavtaler skjer i alminnelighet direkte mellom KS og det enkelte forbund.

14. Formelt sett foreligger derfor ikke bare én hovedtariffavtale for kommunene, men flere hovedtariffavtaler, med vedkommende forbund som part på arbeidstakersiden i den enkelte, og KS som part på arbeidsgiversiden i alle. For tariffperioden 1998-2000 var det i alt 39 hovedtariffavtaler for arbeidstakere i kommuner og fylkeskommuner. I praksis er imidlertid disse hovedtariffavtalene innholdsmessig like så langt det har noen betydning her. I det følgende omtales de for enkelhets skyld som HTA, om ikke annet fremgår av sammenhengen. HTA omfatter i hovedsak alle arbeidstakere som er ansatt i kommuner og fylkeskommuner. For visse typer virksomhet og bedriftsmedlemmer har imidlertid KS særskilte tariffavtaler som inneholder avvikende regulering på enkelte punkter, blant annet om pensjonsforhold. De nærmere detaljene er ikke av betydning her.

Tariffavtaler som rettslige instrumenter

15. Som tariffavtale regnes etter den norske lov av 5 mai 1927 nr 1 om arbeidstvister, (heretter "arbeidstvistloven"), en avtale om "arbeids- og lønnsvilkår eller andre arbeidsforhold". Den må være inngått mellom en arbeidsgiver eller en arbeidsgiverforening på den ene side, og en "fagforening" på den annen side, jf lovens § 1 nr 8. Etter norsk rett er en tariffavtale en rettslig bindende og gjensidig forpliktende avtale. For det første er en tariffavtale, som avtale, bindende og forpliktende for tariffpartene. Dernest er en tariffavtale også bindende for tariffpartenes medlemmer. De enkelte arbeidsgivere (som her kommunene) og de enkelte arbeidstakere som er ansatt hos de berørte arbeidsgivere, og som er medlemmer av de avtalesluttende organisasjoner

parties to the collective agreement. The individual employers (as, in this case, the municipalities) and the individual employees who are employed by the employers in question, and who are members of the organisations party to the agreement (parties to the collective agreement), are legally bound by the collective agreement. Furthermore, a collective agreement binds only those employers and employees who are members of the organisations concerned. Thus, under Norwegian law a collective agreement has no general validity ("universal application" or *erga omnes* effect). Nor are there any legislative provisions in Norwegian law of relevance to the present case which give public authorities the power to stipulate that a collective agreement is to be "with effect for everyone" and binding for all employers (or employees) in a branch, sector, or the like. Who is legally bound by or has rights under a collective agreement depends on the collective agreement and the membership in the organisations participating in the agreement.

16. Furthermore, the parties to the collective agreement dispose over the collective agreement in that they may modify it, even during the course of the contract period. The parties also have a monopoly on interpretation, in that, if the parties agree on a certain interpretation of a provision, that interpretation will as, as a rule, be the one applied. The common interpretation agreed on by the parties is also binding for the members in the same way as the agreement itself.

The Norwegian pension system

17. Briefly, the Norwegian pension system can be said to have three main types of schemes: a) benefits under the National Insurance Scheme, which are statutory pension benefits pursuant to Act No. 19 of 28 February 1997 Relating to National Insurance Pension Benefits (*Folketrygdloven*); b) group "occupational pension schemes" for supplementary pensions in addition to benefits under the National Insurance Scheme (see paragraphs 26 et seq. below); and c) individual pension and life insurance contracts, which can be concluded on a voluntary basis. Only group "occupational pension schemes" for supplementary pensions are to be considered in the case at hand.

18. Supplementary occupational pension schemes are characterised by the fact that they are related to work and they are collective. Such schemes may be based on law and be compulsory; otherwise, they are, in principle, voluntary. Such pension schemes are to be found in both the public sector – including in the municipal sector – and in the private sector. A common trait of all occupational pension schemes is that they are "benefit-based". Otherwise, the content, scope, etc. of the schemes vary.

19. Presently all municipalities and county municipalities have occupational pension schemes. The authority to establish or join occupational pension schemes follows expressly from section 24, fourth paragraph of the Local Government Act. The purpose of that provision was first and foremost to give a clearer basis

(tariffpartene), er rettslig bundet av tariffavtalen. Videre binder tariffavtalen bare de arbeidsgivere og arbeidstakere som er medlemmer av vedkommende organisasjoner. Etter norsk rett har en tariffavtale således ikke noen generell gyldighet ("allmenngyldighet", eller "erga omnes"-virkning). I norsk rett er det heller ingen lovbestemmelser av betydning for saken her som gir offentlige myndigheter adgang til å fastsette at en tariffavtale skal gjøres "allmenngyldig" og forpliktende for alle arbeidsgivere (eller arbeidstakere) i en bransje, sektor el. Hvem som er rettslig bundet eller har rettigheter i henhold en tariffavtale, beror på tariffavtalen og medlemskapet i de avtalesluttende organisasjoner.

16. Videre må det nevnes at tariffpartene råder over tariffavtalen på den måten at de kan modifisere den, selv i kontraktperiodens løp. Avtalepartene har også et fortolkningsmonopol, i den forstand at dersom partene er enige om en viss forståelse av en bestemmelse, skal som alminnelig regel denne forståelsen av bestemmelsen legges til grunn. Partenes felles forståelse er også bindende for deres medlemmer, på samme måte som tariffavtalen selv.

Det norske pensjonssystemet

17. Det norske pensjonssystemet kan kort sies å ha tre hovedtyper av ordninger: a) Folketrygdens pensjonsytelser, som er lovbaserte pensjonsytelser i henhold til lov om folketrygd av 28 februar 1997 nr 19 (folketrygdloven); b) kollektive "tjenestepensjonsordninger" for supplerende pensjon i tillegg til folketrygdens ytelser (jf avsnitt 27 flg nedenfor) og c) individuelle pensjons- og livsforsikringsavtaler, som kan tegnes på frivillig basis. I den foreliggende saken vurderes bare kollektive "tjenestepensjonsordninger" for supplerende pensjon.

18. Supplerende tjenestepensjonsordninger er karakterisert ved at de er knyttet til arbeid og at de er kollektive. Slike ordninger kan være basert på lov og være forpliktende; ellers er de, prinsipielt sett, frivillige. Slike pensjonsordninger finnes både i offentlig sektor - herunder i kommunesektoren - og i privat sektor. Et felles trekk for alle tjenestepensjonsordninger er at de er "ytelsesbaserte". Ordningenes innhold, omfang mv er ellers forskjellige.

19. Samtlige kommuner og fylkeskommuner har i dag tjenestepensjonsordninger. Adgangen til å etablere eller tilslutte seg tjenestepensjonsordninger følger uttrykkelig av kommunelovens § 24 nr 4. Siktemålet med denne bestemmelsen var først og fremst å gi et klarere

of authority for State regulation, control and supervision of occupational pension schemes. Section 24, paragraph 4, second sentence of the Local Government Act confers authority for the King to promulgate further provisions on the material framework for municipal occupational pension schemes, their content and scope. The present rules are contained in Regulation No. 374 of 22 April 1997 on Pension Schemes for Municipal or County Municipal Employees (*forskrift av 22. april 1997 nr. 374 om pensjonsordninger for kommunalt eller fylkeskommunalt ansatte*, hereinafter the "Regulation on Pension Schemes for Municipal or County Municipal Employees"). That Regulation sets out in the main that:

- pension benefits in municipal pension schemes must not be higher than in the Norwegian Public Service Pension Fund (section 2, first paragraph);
- age limits must not be lower than for equivalent positions in the State system (section 2, second paragraph); and
- as a rule, all employees in municipalities/county municipalities are to be covered; however, the pension scheme may have general conditions which limit membership in the scheme due to the scope of the employment situation, length of service and so on (section 3).

20. A municipality may organise its occupational pension scheme in various ways: through its own pension institution, through participation in a collective pension institution or through a life insurance company. As at November 1998, the total number of 453 municipalities and county municipalities had organised their occupational pension schemes as follows:

- 21 municipalities/county municipalities had their own pension institutions;
- 422 municipalities/county municipalities were members of the *Felles kommunal pensjonsordning* (hereinafter "FKP") in KLP;
- 10 municipalities had group pension insurance contracts with other insurance companies than KLP. These figures show that 93% (422 of 453) of the municipalities were party to FKP as at 1 January 1998. The municipalities are of different sizes and have different numbers of employees. It is estimated that occupational pension schemes for about 65% of all municipal employees are covered with KLP; the estimate and the basis for it are, however, uncertain.

21. KLP is a private mutual life insurance company. Effective 1 January 1974, KLP had received a licence to operate group pension insurance, etc. under the insurance companies legislation then in force. The licence was later renewed under Act No. 39 of 10 June 1988 on Insurance Activity (*forsikringsvirksomhetsloven*, hereinafter the "Insurance Activity Act"), most recently in 1998. KLP's members (company partners) are the policyholders, i.e. those employers who have signed an insurance contract with the company. KLP may have other members than municipalities/county municipalities, but with

hjemmelsgrunnlag for statlig regulering, kontroll og tilsyn med kommunale tjenestepensjonsordninger. Kommunelovens § 24 nr 4 annet punktum hjemler adgang for Kongen til å gi nærmere bestemmelser om materielle rammer for kommunale tjenestepensjonsordninger, deres innhold og omfang. De foreliggende regler står i forskrift av 22 april 1997 nr 374 om pensjonsordninger for kommunalt eller fylkeskommunalt ansatte. Forskriften av 1997 fastsetter i hovedsak at:

- pensjonsytelsene i kommunale pensjonsordninger ikke må være høyere enn i Statens Pensjonskasse (§ 2 første ledd),
- aldersgrenser ikke må være lavere enn for tilsvarende stillinger i staten (§ 2 annet ledd), og
- som utgangspunkt skal alle ansatte i kommunen/fylkeskommunen være omfattet; pensjonsordningen kan imidlertid ha alminnelige vilkår som begrenser medlemskap i ordningen på grunnlag av arbeidsforholdets omfang, tjenestetid, oa (§ 3).

20. En kommune kan organisere sin tjenestepensjonsordning på ulike måter: Gjennom en egen pensjonskasse, gjennom deltagelse i en felles pensjonskasse, eller gjennom et livsforsikringsselskap. De til sammen 453 kommuner og fylkeskommuner hadde pr november 1998 organisert sine tjenestepensjons-ordninger slik:

- 21 kommuner/fylkeskommuner hadde egne pensjonskasser;
- 422 kommuner/fylkeskommuner var tilsluttet "Felles kommunal pensjonsordning" (heretter "FKP") i KLP;
- 10 kommuner hadde kollektive pensjonsforsikringsavtaler i andre forsikringsselskaper enn KLP. Ut fra tallene foran var 93 % (422 av 453) av kommunene tilsluttet FKP pr 1 januar 1998. Kommunene er forskjellige i størrelse og antall ansatte. Det er anslått at tjenestepensjonsordninger er dekket i KLP for ca 65 % av alle kommunalt ansatte; anslaget og grunnlaget for det er imidlertid usikkert.

21. KLP er et privat gjensidig livsforsikringsselskap. KLP fikk fra 1 januar 1974 konsesjon til å drive blant annet kollektiv pensjonsforsikring etter den dagjeldende forsikringsselskapslov. Konsesjonen er senere fornyet etter lov nr 39 av 10 juni 1988 om forsikringsvirksomhet (heretter "forsikringsvirksomhets-loven"), senest i 1998. KLPs medlemmer (selskapsdeltakerne) er forsikrings-takerne, dvs de arbeidsgivere som har tegnet forsikringsavtale med selskapet. KLP kan ha andre medlemmer enn kommuner/fylkeskommuner, men med visse

certain limitations. Section 1-3, second paragraph of KLP's Articles of Association, which is part of the licensing conditions, reads as follows:

> *"The proportion of policyholders which are not municipalities, county municipalities, undertakings, independent enterprises (undertakings), institutions or organisations in which municipalities or county municipalities have a majority interest (ownership) shall be limited so that together they cannot have premium reserves which equal more than 10 percent of the total premium reserves in the company. Majority interest means more than 50 percent of both the ownership shares and the voting rights or equivalent interest in relation to the purpose of the enterprise, institution or organisation."*

22. KLP's main product is group pension insurance, which is the most important and most far-reaching scheme. Furthermore, municipalities and county municipalities may be members of KLP, regardless of whether they are affiliated to FKP. As at September 1999, all 453 municipalities and county municipalities were members of KLP. At the same time, KLP had about 2 150 other members ("enterprises"). Their share of annual premium payments accounted for roughly 14.5% of a total premium volume of around NOK 5 billion.

23. KLP's highest authority is the general meeting (section 3-8 Articles of Association, section 3-2 1999 Articles of Association). According to the current Articles of Association, the general meeting is to consist of representatives of the company's members, elected in 19 constituencies. The municipalities/county municipalities make up 18 constituencies and the "enterprises" make up one constituency. An individual constituency "elects between 4 and 17 representatives, depending on the total premium volume in the company's pension schemes paid by that constituency's members", see sections 3-2 and 3-3 of the 1999 Articles of Association.

24. Various "cooperation agreements" have been entered into between KLP and KS. Two of these are relevant for this case: one of 14 December 1994, which was later replaced by an agreement of 30 August 1999. Both agreements contain provisions on regular contact between KS and KLP, the right of KLP to participate at certain meetings and events in KS, the exchange of information and benefits (including compensation for marketing of KLP's products), etc. The agreement of 1999 is more detailed than the one from 1994.

25. The Norwegian Ministry of Finance has given KLP a dispensation from certain provisions of the Insurance Activity Act, including section 7-6 on premiums. As a mutual insurance company, KLP may, pursuant to its Articles of Association and section 4-8 of the Insurance Activity Act and its Articles of Association, conduct "retroactive assessment" of premiums – by which is meant that "all policyholders pay further premiums when it turns out, after the fact, that not enough premiums have been paid in advance, and the premium calculation system presupposes that adjustments, defined benefit guarantees, etc., are insured", see the Banking, Insurance and Securities Commission's letter of 16 December 1998 to the Norwegian Public Service Pension Fund.

begrensninger. I KLPs vedtekter § 1-3 annet ledd, som er en del av konsesjonsvilkårene, heter det:

> *"Andelen forsikringstakere som ikke er kommuner, fylkeskommuner, foretak, selvstendige virksomheter, institusjoner eller organisasjoner der kommuner eller fylkeskommuner har en majoritetsinteresse skal være begrenset slik at de til sammen ikke kan ha en premiereserve som utgjør mer enn 10 prosent av de totale premiereserver i selskapet. Med majoritetsinteresser menes mer enn 50 prosent av både eierandelene og stemmerettighetene, eller tilsvarende interesse i forhold til virksomhetens, institusjonens eller organisasjonens formål."*

22. KLPs hovedprodukt er kollektiv pensjonsforsikring, som den viktigste og mest omfattende ordningen. Videre kan kommuner og fylkeskommuner være medlemmer av KLP, uavhengig av om de er tilknyttet FKP. Pr september 1999 var alle 453 kommuner og fylkeskommuner medlemmer i KLP. På samme tidspunkt hadde KLP ca 2 150 andre medlemmer ("bedriftsmedlemmer"). Deres andel av årlige premieinnbetalinger utgjorde ca 14,5 % av et samlet premievolum på omlag 5 milliarder NOK.

23. KLPs høyeste myndighet er generalforsamlingen (vedtektenes § 3-8, vedtektene av 1999 § 3-2). Etter vedtektene av 1999 skal generalforsamlingen bestå av representanter for selskapets medlemmer, valgt i 19 valgkretser. Kommunene/fylkeskommunene utgjør 18 valgkretser, og "bedriftsmedlemmene" utgjør én valgkrets. Den enkelte valgkrets "velger fra 4 til 17 representanter avhengig av det samlede premievolum i selskapets pensjonsordninger som betales av valgkretsens medlemmer", jf vedtektene av 1999 §§ 3-2 og 3-3.

24. Det er inngått flere "samarbeidsavtaler" mellom KLP og KS. To av disse er relevante for denne saken: En av 14 desember 1994, som senere er erstattet av en avtale av 30 august 1999. Begge avtalene har bestemmelser om regelmessig kontakt mellom KS og KLP, rett for KLP blant annet til å delta i visse møter og arrangementer i KS, utveksling av informasjon og ytelser (herunder vederlag for markedsføring av KLPs produkter). Avtalen fra 1999 er mer detaljert enn den fra 1994.

25. Finansdepartementet har gitt KLP dispensasjon fra enkelte av forsikringsvirksomhetslovens bestemmelser, herunder fra lovens § 7-6 om premier. Som gjensidig livsforsikringsselskap kan KLP, i henhold til forsikringsvirksomhetslovens § 4-8 og selskapets vedtekter, foreta "etterutligning" av premie - med hvilket her forstås at "alle forsikringstakere innbetaler ytterligere premie når det i ettertid viser seg at det er betalt for lite premie på forskudd, og premieberegningssystemet forutsetter at reguleringer, bruttogaranti mv. skal være forsikret", jf Kredittilsynets brev av 16 desember 1998 til Statens Pensjonskasse.

26. KLP has entered into a transfer agreement with the Norwegian Public Service Pension Fund. Through this transfer agreement, policyholders with occupational pension schemes with KLP are affiliated to the "transfer system".

27. FKP is an occupational pension insurance scheme with KLP. It was established as of 1 January 1974, at the same time as KLP was established as an independent insurance company, and is regulated by its own articles of association. FKP has been the object of amendments over the years. The relevant Articles of Association are from 1 January 1999, unless otherwise stated or evidenced by the context.

28. FKP is a joint group pension insurance scheme. Section 1-2 of the Articles of Association on "contracts of affiliation" reads:

> *"Municipalities, county municipalities as well as undertakings, independent enterprises, institutions or organisations in which municipalities or county municipalities have a majority interest may enter into contracts with KLP on membership in and affiliation to the Joint municipal pension scheme."*

29. FKP is subject to the Regulation on Pension Schemes for Municipal or County Municipal Employees and to Act No. 26 of 6 July 1957 Relating to the Coordination of Pension and Insurance Benefits (*samordningsloven*, the "Pension and Insurance Coordination Act"), and is a party to the "transfer system".

30. With respect to benefits, FKP corresponds largely to the occupational pension scheme under the Public Service Pension Fund Act (in the Norwegian Public Service Pension Fund), see on this point section 1-1, second sentence of the FKP Articles of Association. FKP is thus a "defined benefit scheme" and includes the same benefits as the Norwegian Public Service Pension Fund, with the same pension coverage and rules on accrual time.

31. The financing of FKP is based on a system established on insurance principles with advance payment of premiums. The premium consists of the employer's share and "membership contributions", see section 12-1 of the FKP Articles of Association. "Membership contributions" are paid by the employees who are covered, at a rate of 2% of salary. Remaining premiums are to be covered by those employers who participate in FKP.

The provisions of the HTA concerning transfer of pension schemes

32. The relevant provisions of the HTA are to be found in clause 2.1.8, reproduced above. Those provisions provide for certain conditions to be met in the event of transfer and further procedural requirements that must be fulfilled. The Defendants allege *inter alia* that these provisions are not in accordance with Articles 53 and 54 EEA.

26. KLP har inngått overføringsavtale med Statens Pensjonskasse. Gjennom denne overføringsavtalen er forsikringstakere med tjenestepensjonsordninger i KLP, tilsluttet "overføringssystemet".

27. FKP er en tjenestepensjonsforsikringsordning i KLP. Den ble etablert 1 januar 1974, samtidig som KLP ble etablert som selvstendig forsikringsselskap, og er regulert av egne vedtekter. FKP har vært gjenstand for endringer gjennom årene. De relevante vedtekter er fra 1 januar 1999, hvis ikke annet er sagt eller fremgår av sammenhengen.

28. FKP er en felles kollektiv pensjonsforsikringsordning. Vedtektenes § 1-2 om "avtale om tilslutning" lyder som følger:

> *"Kommuner, fylkeskommuner samt foretak, selvstendige virksomheter, institusjoner eller organisasjoner der kommuner eller fylkeskommuner har en majoritetsinteresse kan inngå avtale med KLP om medlemskap og om tilslutning til Felles kommunal pensjonsordning."*

29. FKP er undergitt forskrift av 22 april 1975 nr 1 om pensjonsordninger for kommunalt og fylkeskommunalt ansatte og lov av 6 juli 1957 nr 26 om samordning av pensjons- og trygdeytelser (samordningsloven), og inngår i "overføringssystemet".

30. Forsåvidt gjelder ytelser svarer FKP i hovedsak til tjenestepensjonsordningen etter pensjonskasseloven (i Statens Pensjonskasse), jf her FKP-vedtektenes § 1-1 annet punktum. FKP er således en "bruttoordning" og omfatter de samme ytelser som Statens Pensjonskasse, med samme pensjonsdekning og regler om opptjeningstid.

31. Finansieringen av FKP er basert på et forsikringsteknisk system med forhåndsinnbetaling av premie. Premien består av arbeidsgivers andel og "medlemsinnskudd", jf FKP-vedtektenes § 12-1. "Medlemsinnskudd" dekkes av de arbeidstakere som omfattes, med 2 % av lønn. Øvrig premie skal dekkes av de arbeidsgivere som er med i FKP.

Bestemmelsene i HTA om flytting av pensjonsordninger

32. De relevante bestemmelsene er å finne i HTA punkt 2.1.8 som er gjengitt ovenfor. Disse bestemmelsene gir visse vilkår som må oppfylles i tilfelle flytting, og videre visse prosessuelle krav som må være oppfylt. De saksøkte hevder blant annet at disse bestemmelsene ikke er forenlige med artikkel 53 og 54 EØS.

33. The Request for an Advisory Opinion from Arbeidsretten contains a more detailed description of the system for municipalities in Norway, as well as a description of the Norwegian pension system. There is also a description of how the individual provisions of the collective agreement are to be construed by the parties, as well as a description of the points of disagreement. For the purposes of the present Report, it is not necessary to reproduce them further herein.

IV. Questions

34. The following questions were referred to the EFTA Court:

Scope of application of Article 53 EEA

1a Does a collective agreement generally entail binding legal effects mutually between the participating members on the employer side which can be regarded as an "agreement[ ] between undertakings" under Article 53 EEA?

1b If an employer organisation concludes a collective agreement, is this a "decision[] by [an] association[] of undertakings" under Article 53 EEA?

1c Is a municipality an "undertaking" under Article 53 EEA when, in its capacity as employer, it becomes bound by a collective agreement without being a party thereto?

2a Can a collective agreement provision which has objectives other than to improve salary and working conditions come within the scope of Article 53 EEA?

2b If question 2a is answered in the affirmative: which conditions must then be met?

3 Do collective agreement provisions on group occupational pension schemes, such as the provisions in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-2000 fall within the scope of application of Article 53 EEA?

Prohibition in Article 53 EEA

4 Is it compatible with Article 53 EEA for a collective agreement condition to require that a group occupational pension scheme be based on a gender-neutral financing system which can only be satisfied by one supplier?

33. Arbeidsrettens anmodning om en rådgivende uttalelse inneholder en mer detaljert beskrivelse av kommunesektoren i Norge og det norske pensjonssystemet. Videre er det en beskrivelse av hvordan de enkelte bestemmelsene i tariffavtalen forstås av partene i tillegg til beskrivelse av de omstridte punkter. For den foreliggende saks formål er det ikke nødvendig og gjengi dette videre her.

IV. Spørsmål

34. Følgende spørsmål er forelagt EFTA-domstolen:

Om virkeområdet for EØS art. 53

1a Medfører en tariffavtale i alminnelighet bindende rettsvirkninger innbyrdes mellom de deltakende medlemmene på arbeidsgiversiden som kan regnes som "avtale mellom foretak" etter EØS art. 53?

1b Innebærer en arbeidsgiverorganisasjons inngåelse av en tariffavtale en "beslutning truffet av sammenslutninger av foretak" etter EØS art. 53?

1c Er en kommune et "foretak" etter EØS art. 53 når den i egenskap av arbeidsgiver blir bundet av en tariffavtale uten å være part i den?

2a Kan en tariffavtalebestemmelse som har andre formål enn å forbedre lønns- og arbeidsvilkår, omfattes av EØS art. 53?

2b Hvis svaret på spørsmål 2a er bekreftende: Hvilke vilkår må i så fall være oppfylt?

3 Er tariffavtalebestemmelser om kollektive tjenestepensjons-ordninger, slik som bestemmelsene i hovedtariffavtalen for kommuner m.v. for perioden 1998-2000 pkt. 2.1.8 annet, tredje og fjerde ledd, omfattet av virkeområdet for EØS art. 53?

Om forbudsbestemmelsen i EØS art. 53

4 Er et tariffavtalevilkår som går ut på at en kollektiv tjenestepensjonsordning skal være basert på et kjønnsnøytralt finansieringssystem, og som bare kan oppfylles av én leverandør, forenlig med EØS art. 53?

5a Is it compatible with Article 53 EEA for a collective agreement provision to provide that an offer concerning occupational pension schemes made by an insurance company to an employer must be approved by representatives for the parties to a collective agreement?

5b If question 5a is answered in the affirmative: will the assessment be otherwise if approval can only take place through unanimity amongst the parties?

6 Is it compatible with Article 53 EEA for a collective agreement provision to provide that it is a condition for transfer of an occupational pension scheme that the new insurance product must have been tacitly or expressly accepted by a public body?

7a Is it compatible with Article 53 EEA for collective agreement provisions to provide that a change of supplier of an occupational pension scheme is subject to the condition that the employer, before a decision on change can be made, must have entered into a separate agreement on mutual transfer of pension schemes through approval by the public body which administers the transfer scheme?

7b If question 7a is answered in the affirmative: will the assessment be otherwise if inclusion in the transfer agreements cannot take place before a decision on change has been made?

8 Can the sum of provisions in a collective agreement, such as the provisions in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-2000, be held to be contrary to Article 53 EEA even though none of the provisions, viewed in isolation, come under the prohibition therein?

Interpretation of Article 54 EEA

9 Can an association of municipalities which is an interest and an employer organisation, such as the Norwegian Association of Local and Regional Authorities, be regarded as an "undertaking" under Article 54 EEA in the negotiation of collective agreements?

10 Can an undertaking, assuming that it has a "dominant position", conclude an agreement for or practise conditions for change of supplier of occupational pension schemes such as those laid down in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc., for the period 1998-2000, regardless of Article 54 EEA?

5a Er en tariffavtalebestemmelse om at et tilbud fra et forsikringsselskap til en arbeidsgiver om tjenestepensjonsordning må godkjennes av representanter for tariffavtalens parter, forenlig med EØS art. 53?

5b Hvis svaret på spørsmål 5a er bekreftende: Vil bedømmelsen være annerledes dersom godkjennelse bare kan skje ved enstemmighet mellom partene?

6 Er en tariffavtalebestemmelse som innebærer at det er et vilkår for flytting av en tjenestepensjonsordning, at det nye forsikringsproduktet må være stilltiende eller uttrykkelig akseptert av et offentlg organ, forenlig med EØS art. 53?

7a Er tariffavtalebestemmelser som innebærer at skifte av leverandør av tjenestepensjonsordning er betinget av at arbeidsgiveren, før beslutning om skifte kan treffes, har inngått en egen avtale om gjensidig overføring av pensjonsordninger gjennom godkjenning av det offentlige organ som administrerer overførings-ordningen, forenlig med EØS art. 53?

7b Hvis svaret på spørsmål 7a er bekreftende: Vil bedømmelsen være annerledes dersom opptak i overføringsavtalen ikke kan finne sted før det er truffet beslutning om skifte?

8 Kan summen av bestemmelser i en tariffavtale, slik som bestemmelsene i hovedtariffavtalen for kommuner m.v. for perioden 1998-2000 pkt. 2.1.8 annet, tredje og fjerde ledd, bedømmes som stridende mot EØS art. 53 selv om ingen av bestemmelsene isolert sett rammes av forbudet der?

Om forståelsen av EØS art. 54

9 Kan en sammenslutning av kommuner, som er en interesse- og arbeidsgiverorganisasjon slik som Kommunenes Sentralforbund, ved fremforhandling av tariffavtaler anses som et "foretak" etter EØS art. 54?

10 Kan et foretak, forutsatt at det har "dominerende stilling", uten hinder av EØS art. 54 avtale eller praktisere slike vilkår for skifte av leverandør av tjenestepensjonsordninger som er fastsatt i hovedtariffavtalen for kommuner m.v. for perioden 1998-2000 pkt. 2.1.8 annet, tredje og fjerde ledd.

V. Written Observations

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

– the Plaintiff, the Norwegian Federation of Trade Unions, represented by Advokat Atle Sønsteli Johansen and Advokat Håkon Angell, together with the Norwegian Union of Municipal Employees, represented by Advokat Geir Høin;

– the intervener, the Norwegian Confederation of Municipal Employees, represented by Advokat Vegard Veggeland;

– the Defendant, the Norwegian Association of Local and Regional Authorities, represented by Advokat Per Kristian Knutsen og Advokat Astrid Merethe Svele;

– the Defendants Hamarøy kommune and Tysfjord kommune, represented by Advokat Haakon Blaauw and Advokat Dag Steinfeld;

– the Defendants Hitra kommune and Steigen kommune, represented by Advokat Siri Teigum and Advokat Svein Aage Valen;

– the Defendant Tana kommune, represented by Advokat Tarjei Thorkildsen, Advokat Kari B. Andersen, and Advokat Jan Magne Langseth;

– the Defendants Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune, represented by Advokat Wilhelm Matheson and Advokat Jan Fougner;

– the Government of Norway, represented by Marianne Djupesland, Adviser, Royal Ministry of Foreign Affairs, acting as Agent;

– the Government of Iceland, represented by Dr Magnús Kjartan Hannesson, Legal Adviser, Ministry of Foreign Affairs, acting as Agent;

– the Government of Sweden, represented by Anders Kruse, Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Per Andreas Bjørgan, Officer, Legal and Executive Affairs Department, acting as Agent;

V. Skriftlige saksfremstillinger

35. I medhold av Vedtektene for EFTA-domstolen artikkel 20 og Rettergangsordningen artikkel 97 er skriftlige saksfremstillinger mottatt fra:

– Saksøker, Landsorganisasjonen i Norge, representert ved advokatene Atle Sønsteli Johansen og Håkon Angell, med Norsk Kommuneforbund, representert ved advokat Geir Høin;

– intervenienten, Kommunalansattes Fellesorganisasjon, representert ved advokat Vegard Veggeland;

– saksøkte, Kommunenes Sentralforbund, representert ved advokatene Per Kristian Knutsen og Astrid Merethe Svele;

– saksøkte, Hamarøy kommune og Tysfjord kommune, representert ved advokatene Haakon Blaauw og Dag Steinfeld;

– saksøkte, Hitra kommune og Steigen kommune, representert ved advokatene Siri Teigum og Svein Aage Valen;

– saksøkte, Tana kommune, representert ved advokatene Tarjei Thorkildsen, Kari B. Andersen og Jan Magne Langseth;

– saksøkte, Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune og Volda kommune representert ved advokatene Wilhelm Matheson og Jan Fougner;

– Den norske regjering, representert ved Marianne Djupesland, rådgiver, Utenriksdepartementet, som partsrepresentant;

– Den islandske regjering, representert ved Dr. Magnús Kjartan Hannesson, juridisk rådgiver, Utenriksdepartementet, som partsrepresentant;

– Den svenske regjering, representert ved Anders Kruse, som partsrepresentant;

– EFTAs overvåkningsorgan, representert ved Per Andreas Bjørgan, saksbehandler, Avdelingen for juridiske saker og eksekutivsaker, som partsrepresentant;

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

Norwegian Federation of Trade Unions (LO) and Norwegian Union of Municipal Employees (NKF)

36. The Norwegian Federation of Trade Unions and Norwegian Union of Municipal Employees submit that: a) collective agreements between social partners fall outside the scope of application of Articles 53 and 54 EEA; b) when the parties to a collective agreement negotiate such agreements, they are not "undertakings" within the meaning of Articles 53 and 54 EEA; c) the HTA does not restrict the freedom of the municipalities to establish pension funds or choose the pension supplier they wish; and d) there has been no "abuse" under Article 54 EEA.

37. Furthermore, as an alternative argument in the event that the EFTA Court concludes that collective agreements concerning pension are covered by the competition rules, LO/NKF have submitted that Articles 53 and 54 EEA must be tested against – and possibly made subordinate to – the right of organisation and negotiation, as laid down in a number of international conventions. LO/NKF encourage the EFTA Court to follow the case-law of the Court of Justice of the European Communities in this area, which, they state, is compliant with those conventions.

38. Regarding the first submission, LO/NKF submit that the judgments of the Court of Justice of the European Communities in *Albany*,[1] *Brentjens'*,[2] and *Drijvende Bokken*,[3] and the later judgments in *van der Woude*[4] and *Pavlov*,[5] all support the assertion that collective agreements fall outside the scope of application of Articles 53 and 54 EEA. In those judgments, the Court of Justice of the European Communities drew a distinction between the regulation of competition and the sphere of labour law, based on an assessment of the nature and purpose of a collective agreement.

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1 Case C-67/96 *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751 (hereinafter "*Albany*").

2 Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens'* v *Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-6025 (hereinafter "*Brentjens'* ").

3 Case C-219/97 *Drijvende Bokken* v *Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] ECR I-6121 (hereinafter "*Drijvende Bokken*").

4 Case C-222/98 *Hendrik van der Woude* v *Stichting Beatrixoord* [2000] ECR I-7111 (hereinafter "*van der Woude*").

5 Joined Cases C-180/98 to C-184/98 *Pavlov and Others* v *Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451 (hereinafter "*Pavlov*").

– Kommisjonen for De europeiske fellesskap, representert ved Anthony Whelan og Wouter Wils, ansatt i Rettsavdelingen, som partsrepresentanter.

Landsorganisasjonen i Norge (LO) og Norsk Kommuneforbund (NKF)

36. Landsorganisasjonen i Norge (LO) og Norsk Kommuneforbund (NKF), anfører at; a) tariffavtaler mellom arbeidslivets parter faller utenfor virkeområdet for artikkel 53 og 54 EØS, b) når tariffpartene fremforhandler slike avtaler er de ikke "foretak" i relasjon til artikkel 53 og 54 EØS, c) HTA ikke begrenser kommunenes adgang til å etablere pensjonsfond eller velge pensjonsleverandør, d) at det ikke foreligger noe "misbruk" i relasjon til artikkel 54 EØS.

37. Som subsidiær anførsel, for det tilfelle at EFTA-domstolen finner at tariffavtaler om pensjon faller inn under konkurransereglene, gjør LO/NKF gjeldende at artikkel 53 og 54 EØS må prøves opp mot, og eventuelt underordnes, organisasjons- og forhandlingsretten slik den er nedfelt i en rekke internasjonale konvensjoner. LO/NKF oppfordrer EFTA-domstolen til å følge rettspraksis fra De europeiske fellesskaps domstol på dette området, som etter deres oppfatning er i samsvar med disse konvensjonene.

38. I forhold til den første anførselen hevder LO/NKF at De europeiske fellesskaps domstols dommer i *Albany*[1], *Brentjens'*[2] og *Drijvende Bokken*[3], og de senere dommene i *van der Woude*[4] og *Pavlov,*[5] alle støtter påstanden om at tariffavtaler faller utenfor virkeområdet for artikkel 53 og 54 EØS. I disse dommene sondret De europeiske fellesskaps domstol mellom konkurranseregulering og arbeidsrettens sfære, basert på en vurdering av tariffavtalers karakter og formål.

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1 Sak C-67/96 *Albany International BV* mot *Stichting Bedrijftspensjoenfond Textielindustrie* [1999] ECR I-5751 (heretter "*Albany*").

2 Forenede saker C-115/97, C-116/97 og C-117/97 *Brentjens' Handelsonderneming BV* mot *Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-6025 (heretter "*Brentjens'*").

3 Sak C-219/97 *Drijvende Bokken* mot *Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* [1999] ECR I-6121 (heretter "*Drijvende Bokken*").

4 Sak C-222/98 *Hendrik van der Woude* mot *Stichting Beatrixoord* [2000] ECR I-7111 (heretter "*van der Woude*").

5 Forente saker C-180/98 til C-184/98 *Pavlov med flere* mot *Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451 (heretter "*Pavlov*").

39. The "nature" of the agreement is a question of whether the agreement has been concluded in the form of a collective agreement and has been the subject of collective negotiations. In practice, this implies an examination of whether the agreement is the outcome of negotiations between management and labour organisations, see paragraphs 61-62 of *Albany*, paragraphs 58-59 of *Brentjens'*, paragraphs 48-49 of *Drijvende Bokken*, paragraphs 23-24 of *van der Woude*, and paragraphs 67-68 of *Pavlov*.

40. Determining the "purpose" of a collective agreement involves an examination of whether the substance of the collective agreement can be linked to employment terms. In *Albany*, the Court of Justice of the European Communities held that the purpose of collective agreements concerning supplemental pension is to improve the working conditions of the employees, see paragraphs 63-64 of *Albany*, paragraphs 60-61 of *Brentjens'*, and paragraphs 50-51 of *Drijvende Bokken*.

41. Thus, both "the nature and purpose" entail an examination of objective, ascertainable circumstances. How management and labour choose to administer or organise such benefits has not been of any import for immunity from the competition rules, and thus has not been the subject of examination by the Court of Justice of the European Communities. Consequently, it does not matter whether management and labour organisations choose to establish their own scheme for administering an insurance scheme, or leave it to commercial players. Whether management and labour organisations leave it up to a specifically appointed commercial player to administer the scheme, without participating themselves, also has no bearing on whether the collective agreement has immunity from the competition rules.

42. LO/NKF further submit that this approach of the Court of Justice of the European Communities is in line with the legal situation in the individual Member States and European traditions in general, as well as views expressed in legal theory.

43. LO/NKF then deal with the question of whether the HTA passes the *Albany* test.

44. LO/NKF state that, with respect to the "nature" of the agreement, the Request states that the HTA has been negotiated between KS, as an employers' association, on the one hand, and four different joint negotiations bodies, on the other. These joint negotiations bodies encompass 39 trade unions representing employees in the municipal sector. The information in the Request from Arbeidsretten to the EFTA Court is, therefore, sufficient to establish that the agreement, based on its "nature", is not covered by the competition rules.

45. The "purpose" of the collective agreement entails an examination of whether the substantive subject-matter of the collective agreement can be linked to working conditions. Like the situation in *Albany*, *Brentjens'*, and *Drijvende*

39. Avtalens "karakter" er et spørsmål om avtalen er inngått som en tariffavtale og har vært gjenstand for kollektive forhandlinger. Dette innebærer i praksis en prøving av om avtalen er et resultat av forhandlinger mellom arbeidslivets organisasjoner, se *Albany* avsnitt 61-62, *Brentjens'* avsnitt 58-59, *Drijvende Bokken* avsnitt 48-49, *van der Woude* avsnitt 23-34 og *Pavlov* avsnitt 67-68.

40. Å fastslå en tariffavtales "formål" innebærer en prøving av om den materielle gjenstand for tariffavtalen kan knyttes til arbeidsvilkårene. I *Albany*, slo De europeiske fellesskaps domstol fast at formålet med tariffavtaler om tilleggspensjon er å forbedre arbeidstakernes arbeidsforhold, se *Albany* avsnitt 63-64, *Brentjens'* avsnitt 60-61, *Drijvende Bokken* avsnitt 50-51.

41. Både "karakteren og formålet" er således en prøving av objektivt konstaterbare forhold. Hvordan partene i arbeidslivet velger å administrere eller organisere slike ytelser har i dommene ikke hatt betydning for immuniteten fra konkurransereglene og har dermed heller ikke gjenstand for prøving av De europeiske fellesskaps domstol. Det er derfor uten betydning om arbeidslivets organisasjoner velger å opprette en egen ordning for å administrere en forsikringsordning, eller overlater dette til kommersielle aktører. Om arbeidslivets organisasjoner overlater til en bestemt utpekt kommersiell aktør å administrere ordningen, uten å delta selv, er også uten betydning for tariffavtalens immunitet fra konkurransereglene.

42. LO/NKF hevder videre at denne tilnærmingen fra De europeiske fellesskaps domstols side er i tråd med rettssituasjonen i de enkelte medlemsstatene og med europeiske tradisjoner generelt, såvel som med oppfatninger uttrykt i juridisk teori.

43. LO/NKF går dernest videre til spørsmålet om HTA består "*Albany*-testen".

44. LO/NKF uttaler at når det gjelder avtalens "karakter" fremgår det av anmodningen at HTA er fremforhandlet mellom KS som arbeidsgiverforening på den ene side og fire forskjellige forhandlingssammenslutninger på den andre side. Disse forhandlingssammenslutningene omfatter 39 fagforbund som representerer arbeidstakere i kommunal sektor. Opplysningene gitt i Arbeidsrettens anmodning til EFTA-domstolen er derfor tilstrekkelige til å fastslå at avtalen etter sin "karakter" ikke er omfattet av konkurransereglene.

45. Tariffavtalens "formål" er en prøving av om den materielle gjenstand for tariffavtalen kan knyttes til arbeidsvilkårene. HTA omhandler i likhet med situasjonen i *Albany*, *Brentjens'*, og *Drijvende Bokken*, tilleggspensjon. I mangel

Bokken, the HTA concerns supplemental pensions. In the absence of a collective agreement or some other scheme, the costs of any supplemental pension would have to be borne entirely by the municipal employees. The fact that pension rights are set out in a collective agreement ensures protection for the scheme, since it cannot then be amended unilaterally by an employer, but can be defended through a labour conflict. As established by *Albany*, *Brentjens'*, and *Drijvende Bokken*, collective agreements on supplemental pensions have as their purpose the improvement of employees' working conditions. Accordingly, given its "nature and purpose", the HTA is not covered by the competition rules.

46. Operating on the assumption that the HTA do not come within the scope of the competition rules, LO/NKF submit that it is not necessary for the EFTA Court to delve into the detailed questions of Arbeidsretten. In the event that the EFTA Court nonetheless finds it necessary to answer all the questions, LO/NKF provide brief comments on the regulation of the pension scheme under the HTA.

47. LO/NKF then discuss the objections the municipalities have to the individual provisions of the HTA. Those objections concern both substantive matters, such as a gender- and age-neutral financing system, and procedural rules in the event of transfer of a pension scheme.

48. With respect to question 4, concerning a gender- and age-neutral financing system, LO/NKF submit that the parties to the collective agreement agree that the financing system under the pension scheme is the expression of weighty human resource policy considerations, the purpose of which is to prevent employers from having economic motives for recruiting men ahead of women and younger employees ahead of older ones. These aims can only be achieved by spreading the premium out over a large group of municipalities, and it is this view which forms the basis of question 4 from Arbeidsretten to the EFTA Court.

49. If the municipalities were allowed to enter into pension agreements with private life insurance companies, without the evening-out described above, it could lead in particular to municipalities with "good" risks (predominance of young men) leaving the group. The parties' social policy objectives of preventing the exclusion of women and older employees, and thereby solidarity-oriented nature of the pension scheme, would thus be undermined, see paragraphs 108-111 of *Albany*.

50. As regards question 5, concerning the pension committee, LO/NKF state that the provision is a necessary element for ensuring that the relevant pension scheme fulfils the substantive conditions of the collective agreement, and thereby contributes to the protection of employees' pension rights. The provision does not give the parties to the collective agreement – individually or together – any discretionary power to refuse a transfer. Substantive disagreements relating to the interpretation of the requirements of the collective agreement must, however, be resolved in the usual manner through the parties' dispute resolutions and possibly

av tariffavtale eller annen ordning må kostnadene ved eventuell tilleggspensjon i sin helhet bæres av de kommunale arbeidstakere. Det at pensjonsrettighetene er nedfelt i tariffavtale trygger ordningen ved at den ikke ensidig kan endres av arbeidsgiver, men kan forsvares ved arbeidskamp. Kollektive avtaler om tilleggspensjon har, som fastslått i *Albany*, *Brentjens'* og *Drijvende Bokken*, til formål å forbedre arbeidstakernes arbeidsvilkår. Etter sin "karakter og formål" er HTA dermed ikke omfattet av konkurransereglene.

46. Basert på det hovedsynspunkt at HTA ikke er omfattet av konkurransereglene, hevder LO/NKF at det ikke er nødvendig for EFTA-domstolen å gå inn i den detaljerte spørsmålsstillingen fra Arbeidsretten. For det tilfelle at EFTA-domstolen likevel skulle finne det nødvendig å besvare alle spørsmål gir LO/NKF noen korte merknader til HTAs regulering av pensjonsordningen.

47. Dernest drøfter LO/NKF kommunenes innsigelser til de enkelte bestemmelser i HTA. Disse innsigelsene angår både materielle forhold, slik som et kjønns- og aldersnøytralt finansieringssystem, og saksbehandlingsregler i tilfelle skifte av pensjonsordning.

48. Til spørsmål 4 om kjønns- og aldersnøytralt finansieringssystem, hevder LO/NKF at tariffpartene er enige om at pensjonsordningens finansieringssystem gir uttrykk for tungtveiende personalpolitiske hensyn, hvis formål er å hindre at arbeidsgiverne får et økonomisk motiv for å rekruttere menn fremfor kvinner og yngre arbeidstakere fremfor eldre. Disse hensynene kan bare realiseres ved at premien utlignes over et stort kollektiv av kommuner, og denne forståelse ligger til grunn for Arbeidsrettens spørsmål nr 4 til EFTA-domstolen.

49. Dersom kommunene skulle gis adgang til å inngå pensjonsavtaler med private livselskap, uten at ovennevnte utligning foretas, kan dette medføre at særlig kommuner med "gode" risiki (overvekt av unge menn) vil forlate kollektivet. Partenes sosialpolitiske målsettinger om å hindre ekskludering av kvinner og eldre arbeidstakere, og dermed pensjonsordningens solidariske karakter, vil på den måten undergraves, jf *Albany* avsnitt 108 - 111.

50. Til spørsmål 5 om Pensjonsutvalgets tariffparter peker LO/NKF på at bestemmelsen inngår som et nødvendig element i sikringen av at den aktuelle pensjonsordning oppfyller de materielle vilkår i tariffavtalen, og bidrar dermed til å beskytte arbeidstakernes pensjonsrettigheter. Bestemmelsen gir ikke tariffpartene - enkeltvis eller samlet - noen diskresjonær kompetanse til å nekte skifte. Saklig uenighet knyttet til forståelsen av tariffkravene må imidlertid søkes løst på vanlig måte gjennom partenes tvisteløsninger og eventuelt Arbeidsretten,

Arbeidsretten, and cannot be viewed as conduct which is restrictive of competition.

51. Question 6 concerns the role of the Banking, Insurance and Securities Commission and the meaning of the phrase "taken note of". LO/NKF state, firstly, that the Banking, Insurance and Securities Commission has traditionally informed the parties in writing of when it has no longer had objections to product notifications. Next, they point out that the HTA contains rules on a complex pension insurance product, and that the private life insurance companies have, on several occasions, had to modify their pension products in order to satisfy the conditions. Consequently, control of the products has proven to be most necessary. In the same manner as private purchasers, management and labour organisations must also be free both to specify their product requirements and decide which products they wish to use, regardless of whether the products may be marketed or legally sold.

52. With respect to questions 7a and 7b, LO/NKF submit that, during the contract period of the collective agreement, the Norwegian Public Service Pension Fund advised that it was not willing to consider applications for inclusion in the transfer agreement before a final decision on transfer of the pension scheme was taken by the municipal council/county council. The Pension Committee has considered clause 2.1.8, fourth paragraph of the HTA as fulfilled if an application for approval has been made before consideration by the decision-making body. Moreover, none of the defendant municipalities in the present case had applied for inclusion in the transfer agreement before the transfer took place.

53. LO/NKF then turn to questions 9 and 10. They state that, in principle, the conclusion of the HTA is not covered by Article 54 EEA. If it is accepted that collective agreements do not come within the scope of Article 53 EEA, the conduct of an undertaking cannot, either through the conclusion or practising of provisions in the collective agreement, constitute abuse under Article 54 EEA, regardless of whether KS/KLP are treated as undertakings or not. For a finding of abuse, there must be something other and more than conduct in compliance with the provisions of the collective agreement, for example, arbitrary application of the transfer rules or "abuse" through differential treatment. If "abuse" is interpreted in any other manner, Article 54 EEA will completely undermine the immunity of collective agreements.

54. In the alternative, LO/NKF submit that extreme caution must be exercised in employing the "abuse" criterion when the conduct is in accordance with a collective agreement (see also paragraph 38 of the Opinion of Advocate General Fennelly in *van der Woude*). Disagreement on whether the municipalities have contracted for an insurance product in accordance with the requirements of the collective agreement must be resolved in the usual manner before national courts. There is no basis for assuming that the pension scheme has led KLP to abuse its

og kan ikke anses som konkurransebegrensende atferd.

51. Spørsmål 6 angår Kredittilsynets rolle, og betydningen av formuleringen "tatt til etterretning". LO/NKF bemerker for det første at Kredittilsynet skriftlig har underrettet tariffpartene når de ikke lenger har hatt innsigelser til produktmeldingene. Dernest bemerker de at HTA gir regler om et komplisert pensjonsforsikringsprodukt og at de private livselskapene i flere omganger har måttet endre sine pensjonsprodukter for å tilfredsstille vilkårene. Kontroll av produktene har derfor vist seg å være høyst nødvendig. På samme måte som private innkjøpere må arbeidslivets organisasjoner selv stå fritt til både å spesifisere sine produktkrav og bestemme hvilke produkter de vil benytte uavhengig av om produktene kan markedsføres eller lovlig omsettes.

52. Til spørsmålene 7a og 7b hevder LO/NKF at Statens Pensjonskasse meddelte i tariffperioden at man ikke var villig til å behandle søknader om opptak i overføringsavtalen før det er truffet endelig vedtak om skifte av pensjonsordning i kommunestyret/fylkestinget. Pensjonsutvalgets tariffparter har ansett HTA punkt 2.1.8, fjerde ledd som oppfylt dersom det er søkt om godkjenning før behandling i besluttende organ. Dessuten hadde ingen av de saksøkte kommuner i nærværende sak søkt om opptak i overføringsavtalen før skiftet fant sted.

53. LO/NKF vender seg dernest til spørsmål 9 og 10. De påpeker at inngåelse av HTA ikke er omfattet av artikkel 54 EØS. Dersom man aksepterer at tariffavtaler ikke faller under virkeområdet for artikkel 53 EØS, kan ikke et foretaks opptreden ved å inngå eller praktisere bestemmelsene i tariffavtalen utgjøre et misbruk etter artikkel 54 EØS, uavhengig av om KS/KLP anses som foretak eller ikke. Skal det foreligge et misbruk må det derfor foreligge noe annet og mer enn en opptreden i samsvar med tariffavtalens bestemmelser, for eksempel ved at flyttereglene praktiseres vilkårlig eller ved "utilbørlig" forskjellsbehandling. Dersom "utilbørlig" tolkes på en annen måte, vil artikkel 54 EØS undergrave tariffavtalens immunitet fullstendig.

54. LO/NKF gjør subsidiært gjeldende at det må vises stor varsomhet ved anvendelsen av kriteriet "utilbørlig" når opptredenen er i samsvar med en tariffavtale, (jf også avsnitt 38 i generaladvokat Fennelys uttalelse i *van der Woude*). Uenighet om kommunene har tegnet et forsikringsprodukt i samsvar med tariffavtalens krav må løses på vanlig måte for nasjonale domstoler. Det foreligger ikke noe grunnlag for å anta at pensjonsordningen har foranlediget

dominant position or deliver benefits that do not meet the needs of the employees (see paragraph 30 of *van der Woude*).

55. As further support for immunity of collective agreements under the EEA competition rules, LO/NKF submit that the arguments relating to the social dimension and the support of the principles and basic rights of workers laid down in the Community Charter of the Fundamental Social Rights of Workers of 9 December 1989 are applicable to the EEA Agreement by virtue of a Declaration annexed to the Final Act of the EEA Agreement.[6] Article 12 of that Charter emphasises that management and labour organisations have the right to negotiate collective agreements in accordance with the rules applicable under national legislation.

56. Considerations of legal homogeneity and common rules within the EC and the EEA underline the importance of the abovementioned fundamental considerations and the case-law of the Court of Justice of the European Communities for the present case. LO/NKF submit that there is nothing in the present case which would justify a deviation from the case-law of the Court of Justice of the European Communities.

57. LO/NKF then turn again to the question whether LO/NKF and KS can be viewed as undertakings within the meaning of Articles 53 and 54 EEA. They submit that, even if the EFTA Court concludes that collective agreements concerning pension and health insurance are covered by the competition rules, LO/NKF and the other employee organisations cannot be viewed as undertakings under Articles 53 and 54 EEA. Nothing in the case-law of the Court of Justice of the European Communities supports such an approach. They further submit that, even if the EFTA Court concludes that the municipalities and KS are undertakings pursuant to Articles 53 and 54 EEA, the parties to the collective agreement do not act as undertakings when concluding collective agreements concerning pension.

58. In the alternative, LO/NKF submit that there is no restriction of competition pursuant to Article 53 and 54 EEA. The collective agreement places restrictions on the municipalities with respect to which requirements the pension product must fulfil. Because of the product specifications in the HTA, the municipalities are not free to purchase any product they wish. However, the competition regulations do not prevent the municipalities from committing themselves to a "pool scheme" with other municipalities, instead of concluding pension agreements with outside private companies. Accordingly, the HTA does not constitute an unlawful restriction of competition, even though those municipalities bound by the collective agreement cannot choose schemes other than the joint municipal pension scheme in KLP, due to the product

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[6] Declaration by the Governments of the EFTA States on the Charter of the Fundamental Social Rights of Workers.

KLP til å misbruke sin dominerende stilling eller levere ytelser som ikke svarer til arbeidstakernes behov, (se *van der Woude* avsnitt 30).

55. Som ytterligere argument til støtte for tariffavtalers immunitet mot EØS-avtalens konkurranseregler hevder LO/NKF at argumentene om den sosiale dimensjon og støtten til de prinsipper og grunnleggende rettigheter for arbeidstakere som er nedfelt i det sosiale charter av 9 desember 1989 gjelder tilsvarende under EØS-avtalen via en egen erklæring vedlagt EØS-avtalens sluttakt.[6] Charterets artikkel 12 understreker at arbeidslivets organisasjoner har rett til å forhandle om kollektive overenskomster etter de regler som gjelder etter nasjonal lovgivning.

56. Hensynet til rettsenhet og felles regler innenfor EU og EØS understreker videre betydningen av de grunnleggende hensyn og De europeiske fellesskaps domstols rettspraksis for den foreliggende saken. LO/NKF hevder at det ikke foreligger noe i denne saken som gir grunn til å fravike De europeiske fellesskaps domstols rettspraksis.

57. LO/NKF vender seg dernest igjen til spørsmålet om hvorvidt LO og KS kan anses som foretak i relasjon til artikkel 53 og 54 EØS. De hevder at selv om EFTA-domstolen kommer til at tariffavtaler om pensjon og sykeforsikring er omfattet av konkurransereglene, kan LO/NKF og de øvrige arbeidstaker-organisasjonene ikke anses som foretak i relasjon til artikkel 53 og 54 EØS. Ingenting i De europeiske fellesskaps domstols rettspraksis støtter en slik tilnærming. De anfører videre at selv om EFTA-domstolen skulle mene at kommunene og KS er foretak i henhold til artikkel 53 og 54 EØS, opptrer tariffpartene uansett ikke som foretak ved inngåelsen av tariffavtaler om pensjon.

58. LO/NKF anfører subsidiært at det ikke foreligger noen konkurranse-begrensning i henhold til artikkel 53 og 54 EØS. Tariffavtalen legger bindinger på kommunene når det gjelder hvilke krav pensjonsproduktet må oppfylle. På grunn av produktspesifikasjonene i HTA står kommunene ikke fritt til å tegne et hvilket som helst produkt. Konkurransereglene er derimot ikke til hinder for at kommunene kan forplikte seg i en "pool-ordning" med andre kommuner i stedet for å tegne pensjonsavtaler med utenforstående private selskap. Følgelig representerer ikke HTA noen ulovlig konkurransebegrensning selv om det skulle være slik at de tariffbundne kommuner som følge av produktkravene ikke kan velge andre ordninger enn den felleskommunale pensjonsordning i KLP. Til

[6] Erklæring fra EFTA-statenes regjeringer om grunnleggende sosiale rettigheter for arbeidstakere.

requirements. Reference is made in this connection to paragraph 286 of the Opinion of the Advocate General in *Albany*.

59. LO/NKF add that, in the present case, the authorities have in no way made the scheme compulsory for all. The costs associated with occupational pension for the municipalities are, in any event, so indirect and marginal in relation to the price for municipal services, that there is no appreciable restriction of competition between the municipalities, see *Pavlov*, at paragraphs 95 – 97. Nor is there any obligation to organise, and the municipalities are free to cancel their membership in KS. Lastly, LO/NKF submit that the gender- and age-neutral financing scheme, which is currently established in the joint municipal pension scheme, is the only scheme which complies with the Equal Treatment Directive (Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions) and the Equal Pay Directive (Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes).

60. Lastly, LO/NKF refer to the judgments of the Court of Justice of the European Communities in the light of international conventions concerning the right of organisation and negotiation. Specific reference is made to the European Social Charter of 16 October 1961, Article 11 of the European Convention on Human Rights, Article 22 of the UN International Covenant on Civil and Political Rights, the UN International Covenant on Economic, Social and Cultural Rights, and ILO Conventions 87 and 98. LO/NKF submit that the application of the competition rules to collective agreements could lead to an encroachment on the organisations' free right of negotiation. It cannot be the case that the EEA Agreement is intended to encroach upon constitutional traditions and previously-existing obligations under international law. In the same vein, nor can the EFTA Court interpret Articles 53 and 54 EEA in such a way as to restrict the parties' right of organisation and negotiation as compared to what follows from national legislation and treaties.

61. LO/NKF propose that the following answers be given to Arbeidsretten:

> *"1. Collective agreement provisions on group occupational pension schemes, such as the provisions in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-2000, do not fall within the scope of application of Article 53 EEA.*
>
> *2. Notwithstanding Articles 53 and 54 EEA, an association of municipalities which is an interest and employer organisation, such as the Norwegian Association of Local and Regional Authorities, can, even if it is identified with an undertaking which has a 'dominant position', conclude an agreement for, or practise, those conditions for change of supplier of occupational pension schemes which are laid down in clause 2.1.8, second, third and fourth*

støtte for dette synet henvises det til generaladvokatens uttalelse i *Albany* avsnitt 286.

59. LO/NKF legger til at i denne saken har myndighetene ikke på noe vis almenngjort ordningen. Omkostningene ved tjenestepensjon for kommunene er uansett såvidt indirekte og marginale i forhold til prisen på kommunale tjenester at det ikke foreligger noen målbar konkurransebegrensning mellom kommunene, se *Pavlov* avsnitt 95 - 97. Det er heller ikke organisasjonstvang og kommunene står fritt til å melde seg ut av KS. LO/NKF fastholder endelig at den kjønns- og aldersnøytrale finansieringsordning som er etablert i den felleskommunale pensjonsordning per i dag er den eneste ordning som er i samsvar med likebehandlingsdirektivet, (rådsdirektiv 76/207 EØF av 9 februar 1976 om gjennomføring av prinsippet om lik behandling av menn og kvinner når det gjelder adgang til arbeid, yrkesutdanning og forfremmelse samt arbeidsvilkår), og likelønnsdirektivet (rådsdirektiv 96/97 EØF av 20 desember 1996 om endring av direktiv 86/378/EØF om gjennomføring av prinsippet om lik behandling av menn og kvinner i yrkesbaserte trygdeordninger).

60. Til slutt henviser LO/NKF til De europeiske fellesskaps domstols dommer i lys av internasjonale konvensjoner om organisasjons- og forhandlingsrett. En særlig henvisning er gjort til den europeiske sosialpakt av 16 oktober 1961, den europeiske menneskerettighetskonvensjons artikkel 11, FNs konvensjon om sivile og politiske rettigheter artikkel 22, FNs konvensjon om økonomiske, sosiale og kulturelle rettigheter og ILO konvensjonene 87 og 98. Det hevdes at anvendelse av konkurransereglene på tariffavtaler vil kunne lede til et inngrep i organisasjonenes frie forhandlingsrett. Det kan ikke være slik at EØS-avtalen er ment å gripe inn i konstitusjonelle tradisjoner og eldre folkerettslige forpliktelser. I samme retning kan heller ikke EFTA-domstolen tolke artikkel 53 og 54 EØS på en slik måte at partenes organisasjons- og forhandlingsrett blir begrenset i forhold til det som følger av nasjonal rett og traktater.

61. LO/NKF foreslår Arbeidsrettens spørsmål besvart slik:

> *"1. Tariffavtalebestemmelser om kollektive tjenestepensjonsordninger, slik som bestemmelsene i hovedtariffavtalen for kommuner m.v. for perioden 1998-2000 pkt. 2.1.8 annet, tredje og fjerde ledd er ikke omfattet av virkeområdet for EØS art. 53.*
>
> *2. En sammenslutning av kommuner, som er en interesse- og arbeidsgiverorganisasjon slik som Kommunenes Sentralforbund kan, selv om det identifiseres med et foretak som har "dominerende stilling", uten hinder av EØS art. 53 og 54 avtale eller praktisere slike vilkår for skifte av leverandør av*

paragraphs of the Basic Collective Agreement for municipalities, etc., for the period 1998-2000."

Norwegian Confederation of Municipal Employees (KFO)

62. The views of KFO expressed in their written observations are in accord with the submissions made by LO/NKF as summarised above.

63. As regards the applicability of Articles 53 and 54 EEA, KFO submits that the questions put forward in the Request for an Advisory Opinion must be answered in the negative, on the basis of a series of judgments from the Court of Justice of the European Communities on the corresponding provisions in Article 81 EC (formerly Article 85 of the EC Treaty) and Article 82 EC (formerly Article 86 of the EC Treaty). Those cases are *Albany*, *Brentjens'*, *Drijvende Bokken*, *Pavlov*, and *van der Woude*.

64. KFO submits that the HTA falls outside the scope of application of Article 53 EEA because there is no agreement or decision between undertakings. Reference is made to paragraphs 27 and 28 of the judgment of the Court of Justice of the European Communities in *Becu*.[7]

65. In the alternative, KFO submits that, in any event, the activities of KS merely consist of representing the individual municipalities in collective negotiations, and that, consequently, the activities of the association can in no way be classified as independent economic activity which would bring the organisation within the concept of undertaking.

66. Referring to paragraphs 62 to 64 in *Albany*, KFO argues that, regardless of whether the general subjective grounds for exemption from the EEA competition rules apply, provisions dealing with employees' occupational pensions schemes cannot come within the scope of application of Article 53 EEA. KFO points out that the Norwegian collective agreement scheme is contractually based, and this means that individual municipal employers can, at any time, withdraw from the employer organisation. The municipality is thereby no longer bound by the collective agreement, either. KFO submits that the freedom of the Norwegian municipalities bound by the collective agreement is not limited in any other way than that which follows from the individual municipality's own actions in relation to membership in its own employer organisation. Accordingly, the limitations are both less and have another basis (autonomy) than the statutorily-imposed limitations which the Dutch companies in the textile (*Albany*), building materials (*Brentjens'*) and dock and transport (*Drijvende Bokken*) sectors had to endure. The delegation of the power to conclude agreements is a prerequisite for management and labour organisations to be able to conclude collective agreements.

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7 Case C-22/98 *Becu and Others* [1999] ECR I-5665.

tjenestepensjonsordninger som er fastsatt i hovedtariffavtalen for kommuner m.v. for perioden 1998-2000 punkt 2.1.8 annet, tredje og fjerde ledd."

Kommunalansattes fellesorganisasjon

62. Synspunktene til KFO, uttrykt i deres skriftlige saksfremstillinger, samsvarer med anførslene fra LO/NKF som gjengitt ovenfor.

63. Med hensyn til anvendelse av artikkel 53 og 54 EØS anfører KFO at spørsmålene stillet i anmodningen må besvares benektende, på grunnlag av en rekke avgjørelser fra De europeiske fellesskaps domstol vedrørende de korresponderende og likelydende bestemmelser i EF-traktatens artikkel 81 (tidligere EF-traktatens artikkel 85) og artikkel 82 (tidligere EF-traktatens artikkel 86). Sakene er *Albany*, *Brentjens'*, *Drijvende Bokken*, *Pavlov*, *Van der Woude*.

64. KFO gjør gjeldende at HTA faller utenfor virkeområdet for artikkel 53 EØS fordi det ikke foreligger avtale eller beslutning mellom foretak. Det henvises til De europeiske fellesskaps domstols dom i *Becu*[7], avsnittene 27 og 28.

65. Subsidiært anfører KFO at virksomheten til KS uansett bare består i å representere den enkelte kommune ved kollektive forhandlinger, og at sammenslutningens virksomhet derfor ikke i noe fall kan karakteriseres som selvstendig økonomisk aktivitet slik at foretaksbegrepet kan anses oppfylt for organisasjonens vedkommende.

66. Under henvisning til *Albany* avsnittene 62 og 64 hevder KFO at uavhengig av om de generelle personelle unntaksgrunner kommer til anvendelse, kan ikke bestemmelser som handler om arbeidstakernes tjenestepensjonsordning falle inn under virkeområdet for artikkel 53 EØS. KFO påpeker at den norske tariffavtaleordningen er avtalebasert og dette innebærer at den enkelte kommunale arbeidsgiver når som helst kan melde seg ut av arbeidsgiverorganisasjonen. Kommunen vil dermed heller ikke lenger være bundet av den kollektive avtalen. KFO anfører at friheten til de norske kommunene som er bundet av den kollektive avtalen, ikke er begrenset på annen måte enn det som følger av den enkelte kommunes egne disposisjoner i forhold til medlemskapet i sin egen arbeidsgiverorganisasjon. Begrensningene er derfor både mindre og de har et annet grunnlag (autonomi), enn de lovpålagte begrensninger som de nederlandske bedriftene innen tekstil (*Albany*), byggevare (*Brentjens'*) og havne- og transport (*Drijvende Bokken*) måtte tåle. Avgivelse av avtalekompetanse er en forutsetning for at arbeidslivets organisasjoner skal kunne inngå kollektive avtaler.

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7 Sak C-22/98 *Becu med flere* [1999] ECR I-5665.

67. KFO submits that it is not necessary for the EFTA Court to answer any questions other than question 3 from Arbeidsretten in relation to Article 53 EEA, which it proposes be answered as follows:

> *"Collective agreement provisions on group occupational pension schemes, such as the provisions in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-2000 are not covered by the scope of application of Article 53 EEA."*

68. KFO then turns to question 10, concerning Article 54 EEA. KFO argues that the question assumes that the Norwegian Association of Local and Regional Authorities is identified with KLP in the conclusion and practice of the HTA. KFO adds that the EFTA Court has not been asked to rule on the question of whether the two institutions can be identified with each other, and that no question has been asked or information given which might provide a basis for an assessment of KLP's conduct away from the collective agreement.

69. KFO submits that any identity between the municipalities' mutual insurance company (KLP) and the municipalities' employer organisation (KS) cannot change the nature and purpose of the collective agreement. The agreement is, in any event, concluded within the framework of collective negotiations with a united employee side as necessary contract parties. Furthermore, the practice of the pension provisions is assigned to a separate body – those members of the Pension Committee who represent the parties to the collective agreement.

70. KFO also refers to the discussion of the content of the provisions, etc., in relation to Article 53 EEA, and submits that, when a collective agreement on pension matters falls outside the scope of Article 53 EEA, then the conclusion of that agreement cannot be covered by Article 54 EEA. Moreover, the issue of whether the provisions which were concluded in 1998 are deemed to have the effect of KLP's offer, i.e. the joint municipal pension scheme (FKP), being favoured, must be held to be without relevance.

71. It is expressly stated in *Albany*, at paragraph 56, and *van der Woude*, at paragraph 26, that the competition rules are not to be applied in such a way that they prevent management and labour from arriving at desired schemes within the framework of collective negotiations.

72. KFO submits that, when the rules of the HTA have a lawful content under the competition law rules, the practising of those same rules must be lawful. Pursuant to clause 2.1.8, second paragraph of the HTA, those members of the Pension Committee who represent the parties to the collective agreement exercise discretion within certain legal parameters when deciding whether a change of company is to be allowed or not. Thus, there can be no question of discretionary practices in which considerations other than the provisions of the collective agreement can be taken into account.

73. KFO proposes the following answer to questions 9 and 10:

67. KFO anfører at det ikke er nødvendig for EFTA-domstolen å besvare andre spørsmål enn Arbeidsrettens spørsmål nr 3 i tilknytning til artikkel 53 EØS, som foreslås besvart slik:

> *"Tariffbestemmelser om kollektive pensjonsordninger, slik som bestemmelsene i hovedtariffavtalen for kommuner m.v for perioden 1998-2000 pkt. 2.1.8 annet, tredje og fjerde ledd er ikke omfattet av virkeområdet for EØS artikkel 53."*

68. KFO vender seg så til spørsmål 10 om artikkel 54 EØS. KFO hevder at spørsmålet forutsetter identifikasjon mellom Kommunenes Sentralforbund og KLP ved inngåelsen og praktiseringen av HTA. KFO påpeker at EFTA-domstolen ikke er bedt om å ta stilling til spørsmålet om de to institusjonene kan identifiseres, og at det ikke er stilt spørsmål eller gitt opplysninger som gir grunnlag for en vurdering av KLPs opptreden løsrevet fra kollektivavtalen.

69. KFO anfører videre at en eventuell identifikasjon mellom kommunenes gjensidige forsikringsselskap (KLP) og kommunenes arbeidsgiverorganisasjon (KS) ikke kan endre den kollektive avtalens karakter eller formål. Avtalen er uansett sluttet innenfor rammen av kollektive forhandlinger med en samlet arbeidstakerside som nødvendige avtaleparter. Videre vises det til at praktiseringen av pensjonsbestemmelsene er lagt til et eget organ - Pensjonsutvalgets tariffparter.

70. KFO viser også til drøftelsen av bestemmelsens innhold mv i relasjon til artikkel 53 EØS, og anfører at når en tariffavtale om pensjonsforhold faller utenfor virkeområdet for artikkel 53 EØS, kan heller ikke inngåelsen av avtalen omfattes av artikkel 54 EØS. Dessuten, spørsmålet om bestemmelsene som ble inngått i 1998 må vurderes slik at de har til virkning å favorisere KLPs tilbud, det vil si den felles kommunale pensjonsordningen (FKP), må anses irrelevant.

71. Det er uttrykkelig fastslått i *Albany*, i avsnitt 56, og *Van der Woude*, i avsnitt 26, at konkurranseregelene ikke skal anvendes slik at de hindrer arbeidslivets parter fra å komme frem til ønskede ordninger innenfor rammen av kollektive forhandlinger.

72. KFO anfører at når reglene i HTA har et lovlig konkurranserettslig innhold, vil også praktiseringen av de samme regler måtte være lovlig. I henhold til HTA punkt 2.1.8 annet ledd utøver Pensjonsutvalgets tariffparter et rettslig bundet skjønn ved avgjørelsen av om skifte av selskap skal tillates eller ikke. Det er således ikke adgang til diskresjonær praktisering hvor andre hensyn enn tariffavtalens egne bestemmelser kan tas i betraktning.

73. KFO foreslår at spørsmålene 9 og 10 samlet besvares slik:

"An association of municipalities which is an interest and an employer organisation, such as the Norwegian Association of Local and Regional Authorities, can, even though the organisation is identified with the municipalities' own mutual insurance company, and assuming that the organisation has a dominant position, regardless of Article 54 EEA, conclude an agreement for or practise conditions for change of supplier of occupational pension schemes such as those laid down in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc., for the period 1998-2000. "

Norwegian Association of Local and Regional Authorities (KS)

74. KS argues that the contested provisions of the HTA are not contrary to either Article 53 EEA or Article 54 EEA. It maintains that those provisions apply to the regulation of an occupational pension scheme, i.e. salary and working conditions, and thus fall outside the scope of application of Article 53 EEA. KS also submits that, in any event, the conditions of application of Articles 53 and Article 54 EEA are not met, either as regards the scope of application of the provisions or the conditions relating to the criteria for prohibition under the provisions.

75. KS refers to the case-law of the Court of Justice of the European Communities, particularly *van der Woude* and *Albany*. KS submits that the disputed collective agreement provisions of clause 2.1 of chapter 2 HTA fulfil the conditions relating to "nature and purpose" set out in those judgments.

76. With respect to the "nature" of the disputed provisions, KS submits that they have been concluded in the form of a collective agreement and are the result of collective negotiations between employer and employee organisations. This fulfils the requirement of "nature" as established by the Court of Justice of the European Communities in its case-law. In addition, the purpose of the provisions of clause 2.1 of chapter 2 HTA fulfils the requirement of "purpose", again as established by the Court of Justice of the European Communities in its case-law. The provisions of clause 2.1 of chapter 2 HTA on pension, including the transfer provisions, promote all forms of social security: the purpose of the provisions is to improve salary and working conditions. The provisions have been instituted to give employees satisfactory financial security during the transition from an active working life to retirement. The provisions ensure that that the employees' occupational pension is the same, regardless of who the pension insurance supplier is.

77. In the light of the foregoing, KS finds that there is no basis for answering questions 21 and 2b, since they are purely hypothetical: see paragraph 40 of the judgment of the EFTA Court in *Wilhelmsen*.[8]

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[8] Case E-6/96 *Wilhelmsen* v *Oslo kommune* [1997] EFTA Court Report 53.

"En sammenslutning av kommuner, som er en interesse- og arbeidsgiverorganisasjon slik som Kommunenes Sentralforbund kan, selv om organisasjonen identifiseres med kommunenes eget gjensidige forsikringsselskap, og forutsatt at organisasjonen har dominerende stilling, uten hinder av EØS art. 54 avtale eller praktisere slike vilkår for skifte av leverandør av tjenestepensjonsordninger som er fastsatt i hovedtariffavtalen for kommuner m.v. for perioden 1998-2000 pkt. 2.1.8 annet, tredje og fjerde ledd."

Kommunenes Sentralforbund

74. KS hevder at den omstridte bestemmelsen i HTA ikke er i strid med hverken artikkel 53 eller 54 EØS. Det mener at disse bestemmelsene kommer til anvendelse på reguleringen av tjenestepensjonsordninger, det vil si lønns- og arbeidsvilkårene, og således faller utenfor virkeområdet for artikkel 53 EØS. KS anfører også at vilkårene i artikkel 53 og 54 EØS ikke i noe tilfelle er oppfylt, verken hva gjelder bestemmelsenes virkeområde eller vilkårene for forbud etter bestemmelsen.

75. KS henviser til rettspraksis fra De europeiske fellesskaps domstol særlig *van der Woude* og *Albany*. KS anfører at de omstridte tariffbestemmelser i HTA kapittel 2, punkt 2.1 fyller vilkårene om "karakter og formål" som er oppstilt i disse dommene.

76. Hva gjelder "karakteren" til de omtvistede bestemmelsene, anfører KS at de er tariffbestemmelser som er inngått i form av tariffavtale og er resultatet av kollektive forhandlinger mellom en arbeidsgiver- og arbeidstakerorganisasjoner. Dette oppfyller kravet til "karakter" som De europeiske fellesskaps domstol oppstiller i sin rettspraksis. I tillegg oppfyller formålet med bestemmelsene i HTA kapittel 2 punkt 2.1 kravet til "formål", igjen slik som De europeiske fellesskaps domstol oppstiller i sin rettspraksis. Bestemmelsene i HTA kapittel 2 punkt 2.1, herunder flyttebestemmelsene, fremmer alle former for sosial trygghet; bestemmelsenes formål er å forbedre lønns- og arbeidsvilkår. Bestemmelsene er opprettet for å gi arbeidstakerne en tilfredsstillende økonomisk sikkerhet ved overgang fra et yrkesaktivt liv til pensjonisttilværelse. Bestemmelsene sikrer at arbeidstakernes tjenestepensjon er den samme uavhengig hvem som er pensjonsforsikringsleverandør.

77. I lys av det ovennevnte finner KS at det ikke er noe grunnlag for å besvare spørsmål 2 a og 2 b fordi de er av hypotetisk karakter. Se EFTA-domstolens dom i *Wilhelmsen*[8] avsnitt 40.

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[8] Sak E-6/96 *Tore Wilhelmsen* mot *Oslo kommune* [1997] EFTA Court Report 53.

78. KS argues that, for Article 53 EEA to be applicable, both parties to the agreement must be considered as undertakings within the meaning of that Article, which criterion has not been fulfilled in the present case. KS is an employer organisation for municipal authorities. It negotiates salary and working conditions for its members, in the same way that LO/NKF negotiate salary and working conditions for their members. KS must thus be assessed in the same manner as LO/NKF. KS refers to paragraph 216 of the Opinion of Advocate General Jacobs in *Albany*, and submits that neither LO/NKF nor KS are "undertakings" pursuant to Article 53 EEA.

79. KS further argues that, the defendant municipalities cannot be regarded as undertakings, either, since their main function is the exercise of public authority, see *inter alia Cali & Figli*,[9] at paragraphs 23-25.

80. KS submits that, in any event, the municipalities cannot be considered as undertakings because the conditions of the collective agreement which KS negotiates on behalf of its members concern, directly or indirectly, salary and working conditions, and have immunity from the competition law rules, see *inter alia* paragraph 59 of *Albany*. It is clear from section 1(8) of the Labour Disputes Act that collective agreements are agreements concerning "conditions of employment and wages or other matters relating to employment". The expression "conditions of employment and wages or other matters relating to employment" must be interpreted broadly. In both Norwegian case-law and legal theory, the expression comprehends provisions which directly or indirectly appertain to wages and conditions of employment or other matters relating to employment. Accordingly, it must be accepted that the pension provisions of clause 2.1 of chapter 2 HTA, including the transfer provisions, are encompassed by the expression "conditions of employment and wages or other matters relating to employment". Chapter 2 HTA, which deals with pension matters, clearly contains provisions which come within the characterisation of the substantive content of a collective agreement contained in the Labour Disputes Act. KS also refers to the legal nature of collective agreements in general under Norwegian law, and argues that the municipalities, therefore, cannot be considered undertakings pursuant to Article 53 EEA.

81. If the EFTA Court nonetheless concludes that the municipalities are undertakings, KS submits that clause 2.1 of chapter 2 HTA does not constitute an agreement between the municipalities, and that, consequently, the condition of "agreement[] between undertakings" in Article 53 EEA is not fulfilled, and the provisions of clause 2.1 of chapter 2 HTA fall outside the scope of Article 53 EEA.

82. KS proposes the following answers to questions 1a and 1 c:

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9 Case C-343/95 *Cali & Figli* v *SEPG* (SEPG*)* [1997] ECR I-1547.

78. KS hevder at for at artikkel 53 EØS skal komme til anvendelse må begge partene i avtalen anses som foretak artikkelens forstand, et vilkår som ikke er oppfylt i denne saken. KS er en arbeidsgiverorganisasjon for kommunale myndigheter. Den forhandler lønns- og arbeidsvilkårene på vegne av sine medlemmer, på samme måte som LO/NKF forhandler lønns- og arbeidsvilkårene for sine medlemmer. KS må således vurderes på tilsvarende måte som LO/NKF. KS viser i den forbindelse til generaladvokat Jacobs uttalelser i avsnitt 216 av hans uttalelse i *Albany*, og hevder at verken LO/NKF eller KS er "foretak" etter artikkel 53 EØS.

79. Videre hevder KS at de saksøkte kommunene ikke kan anses som foretak fordi de utøver offentlig myndighet, som er deres hovedoppgave. Dette støttes blant annet ved henvisning til dommen i *Cali & Figli*,[9] avsnitt 23-25.

80. KS gjør gjeldende at kommunene uansett ikke kan anses som foretak fordi de tariffavtalevilkår som KS fremforhandler på vegne av sine medlemmer direkte eller indirekte gjelder lønns- og arbeidsvilkår og har immunitet fra konkurransereglene, jf blant annet *Albany* avsnitt 59. Det følger klart av arbeidstvistloven §1 nr 8 at tariffavtaler er avtaler om "arbeids- og lønnsvilkår eller andre arbeidsforhold." Uttrykket "arbeids- og lønnsvilkår eller andre arbeidsforhold" må tolkes vidt. Både etter norsk rettspraksis og i rettsteori omfatter uttrykket bestemmelser som direkte, så vel som indirekte, gjelder lønns- og arbeidsvilkår eller andre arbeidsforhold. Det må således legges til grunn at pensjonsbestemmelsene i HTA kapittel 2 punkt 2.1, herunder flyttebestemmelsene, faller innenfor uttrykket "arbeids- og lønnsvilkår eller andre arbeidsforhold". HTA kapittel 2 om pensjonsspørsmål er klart bestemmelser som faller inn under arbeidstvistlovens karakterisering av det materielle innholdet i en tariffavtale. KS viser også generelt til tariffavtalers rettslige karakter etter norsk rett, og hevder at kommunene derfor ikke kan anses som foretak etter artikkel 53 EØS.

81. Hvis EFTA-domstolen likevel skulle komme til at kommunene er foretak, anfører KS at HTA kapittel 2 punkt 2.1 ikke innebærer en avtale kommunene imellom, og at vilkåret om "avtale mellom foretak" i artikkel 53 EØS etter dette ikke er oppfylt, og at bestemmelsene i HTA kapittel 2 punkt 2.1 faller utenfor virkeområdet for artikkel 53 EØS.

82. KS foreslår følgende svar på spørsmål 1a og 1c:

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[9] Sak C-343/95 *Cali & Figli* mot *SEPG* [1997] ECR I-1547.

"Question 1a:

A collective agreement, as a general rule, does not entail binding legal effects between the participating members inter se on the employer side which can be held to be an 'agreement[ ] between undertakings' under Article 53 EEA.

Question 1c:

A municipality is not an 'undertaking' under Article 53 EEA when, in its capacity as employer, it becomes bound by a collective agreement without being a party thereto."

83. KS further contests that an agreement between two contract parties, as in the present case, constitutes a "decision[] by [an] association[] of undertakings". It argues that only those decisions which are taken truly independently are covered by the condition, such as the articles of association and internal rules of an association. The HTA is no such unilateral decision by KS.

84. KS proposes the following answer to questions 1b and 3:

"Question 1b:

If an employer organisation concludes a collective agreement, this is not a 'decision[] by [an] association[] of undertakings' under Article 53 EEA.

Question 3:

Collective agreement provisions on group occupational pension schemes, such as the provisions in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-2000 do not fall within the scope of application of Article 53 EEA."

85. KS also contends that, in the event of possible conflict between competition considerations and social policy considerations, it follows from the case-law of the Court of Justice of the European Communities that social policy considerations must take precedence over competition considerations.

86. If the EFTA Court decides to undertake an assessment of whether the provisions distort or prevent competition, KS contends that they do not, because the provisions of the HTA on occupational pension schemes make it possible for employees to be ensured occupational pension in addition to the pension schemes otherwise offered in the market. The alternative to the current scheme would be to make the scheme into a fund, and have the fund allow a single pension insurance supplier to administer the scheme.

87. KS further maintains that clause 2.1.8, third paragraph of chapter 2 HTA, concerning gender- and age-neutrality, is compatible with Article 53 EEA, if the interpretation of the collective agreement advocated by KS is accepted. The requirement may be fulfilled by KLP and other insurance companies, since the

"Spørsmål 1a:

En tariffavtale medfører i alminnelighet ikke bindende rettsvirkninger innbyrdes mellom de deltakende medlemmene på arbeidsgiversiden som kan regnes som "avtale mellom foretak" etter EØS art. 53.

Spørsmål 1c:

En kommune er ikke et "foretak" etter EØS art. 53 når den i egenskap av arbeidsgiver blir bundet av en tariffavtale uten å værte part i den."

83. KS anfører videre at en avtale mellom to avtaleparter som i den foreliggende saken ikke faller inn under vilkåret "beslutning truffet av sammenslutninger av foretak". Det hevdes at bare de beslutninger som gjøres på egenhånd omfattes av dette vilkåret, slik som en sammenslutnings vedtekter og interne regler. HTA er ingen slik ensidig beslutning fattet av KS.

84. KS foreslår følgende svar på spørsmål 1b og 3:

"Spørsmål 1b:

En arbeidsgiverorganisasjons inngåelse av en tariffavtale er ikke en "beslutning truffet av sammenslutninger av foretak" etter EØS art. 53.

Spørsmål 3:

Tariffavtalebestemmelser om kollektive tjenestepensjonsordninger, slik som bestemmelsene i hovedtariffavtalen for kommuner m.v. for perioden 1998-2000 pkt. 2.1.8, annet, tredje og fjerde ledd, er ikke omfattet av virkeområdet for EØS art. 53."

85. KS anfører også at ved en eventuell konflikt mellom konkurransehensyn og sosialpolitiske hensyn følger det av De europeiske fellesskaps domstols rettspraksis at de sosialpolitiske hensyn må gå foran konkurransehensyn.

86. Dersom EFTA-domstolen beslutter å foreta en vurdering av hvorvidt bestemmelsene hindrer eller vrir konkurransen, anfører KS at de ikke gjør det fordi HTAs bestemmelser om tjenestepensjonsordning gjør det mulig for arbeidstakerne å sikres en tjenestepensjon utover de pensjonsordninger som ellers tilbys i markedet. Alternativet til dagens ordning ville vært å legge ordningen til et fond og at fondet lot en enkelt pensjonsforsikringsleverandør administrere ordningen.

87. KS anfører videre at HTA kapittel 2 punkt 2.1.8 tredje ledd om kjønns- og aldersnøytralitet er forenlig med artikkel 53 EØS, dersom KS' forståelse av tariffbestemmelsen legges til grunn. Vilkåret kan være oppfylt av KLP og andre forsikringsselskaper, da tariffavtalen ikke oppstiller noen krav til kollektivets

collective agreement does not impose any requirement as to the size of the group. There is nothing preventing such an evening-out between gender and age from being carried out within an individual municipality, or among several municipalities. The determining factor is that the financing system has several employees among whom an evening-out can be achieved, and this is always the case for a municipality. Private life insurance companies also have, as a general practice, that evening-out may take place within an individual municipality.

88. If, based on the assumption that the pension provisions in clause 2.1 of chapter 2 HTA come within the scope of application of Article 53 EEA, the EFTA Court nonetheless accepts the interpretation of clause 2.1.8, third paragraph of chapter 2 HTA favoured by LO/NKF, to the effect that the requirement of a gender-neutral financing system can only be met using a larger group of several municipalities, KS contends that such an interpretation may be contrary to Article 53 EEA if the result is that only one supplier is actually given the opportunity to fulfil the requirement of clause 2.1.8, third paragraph of chapter 2 HTA.

89. KS proposes the following answer to question 4.

> *"A collective agreement condition which requires that a group occupational pension scheme be based on a gender-neutral financing system which can only be satisfied by one supplier may be incompatible with Article 53 EEA."*

90. With respect to the condition that the insurance product must be approved by those members of the Pension Committee who represent the parties to the collective agreement, KS submits that this is a control mechanism aimed at ensuring that employees' occupational pensions are the same, even in the event of a change of pension insurance supplier. In so far as those members of the Pension Committee who represent the parties to the collective agreement do not approve the pension product, the pension insurance supplier must amend the product so that the occupational pension requirements in chapter 2 HTA are fulfilled. Such an approval scheme does not entail any distortion or prevention of competition, and is thus compatible with Article 53 EEA.

91. KS proposes the following answer to question 5a:

> *"A collective agreement provision which provides that an offer concerning occupational pension schemes made by an insurance company to an employer must be approved by representatives for the parties to a collective agreement is compatible with Article 53 EEA."*

92. With respect to the condition that the insurance product must be taken note of by the Banking, Insurance and Securities Commission, KS argues that this provision does not *de facto* entail prior control of new insurance products, but is only included to ensure that employees' occupational pensions are the same regardless of whether a change of pension insurance supplier occurs. Since the parties to the collective agreement are limited in their opportunities to carry out

størrelse. Det ikke er noe i veien for at slik utjevning mellom kjønn og alder kan foretas innenfor en enkelt kommune, så vel som flere kommuner imellom. Det avgjørende er at finansieringssystemet har flere arbeidstakere det kan utjevnes imellom, og for en kommune er dette alltid tilfelle. Private livselskap har da også den alminnelige praksis at utjevning kan skje innen en enkelt kommune.

88. Dersom EFTA-domstolen, under den forutsetning at pensjons-bestemmelsene i HTA kapittel 2 punkt 2.1 omfattes av virkeområdet for artikkel 53 EØS, likevel legger til grunn LO/NKFs tolkning av HTA kapittel 2 punkt 2.1.8 tredje ledd om at det må et større kollektiv av flere kommuner til for å oppfylle kravet om kjønnsnøytralt finansieringssystem, gjøres det gjeldende at en slik tolkning vil kunne være i strid med artikkel 53 EØS hvis følgen er at bare én leverandør gis mulighet rent faktisk til å oppfylle kravet i HTA kapittel 2 punkt 2.1.8 tredje ledd.

89. KS foreslår følgende svar på spørsmål 4:

> *"Et tariffavtalevilkår som går ut på at en kollektiv tjenestepensjonsordning skal være basert på et kjønnsnøytralt finansieringssystem, og som bare kan oppfylles av en leverandør, kan være i strid med EØS art. 53."*

90. Til vilkåret om at forsikringsproduktet må være godkjent av Pensjonsutvalgets tariffparter gjør KS gjeldende at dette er en kontroll som skal sikre at arbeidstakernes tjenestepensjoner er de samme selv om pensjonsforsikringsleverandøren skiftes ut. I den grad Pensjonsutvalgets tariffparter ikke godkjenner pensjonsproduktet må pensjonsforsikrings-leverandøren endre produktet slik at kravene til tjenestepensjonen i HTA kapittel 2 oppfylles. En slik godkjenningsordning, medfører ingen konkurransevridning eller konkurransehindring og er således forenlig med artikkel 53 EØS.

91. KS foreslår følgende svar på spørsmål 5:

> *"En tariffbestemmelse om at et tilbud fra et forsikringsselskap til en arbeidsgiver om tjenestepensjonsordning må godkjennes av representanter for tariffavtalens parter, er forenlig med EØS art. 53."*

92. Til vilkåret om at forsikringsproduktet må være tatt til etterretning av Kredittilsynet hevder KS at bestemmelsen ikke *de facto* medfører forhåndskontroll av nye forsikringsprodukter, men kun er gitt for å sikre at arbeidstakernes tjenestepensjon er den samme, uavhengig av om det skjer et skifte av pensjonsforsikringsleverandør. Siden tariffpartene har begrensede muligheter til selv å foreta kompliserte forsikringstekniske vurderinger, har de et

themselves complicated evaluations based on insurance principles, they have a legitimate need to receive such support from the Banking, Insurance and Securities Commission. In so far as the Banking, Insurance and Securities Commission does not take note of the schemes, it is because the schemes do not conform to the requirements which the Banking, Insurance and Securities Commission is to control, and the schemes must then be amended. This is in no way related to the tie-in mechanisms, but merely shows that the security scheme functions in accordance with its purpose, which is to ensure that the employees' pension schemes are the same regardless of who the pension supplier is; see, by way of comparison, *Albany*, at paragraph 23. Accordingly, the provision does not have any effect which is restrictive of competition, and does not prevent competition, either.

93. KS proposes the following answer to question 6.

> *"A collective agreement provision which provides that it is a condition for transfer of an occupational pension scheme that the new insurance product must have been tacitly or expressly accepted by a public body is compatible with Article 53 EEA."*

94. With respect to the condition to the effect that, before a matter may be decided upon, there must be approval from the Norwegian Public Service Pension Fund relating to inclusion in the transfer agreement, KS maintains that this requirement is in place to ensure that employees, in the event of a change of employer to a new employer affiliated to the Norwegian Public Service Pension Fund, can take with them their accrued HTA pension, thereby allowing their pension accruals to continue as though they had always been covered by the same scheme. There are relatively widespread transfers of employees within and between municipalities/county municipalities and the State. Accordingly, there are social considerations behind the provision, and the provision leads to protection of a social benefit, occupational pensions. On this basis, KS contends that clause 2.1.8, fourth paragraph of chapter 2 HTA is compatible with Article 53 EEA, and that the approval scheme, therefore, does not lead to any distortion or prevention of competition. KS reasons that it is not necessary to answer question 7b which has been submitted to the EFTA Court.

95. KS proposes the following answer to question 7a.

> *"Collective agreement provisions which provide that a change of supplier of an occupational pension scheme is subject to the condition that the employer, before a decision on change can be made, must have entered into a separate agreement on mutual transfer of pension schemes through approval by the public body which administers the transfer scheme is compatible with Article 53 EEA."*

96. The defendant municipalities have argued that the sum of the tie-in mechanisms of the HTA must be held to be distortive of competition and unlawful. KS responds to this argument by submitting that, when the individual

legitimt behov for å få slik bistand fra Kredittilsynet. I den grad Kredittilsynet ikke tar ordningene til etterretning, er det fordi ordningene ikke er i samsvar med de krav som Kredittilsynet skal kontrollere, og ordningene må da endres. Dette har ingenting med innelåsningsmekanismer å gjøre, men viser kun at sikringsordningen fungerer etter sin hensikt, som er å ivareta at arbeidstakernes pensjonsordning er den samme uavhengig av hvem som er pensjonsforsikringsleverandør, se til sammenligning *Albany* avsnitt 23. Følgelig har bestemmelsen ikke noen konkurransebegrensende virkning og er heller ikke konkurransehindrende.

93. KS foreslår følgende svar på spørsmål 6:

> *"En tariffbestemmelse som innebærer at det er et vilkår for flytting av en tjenestepensjonsordning, at det nye produktet må være stilltiende eller uttrykkelig akseptert av et offentlig organ, er forenlig med EØS art. 53."*

94. Angående vilkåret om at før saken kan avgjøres må godkjenning av Statens Pensjonskasse knyttet til opptak i overføringsavtalen foreligge, gjør KS gjeldende at dette kravet er gitt for å sikre at arbeidstakerne ved et eventuelt arbeidsgiverskifte til ny arbeidsgiver som er tilsluttet Statens Pensjonskasse, får med seg sin opparbeidede HTA pensjon, og derved kan deres pensjonsopptjening fortsette som om de hele tiden hadde vært omfattet av en og samme ordning. Det foregår en forholdsvis omfattende overgang av arbeidstakere innenfor og mellom kommuner/fylkeskommuner og staten. Det er følgelig sosiale hensyn som ligger bak bestemmelsen, samt at bestemmelsen medfører sikring av det sosiale godet, tjenestepensjon. På dette grunnlaget anfører KS at HTA kapittel 2 punkt 2.1.8 fjerde ledd er forenlig med artikkel 53 EØS og at godkjenningsordningen følgelig ikke medfører noen konkurransevridning eller konkurransehindring. Det er ut fra de ovennevnte faktiske forhold ikke nødvendig å besvare spørsmål 7b som er forelagt EFTA-domstolen.

95. KS foreslår følgende svar på spørsmål 7a:

> *"Tariffavtalebestemmelser som innebærer at skifte av leverandør av tjenestepensjonsordning er betinget av at arbeidsgiveren, før beslutning om skifte kan treffes, har inngått en egen avtale om gjensidig overføring av pensjonsordninger gjennom godkjenning av det offentlige organ som administrerer overføringsordningen, er forenlig med EØS art. 53."*

96. De saksøkte kommunene har hevdet at summen av HTAs innelåsningsmekanismer må anses som konkurransevridende og ulovlige. KS svarer på dette argumentet ved å anføre at når de enkelte bestemmelser i HTA

provisions of clause 2.1 of chapter 2 HTA are compatible with Article 53 EEA, the provisions as a whole cannot then be judged to be distortive of competition or unlawful.

97. KS proposes the following answer to question 8.

> *"The sum of provisions in a collective agreement, such as the provisions in clause 2.1.8, second, third and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-2000, cannot be held to be contrary to Article 53 EEA even though none of the provisions, viewed in isolation, come under the prohibition therein."*

98. KS then submits that Article 54 EEA is not applicable because the conditions of application of Article 54 EEA are not fulfilled, either with respect to scope of application (*ratione personae*) or the prohibition (*ratione materiae*).

99. The argument has been put forth that Article 54 EEA applies, since KS, because of its identity with KLP under corporate law, must be identified with KLP. KS rejects this argument, and maintains that KLP and KS are two completely independent, different and separate holders of legal capacity, thereby leaving no grounds for identifying KS with KLP and viewing the two independent holders of legal capacity as one and the same undertaking under Article 54 EEA. That the board of KS used to constitute the general assembly of KLP does not ipso facto result in KS's being identified with KLP and being held to be one and the same undertaking. Additionally, KLP and KS's work tasks and interests are fundamentally different, and their respective memberships are of different compositions.

100. KS proposes the following answer to question 9:

> *"An association of municipalities which is an interest and an employer organisation, such as the Norwegian Association of Local and Regional Authorities, cannot be regarded as an 'undertaking' under Article 54 EEA in the negotiation of collective agreements."*

101. If the EFTA Court finds that clause 2.1.8, second and fourth paragraphs of chapter 2 HTA do come within the scope of application of Article 54 EEA, KS submits that clause 2.1.8, second and fourth paragraphs of chapter 2 HTA are not covered by the prohibition in Article 54 EEA.

102. KS claims that there is no "abuse (…) of a dominant position" pursuant to Article 54 EEA. To include and practise the relevant provisions of the HTA does not involve any abuse of a dominant position. Those provisions, which have been agreed following collective negotiations and based on social considerations, do not in any way entail abuse of a dominant position pursuant to Article 54 EEA. Furthermore, the case-law of the Court of Justice of the European Communities does not support the position put forward by the defendant municipalities.

kapittel 2 punkt 2.1 er forenlige med artikkel 53 EØS, kan ikke summen av bestemmelsene bedømmes som konkurransevridende eller ulovlige.

97. KS foreslår følgende svar på spørsmål 8:

> *"Summen av bestemmelser i en tariffavtale, slik som bestemmelsene i hovedtariffavtalen for kommuner m.v. for perioden 1998-2000 pkt. 2.1.8 annet, tredje og fjerde ledd, kan ikke bedømmes som stridende mot EØS art. 53 når ingen av bestemmelsene isolert sett rammes av forbudet der."*

98. KS anfører dernest at artikkel 54 EØS ikke kommer til anvendelse, fordi vilkårene for å anvende artikkel 54 EØS ikke er oppfylt, verken hva gjelder virkeområdet (*ratione personae*) eller forbudsbestemmelsen (*ratione materiae*).

99. Det er argumentert med at artikkel 54 EØS kommer til anvendelse fordi KS på grunn av sin organrettslige identitet med KLP må identifiseres med KLP. KS avviser dette, og fastholder at KLP og KS er to helt selvstendige, forskjellige og atskilte rettssubjekter, og at det således ikke er grunnlag for å identifisere KS med KLP og å anse de to rettssubjektene som ett og samme foretak etter artikkel 54 EØS. At styret i KS tidligere utgjorde generalforsamlingen i KLP, medfører selvfølgelig ikke at KS kan identifiseres med KLP og anses som ett og samme foretak. Dessuten er KLP og KS sine arbeidsoppgaver og interesser også grunnleggende forskjellige, og noen identifikasjon foreligger derfor verken faktisk eller reelt, og medlemsmassen til henholdsvis KLP og KS er ulikt sammensatt.

100. KS foreslår følgende svar på spørsmål 9:

> *"En sammenslutning av kommuner, som er en interesse- og arbeidsgiverorganisasjon slik som KS, kan ved fremforhandling av tariffavtaler ikke anses som et "foretak" etter EØS art. 54."*

101. Skulle EFTA-domstolen legge til grunn at HTA kapittel 2 punkt 2.1.8 annet og fjerde ledd omfattes av virkeområdet for artikkel 54 EØS, vil KS anføre at HTA kapittel 2 punkt 2.1.8 annet og fjerde ledd, ikke omfattes av forbudsbestemmelsen i artikkel 54 EØS.

102. KS anfører at det ikke er noen "utilbørlig[] utnyttelse av [] dominerende stilling" etter artikkel 54 EØS. Å innta og praktisere de aktuelle bestemmelsene i HTA, innebærer ingen utilbørlig utnyttelse av dominerende stilling. Disse bestemmelsene, som er avtalt etter kollektive forhandlinger og basert på sosiale hensyn innebærer ikke på noen måte misbruk av dominerende stilling i henhold til artikkel 54 EØS. Videre støtter ikke rettspraksis fra De europeiske fellesskaps domstol den påstand de saksøkte kommunene har fremsatt.

103. KS also asserts that the occupational pension scheme under the HTA is of such a nature as to be compatible with Article 54 EEA. When it follows from *inter alia* paragraph 118 of *Pavlov* that it is not an abuse of a dominant position to give a body an exclusive right to administer a supplementary pension scheme, a corresponding view must at least be accepted for a scheme which allows for a change of pension insurance supplier.

104. KS proposes the following answer to question 10.

> *"An undertaking, assuming that it has a 'dominant position', can conclude an agreement for or practise conditions for change of supplier of occupational pension schemes such as those laid down in clause 2.1.8, second, (…) and fourth paragraphs of the Basic Collective Agreement for municipalities, etc., for the period 1998-2000, regardless of Article 54 EEA."*

Hamarøy kommune and Tysfjord kommune

105. Hamarøy kommune and Tysfjord kommune concur with and invoke the same factual and legal arguments as put forth in the written observations submitted collectively on behalf of Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune, although with some additional comments.

106. Hamarøy kommune and Tysfjord kommune begin by pointing out that KLP was separated from the Norsk Kollektiv Pensjonskasse ("NKP"), effective 1 January 1974. The remaining NKP was later merged with Hygea, and the merged company is the current Vital Forsikring ASA ("Vital"), with which the defendant municipalities Hamarøy and Tysfjord are insured.

107. The separation of KLP from NKP did not lead to all of the municipalities' leaving NKP, now Vital. *Inter alia* Tromsø kommune remained. In agreement with the Banking, Insurance and Securities Commission, and pursuant to a prior contract between Vital and the ministries concerned, Tromsø kommune became part of the transfer agreement effective 1 January 1991. Additionally: (i) insurance benefits paid to employees of Tromsø kommune are the same as those offered by KLP; and (ii) those benefits which are not "insurable" must be covered through "single premiums", i.e. the policyholder (the municipality) itself guarantees the cover in the same manner that a municipality which is insured with KLP must cover possible capital contributions. LO or NKF have never argued that Tromsø kommune does not fulfil the requirements of the HTA. Exactly the same product is offered to Hamarøy kommune and Tysfjord kommune as is offered to Tromsø kommune, and – as mentioned – no one has had any objections. The municipalities thus have great difficulty understanding the basis of the action brought by LO/NKF, including the "security mechanism" which LO/NKF maintain the transfer procedure under the HTA is intended to

103. KS gjør også gjeldende at HTAs tjenestepensjonsordning er av en slik art at den er forenlig med artikkel 54 EØS. Når det av blant annet av *Pavlov* avsnitt 118 følger at det ikke er misbruk av dominerende stilling å gi et organ enerett til å administrere en tilleggspensjonsordning, må i hvert fall tilsvarende legges til grunn for en ordning som åpner for skifte av pensjonsforsikringsleverandører.

104. KS foreslår følgende svar på spørsmål 10:

> *"Et foretak, forutsatt at det har "dominerende stilling", kan uten hinder av EØS art. 54 avtale eller praktisere slike vilkår for skifte av leverandør av tjenestepensjonsordninger som er fastsatt i hovedtariffavtalen for kommuner m.v. for perioden 1998-2000 pkt. 2.1.8 annet, […] og fjerde ledd."*

Hamarøy kommune og Tysfjord kommune

105. Hamarøy og Tysfjord Kommune slutter seg til, og gjør gjeldende, de samme faktiske og rettslige anførsler som fremkommer i den skriftlige saksfremstillingen inngitt på vegne Kvam Kommune, Kvinnherad Kommune, Lørenskog Kommune, Os Kommune, Vikna Kommune og Volda Kommune i fellesskap, men med enkelte tilleggsbemerkninger.

106. Hamarøy kommune og Tysfjord kommune begynner med å påpeke at KLP ble utskilt fra Norsk Kollektiv Pensjonskasse ("NKP") med virkning fra 1 januar 1974. Det gjenværende NKP ble senere fusjonert med Hygea og det fusjonerte selskap er det nåværende Vital Forsikring ASA ("Vital") der de saksøkte kommuner Hamarøy og Tysfjord er forsikret.

107. Utskillelsen av KLP fra NKP ikke medførte at alle de forsikrede kommuner forlot NKP, nå Vital. Blant annet Tromsø kommune ble værende igjen. I forståelse med Kredittilsynet, og etter forutgående kontakt mellom Vital og de berørte departement, tiltrådte Tromsø kommune overføringsavtalen med virkning fra 1 januar 1991. I dette ligger følgende: (i) Forsikringsytelsene overfor Tromsø kommunes ansatte er de samme som tilbys av KLP og (ii) de ytelser som ikke er "forsikringsbare" må dekkes gjennom "engangspremie", det vil si at forsikringstakeren (kommunen) selv garanterer for denne dekningen på samme måte som en kommune som er forsikret i KLP må dekke eventuelle egenkapitalinnskudd. LO eller NKF har aldri hevdet at Tromsø kommune ikke oppfyller vilkårene i HTA. Det er akkurat det samme produkt som ytes til Hamarøy og Tysfjord kommuner som ytes til Tromsø kommune og - som nevnt - ingen har hatt noe å innvende til. Kommunene har således ytterst store problemer med å forstå saksøkernes begrunnelse for søksmålet, herunder også den "sikringsmekanisme" saksøkerne hevder at HTAs prosedyre for flytting skal ivareta. De ser denne først og fremst mer som et forsøk på å beskytte KLP fra konkurranse.

safeguard. Rather, they see it first and foremost as an attempt to shield KLP from competition.

108. Hamarøy kommune and Tysfjord kommune go on to state that the separation of KLP from NKP did not lead to any genuine competition on the market for group pension insurance. On the contrary, until the end of the 1980s, the market was characterised by a lack of competition. This situation was among the matters which were discussed by the government and which led to research work being commenced to foster competition. The right to transfer became a key element in forcing such competition to come into existence. Reference is made to Norwegian legislation concerning transfer of pension rights and the appurtenant *travaux préparatoires*.

109. Hamarøy kommune and Tysfjord kommune submit that, despite an attempt by the Norwegian authorities to stimulate competition in the area of pension rights, the practising of the HTA by LO/NKF aims at eliminating the right to transfer as regards KLP. The municipalities have noted that LO/NKF are preoccupied with arguing that the HTA ensures the right to transfer. However, the procedural rules are practised by LO/NKF in such a manner that transfer becomes impossible. This has been described in detail in the written observations submitted collectively on behalf of Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune.

110. Hamarøy kommune and Tysfjord kommune further claim that the insurance product which they have through Vital is the same as that offered by KLP. Premium calculations in both cases are made according to a linear model, as required by the regulations, and, consequently, do not exclude older employees any more with the Vital product than with the KLP product. As to the point concerning gender-neutrality, they submit that it cannot be concluded that KLP's setting of premiums is more "gender-neutral" than that of the others.

111. They add that the HTA is not drafted in such a way that it would be an act of "solidarity" to calculate an average premium for KLP's insurance sample which corresponds to 60% of municipal employees, and which does not necessarily constitute a "national average", whilst it would be an act of "non-solidarity" to calculate the premium as an average for a smaller sample. The point in relation to the *Albany* test must be that municipal employees both within and outside KLP attain the same benefits, and that LO/NKF cannot show any basis for arguing that it is necessary to operate with such a large group as 60% so that all municipal employees can attain the insurance coverage provided for. LO/NKF clearly recognise that it is not necessary to have a larger group than that obtained with each individual municipality to make it possible to attain insurance coverage for the municipal employees: it is only the transfer procedure from KLP to which objections are being raised.

112. Hamarøy kommune and Tysfjord kommune conclude that the restrictive mechanism which is practised in relation to those municipalities which are

108. Hamarøy kommune og Tysfjord kommune bemerker videre at utskillelsen av KLP fra NKP ikke medførte noen reell konkurranse i vanlig forstand på markedet for kollektiv pensjonsforsikring. Markedet var frem til slutten av 1980-årene tvert imot preget av mangel på konkurranse. Denne situasjonen var blant de forhold som ble tatt opp av regjeringen og som førte til at utredningsarbeid ble igangsatt for å skape konkurranse. Flytteretten ble et sentralt moment for å fremtvinge slik konkurranse. Dette støttes ved en henvisning til norsk lovgivning og lovforarbeider om flytting av pensjonsrettigheter.

109. Hamarøy kommune og Tysfjord kommune anfører at til tross for norske myndigheters forsøk på å stimulere konkurransen i markedet for pensjoner, tar saksøkernes praktisering av HTA sikte på å eliminere flytteretten forsåvidt gjelder KLP. Kommunene har notert at saksøkerne er opptatt av å hevde at HTA sikrer flytteretten. Prosedyrereglene praktiseres imidlertid slik av saksøkerne at flytting blir umulig. Dette er utførlig beskrevet i innlegget inngitt fra de øvrige saksøkte kommuner Kvam Kommune, Kvinnherad Kommune, Lørenskog Kommune, Os Kommune, Vikna Kommune og Volda Kommune i fellesskap.

110. Hamarøy kommune og Tysfjord kommune anfører videre at forsikringsproduktet som kommunene har gjennom Vital er det samme som KLP tilbyr. Premieberegningen foretas i begge tilfelle etter en lineær modell slik forskriftene fastsetter, og ekskluderer derfor ikke eldre arbeidstakere i Vitals produkt mere enn i KLPs produkt. Til punktet om kjønnsnøytralitet anføres det at man ikke kan slutte at KLPs premiefastsettelse er mer "kjønnsnøytral" enn de øvriges.

111. De legger til at HTA ikke er formulert slik at det ville være "solidarisk" å beregne en gjennomsnittspremie på KLPs forsikringsbestand som tilsvarer 60% av kommuneansatte, og som ikke nødvendigvis utgjør noe "landsgjennomsnitt", mens det ville være "usolidarisk" å beregne premien som et gjennomsnitt for en mindre bestand. Poenget i forhold til *Albany*-testen må være at de kommuneansatte både innenfor og utenfor KLP oppnår de samme ytelser og at saksøkerne ikke kan påvise noe grunnlag for å hevde at det er nødvendig å operere med et så stort kollektiv som 60% for at alle kommuneansatte skal oppnå den forutsatte forsikringsdekning. Saksøkerne erkjenner tydeligvis at det ikke er nødvendig med større kollektiv enn det hver enkelt kommune representerer for at forsikringsdekningen av de kommuneansatte skal kunne oppnås; det er bare flytteprosessen fra KLP som angripes.

112. Hamarøy kommune og Tysfjord kommune konkluderer med at den innelåsningsmekanisme som praktiseres i forhold til de kommuner som er

insured with KLP is not necessary for the joint scheme (group pension insurance) provided for in the HTA to be realised and function well. The HTA, as it is practised by LO/NKF, thus precludes competition, contrary to Articles 53 and 54 EEA, see paragraphs 272-274 of the Opinion of the Advocate General in *Albany*.

113. Hamarøy kommune and Tysfjord kommune ask for the questions from Arbeidsretten to be answered as set out in the written observations submitted collectively on behalf of Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune.

Hitra kommune and Steigen kommune

114. Hitra kommune and Steigen kommune begin by mentioning that, in 1998, they moved their pension insurance contracts for their employees from KLP to Gjensidige Nor Spareforsikring.

115. Hitra kommune and Steigen kommune submit that the contractual interpretation and practice of the provisions of the HTA favoured by LO/NKF impede all forms of competition in the municipal occupational pension market. Accordingly, the interpretation of the provisions of the HTA advocated by LO/NKF is contrary to the EEA Agreement and, therefore, unlawful.

116. Hitra kommune and Steigen kommune concur with the statements, arguments, and proposed answers as set out in the written observations submitted collectively on behalf of Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune, and, accordingly, restrict their comments to supplementing certain points.

117. Hitra kommune and Steigen kommune submit that the transfer rules of HTA 1998 – 2000 are of such a nature that the conditions established by the Court of Justice of the European Communities for acceptance of collective agreement provisions which restrict competition, in accordance with Article 86 EC, are not fulfilled. They contend that the transfer provisions of the HTA do not have a purely social policy objective, but also one of restriction of competition, and that the elements of the transfer provisions which are restrictive of competition are not necessary to safeguard any social policy objective.

118. They further claim that all conditions for the applicability of Article 53 EEA to the scheme provided for in the HTA are fulfilled. The scheme has as its object and effect the restriction of competition in the supply of municipal occupational pensions, and has an appreciable effect on competition and trade in a substantial part of the EEA.

119. As to the relevance of the case-law of the Court of Justice of the European Communities relied on by LO/NKF, Hitra kommune and Steigen kommune hold the view that that case-law does not resolve the competition law issue in the

forsikret i KLP er ikke nødvendig for at den fellesordning (kollektiv pensjonsforsikring) som er forutsatt i HTA skal kunne oppnås og fungere godt. HTA, slik den praktiseres av saksøkerne, stenger således for konkurranse i strid med artikkel 53 og 54 EØS, jf generaladvokatens uttalelse avsnitt 272-274 i *Albany*.

113. Hamarøy kommune og Tysfjord kommune ber om at Arbeidsrettens spørsmål må besvares som foreslått i den skriftlige saksfremstilling inngitt fra de øvrige saksøkte kommuner Kvam Kommune, Kvinnherad Kommune, Lørenskog Kommune, Os Kommune, Vikna Kommune og Volda Kommune i fellesskap.

Hitra kommune og Steigen kommune

114. Hitra kommune og Steigen kommune begynner med å nevne at de i 1998 flyttet sine pensjonsforsikringsavtaler for ansatte fra KLP til Gjensidige Nor Spareforsikring.

115. Hitra kommune og Steigen kommune gjør gjeldende at den avtaleforståelse og praktisering av HTAs bestemmelser som saksøkerne hevder hindrer enhver konkurranse innenfor det kommunale tjenestepensjonsmarkedet. Følgelig er saksøkernes forståelse av hovedtariffavtalens bestemmelser i strid med EØS-avtalen og derfor lovstridige.

116. Hitra kommune og Steigen kommune tiltrer den saksfremstilling, de anførsler og forslag til svar inngitt fra de øvrige saksøkte kommuner Kvam Kommune, Kvinnherad Kommune, Lørenskog Kommune, Os Kommune, Vikna Kommune og Volda Kommune i fellesskap, og begrenser seg følgelig til å supplere på visse punkter.

117. Hitra kommune og Steigen kommune gjør gjeldende at flyttereglene i HTA 1998 - 2000 er av en slik karakter at de vilkår som De europeiske fellesskaps domstol har oppstilt for å godta konkurransebegrensende tariffbestemmelser i henhold til artikkel 86 i EF-traktaten ikke er oppfylt. De gjør gjeldende at HTAs flyttebestemmelser ikke har et rent sosialpolitisk, men også et konkurransebegrensende formål og at flyttebestemmelsenes konkurranse-begrensende elementer ikke er nødvendige for å ivareta deres eventuelle sosialpolitiske formål.

118. De anfører videre at alle vilkår for anvendelse av artikkel 53 EØS er oppfylt. Ordningen har som formål og virkning å begrense konkurransen om tilbud av kommunale tjenestepensjoner, og påvirker merkbart konkurransen og handelen i en vesentlig del av EØS.

119. Angående relevansen av De europeiske fellesskaps domstols rettspraksis, mener Hitra kommune og Steigen kommune at denne rettspraksis ikke løser de konkurranserettslige spørsmål i denne saken. Dette fordi saksforholdet i disse

present case. This is because the facts of those cases differ on essential points from the circumstances in the present case. Furthermore, the central criterion set out by the Court of Justice of the European Communities is whether social policy objectives are pursued by the agreement. The contested provisions of the HTA do not pursue any such objectives.

120. As regards certain of the individual conditions in the transfer rules of the HTA, Hitra kommune and Steigen kommune argue that the collective agreement condition which requires that a pension scheme be taken note of by the Banking, Insurance and Securities Commission is contrary to the provisions of the Insurance Activity Act. Under the amendments made to the Insurance Activity Act in 1994, a requirement could no longer be maintained for prior approval of premiums or other aspects of an occupational pension product. The legislative amendments were introduced because of Norway's obligations under the EEA Agreement, and were thus a step in the preparations for competition from foreign suppliers as well. That the collective agreement condition requiring pension products to be taken note of by the Banking, Insurance and Securities Commission does not pursue a necessary social policy objective is also confirmed by the fact that the parties did not maintain the condition when concluding a new Basic Collective Agreement for the period 2000 – 2002.

121. Hitra kommune and Steigen kommune also contend that the requirement of affiliation to the transfer agreement and approval from the Norwegian Public Service Pension Fund is contrary to Article 53 EEA. The collective agreement condition requiring the occupational pension scheme to be linked to inclusion in the transfer agreement means that a comprehensive contract must be entered into between the particular municipality and the Norwegian Public Service Pension Fund. It is difficult to imagine that such a contract can be entered into before the municipality has decided on its occupational pension supplier. The contract between the particular municipality and the Norwegian Public Service Pension Fund is based on the actual conditions in the pension insurance contract which is concluded between the municipality and the occupational pension supplier. It is clear from the foregoing that a requirement of approval for inclusion in the transfer agreement before a decision to transfer has been made is extremely restrictive of competition. The collective agreement condition cannot be viewed as necessary to safeguard a social policy objective and must, therefore, give way to the general scope of application of the competition provisions.

122. With respect to the condition concerning gender-neutrality, Hitra kommune and Steigen kommune state that, if the position of LO/NKF is accepted, competition in the municipal occupational pension market in Norway will be precluded. The requirement that the pension scheme be based on a gender-neutral financing system has no social policy objective to be safeguarded. Emphasis is placed on four aspects: (i) the main parties to the collective agreement strongly disagree on the interpretation of the collective agreement provision, and the parties to the collective agreement thus have no common understanding of such an actual objective to be safeguarded; (ii) the real

sakene er forskjellig på vesentlige punkter fra forholdene i denne saken. Videre er det sentrale kriteriet De europeiske fellesskaps domstol oppstiller hvorvidt avtalen forfølger sosialpolitiske målsettinger. De omstridte bestemmelsene i HTA tjener ingen slike formål.

120. Til de enkelte vilkårene i HTAs flytteregler anfører Hitra kommune og Steigen kommune at tariffvilkåret om at pensjonsordningen må være tatt til etterretning av Kredittilsynet er i strid med forsikringsvirksomhetslovens bestemmelser. Etter de endringer som ble gjort i forsikringsvirksomhetsloven i 1994 kunne et krav om forhåndsgodkjennelse av premier eller andre sider ved tjenestepensjonsproduktet ikke lenger opprettholdes. Lovendringene var begrunnet i Norges forpliktelser i henhold til EØS-avtalen og således et ledd i tilretteleggelse for konkurranse fra også utenlandske leverandører. At tariffkravet om at pensjonsprodukter skal være tatt til etterretning av Kredittilsynet ikke forfølger et nødvendig sosialpolitisk formål bekreftes også ved at partene ikke opprettholdt vilkåret ved inngåelse av ny hovedtariffavtale for perioden 2000 - 2002.

121. Hitra kommune og Steigen kommune anfører også at kravet om tilslutning til overføringsavtalen og godkjenning av Statens Pensjonskasse er i strid med artikkel 53 EØS. Tariffvilkåret om at tjenestepensjonsordningen skal være knyttet til opptak i overføringsavtalen innebærer at det må inngås en omfattende avtale mellom den aktuelle kommune og Statens Pensjonskasse. Det er vanskelig å forestille seg at en slik avtale kan inngås før kommunen har bestemt seg for tjenestepensjonsleverandør. Avtalen mellom den aktuelle kommune og Statens Pensjonskasse er basert på de konkrete vilkår i pensjonsforsikringsavtalen som inngås mellom kommunen og tjenestepensjonsleverandøren. Det fremgår klart av det ovennevnte at et krav om godkjennelse om opptak i overføringsavtalen før beslutning om skifte har funnet sted, er sterkt konkurransebegrensende. Tariffvilkåret kan ikke anses å være nødvendig for å ivareta et sosialpolitisk formål og må derfor vike for konkurransebestemmelsenes alminnelige virkeområde.

122. Til vilkåret om kjønnsnøytralitet anfører Hitra kommune og Steigen kommune at dersom saksøkernes standpunkt legges til grunn, utelukker det konkurranse innenfor det kommunale tjenestepensjonsmarkedet i Norge. Kravet om at pensjonsordningen skal være basert på et kjønnsnøytralt finansieringssystem har ingen beskyttelsesverdig sosialpolitisk målsetting. Fire aspekter understrekes; (i) hovedtariffpartene er sterkt uenige i forståelsen av tariffbestemmelsen og tariffpartene har således ingen felles oppfatning av et slik konkret beskyttelsesverdig formål; (ii) den reelle betydning av fastsettelse av premiestørrelsen basert på beregning innenfor den enkelte kommune kontra et landsgjennomsnitt, vil for den alt overveiende del av kommunene utgjøre en ikke signifikant forskjell; (iii) det foreligger øvrig nasjonal lovgivning som sikrer mot

consequences of fixing premium amounts based on calculations within the individual municipality, as opposed to a national average will, for the great majority of municipalities, not make a significant difference; (iii) there is other national legislation in place which protects against gender discrimination in employment, and consequently, which ensures enforcement of the notion that, in hiring, unfair consideration is not to be taken of any gender-related differences in premium in the occupational pension scheme; (iv) the collective agreement condition cannot then be viewed as necessary for the pursuance of a social policy objective and must, therefore, give way to the general scope of application of the competition provisions.

123. Hitra kommune and Steigen kommune then turn to the requirement that relevant offers for new occupational pension schemes must be submitted to and approved by those members of the Pension Committee who represent the parties to the collective agreement prior to being dealt with by the municipality's decision-making body. It has been argued before the national court that the collective agreement condition unlawfully restricts competition in the occupational pension market in the public sector. It was, therefore, deemed desirable to have an Advisory Opinion from the EFTA Court on the lawfulness of concluding collective agreements containing provisions which have the nature and effect which the municipalities maintain that clause 2.1.8, second paragraph of HTA 1998 – 2000 has.

124. The way in which the Pension Committee treated the request from Hitra kommune shows that, in reality, the contested condition has the effect of restricting competition, without there being legitimate social policy objectives to be safeguarded. There are thus no grounds for excluding it from the scope of EEA competition law. All matters which those members of the Pension Committee who represent the parties to the collective agreement are to assess pursuant to the collective agreement are adequately safeguarded through contracts and other legislation. It is not, in any event, necessary to maintain a requirement of prior approval by those members of the Pension Committee who represent the parties to the collective agreement.

125. Hitra kommune and Steigen kommune submit that Article 53 EEA applies to the scheme, since all conditions of application of Article 53(1) EEA are fulfilled. The scheme has as its object and effect the restriction of competition in the supply of municipal occupational pensions, and has an appreciable effect on competition and trade in a substantial part of the EEA.

126. Hitra kommune and Steigen kommune also discuss whether the conclusion and practising of the transfer rules of the HTA constitute an abuse of the undertaking's/undertakings' dominant position in the area covered by the Agreement, pursuant to Article 54 EEA. In that connection, they submit that KS and KLP must be identified with each other. They maintain that KLP and KS constitute an undertaking within the meaning of the EEA Agreement, one that has abused its dominant position by establishing and practising transfer rules in a

diskriminering av kjønn ved ansettelser, og som således sikrer håndhevelse av at det ikke tas usaklige hensyn til eventuelle kjønnsrelaterte premieforskjeller i tjenestepensjonsordningen ved ansettelse; (iv) tariffvilkåret kan derfor ikke anses å være nødvendig for forfølgelsen av et sosialpolitisk formål og må derfor vike for konkurransebestemmelsenes alminnelige virkeområde.

123. Hitra kommune og Steigen kommune vender seg dernest til kravet om at aktuelle tilbud på ny tjenestepensjonsordning skal forelegges for og godkjennes av Pensjonsutvalgets tariffparter før behandling i kommunens besluttende organ. Det er gjort gjeldende for den nasjonale domstol at tariffvilkåret rettsstridig begrenser konkurransen i tjenestepensjonsmarkedet i offentlig sektor. Det er av denne grunn ønskelig å få EFTA-domstolens rådgivende uttalelse knyttet til lovligheten av å inngå tariffavtaler med bestemmelser av den art og med den virkning HTA 1998-2000 pkt. 2.1.8, annet ledd etter kommunens oppfatning har.

124. Måten Pensjonsutvalgets tariffparter behandlet Hitra kommunes og Steigen kommunes søknader på viser at i realiteten har de omstridte vilkårene til virkning å begrense konkurransen uten å ivareta noe beskyttelsesverdig sosialpolitisk formål. Det er således ingen grunn til å unnta dem fra EØS-konkurranserettens virkeområde. Alle forhold Pensjonsutvalgets tariffparter skal vurdere i henhold til tariffavtalen ivaretas tilstrekkelig gjennom avtaler og øvrig lovgivning. Det er under enhver omstendighet ikke nødvendig å opprettholde et krav om forhåndsgodkjennelse i Pensjonsutvalgets tariffparter.

125. Hitra kommune og Steigen kommune gjør gjeldende at artikkel 53 EØS kommer til anvendelse på ordningen, i det alle vilkår for anvendelse av artikkel 53 EØS nr 1 er oppfylt. Ordningen har som formål og virkning å begrense konkurransen om tilbud av kommunale tjenestepensjoner, og påvirker merkbart konkurransen og handelen i en vesentlig del av EØS.

126. Hitra kommune og Steigen kommune drøfter også hvorvidt avtalepartenes inngåelse og praktisering av HTAs flytteregler representerer en utilbørlig utnyttelse av foretaket/foretakenes dominerende stilling innen det territorium som er omfattet av avtalen, i henhold til artikkel 54 EØS. I denne forbindelse anfører de at KS og KLP må identifiseres med hverandre. De fastholder at KLP og KS i EØS-avtalens forstand representerer et foretak som har utnyttet sin dominerende stilling på utilbørlig måte ved etablering og praktisering av flytteregler i en

basic collective agreement which, in practice, preclude competition. Such a lack of competition, and lack of a real right to transfer, favour KLP as the dominant market player. With respect to further comments regarding Article 54 EEA, reference is made to the written observations submitted collectively on behalf of Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune.

Tana kommune

127. With respect to the factual background of the case, Tana kommune refers to the Request for an Advisory Opinion and to the written observations of the other defendant municipalities, particularly the written observations submitted collectively on behalf of Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune. The observations of Tana kommune are thus aimed at describing the special situation of Tana kommune and further pinpointing specific key issues.

128. In December 1998, Tana kommune reached an agreement with employee representatives to the effect that the municipality should consider transferring their pension scheme from KLP if they received a better offer in accordance with all the material provisions of chapter 2 HTA. Pursuant to the procedural provisions set out in clause 2.1.8 HTA, the municipality formally requested approval of transfer of the municipal pension scheme from KLP to the private insurance company VÅR. The application for approval was denied by the Pension Committee on the grounds that the Banking, Insurance and Securities Commission had not "taken note of" the pension product, even though the Banking, Insurance and Securities Commission had, as early as 1997, assessed and approved the pension insurance products in question.

129. Tana kommune points out, however, that the routines followed by the Banking, Insurance and Securities Commission for approval of insurance products have changed due to the entry into force of the EEA Agreement and the secondary legislation covering insurance companies and products, so that the former national advance approval routines were no longer in existence. The approval system referred to in clauses 2.1.6 and 2.1.8 HTA is, therefore, non-existent and would, in any event, be unlawful.

130. On 29 December 1998, on the basis of the guarantee from VÅR, which stated that the scheme offered fulfilled all the material provisions of chapter 2 HTA, the municipal council of Tana kommune decided to transfer their pension scheme from KLP to VÅR.

131. It is the view of Tana kommune that the Pension Committee did not have any objectively justifiable grounds for denying the transfer from KLP to VÅR. Tana kommune further submits that transfers of pension schemes are, in reality, effectively blocked by the Pension Committee, even if all attainable objective

hovedtariffavtale som i praksis umuliggjør konkurranse. Slik manglende konkurranse og manglende reell flytterett favoriserer KLP som den dominerende markedsaktør. Når det gjelder ytterligere bemerkninger angående artikkel 54 vises det til det skriftlige innlegg inngitt på vegne av de øvrige saksøkte kommuner Kvam Kommune, Kvinnherad Kommune, Lørenskog Kommune, Os Kommune, Vikna Kommune og Volda Kommune i fellesskap.

Tana kommune

127. Med hensyn til sakens faktiske bakgrunn viser Tana kommune til anmodningen om en rådgivende uttalelse og til den skriftlige saksfremstilling inngitt fra de øvrige saksøkte kommuner Kvam Kommune, Kvinnherad Kommune, Lørenskog Kommune, Os Kommune, Vikna Kommune og Volda Kommune i fellesskap. Saksfremstillingen fra Tana kommune søker således å beskrive de særlige forhold som gjelder for Tana kommune og videre å poengtere visse nøkkelspørsmål.

128. I desember 1998 kom Tana kommune og representanter for de ansatte til enighet om at kommunen skulle vurdere flytting av deres pensjonsordning fra KLP hvis de mottok et bedre tilbud i samsvar med de materielle bestemmelsene i HTA kapittel 2. I henhold til prosedyrereglene i HTA punkt 2.1.8, ba kommunen formelt om godkjenning av flytting av den kommunale pensjonsordningen fra KLP til det private forsikringsselskapet VÅR. Søknaden om godkjenning ble avslått av Pensjonsutvalgets tariffparter på det grunnlag at Kredittilsynet ikke hadde tatt produktet "til etterretning", selv om Kredittilsynet så tidlig som i 1997 hadde vurdert og godkjent de aktuelle pensjonsforsikringsproduktene.

129. Tana kommune poengterer imidlertid at Kredittilsynets rutiner for godkjenning av forsikringsprodukter er endret etter ikrafttreden av EØS-avtalen og sekundærlovgivning om forsikringsselskaper og forsikringsprodukter, slik at tidligere nasjonale forhåndsgodkjenningsrutiner ikke lenger eksisterte. Godkjenningssystemet som det er vist til i HTA punkt 2.1.6 og 2.1.8 er derfor ikke-eksisterende og ville uansett vært ulovlig.

130. Basert på forsikringen fra VÅR om at den tilbudte ordningen tilfredsstilte alle de materielle bestemmelsene i HTA kapittel 2, besluttet kommunestyret i Tana kommune den 29 desember 1998 å flytte sine pensjonsordninger fra KLP til VÅR.

131. Det er Tana kommunes oppfatning at Pensjonsutvalgets tariffparter ikke hadde noen rettmessige grunner for å nekte flytting fra KLP til VÅR. Tana kommune anfører videre at flytting av pensjonsordninger i realiteten blokkeres av Pensjonsutvalgets tariffparter, selv om alle oppnåelige vilkår for flytting er

criteria for transfer are fulfilled. Reference is made to the fact that since the 1998 HTA entered into effect, the Committee has not rendered a single positive decision on transfer.

132. Tana kommune also points out that a number of municipalities in Norway already operate their own pension schemes in perfect harmony and respect of the HTA. This is not contested and shows that the objective criteria under the HTA can be fulfilled by insurance undertakings other than KLP.

133. With regard to the questions contained in the Request for an Advisory Opinion, Tana kommune submits that the manner in which the Basic Collective Agreement is currently practised is contrary to Articles 53 and 54 EEA, due to the behaviour of the parties in relation to the transfer of pension schemes from KLP.

134. The principal submission of Tana kommune is that the HTA, as it is practised, unavoidably leads to abuse of a dominant position contrary to Article 54 EEA. In addition, the HTA inevitably leads to a concerted practice by KLP and those municipalities which are parties to the HTA.

135. Tana kommune draws attention to a number of issues, which it maintains must be addressed for the EFTA Court to give a correct Advisory Opinion. Firstly, there are the behavioural issues, which must be examined in order to give an interpretation which makes it possible for the national court to have a correct understanding of the EEA competition rules before giving its judgment. Secondly, it must be established that the relevant parties are undertakings under EEA competition law. Thirdly, since the *Albany* case goes quite far in exempting pension schemes from the scope of the competition rules under the EC Treaty, the present case must be distinguished from *Albany*.

136. Taking the issues in reverse order, Tana kommune begins by discussing the difference between the present case and *Albany*, and emphasises two points. Firstly, the facts of *Albany* are quite different. *Albany* concerned a sector-specific pension scheme. By contrast, in the present case, the pension schemes for the whole municipal sector are covered by the HTA. This distinction is relevant, since a transfer from one insurance undertaking to another would entail a full transfer of all the municipal employees of the transferor from one pension scheme to another. Such a transfer cannot *per se* undermine the social object and aim of the pension scheme, by removing only a certain group of affluent individual workers and leaving behind other workers who are "less advantageous" for the scheme.

137. Secondly, it is the settled case-law of the Court of Justice of the European Communities that collective agreements in pursuit of social policy objectives fall outside the scope – *ratione materiae* – of the competition rules. Therefore, it is, as a rule, for the national courts to decide, according to national law, how the different provisions of the collective agreements are to be interpreted. However,

oppfylte. Det vises til at etter at HTA for 1998-2000 trådte i kraft har ikke Pensjonsutvalgets tariffparter gitt ett eneste samtykke til flytting.

132. Tana kommune peker også på at flere kommuner i Norge allerede driver sine egne pensjonsordninger fullt ut i tråd med HTA. Dette er ikke omstridt og viser at formålet med de objektive kravene i HTA kan ivaretas av andre forsikringsforetak enn KLP.

133. Angående spørsmålene i anmodningen om en rådgivende uttalelse, anfører Tana kommune at den måten HTA nå praktiseres på er i strid med artikkel 53 og 54 EØS, på grunn av partenes opptreden i relasjon til flytting av pensjonsordninger fra KLP.

134. Tana kommunes hovedanførsel er at HTA slik den praktiseres, uunngåelig fører til et misbruk av dominerende stilling på utilbørlig måte i strid med artikkel 54 EØS. I tillegg leder HTA uunngåelig til en samordnet opptreden mellom KLP og de kommunene som er parter til HTA.

135. Tana kommune påpeker en rekke forhold, som den mener må drøftes for at EFTA-domstolen skal kunne gi en riktig rådgivende uttalelse. For det første må de atferdsmessige spørsmålene undersøkes for å kunne gi en tolkning som gjør det mulig for den nasjonale domstolen å få en korrekt forståelse av EØS-konkurranseregleне før den avsier sin dom. Dernest må det fastslås at de aktuelle partene er foretak etter EØS-konkurranseretten. For det tredje, ettersom *Albany*-saken går ganske langt i retning av å unnta pensjonsordninger fra virkeområdet for konkurranseregleне i EF-traktaten, må det sondres mellom den foreliggende saken og *Albany*-saken.

136. Spørsmålene behandles i motsatt rekkefølge, og Tana kommune begynner med å drøfte forskjellen mellom den foreliggende saken og *Albany*-saken, og understreker to poenger. For det første er faktum i *Albany* nokså forskjellig. *Albany* angikk en bransjespesifikk pensjonsordning. Til sammenligning er i den foreliggende saken pensjonsordningene for hele kommunesektoren dekket av HTA. Denne sondringen er relevant siden flytting fra ett forsikringsforetak til et annet ville innebære full flytting av alle overdragerens ansatte fra en pensjonsordning til en annen. En slik flytting kan ikke i seg selv undergrave pensjonsordningens sosiale målsetning, ved at bare en viss gruppe velhavende enkeltarbeidstakere flyttes, mens andre arbeidstakere som er "mindre fordelaktige" for ordningen etterlates.

137. Dernest er det etablert rettspraksis fra De europeiske fellesskaps domstol at en tariffavtale som søker å oppfylle sosialpolitiske målsetninger faller utenfor virkeområdet - *ratione materiae* - for konkurranseregleне. Derfor ligger det som regel til de nasjonale domstoler å bedømme etter nasjonal rett hvordan

Albany also established that collective agreements, or the behaviour of undertakings, may go further than what is necessary to attain the goals of the collective agreement or fall outside the scope of the agreement altogether. In such cases, one will fall inside the *ratione materiae* of the EEA competition rules.

138. Tana kommune further argues that the system established under the HTA inevitably leads to a concerted practice between the municipalities as owners and participants in KLP, and as parties to the HTA through their participation in KS and the decision-making procedures under the HTA: see, in particular, clause 2.1.8 of the HTA. The system also unavoidably leads to abuse of a dominant position contrary to Article 54 EEA. It is a fact, for instance, that the municipalities do not know the grounds for the decisions of the Pension Committee or its deliberations. In that light, and taking into account the ownership structure of KLP, it is difficult to accept that decisions, concerted practices, or other behaviour by the municipalities, KLP or KS which are restrictive of competition may justifiably be excluded from the scope of Articles 53 and 54 EEA.

139. As to the issue of "undertaking", Tana kommune argues that KS and KLP are indeed undertakings under the EEA competition rules. It has been consistently held by the Court of Justice of the European Communities that the concept of 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. Municipalities engaged in economic activities do not fall outside the definition. Accordingly, employers remain undertakings when they engage in collective bargaining. It follows that the municipalities and KS (as an association of employers) are associations of undertakings. This is sufficient to draw the conclusion that the competition rules may apply.

140. Tana kommune states that it should not be ruled out that there are circumstances in which the activities or behaviour of trade unions may lead to the conclusion that the union is an undertaking. When trade unions are acting outside the scope of representing employees in collective agreements and engage in economic activity, as defined by the Court of Justice of the European Communities, the competition rules apply also to trade unions.

141. Regarding the question of abuse of dominant position, Tana kommune argues that KLP clearly holds a dominant position in the Norwegian municipal pension insurance market. It stresses that undertakings which have been granted a *de facto* exclusive right to operate in a given market *per se* hold a dominant position. Reference is also made to the assessment of the Commission of the

tariffavtalens forskjellige bestemmelser skal tolkes. Imidlertid slo *Albany* også fast at tariffavtaler, eller foretaks adferd, kan gå utover hva som er nødvendig for å oppnå tariffavtalens målsetninger eller falle helt utenfor virkeområdet for tariffavtalen. I slike saker vil man være innenfor virkeområdet for EØS-konkurransereglene.

138. Tana kommune hevder videre at det systemet som er fastlagt i HTA uunngåelig fører til samordnet opptreden mellom kommunene som eiere og deltagere i KLP, og som parter til HTA gjennom deres deltagelse i KS og vedtaksprosedyrene under HTA, jf særlig HTA punkt 2.1.8. Systemet leder også uunngåelig til misbruk av dominerende stilling i strid med artikkel 54 EØS. Det er for eksempel slik at kommunene ikke kjenner begrunnelsen for Pensjonsutvalgets tariffparters vedtak og dets forhandlinger. I lys av dette og under hensyntagen til KLPs eierstruktur, er det vanskelig å akseptere at beslutninger, samordnet opptreden eller annen opptreden fra kommunene, KLP eller KS som innskrenker konkurransen, kan være utelukket fra virkeområdet for artikkel 53 og 54 EØS.

139. Til spørsmålet om "foretak" anfører Tana kommune at KS og KLP er foretak etter EØS-konkurransereglene. De europeiske fellesskaps domstol har konsekvent lagt til grunn at foretaksbegrepet omfatter enhver enhet som driver økonomisk aktivitet, uansett rettslig status og finansieringsform. Kommuner som driver økonomisk aktivitet faller ikke utenfor denne definisjonen. Arbeidsgivere er dermed foretak når de deltar i tarifforhandlinger. Det følger derav at kommunene og KS (som arbeidsgiverforening) er sammenslutning av foretak. Dette er tilstrekkelig til å trekke den konklusjon at konkurransereglene kan komme til anvendelse.

140. Tana kommune påpeker at det ikke kan utelukkes at det er omstendigheter hvor fagforbunds aktivitet eller opptreden kan føre til den konklusjon at forbundet er et foretak. Når fagforbund opptrer utenfor rammen av å være representant for arbeidstakerne i tariffavtaler og deltar i økonomisk aktivitet, slik De europeiske fellesskaps domstol har definert det, kommer konkurransereglene til anvendelse også for fagforbund.

141. Til spørsmålet om misbruk av dominerende stilling anfører Tana kommune at det er ikke tvil om at KLP har en dominerende stilling i det norske markedet for kommunal pensjonsforsikring. Det understrekes at foretak som er gitt en *de facto* enerett til å operere i et gitt marked dermed har en dominerende stilling. Det henvises også til Kommisjonen for De europeiske fellesskaps

European Communities in *International Group of P&I Clubs*[10] and the XXIX Report on Competition Policy 1999.[11]

142. Tana kommune goes on to state that, in the light of the legal framework for the interpretation of Article 54 EEA, the current system under the HTA has the effect of hindering the maintenance of the degree of competition still existing in the market, or the growth of that competition. It assumes that the concrete grounds given by the Pension Committee for refusing the transfer of the Tana kommune pension scheme were not objectively justified. In other words, the denial of transfer on the grounds that the pension scheme was not based on insurance products which had been "taken note of" by the Banking, Insurance and Securities Commission was not, and cannot be, objectively justified, see clauses 2.1.6 and 2.1.8 HTA. Again, this is a criterion which is not capable of fulfilment following *inter alia* the entry into force of the EEA and the Third Life Assurance Directive.[12] Such criteria must necessarily then be disproportionate and unlawful. If the reason behind the refusal of the Pension Committee to allow transfer of a pension scheme to another insurance undertaking cannot be objectively justified under the provisions of the HTA, then that refusal is caught by Article 54 EEA, and, for the same reason, constitutes unlawful abuse of a dominant market position.

143. Tana kommune adds that the structure of the pension insurance market also gives rise to "structural abuse", contrary to Article 54 EEA, see Europemballage and *Continental Can* v *Commission*.[13] It follows from that judgment that any commercial practices which are damaging to the maintenance of an effective competitive structure are prohibited by Article 82 EC and, accordingly, Article 54 EEA as well. The competition in the pension insurance services market in the municipal sector is limited, due to the structure of the market because of the role of the municipalities as owners of KLP and parties to the HTA, as well as their participation in *inter alia* the Pension Committee. The maintenance of an effective competitive structure is thereby rendered impossible.

144. A reference is also made to Joined Cases 142 and 156/84.[14] Tana kommune submits that the interrelation described above has at least some influence on the municipalities' freedom to choose insurance providers for their

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10 [1999] OJ L125.

11 Sec(2000) 720 Final.

12 Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (Third life assurance directive).

13 Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215.

14 Joined Cases 146 and 152/84 *BAT and Reynolds* v *Commission* [1986] ECR 1899.

vurdering i *International Group of P&I Clubs*[10], og XXIXth Report on Competition Policy 1999[11].

142. Tana kommune påpeker videre at i lys av de rettslige rammene for tolkningen av artikkel 54 EØS har HTAs nåværende ordning som virkning å hindre opprettholdelse av det konkurransenivå som fortsatt eksisterer i markedet, eller vekst i denne konkurransen. Det legges til grunn at de konkrete grunner som ble gitt av Pensjonsutvalgets tariffparter for avslaget på flytting av Tana kommunes pensjonsordning ikke var objektivt begrunnet. Nektingen av flytting på det grunnlag at pensjonsordningen ikke var basert på et pensjonsprodukt tatt "til etterretning" av Kredittilsynet, var med andre ord ikke objektivt begrunnet, og kunne heller ikke være det, jf HTA punkt 2.1.6 og 2.1.8. Også dette er et vilkår som ikke kan etterleves etter ikrafttreden av EØS-avtalen og det tredje livsforsikringsdirektivet[12]. Slike vilkår må nødvendigvis derfor under alle omstendigheter være uforholdsmessige og ulovlige. Hvis motivasjonen bak Pensjonsutvalgets tariffparters nektelse av flytting av pensjonsordningen til et annet forsikringsforetak ikke kan begrunnes objektivt sett etter HTAs bestemmelser, fanges nektelsen av artikkel 54 EØS, og av samme grunn utgjør de uunngåelig et ulovlig misbruk av en dominerende markedsstilling.

143. Tana kommune legger til at markedsstrukturen for pensjonsforsikringsordninger også utgjør et "strukturelt misbruk" i strid med artikkel 54 EØS, jf *Europemballage og Continental Can* mot *Kommisjonen*[13]. Det følger av denne dommen at enhver kommersiell praksis som er til skade for opprettholdelse av en effektiv konkurransestruktur er forbudt etter artikkel 82 EF og tilsvarende etter artikkel 54 EØS. Konkurransen i markedet for pensjonsforsikringstjenester i kommunesektoren er begrenset på grunn av markedsstrukturen som resultat av kommunenes rolle som eiere av KLP og som parter i HTA, og av deltagelsen i blant annet Pensjonsutvalgets tariffparter. Opprettholdelsen av en effektiv konkurransestruktur er derfor umuliggjort.

144. Det henvises også til *BAT og Reynolds* mot *Kommisjonen*[14]. Tana kommune anfører at det ikke kan utelukkes at det innbyrdes forholdet som er beskrevet ovenfor i det minste har en viss innflytelse på kommunenes frihet til å

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10 [1999] OJ L125.

11 Sec (2000) 720 Final.

12 Rådets direktiv 92/96/EØF av 10. november 1992 om samordning av lover og forskrifter om direkte livsforsikring og om endring av direktiv 79/267/EØF og 90/619/EØF (tredje livsforsikringsdirektiv).

13 Sak 6/72 *Europemballage og Continental Can Company Inc.* mot *Kommisjonen* [1973] ECR 215.

14 Forente saker 146 og 152/84 *BAT og Reynolds* mot *Kommisjonen* [1986] ECR 1899.

pension schemes, and that the arrangement limits competition in the market for such insurance services.[15]

145. If the EFTA Court finds that Article 54 EEA does not apply to the above-described market structure, Tana kommune argues that the decision-making procedures under the HTA necessarily lead to a concerted practice on the part of those municipalities participating in KS and KLP, since they have a controlling interest in both undertakings. The organisational structure and the decision-making procedures of the municipalities, KS and KLP inescapably result in collusion. The system is, therefore, contrary to Article 53 EEA.

146. By way of conclusion, Tana kommune submits that the effect and practice of the decision-making procedures for transfer to other insurance providers under the HTA are contrary to Articles 53 and 54 EEA, and that the questions raised by Arbeidsretten in its Request for an Advisory Opinion should be answered accordingly.

Kvam kommune, Kvinnherad kommune, Lørenskog kommune, Os kommune, Vikna kommune and Volda kommune

147. For ease of reference, the aforementioned municipalities will be referred to below as the "municipalities". The municipalities transferred their occupational pension schemes from KLP to the insurance company Storebrand, effective 1 January 1999. The six municipalities' total net pension costs with Storebrand in 1999 were approximately NOK 32.5 million. By way of comparison, the corresponding simulated costs of a continued client relationship with KLP have been calculated at roughly NOK 62.2 million in 1999. In other words, by moving the pensions, the municipalities achieved calculated total savings in their net pension costs that year of approximately NOK 29.7 million.

148. The municipalities argue that there are three main issues which are central for the case as it is presented before the EFTA Court.

149. The first fundamental issue is whether the rules of the HTA governing the transfer of municipal pension schemes come within the scope of the competition rules of the EEA Agreement. The second main issue is whether the other conditions for the application of Article 53 EEA are fulfilled. The municipalities submit that all of those conditions are fulfilled. The third main issue is whether the adoption of the transfer provisions of the HTA constitutes abuse of a dominant position which is covered by the prohibition in Article 54 EEA.

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[15] Further reference is made to paragraph 57 of the Commission's XXIX Report on Competition 1999, where it is stated that it:
" (...) takes the view that such [abusive] practices, which undermine competition, are particularly dangerous when they are carried out by undertakings with the power to shield themselves from competitive pressure and eliminate their competitors without significant damage to themselves or to block market access by new entrants to a significant degree."

velge forsikringstilbydere for deres pensjonsordninger, og at arrangementet begrenser konkurransen i markedet for slike forsikringstjenester.[15]

145. Hvis EFTA-domstolen finner at artikkel 54 EØS ikke kommer til anvendelse på de markedsstrukturer, hevder Tana kommune at vedtaksprosedyrene under HTA nødvendigvis fører til samordnet opptreden mellom de kommunene som deltar i KS og KLP, ettersom de har kontrollerende interesse i begge foretak. Kommunenes, KS' og KLPs organisasjonsstruktur og vedtaksprosesser resulterer uunngåelig i samarbeid. Systemet er således i strid med artikkel 53 EØS.

146. Avslutningsvis anfører Tana kommune at virkningen og praktiseringen av vedtaksprosedyrene i HTA for flytting til andre forsikringstilbydere for kommunene er i strid med artikkel 53 og 54 EØS, og at spørsmålene stilt av Arbeidsretten i dens anmodning om en rådgivende uttalelse bør besvares på en måte som reflekterer dette.

Kvam Kommune, Kvinnherad Kommune, Lørenskog Kommune, Os Kommune, Vikna Kommune og Volda Kommune

147. For å lette referansen vil de nevnte kommunene heretter omtales som "kommunene". Kommunene flyttet med virkning fra 1 januar 1999 sine tjenestepensjonsforsikringer fra KLP til forsikringsselskapet Storebrand. De seks kommunenes samlede netto pensjonskostnader i Storebrand i 1999 var ca NOK 32,5 millioner. Til sammenligning er de tilsvarende simulerte kostnader ved et fortsatt kundeforhold i KLP beregnet til ca NOK 62,2 millioner i 1999. Gjennom flyttingen oppnådde kommunene med andre ord en beregnet samlet besparelse i sine netto pensjonskostnader dette året på ca NOK 29,7 millioner.

148. Kommunene hevder at det er tre hovedspørsmål som er sentrale i saken slik den står for EFTA-domstolen.

149. Det første grunnleggende spørsmålet er om HTAs regler for flytting av kommunale pensjonsordninger er omfattet av virkeområdet for EØS-avtalens konkurranseregler. Det andre hovedspørsmålet er om de øvrige vilkår for anvendelse av artikkel 53 EØS er oppfylt. Kommunene gjør gjeldende at samtlige av disse vilkårene er oppfylt. Det tredje hovedspørsmålet er om inngåelsen av HTAs flytteregler representerer en utilbørlig utnyttelse av dominerende markedsstilling som rammes av forbudet i artikkel 54 EØS.

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15 Det henvises videre til kommisjonens XXXIXth Report on Competition 1999, premiss 57 hvor det uttrykkes at den: « (.) takes the view that such [abusive] practices, which undermine competition, are particularly dangerous when they are carried out by undertakings with the power to shield themselves from competitive pressure and eliminate their competitors without significant damage to themselves or to block market access by new entrants to a significant degree.»

150. The municipalities submit that the contested provisions of the HTA must be seen as a reaction to the increasingly competitive situation in the Norwegian pension market. They point out that, in 1980, a "reinsurance agreement" was entered into by the companies *Norske Folk gjensidig livsforsikringsselskap* (one of the forerunners to the current company Storebrand) and KLP. The purpose of the agreement was to achieve a division of the two companies' aggregate share of the Norwegian insurance market, and in such a way that insurance clients in the public sector were channelled into KLP, whilst private sector clients were channelled to *Norske Folk.* At the time the agreement was concluded, roughly 120 municipalities had their pension insurance agreements with *Norske Folk*. These insurance agreements were, with a few exceptions, transferred to KLP during the 1980s. Marketing efforts by various insurance companies led many municipalities to examine the issue of transfer of pension schemes, and this constituted a threat to KLP's position. The municipalities state that the procedural rules contained in the HTA, which are of crucial importance for KLP's market position, came into being in a meeting held at KLP's premises and in which KLP's senior management participated, and that there, the parties to the collective agreement took into consideration not only any interests they themselves might have had, but also the commercial interests of a pre-selected supplier.

151. The municipalities also claim that, although the contested transfer clauses in the HTA allow, in principle, for the transfer of pension schemes to other pension suppliers, in reality LO/NKF do not allow such transfers at all. So far, all requests for such a transfer have been refused. In fact, it is only KLP which, in the view of LO/NKF, meets the conditions for an age- and gender-neutral financing system, thereby rendering the right to transfer illusory. The agreed transfer rules in clause 2.1.8 HTA are thus self-contradictory: the parties have set out in the agreement that it should be possible to move pension insurance to and from the various pension insurance suppliers and pension institutions, whilst, at the same time, mechanisms are agreed which tie in the municipalities to a specific supplier in the market. In reality, LO/NKF counteract any real right of transfer for the municipalities.

152. As to the question of whether Article 53 EEA applies to the contested transfer rules, the municipalities point out that the judgment in *Albany* should be interpreted as meaning that only those collective agreements which pursue social policy objectives which can improve wage and working conditions should be considered as falling outside the scope of the EEA competition rules. The conditions for transfer provided for in the contested provisions of the HTA must be assessed in this light. If a condition is unsuitable for attaining an objective which otherwise is to be safeguarded, there is no reason to exclude it from the scope of application of the competition rules. Furthermore, if it turns out that a condition is suitable for attaining the objective, it is also necessary, on the basis of the proportionality principle, to examine whether it is proportionate. This principle must also be part of the assessment of whether a competition-restricting

150. Kommunene anfører at HTAs omtvistede bestemmelser må sees som en reaksjon på den skjerpede konkurransesituasjonen i det norske pensjonsmarkedet. De påpeker at det i 1980 ble inngått en såkalt "reassuranseavtale" mellom selskapene Norske Folk gjensidig livsforsikringsselskap (en av forløperne til dagens Storebrand) og KLP. Formålet med avtalen var å oppnå en deling av de to selskapenes samlede andel av det norske forsikringsmarkedet, og da slik at forsikringskunder innen offentlig sektor ble kanalisert til KLP. Privatkunder ble på sin side kanalisert til Norske Folk. På den tid avtalen ble inngått hadde omlag 120 kommuner sine pensjonsforsikringsavtaler med Norske Folk. Disse forsikringsavtalene ble, med enkelte unntak, overført til KLP i løpet av 1980-tallet. Markedsføringsfremstøt fra ulike forsikringsselskaper førte til at mange kommuner vurderte spørsmålet om skifte av pensjonsordning, og dette utgjorde en trussel mot KLPs posisjon. Kommunene påpeker at HTAs prosedyreregler, som er av største viktighet for KLPs markedsposisjon, ble til i et møte hos KLP, der KLPs øverste ledelse deltok, og at tariffavtalepartene her ikke bare tok hensyn til eventuelle egne interesser, men også til en utvalgt leverandørs kommersielle interesser.

151. Kommunene hevder også at selv om de omstridte flyttereglene i HTA i prinsippet tillater flytting av pensjonsordninger til andre pensjonstilbydere, tillater LO/NKF i realiteten ikke slik flytting i det hele tatt. Til nå har alle forespørsler om slik flytting blitt avslått. Det er bare KLP som etter LO/NKF sitt syn tilfredsstiller vilkårene for alders- og kjønnsnøytralt finansieringssystem, noe som gjør flytteretten illusorisk. Derfor er de avtalte flyttereglene i HTA punkt 2.1.8 selvmotsigende; partene har avtalefestet at det skal være adgang til å flytte pensjonsforsikringer til og fra de ulike pensjonsforsikringsleverandører og pensjonskasser, mens det samtidig er avtalt mekanismer som låser kommunene inne til en bestemt leverandør i markedet. Saksøkerne motarbeider i realiteten en reell flytterett for kommunene.

152. Til spørsmålet om artikkel 53 EØS kommer til anvendelse på de omstridte flyttereglene, peker kommunene på at dommen i *Albany* må forstås slik at bare tariffavtaler som har sosialpolitiske målsetninger, som kan forbedre lønns- og arbeidsforhold, bør falle utenfor virkeområdet for EØS-konkurranseregelene. Vilkårene for flytting fastsatt i de omstridte bestemmelsene i HTA må vurderes i lys av dette. Dersom et vilkår er uegnet for å nå et ellers beskyttelsesverdig formål, er det ingen grunn til å unnta det fra virkeområdet for konkurranseregelene. Videre dersom vilkåret er egnet for å nå formålet, er det også nødvendig, på grunnlag av forholdsmessighetsprinsippet, å vurdere om det er forholdsmessig. Dette prinsippet må også gjelde ved bedømmelsen av om et konkurransebegrensende vilkår er nødvendig for den sosiale beskyttelsen, eller om samme beskyttelsesgrad kunne vært oppnådd ved mindre omfattende tiltak.

condition is necessary for social protection, or whether the same degree of protection might be attained through less extensive measures.

153. The municipalities maintain that the Court of Justice of the European Communities in *Albany* actually conducted an examination of the individual agreement condition, with the aim of assessing whether it was suitable and proportionate for attaining the social policy objectives pursued. They argue that the judgment in *Albany* shows that the lawfulness of the exclusive right of the fund was justified by the argument that it could otherwise become impossible for the fund to perform its task. In other words, the exclusive right was deemed as a necessary tool (suitable for attaining the objective and proportionate) for the fund to be able to achieve its social policy objective, *viz*., to guarantee a certain level of pension for all workers in the sector.

154. The municipalities caution that it does not follow from *Albany* that compulsory insurance schemes are simply permitted outright. One cannot simply draw a deductive conclusion and argue that, since compulsory insurance schemes were accepted in *Albany* and the other related cases, so must affiliation schemes which contain a "weaker" restriction of competition be permitted in Norway. The core issue is what justified the lawfulness of the Dutch scheme and, therefore, *Albany* does not resolve the present case. Consequently, an assessment on the merits must be made of whether the contested transfer provisions of the HTA, which the municipalities maintain are restrictive of competition, fall within the scope of the competition rules.

155. The municipalities go on to state that the individual conditions in the contested transfer clauses of the HTA do, in fact, affect competition in the market for municipal occupational pension schemes, since they restrict competition between insurance companies. The assessment of the restrictive effect on competition must be conducted in precisely that market, see paragraph 249 of the Opinion of the Advocate General in *Albany*. The HTA contains peremptory rules for the municipalities bound by the collective agreement. The municipalities are *de facto* unable to choose any other insurance company than KLP as supplier of their occupational pension insurance. In other words, the freedom of contract which the municipalities have in principle as policyholders is taken from them through the HTA. This leads to a situation where the insurance companies are excluded from the potential market for municipal occupational pension schemes.

156. The municipalities submit that the restrictions inherent in the HTA do not have any social policy objective which must be safeguarded and therefore they come within the scope of the competition rules of the EEA. They are not suitable for attaining those objectives; nor are they proportionate, since the objectives can be achieved by less restrictive means.

157. The municipalities then discuss the condition to the effect that the products must be "taken note of by the Banking, Insurance and Securities Commission". Firstly, they argue that the expression "take note of" the product is

153. Kommunene hevder at De europeiske fellesskaps domstol i *Albany* faktisk foretok en konkret vurdering av de enkelte avtalevilkår, med det formål å bedømme hvorvidt de aktuelle tariffbestemmelsene i saken virkelig var egnede og forholdsmessige i forhold til de sosialpolitiske mål de tilstrebet. De hevder at dommen viser at lovligheten av fondets enerett ble begrunnet i at det ellers kunne bli umulig for fondet å oppfylle sine oppgaver. Med andre ord var eneretten et nødvendig redskap (egnet og forholdsmessig) for at fondet skulle kunne oppfylle sin sosialpolitiske målsetning; nemlig å sikre alle arbeidstakere innenfor bransjen et visst pensjonsnivå.

154. Kommunene påpeker at det ikke følger av *Albany* at obligatoriske forsikringsordninger uten videre er tillatt. Man kan derfor ikke slutte fra det mer til mindre og hevde at ettersom tvungne forsikringsordninger ble akseptert i *Albany*, må tilslutningsordninger som inneholder en "svakere" konkurransebegrensning være tillatt i Norge. Kjernespørsmålet er hva som begrunnet rettmessigheten av den nederlandske ordningen, og *Albany*-saken løser derfor ikke den foreliggende saken. Man må derfor foreta en konkret vurdering av om de flyttebestemmelsene i HTA som kommunene mener er konkurransebegrensende, faller innenfor konkurransereglenes virkeområde.

155. Kommunene fortsetter med å vise at de individuelle vilkårene i de omstridte flyttebestemmelsene i HTA faktisk påvirker konkurransen i markedet for kommunale tjenestepensjonsordninger, fordi de begrenser konkurransen mellom forsikringsselskapene. Vurderingen av den konkurransebegrensende effekt må foretas i nettopp dette markedet, slik også avsnitt 249 i generaladvokatens uttalelse i *Albany*. HTA inneholder tvingende regler for de tariffbundne kommuner. Kommunene kan *de facto* ikke velge noe annet forsikringsselskap enn KLP som leverandør av sine tjenestepensjonsforsikringer. Den kontraheringsfrihet kommunene i utgangspunktet har som forsikringstakere, er med andre ord fratatt dem gjennom HTA. Virkningene av dette er at forsikringsselskapene stenges ute fra det potensielle markedet for kommunale tjenestepensjonsforsikringer.

156. Kommunene anfører at begrensningen i HTA ikke har noe beskyttelsesverdig sosialpolitisk formål, og derfor faller de inn under EØS-avtalens konkurranseregler. De er hverken egnede til å oppnå disse formålene eller forholdsmessige, fordi formålet kan oppnås med mindre inngripende midler.

157. Kommunene går så over til å behandle vilkåret om at produktene må være "tatt til etterretning av Kredittilsynet". Først hevder de at uttrykket "tatt [produktet] til etterretning" er en fremmed beskrivelse av de oppgaver tilsynet er

an inapposite description of the tasks with which the Commission is entrusted by Norwegian law. Even so, the parties to the collective agreement have, through the HTA, based the municipalities' right to change insurance supplier on an assumption of the matter having been dealt with in a prior procedure by the Commission. Correspondence between KS and the Banking, Insurance and Securities Commission, on the one hand, and the Pension Committee and the municipalities, on the other, shows that the condition is intended to ensure not only that there must be confirmation that the product has been reported to the Banking, Insurance and Securities Commission in accordance with the requirements of the Insurance Activity Act, but that the Commission's examination of the product has been completed without there having been any comments. Reference is made to correspondence from the Banking, Insurance and Securities Commission, in which it is stated that it does not take note of products which have been lawfully reported, since that would amount to a requirement of prior approval, which is unlawful and restrictive of competition. Further reference is made to the *travaux préparatoires* for the legislative amendments made to section 7-6 of the Insurance Activity Act as part of the implementation of the EEA Agreement in the light of the Third Life Assurance Directive. In dealing with the contract condition pursuant to section 3-10 of the Norwegian Competition Act (Act No. 65 of 11 June 1993 Relating to Competition in Commercial Activity, *konkurranseloven*), the Norwegian Competition Authority (*Konkurransetilsynet*) has concluded that clause 2.1.8, fourth paragraph HTA, see clause 2.1.6, which requires that the insurance products must be "taken note of" before the municipalities may change insurance supplier, restricts competition.

158. The municipalities then argue that the contested condition does not safeguard any specific social policy objectives which might serve as justification. Firstly, as stated above, the Banking, Insurance and Securities Commission does not check the insurance product, since such prior control is prohibited under Norwegian law. Secondly, the fact that Norwegian law provides for follow-up control indicates that this rule is in no way related to the safeguarding of important social policy objectives. Thirdly, the Norwegian Competition Authority has found that the condition "taken note of" does not in itself lead to any quality control. Fourthly, this condition has now been removed and is not to be found in HTA 2000 – 2002.

159. The municipalities argue that the foregoing shows that the collective agreement provision in clause 2.1.8, fourth paragraph HTA, see clause 2.1.6, to the effect that the products must be "taken note of" by the Banking, Insurance and Securities Commission entails a restriction of competition in the market for municipal occupational pension insurance, whilst at the same the condition does not have any social policy objective to be safeguarded which would lead to its falling outside the scope of application of Article 53 EEA.

160. The municipalities then turn to the requirement of gender-neutrality. They submit that the different interpretations of clause 2.8.1. as regards gender- and

tillagt etter norsk rett. Like fullt har tariffpartene gjennom HTA basert kommunenes rett til å bytte forsikringsleverandør på en forutsetning om en forutgående saksbehandling i tilsynet. Korrespondanse mellom KS og Kredittilsynet på den ene siden og Pensjonsutvalgets tariffparter og kommunene på den annen, viser at vilkåret er ment å sikre ikke bare at det foreligger bekreftelse av at produktet er meldt til Kredittilsynet i henhold til forsikringsvirksomhetslovens regler, men også at tilsynets vurdering av produktet er skjedd uten kommentarer. Videre henvises det til korrespondanse fra Kredittilsynet hvor det påpekes at tilsynet ikke tar produkter som har blitt innmeldt på lovlig måte til etterretning, siden det vil utgjøre et krav om forhåndsgodkjenning som er ulovlig og begrenser konkurransen. Dette støttes videre ved henvisning til forarbeidene til de endringer som ble gjort til forsikringsvirksomhetslovens §7-6 i lys av det tredje livsforsikringsdirektivet ved gjennomføringen av EØS-avtalen. Konkurransetilsynet har ved sin behandling av dette avtalevilkåret etter konkurranseloven, lov av 11 juni 1993 nr 65 om konkurranse i ervervsvirksomhet, §3-10, konkludert med at HTA punkt 2.1.8 fjerde ledd, jf punkt 2.1.6 om at forsikringsproduktene må være "tatt til etterretning" før kommunene kan skifte forsikringsleverandør, er konkurransebegrensende.

158. Kommunene hevder videre at det omstridte vilkåret ikke ivaretar noe beskyttelsesverdig sosialpolitisk formål som kan tjene til begrunnelse. Først, som nevnt ovenfor kontrollerer ikke Kredittilsynet forsikringsproduktet, siden slik forhåndskontroll er forbudt etter norsk rett. Dernest viser det forhold at norsk rett ikke krever etterkontroll at denne regelen ikke har noe med beskyttelse av sosialpolitiske målsetninger å gjøre. For det tredje har Konkurransetilsynet fastslått at vilkåret "tatt til etterretning" ikke i seg selv medfører kvalitetskontroll. For det fjerde har dette vilkåret blitt fjernet, og er ikke lenger å finne i HTA for 2000 - 2002.

159. Kommunene hevder at det ovenstående viser at tariffvilkåret i HTA punkt 2.1.8 fjerde ledd, jf punkt 2.1.6 om at produktene må være "tatt til etterretning" av Kredittilsynet medfører en konkurransebegrensning i markedet for kommunale tjenestepensjonsforsikringer, samtidig som vilkåret ikke har noen slik beskyttelsesverdig sosialpolitisk målsetning som innebærer at det faller utenfor virkeområdet for artikkel 53 EØS.

160. Kommunene vender seg så til kravet om kjønnsnøytralitet. Det anføres at de ulike forståelser angående punkt 2.8.1 om alders- og kjønnsnøytralitet ikke er

age-neutrality are not a matter on which the EFTA Court should rule. The only issue before the EFTA Court is whether the interpretation of it favoured by LO/NKF to the effect that it requires gender-related differences to be evened out over a large group (national average) is compatible with the EEA. The municipalities are of the view that it is not.

161. The municipalities submit that this requirement gives rise to a restriction of competition in the market for municipal occupational pension schemes, and that it does not pursue any social policy objective to be safeguarded which might bring it outside the scope of Article 53 EEA.

162. They go on to argue that, if the interpretation advocated by LO/NKF is accepted, only one insurance group can, by definition, be established which can even out the premium over a nation-wide insurance sample. New players on the market will never be able fulfil the condition thus interpreted. This condition has a clear restrictive effect on competition by shutting out other companies from competition. One could even say that it not only restricts competition, it eliminates competition in the market for municipal occupational pension schemes.

163. The municipalities then discuss how the requirement of a financing system which is gender- and age-neutral, as LO/NKF interpret the requirement, does not pursue any social policy objective to be safeguarded, for several reasons. Firstly, the parties' agreement on the requirement of gender- and age-neutrality only in the event of a change of pension scheme weighs against the collective agreement provision's having any social policy objective to be safeguarded. If the objective of the provision had really been to arrange things so that more women and older employees would obtain work, and that those employee groups would not be discriminated against in municipal hiring, the neutrality requirement would have been imposed on each and every pension insurance scheme in effect. A requirement for gender- and age-neutrality which only applies when a municipality wishes to change insurance supplier would have an arbitrary scope of application, and is, by its form, not very appropriate for securing any social policy advantage. It also shows that the real objective with the requirement of gender- and age-neutrality is to prevent transfers from KLP, since there are no other companies which can satisfy the requirement.

164. Secondly, they argue that the recorded disagreement of the parties as to the interpretation of the collective agreement provision on gender- and age-neutrality in itself weighs against there being any social policy objective to be safeguarded in the interpretation of the requirement favoured by LO/NKF, see paragraph 59 of *Albany*.

165. Thirdly, reference is made to views expressed by KLP itself, to the effect that evening-out of premiums over a national average is of minimal significance for the level of premiums in individual municipalities. In other words, the restriction of competition implicit in the interpretation of the collective

tema for EFTA-domstolen. Det eneste spørsmålet for EFTA-domstolen er om saksøkernes forståelse av at den krever at kjønnsmessige forskjeller skal utlignes over en stor gruppe (landsgjennomsnitt), er forenlig med EØS-avtalen. Kommunene mener at det er det ikke.

161. Kommunene anfører at dette kravet utgjør en konkurransebegrensning i markedet for kommunale tjenestepensjonsordninger, og at vilkåret ikke forfølger noen slik beskyttelsesverdig sosialpolitisk målsetning som innebærer at det faller utenfor virkeområdet for artikkel 53 EØS.

162. De fortsetter med å hevde at dersom den forståelsen LO/NKF fremmer aksepteres, kan det pr definisjon bare etableres ett forsikringskollektiv som kan utligne premien over en landsomfattende forsikringsbestand. Nye markedsdeltagere vil aldri kunne oppfylle vilkårene tolket slik. Dette vilkåret har en klar konkurransebegrensende virkning ved at den stenger andre selskaper ute fra konkurransen. Man kan til og med si at det faktisk ikke bare begrenser konkurransen, men fjerner konkurransen fullstendig i markedet for kommunale tjenestepensjonsordninger.

163. Kommunene drøfter så hvordan kravet til kjønns- og aldersnøytralitet, slik LO/NKF tolker kravet, av flere grunner ikke har noen beskyttelsesverdig sosialpolitisk målsetning. For det første taler partenes enighet om at kravet til kjønns- og aldersnøytralitet først utløses ved skifte av pensjonsordning mot at tariffvilkåret har noen beskyttelsesverdig sosialpolitisk målsetning. Dersom formålet med vilkåret faktisk hadde vært å legge til rette for at flere kvinner og eldre arbeidstakere skulle komme i arbeid, og at disse arbeidstakergruppene ikke skulle bli diskriminert i forbindelse med kommunale ansettelser, skulle nøytralitetskravet ha blitt stilt til enhver løpende pensjonsforsikringsordning. Et krav om kjønns- og aldersnøytralitet som kun kommer til anvendelse når en kommune vil skifte forsikringsleverandør, får et vilkårlig nedslagsfelt, og er i sin form lite egnet til å sikre noen sosialpolitisk gevinst. Dette viser også at det reelle formålet med kravet til kjønns- og aldersnøytralitet er å hindre flytting fra KLP ettersom det ikke finnes andre selskaper som kan oppfylle kravet.

164. Kommunene gjør dernest gjeldende at partenes protokollerte uenighet om forståelsen av tariffvilkåret om kjønns- og aldersnøytralitet i seg selv taler mot at det ligger noen beskyttelsesverdig sosialpolitisk målsetning i LO/NKF sin forståelse av kravet, jf *Albany* avsnitt 59.

165. Det henvises for det tredje til det syn uttrykt av KS selv at premieutjevning over et landsgjennomsnitt har minimal betydning for premienivået i den enkelte kommune. Den konkurransebegrensning som ligger i LO/NKF sin avtaleforståelse er med andre ord ikke forholdsmessig, idet

agreement advocated by LO/NKF is not proportionate, in that the advantage of the measure is barely noticeable, and an equivalent effect can be attained through the municipalities' interpretation of the collective agreement. This would point to there not being any social policy objective to be safeguarded in the interpretation of clause 2.1.8, third paragraph HTA as advocated by LO/NKF.

166. The municipalities then turn to the condition of inclusion in the transfer agreement with the Norwegian Public Service Pension Fund before a decision on transfer may be made, see clause 2.1.8, fourth paragraph HTA, and again submit that this condition restricts competition within the meaning of Article 53 EEA, and that it does not serve any social policy objectives which must be safeguarded.

167. They point out that the processing time triggered by this requirement significantly delays the transfer process and, by its nature, gives rise to a restriction of competition. If it is assumed that the Norwegian Public Service Pension Fund will not, under any circumstances, consent to inclusion in the agreement before the municipal decision on change of supplier has been adopted, compliance by the municipalities with the collective agreement will completely exclude competition on the occupational pension market.

168. They further argue that this requirement cannot be justified by reference to any social policy objective to be safeguarded. The tightening-up of the procedural rules of the HTA on this point shows that the requirement that there must be inclusion before a decision on transfer can be taken cannot be justified by any social policy objective to be safeguarded. The substantive legal position of the municipal employees has always been safeguarded, regardless of whether the municipalities have only applied for inclusion in the transfer agreement at a later time than that assumed in the HTA. This shows that the objective behind the rule has only been to make transfers more difficult. Additionally, the provision, in the form it had in the HTA 1998 – 2000, has not been maintained in HTA 2000 – 2002. This would point to there not being any social policy objectives to be safeguarded.

169. The municipalities then turn to the condition of approval from those members of the Pension Committee who represent the parties to the collective agreement, see clause 2.1.8, second paragraph HTA. They claim that this condition restricts competition and does not serve any social policy objectives to justify its exclusion from the scope of Article 53 EEA.

170. The parties to the HTA have stated that the purpose of this condition was to assist the municipalities in ensuring the quality of the pension schemes to which they were considering transferring. However, the condition has not been applied in this manner, as the practice of the Pension Committee shows. In practice, the Pension Committee has accepted transfers between private companies, even though the collective agreement provisions, on their wording, have not been fulfilled, whilst at the same time refusing to give approval in similar cases where the transfer is to be from KLP to a private company.

gevinsten ved tiltaket knapt er synlig og en tilsvarende effekt kan nås gjennom kommunenes avtaleforståelse. Dette støtter kommunenes oppfatning av at det ikke ligger noen beskyttelsesverdig sosialpolitisk målsetning i LO/NKF sin forståelse av punkt 2.1.8 tredje ledd.

166. Kommunene vender seg dernest til kravet til opptak i overføringsavtalen med Statens Pensjonskasse før beslutning om skifte av pensjonsforsikrings-leverandør kan treffes, jf HTA punkt 2.1.8 fjerde ledd, og anfører igjen at dette vilkåret begrenser konkurransen etter artikkel 53 EØS, og at den ikke tjener noe beskyttelsesverdig sosialpolitisk formål.

167. De påpeker at den saksbehandlingstid som tariffkravet utløser, forsinker flytteprosessen vesentlig og innebærer etter sin art en begrensning av konkurransen. Dersom det legges til grunn at Statens Pensjonskasse ikke under noen omstendighet vil innvilge opptak i avtalen før den kommunale beslutningen om skifte av leverandør er fattet, vil en tariffmessig opptreden fra kommunenes side fullstendig utelukke konkurranse på tjenestepensjonsmarkedet.

168. De hevder videre at dette vilkåret ikke kan begrunnes ved henvisning til beskyttelsesverdige sosialpolitiske formål. Skjerpingen av HTAs prosedyreregler på dette punkt viser at kravet om at opptak skal ha funnet sted før flytting vedtas, ikke kan begrunnes i noen beskyttelsesverdig sosialpolitisk målsetning. De kommuneansattes materielle rettstilling har alltid blitt ivaretatt, uansett om kommunene først har søkt om opptak i overføringsavtalen på et senere tidspunkt enn det HTA forutsetter. Dette viser at formålet med regelen kun har vært å vanskeliggjøre flytting. I tillegg er vilkåret i den form det hadde i HTA 1998-2000 ikke videreført i HTA 2000-2002. Dette tyder på at det neppe forelå beskyttelsesverdige sosialpolitiske målsetninger.

169. Kommunene vender seg så til vilkåret vedrørende godkjenning fra Pensjonsutvalgets tariffparter. De påstår at dette vilkåret begrenser konkurransen og ikke tjener noe sosialt formål som bringer det utenom virkeområdet for artikkel 53 EØS.

170. HTAs parter har fastslått at formålet med dette vilkåret var å bistå kommunene i å trygge kvaliteten på de pensjonsordningene de vurderte å flytte til. Vilkåret har imidlertid ikke blitt anvendt på denne måten, som Pensjons-utvalgets tariffparters praksis viser. I virkeligheten har Pensjonsutvalgets tariffparter akseptert flytting mellom private selskaper, selv om tariffvilkårene etter sin ordlyd ikke er oppfylt, samtidig som man i tilsvarende saker om flytting fra KLP til et privat selskap, nekter godkjenning.

171. The municipalities argue that this arbitrary treatment of applications is possible because the principal parties to the collective agreement, pursuant to minutes of 22 December 1998, agreed that "those members of the Pension Committee who represent the parties to the collective agreement" would be composed of one representative for KS, and one representative from each of the four joint negotiations bodies on the employee side. In other words, the composition of the Committee is determined by organisational affiliation and not by requirements of particular competence in the area of pension insurance. Nor are there any guidelines for the Committee's consideration of business or voting procedure. Further, there is no requirement that reasons be given for the decisions of the Committee. The lack of such procedural rules has given rise to a pending separate action before Arbeidsretten on how "those members of the Pension Committee who represent the parties to the collective agreement" are to carry out their tasks. The municipalities state that this shows that the contested requirement is restrictive of competition within the meaning of Article 53 EEA.

172. The municipalities further submit that the arbitrary nature of the treatment of applications for transfer, depending on whether a transfer is from KLP or not, shows that there are no social policy objectives which must be safeguarded in this way. They argue that, in reality, the Pension Committee does not offer any quality control, and point to the fact that the requirement was not maintained in the new HTA 2000 – 2002.

173. The municipalities then discuss the significance of the attitude of Norwegian authorities towards competition in the municipal occupational pension market. They submit that this point is relevant for the assessment of whether the contested provisons of the HTA are to enjoy immunity from the competition rules. A description of the present Norwegian legislation and its background is provided. They argue that it follows from the *travaux préparatoires* for the Insurance Activity Act that the background for the statutory right to transfer was a wish to ensure competition between the insurance companies. The Norwegian authorities have, on numerous occasions, stated that the principle of free competition is to apply in the occupational pension market, and that the provisions of the HTA should be amended.

174. The municipalities then turn to the further conditions for the application of Article 53 EEA. The concept of "undertaking" is discussed. The municipalities submit that management and labour organisations act as undertakings when they, through their contractual framework, determine who is to be the supplier of services provided for in the collective agreement. LO and KS, therefore, act as undertakings when they, in connection with collective agreements, pursue the clear economic interests of a commercial player. Consequently, the transfer provisions of the HTA constitute an agreement between undertakings within the meaning of Article 53 EEA.

175. The municipalities submit that, in any event, those municipalities bound by the collective agreement must be held to be undertakings. Thus, any decision

171. Kommunene hevder at denne vilkårlige saksbehandlingen er mulig på bakgrunn av at de overordnede tariffparter i henhold til protokoll av 22 desember 1998 ble enige om at utvalget "Pensjonsutvalgets tariffparter" skal være sammensatt av én representant for KS og én representant fra hver av de fire forhandlingssammenslutningene på arbeidstakersiden. Sammensetningen av utvalget styres med andre ord av organisasjonsmessig tilknytning og ikke av krav til særskilt kompetanse på pensjonsforsikringsområdet. Det finnes heller ingen retningslinjer for utvalgets saksbehandling og avstemninger. Videre påpekes det at det ikke er noen krav til at utvalgets beslutninger skal grunngis. Mangelen på slike saksbehandlingsregler har ført til at det verserer et eget søksmål for Arbeidsretten om hvordan Pensjonsutvalgets tariffparter skal vareta sine oppgaver. Kommunene påpeker at dette viser at de omstridte vilkårene begrenser konkurransen etter artikkel 53 EØS.

172. Kommunene anfører videre at vilkårligheten i behandlingen av søknader om flytting avhengig av om det flyttes fra KLP eller ikke viser at det ikke er noen sosialpolitiske formål som må ivaretas på denne måten. De hevder at Pensjonsutvalgets tariffparter i realiteten ikke tilbyr noen kvalitetskontroll, og peker på det forhold at vilkåret ikke ble opprettholdt i den nye HTA for 2000 - 2002.

173. Dernest diskuterer kommunene betydningen av norske myndigheters holdning til konkurranse i det kommunale tjenestepensjonsmarkedet. De anfører at dette er relevant for vurderingen av hvorvidt den omstridte bestemmelsen i HTA skal nyte immunitet mot konkurransereglene. Det gis en gjennomgang av den foreliggende norske lovgivning og dens bakgrunn. De anfører at det følger av forsikringslovens forarbeider at bakgrunnen for den lovbestemte flytteretten var et ønske om å sikre konkurransen mellom forsikringsselskapene. De norske myndighetene har gjentatte ganger uttalt at prinsippet om fri konkurranse også skal gjelde på tjenestepensjonsmarkedet, og at HTAs bestemmelser burde endres.

174. Kommunene vender seg så til de øvrige vilkår for anvendelse av artikkel 53 EØS. "Foretaksbegrepet" drøftes. Det anføres at organisasjonene i arbeidslivet opptrer som foretak når de gjennom sitt avtaleverk bestemmer hvem som skal være leverandør av tariffbestemte tjenester, og således blir forbundet med markedsdeltagerne på en slik måte at konkurransen begrenses i et produktmarked. Derfor opptrer LO og KS som foretak når de i tariffavtalesammenheng forfølger en kommersiell aktørs klare økonomiske interesser. HTAs flyttebestemmelser representerer derfor en avtale mellom foretak etter artikkel 53 EØS.

175. Kommunene anfører at de kommunene som er bundet av tariffavtalen uansett må anses som foretak. Dermed må enhver beslutning av en

by an association of those undertakings, in this case KS, must be held to be a decision by an association of undertakings. They advance three arguments in support of this position.

176. Firstly, they submit that the municipalities bound by the collective agreement are undertakings within the meaning of Article 53 EEA. The municipalities disagree with the argument of LO/NKF to the effect that it is enough that the exercise of public authority is the central activity for them to be excluded from the scope of the competition rules. They point to the case-law of the Court of Justice of the European Communities,[16] which, they maintain, shows that there is no question of any overall assessment based on which part of the municipality's activities is greatest in scope ("the authority part" as opposed to "the economic part"). If that were so, such an "overall assessment" would mean that the public sector's participation in economic activities through *inter alia* the purchase and sale of goods and services would fall outside the scope of the competition rules.

177. Secondly, they submit that the municipalities do not exercise public authority when they, as employers, become bound by a collective agreement. A municipality does not perform its tasks in that connection *qua* public body, but on the basis of its private law autonomy as employer. The question then becomes whether a municipality carries on activities of an economic nature when it, in its capacity as employer, becomes bound by a collective agreement.

178. Thirdly, they argue that the municipalities are undertakings when they, as employers, become bound by collective agreements. The key point in this assessment is the classification of the municipality in the function as employer in the context of a collective agreement. The economic nature of that function becomes particularly clear when one considers the effect of the negotiated collective agreement provisions on the finances of the municipality.

179. The municipalities turn briefly to the significance of the statements of Advocate General Tesauro in *SAT Fluggesellschaft v Eurocontrol*,[17] to the effect that only those activities which, in principle, can be carried out by private undertakings for profit are of an economic nature. If a given municipal activity can conceivably be carried out by a private undertaking with a view to profit, that activity will then make the municipality an undertaking for the purposes of competition law in relation to the activity in question. The municipalities submit that the municipal employer liability cannot be entrusted to private undertakings, but the function as employer in the context of negotiations can, in principle, be performed by others in return for compensation. Lawyers, consultants, and

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16 Case C-41/90 *Höfner and Elser v. Macrotron GmbH* [1991] ECR I-1979; Case C-55/96 *Job Centre Coop arl.* [1997] ECR I-7119; Case C-179/90 *Merc* [1991] ECR I-5889; Case 30/87 *Corine Bodson* [1988] ECR 2479; Case C-343/95 *Cali* [1997] ECR I-1547; Case 118/85 *Commission* v *Italy* [1987] ECR 2599.

17 Case C-364/92 *SAT Fluggesellschaft* v *Eurocontrol* [1994] ECR I-43.

sammenslutning av disse foretakene, i dette tilfellet KS, anses som en beslutning truffet av en sammenslutning av foretak. Til støtte for dette vises det til tre forhold.

176. For det første er de tariffbundne kommunene foretak etter artikkel 53 EØS. Kommunene er uenige i LO/NKF sitt argument om at det er tilstrekkelig at utøvelsen av offentlig myndighet er deres hovedaktivitet, for at de skal falle utenfor konkurransereglenes virkeområde. De peker på rettspraksis fra De europeiske fellesskaps domstol,[16] som viser at det ikke er spørsmål om noen helhetsbedømmelse ut fra hvilken del av kommunens virksomhet som har størst omfang ("myndighetsdelen" contra "den økonomiske virksomhetsdelen"). En slik "helhetsbedømmelse" ville i så fall innebære at det offentliges deltagelse i økonomiske aktiviteter gjennom blant annet kjøp og salg av varer og tjenester faller utenfor virkeområdet for konkurransereglene.

177. For det andre anfører de at kommunen ikke utøver offentlig myndighet når den som arbeidsgiver blir bundet av en tariffavtale. En kommune utfører ikke sine oppgaver i den sammenheng som offentlig myndighet, men på grunnlag av privatrettslig autonomi som arbeidsgiver. Spørsmålet etter dette blir om en kommune utøver virksomhet av økonomisk natur når den i egenskap av arbeidsgiver blir bundet av en tariffavtale.

178. For det tredje anfører de at kommunen er foretak når den som arbeidsgiver blir bundet av en tariffavtale. Det sentrale er her klassifiseringen av kommunen i funksjonen som arbeidsgiver i tariffavtalesammenheng. Arbeidsgiverfunksjonens økonomiske natur blir særlig klar når man tar i betraktning den virkning de fremforhandlede tariffvilkårene har på kommuneøkonomien.

179. Kommunene vender seg så kort til betydningen av generaladvokatens uttalelser i *SAT Fluggesellshaft* v *Eurocontrol*[17] om at bare aktiviteter som i prinsippet kan utføres av private med profittformål er av økonomisk natur. Dersom en gitt kommunal aktivitet rimeligvis kan utøves av private foretak med målsetting om fortjeneste, vil denne aktiviteten gjøre kommunen til et foretak i konkurranserettslig forstand i relasjon til aktiviteten. Kommunene hevder at det kommunale arbeidsgiveransvaret ikke kan overlates til private, men funksjonen som arbeidsgiver i forhandlingssammenheng kan i prinsippet utføres av andre mot vederlag. Man overlater for eksempel til advokater, konsulenter og rådgivere

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16 Sak C-41/90 *Höfner og Elser* mot *Macrotron GmbH* [1991] ECR I-1979; sak C-55/96 *Job Centre Coop arl.* [1997] ECR I-7119; sak C-179/90 *Merc* [1991] ECR I-5889; sak 30/87 *Corine Bodson* [1988] ECR 2479; sak C-343/95 *Cali* [1997] ECR I-1547; sak 118/85 *Kommisjonen* mot *Italia* [1987] ECR 2599.

17 Sak C-364/92 *SAT Fluggesellshaft* v *Eurocontrol* [1994] ECR I-43.

advisers, for example, can be entrusted with the task of conducting negotiations, within a given framework.

180. The municipalities are, in any event, of the view that there is an agreement between undertakings within the meaning of Article 53 EEA. The HTA not only creates rights and obligations between the principal parties to the collective agreement, but also creates mutual obligations in the relationship between the members of the contracting groups on each side. In other words, the collective agreement gives rise to an obligation for the municipalities *inter se* to comply with the substantive and procedural requirements for change of supplier of pension insurance. This is sufficient to establish a finding of an agreement between undertakings under Article 53 EEA. Reference is made to the case-law of the Court of Justice of the European Communities.[18]

181. The municipalities point out that the HTA creates obligations for the individual municipalities towards the other member municipalities in KS, and refer *inter alia* to Norwegian law. The municipalities then deduce that there can be no doubt that the HTA between LO and KS not only creates rights and obligations between the principal parties to the collective agreement, but that it also creates mutual contractual obligations between the members of the contracting group on the employer side. In other words, applied to the present case, the collective agreement gives rise to an obligation between the municipalities to comply with the substantive and procedural requirements of the HTA regarding change of pension insurance supplier. This is sufficient for there to be an "agreement between undertakings" under Article 53 EEA, see the discussion of the Advocate General in *Albany*.

182. The municipalities further point out that, in *Albany*, the Advocate General discussed whether the collaboration which restricted competition in that case was of the nature of an agreement or some other form of concertation. The municipalities submit that the EFTA Court must do the same in the present case: if the EFTA Court is in doubt as to whether the conditions of the collective agreement constitute an agreement between undertakings, the conditions must, in any event, be covered by the wording "concerted practices" in Article 53 EEA.

183. The municipalities further submit that, in any event, the transfer provisions of the HTA are a decision by an association of undertakings within the meaning of Article 53 EEA.

184. Next, the municipalities discuss whether the criterion relating to trade is fulfilled. One of the requirements for Article 53 EEA to be applicable is that there must be an effect on cross-border trade. According to the case-law of the Court of Justice of the European Communities, it is sufficient to demonstrate that

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[18] Case 28/77 *Tepea* v *Commission* [1978] ECR 1391,paragraph 41 and Case 107/82 *AEG v Commission*, [1983] ECR I-3151, paragraph 38; Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112; and Joined Cases 209-215 and 218/78 *van Landewyck* v *Commission* [1980] ECR 3125.

å gjennomføre forhandlingene mot betaling innenfor gitt rammer.

180. Videre er kommunene i alle tilfelle av den oppfatning at det foreligger en avtale mellom foretak etter artikkel 53 EØS. HTA skaper ikke bare rett og plikt mellom de overordnede tariffparter, men også plikter innbyrdes i forholdet mellom medlemmene i avtalekollektivene på hver side. Tariffavtalen innebærer med andre ord en forpliktelse mellom kommunene til å overholde avtalens materielle og prosessuelle krav til skifte av leverandør av pensjonsforsikringer. Dette er tilstrekkelig til at man har å gjøre med en avtale mellom foretak etter artikkel 53 EØS. Dette støttes ved henvisning til praksis fra De europeiske fellesskaps domstol.[18]

181. Kommunene peker på at HTA gir forpliktelser for den enkelte kommune overfor de øvrige medlemskommunene i KS og henviser blant annet til norsk rett. På dette grunnlaget trekker kommunene den slutning at det ikke kan være tvilsomt at hovedtariffavtalen i kommunal sektor mellom LO og KS ikke bare skaper rett og plikt mellom de overordnede tariffparter, men at den også skaper avtalemessige forpliktelser innbyrdes i forholdet mellom medlemmene i avtalekollektivet på arbeidsgiversiden. Anvendt på vår sak innebærer tariffavtalen med andre ord en forpliktelse mellom kommunene til å overholde avtalens materielle og prosessuelle krav til skifte av leverandør av pensjonsforsikringer. Dette er tilstrekkelig til at man har å gjøre med en "avtale mellom foretak" etter artikkel 53 EØS. Dette synet støttes videre ved en henvisning til generaladvokatens drøftelse i *Albany*.

182. Kommunene påpeker videre at i *Albany* drøftet generaladvokaten hvorvidt det konkurransebegrensende samarbeidet der hadde karakter av avtale eller annen form for samordning. Kommunene anfører at EFTA-domstolen må gjøre det samme i vår sak; dersom EFTA-domstolen skulle være i tvil om hvorvidt tariffavtalens vilkår representerer en avtale mellom foretak, må vilkårene under enhver omstendighet omfattes av alternativet "samordnet opptreden" i artikkel 53 EØS.

183. Kommunene hevder videre at flyttebestemmelsene i alle tilfelle er en beslutning av en sammenslutning av foretak etter artikkel 53 EØS.

184. Dernest behandler kommunene spørsmålet om vilkåret om påvirkning av handelen mellom avtalepartene er oppfylt. Ett av vilkårene for at artikkel 53 EØS skal komme til anvendelse er at handelen over grensene må påvirkes. I henhold til rettspraksis fra De europeiske fellesskaps domstol er det tilstrekkelig å påvise

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[18] Sak 28/77 *Tepea* v *Kommisjonen* [1978] ECR 1391, premiss 41; og sak 107/82 *AEG v Kommisjonen* [1983] ECR I-3151, premiss 38; Sak 41/69 *ACF Chemiefarma* v *Kommisjonen* [1970] ECR 661, premiss 112; og forente saker 209-215 og 218/78 *Landewyck* v *Kommisjonen* [1980] ECR 3125.

trade may potentially be affected, directly or indirectly. With respect to what is required for the criterion to be deemed fulfilled, reference is made to *Consten and Grundig* v *Commission*,[19] in which the Court of Justice of the European Communities stated that the issue of whether an agreement may affect trade will depend on whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States. Reference is also made to the Commission's Decision in *Carlsberg*.[20] In that case, a large-scale purchaser was bound to purchase from a single supplier. That obligation led to imports being reduced, and the condition relating to effect on trade was thus fulfilled.

185. The municipalities argue that this illustration is applicable to the contested provisions of the HTA. The municipalities together constitute a large-scale purchaser. The transfer rules of the HTA lead to the municipalities' being tied in to a contractual relationship with one supplier of pension insurance, to wit, KLP. The result is that the import of pension insurance services is reduced. Even if the conclusion were reached that the municipalities are not completely tied to KLP, the transfer procedures do, in any event, mean that the system is weighed down with a slowness which affects trade.

186. The municipalities add that the Third Life Assurance Directive assumes normal, cross-border trade in insurance products. No insurance categories are exempted from this general rule. Even though, in Norway today, municipal pension insurance is, in practice, not bought and sold across national borders, there is, in any event, a potential effect on trade, in the light of the assumption contained in the Life Assurance Directive. In so far as the transfer provisions of the HTA preserve KLP's market position in Norway and restrict competition from other companies, they will also be of import for EEA trade in municipal occupational pension schemes.

187. By way of conclusion, the municipalities submit that it is clear that trade in municipal occupational pension insurance products is weakened by compliance with the transfer rules of the HTA, and that this is due to the tie-in effect with KLP.

188. The municipalities further submit that the criterion relating to appreciable effect on trade is fulfilled. The disputed transfer provisions of the HTA have an appreciable effect on competition and trade, since all of the municipalities and county municipalities – with the exception of Oslo – are bound by that agreement structure. KLP's share of the market for municipal occupational

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19 Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299. See also Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235; Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, at paragraph 104; and Case 42/84 *Remia* v *Commission* [1985] ECR 2545, at paragraph 22.

20 Commission Decision *Carlsberg*, OJ [1984] L 207/26.

at handelen potensielt kan påvirkes, direkte eller indirekte. Med hensyn til hva som skal til for at kriteriet skal anses oppfylt, vises det til De europeiske fellesskaps domstols saker *Consten og Grundig* mot *Kommisjonen*[19], hvor domstolen uttalte at hvorvidt en avtale kan påvirke handelen vil bero på om avtalen kan utgjøre en trussel, direkte eller indirekte, aktuelt eller potensielt, for den frie handelen mellom medlemsstatene, på en måte som kan hindre oppnåelsen av formålet med det felles marked mellom statene. Videre henvises det til Kommisjonens beslutning i *Carlsberg*[20]. I denne saken var en betydelig kjøper forpliktet til kun å kjøpe fra én leverandør. Denne forpliktelsen førte til at importen ble redusert, og følgelig at samhandelskriteriet var oppfylt.

185. Kommunene hevder at denne illustrasjonen får anvendelse på de omstridte bestemmelsene i HTA. Kommunene utgjør samlet en betydelig kjøper. HTAs flytteregler fører til at kommunene låses inne i et avtaleforhold med én leverandør av pensjonsforsikringer, nemlig KLP. Resultatet er at importen av pensjonsforsikringstjenester reduseres. Selv om man skulle komme til at kommunene ikke er fullstendig låst til KLP, innebærer flytteprosedyrene under enhver omstendighet at systemet gis en betydelig treghet som påvirker handelen.

186. Kommunene legger til at det tredje livsforsikringsdirektiv forutsetter normal, grenseoverskridende handel med forsikringsprodukter. Ingen forsikringskategorier er unntatt fra dette utgangspunktet. Selv om situasjonen i Norge er slik at kommunale pensjonsforsikringer faktisk ikke kjøpes og selges over landegrensene i dag, foreligger det under enhver omstendighet en potensiell påvirkning på handelen ut fra livsforsikringsdirektivets forutsetning. I den grad HTAs flytteregler konserverer KLPs markedsposisjon i Norge og hindrer konkurranse fra andre selskaper, vil de også ha betydning for EØS-handelen med kommunale tjenestepensjonsordninger.

187. Kommunene konkluderer med at det er på det rene at handelen med kommunale tjenestepensjonsforsikringsprodukter svekkes ved etterlevelse av HTAs flytteregler, og at dette skyldes innelåsningen til KLP.

188. Kommunene anfører videre at merkbarhetskriteriet er oppfylt. De omtvistede flyttebestemmelsene i HTA har merkbar påvirkning på konkurransen og handelen ettersom samtlige kommuner og fylkeskommuner - med unntak av Oslo - er bundet av dette avtaleverket. KLPs andel av markedet for kommunale

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19 Forenede saker 56/64 og 58/64 *Consten og Grundig* mot *Kommisjonen* [1966] ECR 299. Se også sak 56/65 *Société Technique Minière* mot *Maschinenbau Ulm* [1966] ECR 235, sak 322/81 *Michelin* mot *Kommisjonen* [1983] ECR 3461 premiss 104, og sak 42/84 *Remia* mot *Kommisjonen* [1985] ECR 2545 premiss 22.

20 Kommisjonens vedtak i *Carlsberg*, OJ [1984] L 207/26

pension schemes is roughly 90% of the municipalities and over 60% of municipal employees. They argue that the ties established with one supplier holding such a significant market share have an appreciable effect on competition within the meaning of the Treaty and the EEA Agreement.

189. Next, the municipalities turn to Article 54 EEA. They contend that the adoption of the transfer provisions is an abuse of a dominant position within the meaning of that Article. Referring to earlier argument, the municipalities state that LO and KS must be deemed to be undertakings when they, in connection with collective agreements, pursue economic objectives which lie outside their own sphere of activity, and which regulate competition in an outside market. The position KS thereby acquires as an undertaking should, by itself, have significance in relation to Article 54 EEA. That Article, however, requires that the undertaking has abused its dominant position. Thus, for Article 54 EEA to apply, it is necessary to establish also that KS is dominant in the market for municipal occupational pension schemes. Such a position requires that KS can be identified with KLP.

190. The municipalities invoke several factors to demonstrate that KS and KLP can be identified with each other. First of all, they refer to the fact that the Board of KS is KLP's general assembly. Moreover, KS and KLP are to be identified with each other through the entire time-frame which is relevant to the present case. It is clear that KS, through its complete control over KLP's general assembly, administered KLP right from the conclusion of HTA 1998-2000 through to the turn of the year 1999/2000. In addition to their being identical under corporate law, there were apparently particularly close financial ties between the two enterprises. Those ties show how – and why – KS tends to favour KLP as a company and hedge this way in the competition with other insurance companies. Moreover, there is also considerable interaction between the two enterprises, which crystallises KS's and KLP's being identified with each other from a legal standpoint. In addition, there has been a "marketing agreement" or "cooperation agreement" for a number of years between KS and KLP. At the time HTA 1998-2000 was negotiated and concluded, an agreement which had been signed on 14 December 1994 was in effect. That agreement gave KLP *inter alia* rights with respect to participation and marketing at KS events such as the national assembly, national council, conferences, county meetings for mayors, chief officers, etc. It also contained provisions to the effect that union representatives and employees in KS were obliged to support actively the marketing of KLP. The agreement also had provisions on mutual support in individual matters, exchange of information, as well as a clause on loan payments to KS's enterprises. The cooperation agreement also assumed annual compensation from KLP to KS in the order of NOK 2.5 million, an amount which was later indexed. The agreement was renewed on 30 August 1999. Lastly, reference is made to KLP's contribution to the negotiation of collective agreements and participation by KLP during meetings with those members of the Pension Committee who represent the parties to the collective agreement.

tjenestepensjonsforsikringer utgjør om lag 90% av kommunene og mer enn 60% av de kommunalt ansatte. De hevder at bindingene som er etablert til en leverandør med en slik betydelig markedsandel, påvirker konkurransen på merkbar måte i traktatens og EØS-avtalens forstand.

189. Kommunene vender seg så til artikkel 54 EØS. De hevder at vedtagelsen av flyttebestemmelsene er et misbruk av dominerende stilling i denne artikkelens forstand. Under henvisning til tidligere argumenter anfører kommunene at LO og KS må anses som foretak når de i tariffavtalesammenheng forfølger økonomiske formål som ligger utenfor deres eget virksomhetsområde, og som regulerer konkurransen i et tredjemarked. Den posisjonen KS derved får som foretak burde i seg selv være av betydning i relasjon til artikkel 54 EØS. Denne artikkelen krever imidlertid at foretaket må ha utnyttet sin dominerende stilling. Man må følgelig også kunne etablere at KS er dominerende i markedet for kommunale tjenestepensjonsforsikringer for at artikkel 54 skal komme til anvendelse. En slik stilling krever at man kan identifisere KS med KLP.

190. Kommunene påberoper seg flere forhold for å vise at KS og KLP kan identifiseres med hverandre. For det første henviser de til det forhold at styret i KS er KLPs generalforsamling. Videre må KS og KLP identifiseres gjennom hele den tidsperiode som er aktuell i vår sak. Det er på det rene at KS ved sin fullstendige kontroll over KLPs generalforsamling forvaltet KLP helt fra inngåelsen av HTA 1998-2000 og frem til årsskiftet 1999/2000. I tillegg til den organrettslige identitet, skal det ha vært særlig tette økonomiske bånd mellom de to virksomhetene. Disse båndene viser hvordan - og hvorfor - KS favoriserer KLP som selskap og hegner om dette i konkurransen med andre forsikringsselskapene. Det er også ellers en betydelig interaksjon mellom de to virksomhetene som sementerer den rettslige identifikasjonen mellom KS og KLP. I tillegg har det i en årrekke eksistert en såkalt "markedsføringsavtale" eller "samarbeidsavtale" mellom KS og KLP. Når HTA 1998-2000 ble fremforhandlet og inngått gjaldt det en avtale som ble signert 14 desember 1994. Den avtalen innebar blant annet rettigheter for KLP hva gjaldt deltakelse og markedsføring på KS-arrangementer som landsting, landsråd, konferanser og fylkesvise samlinger for ordførere og rådmenn. Den inneholdt også bestemmelser om at tillitsvalgte og ansatte i KS hadde plikt til aktivt å støtte markedsføringen av KLP. Avtalen hadde også bestemmelser om gjensidig støtte i enkeltsaker, utveksling av informasjon, samt en klausul om låneytelser til KS' virksomheter. Samarbeidsavtalen forutsatte også en årlig godtgjørelse fra KLP til KS på 2,5 millioner kroner, et beløp som senere ble indeksregulert. Avtalen ble fornyet den 30 august 1999. Til slutt henvises det til KLPs medvirkning under tarifforhandlingene og KLPs deltakelse under møter med Pensjonsutvalgets tariffparter.

191. The municipalities conclude that the close organisational and economic ties between KS and KLP justify the municipalities' view that, at the time HTA 1998-2000 was negotiated and concluded, KS and KLP were identical under corporate law, and that those ties remained at least until 1 January 2000, when the new Articles of Association for KS entered into effect. The municipalities argue that there can be no doubt that KS must be deemed to be carrying on business through its strong management of KLP and active hedging of KLP's interests, *inter alia* by bringing KLP directly into the organisation's employer activity during the collective agreement negotiations in the spring of 1998. KS, as a party to the HTA, must thus undoubtedly be covered by the concept of undertaking in Article 54 EEA.

192. The municipalities go on to discuss in more detail the individual conditions for the applicability of Article 54 EEA.

193. Firstly, they submit that KLP's market position is the decisive factor as to whether the criterion relating to dominant position is fulfilled. The assessment must start with the notion that group pension insurance for employees in the municipalities constitutes the relevant product market in the present case. Moreover, since it does not appear that group pension insurance is being purchased from any offerors other than ones established in Norway, it must be assumed that Norway constitutes the relevant geographical market. As regards the issue of dominance in the relevant market, they argue that there can be no doubt that KLP, with 90 per cent of the municipalities and some 60 per cent of the municipal employees in its pension scheme, is the dominant player in the market. The municipalities affiliated with KLP, taken together, hold a correspondingly dominant position as purchaser in the same market.

194. The municipalities then argue that KS/KLP have abused their dominant position by applying the tie-in contractual mechanisms of the HTA in connection with the transfer of municipal pension schemes. The tie-in mechanisms in clause 2.1.8 of the transfer provisions of the HTA cannot be justified for the purposes of competition law, and, therefore, constitute an abuse of a dominant position within the meaning of Article 54 EEA.

195. The municipalities propose the following answer to questions 2a and 2b.

> *"An employee and/or employer organisation acts as an 'undertaking' under Article 53 EEA when it, in a collective agreement, adopts provisions which are not suitable for improving 'conditions of work and employment' for the employees, but which have first and foremost the purpose and effect of restricting opportunities for insurance companies to offer group occupational pension schemes pursuant to collective agreement to the parties bound by the collective agreement."*

196. The municipalities propose the following answer to question 1c:

191. Kommunene trekker den slutning at de tette organisatoriske og økonomiske bånd mellom KS og KLP begrunner kommunenes syn om at det på tidspunktet for fremforhandling og inngåelse av HTA 1998-2000 eksisterte organrettslig identitet mellom KS og KLP, og at disse båndene i det minste besto frem til 1 januar 2000, da de nye vedtektene for KS trådte i kraft. Kommunene hevder at det ikke kan være tvilsomt at KS må anses å drive ervervsvirksomhet gjennom sin sterke styring av KLP og aktive hegning om KLPs interesser, blant annet ved å bringe KLP direkte inn i organisasjonens arbeidsgivervirksomhet under tarifforhandlingene våren 1998. KS må, som part i HTA, etter dette utvilsomt være omfattet av foretaksbegrepet i artikkel 54 EØS.

192. Kommunene fortsetter så med å drøfte de enkelte vilkårene for at artikkel 54 EØS kommer til anvendelse.

193. Først anfører de at KLPs markedsposisjon er den avgjørende faktor for om vilkåret om dominerende stilling er oppfylt. Vurderingen må starte med forestillingen om at produktgruppen pensjonsforsikring for kommunale arbeidstakere utgjør det relevante produktmarked i den foreliggende saken. Videre må det, i lys av at det foreløpig ikke synes aktuelt å kjøpe kollektiv pensjonsforsikring fra andre enn tilbydere etablert i Norge, legges til grunn at Norge utgjør det relevante geografiske markedet. I spørsmålet om dominans i det relevante marked, kan det ikke være tvilsomt at KLP med 90 prosent av kommunene og vel 60 prosent av de kommunalt ansatte i sin pensjonsordning er markedets dominerende aktør. De kommunene som er tilsluttet KLP har til sammen en tilsvarende dominerende stilling som kjøper i det samme markedet.

194. Kommunene gjør videre gjeldende at KS/KLP har utnyttet sin dominerende stilling på utilbørlig måte ved å innta HTAs innelåsende mekanismer i forbindelse med flytting av kommunale pensjonsordninger. Denne innelåsningsmekanismen i HTAs flytteregler i punkt 2.1.8 kan etter ovenstående ikke rettferdiggjøres i konkurranserettslig forstand, og representerer derfor en utilbørlig utnyttelse av en dominerende stilling som rammes av artikkel 54 EØS.

195. Kommunene foreslår følgende svar på spørsmålene 2a og 2b:

> *"En arbeidstaker- og/eller arbeidsgiverorganisasjon opptrer som "foretak" etter EØS art. 53 når den i en kollektiv avtale (tariffavtale) treffer bestemmelser som ikke er egnet til å forbedre "conditions of work and employment" for de ansatte, men som først og fremst har som formål og virkning å begrense forsikringsselskapers muligheter til å tilby tariffbestemte kollektive tjenestepensjonsordninger til de tariffbundne parter."*

196. Kommunene foreslår følgende svar på spørsmål 1c:

"A municipality acts as an 'undertaking' under Article 53 EEA when it, in its capacity as employer, becomes bound by a collective agreement."

197. The municipalities propose the following answer to question 1a:

"Those legal obligations which might arise between the members bound by the collective agreement on the employer side as a result of a collective agreement concluded between the principal parties to the collective agreement must be deemed to be an 'agreement' under Article 53 EEA."

198. The municipalities propose the following answer to question 1b:

"An employee organisation's conclusion of a collective agreement can be deemed to be a 'decision[] by [an] association[] of undertakings' under Article 53 EEA."

199. The municipalities are of the view that there is no need to answer question 3 separately.

200. The municipalities propose the following answer to question 4:

"Provisions in a collective agreement which require that a group occupational pension scheme must be based on a gender-neutral financing system, and which can only be satisfied by one supplier are incompatible with Article 53 EEA if the provisions are not suitable for improving conditions of work and employment for the employees, but which have first and foremost the purpose and effect of restricting opportunities for insurance companies to offer group occupational pension schemes pursuant to collective agreement to the parties bound by the collective agreement."

201. The municipalities propose the following answer to question 5a:

"Provisions in a collective agreement which require that offers from an insurance company to an employer concerning occupational pension schemes must be approved by representatives of the parties to the collective agreement are incompatible with Article 53 EEA if the provisions are not suitable for improving conditions of work and employment for the employees, but which have first and foremost the purpose and effect of restricting opportunities for insurance companies to offer group occupational pension schemes pursuant to collective agreement to the parties bound by the collective agreement."

202. The municipalities are of the view that there is no need to answer question 5b.

203. The municipalities propose the following answer to question 6:

"A provision in a collective agreement which requires that an insurance product must be tacitly or explicitly accepted by the local insurance authority before a change of pension insurance scheme may lawfully be made is incompatible with Article 53 EEA if the provision is not suitable for improving 'conditions of work

"En kommune opptrer som "foretak" etter EØS art. 53 når den i egenskap av arbeidsgiver blir bundet av en tariffavtale."

197. Kommunene foreslår følgende svar på spørsmål 1a:

"De rettslige forpliktelser som måtte oppstå mellom de tariffbundne medlemmene på arbeidsgiversiden som følge av en tariffavtale inngått mellom overordnede tariffparter, må anses som en "avtale" etter EØS art. 53."

198. Kommunene foreslår følgende svar på spørsmål 1b:

"En arbeidsgiverorganisasjons inngåelse av en tariffavtale kan anses som en "beslutning truffet av sammenslutning(er) av foretak" etter EØS art. 53."

199. Kommunene er av den oppfatning av det ikke er noen grunn til å besvare spørsmål 3 separat.

200. Kommunene foreslår følgende svar på spørsmål 4:

"Bestemmelser i en tariffavtale som krever at en kollektiv tjenestepensjonsordning skal være basert på et kjønnsnøytralt finansieringssystem, og som bare kan oppfylles av én leverandør, er uforenlig med EØS art. 53 dersom bestemmelsene ikke er egnet til å forbedre "conditions of work and employment" for de ansatte, men først og fremst har som formål og virkning å begrense forsikringsselskapers muligheter til å tilby tariffbestemte kollektive tjenestepensjonsordninger til de tariffbundne parter."

201. Kommunene foreslår følgende svar på spørsmål 5a:

"Bestemmelser i en tariffavtale som krever at et tilbud fra et forsikringsselskap til en arbeidsgiver om tjenestepensjonsordning må godkjennes av representanter for tariffavtalens parter, er uforenlig med EØS art. 53 dersom bestemmelsene ikke er egnet til å forbedre "conditions of work and employment" for de ansatte, men først og fremst har som formål og virkning å begrense forsikringsselskapers muligheter til å tilby tariffbestemte kollektive tjenestepensjonsordninger til de tariffbundne parter."

202. Kommunene er av den oppfatning av det ikke er noen grunn til å besvare spørsmål 5b.

203. Kommunene foreslår følgende svar på spørsmål 6:

"Bestemmelse i en tariffavtale som krever at et forsikringsprodukt må være stilltiende eller uttrykkelig akseptert av det stedlige forsikringstilsyn før man lovlig kan skifte pensjonsforsikringsordning, er uforenlig med EØS art. 53 dersom bestemmelsen ikke er egnet til å forbedre "conditions of work and

and employment' for the employees, but which has first and foremost the purpose and effect of restricting opportunities for insurance companies to offer group occupational pension schemes pursuant to collective agreement to the parties bound by the collective agreement."

204. The municipalities propose the following answer to question 7a:

"Provisions in a collective agreement which require that, before a decision may be taken on change of supplier of occupational pension insurance, the employer must have concluded a separate agreement on mutual transfer of pension schemes through approval from the public body which administers the transfer scheme are incompatible with Article 53 EEA if the provision is not suitable for improving conditions of work and employment for the employees, but which has first and foremost the purpose and effect of restricting opportunities for insurance companies to offer group occupational pension schemes pursuant to collective agreement to the parties bound by the collective agreement."

205. The municipalities propose the following answer to question 7b:

"Provisions in a collective agreement which require that, before a decision may be taken on change of supplier of occupational pension insurance, the employer must have concluded a separate agreement on mutual transfer of pension schemes through approval from the public body which administers the transfer scheme are incompatible with Article 53 EEA if such an agreement cannot be concluded before a decision on change has been taken."

206. The municipalities propose the following answer to question 8:

"The sum of provisions in a collective agreement may be incompatible with Article 53 EEA, even though none of the provisions, viewed in isolation, come under the prohibition therein, if the sum of the provisions have the purpose and effect of restricting opportunities for insurance companies to offer group occupational pension schemes pursuant to collective agreement to the parties bound by the collective agreement."

207. The municipalities propose the following answer to question 9:

"An interest and employer organisation such as the Norwegian Association of Local and Regional Authorities, in the negotiation of collective agreements, acts as an 'undertaking' under Article 54 EEA when the organisation, in the negotiations, seeks to defend the interests of an undertaking which the organisation owns, manages, or with which it has close economic and organisational cooperation."

208. The municipalities propose the following answer to question 10:

"An undertaking which has a dominant position in the market for municipal occupational pension schemes cannot conclude an agreement for, or practise, conditions for change of supplier of such schemes, unfettered by Article 54 EEA, in a manner which makes transfer from the undertaking more difficult or

employment" for de ansatte, men først og fremst har som formål og virkning å begrense forsikringsselskapers muligheter til å tilby tariffbestemte kollektive tjenestepensjonsordninger til de tariffbundne parter."

204. Kommunene foreslår følgende svar på spørsmål 7a:

"Bestemmelser i en tariffavtale som krever at arbeidsgiveren, før beslutning kan treffes om skifte av leverandør av tjenestepensjonsforsikring, har inngått en egen avtale om gjensidig overføring av pensjonsordninger gjennom godkjenning av det offentlige organ som administrerer overføringsordningen, er uforenlig med EØS art. 53 dersom bestemmelsen ikke er egnet til å forbedre "conditions of work and employment" for de ansatte, men først og fremst har som formål og virkning å begrense forsikringsselskapers muligheter til å tilby tariffbestemte kollektive tjenestepensjonsordninger til de tariffbundne parter."

205. Kommunene foreslår følgende svar på spørsmål 7b:

"Bestemmelser i en tariffavtale som krever at arbeidsgiveren, før beslutning kan treffes om skifte av leverandør av tjenestepensjonsforsikring, har inngått en egen avtale om gjensidig overføring av pensjonsordninger gjennom godkjenning av det offentlige organ som administrerer overføringsordningen, er uforenlig med EØS art. 53 dersom slik avtale ikke kan inngås før det er truffet beslutning om skifte."

206. Kommunene foreslår følgende svar på spørsmål 8:

"Summen av bestemmelser i en tariffavtale kan være i strid med EØS art. 53 selv om ingen av bestemmelsene isolert sett rammes av forbudet der, dersom bestemmelsene til sammen har som formål og virkning å begrense forsikringsselskapers muligheter til å tilby tariffbestemte kollektive tjenestepensjonsordninger til de tariffbundne parter."

207. Kommunene foreslår følgende svar på spørsmål 9:

"En interesse- og arbeidsgiverorganisasjon slik som Kommunenes Sentralforbund, opptrer ved fremforhandling av tariffavtaler som "foretak" etter EØS art. 54 når organisasjonen i forhandlingene søker å ivareta interessene til et foretak som organisasjonen eier, styrer eller har et nært økonomisk og organisatorisk samarbeid med."

208. Kommunene foreslår følgende svar på spørsmål 10:

"Et foretak som har en dominerende stilling i markedet for kommunale tjenestepensjonsforsikringer, kan ikke uten hinder av EØS art. 54 avtale eller praktisere vilkår for skifte av leverandør av slike ordninger på en måte som gjør at flytting fra foretaket blir vanskelig eller helt umulig, med mindre

completely impossible, unless the restrictions are required to be able to maintain the insurance scheme, and the undertaking's scheme is necessary to improve 'conditions of work and employment' for the insured parties."

The Government of Iceland

209. The Government of Iceland limits its remarks to questions 1 to 3. Reference is made to *Albany*, *Brentjens'*, and *Drijvende Bokken*. In those cases, the Court of Justice of the European Communities concluded that the provisions of collective agreements which are aimed at improving conditions of work and employment for workers must, by virtue of their nature and purpose, be regarded as falling outside the scope of (now) Article 81(1) EC.

210. On the basis of that case-law, the Government of Iceland submits the following: (i) it is a pre-condition for exemption from the scope of Article 81 EC that agreements must be concluded under the umbrella of a collective agreement; (ii) the parties must be employers (associations of employers), on the one hand, and associations of workers, on the other, concluding collective bargaining between themselves which is aimed at improving employment conditions; (iii) the content of the collective agreement must concern improvement of the working conditions of the workers; (iv) employers' contributions to the pension schemes must be deemed to be a kind of remuneration to the workers, in the broad sense of the term; (v) the term "conditions" must be applied in a very broad sense and must include all financial claims, including all types of remuneration to which workers are entitled in return for their work , as well as non-financial claims which workers may receive from their employer on the basis of the collective agreement; (vi) regardless of Article 81 EC, the employees must be entitled to create and run institutions or engage in other activities in order to realise their aim of improving working conditions, as provided for by the collective agreements, in whatever form those commitments may take; (vii) lastly, the Government of Iceland endorses the views expressed by the Norwegian Federation of Trade Unions and the Norwegian Association of Local and Regional Authorities.

211. The Government of Iceland proposes the following answers to questions 1 to 3.

"1a: Due to their nature and purpose, collective agreements fall outside the scope of Article 53 of the EEA Agreement. Consequently, collective agreements are not 'agreements between undertakings' in the context of Article 53 of the EEA Agreement.

1b: With reference to the answer given to the first question, collective agreements are not 'decisions between associations of undertakings' in the context of Article 53 of the EEA Agreement, although they are concluded on the employers' side by an employers' organisation.

begrensningene er påkrevet for å kunne opprettholde forsikringsordningen og foretakets ordning er nødvendig for å forbedre "conditions of work og employment" for de forsikrede."

Den islandske regjering

209. Den islandske regjering begrenser sine bemerkninger til spørsmålene 1 til 3. Det henvises til *Albany*, *Brentjens'* og *Drijvende Bokken*. I disse sakene kom De europeiske fellesskaps domstol til at bestemmelsene i en tariffavtale som sikter på å bedre arbeids- og ansettelsesvilkårene for arbeidstakerne må etter sin karakter og formål falle utenfor virkeområdet for (nå) artikkel 81 nr 1 i EF-traktaten.

210. På grunnlag av denne rettspraksis anfører Den islandske regjering det følgende; (i) det er en betingelse for unntak fra virkeområdet for artikkel 81 EF at avtalen er inngått som en tariffavtale; (ii) partene må være arbeidsgivere (sammenslutninger av arbeidsgivere) på den ene siden, og forbund av arbeidstakere, på den annen, som ved tarifforhandlinger seg i mellom søker å bedre arbeidsvilkårene; (iii) tariffavtalens innhold må gjelde bedring av arbeidsforholdene for de ansatte; (iv) arbeidsgivernes bidrag til pensjonsordningene må bedømmes som en form for vederlag til arbeidstakerne i vid forstand; (v) uttrykket "vilkår" må forstås svært vidt, og må omfatte alle økonomiske krav, herunder alle former for vederlag som arbeidstakeren får rett til ved sitt arbeid, såvel som ikkeøkonomiske ytelser som arbeidstakeren kan motta fra arbeidsgiveren deres på grunnlag av tariffavtalen; (vi) uansett artikkel 81 EF må arbeidstakerne ha rett til å opprette og drive institusjoner, eller sette i gang annen virksomhet for å virkeliggjøre målsetningen om å bedre arbeidsvilkårene i samsvar med tariffavtalenes bestemmelser, i en hvilken som helst form disse måtte ta; (vii) Den islandske regjering slutter seg til det syn som uttales av Landsorganisasjonen i Norge og Kommunenes Sentralforbund.

211. Den islandske regjeringen foreslår følgende svar på spørsmålene 1 til 3:

"1a: På grunn av sin karakter og formål, faller tariffavtaler utenfor virkeområdet for artikkel 53 i EØS-avtalen. Følgelig er ikke tariffavtaler "avtale mellom foretak" etter artikkel 53 i EØS-avtalen.

1b: Med henvisning til svaret gitt til det første spørsmålet, er tariffavtaler ikke "beslutning truffet av sammenslutninger av foretak" etter artikkel 53 i EØS-avtalen, selv om de er inngått av en arbeidsgiverorganisasjon på arbeidsgiversiden.

1c: The entity or sector in which an employer operates is irrelevant in the context of Article 53 of the EEA Agreement.

2a: Only in exceptional circumstances may a provision of a collective agreement come within the scope of Article 53 of the EEA Agreement.

2b: It is not possible to define specific rules to answer this question. However, if a provision of a collective agreement, which must be concluded in good faith and concerning core subjects of a collective bargaining such as wages or working conditions, is inappropriate or disproportionate to what is necessary to secure the purpose and nature of the collective agreement, and the provision directly affects relations between an employer and a third party, it may, in exceptional circumstances, come within the scope of Article 53 of the EEA Agreement.

3: Collective agreement provisions on group occupational pension schemes, such as those disputed in the main proceedings, form a part of provisions regarding remuneration of workers and thus fall outside the scope of Article 53(1) of the EEA Agreement. This is also true in regard to those provisions which serve the purpose of safeguarding the contracting parties' control over the pension scheme or verifying whether the employees covered by the collective agreement will be sufficiently covered if the municipalities concerned seek other insurers."

The Government of Norway

212. The Government of Norway emphasises the importance of the EEA competition rules, whilst at the same time pointing out that the competition rules necessarily must be balanced with other, equally important goals, such as those underlying collective agreements.

213. The Government of Norway is of the view that it is essential to protect the freedom of the social partners to enter into collective agreements. This freedom is, to some extent, limited by law, but it is important that the purpose of collective agreements, namely, to regulate wages and other working conditions, is not jeopardised by competition rules, under either national law or the EEA Agreement. The socially accepted goals of labour law could not have been achieved in a satisfactory manner if the anti-competitive effect of collective agreements on wages and working conditions were to be regarded as contrary to Articles 53(1) EEA.

214. The Government of Norway refers to the judgments of the Court of Justice of the European Communities in *Albany*, *Brentjens'*, *Drijvende Bokken*, *Pavlov*, and *van der Woude*, which dealt with the relationship between collective agreements and Article 81 EC. It submits that that case-law brings out three elements which must be present for an agreement to fall outside the scope of application of Article 81(1) EC: (i) the agreement must be concluded in the form

1c: Enheten eller sektoren en arbeidsgiver driver i er ikke relevant i forhold til artikkel 53 i EØS-avtalen.

2a: Bare rent unntaksvis kan en bestemmelse i en tariffavtale falle inn under virkeområdet for artikkel 53 i EØS-avtalen.

2b: Det er ikke mulig å definere særlige regler for å besvare dette spørsmålet. Imidlertid, dersom en bestemmelse i en tariffavtale, som må være sluttet i god tro og angå kjernespørsmål for tarifforhandlinger, slik som lønns- og arbeidsforhold, er uegnet eller uforholdsmessig i forhold til hva som er nødvendig for å ivareta tariffavtalens formål og karakter, og bestemmelsen direkte påvirker forholdet mellom en arbeidsgiver og en tredje part, kan den, i unntakstilfelle, falle inn under virkeområdet for artikkel 53 i EØS-avtalen.

3: Tariffavtalebestemmelser om tjenestepensjonsordninger, slik som omtvistet i hovedsaken, er del av bestemmelser om godtgjørelse av arbeidstakere, og faller således utenfor virkeområdet for artikkel 53 nr 1 i EØS-avtalen. Dette gjelder også de bestemmelser som tjener til å sikre avtalepartenes kontroll over pensjonsordningene eller etterprøve om arbeidstakerne som er dekket av tariffavtalen er tilstrekkelig dekket dersom de vedkommende kommunene søker andre forsikrere."

Den norske regjering

212. Den norske regjering understreker viktigheten av EØS-konkurranse-reglene, men peker samtidig på at konkurransereglene nødvendigvis må balanseres mot andre like viktige mål, som de som ivaretas gjennom tariffavtaler.

213. Den norske regjering er av den oppfatning at det er avgjørende å sikre friheten for arbeidslivets parter til å inngå tariffavtale. Denne friheten er i en viss utstrekning begrenset ved lov, men det er viktig at tariffavtalenes formål, å regulere lønns- og andre arbeidsvilkår, ikke settes i fare av konkurransereglene hverken i nasjonal rett eller i EØS-avtalen. De sosialt aksepterte målsetninger i arbeidsretten ville ikke kunne oppnås dersom tariffavtaler om lønns- og arbeidsvilkår skulle kunne anses som værende i strid med artikkel 53 nr 1 EØS.

214. Den norske regjering viser til De europeiske fellesskaps domstols dommer i *Albany*, *Brentjens'*, *Drijvende Bokken*, *Pavlov* og *van der Woude*, som behandlet forholdet mellom tariffavtaler og artikkel 81 EF. Det anføres at denne rettspraksisen angir tre elementer som må foreligge for at en avtale skal kunne unntas fra virkeområdet for artikkel 81 nr 1 EF: (i) avtalen må være inngått som

of a collective agreement; (ii) the agreement must be an outcome of collective organisations representing employers and workers; and (iii) the agreement must contribute to improving working or employment conditions.

215. The Government of Norway submits that the abovementioned case-law of the Court of Justice of the European Communities is relevant to answering the questions in the present case and that there is no reason, such as, for instance, the particular characteristics of the EEA Agreement, why the scope of application of Articles 53(1) EEA should, in the present context, differ from that of Article 81(1) EC with regard to collective agreements.

216. The Government of Norway then concludes that agreements which are entered into in the form of collective agreements which are the outcome of collective negotiations between organisations representing employers and workers, and which contribute to improving working or employment conditions, fall outside the scope of application of Article 53(1) EEA. On the basis of that conclusion, the Government of Norway considers it unnecessary to examine further the questions referred by Arbeidsretten.

217. The Government of Norway then turns to the purpose of the Advisory Opinion procedure. It mentions that the Advisory Opinion procedure is an instrument of cooperation between national courts and the EFTA Court, the aim of which is to provide the national courts with the necessary elements of EEA law to decide the cases before them,[21] and that it is clear from Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (ESA/Court Agreement) that the EFTA Court only has competence to rule on the interpretation of the EEA Agreement. It is for the national court, however, to apply the relevant provision of the EEA Agreement to the factual circumstances of the case in its judgment at the national level. If the EFTA Court wishes to answer the questions in the present case in detail, then the Government of Norway is of the view that that would be going beyond a mere interpretation of the EEA Agreement. The Government of Norway, apart from stating that agreements which are concluded in the form of a colelctive agreement, which are the outcome of collective negotiations between organisations representing employers and workers, and which contribute to improving working or employment conditions, fall outside the scope of application of Article 53(1) EEA, suggests that the EFTA Court should refrain from answering the questions referred to it by Arbeidsretten, on grounds of lack of jurisdiction.

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[21] Case E-5/96 *Ullensaker kommune and Others* v *Nille AS* [1997] EFTA Court Report 30, at paragraph 12.

en tariffavtale; (ii) avtalen må være resultat av kollektive forhandlinger mellom arbeidstaker- og arbeidsgiverorganisasjoner, og (iii) avtalen må bidra til å forbedre arbeids- og ansettelsesvilkårene.

215. Den norske regjering anfører at den ovennevnte rettspraksis fra De europeiske fellesskaps domstol er relevant for å besvare spørsmålene i den foreliggende sak, og at det ikke er noen grunner, for eksempel knyttet til EØS-avtalens egenart, som tilsier at virkeområdet for artikkel 53 nr 1 EØS med hensyn til tariffavtaler i denne sammenheng skulle være annerledes enn i forhold til artikkel 81 nr 1 EF.

216. Den norske regjering trekker den slutning at avtaler som er inngått i form av tariffavtale som er resultat av kollektive forhandlinger mellom arbeidstaker- og arbeidsgiverorganisasjoner, og som bidrar til å forbedre arbeids- og ansettelsesvilkårene, faller utenfor virkeområdet for artikkel 53 nr 1 EØS. På grunnlag av denne konklusjonen anser Den norske regjering det unødvendig med en videre gjennomgang av spørsmålene som er stillet av Arbeidsretten.

217. Den norske regjering går så over til å drøfte formålet med rådgivende uttalelser. Den påpeker at rådgivende uttalelser er et instrument for samarbeid mellom nasjonale domstoler og EFTA-domstolen med det formål å formidle de nødvendige EØS-rettslige elementer til de nasjonale domstoler for at de skal kunne avgjøre saker som verserer for dem,[21] og at det fremgår klart av artikkel 34 i Avtale mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol (Overvåknings- og domstolsavtalen) at EFTA-domstolen bare har kompetanse til å uttale seg om tolkningen av EØS-avtalen. Det er imidlertid opp til den nasjonale domstolen å anvende de relevante bestemmelsene i EØS-avtalen på de faktiske forhold i saken i sin dom på nasjonalt nivå. Dersom EFTA-domstolen ønsker å besvare spørsmålene i nærværende sak i detalj, er Den norske regjering av den oppfatning at det vil gå utover en ren tolkning av EØS-avtalen. Den norske regjering foreslår, i tillegg til å påpeke at avtaler som er inngått i form av en tariffavtale, og som er resultatet av tarifforhandlinger mellom arbeidsgiver- og arbeidstagerorganisasjoner, faller utenfor virkeområdet for artikkel 53 nr 1 EØS, at EFTA-domstolen burde avstå fra å besvare spørsmålene som er stillet den av Arbeidsretten, på grunn av manglende kompetanse.

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[21] Sak E-5/96 *Ullensaker kommune med flere* mot *Nille AS* [1997] EFTA Court Report 30, premiss 12.

The Government of Sweden

218. The Government of Sweden begins by stating that the Court of Justice of the European Communities has, in several cases, established that collective agreements should enjoy immunity from competition law, see *inter alia Albany*, *Drijvende Bokken*, *Brentjens'*. The Government of Sweden submits that this principle also applies to Article 53(1) EEA. Any special characteristics the EEA Agreement may have do not justify a different interpretation in the present case.

219. The Government of Sweden points out that the agreement at issue in the present case were concluded in the form of a collective agreement, and that it is the outcome of collective negotiations between organisations representing employers and workers. Furthermore, the establishment of a compulsory group occupational pension scheme, such as the one at hand, which seeks to guarantee a certain level of pension for all workers, clearly aims to improve the remuneration of the workers. The specific provisions referred to by the Labour Court under questions 4 to 7b do not, by themselves or read in conjunction with each other, change the general purpose of the agreement. Accordingly, the agreement falls outside the scope of application of Article 53(1) EEA.

220. As regards Article 54 EEA, the Government of Sweden argues that the agreement, taken as a whole or in part, cannot, by its nature and content, be considered an abuse of a dominant position. The provisions of the agreement at hand are also less far-reaching than the systems under scrutiny in, for example, *Albany* and *van der Woude*. Since the agreement does not confer exclusive rights to one undertaking to manage the pension schemes, as was the case in *Albany* and *van der Woude*, the agreement *per se* cannot be said to lead to abuse of dominant position. Therefore, the agreement cannot be considered to be contrary to Article 54 EEA.

EFTA Surveillance Authority

221. The EFTA Surveillance Authority points out that questions such as those in the present case have been the subject of judgments by the Court of Justice of the European Communities. It follows from those judgments that, by their nature and purpose, collective agreements which have as their object the improvement of employment and working conditions fall outside the scope of Article 81 EC, which is identical in substance to Article 53 EEA. It follows from this that a pension fund entrusted with the task of realising those objectives is not in violation of the competition provisions.

222. The EFTA Surveillance Authority offers an analysis of the relevant case-law of the Court of Justice of the European Communities, i.e., *Albany*, *Drijvende*

Den svenske regjering

218. Den svenske regjering begynner med å peke på at De europeiske fellesskaps domstol i flere saker har slått fast at tariffavtaler nyter konkurranserettslig immunitet, jf blant annet *Albany*, *Drijvende Bokken* og *Brentjens'*. Den svenske regjering anfører at dette prinsippet også kommer til anvendelse på artikkel 53 nr 1 EØS. Særlige egenskaper ved EØS-avtalen begrunner ikke en annerledes tolkning.

219. Den svenske regjering peker på at de avtaler saken gjelder ble inngått som en tariffavtale, og er resultatet av kollektive forhandlinger mellom arbeidstaker- og arbeidsgiverorganisasjoner. Videre tar opprettelsen av en obligatorisk tjenestepensjonsordning, slik som den i den foreliggende saken, som tar sikte på å sikre et visst pensjonsnivå for alle arbeidstakerne, klart sikte på å forbedre arbeidstakernes lønn. De enkelte bestemmelsene som det er henvist til i Arbeidsrettens spørsmål nr 4 til 7b endrer ikke selv, eller i sammenheng med hverandre, det generelle formål med avtalen. Derfor faller avtalene utenfor virkeområdet for artikkel 53 nr 1 EØS.

220. Når det gjelder artikkel 54 EØS hevder Den svenske regjering at avtalen, hverken i sin helhet eller dens enkeltheter, etter sin karakter og innhold kan sies å innebære et misbruk av dominerende stilling. Bestemmelsene i den foreliggende avtalen er også mindre vidtrekkende enn de ordningene som ble vurdert i for eksempel *Albany* og *van der Woude*. Fordi avtalen ikke gir noe enkeltforetak eksklusive rettigheter til å forvalte pensjonsordningene, slik tilfellet var i *Albany* og *van der Woude*, kan ikke avtalen i seg selv sees å medføre en utnyttelse av en dominerende stilling på utilbørlig måte. Derfor kan ikke avtalen sies å være i strid med EØS-avtalen.

EFTAs overvåkningsorgan

221. EFTAs overvåkningsorgan peker på at spørsmål som de i den foreliggende saken har vært gjenstand for avgjørelser av De europeiske fellesskaps domstol. Det følger av disse avgjørelsene at tariffavtaler som har som sitt formål å bedre ansettelses- og arbeidsforhold ved sin karakter og formål faller utenfor virkeområdet for artikkel 81 EF, som er innholdsmessig identisk med artikkel 53 EØS. Det følger av dette at pensjonsfond tillagt oppgaven å gjennomføre disse oppgavene ikke overtrer konkurransebestemmelsene.

222. EFTAs overvåkningsorgan gir en analyse av den relevante rettspraksis fra De europeiske fellesskaps domstol, det vil si *Albany*, *Drijvende Bokken* og

Bokken, and *Brentjens'*. It submits that that case-law is directly relevant for the interpretation of the corresponding provisions of the EEA Agreement.

223. The EFTA Surveillance Authority points out that the HTA was concluded in the form of a collective agreement, and is the result of collective bargaining between organisations representing employers and employees. It establishes the right to supplementary pension benefits, and the pension scheme must satisfy a number of requirements aimed at securing the employees a certain level of pension. The provisions are aimed at improving employees' working conditions, namely, remuneration. According to *Albany* and related cases, such provisions fall outside the scope of the competition rules.

224. As regards the HTA provisions (clause 2.1.8) concerning the procedure and approval for change of company/pension institution, and the intercession of the Norwegian Public Service Pension Fund and the Banking, Insurance and Securities Commission, the EFTA Surveillance Authority submits that it appears that, by their nature and purpose, such provisions seek to guarantee employees rights under the collective agreement, and thus fall outside the scope of Article 53 EEA.

225. With respect to the requirement under clause 2.1.8 that the pension scheme must be based on a financing system which is gender-neutral and does not have the effect of excluding older employees, the EFTA Surveillance Authority points out that the intention of the parties was to prevent municipal employers from having an economic incentive to recruit younger men ahead of older persons. Although the provision is not directly aimed at improving remuneration, its stated purpose is to prevent older, female workers from being excluded from participating in working life. In view of the EFTA Surveillance Authority, the provision may be said to improve conditions of work and employment.

226. Against this background, the EFTA Surveillance Authority submits that the nature and purpose of the HTA provisions on pension fall outside the scope of Article 53 EEA. Collective agreement provisions on group occupational pension schemes, such as the provisions in clause 2.1.8, second third and fourth paragraphs HTA, fall outside the scope of Article 53 EEA.

227. As to the issue of possible abuse of a dominant position, the EFTA Surveillance Authority submits, firstly, that it should be reasonably clear that KLP is to be considered as an "undertaking" within the meaning of Article 54 EEA. Moreover, there cannot be any reasonable doubt that KLP has a dominant position within the relevant product and geographic market. However, two further conditions must be fulfilled for a finding of infringement of Article 54 EEA. Firstly, the undertaking must have abused its dominant position, and, secondly, the abuse must have the potential to affect trade between the Contracting Parties. The EFTA Surveillance Authority is of the view that the

Brentjens'. Det anføres at denne rettspraksis er direkte relevant for tolkningen av de korresponderende bestemmelsene i EØS-avtalen.

223. EFTAs overvåkningsorgan peker på at HTA ble inngått som en tariffavtale og er resultat av kollektive forhandlinger mellom arbeidsgiver- og arbeidstakerorganisasjoner. Den etablerer rett til tilleggspensjonsytelser, og pensjonsordninger må tilfredsstille en rekke krav som tar sikte på å sikre arbeidstakeren et visst pensjonsnivå. Bestemmelsene søker dermed å bedre arbeidstakerens arbeidsforhold, nærmere bestemt deres godtgjørelse. Etter *Albany* og de beslektede saker faller slike bestemmelser utenfor konkurransereglenes virkeområde.

224. Hva angår bestemmelsene i HTA punkt 2.1.8 om fremgangsmåte og godkjenning for skifte av selskap/pensjonskasse, og mellomkomst av Statens Pensjonskasse og Kredittilsynet, anfører EFTAs overvåkningsorgan at det fremgår at slike bestemmelser etter sin karakter og formål søker å sikre arbeidstakernes rettigheter etter tariffavtalen og således faller utenfor virkeområdet for artikkel 53 EØS.

225. Vedrørende kravene i punkt 2.1.8 om at pensjonsordningen må være basert på et finansieringssystem som er kjønnsnøytralt og ikke virker ekskluderende på eldre arbeidstakere, peker EFTAs overvåkningsorgan på at partenes formål er å hindre kommunale arbeidsgivere fra å få et økonomisk motiv for å rekruttere yngre menn fremfor eldre personer. Selv om bestemmelsen ikke direkte søker å bedre arbeidstakernes lønn, er det dens uttalte formål å sikre eldre kvinnelige arbeidstakere fra å bli ekskludert fra deltagelse i arbeidslivet. Etter EFTAs overvåkningsorgans syn kan en bestemmelse med dette formål sies å føre til forbedring av arbeids- og ansettelsesvilkårene.

226. Mot denne bakgrunn anfører EFTAs overvåkningsorgan at karakteren og formålet til pensjonsbestemmelsen i HTA faller utenfor virkeområdet for artikkel 53 EØS. Tariffavtalebestemmelser om kollektive tjenestepensjonsordninger, slik som bestemmelsene i HTA punkt 2.1.8 annet, tredje og fjerde ledd faller utenfor virkeområdet for artikkel 53 EØS.

227. Til spørsmålet om mulig misbruk av dominerende stilling anfører EFTAs overvåkningsorgan først at det bør være rimelig klart at KLP er å anse som et "foretak" etter artikkel 54 EØS . Videre kan det ikke være rimelig tvil om at KLP har en dominerende stilling innen det relevante produkt- og geografiske marked. To ytterligere vilkår må imidlertid være oppfylt for å etablere et brudd på artikkel 54 EØS. For det første at foretaket har utnyttet sin dominerende stilling på utilbørlig måte og dernest at misbruket må påvirke handelen mellom avtalepartene. EFTAs overvåkningsorgan hevder at det faktum som er presentert i saken gir ikke anledning til noen konklusjon med hensyn til hvorvidt dette siste vilkåret er oppfylt.

facts presented in the case do not permit any conclusion as to whether this last condition is fulfilled.

228. The EFTA Surveillance Authority contends that the provisions in clause 2.1.8 may have the effect of tying the municipalities to one company which has a dominant position. This may constitute abuse under Article 54 EEA, if the tying goes further than what is necessary to attain the purpose of the provisions. However, the Request does not contain a sufficient factual basis on which to make such an assessment. Therefore, the national court must make the necessary findings of fact.

229. The EFTA Surveillance Authority submits that the questions should be answered as follows:

> *"Collective agreement provisions on group occupational pension schemes, such as the provisions in clause 2.1.8, second, third, and fourth paragraphs of the Basic Collective Agreement for municipalities, etc. for the period 1998-2000 fall outside the scope of Article 53 of the EEA Agreement.*
>
> *Such provisions may have the effect of tying the municipalities to one company which has a dominant position. If the tying goes beyond what is necessary for the provisions to attain their purpose, and are otherwise not justifiable, there may be an abuse under Article 54 of the EEA Agreement. It is for the national court to make the necessary factual findings."*

Commission of the European Communities

230. The Commission of the European Communities suggests that the Court should first examine question 3, and refers to the case-law of the Court of Justice of the European Communities, in which it has been held that agreements concluded in the context of collective negotiations between management and labour in pursuit of social policy objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 81(1) EC. This approach of the Court of Justice of the European Communities is founded on the commitments in the EC Treaty to both a policy of undistorted competition and a policy in the social sphere. The former is expressed by the terms of Article 81(1) and (2) EC, as well as by the description of activities of the Community in Article 3(1)(g) EC. The social policy, on the other hand, is provided for in general terms by the references in Article 2 and Article 3(1)(j) EC.

231. The Commission of the European Communities observes that the terms of Article 81 EC and Article 53 EEA are identical. Whilst the social policy provisions of the EEA Agreement are less extensive than their EC Treaty counterparts, the Contracting Parties' intentions in the area are reflected in the preamble, Articles 1(2), 66, and 71 EEA. The Commission submits that the social policy objectives of the EEA Agreement would be seriously undermined if Article 53 EEA were not construed by reference to the provisions of the EEA

228. EFTAs overvåkningsorgan anfører at bestemmelsene i punkt 2.1.8 kan ha som virkning å binde kommunene til ett selskap som har dominerende stilling. Dette kan utgjøre et misbruk etter artikkel 54 EØS, hvis bindingen går utover det som er nødvendig for å oppnå bestemmelsenes formål. Imidlertid gir ikke anmodningen faktagrunnlag nok til å foreta en slik vurdering. Det må derfor bli opp til den nasjonale domstol å gjøre de nødvendige faktavurderinger.

229. EFTAs overvåkningsorgan foreslår følgende svar på spørsmålene:

> *"Tariffavtalebestemmelser om kollektive tjenestepensjonsordninger, slik som bestemmelsene i hovedtariffavtalen for kommuner m.v. for perioden 1998-2000 punkt 2.1.8 annet, tredje og fjerde ledd faller utenfor virkeområdet for EØS-avtalens artikkel 53.*
>
> *Slike bestemmelser kan medføre at kommunene bindes til ett selskap som har en dominerende stilling. Dersom bindingen går utover det som er nødvendig for at bestemmelsen skal nå sitt formål, og ikke kan begrunnes i andre forhold, kan det foreligge misbruk i forhold til EØS-avtalens artikkel 54. Det er opp til den nasjonale domstol å gjøre de nødvendige faktavurderinger."*

Kommisjonen for De europeiske fellesskap

230. Kommisjonen for De europeiske fellesskap foreslår at Domstolen først bør vurdere spørsmål 3, og viser til rettspraksis fra De europeiske fellesskaps domstol hvor det er slått fast at avtaler inngått i kollektive forhandlinger mellom arbeidslivets parter som søker å realisere sosialpolitiske formål, på grunn av sin karakter og formål må anses å falle utenfor virkeområde for artikkel 81 nr 1 EF. Denne tilnærmingen fra De europeiske fellesskaps domstol er basert på forpliktelsen etter EF-traktaten til å føre både konkurransepolitikk og sosialpolitikk. Det første er uttrykt i ordlyden i artikkel 81 nr 1 og nr 2 EF, så vel som i beskrivelsen av Fellesskapets aktiviteter i artikkel 3 nr 1 bokstav g EF. Sosialpolitikken er på den annen side nedfelt i generelle formuleringer ved henvisningene i artikkel 2 EF og 3 nr 1 bokstav j EF.

231. Kommisjonen for De europeiske fellesskap bemerker at ordlydene i artikkel 81 EF og artikkel 53 EØS er identiske. Mens bestemmelsene om sosial politikk i EØS-avtalen er mindre vidtgående enn dem i EF-traktaten, er avtalepartenes intensjoner på dette området reflektert i fortalen, artikkel 1 nr 2, 67 og 71. Kommisjonen for De europeiske fellesskap anfører at EØS-avtalens sosialpolitiske målsetninger ville bli satt alvorlig i fare hvis artikkel 53 EØS ikke

Agreement as a whole. This would entail construing Article 53(1) in line with the interpretation of Article 81(1) EC given by the Court of Justice of the European Communities in *Albany* and related cases.

232. The Commission of the European Communities points out that the facts of the present case differ from those of the *Albany* and related cases in a number of respects, but concludes that none of those differences should lead to a materially different outcome in the present case. As in the *Albany* cases, the HTA was concluded in the context of collective negotiations between, on the one hand, KS, representing the municipal employers, and, on the other hand, a number of employee organisations. Furthermore, by requiring the employers to establish supplementary occupational pension schemes, the HTA seeks generally to guarantee a certain level of pension for all workers in the municipal sector, *viz.*, at least 66% of their final salary, and therefore contributes directly to improving one of their working conditions, namely, their remuneration.

233. Once the general condition, *viz.*, that the contested provisions of a collective agreement are designed to improve conditions of work and employment, is met, the parties to that agreement must have reasonable freedom to provide in detail for the organisation of the pension schemes in question. The provisions should, therefore, be the subject of a general verification, as opposed to a detailed examination of individual provisions, having due regard to the autonomy of the social partners, to ensure that no implementing provision (that is potentially restrictive of competition) is inconsistent with, or unnecessary to, the pursuit of the overall objective of improving conditions of work and employment. This is a task for the national court, especially in the present case, because of the numerous uncertainties regarding the interpretation of the HTA. The Commission then offers some guidance as to how that analysis should be conducted.

234. The Commission of the European Communities points out, firstly, that the interpretation of clause 2.1.8, third paragraph, regarding a gender-neutral financing system, is a matter of dispute between KS and LO/NKF, on which the Commission cannot pronounce a view. It states merely that, whichever interpretation is adopted, the requirement of gender-neutral financing, combined with the requirement that the scheme does not have the effect of excluding workers, seems clearly to be designed to improve conditions of work and employment, by preventing employers from having an economic incentive to recruit younger men ahead of women and older persons, and thus equalising chances for all members of the workforce. The Commission further argues, with reference to the *Albany* line of cases that, even if the requirement of gender-neutral financing were, in practice, to confer an effective monopoly on KLP, this would not entail a more extensive restriction of competition than was at issue in the earlier case-law of the Court of Justice of the European Communities. Furthermore, it would not establish that the clause in question was unnecessary to or inconsistent with the social policy objective pursued, as it would be precisely the objective of ensuring gender equality in the workplace which had

skulle forstås i sammenheng med avtalen i sin helhet. Dette ville innebære at artikkel 53 nr 1 EØS forstås i samsvar med den tolkningen De europeiske fellesskaps domstol ga av artikkel 81 nr 1 EF i *Albany* og de beslektede saker.

232. Kommisjonen for De europeiske fellesskap peker på at faktum i den foreliggende saken skiller seg fra det i *Albany* og de beslektede saker på flere måter, men konkluderer med at ingen av disse forskjellene burde føre til et materielt forskjellig utfall i den foreliggende sak. Som i *Albany*-sakene var HTA inngått i kollektive forhandlinger mellom på den ene side KS, som representerte kommunale arbeidsgivere, og på den andre side flere arbeidstakerorganisasjoner. Videre, ved å kreve at arbeidsgiverne etablerer tjenestepensjonsordninger, søker HTA generelt å sikre alle arbeidstakere innen kommunesektoren et vist pensjonsnivå, det vil si minst 66% av sluttlønn, og den bidrar således til en forbedring av et av arbeidstakernes arbeidsvilkår, nemlig deres godtgjørelse.

233. Så snart det generelle vilkåret er oppfylt, det vil si at de omtvistede tariffbestemmelsene er ment å forbedre arbeids- og ansettelsesvilkårene, må partene til avtalen ha en rimelig frihet til å fastlegge organiseringen av den pensjonsordningen det dreier seg om i detalj. Disse enkelte bestemmelser burde derfor etterprøves samlet i motsetning til en detaljert vurdering enkeltvis, under hensyn til de sosiale partenes autonomi, for å sikre at ingen gjennomføringsbestemmelser (som er potensielt konkurransebegrensende) er uforenlige med, eller unødvendige for å nå den alminnelige målsetningen om å forbedre arbeids- og ansettelsesvilkårene. Dette er en oppgave for den nasjonale domstolen, særlig i den foreliggende saken, på grunn av de mange usikkerhetene om tolkningen av HTA. Kommisjonen antyder en viss veiledning for hvordan en slik analyse bør gjennomføres.

234. Kommisjonen for De europeiske fellesskap peker først på at tolkningen av punkt 2.1.8., tredje ledd, om kjønnsnøytralt finansieringssystem er en del av saken mellom KS og LO/NKF, som Kommisjonen ikke kan uttale seg om. Den uttaler bare at uansett hvilken tolkning som velges synes kravet om kjønnsnøytral finansiering, kombinert med kravet om at ordningen ikke virker ekskluderende på arbeidstakere, klart å være skapt for å bedre arbeids- og ansettelsesvilkårene, ved å hindre arbeidsgivere fra å ha et økonomisk motiv for å rekruttere yngre menn fremfor kvinner og eldre personer, og dermed likestille mulighetene for alle medlemmer av arbeidsstyrken. Kommisjonen for De europeiske fellesskap hevder videre under henvisning til *Albany*-rettspraksisen at selv om kravet om kjønnsnøytral finansiering i praksis førte til at KLP ble satt i en faktisk monopolstilling, ville ikke dette innebære en mer inngripende konkurransebegrensning enn det som var omhandlet i tidligere rettspraksis fra De europeiske fellesskaps domstol. Videre ville det ikke medføre at den omstridte bestemmelsen var unødvendig for, eller uforenlig med det ønskede sosialpolitiske formålet, nemlig å sikre likhet mellom kjønnene på arbeidsplassen, som

necessitated such a monopoly. Consequently, it argues, clause 2.1.8, third paragraph HTA should be held to fall outside the scope of application of Article 53(1) EEA.

235. The Commission of the European Communities observes that clause 2.1.8, fourth paragraph, contains two material requirements. The first relates to a transfer agreement with the Norwegian Public Service Pension Fund, see clauses 2.1.5 and 2.1.6 HTA, whilst the second relates to the Banking, Insurance and Securities Commission's taking note of the scheme to which a municipality wishes to transfer its affiliation. As to the first requirement, the Commission notes that the purpose of such agreements is to ensure that employees who have been covered by several public pension schemes receive a pension as though they had always been covered by one and the same scheme. It is a condition designed to improve conditions of work and employment, as it aims at the protection of the continuously-accrued pension entitlements of employees who have worked for more than one public body during their careers. Similarly, the Commission takes the view that the second requirement aims at extending to the new scheme a condition already applicable, by virtue of clause 2.1.6 HTA, to the municipality's existing scheme. This contributes to the improvement of conditions of work and employment, as it reinforces the guarantee to workers that the benefits foreseen under the scheme will, in fact, be paid. The supervisory role of the Banking, Insurance and Securities Commission is also apparently consistent with this objective, as it provides an additional guarantee that the insurance offered for the pension benefits in question is adequate. Clause 2.1.8, paragraph 2, governs the procedure to be followed in order for a change of affiliation to take place. In the view of the Commission, it is quite logical, and consistent with the autonomy of the social partners in negotiating, concluding and applying collective agreements in respect of conditions of work and employment, that the parties should assume a role in supervising the execution of such agreements.

236. Referring to *Albany* and related cases, the Commission of the European Communities notes that it is permissible for a fund itself to decide upon exemptions, without the need for the power of exemption to necessarily be attributed to a separate body, provided that decisions on refusal are subject to judicial review, and provided of course that the fund, in this case those members of the Pension Committee representing the parties to the HTA, apply the substantive criteria of the HTA in a non-arbitrary manner. Therefore, in order to justify the exclusion of such provisions from the scope of application of Article 53(1) EEA, legal recourse must be possible against any alleged use by the parties to the HTA of their power to verify compliance with either the general requirements of clauses 2.1.1 to 2.1.7, or the specific requirements regarding a change of schemes in clause 2.1.8 for ends other than achievements of the social policy objectives inherent in those requirements. Thus, even if the parties were required to approve all schemes or changes of scheme by unanimity, and if the defendant municipalities were correct in positing a fundamental identity of interests between KS and KLP, thereby resulting in KLP having a veto over approval of the other schemes, the possibility of objective judicial review should

nødvendiggjorde et slikt monopol. Derfor burde HTA punkt 2.1.8 tredje ledd anses å falle utenfor virkeområdet for artikkel 53 nr 1 EØS.

235. Kommisjonen for De europeiske fellesskap bemerker at punkt 2.1.8, fjerde ledd inneholder to materielle krav. Det første om en overføringsavtale med Statens Pensjonskasse, jf HTA 2.1.5 og 2.1.6, og det andre om at Kredittilsynet må ta til etterretning den ordning en kommune ønsker å tilknytte seg. Til det første vilkåret bemerker Kommisjonen for De europeiske fellesskap at formålet med slike avtaler er å sikre at arbeidstakere som har vært omfattet av flere offentlige pensjonsordninger, får pensjon som om de hele tiden har vært omfattet av en og samme ordning. Det er et vilkår som er ment å forbedre arbeids- og ansettelsesvilkårene, da det tar sikte på beskyttelse av de stadig opptjente pensjonsrettighetene for arbeidstakere som har arbeidet i mer enn ett offentlig organ i sin karriere. Tilsvarende mener Kommisjonen for De europeiske fellesskap at det andre kravet tar sikte på å gjelde også for den nye ordningen, et vilkår som allerede gjelder i henhold til HTA punkt 2.1.6, for kommunenes allerede eksisterende ordninger. Dette bidrar til forbedring av arbeids- og ansettelsesvilkårene, ved at det styrker arbeidstakernes garanti for at de ytelsene de er forespeilet etter ordningen faktisk blir utbetalt. Kredittilsynets overvåkende rolle er også tilsynelatende forenlig med dette formålet, da det gir en tilleggsgaranti for at sikringen av pensjonsytelsene er tilstrekkelig. Punkt 2.1.8, annet ledd gjelder videre den prosedyre som må følges for at et skifte av tilknytning skal kunne skje. Etter Kommisjonen for De europeiske fellesskaps syn er det logisk og i samsvar med de sosiale partenes autonomi til å forhandle, inngå og gjennomføre tariffavtaler om forbedring av arbeids- og ansettelsesvilkårene, at partene tar del i overvåkningen av gjennomføringen av slike avtaler.

236. Med henvisning til *Albany* og de beslektede saker, bemerker Kommisjonen for De europeiske fellesskap at det må tillates at et fond selv tar stilling til unntak, uten at det er nødvendig at unntaksadgangen nødvendigvis tillegges et særskilt organ, dersom beslutningene om nekting er gjenstand for rettslig prøving, og dersom fondet, i dette tilfellet Pensjonsutvalgets tariffparter ikke anvender HTAs innholdsmessige vilkår på en vilkårlig måte. For at slike bestemmelser skal falle utenfor virkeområdet for artikkel 53 nr 1 EØS, må det være adgang til rettslig prøving av påstander om at partene til HTA bruker sin adgang til å etterprøve overholdelsen av enten de alminnelige kravene i punkt 2.1.1 til 2.1.7, eller de særlige flyttereglene i punkt 2.1.8 for andre formål enn å oppnå de sosiale målsetninger som ligger i disse kravene. Selv om partene dermed måtte godkjenne alle ordninger eller skifte av ordninger ved enstemmighet, og selv om de saksøkte kommunene hadde rett i påstanden om at det er en grunnleggende interessesammenfall mellom KS og KLP, som fører til at KLP får vetorett over godkjenning av andre ordninger, skulle muligheten for

prevent any restriction of competition within the scope of the prohibition in Article 53(1) EEA. The Commission is of the view that the main proceedings before the national court suggest the existence of the necessary avenues of legal recourse.

237. In conclusion, the Commission of the European Communities proposes that the Court respond to the third question referred by the national court that the provisions of clause 2.1.8, second, third and fourth paragraphs HTA appear to fall outside the scope of application of Article 53(1) EEA. As a result, it is not necessary to answer questions 1 and 2, or questions 4 to 7; in any event, the latter questions have, to a considerable extent, already been addressed implicitly. The Commission adds, for the purposes of briefly responding to question 8, that it sees no reason why the combination of the provisions in question should fall within the scope of Article 53(1) EEA if the provisions do not do so individually. There is no apparent cumulative effect that might be inconsistent with or unnecessary to the pursuit of the social policy goal of chapter 2 of the HTA.

238. In relation to Article 54 EEA, the Commission proposes that the EFTA Court address question 10 first. If this question is answered in the affirmative, it will not be necessary to respond to question 9.

239. The Commission of the European Communities has argued earlier that the contested provisions of the HTA do not fall within the scope of application of Article 53(1) EEA, since they relate to the aim of improving of conditions of work and employment. However, if an undertaking which enjoyed a dominant position derived from a collective agreement were to engage in abuses that were unrelated to the pursuit of the social policy objectives of that agreement, it would remain subject to Article 82 EC and Article 54 EEA, as the case may be. In conclusion, the Commission submits that the Court should respond to the tenth question referred by the national court that the provisions of clause 2.1.8, second, third and fourth paragraphs HTA fall outside of the scope of application of Article 54 EEA.

Thór Vilhjálmsson
Judge-Rapporteur

objektiv rettslig prøving hindre enhver konkurransebegrensning innenfor virkeområdet for artikkel 53 nr 1 EØS. Hovedsøksmålet for den nasjonale domstolen tyder på at den påkrevde mulighet til rettslig prøving foreligger.

237. Kommisjonen for De europeiske fellesskap foreslår avslutningsvis at Domstolen besvarer det tredje spørsmålet som er forelagt den av den nasjonale domstolen med at bestemmelsene i HTA punkt 2.1.8, andre, tredje og fjerde ledd synes å falle utenfor virkeområdet for EØS-avtalens artikkel 53 nr 1. Som følge av dette er det ikke nødvendig å besvare spørsmål 1 og 2, eller spørsmål 4 til 7; i alle tilfelle er de siste spørsmål i betydelig utstrekning blitt behandlet implisitt. Kommisjonen legger til, for i korthet å besvare spørsmål 8, at den ikke kan se noen grunn til at de omstridte bestemmelsene samlet skulle falle innenfor virkeområdet for artikkel 53 nr 1 EØS, hvis bestemmelsene enkeltvis ikke gjør det. Det er ingen åpenbar kumulativ virkning som kunne være uforenlig med eller unødvendig for å søke å nå de sosialpolitiske målsetningene i HTA kapittel 2.

238. I forhold til artikkel 54 EØS foreslår Kommisjonen at Domstolen først vender seg til spørsmål 10. Dersom dette spørsmålet besvares bekreftende er det ikke nødvendig å besvare spørsmål 9.

239. Det er allerede hevdet av Kommisjonen for De europeiske fellesskap at alle de omstridte bestemmelsene i HTA ikke faller innenfor virkeområdet for artikkel 53 nr 1 EØS, fordi de gjelder målet om forbedring av arbeids- og ansettelsesvilkårene. Dersom imidlertid et foretak som innehar en dominerende stilling avledet fra en tariffavtale innlot seg på misbruk som ikke er relatert til å søke å nå avtalens sosialpolitiske målsetninger, ville det fortsatt omfattes av henholdsvis artikkel 82 EF og artikkel 54 EØS. Avslutningsvis anfører Kommisjonen for De europeiske fellesskap at Domstolen bør besvare det tiende spørsmål som er forelagt den av den nasjonale domstolen med at bestemmelsen i HTA punkt 2.1, andre, tredje og fjerde ledd faller utenfor virkeområdet for artikkel 54 EØS.

Thór Vilhjálmsson
Saksforberedende dommer

Case E-3/01

Alda Viggósdóttir
v
Iceland Post Ltd

(Council Directive 77/187/EEC – Transfer of a State administrative entity to a State-owned limited liability company)

Summary of the Judgment

1. The fact that a transfer has been effected by statute rather than agreement, does not prevent Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses from being applicable. Nor does the fact that the limited liability company is also wholly owned by the State prevent the Directive from being applicable. It is sufficient that there is a change in the natural or legal person responsible for carrying out the business and assuming the position of an employer towards the employees of the undertaking.

The conversion of a State-owned entity into a wholly State-owned limited liability company may constitute a transfer within the meaning of Article 1(1) of the Directive. Whether the transfer was for value or not is immaterial in that regard.

The Directive is only applicable if the employee was at the time of the transfer protected under national employment law. The Directive is not applicable if the employee enjoyed, at the relevant point in time, the special protection against dismissal granted only to civil servants for reasons associated with the public law function or the character of their employment.

2. The transfer of the employee's rights cannot be restricted, even with the employee's consent. An employee cannot waive the rights conferred upon him by the mandatory provisions of the Directive.

With regard to the objective of the Directive, which is not to improve the

Mál E-3/01

Alda Viggósdóttir
gegn
Íslandspósti hf.

(Tilskipun ráðsins 77/187/EEC – Breyting ríkisfyrirtækis í hlutafélag í eigu ríkisins)

Samantekt

1. Það kemur ekki í veg fyrir beitingu tilskipunar ráðsins nr. 77/187/EBE frá 14. febrúar 1977, um samræmingu á lögum aðildarríkjanna um vernd launþega við eigendaskipti að fyrirtækjum, atvinnurekstri eða hluta atvinnurekstrar, að yfirfærsla fyrirtækis hefur farið fram með lagasetningu en ekki samkomulagi. Ekki kemur sú staðreynd heldur í veg fyrir beitingu tilskipunarinnar, að hlutafélagið er að öllu leyti ríkiseign. Það er nægilegt að breyting verði á þeirri persónu eða lögaðila sem ábyrgð ber á rekstrinum og sem kemur fram sem vinnuveitandi gagnvart starfsmönnum fyrirtækisins.

Breyting ríkisfyrirtækis í hlutafélag sem að öllu leyti er í eigu ríkisins getur verið eigendaskipti í skilningi 1. mgr. 1. gr. tilskipunarinnar. Ekki skiptir máli í því sambandi hvort yfirfærslan var gegn gjaldi eða ekki.

Tilskipunin gildir aðeins ef launþegi var þegar eigendaskiptin áttu sér stað verndaður samkvæmt vinnulöggjöf í heimalandi hans. Einnig leiðir það af þessu, að tilskipunin gildir ekki um aðstæður sem fjallað er um í Héraðsdómi Reykjavíkur, ef launþeginn naut, á þeim tíma sem máli skiptir, þeirrar sérstöku verndar gegn uppsögn sem eingöngu er veitt opinberum starfsmönnum af ásæðum sem tengjast starfi þeirra samkvæmt opinberum rétti eða eðli starfsins. Þetta gildir án tillits til sérstaks eðlis starfa launþegans.

2. Ekki sé unnt að takmarka yfirfærslu réttinda launþega, jafnvel ekki með samþykki launþegans. Launþegi getur ekki fallið frá réttindum sem hann nýtur samkvæmt ófrávíkjanlegum ákvæðum tilskipunar.

Markmið tilskipunarinnar eru ekki þau að bæta kjör launþega vegna

situation of an employee following a transfer, but merely to preserve his acquired rights, the new employer may agree with the employee to change the terms of the latter's employment to the same extent as could have been done during the contractual relationship with the previous employer. The Directive does not preclude an agreement with the new employer to modify the employment relationship to the extent that such modification is permitted by the applicable national law in situations other than those involving the transfer of the undertaking.

eigendaskipta, heldur aðeins að vernda uppsöfnuð réttindi hans. Hinn nýi vinnuveitandi getur þess vegna samið við launþega um að breyta kjörum hans að því marki sem heimilt hefði verið á meðan á ráðningarsambandinu við hinn fyrri vinnuveitanda stóð. Á hinn bóginn geta eigendaskiptin sjálf aldrei verið ástæða til breytinga á ráðningarkjörum.

JUDGMENT OF THE COURT

22 March 2002*

(Council Directive 77/187/EEC - Transfer of a State administrative entity to a State-owned limited liability company)

In Case E-3/01

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

Alda Viggósdóttir

and

Íslandspóstur hf. (Iceland Post Ltd)

on the interpretation of the Agreement on the European Economic Area (hereinafter the "EEA Agreement"), with particular reference to Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (hereinafter the "Directive"), in particular Articles 1 and 3 thereof,

THE COURT,

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

Registrar: Lucien Dedichen,

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* Language of the request: Icelandic.

DÓMUR DÓMSTÓLSINS

22. mars 2002*

(Tilskipun ráðsins nr. 77/187/EBE – Breyting ríkisfyrirtækis í hlutafélag í eigu ríkisins)

Mál E-3/01

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

Alda Viggósdóttir

gegn

Íslandspósti hf

varðandi skýringu EES-samningsins, einkum tilskipun ráðsins nr. 77/187/EBE frá 14. febrúar 1977 um samræmingu á lögum aðildarríkjanna um vernd launþega við eigendaskipti að fyrirtækjum, atvinnurekstri eða hluta atvinnurekstrar (hér eftir "tilskipunin"), sérstaklega 1. og 3. gr. hennar.

DÓMSTÓLLINN,

skipaður dómurunum Þór Vilhjálmssyni, forseta, Carl Baudenbacher (framsögumanni) og Per Tresselt,

dómritari: Lucien Dedichen

* Beiðni um ráðgefandi álit er á íslensku.

having considered the written observations submitted on behalf of:

– Alda Viggósdóttir, represented by Stefán Geir Þórisson, Supreme Court Advocate;

– Íslandspóstur hf., represented by Andri Árnason, Supreme Court Advocate;

– the Government of Iceland, represented by Anna Jóhannsdóttir, Legal Officer, External Trade Department, Ministry for Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Dóra Sif Tynes, Legal Officer, Department of Legal & Executive Affairs, acting as Agent;

– the Commission of the European Communities, represented by John Forman and Jörn Sack, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard the oral observations of Alda Viggósdóttir, represented by Stefán Geir Þórisson; Íslandspóstur hf., represented by Jón Sigurðsson, District Court Advocate; the Government of Iceland, represented by Anna Jóhannsdóttir; the EFTA Surveillance Authority, represented by Dóra Sif Tynes, and the Commission of the European Communities, represented by Jörn Sack, at the hearing on 15 November 2001,

gives the following

Judgment

I Facts and procedure

1 By a reference dated 15 March 2001, registered at the Court 22 March 2001, Héraðsdómur Reykjavíkur (Reykjavík District Court) made a Request for an Advisory Opinion in a case pending before it between Alda Viggósdóttir (hereinafter, the "Plaintiff") against Íslandspóstur hf. (Iceland Post Ltd, hereinafter, the "Defendant").

2 In 1963, the Plaintiff began working for the General Directorate for Post and Telecommunication (*Póst og símamálastjórnin - Póstur og sími*), which later became the Post and Telecommunications Administration (*Póst- og símamálastofnunin*). On 1 January 1997, the Administration was, by Act No. 103/1996, converted into a wholly State-owned limited liability company, operating under the name "Post and Telecom Iceland Ltd. " In connection with the assumption of operations by this company, an employment contract was

hefur með tilliti til skriflegra greinargerða frá:

- Öldu Viggósdóttur. Í fyrirsvari er Stefán Geir Þórisson, hæstaréttarlögmaður, Reykjavík.

- Íslandspósti hf. Í fyrirsvari er Andri Árnason, hæstaréttarlögmaður, Reykjavík.

- Ríkisstjórn Íslands. Í fyrirsvari sem umboðsmaður er Anna Jóhannsdóttir, lögfræðingur á viðskiptaskrifstofu utanríkisráðuneytisins.

- Eftirlitsstofnun EFTA. Í fyrirsvari sem umboðsmaður er Dóra Sif Tynes, lögfræðingur á lögfræði- og framkvæmdasviði.

- Framkvæmdastjórn Evrópubandalaganna. Í fyrirsvari sem umboðsmenn eru John Forman og Jörn Sack, lögfræðingar hjá lagadeild.

svo og með tilliti til skýrslu framsögumanns,

og munnlegs málflutnings Stefáns Geirs Þórissonar af hálfu Öldu Viggósdóttur, Jóns Sigurðssonar, héraðsdómslögmanns, af hálfu Íslandspósts hf, Önnu Jóhannsdóttur af hálfu íslensku ríkisstjórnarinnar, Dóru Sif Tynes af hálfu Eftirlitsstofnunar EFTA og Jörn Sack af hálfu Framkvæmdastjórnar Evrópubandalaganna

hinn 22. mars 2002, kveðið upp svofelldan

Dóm

I Málsatvik og meðferð málsins

1 Með beiðni sem dagsett var 15. mars 2001 og skráð í málaskrá dómstólsins 22. mars, óskaði Héraðsdómur Reykjavíkur eftir ráðgefandi áliti í máli sem þar er rekið milli Öldu Viggósdóttur (stefnanda) og Íslandspósts hf (stefnda).

2 Stefnandi hóf 1963 störf hjá Póst- og símamálastjórninni (Pósti og síma), sem síðar varð Póst- og símamálastofnunin. Stofnuninni var breytt 1. janúar 1997 í hlutafélag, sem ríkið átti að öllu leyti, sbr. lög nr. 103/1996 um stofnun hlutafélags um rekstur Póst- og símamálastofnunar. Hlutafélagið var rekið undir heitinu Póstur og sími hf. Þegar hlutafélagið tók við rekstrinum var

concluded with the Plaintiff, covering her work for the new company. Subsequently, on 1 January 1998, the Defendant, Íslandspóstur hf., came into being as a result of the break-up of Post and Telecom Iceland Ltd. into two limited liability companies, and the Plaintiff became an employee of the Defendant.

3 The Defendant gave the Plaintiff, who was working as manager of a post office, notice of temporary suspension of employment on 5 October 1999. The Defendant offered the Plaintiff a termination of employment agreement. Under the terms of that proposal, the Plaintiff would have received 12 months salary plus vacation pay and a December bonus. The Plaintiff rejected the offer. By a letter of dismissal dated 28 December 1999, the Defendant gave the Plaintiff notice of final termination of employment, with the contractual three-month notice period. The reason stated for the dismissal was that the Plaintiff's dealings with the Defendant's employees and customers had not been satisfactory. The Plaintiff was asked not to work during the notice period. In addition to salary during the notice period, the Plaintiff received a further one month's salary.

4 In the main proceedings, the Plaintiff requested that the Defendant be ordered to pay damages and compensation for non-financial loss totalling ISK 6 896 120, plus accrued interest as specified in further detail. In addition, the Plaintiff requested that the Defendant be ordered to pay costs, plus value-added tax. The Defendant requested that the Court reject all claims of the Plaintiff; or, in the alternative, that the Plaintiff's claims be substantially reduced. In addition, the Defendant requested that costs be awarded in favour of the Defendant, or, in the alternative, that each party be ordered to bear its own costs in the case.

5 Héraðsdómur Reykjavíkur decided to submit a Request for an Advisory Opinion to the EFTA Court on the following questions:

> *1. Is Article 1(1) of Council Directive 77/187/EEC to be interpreted to the effect that the conversion of a State-owned entity into a wholly State-owned limited company constitutes a transfer within the meaning of that provision?*
>
> *2. Is Article 3(1) of Council Directive 77/187/EEC to be interpreted as prohibiting the provision, in an employment contract which is concluded in connection with a transfer within the meaning of Article 1(1) of the Directive, of less advantageous terms regarding termination of employment as compared with those enjoyed by the employee prior to the date of the transfer?*

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

ráðningarsamningur gerður við stefnanda um starf hennar fyrir það. Eftir þetta, hinn 1. janúar 1998, var stefndi, Íslandspóstur hf, stofnaður eftir skiptingu Pósts og síma hf í tvö hlutafélög. Stefnandi varð starfsmaður stefnda.

3 Stefnandi var forstöðumaður í pósthúsi. Stefndi leysti hana frá störfum tímabundið 5. október 1999. Stefndi bauð stefnanda starfslokasamning. Eftir honum hefði stefnandi fengið 12 mánaða laun auk orlofsgreiðslu og desemberuppbótar. Stefnandi hafnaði boðinu. Með uppsagnarbréfi 28. desember 1999 sagði stefndi stefnanda upp störfum með þriggja mánaða umsömdum uppsagnarfresti. Þær ástæður voru færðar fram fyrir uppsögninni, að samskipti stefnanda við starfsmenn stefnda og viðskiptavini hefðu ekki verið með viðunandi hætti. Því var beint til stefnanda, að hún sinnti ekki störfum til loka uppsagnarfrestsins. Auk launa þann tíma fékk stefnandi laun í einn mánuð til viðbótar.

4 Í málinu í héraði krefst stefnandi þess að stefnda verði gert að greiða skaðabætur og miskabætur alls 6.896.120 krónur auk dráttarvaxta eins og nánar er rakið. Að auki krefst stefnandi úr hendi stefnda málskostnaðar og jafngildis virðisaukaskatts. Stefndi krefst sýknu af öllum kröfum stefnanda, en til vara verulegrar lækkunar þeirra. Þá krefst stefndi málskostnaðar sér til handa, en til vara að aðilum sjálfum verði gert að bera kostnað sinn.

5 Héraðsdómur Reykjavíkur ákvað að senda EFTA-dómstólnum beiðni um ráðgefandi álit á þessum spurningum:

> *"1. Ber að skýra ákvæði 1. mgr. 1. gr. tilskipunar ráðsins 77/187/EBE þannig að það séu eigendaskipti í skilningi ákvæðisins þegar ríkisfyrirtæki er breytt í hlutafélag alfarið í eigu ríkisins?*
>
> *2. Ber að skýra ákvæði 1. mgr. 3. gr. tilskipunar ráðsins 77/187/EBE þannig að óheimilt sé að skerða með ráðningarsamningi, sem gerður er vegna eigendaskipta í skilningi 1. mgr. 1. gr. tilskipunarinnar, þau uppsagnarkjör sem launþegi naut fyrir eigendaskiptin?"*

6 Vísað er til skýrslu framsögumanns um frekari lýsingu löggjafar, atvika, málsmeðferðar og skriflegra greinargerða, sem dómstólnum bárust. Þessi atriði verða ekki rakin eða rædd hér á eftir nema að því leyti sem forsendur dómsins krefjast.

II Legal background

EEA Law

7 The Directive states *inter alia*:

"SECTION 1 Scope and definitions

Article 1

1. This Directive shall apply to the transfer of an undertaking, business or of part of a business to another employer as a result of a legal transfer or merger.

2. This Directive shall apply where and in so far as the undertaking, business or part of the business to be transferred is situated within the territorial scope of the Treaty.

3. This Directive shall not apply to sea-going vessels.

(…)

SECTION II Safeguarding of employees' rights

Article 3

1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer with the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.

2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions, with the provision that it shall not be less than one year.

3. Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer within the meaning of Article 1(1) in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary schemes referred to in the first subparagraph."

II Löggjöf

EES réttur

7 Í tilskipuninni segir m.a.:

> "1. ÞÁTTUR Gildissvið og skilgreiningar
>
> 1. gr.
>
> 1. Tilskipun þessi gildir um eigendaskipti að fyrirtækjum, atvinnurekstri eða hluta atvinnurekstrar vegna löglegs afsals eða samruna.
>
> 2. Tilskipun þessi gildir þegar fyrirtæki, atvinnurekstur eða hluti atvinnurekstrar, sem skipta á um eigendur að, er staðsettur innan þess yfirráðasvæðis þar sem sáttmálinn gildir.
>
> 3. Tilskipun þessi gildir ekki um hafskip.
>
> (…)
>
> 2. ÞÁTTUR Réttur launþega tryggður
>
> 3. gr.
>
> 1. Afsalshafi skal takast á hendur réttindi og skyldur afsalsgjafa í sambandi við ráðningarsamning eða ráðningarsamkomulag, sem var fyrir hendi þann dag sem eigendaskipti í skilningi 1. mgr. 1. gr. fara fram, þegar um slík eigendaskipti er að ræða.
>
> Aðildarríkin geta kveðið á um að afsalsgjafinn standi, eftir þann dag er eigendaskipti í skilningi 1. mgr. 1. gr. fara fram, ásamt afsalshafa við skuldbindingar sem gerðar hafa verið í sambandi við ráðningarsamning eða ráðningarsamkomulag.
>
> 2. Þegar eigendaskipti í skilningi 1. mgr. 1. gr. eru frágengin skal afsalshafinn virða þau launakjör og starfsskilyrði, sem samþykkt hafa verið í almennum kjarasamningi, með sömu skilmálum og giltu fyrir afsalsgjafa þar til samningi verður sagt upp eða hann rennur út eða þar til annar kjarasamningur öðlast gildi eða kemur til framkvæmda.
>
> Aðildarríkjunum er heimilt að stytta tímabilið sem launakjörum og starfsskilyrðum er haldið óbreyttum enda vari þetta tímabil að minnsta kosti eitt ár.
>
> 3. Ákvæði 1. og 2. mgr. gilda ekki um rétt launþega til elli- og örorkulífeyris eða eftirlifendabóta, þegar um er að ræða viðbótarlífeyrissjóði fyrir eina eða fleiri starfsstéttir sem eru utan lögskipaðra almannatryggingakerfa í aðildarríkjunum.
>
> Aðildarríkin skulu gera nauðsynlegar ráðstafanir til að vernda hagsmuni launþega og hagsmuni þeirra sem starfa ekki lengur við atvinnurekstur afsalsgjafa á þeim tíma sem gengið er frá eigendaskiptum í skilningi 1. mgr. 1. gr. varðandi áunninn eða væntanlegan rétt þeirra til ellilífeyris, að meðtöldum eftirlifendabótum, í viðbótarlífeyrissjóðum þeim sem um getur í undanfarandi undirgrein."

National law

8 The principal statutory provisions under examination in the main proceedings are set out below. Reference is made to Icelandic Act No. 77/1993 on the Legal Status of Employees in the Event of the Transfer of Undertakings (Lög um réttarstöðu starfsmanna við aðilaskipti að fyrirtækjum), in particular Sections 1 and 2. The first paragraph of Section 2 reads as follows:

> "As of the date of transfer within the meaning of the first paragraph of section 1, the transferee shall acquire the rights and obligations of the transferor as specified in the employment contract and respect the wage terms and terms of service that have been approved in general collective agreements, subject to the same conditions as applied to the transferor until such time as the contract is terminated or expires, or until another collective agreement takes effect or is applied."

9 Further, reference is made to Icelandic Act No. 103/1996 Establishing a Limited Company to Operate the Post and Telecommunications Administration (Lög um stofnun hlutafélags um rekstur Póst- og símamálastofnunar), particularly Sections 1, 7 and 8. The first paragraph of Section 8 reads as follows:

> "Permanent employees of the Post and Telecommunications Administration shall have the right of employment with the new company, and shall be offered positions therein which are comparable to those in which they were employed in the Administration, provided that they retain in the company the rights that they have already earned in the Administration. Their right to severance pay, however, shall be subject to the Civil Servants' Rights and Obligations Act in force at the time of commencement of this Act."

10 Reference is also made to Section 4 of the former Act No. 38/1954 on Civil Servants' Rights and Obligations (*Lög um réttindi og skyldur starfsmanna ríkisins*), which reads as follows:

> "If a person is appointed to a position, the view shall then be taken that he will work in that position until one of the following occurs:
>
> 1. he commits an offence while at work, with the result that he has to be dismissed from the position;
>
> 2. he does not meet the conditions of section 3 of this Act;
>
> 3. he is released from the position at his own request;
>
> 4. he attains the maximum age limit (cf. section 13);
>
> 5. he is transferred to another position with the State;
>
> 6. his period of appointment according to a letter of temporary appointment expires;
>
> 7. the position is abolished (cf. Section 14)."

11 Lastly, reference is made to the current Act No. 70/1996 on Civil Servants' Rights and Obligations (Lög um réttindi og skyldur starfsmanna ríkisins), in

Landsréttur

8 Helstu lagaákvæði sem koma til skoðunar í þessu máli eru eftirfarandi: Fyrst ber að nefna lög nr. 77/1993 um réttarstöðu starfsmanna við aðilaskipti að fyrirtækjum, einkum 1. og 2. gr. Ákvæði 1. mgr. 2. gr. hljóðar svo:

> "Frá og með þeim degi, sem aðilaskipti verða í skilningi 1. mgr. 1. gr., skal nýr eigandi takast á hendur réttindi og skyldur fyrri eigenda samkvæmt ráðningarsamningi og virða þau launakjör og starfsskilyrði sem samþykkt hafa verið í almennum kjarasamningi með sömu skilmálum og giltu fyrir fyrri eiganda þar til samningi verður sagt upp eða hann rennur út eða þar til annar kjarasamningur öðlast gildi eða kemur til framkvæmda."

9 Næst koma til skoðunar lög nr. 103/1996 *um stofnun hlutafélags um rekstur Póst- og símamálastofnunar*, einkum 1., 7. og 8. gr. Ákvæði 1. mgr. 8. gr. er svohljóðandi:

> "Fastráðnir starfsmenn Póst- og símamálastofnunar skulu eiga rétt á störfum hjá hinu nýja félagi og skulu þeim boðnar stöður hjá því, sambærilegar þeim er þeir áður gegndu hjá stofnuninni, enda haldi þeir hjá félaginu réttindum sem þeir höfðu þegar áunnið sér hjá stofnuninni. Þó fer um biðlaunarétt þeirra eftir þeim lögum um réttindi og skyldur starfsmanna ríkisins sem í gildi eru við gildistöku laga þessara."

10 Í þriðja lagi er vísað í 4. gr. fyrri laga nr. 38/1954 um réttindi og skyldur starfsmanna ríkisins, en greinin hljóðar svo:

> "Nú er maður skipaður í stöðu, og ber þá að líta svo á, að hann skuli gegna stöðunni, þar til eitthvert eftirgreindra atriða kemur til:
>
> 1. að hann brýtur af sér í starfinu, svo að honum beri að víkja úr því;
>
> 2. að hann fullnægir ekki skilyrðum 3. gr. laga þessara;
>
> 3. að hann fær lausn samkv. eigin beiðni;
>
> 4. að hann hefur náð hámarksaldri, sbr. 13. gr.;
>
> 5. að hann flyzt í aðra stöðu hjá ríkinu;
>
> 6. að skipunatími hans samkvæmt tímabundnu skipunarbréfi er runninn út;
>
> 7. að staðan er lögð niður, sbr. 14. gr."

11 Að síðustu koma til skoðunar gildandi lög nr. 70/1996 um réttindi og skyldur starfsmanna ríkisins, einkum 25. gr., en efni hennar er hið sama og í 4. gr. laga

particular Section 25, the content of which is the same as Section 4 of Act No. 38/1954 (cited in the previous paragraph).

III Findings of the Court

The first question

12 By the first question, the national court seeks to ascertain whether Article 1(1) of the Directive is to be interpreted to the effect that a conversion of a State administrative entity into a wholly State-owned limited liability company constitutes a transfer within the meaning of that provision.

13 The Plaintiff argues that the conditions for the application of the Directive appear to be clear. In particular, she argues that there is no requirement that there be a new owner of the undertaking or part thereof. Thus, the Directive is intended to cover all cases in which there is a change in the party operating the undertaking, regardless of whether a private or a public party is involved.

14 The Defendant submits that the Directive does not unequivocally cover the transfer of the rights and obligations of a State-owned entity to a limited liability company, unless some transfer of proprietary rights accompanies it. In the present case, the change consisted solely of a change in operational form, while the holder of proprietary rights, i.e. the Icelandic State, has remained unchanged.

15 In addition, the Defendant argues that, as a servant of the Post and Telecommunications Administration, the Plaintiff was a civil servant and therefore subject to public law, in particular Act No. 70/1996 on Civil Servants' Rights and Obligations. In the opinion of the Defendant, it follows from the judgment of the Court of Justice of the European Communities in case C-343/98 *Collino and Chiappero* [2000] ECR I-6659 that the Directive does not apply to civil servants enjoying the benefits of public law at the time of the alleged transfer.

16 The Government of Iceland submits that the Defendant, Íslandspóstur hf., operates a public postal service for a fee. Consequently, the Directive may apply to the circumstances in the main proceedings even though the Defendant is a State-owned entity, because a unilateral decision by a public authority to transfer a public entity to another legal person falls within the material scope of the Directive. However, the Government of Iceland argues that the Plaintiff's legal situation at the time of the transfer was governed by public law, and therefore the Directive is not applicable in the present case.

17 The EFTA Surveillance Authority argues that it constitutes a transfer of undertakings within the meaning of Article 1(1) of Directive when an entity that provides postal services for the public and is a part of the public administration,

nr. 38/1954, sem getið er að ofan.

III Álit dómstólsins

Fyrsta spurning

12 Með fyrstu spurningunni leitar Héraðsdómur Reykjavíkur svars við því, hvort skýra eigi 1. mgr. 1. gr. tilskipunarinnar þannig að breyting ríkisfyrirtækis í hlutafélag að fullu í ríkiseign sé eigendaskipti í skilningi ákvæðisins.

13 Stefnandi heldur því fram að skilyrði fyrir beitingu tilskipunarinnar virðist ljós. Sérstaklega heldur hann því fram að þess sé ekki krafist að nýr eigandi komi að fyrirtækinu eða hluta þess. Því sé tilskipuninni ætlað að gilda jafnan þegar skipti verða á rekstraraðila hvort sem einkaaðili eða opinber aðili eigi í hlut.

14 Stefndi heldur því fram, að ekki sé óyggjandi að tilskipunin taki til yfirfærslu réttinda og skyldna ríkisfyrirtækis til hlutafélags í ríkiseign nema því fylgi einhvers konar yfirfærsla eignaréttar. Í málinu, sem fyrir liggur, var breytingin aðeins varðandi rekstrarform, en eigandinn var hinn sami, þ.e. íslenska ríkið.

15 Ennfremur heldur stefndi því fram að stefnandi hafi verið opinber starfsmaður og um hana hafi gilt reglur opinbers réttar, þegar hún starfaði hjá Póst- og símamálastofnuninni. Hafi þetta einkum verið lög um réttindi og skyldur opinberra starfsmanna nr. 70/1996. Að áliti stefnda má ráða þetta af dómi dómstóls Evrópubandalaganna í máli C-343/98 *Collino og Chiappero* [2000] ECR I-6659. Stefndi telur leiða af þessum dómi, að tilskipunin gildi ekki um fyrrverandi starfsmenn Póst- og símamálastofnunar af þeirri ástæðu, að réttarstaða þeirra hafi farið eftir opinberum rétti þegar ætluð eigendaskipti áttu sér stað.

16 Íslenska ríkisstjórnin heldur því fram að stefndi reki opinbera póstþjónustu gegn gjaldi. Það leiði til þess að tilskipunin geti gilt um þær aðstæður sem eru í málinu fyrir Héraðsdómi Reykjavíkur, þó að stefndi sé í ríkiseign, vegna þess að einhliða ákvörðun yfirvalds um að færa ríkisfyrirtæki til annars lögaðila falli undir gildissvið tilskipunarinnar. Engu að síður heldur ríkisstjórnin því fram, að réttarstaða stefnanda hafi ráðist af opinberum rétti, þegar eigendaskiptin áttu sér stað og af þeim sökum verði tilskipuninni ekki beitt í þessu máli.

17 Eftirlitsstofnun EFTA heldur því fram að eigendaskipti gegn gjaldi á einingu, sem reki póstþjónustu fyrir almenning og sé hluti stjórnsýslunnar, til hlutafélags í ríkiseign sem sinnir hinu sama og stjórnsýslustofnunin gerði og hefur til þess

is transferred to a wholly State-owned limited company which carries out the same task as the administrative entity, and has for those purposes assumed its tangible and intangible assets. The persons affected by such a transfer must, however, have been protected under national employment law prior to the transfer.

18 The Commission of the European Communities states that the conversion of a State-owned economic entity into a wholly State-owned limited liability company constitutes a transfer within the meaning of the Directive.

19 The Court has in several judgments considered the concept of transfer within the meaning of Article 1 of the Directive (see Case E-2/95 *Eidesund* v *Stavanger Catering* [1995-1996] EFTA Court Report 3; Case E-2/96 *Ulstein and Røiseng* v *Møller* [1995-1996] EFTA Court Report 65; and Case E-3/96 *Ask and Others* v *ABB Offshore Technology and Aker Offshore Partner* [1997] EFTA Court Report 3).

20 In these judgments, the Court has set out criteria for determining whether there is a transfer within the meaning of Article 1(1) of the Directive. According to that case law, it is necessary to consider all the facts characterising the transaction in question, including the type of undertaking or business concerned, whether or not tangible assets, such as buildings and moveable property, or intangible assets, such as patents or know-how, are transferred, the value of the assets at the time of the transfer, whether or not most of the personnel is kept on by the new employer, whether or not customers are transferred, the degree of similarity between the activities carried out before and after the transfer and the period of any suspension of those activities. All those circumstances are, however, only individual factors in the overall assessment to be made and cannot therefore be considered in isolation (see, for example, *Eidesund*, cited above, at paragraph 32; see also, Case C-24/85 *Spijkers* v *Benedik* [1986] ECR 1119, at paragraph 13).

21 The Defendant does not appear to dispute that the requirements described in the previous paragraph are, to a sufficient degree, fulfilled in the case at hand, and that the conditions for the applicability of the Directive are thereby fulfilled. However, it is for the national court to make the necessary factual appraisal in order to establish whether these conditions are sufficiently met in the case before it.

22 The Defendant has submitted that the Directive does not unequivocally cover the transfer of the rights and obligations of a State entity to a limited liability company owned by the State, unless some transfer of proprietary rights accompanies it. The Defendant argues that no such transfer has taken place.

23 This argument must be rejected. The Icelandic State has, through the enactment of a statute, transferred its postal services from a State entity to a limited liability company wholly owned by the State. The fact that the transfer has been effected by statute rather than agreement, does not prevent the Directive from being applicable (see Case C-29/91 *Redmond Stichting* v *Hendrikus Bartol* [1992] ECR

tekið við eignum hennar, hvers eðlis sem þær eru, feli í sér eigendaskipti í skilningi 1. mgr. 1. gr. tilskipunarinnar. Þeir einstaklingar sem þetta varðar verða þó upphaflega að hafa notið verndar samkvæmt innlendri vinnulöggjöf.

18 Framkvæmdastjórn Evrópubandalaganna heldur því fram, að breyting á efnahagslegri einingu í ríkiseign í hlutafélag sem er að öllu leyti í eigu ríkisins feli í sér eigendaskipti í skilningi tilskipunarinnar.

19 Dómstóllinn hefur í nokkrum dómum fjallað um hugtakið eigendaskipti í skilningi 1. gr. tilskipunarinnar (sbr. mál E-2/95 *Eidesund* gegn *Stavanger Catering* [1995-1996] EFTA Court Report 3; mál E-2/96 *Ulstein og Røiseng* [1995-1995] EFTA Court Report 65; mál E-3/96 *Ask o.fl.* gegn *ABB Offshore Technology og Aker Offshore Partner* [1997] EFTA Court Report 3).

20 Í þessum dómum eru rakin atriði sem segja til um hvort eigendaskipti í merkingu 1. mgr. 1. gr. tilskipunarinnar hafi átt sér stað. Samkvæmt þessum fordæmum verður að skoða öll atvik sem einkenna yfirfærsluna þar á meðal hvers konar starfsemi eða fyrirtæki er um að ræða, hvort hlutir, svo sem byggingar eða lausafé, eða önnur verðmæti, svo sem einkaleyfi eða þekking, eru yfirfærð. Líta verður á verðmæti eignanna þegar yfirfært er, hvort meginhluti starfsfólks fer í þjónustu hins nýja vinnuveitanda, hvort viðskipamenn taka upp samband við hann, hve svipuð starfsemin er fyrir og eftir yfirfærsluna og hve lengi starfsemin kann að liggja niðri. Allt eru þetta þó aðeins einstök atriði varðandi heildarmat sem fara verður fram, og verða ekki skoðuð hvert fyrir sig (sbr. til dæmis mál E-2/95 *Eidesund*, sem vitnað er í hér á undan, 32. grein; svo og mál C-24/85 *Spijkers* gegn *Benedik* [1986] ECR 1119 í 13. grein).

21 Stefndi sýnist ekki andmæla því að þeim kröfum sem lýst er í síðustu grein sé mætt í málinu svo að nægilegt sé og að skilyrðin fyrir því að tilskipuninni verði beitt séu uppfyllt að því leyti. Engu að síður er það á verksviði Héraðsdóms Reykjavíkur að meta atvik eins og þarf til að ganga úr skugga um hvort skilyrðin séu uppfyllt nægilega í málinu, sem þar er rekið.

22 Stefndi hefur haldið því fram að tilskipunin taki ekki, svo að óyggjandi sé, til eigendaskipta á eignum og skyldum ríkisfyrirtækis í hendur hlutafélags í ríkiseign nema því fylgi yfirfærsla á eignarétti. Heldur stefndi því fram að slík eigendaskipti hafi ekki átt sér stað.

23 Þessari röksemd verður að hafna. Með lagasetningu hefur íslenska ríkið fært póstþjónustu sína frá einingu í ríkiseign til hlutafélags sem er að fullu í eigu ríkisins. Það kemur ekki í veg fyrir beitingu tilskipunarinnar, að yfirfærslan hefur farið fram með lagasetningu en ekki samkomulagi (sbr. mál C-29/91 *Redmond Stichting* gegn *Hendrikus Bartol* [1992] ECR I-3189 í 15. og 17. grein). Ekki

I-3189, at paragraphs 15 to 17). Nor does the fact that the limited liability company is also wholly owned by the State prevent the Directive from being applicable. It is sufficient that there is a change in the natural or legal person responsible for carrying out the business and assuming the position of an employer towards the employees of the undertaking (see case C-13/95 *Süzen* v *Zehnacker Gebäudereinigung* [1997] ECR I-1259, at paragraph 12; Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1267, at paragraph 28). Furthermore, the Court of Justice of the European Communities has found that the Directive may apply to a situation in which an entity operating telecommunications services for public use and managed by a public body within the State administration is, following decisions of the public authorities, the subject of a transfer for value to a private company established by another public body that holds its entire capital (see C-343/98 *Collino and Chiappero*, cited above, at paragraph 41).

24 On the basis of the foregoing, and assuming that the criteria set out above have been fulfilled, the answer to the first question must be that the conversion of a State-owned entity into a wholly State-owned limited liability company may constitute a transfer within the meaning of Article 1(1) of the Directive. Whether the transfer was for value or not is immaterial in that regard.

25 The Defendant has further argued that, as a servant of the Post and Telecommunications Administration, the Plaintiff was a civil servant at the time of the alleged transfer, and therefore subject to public law rather than national employment law. Since the Plaintiff was a civil servant, enjoying the benefits of public law at the time of transfer, it must follow from the judgment of the Court of Justice of the European Communities in C-343/98 *Collino and Chiappero*, cited above, that the Directive does not apply in the present case.

26 The Court notes that the Directive is intended to achieve partial harmonisation in the area of employment law, mainly by ensuring that the transferee maintains the protection guaranteed to employees under national employment law. Its aim is therefore to ensure, as far as possible, that the acquired rights protected by national employment law remain unchanged with the transferee, so that the persons affected by the transfer of the undertaking are not placed in a less favourable position solely as a result of the transfer. It is not, however, intended to establish a uniform level of protection throughout the Community on the basis of common criteria (see Case 105/84 *Foreningen for Arbejdsledere i Danmark v Danmols Inventar* [1985] ECR 2639, at paragraph 26; *Redmond Stichting* v *Hendrikus Bartol*, cited above, at paragraph 18; and Joined Cases C-173/96 and C-247/96 *Sánchez Hidalgo and Others* [1998] ECR I-8179, at paragraph 24; and *Collino and Chiappero*, cited above, at paragraph 37).

27 From this, the Court of Justice of the European Communities has drawn the conclusion that the Directive does not apply to employees who are not protected under the national employment law, regardless of the nature of their tasks (see *Collino and Chiappero*, cited above, at paragraph 38).

kemur sú staðreynd heldur í veg fyrir beitingu tilskipunarinnar, að hlutafélagið er að öllu leyti ríkiseign. Nægilegt er að breyting verður á þeirri persónu eða lögaðila sem ábyrgð ber á rekstrinum og sem kemur fram sem vinnuveitandi gagnvart starfsmönnum fyrirtækisins (sbr. mál C-13/95 *Süzen* gegn *Zehnacker Gebäudereinigung* [1997] ECR I-1259 í 12. gr. og sameinuð mál C-171/94 og C-172/94 *Merckx og Neuhuys* [1996] ECR I-1267 í 28. grein). Að auki hefur dómstóll Evrópubandalaganna komist að þeirri niðurstöðu að tilskipunin geti átt við ástand þar sem fyrirtæki sem rekur fjarskipti til almenningsnota og er stjórnað af opinberum stjórnsýsluaðila er með ákvörðun yfirvalda yfirfært gegn gjaldi til einkaréttarfélags sem stofnað er af öðrum opinberum aðila sem er eigandi alls stofnfjárins (sbr. mál C-343/98 *Collino og Chiappero*, nefnt að framan, í 41. grein).

24 Á grundvelli þess sem nú var sagt og á þeirri forsendu að önnur skilyrði, sem nefnd hafa verið, séu uppfyllt, verður að svara fyrstu spurningunni þannig, að breyting ríkisfyrirtækis í hlutafélag sem að öllu leyti er í eigu ríkisins geti verið eigendaskipti í skilningi 1. mgr. 1. gr. tilskipunarinnar. Hvort yfirfærslan var gegn gjaldi eða ekki skiptir ekki máli í þessu sambandi.

25 Stefndi hefur ennfremur haldið því fram að stefnandi hafi, þegar ætluð eigendaskipti áttu sér stað verið opinber starfsmaður og bundin af opinberum rétti fremur en innlendri vinnulöggjöf, þar sem hún var í þjónustu Póst- og símamálastofnunarinnar. Vegna þess að stefnandi var opinber starfsmaður og naut aðstöðu samkvæmt opinberum rétti þegar yfirfært var, hljóti að leiða af fyrrgreindum dómi dómstóls Evrópubandalaganna í máli C-343/98 *Collino og Chiappero* að tilskipuninni verður ekki beitt í þessu máli.

26 Dómstóllinn tekur fram, að tilskipuninni er ætlað að koma á samræmingu á vinnurétti að hluta, aðallega með því að tryggja þá vernd sem starfsmenn njóta í landsrétti. Tilgangurinn er því að tryggja, eftir því sem unnt er, að vernd áunninna réttinda samkvæmt landslögum á sviði vinnuréttar haldist óbreytt á vegum viðtakanda og staða fólks, sem eigendaskiptin varða, verði þannig ekki verri eingöngu vegna eigendaskiptanna. Tilskipuninni er hins vegar ekki ætlað að koma á samræmdri vernd innan Evrópubandalagsins með sameiginlegri viðmiðun. (Sjá mál 105/84 *Foreningen af Arbejdsledere i Danmark* gegn *Danmols Inventar* [1985] ECR 2639 í 26. grein, mál C-29/91 *Redmond Stichting* gegn *Hendrikus Bartol*, áður nefnt, í 18. grein; og sameinuð mál C-173/96 og C-247/96 *Sánchez Hidalgo og fleiri* [1998] ECR I-8237 í 24. grein; og C-343/98 *Collino og Chiappero*, áður nefnt, í 37. grein).

27 Af þessu hefur dómstóll Evrópubandalaganna dregið þá ályktun að tilskipunin gildi ekki um þá sem ekki njóta verndar sem launþegar eftir vinnurétti í heimalandi þeirra hvers eðlis sem starf þeirra er (samanber mál C-343/98 *Collino og Chiappero*, áður nefnt, í 38. grein).

28 This understanding has been confirmed by Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1998 L 201, p. 88). Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16) is a consolidated version of the various directives. Here it is specifically stated that for the purpose of the Directive, an "employee" shall mean "any person who, in the Member State concerned, is protected as an employee under national employment law." This more specific language confirms that the Directive does not apply in respect of functionaries whose protection from dismissal is stronger than that which may be afforded by national employment law. This Directive is referred to in point 32d of Annex XVIII to the EEA Agreement (see Decision of the EEA Joint Committee No 159/2001 of 11 December 2001).

29 On the basis of the foregoing, the Court finds that the Directive is only applicable in the present case if the Plaintiff was at the time of the transfer protected under national employment law. It also follows that the Directive is not applicable to the situation in the main proceedings if the Plaintiff enjoyed, at the relevant point in time, the special protection against dismissal granted only to civil servants for reasons associated with the public law function or the character of their employment. This must apply regardless of the specific nature of the Plaintiff's tasks as a servant of the Post and Telecommunications Administration.

30 The national court must therefore examine whether at the time of the transfer the Plaintiff in the present case enjoyed this special protection, or whether her protection from dismissal was governed by national employment law.

31 The national court's examination must be based on all legal instruments that may be relevant to the Plaintiff's situation, i.e. statutes, collective agreements and any contractual relationship between the Plaintiff and the Post and Telecommunications Administration. It cannot be ruled out that the status of the Plaintiff must be regarded as being partly governed by public law and partly by national employment law. In that event, a situation may arise where different sets of rules may apply to different aspects of her legal situation. It is for the national court to undertake this examination, on the basis of national law, with regard to the distinction between public law and national general employment law. If the national court finds that issues relating to protection against dismissal in the Plaintiff's case are primarily subject to rules of public law, it will proceed on the basis that the Directive does not apply. If, however, the national court finds that those issues are primarily subject to the rules of Icelandic general employment law, it is bound to proceed on the basis that the Directive applies.

32 The answer to the first question must therefore be that the conversion of a State entity into a wholly State-owned limited liability company may constitute a transfer within the meaning of Council Directive 77/187/EEC of 14 February

28 Þessi skilningur hefur verið staðfestur með tilskipun ráðsins 98/50/EC frá 29. júní 1998 sem breytti tilskipun 77/187/EBE um samræmingu á lögum aðildarríkjanna um vernd launþega við eigendaskipti að fyrirtækjum, atvinnurekstri eða hluta atvinnurekstrar (Stjórnartíðindi Evrópusambandsins, OJ 1998 Nr. L 201, bls. 88). Tilskipun ráðsins 2001/23/EC frá 12. mars 2001 um samræmingu á lögum aðildarríkjanna um vernd launþega við eigendaskipti að fyrirtækjum, atvinnurekstri eða hluta atvinnurekstrar (Stjórnartíðindi Evrópusambandsins, OJ 2001 nr. L 82 bls. 16) er samræmd gerð fyrri tilskipana. Sérstaklega er tekið fram að í tilskipuninni merki "launþegi" hvern þann "sem nýtur verndar sem launþegi í hlutaðeigandi aðildarríki samkvæmt innlendri vinnulöggjöf." Þetta sértæka orðalag staðfestir að tilskipunin gildir ekki um opinbera starfsmenn, sem eru verndaðir gegn uppsögn í ríkara mæli en leitt getur af innlendri vinnulöggjöf. Þessi tilskipun er nú talin í 18. viðauka við EES-samninginn, tölulið 32d, sbr. ákvörðun sameiginlegu nefndarinnar 11. desember 2001.

29 Á grundvelli þess, sem sagt hefur verið, er það niðurstaða dómstólsins að tilskipunin gildi aðeins í málinu sem fyrir liggur ef stefnandi var þegar eigendaskiptin áttu sér stað verndaður samkvæmt vinnulöggjöf í heimalandi hans. Einnig leiðir það af þessu, að tilskipunin gildir ekki um aðstæður sem fjallað er um í Héraðsdómi Reykjavíkur, ef stefnandi naut, á þeim tíma sem máli skiptir, þeirrar sérstöku verndar gegn uppsögn sem eingöngu er veitt opinberum starfsmönnum af ástæðum sem tengjast starfi þeirra samkvæmt opinberum rétti eða eðli starfsins. Þetta verður að gilda án tillits til sérstaks eðlis starfa stefnanda í þjónustu Póst- og símamálastofnunar.

30 Héraðsdómur Reykjavíkur verður þess vegna að kanna, hvort stefnandi í þessu máli naut, þegar eigendaskiptin áttu sér stað, þessarar sérstöku verndar, eða hvort vernd hennar gegn uppsögn réðst af innlendri vinnulöggjöf.

31 Héraðsdómur Reykjavíkur verður að byggja könnun sína á öllum réttargerðum, sem gætu átt við stöðu stefnanda, þ.e. lögum, kjarasamningum og samningssambandi milli stefnanda og Póst- og símamálastofnunar. Ekki verður útilokað að staða stefnanda verði talin ráðast að hluta af opinberum rétti og að hluta af innlendri vinnulöggjöf. Ef svo er getur skapast slík staða að mismunandi reglur gildi um mismunandi hluta réttarstöðu stefnanda. Héraðsdómur Reykjavíkur verður að gera þessa könnun á grundvelli landsréttar og taka tillit til aðgreiningar ríkisréttar og innlendrar vinnulöggjafar landsins. Komist héraðsdómurinn að þeirri niðurstöðu að atriði sem varða vernd stefnanda gegn uppsögn séu aðallega á sviði opinbers réttar, miðar hann við, að tilskipuninni verði ekki beitt. Ef héraðsdómurinn kemst hins vegar að þeirri niðurstöðu að þessi atriði séu aðallega á sviði íslenskrar vinnulöggjafar, hlýtur hann að vinna á þeim grundvelli, að tilskipuninni verði beitt.

32 Svar við fyrri spurningunni verður því að vera að breyting á einingu í eigu ríkisins í hlutafélag, sem ríkið á að öllu leyti, getur verið eigendaskipti í skilningi tilskipunar ráðsins 77/187/EBE 14. febrúar 1977 um vernd launþega við

1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. Further, that Directive may apply when an employee, at the time of the transfer, was protected as an employee under national employment law. It is for the national court to assess whether that was the case or whether the employee enjoyed protection from dismissal under public law.

The second question

33 By its second question the national courts seeks to ascertain whether Article 3(1) of the Directive is to be interpreted as prohibiting the provision, in an employment contract concluded in connection with a transfer within the meaning of Article 1(1) of the Directive, of less advantageous terms regarding termination of employment as compared with those enjoyed by the employee prior to the date of the transfer.

34 The Court notes that the answer to this question is only relevant if the national court comes to the conclusion that the Plaintiff in this case was, at the time of the transfer, an employee protected under national employment law and thus by the Directive.

35 The Defendant has argued that the Plaintiff, in her contract of employment with the new limited liability company, had renounced her rights with regard to more favourable rules concerning dismissal.

36 The Court has previously held that the transfer of the employee's rights cannot be restricted, even with the employee's consent (Case E-3/95 *Langeland* v *Norske Fabricom* [1995-1996] EFTA Court Report 36, at paragraph 43; see also Case 324/86 *Tellerup* v *Daddy's Dance Hall* [1988] ECR 739, at paragraph 15).

37 This case law is mainly based on the objective of the Directive, which is not to improve the situation of an employee following a transfer, but merely to preserve his acquired rights. The new employer may, therefore, agree with the employee to change the terms of the latter's employment to the same extent as could have been done during the contractual relationship with the previous employer. However, the transfer of the undertaking may not in itself constitute the reason for the change in the terms of employment. Otherwise, the mandatory provisions of the Directive could be easily circumvented.

38 It is not disputed that the contract at issue in the main proceedings, which was the basis of the Plaintiff's legal situation after the conversion of the State entity into a limited liability company, was made in connection with the transfer.

39 The answer to the second question must therefore be that an employee cannot waive the rights conferred upon him by the mandatory provisions of Directive 77/187/EEC. The Directive does not, however, preclude an agreement with the

eigendaskipti að fyrirtækjum, atvinnurekstri eða hluta atvinnurekstrar. Til að tilskipunin geti gilt þarf launþegi ennfremur að hafa sem launþegi notið verndar innlendrar vinnulöggjafar. Það kemur í hlut Héraðsdóms Reykjavíkur að meta hvort svo var eða hvort launþeginn naut verndar gegn uppsögn eftir opinberum rétti.

Önnur spurning

33 Í annarri spurningunni óskar Héraðsdómur Reykjavíkur svars við því hvort 1. mgr. 3. gr. tilskipunarinnar beri að skýra svo að óheimilt sé í ráðningarsamningi, sem gerður er vegna eigendaskipta í skilningi 1. mgr. 1. gr. tilskipunarinnar, að mæla fyrir um lakari uppsagnarkjör en þau sem launþegi naut fyrir eigendaskiptin.

34 Dómstóllinn bendir á að svarið við þessari spurningu skiptir aðeins máli ef héraðsdómur kemst að þeirri niðurstöðu að stefnandi í þessu máli sé launþegi sem við eigendaskiptin njóti verndar samkvæmt innlendri vinnulöggjöf og þar af leiðandi samkvæmt tilskipuninni.

35 Stefndi heldur því fram að stefnandi hafi í ráðningarsamningi um starf hennar hjá hinu nýja hlutafélagi fallið frá rétti sínum samkvæmt hinum hagstæðu uppsagnarkjörum.

36 Dómstólinn hefur áður komist að þeirri niðurstöðu að ekki sé unnt að takmarka yfirfærslu réttinda launþega, jafnvel ekki með samþykki launþegans (mál E-3/95 *Langeland* gegn *Norske Fabricom* [1995 - 1996] EFTA Court Report 36 í 43. grein; samanber einnig mál 324/86 *Tellerup* gegn *Daddy´s Dance Hall* [1988] ECR 739 í 15. grein).

37 Tilvitnaðir dómar eru einkum byggðir á markmiðum tilskipunarinnar, sem eru ekki þau að bæta kjör launþega vegna eigendaskiptanna, heldur aðeins að vernda uppsöfnuð réttindi hans. Hinn nýi vinnuveitandi getur þess vegna samið við launþega um að breyta kjörum hans að því marki sem heimilt hefði verið á meðan á ráðningarsambandinu við hinn fyrri vinnuveitanda stóð. Á hinn bóginn geta eigendaskiptin sjálf aldrei verið ástæða til breytinga á ráðningarkjörum, þar sem mjög auðvelt væri að öðrum kosti að fara í kringum ófrávíkjanleg ákvæði tilskipunarinnar.

38 Óumdeilt er að samningur sá sem fjallað er um í málinu, sem var grundvöllurinn að réttarstöðu stefnanda eftir breytingu á einingu í eigu ríkisins í hlutafélag með lögum nr. 103/1997 var gerður í tilefni af eigendaskiptunum.

39 Svarið við annarri spurningunni verður því það að launþegi getur ekki fallið frá réttindum sem hann nýtur samkvæmt ófrávíkjanlegum ákvæðum tilskipunar 77/187/EBE. Tilskipunin kemur aftur á móti ekki í veg fyrir að launþegi semji

new employer to modify the employment relationship to the extent that such modification is permitted by the applicable national law in situations other than those involving the transfer of an undertaking.

IV Costs

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

On those grounds,

THE COURT,

in answer to the question referred to it by Héraðsdómur Reykjavíkur by the reference of 15 March 2001, hereby gives the following Advisory Opinion:

The conversion of a State entity into a wholly State-owned limited liability company may constitute a transfer within the meaning of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. That Directive may apply when an employee, at the time of the transfer, was protected as an employee under national employment law. It is for the national court to assess whether that was the case or whether the employee enjoyed protection from dismissal under public law.

An employee cannot waive the rights conferred upon him by the mandatory provisions of Directive 77/187/EEC. The Directive does not, however, preclude an agreement with the new employer to modify the employment relationship to the extent that such modification is permitted by the applicable national law in situations other than those involving the transfer of an undertaking.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 22 March 2002.

við nýjan vinnuveitanda um að breyta vinnusambandinu að því marki, sem heimilt er samkvæmt þeim reglum landsréttar sem við eiga, við aðrar aðstæður en þær sem tengjast eigendaskiptunum.

IV Málskostnaður

40 Ríkisstjórn Íslands, Eftirlitsstofnun EFTA og Framkvæmdastjórn Evrópubandalaganna, sem lagt hafa greinargerðir sínar fyrir dómstólinn, skulu bera sinn málskostnað. Að því er lýtur að aðilum málsins verður að líta á málsmeðferð fyrir EFTA-dómstólnum sem þátt í meðferð málsins fyrir Héraðsdómi Reykjavíkur og kemur það í hlut þess dómstóls að kveða á um málskostnað.

Á þessum forsendum telur

DÓMSTÓLLINN

að spurningum þeim, sem Héraðsdómur Reykjavíkur beindi til hans með úrskurði upp kveðnum 15 mars 2001, beri að svara með svohljóðandi ráðgefandi áliti:

Breyting á einingu í eigu ríkisins í hlutafélag, sem ríkið á að öllu leyti, getur verið eigendaskipti í skilningi Tilskipunar ráðsins 77/187/EBE 14. febrúar 1977 um samræmingu á lögum aðildarríkjanna um vernd launþega við eigendaskipti að fyrirtækjum, atvinnurekstri eða hluta atvinnurekstrar. Til að tilskipunin geti gilt þarf launþegi ennfremur að hafa sem launþegi notið verndar innlendrar vinnulöggjafar. Það kemur í hlut Héraðsdóms Reykjavíkur að meta hvort svo var eða hvort launþeginn naut verndar gegn uppsögn eftir opinberum rétti.

Launþegi getur ekki fallið frá réttindum sem hann nýtur samkvæmt ófrávíkjanlegum ákvæðum tilskipunar 77/187/EBE. Tilskipunin kemur aftur á móti ekki í veg fyrir að launþegi semji við nýjan vinnuveitanda um að breyta vinnusambandinu að því marki, sem heimilt er samkvæmt þeim reglum landsréttar sem við eiga, við aðrar aðstæður en þær sem tengjast eigendaskiptunum.

Þór Vilhjálmsson Carl Baudenbacher Per Tresselt

Kveðið upp í heyranda hljóði í Lúxemborg 22. mars 2002.

Lucien Dedichen
Registrar

Thór Vilhjálmsson
President

Lucien Dedichen
Dómritari

Þór Vilhjálmsson
Dómsforseti

REPORT FOR THE HEARING
in Case E-3/01

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

Alda Viggósdóttir

and

Iceland Post Ltd (Íslandspóstur hf.)

on the interpretation of the Agreement on the European Economic Area (hereinafter the "EEA Agreement"), with particular reference to Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (hereinafter the "Directive"), in particular Articles 1 and 3 thereof.[1]

I. Introduction

1. By a reference dated 15 March 2001, registered at the Court on 22 March 2001, the Reykjavík District Court made a Request for an Advisory Opinion in a case brought before it by Alda Viggósdóttir (hereinafter, the "Plaintiff") against the Iceland Post Ltd (Íslandspóstur hf., hereinafter, the "Defendant").

[1] The Directive has, in the meantime, been amended by Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1998 No L 201, p. 88). Reference to that act is made in point 24 of Annex XVIII to the EEA Agreement. Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 No L 82, p. 16) is a consolidated version of the various directives.

SKÝRSLA FRAMSÖGUMANNS
í máli E-3/01

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

Alda Viggósdóttir

gegn

Íslandspósti hf.

varðandi túlkun á samningnum um Evrópska efnahagssvæðið (hér eftir EES) og tilskipun ráðsins 77/187/EBE frá 14. febrúar 1977 um samræmingu á lögum aðildarríkjanna um vernd launþega við eigendaskipti að fyrirtækjum, atvinnurekstri eða hluta atvinnurekstrar (hér eftir tilskipunin), einkum 1. og 3. gr. hennar.[1]

I. Inngangur

1. Með beiðni dagsettri 15. mars 2001, sem skráð var í málaskrá dómstólsins 7. febrúar 2000, óskaði Héraðsdómur Reykjavíkur eftir ráðgefandi áliti í máli sem rekið er fyrir dómstólnum milli Öldu Viggósdóttur, stefnanda, og Íslandspósts hf., stefnda.

[1] Tilskipuninni hefur nú verið breytt með tilskipun ráðsins 98/50/EB frá 29. júní 1998 um breytingu á tilskipun 77/187/EBE um samræmingu á lögum aðildarríkjanna um vernd launþega við eigendaskipti að fyrirtækjum, atvinnurekstri eða hluta atvinnurekstrar (Stjórnartíðindi Evrópusambandsins, OJ 1998 Nr. L 201, bls. 88). Vísað er til þessarar gerðar í 24. tölulið í viðauka 18 við EES-samninginn. Fyrrnefndar tvær tilskipanir hafa verið felldar saman og gefnar út á ný sem tilskipun ráðsins 2001/23/EB frá 12 mars 2001 umsamræmingu á lögum aðildarríkjanna um vernd launþega við eigendaskipti að fyrirtækjum, atvinnurekstri eða hluta atvinnurekstrar (Stjórnartíðindi Evrópusambandsins, OJ 2001 nr. L 82, bls. 16).

II. Legal background

EEA law

2. The Directive states *inter alia*:

> *"SECTION 1 Scope and definitions*
> *Article 1*
> *1. This Directive shall apply to the transfer of an undertaking, business or of part of a business to another employer as a result of a legal transfer or merger.*
> *2. This Directive shall apply where and in so far as the undertaking, business or part of the business to be transferred is situated within the territorial scope of the Treaty.*
> *3. This Directive shall not apply to sea-going vessels.*
>
> *(…)*
>
> *SECTION II Safeguarding of employees' rights*
> *Article 3*
> *1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.*
> *Member States may provide that, after the date of transfer with the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.*
> *2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement. Member States may limit the period for observing such terms and conditions with the provision that it shall not be less than one year.*
> *3. Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States. Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer within the meaning of Article 1(1) in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary schemes referred to in the first subparagraph."*

II. Löggjöf

EES-réttur

2. Í tilskipuninni segir m.a.:

"1. ÞÁTTUR Gildissvið og skilgreiningar
1. gr.
1. Tilskipun þessi gildir um eigendaskipti að fyrirtækjum, atvinnurekstri eða hluta atvinnurekstrar vegna löglegs afsals eða samruna.
2. Tilskipun þessi gildir þegar fyrirtæki, atvinnurekstur eða hluti atvinnurekstrar, sem skipta á um eigendur að, er staðsettur innan þess yfirráðasvæðis þar sem sáttmálinn gildir.
3. Tilskipun þessi gildir ekki um hafskip.

(…)

2. ÞÁTTUR Réttur launþega tryggður
3. gr.
1. Afsalshafi skal takast á hendur réttindi og skyldur afsalsgjafa í sambandi við ráðningarsamning eða ráðningarsamkomulag, sem var fyrir hendi þann dag sem eigendaskipti í skilningi 1. mgr. 1. gr. fara fram, þegar um slík eigendaskipti er að ræða.
Aðildarríki geta kveðið á um að afsalsgjafinn standi, eftir þann dag er eigendaskipti í skilningi 1. mgr. 1. gr. fara fram, ásamt afsalshafa við skuldbindingar sem gerðar hafa verið í sambandi við ráðningarsamning eða ráðningarsamkomulag.
2. Þegar eigendaskipti í skilningi 1. mgr. 2. gr. eru frágengin skal afsalshafinn virða þau launakjör og starfsskilyrði, sem samþykkt hafa verið í almennum kjarasamningi, með sömu skilmálum og giltu fyrir afsalsgjafa þar til samningi verður sagt upp eða hann rennur út eða þar til annar kjarasamningur öðlast gildi eða kemur til framkvæmda.
Aðildarríkjunum er heimilt að stytta tímabilið sem launakjörum og starfsskilyrðum er haldið óbreyttum enda vari þetta tímabil að minnsta kosti eitt ár.
3. Ákvæði 1. og 2. mgr. gilda ekki um rétt launþega til elli- og örorkulífeyris eða eftirlifendabóta, þegar um er að ræða viðbótarlífeyrissjóði fyrir eina eða fleiri starfsstéttir sem eru utan lögskipaðra almannatryggingakerfa í aðildarríkjunum.
Aðildarríkin skulu gera nauðsynlegar ráðstafanir til að vernda hagsmuni launþega og hagsmuni þeirra sem starfa ekki lengur við atvinnurekstur afsalsgjafa á þeim tíma sem gengið er frá eigendaskiptum í skilningi 1. mgr. 1. gr. varðandi áunninn eða væntanlegan rétt þeirra til ellilífeyris, að meðtöldum eftirlifendabótum, í viðbótarlífeyrissjóðum þeim sem um getur í undanfarandi undirgrein"

National law

3. The principal statutory provisions that must be examined in this case are set out in the following. The first is Icelandic Act No. 77/1993 on the Legal Status of Employees in the Event of the Transfer of Undertakings (*Lög um réttarstöðu starfsmanna við aðilaskipti að fyrirtækjum*, hereinafter the "Act"), in particular sections 1 and 2. The first paragraph of section 2 reads as follows:

> *"As of the date of transfer within the meaning of the first paragraph of section 1, the transferee shall acquire the rights and obligations of the transferor as specified in the employment contract and respect the wage terms and terms of service that have been approved in general collective agreements, subject to the same conditions as applied to the transferor until such time as the contract is terminated or expires, or until another collective agreement takes effect or is applied."*

4. Next is Icelandic Act No. 103/1996 Establishing a Limited Company to Operate the Post and Telecommunications Administration (*Lög um stofnun hlutafélags um rekstur Póst- og símamálastofnunar*), particularly sections 1, 7 and 8. The first paragraph of section 8 reads as follows:

> *"Permanent employees of the Post and Telecommunications Administration shall have the right of employment with the new company, and shall be offered positions therein which are comparable to those in which they were employed in the Administration, provided that they retain in the company the rights that they have already earned in the Administration. Their right to severance pay, however, shall be subject to the Civil Servants' Rights and Obligations Act in force at the time of commencement of this Act."*

5. Thirdly, section 4 of the previous Civil Servants' Rights and Obligations Act, No. 38/1954 (*Lög um réttindi og skyldur starfsmanna ríkisins*) reads as follows:

> *"If a person is appointed to a position, the view shall then be taken that he will work in that position until one of the following occurs:*
> *1. he commits an offence while at work, with the result that he has to be dismissed from the position;*
> *2. he does not meet the conditions of section 3 of this Act;*
> *3. he is released from the position at his own request;*
> *4. he attains the maximum age limit (cf. section 13);*
> *5. he is transferred to another position with the State;*
> *6. his period of appointment according to a letter of temporary appointment expires;*
> *7. the position is abolished (cf. section 14)."*

6. Lastly, there is the current Civil Servants' Rights and Obligations Act, No.

Landsréttur

3. Helstu lagaáakvæði sem koma til skoðunar í þessu máli eru eftirfarandi: Fyrst ber að nefna lög nr. 77/1993 um réttarstöðu starfsmanna við aðilaskipti að fyrirtækjum, hér eftir "lögin"), einkum 1. og 2. gr. Ákvæði 1. mgr. 2. gr. hljóðar svo:

> *"Frá og með þeim degi, sem aðilaskipti verða í skilningi 1. mgr. 1. gr., skal nýr eigandi takast á hendur réttindi og skyldur fyrri eigenda samkvæmt ráðningarsamningi og virða þau launakjör og starfsskilyrði sem samþykkt hafa verið í almennum kjarasamningi með sömu skilmálum og giltu fyrir fyrri eiganda þar til samningi verður sagt upp eða hann rennur út eða þar til annar kjarasamningur öðlast gildi eða kemur til framkvæmda."*

4. Næst koma til skoðunar lög nr. 103/1996 *um stofnun hlutafélags um rekstur Póst- og símamálastofnunar*), einkum 1., 7. og 8. gr. Ákvæði 1. mgr. 8. gr. er svohljóðandi:

> *"Fastráðnir starfsmenn Póst- og símamálastofnunar skulu eiga rétt á störfum hjá hinu nýja félagi og skulu þeim boðnar stöður hjá því, sambærilegar þeim er þeir áður gegndu hjá stofnuninni, enda haldi þeir hjá félaginu réttindum sem þeir höfðu þegar áunnið sér hjá stofnuninni. Þó fer um biðlaunarétt þeirra eftir þeim lögum um réttindi og skyldur starfsmanna ríkisins sem í gildi eru við gildistöku laga þessara."*

5. Í þriðja lagi kemur til athugunar 4. gr. fyrri laga nr. 38/1954 um réttindi og skyldur starfsmanna ríkisins, en greinin hljóðar svo:

> *"Nú er maður skipaður í stöðu, og ber þá að líta svo á, að hann skuli gegna stöðunni, þar til eitthvert eftirgreindra atriða kemur til:*
>
> *1. að hann brýtur af sér í starfinu, svo að honum beri að víkja úr því;*
> *2. að hann fullnægir ekki skilyrðum 3. gr. laga þessara;*
> *3. að hann fær lausn samkv. eigin beiðni;*
> *4. að hann hefur náð hámarksaldri, sbr. 13. gr.;*
> *5. að hann flyzt í aðra stöðu hjá ríkinu;*
> *6. að skipunatími hans samkv. tímabundnu skipunarbréfi er runninn út;*
> *7. að staðan er lögð niður, sbr. 14. gr.)."*

6. Að síðustu koma til skoðunar gildandi lög nr. 70/1996 um réttindi og

70/1996 (*Lög um réttindi og skyldur starfsmanna ríkisins*).

III. Facts and procedure

7. The Plaintiff began working for the General Directorate for Post and Telecommunication (*Póst og símamálastjórnin - Póstur og sími*), which later became the Post and Telecommunications Administration (*Póst- og símamálastofnunin*), in 1963. On 1 January 1997, the Administration was converted into a wholly State-owned limited company, see Act No. 103/1996 Establishing a Limited Company to Operate the Post and Telecommunications Administration (*Lög um stofnun hlutafélags um rekstur Póst og símamálastofnunar*). In connection with the take-over of operations by the limited company, an employment contract was concluded with the Plaintiff, covering her work for the new company. Subsequently, on 1 January 1998, the Defendant, Iceland Post Ltd, came into being as a result of the division of the Post and Telecommunications Administration Ltd into two limited companies, and the Plaintiff became an employee of the Defendant. The Defendant gave the Plaintiff notice of temporary termination of employment on 5 October 1999. The Defendant offered the Plaintiff a termination of employment agreement, which she rejected. Under that agreement, she was to have received her fixed monthly wages for 12 months, plus vacation pay and a December bonus. By a letter of dismissal dated 28 December 1999, the Defendant gave the Plaintiff notice of final termination of employment, with the contractually agreed three-month notice period. The reason stated for the dismissal was that the Plaintiff's dealings with the Defendant's employees and customers had not been satisfactory. The Plaintiff was asked not to work during the notice period. In addition to wages during the notice period, the Plaintiff received a further one month's wages.

8. The Plaintiff asks that the Defendant be ordered to pay damages and compensation for non-financial loss due to the dismissal, which the Plaintiff maintains was unlawful.

IV. Questions

9. The following questions were referred to the EFTA Court:

> **1. Is Article 1(1) of Council Directive 77/187/EEC to be interpreted to the effect that the conversion of a State-owned entity into a wholly State-owned limited company constitutes a transfer within the meaning of that provision?**
>
> **2. Is Article 3(1) of Council Directive 77/187/EEC to be interpreted as prohibiting the provision, in an employment contract which is concluded in connection with a transfer within the meaning**

skyldur starfsmanna ríkisins.

III. Málavextir og meðferð málsins

7. Stefnandi hóf störf hjá Póst- og símamálastjórninni - Pósti og síma, sem síðar varð Póst- og símamálastofnunin, á árinu 1963. Hinn 1. janúar 1997 var stofnuninni breytt í hlutafélag alfarið í eigu ríkisins, sbr. lög nr. 103/1996 um stofnun hlutafélags um rekstur Póst- og símamálastofnunar. Vegna yfirtöku hlutafélagsins á rekstrinum var gerður ráðningarsamningur við stefnanda um starf hennar hjá hinu nýja félagi. Hinn 1. janúar 1998 varð stefndi, Íslandspóstur hf., síðan til við skiptingu Póst- og símamálastofnunar hf. í tvö hlutafélög og varð stefnandi starfsmaður stefnda. Stefndi sagði stefnanda upp störfum tímabundið hinn 5. október 1999. Stefndi bauð stefnanda starfslokasamning sem hún hafnaði. Samkvæmt honum átti stefnandi að fá greidd föst mánaðarlaun í 12 mánuði, auk orlofs og desemberuppbótar. Með uppsagnarbréfi, dags. 28. desember 1999, sagði stefndi stefnanda upp störfum með þriggja mánaða umsömdum uppsagnarfresti. Tilgreindar ástæður uppsagnarinnar voru þær að samskipti stefnanda við starfsmenn og viðskiptavini hafi ekki verið með ásættanlegum hætti. Ekki var óskað eftir vinnuframlagi stefnanda til loka uppsagnarfrestsins. Auk launa í uppsagnarfresti fékk stefnandi greidd laun í einn mánuð til viðbótar.

8. Stefnandi krefst skaða- og miskabóta vegna uppsagnarinnar sem hún telur að hafi verið ólögmæt.

IV. Spurningar

9. Eftirfarandi spurningar voru bornar undir EFTA-dómstólinn:

1. Ber að skýra ákvæði 1. mgr. 1. gr. tilskipunar ráðsins 77/187/EBE þannig að það séu eigendaskipti í skilningi ákvæðisins þegar ríkisfyrirtæki er breytt í hlutafélag alfarið í eigu ríkisins?

2. Ber að skýra 1. mgr. 3. gr. tilskipunar ráðsins 77/187/EBE þannig að óheimilt sé að skerða með ráðningarsamningi, sem gerður

of Article 1(1) of the Directive, of less advantageous terms regarding termination of employment as compared with those enjoyed by the employee prior to the date of the transfer?

V. Written Observations

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

– Ms. Alda Viggósdóttir, represented by Stefán Geir Þórisson, hæstaréttarlögmaður (Supreme Court Advocate) Reykjavík;

– Iceland Post Ltd (Íslandspóstur hf.), represented by Andri Árnason, hæstaréttarlögmaður (Supreme Court Advocate) Reykjavík;

– the Government of Iceland, represented by Anna Jóhannsdóttir, Legal Officer, External Trade Department, Ministry for Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Dóra Sif Tynes, Legal Officer, Department of Legal & Executive Affairs of the EFTA Surveillance Authority, acting as Agent;

– the Commission of the European Communities, represented by John Forman and Jörn Sack, members of its Legal Service, acting as Agents.

The first question

Alda Viggósdóttir

11. The Plaintiff states that the conditions for the application of the Directive would appear to be clear to the effect that there is no requirement that there be a new owner of the undertaking or part thereof. Thus, the Directive is intended to cover all cases in which there is a change in the party operating the undertaking, regardless of whether a private or a public party is involved. Moreover, the new party is to be liable for the management and thus acts as the employer of the employees affected by the transfer.

12. The Plaintiff contends that, therefore, the most important consideration is whether the transferee acquires the position vis-à-vis the employees of the operation which the transferor held prior to the transfer. Reference is made to judgments of the Court of Justice of the European Communities in *Süzen*,[2]

[2] Case C-13/95 *Süzen* v *Zehnacker Gebäudereinigung* [1997] ECR I-1259 (hereinafter "*Süzen*").

er vegna eigendaskipta í skilningi 1. mgr. 1. gr. tilskipunarinnar, þau uppsagnarkjör sem launþegi naut fyrir eigendaskiptin?

V. Greinargerðir

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

– Öldu Viggósdóttur. Í fyrirsvari er Stefán Geir Þórisson, hæstaréttarlögmaður, Reykjavík;

– Íslandspósti hf. Í fyrirsvari er Andri Árnason, hæstaréttarlögmaður, Reykjavík;

– Ríkisstjórn Íslands. Í fyrirsvari sem umboðsmaður Anna Jóhannsdóttir, lögfræðingur á viðskiptaskrifstofu utanríkisráðuneytisins;

– Eftirlitsstofnun EFTA. Í fyrirsvari sem umboðsmaður Dóra Sif Tynes, lögfræðingur á lögfræði- og framkvæmdasviði;

– Framkvæmdastjórn Evrópubandalaganna. Í fyrirsvari sem umboðsmenn John Forman og Jörn Sack, lögfræðingar hjá lagadeild.

Fyrri spurningin

Alda Viggósdóttir

11. Stefnandi heldur því fram að skilyrðin fyrir því að tilskipunin eigi við virðist vera afdráttarlaus að því leyti að ekki sé gerð sú krafa að um sé ræða nýjan eiganda að fyrirtæki eða hluta þess. Af því leiði, að tilskipuninni sé ætlað að ná til allra þeirra tilvika þegar skipti verði á rekstraraðila starfseminnar, hvort sem einkaaðili eða opinber aðili eigi í hlut. Ennfremur að nýi aðilinn verði ábyrgur fyrir rekstrinum og komi þannig fram sem vinnuveitandi þess starfsfólks sem eigendaskiptin hafa áhrif á.

12. Stefnandi telur því að meginmáli skipti hvort afsalshafi öðlist þá stöðu, sem afsalsgjafi hafði gagnvart starfsfólki starfseminnar áður en eigendaskiptin áttu sér stað. Vísað er til dóma dómstóls Evrópubandalaganna í málunum *Süzen*,[2] *Spijkers*[3] og *Merckx and Neuhuys*.[4] Sé tekið mið af dómum í þessum málum ráði

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[2] Mál C-13/95 *Süzen* gegn *Zehnacker Gebäudereinigung* [1997] ECR I-1259 (hér eftir "*Süzen*").

[3] Mál C-24/85 *Spijkers* gegn *Benedik* [1986] ECR 1119 (hér eftir "*Spijkers*").

[4] Sameinuð mál C-171/94 og C-172/94 *Merckx og Neuhuys* [1996] ECR I-1267.

Spijkers[3] and *Merckx and Neuhuys*.[4] Following that case-law, the decisive criterion is the replacement of the employer "irrespective of any change of ownership". The Directive places the emphasis on the employment relationship and the rights that may flow therefrom. For that reason, the emphasis is placed on the change of employer rather than the change of owner: it is a matter of key importance whether the employees find themselves facing a new legal person as their employer.

13. The Plaintiff refers to the rulings of the EFTA Court,[5] where the conditions which must be met for a transfer to be covered by Article 1(1) of the Directive were examined. Particular reference is made to the *Eidesund* case, in which the conditions were discussed thoroughly in the light of the case-law of the Court of Justice of the European Communities up to that time.

14. The Plaintiff points out that Article 1(1) of the Directive applies to measures taken by the State in connection with privatisation or change to the form of ownership of a publicly-owned undertaking or institution. In this connection, it is irrelevant whether the share capital is still wholly-owned by the State if there has been a change of the party operating the undertaking. In the assessment of whether the privatisation of the Post and Telecommunications Administration comes within the definition of a transfer under Article 1(1) of the Directive, account should be taken of the fact that the employees of the institution received a new legal person, i.e. the limited company, as their employer. It is the limited company and its Board of Directors which determine the company's human resources policy. It is the limited company which bears liability for claims made by the employees. Thus, it is the limited company which takes over the position previously held by the State. The fact that the State is still currently the sole owner of the share capital is simply of no significance, in the light of the case-law of the Court of Justice of the European Communities.

15. The Plaintiff maintains that the conclusion to be drawn from the aforementioned case-law is that a change of ownership is by no means a prerequisite for the application of the Directive.

16. In the *Spijkers* judgment, the Court of Justice of the European Communities set out some guidelines for determining whether there is a transfer within the meaning of the Directive.[6] The Plaintiff maintains that those guidelines

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3 Case C-24/85 *Spijkers* v *Benedik* [1986] ECR 1119 (hereinafter "*Spijkers*").

4 Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1267.

5 Case E-2/95 *Eidesund* v *Stavanger Catering A/S* [1996] EFTA Court Report 3 (hereinafter "*Eidesund*"); Case E-2/96 *Ulstein and Røiseng* [1996] EFTA Court Report 65 (hereinafter "*Ulstein*"); Case E-3/96 *Ask and Others* v *ABB Offshore Technology and Aker Offshore Partner AS* [1997] EFTA Court Report 3.

6 See paragraph 13 of the reasons in the *Spijkers* judgment, which reads as follows: "In order to determine whether those conditions are met, it is necessary to consider all the facts characterising the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and moveable property, are transferred,

úrslitum að skipti hafi orðið á vinnuveitanda "óháð breytingum á eignaraðild". Tilskipunin leggi áherslu á vinnusambandið og réttindi sem því geti fylgt. Af þeirri ástæðu sé áherslan lögð á vinnuveitendaskiptin fremur en eigendaskiptin. Það sé lykilatriði hvort starfsfólkið standi frammi fyrir nýjum lögaðila sem vinnuveitanda.

13. Stefnandi vísar til dóma EFTA-dómstólsins,[5] þar sem til skoðunar komu skilyrði þau sem eigendaskipti verða að fullnægja til að þau verði talin falla undir 1. mgr. 1. gr. tilskipunarinnar. Einkum er vísað til *Eidesund*-málsins þar sem rækilega hafi verið fjallað um skilyrðin í ljósi dómaframkvæmdar dómstóls Evrópubandalaganna fram til þess að málið var afgreitt.

14. Stefnandi bendir á að 1. mgr. 1. gr. tilskipunarinnar eigi við ráðstafanir ríkisins í tengslum við einkavæðingu eða breytingar á eignarhaldi fyrirtækis eða stofnunar í opinberri eigu. Það skipti ekki máli í þessu sambandi hvort hlutafé sé enn allt í eigu ríkisins, ef skipti verði á þeim aðila sem annast rekstur fyrirtækisins. Við mat á því hvort einkavæðing Póst- og símamálastofnunarinnar falli undir eigendaskipti í skilningi 1. mgr. 1. gr. tilskipunarinnar, beri að hafa í huga þá staðreynd að starfsfólkið fær nýjan lögaðila, þ.e. hlutafélagið, sem vinnuveitanda. Það sé hlutafélagið og stjórn þess sem ráði starfsmannastefnu félagsins. Það sé hlutafélagið sem sé ábyrgt gagnvart kröfum starfsmanna. Það sé því hlutafélagið sem kemur í staðinn fyrir ríkið. Sú staðreynd að ríkið sé enn sem komið er eini eigandi hlutafjárins skipti einfaldlega engu máli, sbr. dómaframkvæmd dómstóls Evrópubandalaganna.

15. Stefnandi telur að draga megi þá ályktuna af fyrrnefndum dómum að breyting á eignarhaldi sé alls ekki nauðsynlegt skilyrði fyrir því að tilskipunin eigi við.

16. Í dómi í *Spijkers*-málinu hafi dómstóll Evrópubandalaganna sett fram sjónarmið til leiðbeiningar við mat á því hvort um sé að ræða eigendaskipti í skilningi tilskipunarinnar.[6] Stefnandi telur að samkvæmt þessum sjónarmiðum sé

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5 Mál E-2/95 *Eidesund* gegn *Stavanger Catering A/S* [1996] EFTA Court Report 3 (hér eftir "*Eidesund*"); Mál E-2/96 *Ulstein og Røiseng* [1996] EFTA Court Report 65 (hér eftir "*Ulstein*"); Mál E-3/96 *Ask o. fl.* gegn *ABB Offshore Technology og Aker Offshore Partner AS* [1997] EFTA Court Report 3.

6 Sjá málsgrein 13 í rökstuðningi í dómi í *Spijkers* málinu, sem hljóðar svo: "Til að ákvarða hvort skilyrðum þessum er fullnægt er nauðsynlegt að taka mið af öllum þeim atvikum sem einkenna þá ráðstöfun sem um ræðir, þ.m.t. tegund fyrirtækis eða atvinnurekstrar, hvort áþreifanleg verðmæti, svo sem byggingar og laust fé, eru látnar af hendi, verðmæti óáþreifanlegra eigna á þeirri stundu er yfirfærsla á sér stað, hvort hinn nýi atvinnurekandi hefur tekið yfir meiri hluta starfsmanna, hvort viðskiptavinir fylgja með og að hvaða marki starfsemin, eftir yfirfærsluna, er sambærileg við það sem var fyrir, og hversu lengi, ef um það hefur verið að ræða, starfsemin hefur legið niðri. Að því er þó að gæta að þetta eru einstök atriði sem koma til skoðunar við heildarmat og þau verði því ekki lögð til grundvallar ein og sér."

make it clear that the Directive is to be interpreted in such a way that the privatisation of the Post and Telecommunications Administration comes within the scope of the Directive.

17. The Plaintiff states that the new company took over all of the employees of the post offices and all of the tangible assets and moveable property of the Post and Telecommunications Administration. The activities were the same before and after the change in the form of ownership, and all of the commercial goodwill and customers were taken over by the new company. According to the case-law[7] of the Court of Justice of the European Communities, the Directive is to be interpreted in such a way that the privatisation of the Post and Telecommunications Administration comes within the scope of the Directive.

18. A similar question was answered in the affirmative by the Court of Justice of the European Communities in the case *Collino and Chiappero*.[8]

19. According to the Plaintiff, the central issue is that, when a public body is privatised, a new legal person which takes over the operations comes into being. When such a measure is taken, there is also a change in the person responsible for operating the undertaking, which alone is sufficient to constitute a transfer within the meaning of Article 1(1) of the Directive. This conclusion follows from the fact that the Directive is intended to be comprehensive in scope, and the general rule is that transfers will be covered by the Directive unless they are specifically excluded from its scope. The fact that a transfer takes places in several stages, i.e. with the business being assigned by the original transferee to another transferee,[9] does not affect the above conclusion. The employees are in need of the same protection, irrespective of the technical nature of the transfer.

20. The Plaintiff proposes that the first question should be answered as follows:

> *"Article 1(1) of Council Directive 77/187/EEC is to be interpreted to the effect that the conversion of a State-owned entity into a wholly State-owned limited company constitutes a transfer within the meaning of that provision."*

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the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation."

7 See footnote 3, *Spijkers*.

8 Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659 (hereinafter "*Collino and Chiappero*").

9 Cases 324/86 *Tellerup* v *Daddy's Dance Hall* [1988] ECR 739, at paragraph 9 (hereinafter "*Daddy's Dance Hall*").

það ótvírætt að tilskipunina beri að túlka þannig að einkavæðing Póst- og símamálastofnunar falli undir gildissvið hennar.

17. Stefnandi heldur því fram að hið nýja hlutafélag hafi tekið yfir allt starfsfólk póststöðvanna auk allra fasteigna og lausafjár Póst- og símamálastofnunar. Starfsemin fyrir og eftir breytingu á eignarforminu hafi verið sú sama, auk þess sem viðskiptavild og viðskiptavinir hafi að öllu leyti flust yfir til hins nýja fyrirtækis. Samkvæmt dómaframkvæmd[7] dómstóls Evrópubandalaganna beri að túlka tilskipunina þannig að einkavæðing Póst- og símamálastofnunar falli undir gildissvið hennar.

18. Sambærilegri spurningu hafi verið svarað játandi af dómstól Evrópubandalaganna í dómi í málinu *Collino and Chiappero.*[8]

19. Samkvæmt því sem stefnandi heldur fram er það meginatriði, þegar um sé að ræða einkavæðingu fyrirtækis eða stofnunar í opinberri eigu, að til verður nýr lögaðili, sem tekur við rekstrinum. Við slíka ráðstöfun verði jafnframt skipti á þeim sem er ábyrgur fyrir rekstri starfseminnar, en það eitt sé nægjanlegt til að um eigendaskipti í skilningi 1. mgr. 1. gr. tilskipunarinnar sé að ræða. Þessi niðurstaða ræðst í raun af því að gildissviði tilskipunarinnar sé ætlað að vera almennt, og sé meginreglan sú að eigendaskipti eigi undir hana nema þau séu berlega undanskilin frá gildissviði hennar. Það hafi ekki áhrif á ofangreinda niðurstöðu þótt eigendaskipti eigi sér stað í þrepum, þ.e. starfsemin sé framseld frá upphaflegum framsalshafa til annars framsalshafa.[9] Starfsfólkið hafi þörf fyrir sömu vernd óháð tæknilegri útfærslu eigendaskiptanna.

20. Stefnandi leggur til að fyrri spurningunni verði svarað á eftirfarandi hátt:

> *"Skýra ber ákvæði 1. mgr. 1. gr. tilskipunar ráðsins 77/187/EBE þannig að það séu eigendaskipti í skilningi ákvæðisins þegar ríkisfyrirtæki er breytt í hlutafélag alfarið í eigu ríkisins."*

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7 Sjá nmgr. 3 *Spijkers*.

8 Mál C-343/98 *Collino og Chiappero* [2000] ECR I-6659 (hér eftir "*Collino and Chiappero*").

9 Máls 324/86 *Tellerup* gegn *Daddy's Dance Hall* [1988] ECR 739, málsgrein 9 (hér eftir "*Daddy's Dance Hall*").

Iceland Post Ltd

21. The Defendant submits that the Directive does not unequivocally cover the transfer of the rights and obligations of a State-owned entity to a limited company owned by the relevant State (a change of form), unless it is accompanied by some sort of transfer of ownership. According to Article 1(1) of the Directive, the Directive applies to the "transfer" of an undertaking, business or part of a business as a result of "a legal transfer or merger".

22. In the present case, it has been established that neither a legal transfer nor a merger took place when a limited company was established to operate the Post and Telecommunications Administration in 1996. The change, therefore, consisted solely of a change in operational form, with the owner, i.e. the Icelandic State, remaining unchanged.

23. The main part of the activities of Iceland Post Ltd consists of activities which were transferred to the company through the change, whilst the administrative part of the postal operations of the Post and Telecommunications Administration was transferred to a special public institution, the Post and Telecom Administration, which was founded at the same time.

24. The Defendant maintains that the judgment of the Court of Justice of the European Communities in *Collino and Chiappero*[10] cannot be regarded as stating unequivocally that a change in the operational form of a public entity constitutes a transfer, with the result that assets undergo a change of ownership.

25. According to the Defendant, the first question from the Héraðsdómur Reykjavíkur concerns only whether Article 1(1) of the Directive is to be interpreted to the effect that the conversion of a State-owned entity into a wholly State-owned limited company constitutes a transfer within the meaning of the provision. This question must be regarded as misleading to some extent, since it must be understood as meaning that the Directive applies to all employees in the event of a transfer, irrespective of their legal position in other respects.

26. The Defendant submits that the Directive must be interpreted narrowly, and as not necessarily applying to all employees in the event of a transfer; in other words, differences in legal position must be taken into account in the assessment of the scope of the Directive.

27. In *Collino and Chiappero*, the Court of Justice of the European Communities specifically discussed the issue which has also been raised by the Héraðsdómur Reykjavíkur in its first question to the EFTA Court. In its conclusion in *Collino and Chiappero*, the Court of Justice of the European

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[10] See footnote 8, *Collino and Chiappero*.

Íslandspóstur

21. Stefndi heldur því fram að það sé ekki óyggjandi að tilskipunin taki til yfirfærslu réttinda og skyldna ríkisfyrirtækis til hlutafélags í eigu viðkomandi ríkis (formbreyting) nema samhliða verði einhvers konar "eigendaskipti". Samkvæmt 1. mgr. 1. gr. tilskipunarinnar gildi hún um "eigendaskipti" að fyrirtækjum, atvinnurekstri eða hluta atvinnurekstrar vegna "löglegs afsals eða samruna".

22. Í þessu máli liggi fyrir að hvorki hafi verið um afsal eða samruna að ræða þegar hlutafélag hafi verið stofnað um rekstur Póst- og símamálastofnunar árið 1996. Breytingin hafi því eingöngu falist í breyttu rekstrarformi með óbreyttri eignaraðild, þ.e. íslenska ríkisins.

23. Meginhluti starfsemi Íslandspósts hf. sé fólgin í atvinnustarfsemi sem flutt hafi verið yfir til félagsins við breytinguna, en samhliða hafi stjórnsýsluþáttur póstrekstrar Póst- og símamálastofnunar verið fluttur til sérstakrar opinberrar stofnunar, Póst- og fjarskiptastofnunar, sem stofnuð hafi verið samhliða.

24. Stefndi telur að því verði ekki haldið fram með réttu að í dómi dómstóls Evrópubandalaganna í *Collino and Chiappero*[10] hafi því afdráttarlaust verið slegið föstu að formbreyting á rekstri opinberrar starfsemi teljist eigendaskipti þannig að verðmæti hafi skipt um eigendur.

25. Stefndi telur að með fyrri spurningu dómstólsins sé einungis spurt um hvort skýra beri ákvæði 1. mgr. 1. gr. tilskipunarinnar svo, að það séu eigendaskipti í skilningi ákvæðisins þegar ríkisfyrirtæki sé breytt í hlutafélag alfarið í eigu ríkisins. Telja verði umrædda spurningu að nokkru leyti misvísandi, þar sem skilja verði hana svo að tilskipunin taki til allra launþega við eigendaskipti, óháð réttarstöðu þeirra að öðru leyti.

26. Íslandspóstur hf. telur að skýra verði tilskipunina þröngt með þeim hætti að ekki sé víst að hún taki til allra launþega við eigendaskipti, þ.e. að taka verði tillit til mismunandi réttarstöðu við mat á gildissviði tilskipunarinnar.

27. Dómstóll Evrópubandalaganna hafi í *Collino and Chiappero*, fjallað sérstaklega um fyrri spurninguna sem héraðsdómur leiti álits EFTA-dómstólins á. Í niðurstöðu sinni í *Collino and Chiappero*, hafi dómstóll Evrópubandalaganna

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[10] Sjá nmgr. 8, *Collino and Chiappero*.

Communities stressed that the employees of ASST had been civil servants up to the time they were transferred to Iritel, and that they were therefore subject to public law provisions. Only citizens of Member States to whom national labour legislation (in the private sector) applies are able to base their rights on the Directive. Thus, it was argued, the Directive did not apply to those who were not subject to such labour law, irrespective of their field of work. The Court of Justice of the European Communities took the view that, at the time of the transfer of rights in the case then under examination, the employees of the State-owned entity, ASST, were civil servants and were therefore subject to public law, and not to national labour legislation applying to the private sector, but that a final assessment of this point was up to the relevant court. From this it followed that the provisions of Article 1(1) of the Directive applied only to citizens who were subject to labour law applicable to the private sector.

28. In the present case, it is not disputed that, as an employee of the Post and Telecommunications Administration, the Plaintiff was a civil servant and was therefore subject to public law, in particular the Civil Servants' Rights and Obligations Act, No. 70/1996, which applies to civil servants, nor that the Plaintiff's legal position was subject to Act No. 70/1996 when the Post and Telecommunications Administration was converted into a limited company under Act No. 103/1996. The Plaintiff did not work in the private sector prior to her transfer to Iceland Post Ltd, and therefore did not come under the labour legislation normally applying to employees under private law. The Plaintiff argues that, from this, it is clear that the Directive does not apply to the former employees of the Post and Telecommunications Administration.

The Government of Iceland

29. Referring to *Collino and Chiappero*, the Government of Iceland submits that the Defendant operates a public postal service for a fee. Consequently, the Directive may apply to the circumstances in the main proceedings, even though the Defendant is a State-owned entity, because a unilateral decision by a public authority to transfer a public undertaking to another legal person falls within the material scope of the Directive.[11]

30. Therefore, the Government of Iceland suggests that the first question be answered mostly in the affirmative, in keeping with the judgment of the European Court of Justice of the European Communities in *Collino and Chiappero*.

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[11] See footnote 8, *Collino and Chiappero*, at paragraphs 34, 35 and 41.

lagt áherslu á að starfsmenn ASST hefðu verið opinberir starfsmenn fram að því að þeir fluttust yfir til Iritel og því hafi þeir lotið reglum opinbers réttar. Einungis þeir þegnar í aðildarríkjunum sem innlend vinnulöggjöf í einkageiranum tæki til, gætu byggt rétt sinn á tilskipuninni. Þannig var haldið fram tilskipunin tæki ekki til þeirra sem ekki féllu undir slíka vinnulöggjöf, óháð starfssviði þeirra. Dómurinn áleit að við yfirfærslu réttinda í því máli sem til umfjöllunar var, hafi starfsmenn ríkisfyrirtækisins ASST verið opinberir starfsmenn og því hafi um réttarstöðu þeirra farið samkvæmt opinberum rétti, en ekki samkvæmt hinni almennu vinnulöggjöf, en að slíkt væri á færi viðkomandi dómstóls að meta endanlega. Af þessu leiddi að ákvæði 1. mgr. 1. gr. tilskipunarinnar giltu aðeins þegar um væri að ræða starfsmenn sem féllu undir vinnulöggjöf fyrir hinn almenna vinnumarkað.

28. Í þessu máli er ekki um það deilt að stefnandi hafi sem starfsmaður Póst- og símamálastofnunar verið opinber starfsmaður og lotið opinberum rétti. Um opinbera starfsmenn gildi lög nr. 70/1996 um réttindi og skyldur starfsmanna ríkisins. Óumdeilt sé í málinu að um réttarstöðu stefnanda hafi farið samkvæmt lögum nr. 70/1996, er Póst- og símamálastofnun hafi verið breytt í hlutafélag, sbr. lög nr. 103/1996. Hún hafi ekki starfað á almennum vinnumarkaði áður en kom að yfirfærslunni til Íslandspósts hf. og því hafi hún ekki fallið undir vinnulöggjöf sem almennt hafi átt við um starfsfólk í einkaréttarlegu tilliti. Af þessu megi ljóst vera að tilskipunin gildi ekki um fyrrum starfsmenn Póst- og símamálastofnunar.

Ríkisstjórn Íslands

29. Ríkisstjórn Íslands vísar til dóms í málinu *Collino and Chiappero*, og heldur því fram að stefndi reki opinbera póstþjónustu gegn gjaldi. Af því leiði að tilskipunin geti átt við aðstæður eins og þær sem séu fyrir hendi í aðalmálinu, þótt stefndi sé í ríkiseign, vegna þess að einhliða ákvörðun opinbers yfirvalds um það að færa ríkisfyrirtæki yfir til annars lögaðila falli undir gildissvið tilskipunarinnar.[11]

30. Af þessum sökum leggur Ríkisstjórn Íslands til að fyrri spurningunni verði í aðalatriðum svarað játandi, í samræmi við dóm dómstóls Evrópubandalaganna í málinu *Collino and Chiappero*.

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[11] Sjá nmgr. 8, *Collino and Chiappero*, málsgreinar 34, 35 og 41.

The EFTA Surveillance Authority

31. The EFTA Surveillance Authority refers to the purpose of the Directive, which is to ensure that the restructuring of undertakings within the common market does not adversely affect the workers in the undertakings concerned.[12]

32. The EFTA Surveillance Authority refers to the case-law of the Court of Justice of the European Communities, according to which the Directive applies to all transfers of entities which are engaged in economic activities, whether or not they operate with a view to profit.[13] However, it has not been held to be applicable in instances where there is a mere reorganisation of the structure of public administration, as the transfer then concerns activities involving the exercise of public authority.[14]

33. The EFTA Surveillance Authority states that it is unimportant whether the transfer in question results from unilateral decisions of a public authority or from an agreement between the transferor and transferee.[15] What has to be assessed are the facts characterising the transfer, such as whether buildings and moveable property are transferred, whether or not the majority of employees are taken over by the transferee and the degree of similarity between the activities carried out before and after the transfer.[16]

34. Reference is made to a judgment of the Court of Justice of the European Communities in which it has held, in the context of competition law, that an undertaking which has been granted an exclusive right to carry out postal services performs a task in the general economic interest.[17] The referring court in the present case has not submitted any information on whether Iceland Post Ltd has been granted such an exclusive right. However, for the purposes of assessing whether the change of the Postal Administration into a limited company constitutes a transfer of undertaking within the meaning of the Act, it may be assumed that the administration, and later the company into which it evolved, is engaged in economic activities which render the Act applicable in the case at hand.

35. Furthermore, the Court of Justice of the European Communities has held that the Directive may apply to a situation in which an entity operating

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12 Case 135/83 *Abels* v *Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 479, at paragraph 18.

13 Case C-382/92 *Commission* v *United Kingdom* [1994] ECR I-2435, at paragraphs 44 to 46 (hereinafter "*Commission* v *United Kingdom*").

14 Case C-298/94 *Henke* v *Gemeinde Schierke und Verwaltungsgemeinschaft 'Brocken'* [1996] ECR I-4989, at paragraphs 14 and 17 (hereinafter "*Henke*").

15 Case C-29/91 *Redmond Stichting* v *Bartol* [1992] ECR I-3189, at paragraphs 15 to 17 (hereinafter "*Redmond Stichting*").

16 See footnote 5, *Eidesund*, at paragraph 32; see also footnote 2, *Süzen*, at paragraph 14.

17 Case 320/91 *Corbeau* [1993] ECR I-2533, at paragraph 15.

Eftirlitsstofnun EFTA

31. Eftirlitsstofnun EFTA vísar til tilgangs tilskipunarinnar, sem sé að tryggja að breyting á fyrirtæki á hinum sameiginlega markaði hafi ekki áhrif til hins verra fyrir starfsmenn viðkomandi fyrirtækis.[12]

32. Eftirlitsstofnun EFTA vísar til dómaframkvæmdar dómstóls Evrópubandalaganna þar sem gert sé ráð fyrir að tilskipunin eigi við allar yfirfærslur eininga sem hafa með höndum efnahagslega starfsemi, hvort sem þær eru reknar í hagnaðarskyni eða ekki.[13] Aftur á móti hafi hún ekki verið talin eiga við þar sem um sé að ræða hreina endurskipulagningu opinberrar stjórnsýslu, þar sem yfirfærslan tekur til starfsemi sem varðar framkvæmd opinbers valds.[14]

33. Eftirlitsstofnun EFTA heldur því fram að litlu skipti hvort eigendaskipti sé að rekja til einhliða ákvörðunar opinberra yfirvalda eða samnings milli afsalsgjafa og afsalshafa.[15] Það sem hafa þurfi í huga séu aðstæður við eigendaskiptin, svo sem hvort byggingar og laust fé fylgir með í skiptunum, hvort meirihluti starfsmanna fari til hins nýja aðila og að hvaða marki starfsemin er sambærileg við það sem hún var fyrir eigendaskiptin.[16]

34. Vísað er til dóms dómstóls Evrópubandalaganna þar sem komist hafi verið að þeirri niðurstöðu, í tengslum við samkeppnisreglur, að fyrirtæki sem fengið hafi einkarétt til að reka póstþjónustu veiti þjónustu sem hefur almenna efnahagslega þýðingu.[17] Dómstóllinn sem hér óski eftir áliti hafi ekki veitt neinar upplýsingar um það hvort Íslandspóstur hf. hafi fengið slíkan einkarétt. Á hinn bóginn megi, við mat á því hvort breyting á Póst- og símamálastofnuninni í hlutafélag, feli í sér eigendaskipti í skilningi tilskipunarinnar, gera ráð fyrir að stjórnsýslustofnunin og hlutafélagið sem hún síðar varð, hafi með höndum efnahagslega starfsemi, sem geri það að verkum að tilskipunin eigi við.

35. Ennfremur er bent á að dómstóll Evrópubandalaganna hafi komist að þeirri niðurstöðu, að tilskipunin geti átt við um aðstæður þar sem eining, sem

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12 Mál 135/83 *Abels* gegn *Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 479, málsgrein 18.

13 Mál C-382/92 *Commission* gegn *United Kingdom* [1994] ECR I-2435, málsgreinar 44 til 46 (hér eftir "*Commission* gegn *United Kingdom*").

14 Mál C-298/94 *Henke* gegn *Gemeinde Schierke und Verwaltungsgemeinschaft 'Brocken'* [1996] ECR I-4989, málsgreinar 14 og 17 (hér eftir "*Henke*").

15 Mál C-29/91 *Redmond Stichting* gegn *Bartol* [1992] ECR I-3189, málsgreinar 15 til 17 (hér eftir "*Redmond Stichting*").

16 Sjá nmgr. 5, *Eidesund*, málsgrein 32; sjá einnig nmgr. 2, *Süzen*, málsgrein 14.

17 Mál 320/91 *Corbeau* [1993] ECR I-2533, málsgrein 15.

telecommunications services for public use and managed by a public body within the State administration is, following a decision of the public authorities, the subject of a transfer for value to a private-law company established by another public body which holds its entire capital.[18]

36. The EFTA Surveillance Authority submits that the same interpretation should apply to an entity which operates postal services for public use and which is part of the public administration, which is subsequently subject to a transfer for value to a private-law company wholly owned by the State.

37. The EFTA Surveillance Authority submits that it is for the national court to determine whether the change of a postal administration into a limited company fulfils the criteria of transfer.[19] Consequently, it is for the national court to determine whether the company in the present case performs an economic activity and whether the facts characterising the transfer point towards there being a transfer within the meaning of Article 1(1) of the Directive.

38. The EFTA Surveillance Authority proposes that the first question be answered as follows:

> *"Transfer for value of an entity operating postal services for public use which is a part of the public administration to a wholly State-owned limited company, which carries out the same task as the administrative entity and has for those purposes taken over its tangible and intangible assets, constitutes a transfer of undertakings within the meaning of Article 1(1) of Directive 77/187/EEC. The persons concerned by such a transfer must, however, originally have been protected under national employment law."*

Commission of the European Communities

39. The Commission of the European Communities refers to the case-law of the Court of Justice of the European Communities, according to which Directive 77/187 is applicable to the transfer of all undertakings, public or private, which are engaged in economic activities and whether or not they operate with a view to profit.[20]

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18 See footnote 8, *Collino and Chiappero*, at paragraph 41.

19 Cases 105/84 *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar* [1985] ECR 2639, at paragraphs 27 and 28 (hereinafter "*Danmols Inventar*"); see footnote 16, *Redmond Stichting*, at paragraph 18 and Joined Cases C-173/96 and C-247/96 *Sánchez Hidalgo and Others* [1998] ECR I-8237, at paragraph 24.

20 See footnote 15, *Redmond Stichting*; footnote 13, *Commission* v *United Kingdom*, at paragraphs 44 to 46; footnote 8, *Collino and Chiappero*, at paragraph 30; and Case C-175/99 *Mayeur* [2000] ECR I-7780, at paragraph 32. See also Article 1(1)(c) of Directive 98/50.

veitt hafði símaþjónustu fyrir almenning og rekin hafði verið af stofnun sem var hluti af opinberri stjórnsýslu, var samkvæmt ákvörðun yfirvalda framseld gegn gjaldi til einkafyrirtækis sem sett hafði verið á fót af annarri opinberri stofnun sem átti allt hlutaféð.[18]

36. Eftirlitsstofnun EFTA heldur því fram að sama skýring eigi við um einingu sem rekur póstþjónustu fyrir almenning og sem er hluti af hinni almennu stjórnsýslu, sem síðar verður andlag eigendaskipta gegn gjaldi til einkafyrirtækis sem er að öllu leyti í eigu ríkisins.

37. Eftirlitsstofnun EFTA heldur því fram að það sé hlutverk dómstóls aðildarríkis að ákvarða hvort það að breyta opinberri stofnun sem annast póstþjónustu í hlutafélag fullnægir skilyrðum þess að teljast eigendaskipti.[19] Af því leiðir að það kemur einnig í hlut þess dómstóls að ákvarða hvort hlutafélagið sem um ræðir í málinu hefur með höndum efnahagslega starfsemi og hvort aðstæður sem varða yfirfærsluna leiði til þess að um sé að ræða eigendaskipti í skilningi 1. mgr. 1. gr. tilskipunarinnar.

38. Eftirlitsstofnun EFTA leggur til að fyrri spurningunni verði svarað á eftirfarandi hátt:

> *"Yfirfærsla gegn gjaldi á einingu sem rekur póstþjónustu fyrir almenning, sem er hluti af opinberri stjórnsýslu, til hlutafélags sem er að öllu leyti í eigu ríkisins og sem rekur sömu starfsemi og stjórnsýslueiningin gerði og hefur vegna þessa tekið yfir eignir stofnunarinnar, lausar og fastar, felur í sér eigendaskipti í skilningi 1. mgr. 1. gr. tilskipunar 77/187/EBE. Þeir einstaklingar sem eiga í hlut verða þó að hafa notið verndar samkvæmt almennri innlendri vinnulöggjöf."*

Framkvæmdastjórn Evrópubandalaganna

39. Framkvæmdastjórn Evrópubandalaganna vísar til dómaframkvæmdar dómstóls Evrópubandalaganna, þar sem gert er ráð fyrir að tilskipun 77/187/EBE eigi við um eigendaskipti að öllum fyrirtækjum, opinberum- sem einkafyrirtækjum, sem hafa með höndum efnahagslega starfsemi hvort sem þau eru rekin í hagnaðarskyni eða ekki.[20]

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18 Sjá nmgr. 8, *Collino and Chiappero*, málsgrein 41.

19 Mál 105/84 *Foreningen af Arbejdsledere i Danmark* gegn *Danmols Inventar* [1985] ECR 2639, málsgreinar 27 og 28 (hér eftir "*Danmols Inventar*"); sjá nmgr. 16, *Redmond Stichting*, málsgrein 18 og sameinuð mál C-173/96 og C-247/96 *Sánchez Hidalgo og fl.* [1998] ECR I-8237, málsgrein 24.

20 Sjá nmgr. 15, *Redmond Stichting*; nmgr. 13, *Commission* gegn *United Kingdom*, málsgreinar 44 til 46; nmgr. 8, *Collino and Chiappero*, málsgrein 30; og Mál C-175/99 *Mayeur* [2000] ECR I-7780, málsgrein 32. Sjá einnig 1. gr. 1. mgr. ítilskipunar 98/50/EB.

40. The Commission of the European Communities notes that Iceland Post and Telecommunications Administration has been engaged mainly in economic activities, although it may well have also exercised regulatory powers. The two kinds of activities must have been separated at the latest when the Administration was privatised, with the economic activities then being transferred to the private companies, whilst regulatory matters remained with the State.

41. The Commission is of the view that the transfer of the activities of the Administration may not, therefore, be considered to constitute a "reorganisation of structures of the public administration or the transfer of administrative functions between public administrative authorities".[21]

42. Reference is made to a ruling of the Court of Justice of the European Communities, which held that the Directive is applicable, not only when an undertaking is transferred by virtue of an agreement, but in all cases where a change in ownership occurs.[22] Therefore, it is irrelevant that, in many cases of privatisation, the State transfers its economic activities by means of a law or by a unilateral decision of the public authority to a private company which it wholly owns; as there is a change in the ownership of the undertaking, the Directive would apply.

43. The Commission of the European Communities proposes that the first question be answered as follows:

> *"The conversion of a State-owned economic entity into a wholly State-owned limited company constitutes a transfer within the meaning of Council Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses."*

The second question

Alda Viggósdóttir

44. The Plaintiff argues that this question concerns the principal aim of the Directive, which is to protect employees' accrued rights in the context of the frequent changes and reversals which occur in the business sector: changes in companies' operations, mergers, privatisation, etc. The Directive is intended *inter alia* to prevent employees' having to accept positions with wages and terms that are different from, and less advantageous than, those they held with their former

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21 See footnote 14, *Henke*, at paragraphs 14 and 17; and footnote 8, *Collino and Chiappero*, at paragraph 31. See also Article (1)(1)(c) of Directive 98/50.

22 See footnote 9, *Daddy's Dance Hall*; and footnote 15, *Redmond Stichting*, at paragraphs 15-17.

40. Framkvæmdastjórn Evrópubandalaganna bendir á að hin íslenska Póst- og símamálastofnun hafi að stærstum hluta stundað efnahagslega starfsemi, þótt hún kunni einnig að hafa farið með opinbert stjórnsýsluvald. Þessir tvenns konar þættir starfseminnar hljóti að hafa verið aðgreindir ekki síðar en þegar stofnunin var einkavædd og við það hafi hin efnahagslega starfsemi flust yfir til hlutafélagsins, en opinber reglusetning hafi orðið eftir hjá ríkinu.

41. Framkvæmdastjórn Evrópubandalaganna er þeirrar skoðunar að yfirfærsla þeirrar starfsemi sem stjórnsýslustofnunin hafði með höndum geti ekki þar með talist breyting á skipulagi opinberrar stofnunar eða að um hafi verið ræða flutning á stjórnsýsluvaldi milli opinberra stjórnsýslustofnana.[21]

42. Vísað er til dómstóls Evrópubandalaganna sem hafi talið að tilskipunin ætti við, ekki aðeins þegar eigendaskipti verða með samningi, heldur í öllum tilvikum þegar breyting verði á eignarhaldi.[22] Það skipti þess vegna ekki máli þótt ríkið í mörgum tilvikum, þar sem einkavæðing á sér stað, yfirfæri efnahagslega starfsemi með lögum, eða annars konar einhliða ákvörðun opinbers stjórnvalds, til hlutafélags sem það á að öllu leyti sjálft. Þar sem breyting verði á eignarhaldi fyrirtækis eigi tilskipunin við.

43. Framkvæmdastjórn Evrópubandalaganna leggur til að fyrri spurningunni verði svarað á eftirfarandi hátt:

> *"Breyting á efnahagslegri einingu í ríkiseign í hlutafélag sem er að öllu leyti í eigu ríkisins felur í sér eigendaskipti í skilningi tilskipunar ráðsins 77/187/EBE um samræmingu á lögum aðildarríkjanna um vernd launþega við eigendaskipti að fyrirtækjum, atvinnurekstri eða hluta atvinnurekstrar."*

Síðari spurning

Alda Viggósdóttir

44. Stefnandi leiðir að því rök að þessi spurning varði meginmarkmið tilskipunarinnar, sem sé að vernda áunnin réttindi vegna hinna tíðu breytinga og umskipta í viðskiptalífinu sem birtist m.a. í breyttum rekstri fyrirtækja, samruna, einkavæðingu o.fl. Tilskipunin hafi m.a. að markmiði að koma í veg fyrir að launþegar þurfi að sætta sig við stöður á öðrum og lakari kjörum en þeir höfðu hjá fyrri vinnuveitanda sínum og ennfremur að koma í veg fyrir að þessi réttindi

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21 Sjá nmgr. 14, *Henke*, málsgreinar 14 og 17; og nmgr. 8, *Collino and Chiappero*, málsgrein 31. Sjá einnig c-lið 1. mgr. 1. gr. í tilskipun 98/50.

22 Sjá nmgr. 9, *Daddy's Dance Hall*; og nmgr. 15, *Redmond Stichting*, málsgreinar 15-17.

employer, and also to prevent the loss of accrued rights in the event of a transfer. The Directive is designed to prevent such consequences of frequent changes.

45. The Plaintiff contends that the general rule is that the transferor's rights and obligations towards the employees are transferred automatically to the transferee. There is no need for any special declaration by the transferor or the transferee. In order to ensure that the objective of the Directive is achieved, the transferor and the transferee are also forbidden from making an agreement amongst themselves to the effect that the transferor will dismiss its employees before the transfer takes place or change their employment relationship in any way, for example, by means of a new employment contract, since such measures could be attributed to the transfer and would therefore be contrary to the Directive. New employment contracts or other agreements concluded with employees in connection with a proposed transfer may not affect their rights, because the rules of the Directive are compulsory. The rationale for the compulsory nature of the rules of the Directive is that, if this were not so, achievement of the objectives of the Directive would hardly be feasible. This rationale is also based on the traditional protective assumption in labour law: that employees generally are in a weaker bargaining position than the employer. Thus, in many cases, the employer is able to exploit the freedom of negotiation and his strong bargaining position to his own advantage.

46. The Plaintiff goes on to argue that any employment contract concluded by a committee appointed to prepare for privatisation must necessarily be made in connection with the proposed transfer. If it emerges that such a contract gives an employee less advantageous terms of employment than he previously enjoyed, this must be deemed to be a violation of Article 3 of the Directive, as the transferee must continue to observe the terms and conditions enjoyed by the employees prior to the transfer, on the same terms as were applicable prior to the transfer.

47. The Plaintiff argues that the protection given under Article 3(1) of the Directive entails the strict observation of the employee's rights exactly as they are defined. In *Daddy's Dance Hall*, the Court of Justice of the European Communities held that an employee may not waive his rights, even if an overall evaluation reveals that the changes do not place him in a worse position. The EFTA Court came to the same conclusion in its ruling in *Langeland*.[23] Consequently, every detail in the pay arrangements and working conditions must be retained. If, in the event of a transfer, the transferor or the transferee could curtail the rights regarding termination which the employee enjoyed prior to the transfer, then this would obviously open the door to making a substantial curtailment of the employee's terms of employment, since rights in connection with termination constitute part of his rights. But such a curtailment of rights could never be compatible with the aim and objectives of the Directive, which

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[23] Case E-3/95 *Langeland* v *Norske Fabricom* [1996] EFTA Court Report 36 (hereinafter "*Langeland*").

glatist við eigendaskiptin. Tilskipuninni sé er ætlað að koma í veg fyrir slíkar afleiðingar tíðra breytinga.

45. Stefnandi heldur því fram að hin almenna regla sé sú að afsalshafi starfseminnar taki sjálfkrafa yfir réttindi og skyldur afsalsgjafa gagnvart starfsmönnum. Ekki sé þörf á sérstakri yfirlýsingu af hálfu afsalshafa eða afsalgjafa. Til að tryggja að markmiðum tilskipunarinnar verði náð er afsalshafa og afsalsgjafa jafnframt óheimilt að semja sín á milli um að afsalsgjafi skuli segja starfsmönnum sínum upp áður en eigendaskiptin eiga sér stað eða breyta ráðningarsambandinu með öðrum hætti, svo sem með nýjum ráðningarsamningi, þar sem slíkar ráðstafanir megi rekja til eigendaskiptanna og væru af þeirri ástæðu í andstöðu við tilskipunina. Nýir ráðningarsamningar eða aðrir samningar sem gerðir séu við launþega vegna fyrirhugaðra eigendaskipta geti ekki haft áhrif á rétt þeirra, þar sem reglur tilskipunarinnar séu ófrávíkjanlegar. Röksemdir fyrir því að ákvæði tilskipunarinnar séu ófrávíkjanlegar felist í því að ella verði markmiðum hennar trauðla náð. Einnig sé byggt á því hefðbundna verndarsjónarmiði vinnuréttarins, að samningsstaða launafólks sé að jafnaði lakari en vinnuveitandans. Vinnuveitandi geti í mörgum tilfellum nýtt sér samningsfrelsið og sterkari samningsstöðu sér til hagsbóta.

46. Stefnandi færir ennfremur fram þau rök að ráðningasamningur sem gerður sé af undirbúningsnefnd vegna einkavæðingar hljóti óhjákvæmilega að vera gerður vegna fyrirhugaðra eigendaskipta. Ef í ljós komi að slíkur samningur veiti starfsmanni lakari starfskjör en hann hafði fyrir, teljist það brot á 3. gr. tilskipunarinnar, þar sem afsalshafi þurfi að virða launakjör og starfsskilyrði sem starfsmenn hafi notið áður en til eigendaskipta kom, með sömu skilmálum og giltu fyrir.

47. Stefnandi færir fyrir því rök að verndin sem 1. mgr. 3. gr. tilskipunarinnar veiti feli í sér að halda verði til streitu réttindum starfsmannsins lið fyrir lið. Í dómi í máli *Daddy's Dance Hall* taldi dómstóll Evrópubandalaganna að starfsmaður gæti ekki afsalað sér réttindum, jafnvel ekki þegar heildarmat leiði í ljós að breytingarnar hafi ekki áhrif á stöðu hans til hins verra. EFTA-dómstóllinn hafi í ráðgefandi áliti sínu í *Langeland*-málinu[23] komist að sömu niðurstöðu. Af því leiði að hver liður í launafyrirkomulagi og starfsskilyrðum verði að standa. Ef afsalsgjafi eða afsalshafi starfseminnar gætu við eigendaskiptin skert uppsagnarkjör þau sem launþegi naut fyrir eigendaskiptin, sé ljóst að með því yrði opnað fyrir möguleika til að skerða starfskjör starfsmannsins verulega enda séu uppsagnarkjörin einn liður í réttindum hans. Slík skerðing gæti hins vegar aldrei samræmst tilgangi og markmiðum tilskipunarinnar, sem séu að tryggja að eigendaskiptin verði ekki tilefni til að ganga á rétt launþega.

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[23] Mál E-3/95 *Langeland* gegn *Norske Fabricom* [1996] EFTA Court Report 36 (hér eftir "*Langeland*").

are to ensure that transfers are not used as an opportunity to encroach on employees' rights.

48. The Plaintiff recalls that the conclusion reached by the Court of Justice of the European Communities in *Daddy's Dance Hall* and by the EFTA Court in *Langeland* was that an employee may not waive the rights he has under the compulsory provisions of the Directive, even if the disadvantages arising from such a waiver were to be compensated for in such a way that, on an overall evaluation, the employee was not placed in a less advantageous position. Nonetheless, the Directive does not exclude the possibility of an agreement between the employee and the new employer involving a change in the employment relationship, provided that such a change is permitted under national law in circumstances other than those involving a transfer. The assessment of whether such circumstances apply involves the interpretation of Icelandic law, which does not come within the role of the EFTA Court. Nevertheless, it should be stated here that such circumstances did not apply under Icelandic law at the time of the transfer which is at the centre of the present case.[24]

49. The Plaintiff proposes that the second question be answered as follows:

> *"Article 3(1) of Council Directive 77/187/EEC is to be interpreted as prohibiting the provision, in an employment contract concluded in connection with a transfer within the meaning of Article 1(1) of the Directive, of less advantageous terms regarding termination of employment as compared with those enjoyed by the employee prior to the date of the transfer."*

Iceland Post Ltd

50. The Defendant argues that the Plaintiff made a new employment contract concerning her work with the prospective limited company which was to take over the operations of the Post and Telecommunications Administration, in which she agreed to different wage terms.

51. The Defendant points out that no provision is to be found, either in Icelandic law or in the Directive, which limits the right of employees themselves to change their terms of employment by means of an agreement with their employer; such a provision would be an attack on the principle of freedom of bargaining. Restrictions on the unilateral amendment of terms of employment do not exclude the right of employees and employers to negotiate amendments to terms of employment, even at the time of a transfer.

52. The Defendant refers to Article 3(1) of the Directive. As it is worded, that paragraph defines the obligations of the transferee in the event of a transfer and

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[24] See footnote 9, *Daddy's Dance Hall*, at paragraph 17; and footnote 23, *Langeland*, at paragraph 46.

48. Stefnandi bendir á að niðurstaða dómstóls Evrópubandalaganna í *Daddy's Dance Hall* og niðurstaða EFTA-dómstólsins í *Langeland* hafi verið sú að launþegi geti ekki afsalað sér rétti sem hann eigi samkvæmt ófrávíkjanlegum ákvæðum tilskipunarinnar, þótt skerðingin sem af slíku afsali leiddi væri bætt þannig að starfsmaðurinn væri ekki verr settur en áður þegar á heildina væri litið. Samt sem áður útilokar tilskipunin ekki samkomulag milli starfsmannsins og hins nýja vinnuveitanda um breytingar á vinnusambandinu, að svo miklu leyti sem slíkar breytingar væru heimilar samkvæmt landslögum í öðrum tilvikum en þeim er eigendaskipti eiga sér stað. Mat á því hvort þau skilyrði eru fyrir hendi lýtur að skýringu íslenskra laga sem ekki sé á verksviði EFTA-dómstólsins. Það beri samt að upplýsa að þau skilyrði hafi ekki verið fyrir hendi samkvæmt íslenskum lögum er eigendaskipti þau er mál þetta snýst um áttu sér stað.[24]

49. Stefnandi leggur til að síðari spurningunni verði svarað á eftirfarandi hátt:

> *"Skýra ber ákvæði 1. mgr. 3. gr. tilskipunar ráðsins 77/1187/EBE þannig að óheimilt sé að skerða með ráðningarsamningi, sem gerður er vegna eigendaskipta í skilningi 1. mgr. 1. gr. tilskipunarinnar, þau uppsagnarkjör sem launþegi naut fyrir eigendaskiptin."*

Íslandspóstur hf.

50. Stefndi bendir á að stefnandi hafi gert nýjan ráðningarsamning um starf hjá væntanlegu hlutafélagi sem átti að taka yfir rekstur Póst- og símamálastofnunar, þar sem hún hafi samið um önnur launakjör.

51. Stefndi bendir á að hvergi í íslenskum lögum eða í tilskipuninni sé að finna ákvæði sem skerði rétt starfsfólks til að breyta sjálft ráðningarkjörum sínum með samningi við vinnuveitanda, enda væri með slíkum ákvæðum vegið að meginreglunni um samningsfrelsi. Takmarkanir á einhliða breytingum á ráðningarkjörum ryðji ekki úr vegi rétti launþega og vinnuveitanda til þess að semja um breytt ráðningarkjör, jafnvel við eigendaskipti.

52. Stefndi vísar til 1. mgr. 3. gr. tilskipunarinnar. Í samræmi við orðanna hljóðan kveði málsgreinin á um skyldur afsalshafa við eigendaskipti og eftir þeim

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[24] Sjá nmgr. 9, *Daddy's Dance Hall*, málsgrein 17; og nmgr. 23, *Langeland*, málsgrein 46.

according to the employment contract in effect at that time. However, the paragraph makes no mention of the nature of the rights and obligations to be transferred, or whether they are subject to negotiation between the employee and the transferor prior to the transfer. The logical inference of this is, therefore, that it is not possible to deduce from Article 3(1) of the Directive that terms of employment are non-negotiable if such negotiations are carried out with the consent of both the employee and the employer, as was done in the present case.

53. The Defendant refers to *Daddy's Dance Hall*, in which the Court of Justice of the European Communities held that amendments which are to the disadvantage of the employee may be made to an employment relationship, even if a transfer is effected at the same time, if the law of the Member State does not prohibit such amendments.

54. The Defendant refers to the judgment of the Court of Justice of the European Communities in *Danmols Inventar*, and contends that the view must be taken that an employee is permitted to enter into an agreement with the employer on amended terms regarding termination of employment.

55. The Defendant further argues that Article 3 of the Directive must be understood as meaning that the employee's right to negotiate amended terms of employment, including terms of termination of employment, either independently or on the basis of a general collective agreement, is not subject to the restrictions applying to agreements between the parties carrying out the transfer, i.e. the transferor and the transferee. The view must be taken that the main aim of the Directive is to prevent a transfer agreement between a transferor and a transferee from resulting in a curtailment of the rights of the employees affected by the transfer. By contrast, the Directive cannot be aimed at restricting the right of employees or trade unions to negotiate amendments to their terms in the event of a transfer.

56. The Plaintiff draws particular attention to the fact that the Plaintiff has not argued that the terms of the employment agreement signed by the parties in 1996 are invalid or non-binding as such. The agreement was concluded in full consultation with her, and she signed it of her own free will.

The Government of Iceland

57. The Government of Iceland refers to the case-law of the Court of Justice of the European Communities, according to which the Directive has as its aim only to achieve partial harmonisation, by extending the protection of workers,

ráðningarsamningi sem þá gilti. Aftur á móti sé hvergi í málsgreininni minnst á hver þau réttindi og skyldur, sem afsala á, skuli vera eða hvort þær séu umsemjanlegar milli launþega og afsalsgjafa áður en að eigendaskiptum kemur. Rökrétt ályktun af því sé sú, að af ákvæði 1. mgr. 3. gr. tilskipunarinnar verði ekki ráðið að ráðningarkjör séu óumsemjanleg ef þau fara fram með samþykki bæði launþega og vinnuveitanda, eins og um hafi verið að ræða í þessu máli.

53. Stefndi vísar til dómsins í *Daddy´s Dance Hall* þar sem dómstóll Evrópubandalaganna hafi komist að þeirri niðurstöðu að heimilt væri að gera breytingar á ráðningarsambandi sem væru launþegum óhagstæðar, þrátt fyrir að eigendaskipti færu fram á sama tíma, ef lög aðildarríkis mæltu ekki í mót slíkum breytingum.

54. Stefndi vísar til dóms dómstóls Evrópubandalaganna í *Danmols Inventar*, og heldur því fram að líta verði svo á að launþega sé heimilt að semja við vinnuveitanda um breytingar á uppsagnarkjörum.

55. Stefndi færir ennfremur fyrir því rök að skilja verði 3. gr. tilskipunarinnar svo að réttur launþega til að semja um breytt ráðningarkjör á eigin vegum eða á grundvelli almenns kjarasamnings, þar með talið um uppsagnarkjör, sé ekki háður þeim takmörkunum sem gilda um samninga þeirra sem að eigendaskiptunum standa, þ.e. afsalsgjafa og afsalshafa. Líta verði svo á að meginmarkmið tilskipunarinnar sé að koma í veg fyrir að samningur um eigendaskipti milli afsalsgjafa og afsalshafa leiði til skerðingar á rétti þeirra launþega sem eigendaskiptin varða. Markmið tilskipunarinnar geti hins vegar ekki lotið að því að takmarka rétt launþega eða stéttarfélaga til að semja um breytt kjör við eigendaskipti.

56. Stefndi vekur sérstaka athygli á því að af hálfu stefnanda hafi ekki í málinu verið á því byggt, að ákvæði ráðningarsamnings milli aðila, sem undirritaður var 1996, séu ógild eða óskuldbindandi sem slík. Samningurinn hafi verið gerður í fullu samráði við hana og hafi hún undirritað hann af fúsum og frjálsum vilja.

Ríkisstjórn Íslands

57. Ríkisstjórn Íslands vísar til dómaframkvæmdar dómstóls Evrópubandalaganna, en samkvæmt henni miði tilskipunin aðeins að samræmingu að hluta með því að auka vernd launþega, sem tryggð sé við

guaranteed in the event of transfers of undertakings under the laws of several Member States.[25]

58. In *Danmols Inventar*, the Court of Justice of the European Communities stated that "the expression employee within the meaning of Directive No. 77/187/EEC must be interpreted as covering any person who, in the Member State concerned, is protected as an employee under national employment law." This has been repeated by that Court in later cases, such as in *Collino and Chiappero,* where it was held that the nature of tasks performed by the persons was of no relevance, and that only the relevant issue was whether or not the persons were protected under national employment law. That Court also referred to Council Directive 98/50/EC of 29 June 1998, with which the Member States are to have complied by 17 July 2001 at the latest.[26] That Directive defines the term "employee" in accordance with established case-law.[27]

59. In *Collino and Chiappero*, the Court of Justice of the European Communities stated clearly that, if the employees of State-owned entity were subject to a public-law status, as opposed to employment law, the Directive was not applicable to them. Protection under national employment law is, therefore, a necessary condition for the Directive to apply, and for the transfer of rights and obligations to be possible. This is logical, since some of the rights and obligations conferred by public law status are not transferable at all.

60. The Government of Iceland points out that the Plaintiff was appointed to her position as a civil servant under the provisions of the Civil Servants' Rights and Obligations Act of 1954. The special rules regarding civil servants in Iceland who had taken up employment prior to 1 July 1996, when the new legislation came into effect, entail *inter alia* that civil servants have a special obligation of loyalty and discretion. They are not allowed to hold other jobs unless a special exemption is given, and termination of their employment is only possible in accordance with various special provisions which are very different from laws relating to the private labour sector and employment law. Additionally, if their position is abolished, civil servants hired before the abovementioned date are entitled to severance pay for six to twelve months, depending on length of service.[28]

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25 See Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755 (hereinafter "*Watson Rask*"); and footnote 8, *Collino and Chiappero*, at paragraph 37.

26 See footnote 1.

27 See footnote 1, Art. 2(1) d) of Directive 9850/EC, and the sixth recital of the preamble.

28 Act 70/1996 Temporary provision, paragraph 5: "If a job is eliminated, an employee who has been appointed or hired into government service before the entry into force of this Act and to which Act no. 38/1954 has applied, and is not regarded as a civil servant according to Article 22 of this Act, shall have the right to receive severance pay for a period of six months, if he has been employed by the government for less than 15 years, otherwise for twelve months. …" (unofficial translation from the Ministry of Finance's homepage).

eigendaskipti að fyrirtækjum, í lögum ýmissa aðildarríkja.[25]

58. Í dómi í málinu *Danmols Inventar* hafi dómstóll Evrópubandalaganna haldið því fram að "orðið launþegi í skilningi tilskipunar ráðsins 77/187/EBE verði að skýra svo að það taki til allra sem í viðkomandi aðildarríki njóta verndar sem launþegar samkvæmt vinnulöggjöf landsréttar." Þetta hafi verið endurtekið í síðari dómum svo sem *Collino and Chiappero,* þar sem talið hafi verið að eðli starfsskyldna viðkomandi skipti engu máli, heldur aðeins það hvort viðkomandi nyti verndar samkvæmt vinnulöggjöf landsréttar. Sá dómstóll hafi einnig vísað til tilskipunar ráðsins 98/50/EB frá 29 júní 1998, sem aðildarríkin áttu að hafa komið í framkvæmd í síðasta lagi 17. júlí 2001.[26] Tilskipunin skilgreini hugtakið "launþegi" í samræmi við fasta dómaframkvæmd.[27]

59. Í dómi í máli *Collino and Chiappero*, komi skýrt fram af hálfu dómstóls Evrópubandalaganna, að ef launþegar hjá einingu í ríkiseign hefðu réttarstöðu samkvæmt opinberum rétti, gagnstætt almennri vinnulöggjöf, ætti tilskipunin ekki við um þá. Vernd samkvæmt hinni almennu vinnulöggjöf sé þess vegna nauðsynlegt skilyrði þess að tilskipunin eigi við og til þess að yfirfærsla réttinda og skyldna sé möguleg. Þetta sé rökrétt, þar sem sum réttindi og sumar skyldur samkvæmt opinberum rétti sé ekki hægt að yfirfæra.

60. Ríkisstjórn Íslands bendir á að stefnandi hafi verið skipuð til starfa sem opinber starfsmaður samkvæmt lögum um réttindi og skyldur starfsmanna ríkisins frá 1954. Hinar sérstöku reglur um opinbera starfsmenn á Íslandi sem hafið höfðu störf fyrir 1. júlí 1996, þegar ný lög tóku gildi, fela m.a. í sér sérstakar reglur um trúnað og þagmælsku opinberra starfsmanna. Þeim hafi verið óheimilt að gegna öðrum störfum nema sérstök undanþága væri veitt og uppsögn þeirra hafi aðeins verið möguleg samkvæmt sérstökum reglum sem hafi verið mjög frábrugðnar því sem gilt hafi hjá einkafyrirtækjum og samkvæmt almennri vinnulöggjöf. Til viðbótar hafi verið gert ráð fyrir að væri staða þeirra lögð niður skyldu þeir eiga rétt á biðlaunum í sex til tólf mánuði eftir starfstíma.[28]

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25 Sjá mál C-209/91 *Watson Rask og Christensen* [1992] ECR I-5755 (hér eftir "*Watson Rask*"); og nmgr. 8, *Collino and Chiappero*, málsgrein 37.

26 Sjá nmgr. 1.

27 Sjá nmgr. 1, 2. gr. 1. mgr. d í tilskipun 98/50/EB og 6. lið inngangsins.

28 Lög nr. 70/1996, 5. mgr. ákvæðis til bráðabirgða: "Sé starf lagt niður á starfsmaður, sem skipaður hefur verið eða ráðinn í þjónustu ríkisins fyrir gildistöku laga þessara og fallið hefur undir lög nr. 38/1954, en telst ekki embættismaður skv. 22. gr. laga þessara, rétt til bóta er nemi launum í sex mánuði, ef hann hefur verið í þjónustu ríkisins skemur en í 15 ár, en ella í tólf mánuði.

61. The Government of Iceland points out that a special Act is also in force governing collective agreements for civil servants.[29] Collective agreements are concluded respecting wages, vacation time and other financial terms between the State and unions of civil servants, but the foundation of the rights and obligations is based on special legal provisions, which neither the employer nor the employee can change or amend.

62. The Government of Iceland is, accordingly, of the view that it appears that the Plaintiff's status must have been largely subject to public law and, consequently, only partly governed by collective agreements, which could be defined as contracts of employment or employment relationships within the meaning of Article 3(1) of the Directive. The status of a civil servant in relation to termination of employment is certainly based on the legislation.[30]

63. The Government of Iceland points out that, in *Collino and Chiappero*, the decision on whether the Plaintiff had public law status was left to the national court to decide, although the Court of Justice of the European Communities held that the case-file suggested public law status.[31] That Court has also left it to the national courts to decide whether a person is protected under national employment law.[32] The meaning of the term "employee" may differ between different legal systems of the Member States, as it has not been harmonised.

64. Furthermore, the Government of Iceland submits that the Directive is not aimed at enhancing the special privileges and rights enjoyed by civil servants in domestic legislation, when their position is changed, abolished or their employment terminated. These rights and privileges are not harmonised by EEA law and are within the sole competence of the national legislator.

65. If, however, the Plaintiff in the main proceedings is found not to have had a public law status regarding termination of employment and other relevant provisions, then the Government of Iceland submits that her rights and obligations are determined by national employment law. Such terms can be altered by individual agreements, upon termination of contract and after a collective agreement has expired. In *Daddy's Dance Hall*,[33] the Court of Justice of the European Communities stated that, if national law allows such an employment relationship to be altered in a manner unfavourable to the employee during the course of the employment relationship with the transferor, such an alteration is not precluded merely because of the transfer of the undertaking to

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29 Act No. 94/1986 on Collective Agreements for Civil Servants (*Lög um kjarasamninga opinberra starfsmanna*).

30 Section 4 of the Civil Servants' Rights and Obligations Act.

31 See footnote 8, *Collino and Chiappero*, at paragraph 40.

32 See footnote 19, *Danmols Inventar*, at paragraph 3; and footnote 8 *Collino and Chiappero*, at paragraph 41.

33 See footnote 9, *Daddy's Dance Hall*, at paragraph 17.

61. Ríkisstjórn Íslands bendir á að einnig séu í gildi sérstök lög um kjarasamninga opinberra starfsmanna.[29] Kjarasamningar hafi að geyma ákvæði um laun, frídaga og önnur ákvæði af fjárhagslegu tagi og séu gerðir milli ríkisins og stéttarfélaga ríkisstarfsmanna, en grundvöllur að réttindum þeirra og skyldum sé lagður í sérsökum lagaákvæðum sem hvorki vinnuveitendur né launþegar geti breytt.

62. Ríkisstjórn Íslands sé því á þeirri skoðun að svo virðist sem réttarstaða stefnanda hafi að verulegu leyti ráðist af opinberum rétti og hún þar af leiðandi aðeins að hluta til ráðist af kjarasamningi, sem gæti talist samningur umráðningu eða vinnusamband milli starfsmanns og vinnuveitanda í skilningi 1. mgr. 3. gr. tilskipunarinnar. Réttarstaða opinberra starfsmanna að því er varðar uppsögn vinnusambands ræðst vissulega af löggjöfinni.[30]

63. Ríkisstjórn Íslands bendir á að í *Collino and Chiappero* hafi ákvörðun um það hvort stefnandi hafði réttarstöðu samkvæmt opinberum rétti verið eftirlátin dómstól aðildarríkis þótt dómurinn teldi að gögn málsins bentu til þess að um væri að ræða réttarstöðu að opinberum rétti.[31] Dómstóllinn hafi ennfremur eftirlátið það dómstól aðildarríkis að ákvarða hvort viðkomandi nyti verndar samkvæmt hinni almennu vinnulöggjöf.[32] Merking hugtaksins "launþegi" geti verið breytilegt frá einu réttarkerfi til annars, þar sem merking þess hafi ekki verið samræmd.

64. Ríkisstjórn Íslands heldur því ennfremur fram að tilskipunin miði ekki að því að festa í sessi sérstök sérréttindi eða réttindi sem opinberir starfsmenn njóti samkvæmt landsrétti í tilvikum þegar stöðu þeirra er breytt, hún lögð niður eða þeim sagt upp störfum. Þessi réttindi séu ekki samræmd á grundvelli EES-réttar og það sé alfarið á valdi löggjafa samningsríkjanna að kveða á um þau.

65. Ef á hinn bóginn komist verður að þeirri niðurstöðu að réttarstaða stefnanda hafi ekki ákvarðast af opinberum rétti að því er varðar uppsögn vinnusambands og önnur ákvæði sem við eigi, heldur ríkisstjórn Íslands því fram að réttindi stefnanda og skyldur ráðist af hinni almennu vinnulöggjöf. Víkja megi frá henni með samningum í kjölfar samningsslita eftir að kjarasamningstímabil er liðið. Í dóminum í *Daddy's Dance Hall*,[33] taldi dómstóll Evrópubandalaganna að ef landsréttur heimilaði að vinnusambandi væri breytt til hins verra fyrir launþega á meðan á vinnusambandi hans við afsalsgjafa stæði, sé slík breyting ekki

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29 Lög nr. 94/1986 um kjarasamninga opinberra starfsmanna.

30 4. gr. laga um réttindi og skyldur starfsmanna ríkisins.

31 Sjá nmgr. 8, *Collino and Chiappero*, málsgrein 40.

32 Sjá nmgr. 19, *Danmols Inventar*, málsgrein 3; og nmgr. 8 *Collino and Chiappero*, málsgrein 41.

33 Sjá nmgr. 9, *Daddy's Dance Hall*, málsgrein 17.

the transferee.[34] However, the transfer of an undertaking must not constitute the reason for the amendment.

66. In the main proceedings, the terms of employment were agreed between parties to an individual contract between the new limited company and the employer, at the time of transfer. Special reference was made to rights acquired under the previous employment relationship, and the employees were offered comparable positions with the new company. The Government of Iceland emphasises, however, that the special rights and obligations attached to civil servants cannot simply be carried over to the private employment sector.

67. Employees leaving the public service to work for a limited company are entitled to severance pay, if they believe that they cannot acquire comparable positions in terms of employment conditions elsewhere. They cannot, however, take with them the special rights and obligations of the public service to the limited company, be it State-owned or privately owned.

68. The Government of Iceland submits that the EFTA Court base its answers on the following:

> *"Council Directive 77/187/EEC may apply to the situation in the main proceedings, provided that the Plaintiff was originally protected as an employee under national employment law. It is, however, for the national court to decide whether the Plaintiff enjoyed, wholly or partly, public law status under Icelandic law, as the case file suggests."*

The EFTA Surveillance Authority

69. The EFTA Surveillance Authority points out that, according to the case-law of the Court of Justice of the European Communities, the Directive can only be relied upon by persons who are protected as workers under national labour law. This was confirmed by the adoption of Council Directive 98/50/EC which amended Directive 77/187/EC, defining "employee" as any person who is protected as an employee under national employment law.[35] In order to determine the applicability of Article 1(1) in the present case, it must be established whether the Plaintiff may be regarded as an employee under national employment law.

70. The EFTA Surveillance Authority submits that such an assessment should be carried out by the national court on the basis of the relevant national provisions.

71. Reference is made to Article 3(1) of the Directive. This provision stipulates that, in the event of transfer within the meaning of Article 1(1), the

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34 See footnote 8, *Collino and Chiappero*, paragraph 52.

35 Article 2 of Directive 98/50/EC.

útilokuð eingöngu vegna eigendaskipta.[34] Á hinn bóginn megi eigendaskiptin aldrei vera ástæða breytinganna.

66. Í aðalmálinu hafi verið samið um ráðningarkjör milli aðila einstaks samnings, milli nýs hlutafélags og starfsmanns við eigendaskiptin. Sérstaklega hafi verið vísað til réttinda sem áunnist höfðu í fyrra vinnusambandi og launþegum voru boðin sambærileg störf hjá hinu nýja félagi. Ríkisstjórn Íslands leggur áherslu á að hin sérstöku réttindi og skyldur sem eigi við um opinbera starfsmenn sé einfaldlega ekki hægt að yfirfæra yfir á vinnusambönd hjá einkafyrirtækjum.

67. Launþegar sem hætta störfum sem opinberir starfsmenn og hefja störf hjá einkafyrirtæki eigi rétt á biðlaunum telji þeir sig ekki geta fengið sambærilegt starf að því er varðar starfskjör. Þeir geti aftur á móti ekki tekið með sér til hlutafélagsins sérstök réttindi eða sérstakar skyldur sem opinberir starfsmenn, hvort sem félagið er í eigu ríkisins eða í einkaeign.

68. Ríkisstjórn Íslands telur að EFTA-dómstóllinn eigi að byggja svar sitt á eftirfarandi:

> *"Tilskipun ráðsins 77/187/EBE getur átt við í aðalmálinu að því gefnu að stefnandi hafi upphaflega notið verndar á grundvelli almennrar vinnulöggjafar landsréttar. Það sé aftur á móti hlutverk dómstóls samningsríkis að meta það hvort stefnandi naut að öllu leyti eða hluta réttarstöðu á grundvelli opinbers réttar eins og gögn málsins bendi til."*

Eftirlitsstofnun EFTA

69. Eftirlitsstofnun EFTA bendir á að samkvæmt dómaframkvæmd dómstóls Evrópubandalaganna geti eingöngu þeir aðilar byggt á tilskipuninni sem njóti verndar sem launþegar samkvæmt innlendri vinnulöggjöf. Þetta hafi verið staðfest með setningu tilskipunar 98/50/EB sem breytt hafi tilskipun 77/187/EC og skilgreint "launþega" sem hvern þann einstakling sem nyti verndar sem launþegi samkvæmt almennri vinnulöggjöf landsréttar.[35] Til að ákvarða hvort 1. mgr. 1. gr. eigi við um atvik þessa máls þurfi að taka afstöðu til þess hvort stefnandi sé launþegi samkvæmt almennri vinnulöggjöf landsréttar.

70. Eftirlitsstofnun EFTA telur að slíkt mat eigi undir hinn innlenda dómstól á grundvelli viðeigandi ákvæða landsréttar.

71. Vísað er til 1. mgr. 3. gr. tilskipunarinnar. Greinin mæli svo fyrir að við eigendaskipti í skilningi 1. mgr. 3.gr. tilskipunarinnar færist réttindi og skyldur afsalsgjafa er tengjast ráðningarsamningi eða ráðningarsambandi og sem eru fyrir

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34 Sjá nmgr. 8, *Collino and Chiappero*, málsgrein 52.

35 Sjá 2. gr. tilskipunar 98/50/EB.

transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of transfer are to be taken over by the transferee. The Directive is thus intended to safeguard the rights of workers in the event of a change of employer, by making it possible for them to work for the new employer under the same conditions as with their former employer.[36]

72. The EFTA Surveillance Authority argues that an employment relationship may only be altered in a manner unfavourable to employees in so far as national law allows such changes in situations other than those related to the transfer of undertakings. Thus, once the transfer has taken place, changes to employment contracts are only allowed if they might have been introduced before the transfer in situations other than those related to the transfer of undertakings. In any event, the transfer itself may never be the reason for the alteration of the employment relationship between the transferee and the employee.[37]

73. The EFTA Surveillance Authority states that the EFTA Court has held that, due to the mandatory nature of the rules of the Directive, employees are not entitled to waive the rights conferred on them by the Directive. Moreover, those rights cannot be restricted, even with the consent of the employees.[38] This applies even if the disadvantages resulting from an amendment to the contract of employment have been offset by benefits which, on the whole, do not place the employee in a worse position.[39]

74. The EFTA Surveillance Authority thus submits that Article 3(1) of the Directive prohibits provisions in an employment contract concluded in connection with a transfer of an undertaking which provide for less advantageous terms regarding termination than those enjoyed by the employee prior to the date of transfer, unless such alteration is permissible in situations other than the transfer of undertakings.

75. The EFTA Surveillance Authority suggests that the second question be answered as follows:

> *"Article 3(1) of the Directive is to be interpreted as prohibiting a provision in an employment contract, concluded in the connection with a transfer within the meaning of Article 1(1), which provides for less advantageous terms regarding termination of employment than those enjoyed by the employee prior to the date of transfer."*

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36 Joined Cases 144/87 and 145/87 *Berg* v *Besselsen* [1988] ECR 2559, at paragraph 12; and Case 362/89 *D'Urso and Others* [1991] ECR I-4105, at paragraph 9.

37 See footnote 9, *Daddy's Dance Hall*, at paragraph 17; and footnote 25, *Watson Rask* [1992] ECR I-5755, at paragraph 28.

38 See footnote 23, *Langeland*, at paragraph 43.

39 See footnote 23, *Langeland*, at paragraph 46.

hendi þann dag sem eigendaskipti fara fram, yfir til afsalshafa. Tilskipunin miðar þannig að því að vernda réttindi launþega við skipti á vinnuveitanda með því að gera þeim kleift að vinna hjá hinum nýja vinnuveitanda á sömu kjörum og hjá fyrri vinnuveitanda.[36]

72. Eftirlitsstofnun EFTA færir fram þau rök að ráðningarsambandi megi aðeins breyta til hins verra fyrir launþega að því marki sem innlend löggjöf heimilar slíkar breytingar við aðrar aðstæður en þegar um eigendaskipti er að ræða. Af því leiðir, að þegar eigendaskipti hafa átt sér stað, eru aðeins heimilar breytingar á vinnusamningi hafi þær mátt gera fyrir eigendaskiptin að því gefnu að þær væru ekki í tengslum við eigendaskiptin. Hvernig sem á allt sé litið geti eigendaskiptin sjálf aldrei verið tilefni breytinga á ráðningarsambandi milli afsalshafa og launþega.[37]

73. Eftirlitsstofnun EFTA heldur því fram að EFTA-dómstóllinn hafi komist að þeirri niðurstöðu, að vegna ófrávíkjanlegra reglna tilskipunarinnar, sé launþegum ekki heimilt að falla frá réttindum þeim sem þeir hafa samkvæmt tilskipuninni. Ennfremur sé ekki unnt, jafnvel ekki með samþykki launþega, að takmarka þessi réttindi.[38] Þetta á við jafnvel þótt vegið sé upp á móti ókostunum sem leiði af breytingunum með öðrum kjörum þannig að staða þeirra versni ekki vegna breytinganna þegar á heildina sé litið.[39]

74. Af því leiðir að Eftirlitsstofnun EFTA telur að 1. mgr. 3. gr. tilskipunarinnar banni ákvæði í ráðningarsamningi, sem gerður sé í tilefni af eigendaskiptum, sem geri ráð fyrir lakari réttarstöðu launþega varðandi slit samnings en hann naut fyrir eigendaskiptin, nema slík breyting hafi verið heimil í öðrum tilvikum en þegar um eigendaskipti er að ræða.

75. Eftirlitsstofnun EFTA leggur til að síðari spurningunni verði svarað á eftirfarandi hátt:

> *"Skýra ber 1. mgr. 3. gr. tilskipunarinnar svo að hún banni ákvæði í ráðningarsamningi, sem gerður er í tilefni af eigendaskiptum í skilningi 1. mgr. 1. gr. , sem gera ráð fyrir verri réttarstöðu launþega varðandi lok ráðningar, en hann naut hjá vinnuveitanda sínum fyrir eigendaskiptin."*

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36 Sameinuð mál 144/87 og 145/87 *Berg* gegn *Besselsen* [1988] ECR 2559, málsgrein 12; og mál 362/89 *D'Urso og fl.* [1991] ECR I-4105, málsgrein 9.

37 Sjá nmgr. 9, *Daddy's Dance Hall*, málsgrein 17; og nmgr. 25, *Watson Rask* [1992] ECR I-5755, málsgrein 28.

38 Sjá nmgr. 23, *Langeland*, málsgrein 43.

39 Sjá nmgr. 23, *Langeland*, málsgrein 46.

The Commission of the European Communities

76. The Commission of the European Communities begins by pointing out that the transfer of rights and obligations arising from a contract of employment, or an employment relationship, from the transferor to the transferee is, according to Article 3(1) of Directive 77/187, unconditional, and that the principal rules of the Directive are mandatory. The Court of Justice of the European Communities and the EFTA Court have held that the transfer of the employee's rights cannot be restricted, even with his consent. [40]

77. The Commission states that the objective of the Directive is not to improve the situation of an employee following a transfer; its purpose is merely to preserve his acquired rights. The new employer may, therefore, agree with the employee to change the terms of the latter's employment in the same way as this could have been done during the previous contractual relationship.[41] However, the transfer of the undertaking may not itself constitute the reason for the amendment of the terms of employment as, otherwise, the mandatory provisions of the Directive could be easily circumvented.[42]

78. The Commission of the European Communities contends that, in the case at hand, it appears that the transfer of the undertaking did constitute the reason for the amendment of the conditions for dismissal. The conclusion of the relevant contract coincided with the transfer of the undertaking which, albeit in two stages, took the form of a change from public to private ownership, the latter entailing new private law contracts with employees formerly employed according to the rules applicable to civil servants.

79. The Commission of the European Communities proposes that the second question be answered as follows:

> *"An employee cannot waive those rights which are conferred upon him by the mandatory provisions of Directive 77/187/EEC. The Directive does not, however, preclude an agreement with the new employer to modify the employment relationship to the extent that such modification is permitted by the applicable national law in situations other than those involving the transfer of an undertaking."*

Carl Baudenbacher
Judge-Rapporteur

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40 See footnote 9, *Daddy's Dance Hall*, at paragraph 15; and footnote 23, *Langeland*, at paragraph. 43.

41 See footnote 8, *Collino and Chiappero*, at paragraph 52.

42 See footnote 9, *Daddy's Dance Hall*, at paragraph 17.

Framkvæmdastjórn Evrópubandalaganna

76. Framkvæmdastjórn Evrópubandalaganna bendir í upphafi á að yfirfærsla réttinda og skyldna á grundvelli ráðningarsamnings, eða ráðningarsambands, frá afsalsgjafa til afsalshafa, sé samkvæmt 1. mgr. 3. gr. tilskipunar 77/187 óskilyrt og að meginreglur tilskipunarinnar séu ófrávíkjanlegar. Dómstóll Evrópubandalaganna og EFTA-dómstóllinn hafi talið að yfirfærslu á réttindum launþega megi ekki takmarka, jafnvel ekki með samþykki hans. [40]

77. Framkvæmdastjórnin telur ekki að það sé markmið tilskipunarinnar að bæta kjör launþega eftir eigendaskipti. Markmiðið sé aðeins að vernda áunnin réttindi hans. Hinn nýi vinnuveitandi geti þess vegna samið við launþegann um að breyta starfskjörum þess síðarnefnda á þann hátt sem heimilt hefði verið í fyrra samningssambandi.[41] Á hinn bóginn megi eigendaskiptin sjálf aldrei vera tilefni til breytinga á ráðningarkjörum, þar sem með því væri auðveldlega unnt að sniðganga ófrávíkjanleg ákvæði tilskipunarinnar.[42]

78. Framkvæmdastjórn Evrópubandalaganna heldur því fram að í máli þessu virðist sem eigendaskipti að fyrirtæki hafi verið tilefni breytinga á ákvæðum um uppsögn. Samningsgerðin fór saman með eigendaskiptum að fyrirtækinu sem gerðist með þeim hætti, þrátt fyrir að gerast í tveimur þrepum, að fyrirtækið fór úr opinberri eigu í einkaeigu. Í því fólst einnig gerð nýrra samninga að einkarétti við launþega sem áður voru ráðnir samkvæmt reglum sem áttu við um opinbera starfsmenn.

79. Framkvæmdastjórn Evrópubandalaganna leggur til að síðari spurningunni verði svarað á eftirfarandi hátt:

> *"Launþegi getur ekki afsalað sér réttindum sem hann hefur samkvæmt ófrávíkjanlegum ákvæðum tilskipunar 77/187/EEC. Tilskipunin útilokar aftur á móti ekki samning við nýjan vinnuveitanda um að breyta ráðningarsambandi að því marki sem slík breyting er heimil samkvæmt viðeigandi innlendri löggjöf við aðstæður sem ekki tengjast eigendaskiptum að fyrirtæki."*

Carl Baudenbacher
Framsögumaður

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40 Sjá nmgr. 9, *Daddy's Dance Hall*, málsgrein 15; og nmgr. 23, *Langeland*, málsgrein. 43.

41 Sjá nmgr. 8, *Collino and Chiappero*, málsgrein 52.

42 Sjá nmgr. 9, *Daddy's Dance Hall*, málsgrein 17.

ORDER OF THE PRESIDENT OF THE COURT
21 May 2002

(Withdrawal of a request for an Advisory Opinion)

In Case E-8/01,

Gunnar Amundsen AS and Others
v
Vectura AS,

a request for an Advisory Opinion by Borgarting lagmannsrett (Borgarting Court of Appeal, Oslo, Norway) by order of that court of 11 October 2001 in the case of *Gunnar Amundsen AS and Others* v *Vectura AS*,

THE PRESIDENT OF THE COURT

makes the following

ORDER

A request was made to the EFTA Court by an order of 11 October 2001 by Borgarting lagmannsrett (Borgarting Court of Appeal, Oslo, Norway), which was registered at the Court on 18 October 2001, for an Advisory Opinion in the case of *Gunnar Amundsen AS and Others* v *Vectura AS*, on the following questions:

1. Will a market share of over 60 per cent in the relevant market, in itself be sufficient for a finding that an undertaking has a dominant position under Article 54 EEA?

2. If question 1 is answered in the negative, will a market share of over 60 per cent in the relevant market in itself create a presumption that an undertaking has a dominant position under Article 54 EEA?

3. If question 2 is answered in the affirmative, and an undertaking has such a market share, what other market conditions in the relevant market might imply that the undertaking nonetheless does not have a dominant position under Article 54 EEA?

4. If a dominant undertaking provides marketing support to some customers and not to others, could that constitute abuse under Article 54 EEA, if that marketing support

   (i) must be viewed in its entirety as being a price discount for the dominant undertaking's performance of distribution services for the customers in question?

   (ii) must be viewed in its entirety as being compensation for marketing services which the customers in question provide to the undertaking?

   (iii) must be viewed partially as being compensation for marketing services which the customers in question provide to the undertaking, and partially as a price discount for the dominant undertaking's performance of distribution services for the customers in question?

5. If a dominant undertaking has unjustifiably treated its customers differently, could a finding of infringement of Article 54 EEA be made, without a concurrent finding that the differential treatment has impaired competition in the market in which the customers compete?

Pursuant to a letter dated 26 March 2001, registered at the Court on 8 April 2001, the Borgarting Lagmannsrett notified the Court that the parties before the national court had withdrawn their case. Accordingly, Borgarting Lagmannsrett has withdrawn its request for an Advisory Opinion.

Costs have not been claimed.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

Case E-8/01 removed from the Register.

Luxembourg, 21 May 2002

Thor Vilhjalmsson
President

Lucien Dedichen
Registrar

Case E-4/01

Karl K. Karlsson hf.
v
The Icelandic State

(State alcohol monopoly – incompatibility with 16 EEA – State liability in the event of a breach of EEA law – Conditions of liability)

Summary of the Judgment

1. With respect to an import monopoly, Article 16 EEA must be interpreted as meaning that, as from the entry into force of the EEA Agreement, every national monopoly of a commercial character must be adjusted so as to eliminate the exclusive right to import from other EEA States. Therefore, the maintenance after 1 January 1994 of a State monopoly on the import of alcoholic beverages is contrary to Article 16 EEA.

A commercial wholesale distribution monopoly, it cannot be regarded as being discriminatory by nature. However, Article 16 EEA requires that its organization and operation be arranged so as to preclude any discrimination between nationals of EEA States as regards conditions of procurement and marketing, so that trade in goods from other EEA States is not put at a disadvantage, in law or in fact, in relation to that in domestic goods.

National rules that are separable from the operation of the wholesale distribution monopoly, although they have a bearing upon it, must be assessed by the national court under Article 11 EEA.

2. EEA law does not entail a transfer of legislative powers. Therefore, EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts.

The absence of recognition of direct effect for EEA rules does not preclude the existence of an obligation on the State to provide for compensation for loss and damage caused to individuals and economic operators as a result of breaches of obligations under the EEA

Mál E-4/01

Karl K. Karlsson hf.
gegn
íslenska ríkinu

(Ríkiseinkasala á áfengi – Brot á 16. gr. EES – Skaðabótaábyrgð ríkisins vegna brota á EES-samningnum – Skilyrði bótaábyrgðar)

Samantekt

1. Skýra ber 16. gr. EES þannig að frá og með gildistöku EES-samningsins bar að breyta ríkiseinkasölum í viðskiptum með því að afnema einkarétt á innflutningi frá öðrum EES-ríkjum. Þess vegna var það andstætt 16. gr. EES að viðhalda einkarétti ríkisins á innflutningi á áfengi eftir 1. janúar 1994.

Ekki er unnt að líta svo á að einkaréttur á heildsöludreifingu feli sjálfkrafa í sér mismunun. Á hinn bóginn er í 6. gr. EES gert ráð fyrir að skipulag og starfræksla slíkrar einkasölu sé með þeim hætti að enginn greinarmunur sé gerður milli ríkisborgara aðildarríkja Evrópska efnahagssvæðisins hvað snertir skilyrði til aðdrátta og markaðssetningar vara, þannig að viðskipti með vörur frá öðrum EES-ríkjum njóti ekki lakari stöðu að lögum eða í reynd, í samanburði við innlenda framleiðslu.

Reglur landsréttar, sem ekki varða beint framkvæmd einkaréttar á heildsöludreifingu, þótt þær geti skipt máli fyrir hann, verður að meta á grundvelli 11. gr. EES.

2. EES-samningurinn felur ekki í sér framsal löggjafarvalds. Af því leiðir að EES-réttur gerir ekki kröfu til þess að einstaklingar og aðilar í atvinnurekstri geti byggt rétt fyrir dómstólum aðildarríkis á ákvæðum EES-réttar sem ekki hafa verið innleidd í landsrétt.

Þótt ekki sé miðað við að EES reglur hafi bein réttaráhrif útilokar það ekki skyldu ríkisins til að bæta tjón sem einstaklingar og aðilar í atvinnurekstri verða fyrir vegna vanefnda á skuldbindingum ríkisins samkvæmt EES-samningnum og sem viðkomandi ríki ber ábyrgð á.

Agreement for which that State can be held responsible.

The application of the principle of State liability under the EEA Agreement may not necessarily be in all respects coextensive with the corresponding principle under EC law.

An EEA State can be held responsible for breaches of its obligations under EEA law where three conditions are met: first, the rule of law infringed must be intended to confer rights on individuals; second, the breach must be sufficiently serious; and third, there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured party.

Under the EEA Agreement, an EEA State may, in principle, be held liable for breaches of its obligations under both secondary acts of EEA legislation and the main part of the EEA Agreement.

An EEA State will, under the EEA Agreement, be liable to a prospective importer of alcoholic beverages for loss or damage incurred as a result of the maintenance of a State monopoly on the import of alcoholic beverages, provided that the conditions for State liability are fulfilled. Where those conditions are fulfilled, compensation by the State for such loss and damage must be based on national liability law. The rules on compensation laid down by national law must not be less favourable than those relating to similar domestic claims and must not be framed so as to make it in practice impossible or excessively difficult to obtain compensation.

3. It is, in principle, for the national court to assess the facts, and to determine whether the conditions for State liability for breach of EEA law are met.

As regards the condition that the rule of law infringed must be intended to confer rights on individuals, such is the case when the relevant provision is unconditional and sufficiently precise. This condition is satisfied in the case of Article 16 EEA.

As regards the condition that the breach must be sufficiently serious, this depends on whether, in the exercise of its legislative powers, an EEA State has manifestly and gravely disregarded the limits on the exercise of its powers. A mere infringement of EEA law by an EEA State does not necessarily constitute a sufficiently serious breach. It will be sufficiently serious if the breach has persisted despite settled case law from which it is clear that the conduct in question constituted an infringement.

The EEA States must be allowed a reasonable time to adjust their legislation without incurring liability. However, it was clear long before the entry into force of the EEA Agreement that an import monopoly could not be maintained. The Icelandic State had sufficient time to make the necessary amendments in its national legislation, thereby preventing any breach of its obligation to abolish its import monopoly on alcoholic beverages. The breach of Article 16 EEA is therefore sufficiently serious.

Whether there is a direct causal link between the breach of Article 16 EEA and any damage sustained, is for the national court to decide.

Beiting meginreglunnar um skaðabótaskyldu ríkisins samkvæmt EES-rétti og gildissvið hennar þarf heldur ekki að vera að öllu leyti hið sama og samkvæmt EB-rétti.

EES-ríki getur orðið skaðabótaskylt vegna brota á skuldbindingum samkvæmt EES-rétti að þremur skilyrðum uppfylltum: Í fyrsta lagi verður að felast í reglunni sem brotin er að einstaklingar öðlist tiltekin réttindi; í öðru lagi verður að vera um nægilega alvarlega vanrækslu á skuldbindingum ríkisins að ræða, og í þriðja lagi verður að vera orsakasamband milli vanrækslu ríkisins á skuldbindingum sínum og þess tjóns sem tjónþoli verður fyrir.

EFTA-ríki getur, að meginstefnu til, verið skaðabótaskylt samkvæmt EES-samningnum, hvort sem um er að ræða brot á skuldbindingum sem leiða af afleiddri löggjöf eða skuldbindingum samkvæmt meginmáli EES-samningsins.

EES-ríki verður skaðabótaskylt gagnvart mögulegum innflytjanda áfengis vegna tjóns sem hann hefur orðið fyrir vegna þess að einkarétti ríkisins á innflutningi var viðhaldið, að því gefnu að skilyrði fyrir skaðabótaskyldu séu uppfyllt. Þar sem þessi skilyrði eru uppfyllt, ber að ákvarða bætur á grundvelli skaðabótareglna landsréttar. Reglur um skaðabætur sem mælt er fyrir um í landsrétti mega ekki fela í sér lakari réttarstöðu en gildir um hliðstæðar innlendar kröfur og mega ekki vera settar þannig fram að það verði í reynd ómögulegt eða óhæfilega erfitt að fá bætur.

3. Það kemur, að meginstefnu til, í hlut dómstóls aðildarríkis að meta staðreyndir málsins og ákvarða hvort skilyrðin fyrir skaðabótaskyldu ríkisins eru uppfyllt.

Hvað snertir skilyrðið um að reglan sem brotin mæli svo fyrir að einstaklingar öðlist tiltekin réttindi, hefur dómstóllinn áður komist að þeirri niðurstöðu að svo sé þegar reglan sem um ræðir er nægilega skýr og óskilyrt Þessu skilyrði er fullnægt að því er 16. gr. EES varðar.

Að því er varðar skilyrðið um að brotið verði að vera nægilega alvarlegt, er það háð því hvort samningsaðili með ber-sýnilegum og alvarlegum hætti leit fram hjá þeim takmörkunum sem eru á svigrúmi ríkisins til mats við ákvarðanatöku. Við mat á því hvort þetta skilyrði er uppfyllt, verður dómstóll sem fjallar um skaðabótakröfuna, að taka mið af öllum þeim þáttum sem einkenna þær aðstæður sem fyrir liggja.

Ætla verður EES-ríki hæfilegan tíma til að aðlaga löggjöf sína án þess að til skaðabótaskyldu stofnist. Á hinn bóginn hafi verið ljóst löngu fyrir gildistöku EES-samningsins að ekki yrði heimilt að viðhalda einkarétti á innflutningi. Íslenska ríkið virðist hafa haft nægilegan tíma frá því samningurinn var undirritaður og þar til hann tók gildi til að gera nauðsynlegar breytingar á innlendri löggjöf og þar með koma í veg fyrir brot á þeirri skyldu sinni að afnema einkarétt á innflutningi áfengis. Brot á 16. gr. EES er því nægilega alvarlegt.

Það er hlutverk dómstóls aðildarríkis að meta hvort fullnægt er því skilyrði að beint orsakasamband sé milli vanefnda á skuldbindingum ríkisins og þess tjóns sem aðili hefur orðið fyrir.

JUDGMENT OF THE COURT

30 May 2002*

(State alcohol monopoly – incompatibility with 16 EEA – State liability in the event of a breach of EEA law – Conditions of liability)

In Case E-4/01

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

Karl K. Karlsson hf.

and

The Icelandic State

on the interpretation of the EEA Agreement, in particular Articles 11 and 16 EEA.

THE COURT,

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

Registrar: Lucien Dedichen

having considered the written observations submitted on behalf of:

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

DÓMUR DÓMSTÓLSINS

30. maí 2002*

(Ríkiseinkasala á áfengi – Brot á 16. gr. EES-samningsins – Skaðabótaábyrgð ríkisins vegna brota á EES-samningnum – Skilyrði bótaábyrgðar)

Mál E-4/01

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

Karl K. Karlsson hf.

gegn

íslenska ríkinu

varðandi skýringu EES-samningsins, einkum 11. og 16. gr.

DÓMSTÓLLINN,

skipaður dómurunum Þór Vilhjálmssyni, forseta, Carl Baudenbacher og Per Tresselt (framsögumanni),

Dómritari: Lucien Dedichen

hefur, með tilliti til skriflegra greinargerða frá:

* Beiðni um ráðgefandi álit er á íslensku.

– the Plaintiff, Karl K. Karlsson hf., represented by Stefán Geir Þórisson, hæstaréttarlögmaður (Supreme Court Advocate);

– the Defendant, the Icelandic State, represented by Skarphéðinn Þórisson, Attorney General (Civil Affairs), assisted by Einar Karl Hallvarðsson, hæstaréttarlögmaður (Supreme Court Advocate), Office of the Attorney General (Civil Affairs);

– the Government of Norway, represented by Thomas Nordby, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent, and Frode Elgesem, Advocate, Office of the Attorney General (Civil Affairs), acting as Co-agent;

– the EFTA Surveillance Authority, represented by Bjarnveig Eiríksdóttir and Dóra Sif Tynes, Officers, Legal & Executive Affairs, acting as Agents;

– the Commission of the European Communities, represented by Lena Ström, Legal Adviser, Legal Service, acting as Agent;

having regard to the Report for the Hearing,

having heard the oral arguments of the Plaintiff, represented by Stefán Geir Þórisson; the Defendant, represented by Skarphéðinn Þórisson; the Government of Norway, represented by Thomas Nordby and Frode Elgesem; the EFTA Surveillance Authority, represented by Peter Dyrberg, Director of Legal & Executive Affairs, and Dóra Sif Tynes; and the Commission of the European Communities, represented by Lena Ström, at the hearing on 5 December 2001,

gives the following

Judgment

I Facts and procedure

1 By an order dated 6 April 2001, registered at the Court on 12 April 2001, the Héraðsdómur Reykjavíkur (Reykjavík District Court) made a Request for an Advisory Opinion in the case pending before it between Karl K. Karlsson hf. (hereinafter, the "Plaintiff") and the Icelandic State (hereinafter, the "Defendant").

2 The dispute before the Héraðsdómur Reykjavíkur concerns the questions of whether the State monopoly on the import and wholesale distribution of alcoholic beverages in force in Iceland until 1 December 1995 was incompatible with the EEA Agreement, and, if so, whether a legal person prevented from importing

– stefnanda, Karli K. Karlssyni hf. Í fyrirsvari sem umboðsmaður er Stefán Geir Þórisson, hæstaréttarlögmaður;

– stefnda, íslenska ríkinu. Í fyrirsvari sem umboðsmaður er Skarphéðinn Þórisson, ríkislögmaður, og honum til aðstoðar er Einar Karl Hallvarðsson, hæstaréttarlögmaður á skrifstofu ríkislögmanns;

– ríkisstjórn Noregs. Í fyrirsvari sem umboðsmenn eru Thomas Nordby, lögmaður á skrifstofu ríkislögmanns og Frode Elgesem, lögmaður, skrifstofu ríkislögmanns;

– Eftirlitsstofnun EFTA. Í fyrirsvari sem umboðsmenn eru Bjarnveig Eiríksdóttir og Dóra Sif Tynes, lögfræðingar á lögfræði- og framkvæmdasviði;

– Framkvæmdastjórn Evrópubandalaganna. Í fyrirsvari sem umboðsmaður er Lena Ström, lögfræðingur hjá lagadeild;

með tilliti til skýrslu framsögumanns,

og munnlegs málflutnings umboðsmanns stefnanda Stefáns Geirs Þórissonar; umboðsmanns stefnda Skarphéðins Þórissonar; umboðsmanna Norsku ríkisstjórnarinnar Thomas Nordby, og Frode Elgesem; umboðsmanna Eftirlitsstofnunar EFTA Peter Dyrberg, deildarstjóra á lögfræði og framkvæmdasviði og Dóru Sif Tynes; og umboðsmanns Framkvæmdastjórnarinnar Lena Ström, þann 5. desember 2001,

kveðið upp svofelldan

Dóm

I Málsatvik og meðferð málsins

1 Með beiðni dags. 6. apríl 2001, sem skráð var í málaskrá dómstólsins 12. apríl 2001, óskaði Héraðsdómur Reykjavíkur eftir ráðgefandi áliti í máli sem rekið er fyrir dómstólnum milli Karls K. Karlssonar hf. (stefnanda) og íslenska ríkisins (stefnda).

2 Ágreiningurinn fyrir Héraðsdómi Reykjavíkur varðar það hvort einkaréttur ríkisins á innflutningi og heildsölu áfengis, sem var við lýði á Íslandi til 1. desember 1995, var ósamrýmanlegur EES-samningnum, og ef svo er, hvort aðili sem hindraður var í að flytja inn áfengi eigi rétt til skaðabóta úr hendi ríkisins vegna þess fjártjóns sem hann varð fyrir vegna einkaréttarins.

alcoholic beverages is entitled to compensation from the State for financial loss incurred as a result of that monopoly.

3 The national legislation contested before the Héraðsdómur Reykjavíkur is the Icelandic *Áfengislög nr. 82/1969* (Act No. 82/1969 on Alcoholic Beverages, hereinafter the "Alcoholic Beverages Act") and *Lög nr. 63/1969 um verslun með áfengi og tóbak* (Act No. 63/1969 on Trading with Alcoholic Beverages and Tobacco, hereinafter the "Alcoholic Beverages and Tobacco Trading Act").

4 At the time of the entry into force of the EEA Agreement on 1 January 1994, the Alcoholic Beverages Act provided that only the Icelandic State was permitted to import alcoholic beverages, and that the Áfengis- og tóbaksverslun ríkisins (State Alcohol and Tobacco Monopoly) was to handle the import and wholesale distribution of such products. The State monopoly on the import and wholesale distribution of alcoholic beverages was abolished and the right to such imports and wholesale distribution was liberalised as of 1 December 1995, by way of the adoption of *Lög nr. 94/1995 um breyting á áfengislögum* and *Lög nr. 95/1995 um breyting á lögum um verslun með áfengi og tóbak*, amending the Alcoholic Beverages Act and the Alcoholic Beverages and Tobacco Trading Act, respectively. The Alcoholic Beverages Act has since been replaced by *Áfengislög nr. 75/1998* (Act No. 75/1998 on Alcoholic Beverages).

5 It is stated in the Request for an Advisory Opinion that, prior to the entry into force of the EEA Agreement, the Plaintiff, Karl K. Karlsson hf., had taken measures to commence the import and wholesale distribution of alcoholic beverages, and was appointed agent for many types of alcoholic beverages, including the French liqueur Cointreau, in Iceland.

6 Moreover, it follows from the Request for an Advisory Opinion that, from 1 January 1994, when the EEA Agreement entered into force, until 1 December 1995, when the State monopoly on the import and wholesale distribution of alcoholic beverages was abolished, the Plaintiff was prohibited from importing into Iceland the alcoholic beverages for which it was the agent, and distributing such products to retailers. The Plaintiff claims that it incurred a considerable financial loss as a result of that prohibition.

7 The Plaintiff brought proceedings against the Defendant before the Héraðsdómur Reykjavíkur seeking a declaratory judgment to the effect that the Defendant is liable for the financial loss sustained by the Plaintiff by not being permitted to import and distribute Cointreau on a wholesale basis. In the proceedings, the Plaintiff questioned the compatibility with the EEA Agreement of the State monopoly on the import and wholesale distribution of alcoholic beverages in force in Iceland until 1 December 1995. The Plaintiff has, moreover, claimed entitlement under EEA law to compensation for financial loss incurred as a result of that monopoly.

8 On 6 April 2001, Héraðsdómur Reykjavíkur submitted a Request for an Advisory Opinion to the EFTA Court on the following questions:

3 Íslenska löggjöfin sem um er deilt fyrir Héraðsdómi Reykjavíkur eru *Áfengislög nr. 82/1969* og *lög nr. 63/1969 um verslun með áfengi og tóbak.*

4 Þegar EES-samningurinn gekk í gildi 1. janúar 1994 var í áfengislögunum mælt svo fyrir að aðeins íslenska ríkinu skyldi vera heimilt að flytja inn áfengi og að Áfengis- og tóbaksverslun ríkisins skyldi annast innflutning og heildsöludreifingu áfengis. Með gildistöku laga nr. 94/1995, um breyting á áfengislögum, og laga nr. 95/1995 um breyting á lögum um verslun með áfengi og tóbak, þann 1. janúar 1995, var einkaréttur ríkisins á innflutningi og heildsöludreifingu áfengis afnuminn og kveðið á um aukið frelsi í þeim efnum. Áfengislög nr. 75/1998 hafa nú komið í stað eldri áfengislaga.

5 Fram kemur í beiðni um ráðgefandi álit, að áður en EES-samningurinn gekk í gildi hafi stefnandi, Karl K. Karlsson hf., gert ráðstafanir til að hefja innflutning og heildsöludreifingu áfengis og hafi haft á Íslandi umboð fyrir fjölda áfengistegunda, þar á meðal hinn franska líkjör Cointreau.

6 Ennfremur kemur fram í beiðninni um ráðgefandi álit, að frá 1. janúar 1994, þegar EES-samningurinn gekk í gildi, til 1. desember 1995, þegar einkaréttur ríkisins á innflutningi og heildsöludreifingu áfengis var afnuminn, hafi stefnanda verið óheimilt að flytja inn til Íslands þær áfengistegundir sem hann hafði umboð fyrir og að dreifa þessum vörum til smásöluaðila. Stefnandi telur að vegna þessa banns hafi hann orðið fyrir talsverðu fjártjóni.

7 Stefnandi höfðaði mál gegn stefnda fyrir Héraðsdómi Reykjavíkur til að fá viðurkenningardóm um skaðabótaskyldu stefnda vegna þess fjártjóns sem stefnandi hefur orðið fyrir sökum þess að honum var óheimilt að flytja til landsins og dreifa í heildsölu franska líkjörnum Cointreau. Við meðferð málsins hefur stefnandi dregið í efa að einkaréttur ríkisins á innflutningi og heildsöludreifingu áfengis, sem var við lýði á Íslandi til 1. desember 1995, hafi verið samrýmanlegur EES-samningnum. Stefnandi hefur ennfremur haldið því fram að hann eigi á grundvelli EES-samningsins rétt til skaðabóta vegna fjártjóns sem hann varð fyrir vegna einkaréttarins.

8 Þann 6. apríl 2001 lagði Héraðsdómur Reykjavíkur fram beiðni um ráðgefandi álit EFTA-dómstólsins varðandi þessar spurningar:

1. Should the provisions of the EEA Agreement, in particular Articles 11 and 16, be interpreted as meaning that Iceland was obliged to abolish the State monopoly for the import and wholesale distribution of alcoholic beverages as of the commencement of the Agreement on 1 January 1994?

2. If the aforementioned question is answered in the affirmative, is Iceland liable for compensation to a legal person which, at the time of entry into force of the Agreement, was the exclusive agent for a specific type of alcoholic beverage, for the financial loss it incurred due to the fact that the import and wholesale distribution of the alcoholic beverage was not permitted until nearly two years after the entry into force of the EEA Agreement, provided that the conditions for liability for compensation according to the case law of the EFTA Court and Court of Justice of the European Communities are fulfilled?

3. If Questions 1 and 2 are answered in the affirmative, are the conditions for liability for compensation according to the case law of the aforementioned courts fulfilled?

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

II Findings of the Court

Admissibility

10 The Government of Norway has contended that the first question should be ruled inadmissible, as the national court has failed to comply with Article 96(3) of the Rules of Procedure of the EFTA Court, in that the Request from the Héraðsdómur Reykjavíkur for an Advisory Opinion does not contain a sufficient description of the facts of the case.

11 In order to provide an interpretation of EEA law that will be of use to the national court, it is necessary that the Request for an Advisory Opinion contains, at the very least, an explanation of the factual circumstances on which the submitted questions are based. The information provided must not only enable the Court to reply to the national court, but must also give the Governments of the EEA States and other interested parties the opportunity to submit observations pursuant to Article 20 of the Statute of the EFTA Court and Article 97 of its Rules of Procedure. It is the Court's duty to ensure that this opportunity is safeguarded, bearing in mind that only the requests are made available to the interested parties (see, *inter alia*, Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraphs 30 and 31).

1. Ber að skýra ákvæði EES-samningsins, einkum 11. og 16. gr., þannig að íslenska ríkinu hafi frá gildistöku samningsins 1. janúar 1994 verið skylt að afnema einkarétt ríkisins á innflutningi og heildsöludreifingu áfengis?

2. Sé svarið við ofangreindri spurningu jákvætt, er spurt, hvort íslenska ríkið sé skaðabótaskylt gagnvart lögaðila, sem við gildistöku samningsins hafði aflað sér einkasölumboðs fyrir tiltekna áfengistegund, að því tilskildu að hann hafi orðið fyrir fjártjóni vegna þess að ekki var heimilaður innflutningur og heildsöludreifing áfengistegundarinnar, fyrr en tæpum tveimur árum eftir gildistöku EES-samningsins, að fullnægðum bótaskilyrðum samkvæmt dómafordæmum EFTA-dómstólsins og Evrópudómstólsins?

3. Sé svarið við spurningum 1 og 2 jákvætt, er spurt, hvort fullnægt sé bótaskilyrðum samkvæmt dómafordæmum ofangreindra dómstóla?

9 Vísað er til skýrslu framsögumanns um frekari lýsingu löggjafar, málsatvika og meðferðar málsins, svo og um greinargerðir sem dómstólnum bárust. Þessi atriði verða ekki rakin eða rædd hér á eftir nema að því leyti sem forsendur dómsins krefjast.

II Álit dómstólsins

Spurningar tækar til efnismeðferðar

10 Ríkisstjórn Noregs heldur því fram að vísa eigi fyrstu spurningunni frá þar sem dómstóllinn sem beðið hafi um ráðgefandi álit hafi ekki fullnægt skyldu sinni samkvæmt 3. mgr. 96. gr. starfsreglna fyrir EFTA-dómstólinn, að því leyti að ekki sé að finna nægilegar upplýsingar um málsatvik í beiðninni frá Héraðsdómi Reykjavíkur.

11 Í því skyni að láta í té álit um skýringu EES-réttar sem komi að gagni fyrir dómstólinn sem beðið hefur um álit er nauðsynlegt að beiðnin hafi að geyma, a. m. k., lýsingu á málsatvikum sem spurningarnar eru byggðar á. Upplýsingarnar eiga ekki aðeins að gera EFTA-dómstólnum kleift að svara dómstólnum sem beðið hefur um álit, heldur einnig að veita ríkisstjórnum samningsaðila EES-samningsins og öðrum sem áhuga hafa, tækifæri til að leggja fram athugasemdir samkvæmt 20. gr. stofnsamþykktar EFTA-dómstólsins og 97. gr. starfsreglna hans. Það er skylda EFTA-dómstólsins að standa vörð um þennan rétt og hafa í huga að aðeins beiðnin er aðgengileg þeim aðilum sem kynnu að vilja láta sig málið varða (sjá m.a. sameinuð mál C-51/96 og C-191/97 *Deliège* [2000] ECR I-2549, liðir 30 og 31).

12 It is clear from the written observations submitted to the Court by the Government of Norway, the EFTA Surveillance Authority and the Commission of the European Communities that the information contained in the Request for an Advisory Opinion duly enabled them to take a position on each of the three questions submitted to the Court by Héraðsdómur Reykjavíkur. Those questions are admissible and must be answered by the Court.

The first question

13 By its first question, the Héraðsdómur Reykjavíkur essentially seeks to ascertain whether a State monopoly on the import and wholesale distribution of alcoholic beverages, such as the State alcohol monopoly in Iceland, as it existed until 1 December 1995, was incompatible with Article 11 or 16 EEA as of the entry into force of the EEA Agreement on 1 January 1994.

14 As a preliminary point, the Court observes that the product at issue in the main proceedings, Cointreau, falls within the material scope of the EEA Agreement. This follows from Article 8(3)(b) EEA read with Article 1 of Protocol 3 to the Agreement, which provides that the provisions in the Agreement are to apply to products listed in Tables I and II. Liqueurs containing more than 5% by weight of added sugar are listed in Table I under Heading 22.08 of the Harmonized Commodity Description and Coding System.

15 The first question relates to both Articles 11 and 16 EEA. The Court notes that rules relating to the existence and operation of a monopoly must be examined under Article 16 EEA, which applies specifically to a domestic commercial monopoly's exercise of its exclusive rights (see, *inter alia*, Case E-1/97 *Gundersen* v *Oslo kommune* [1997] EFTA Court Report 108, at paragraph 17; and Case C-189/95 *Franzén* [1997] ECR I-5909 (hereinafter, "*Franzén*"), at paragraph 35). The national rules contested in the main proceedings relate to the maintenance, after the entry into force of the EEA Agreement, of the State monopoly for the import and wholesale distribution of alcoholic beverages. These rules must therefore be examined under Article 16 EEA.

16 Article 16 EEA provides:

> "1. The Contracting Parties shall ensure that any State monopoly of a commercial character be adjusted so that no discrimination regarding the conditions under which goods are procured and marketed will exist between nationals of EC Member States and EFTA States.
>
> 2. The provisions of this Article shall apply to any body through which the competent authorities of the Contracting Parties, in law or in fact, either directly or indirectly supervise, determine or appreciably influence imports or exports between Contracting Parties. These provisions shall likewise apply to monopolies delegated by the State to others."

12 Ljóst er af skriflegum greinargerðum sem lagðar hafa verið fram fyrir dóminn af hálfu ríkisstjórnar Noregs, Eftirlitsstofnunar EFTA og Framkvæmdastjórnar Evrópubandalaganna að upplýsingarnar sem fram koma í beiðninni um ráðgefandi álit hafa verið nægilegar til að þessir aðilar gætu tekið afstöðu til allra þriggja spurninganna sem Héraðsdómur Reykjavíkur hefur lagt fyrir EFTA-dómstólinn. Spurningarnar eru efnislega tækar og dómstólnum ber að svara þeim.

Fyrsta spurning

13 Í fyrstu spurningunni leitar Héraðsdómur Reykjavíkur svara við því hvort einkaréttur ríkisins á innflutningi og heildsöludreifingu áfengis, af því tagi sem við lýði var á Íslandi til 1. desember 1995, hafi verið ósamrýmanlegur 11. og 16. gr. EES-samningsins frá gildistöku hans 1. janúar 1994.

14 Dómstóllinn bendir fyrst á að framleiðsluvara sú sem um ræðir í aðalmálinu, Cointreau, fellur undir efnissvið EES-samningsins. Þetta leiðir af 3. mgr. 8. gr. hans, sbr. og 1. gr. bókunar 3 við samninginn, sem mælir svo fyrir að ákvæði samningsins skuli taka til framleiðsluvara sem taldar eru upp í töflu I og II. Líkjörar sem innihalda meira en 5% af viðbættum sykri eru taldir upp undir númeri 22.08 í töflu I í samræmdu vörulýsingar- og vörumerkjaskránni.

15 Fyrsta spurningin lýtur bæði að 11. og 16. gr. EES. Dómstóllinn bendir á að reglur sem varða tilvist og starfsemi einkasölu verður að meta á grundvelli 16. gr. EES, sem tekur sérstaklega til framkvæmdar einkaréttarins af hálfu einkasölu (sjá m.a. mál E-1/97 *Gundersen* gegn *Oslo kommune* [1997] Skýrsla EFTA-dómstólsins 108, lið 17; og mál C-189/95 *Franzén* [1997] ECR I-5909 (hér eftir "*Franzén*"), lið 35). Þær reglur landsréttar sem fjallað er um í málinu varða þá aðstöðu að einkarétti ríkisins á innflutningi og heildsöludreifingu áfengis var viðhaldið eftir gildistöku EES-samningsins. Þessar reglur verður því að meta í ljósi 16. gr. EES.

16 Ákvæði 16. gr. EES hljóðar svo:

> 1. Samningsaðilar skulu tryggja breytingar á ríkiseinkasölum í viðskiptum þannig að enginn greinarmunur sé gerður milli ríkisborgara aðildarríkja EB og EFTA ríkja hvað snertir skilyrði til aðdrátta og markaðssetningar vara.
>
> 2. Ákvæði þessarar greinar gilda um allar stofnanir sem þar til bær yfirvöld samningsaðilanna nota samkvæmt lögum eða í reynd, beint eða óbeint, til að hafa eftirlit með, ráða eða hafa umtalsverð áhrif á inn- eða útflutning milli samningsaðila. Þessi ákvæði gilda einnig um einkasölur sem ríki hefur fengið öðrum í hendur.

17 The purpose of Article 16 EEA is to reconcile the possibility for EEA States to maintain certain monopolies of a commercial nature as instruments for the pursuit of public interest aims with the requirements of the establishment and functioning of the EEA market. It seeks to eliminate obstacles to the free movement of goods, save, however, for restrictions on trade inherent in the existence of the monopolies in question (see *Franzén*, at paragraph 39).

18 At the time of the entry into force of the EEA Agreement on 1 January 1994, the national rules contested in the main proceedings provided that alcoholic beverages could only be imported and distributed on a wholesale basis by the Icelandic State. The State monopoly on the import and wholesale distribution of alcoholic beverages was not abolished until 1 December 1995.

The import monopoly

19 The Court has already held that a statutory State monopoly that enjoys exclusive right to import certain goods thereby has the discretion to determine the supply of those goods on the domestic market and may consequently also determine their price (see Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 15 (hereinafter, "*Restamark*"), at paragraph 71). It follows from the case law of both the EFTA Court and the Court of Justice of the European Communities that Article 16 EEA must be interpreted as meaning that, as from the entry into force of the EEA Agreement, every national monopoly of a commercial character must be adjusted so as to eliminate the exclusive right to import from other EEA States (see *Restamark*, at paragraph 74; and Case 59/75 *Pubblico Ministereo* v *Manghera* [1976] ECR 91 (hereinafter, "*Manghera*"), at paragraph 13). Therefore, the maintenance after 1 January 1994 of a State monopoly on the import of alcoholic beverages is contrary to Article 16 EEA.

The wholesale distribution monopoly

20 As regards the contested wholesale distribution monopoly, the Court notes that Article 16 EEA requires that the organization and operation of such a commercial monopoly be arranged so as to preclude any discrimination between nationals of EEA States as regards conditions of procurement and marketing, so that trade in goods from other EEA States is not put at a disadvantage, in law or in fact, in relation to that in domestic goods (see, to this effect, *Franzén*, at paragraph 40). A wholesale distribution monopoly cannot be regarded as being discriminatory by nature. It may not be incompatible with Article 16 EEA if the trade in goods from other EEA States is not put at a disadvantage, in law or in fact, in relation to trade in domestic goods.

21 It is for the national court to make the necessary assessment of the organisation and operation of the wholesale distribution monopoly. If the national court finds that the monopoly was operated in a manner that gave rise to any disadvantage to

17 Markmið 16. gr. er að gera EES-ríkjum kleift að viðhalda vissum ríkiseinkasölum í viðskiptum vegna almannhags þannig að samræmist stofnun og framkvæmd hins sameiginlega EES-markaðar. Með ákvæðinu er stefnt að afnámi hindrana á frjálsum vöruflutningum, að því marki sem slíkar hindranir eru ekki innbyggðar í sjálfa einkasöluna (sjá *Franzén*, lið 39).

18 Þegar EES-samningurinn gekk í gildi 1. janúar 1994 mæltu hinar íslensku reglur, sem um er fjallað í málinu, svo fyrir að íslenska ríkið hefði einkarétt á innflutningi og heildsöludreifingu áfengis. Einkaréttur ríkisins á innflutningi og heildsöludreifingu áfengis var ekki afnuminn fyrr en 1. desember 1995.

Einkaréttur á innflutningi

19 Dómstóllinn hefur áður komist að þeirri niðurstöðu að lögmætur einkaréttur ríkisins á öllum innflutningi tiltekinna vara hafi það í för með sér að ríkið hafi í hendi sér að ákvarða framboð þeirra vara á innanlandsmarkaði og geti þar með einnig ráðið verði þeirra (sjá mál E-1/94 *Restamark* [1994-1995] Skýrsla EFTA-dómstólsins 15 (hér eftir, "*Restamark*"), lið 71). Það leiðir af dómaframkvæmd bæði EFTA-dómstólsins og dómstóls Evrópubandalaganna að 16. gr. ber að skýra þannig að frá og með gildistöku EES-samningsins bar að breyta ríkiseinkasölum í viðskiptum með því að afnema einkarétt á innflutningi frá öðrum EES-ríkjum (sjá *Restamark*, lið 74; og mál 59/75 *Publico Ministereo* v *Manghera* [1976] ECR 91 (hér eftir "*Manghera")*, lið 13). Þess vegna var það andstætt 16. gr. EES að viðhalda einkarétti ríkisins á innflutningi á áfengi eftir 1. janúar 1994.

Einkaréttur á heildsöludreifingu

20 Að því er varðar hinn umdeilda einkarétt á heildsöludreifingu bendir dómstóllinn á að 16. gr. EES gerir ráð fyrir að skipulag og starfræksla slíkar einkasölu verði að vera með þeim hætti að enginn greinarmunur sé gerður milli ríkisborgara aðildarríkja Evrópska efnahagssvæðisins hvað snertir skilyrði til aðdrátta og markaðssetningar vara, þannig að viðskipti með vörur frá öðrum EES-ríkjum, njóti ekki lakari stöðu að lögum eða í reynd, í samanburði við innlenda framleiðslu (sjá um þetta, *Franzén*, lið 40). Ekki er unnt að líta svo á að einkaréttur á heildsöludreifingu sé eftir eðli sínu ósamrýmanlegur 16. gr. EES. Verið getur að einkaréttur á heildsöludreifingu sé ekki andstæður 16. gr. EES ef viðskipti með vörur frá öðrum EES-ríkjum búa ekki við lakari skilyrði, að lögum eða í reynd, í samanburði við viðskipti með innlendar framleiðsluvörur.

21 Það er hlutverk Héraðsdóms Reykjavíkur að meta skipulag og framkvæmd einkaréttar til heildsöludreifingar. Ef dómstóllinn kemst að þeirri niðurstöðu að einkarétturinn hafi verið framkvæmdur þannig að vörur fluttar inn frá öðrum EES-ríkjum hafi sætt lakari viðskiptakjörum en innlendar vörur, verður að líta

trade in goods from other EEA States compared to trade in domestic goods, the exclusive right to wholesale distribution of the Icelandic State monopoly was incompatible with Article 16 EEA.

22 National rules that are separable from the operation of the wholesale distribution monopoly, although they have a bearing upon it, must be assessed by the national court under Article 11 EEA (see, to that effect, *Franzén*, at paragraph 36). In that assessment, regard must be had to the judgment in Case E-6/96 *Wilhelmsen* v *Oslo kommune* [1997] EFTA Court Report 56, at paragraph 51, from which it follows that the relevant question is whether the wholesale distribution monopoly impedes the access to the market of products from other EEA States more than it impedes the access of domestic products.

23 Based on the above considerations, the answer to the first question must be that the maintenance after 1 January 1994 of a State monopoly on the import of alcoholic beverages is incompatible with Article 16 EEA.

The second question

24 By its second question, the Héraðsdómur Reykjavíkur essentially seeks to ascertain whether, under the EEA Agreement, an EEA State may be liable to a prospective importer of alcoholic beverages for loss or damage incurred by him as a result of the maintenance of a State monopoly on the import of alcoholic beverages, provided that the conditions for State liability are fulfilled.

25 In Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Court Report 95 (hereinafter, "*Sveinbjörnsdóttir*"), the EFTA Court held that the EEA Agreement is an international treaty *sui generis* that contains a distinct legal order of its own. The depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, but the scope and the objective of the EEA Agreement goes beyond what is usual for an agreement under public international law (see *Sveinbjörnsdóttir*, at paragraph 59). In *Sveinbjörnsdóttir*, the EFTA Court concluded that it is a principle of the EEA Agreement that an EEA State is obliged to provide for compensation for loss and damage caused to individuals as a result of breaches of the obligations under the EEA Agreement for which that State can be held responsible. The EEA Agreement does not entail a transfer of legislative powers. However, the principle of State liability must be seen as an integral part of the EEA Agreement as such (see *Sveinbjörnsdóttir*, at paragraphs 62 and 63). This was noted by the Court of Justice of the European Communities in Case C-140/97 *Rechberger and Others* [1999] ECR I-3499, at paragraph 39.

26 The Government of Norway has argued that the principle of State liability under Community law, as developed in the case law of the Court of Justice of the European Communities, is inseparable from the fundamental principle of direct effect. The principles of direct effect and State liability constitute complementary elements of the supranationality of Community law, which is absent in the EEA.

svo á að einkaréttur íslensku ríkiseinkasölunnar til heildsöludreifingar hafi verið andstæður 16. gr. EES.

22 Reglur landsréttar sem ekki varða beint framkvæmd einkaréttar á heildsöludreifingu, þótt þær geti skipt máli fyrir hann, verður Héraðsdómur Reykjavíkur að meta á grundvelli 11. gr. EES (sjá um þetta, *Franzén*, lið 36). Við það mat verður að taka mið af dómi í máli E-6/96 *Wihelmsen* v *Oslo kommune* [1997] Skýrsla EFTA-dómstólsins 56, lið 51. Af þeim dómi leiðir að meginspurningin er hvort einkaréttur á heildsöludreifingu takmarkar í ríkara mæli möguleika til að koma á markað framleiðsluvörum frá öðrum EES-ríkjum en innlendum framleiðsluvörum.

23 Með vísan til framangreinds verður svarið við fyrstu spurningunni, að viðhald einkaréttar á innflutningi áfengis eftir 1. janúar 1994 sé ósamrýmanlegt 16. gr. EES-samningsins.

Önnur spurning

24 Í annarri spurningunni leitar Héraðsdómur Reykjavíkur í raun svars við því hvort EES-ríki geti samkvæmt EES-samningnum verið skaðabótaskylt gagnvart mögulegum innflytjanda áfengis vegna tjóns sem hann hafi orðið fyrir vegna þessa að einkarétti á innflutningi áfengis var viðhaldið, að því gefnu að skilyrðum skaðabótaskyldu sé fullnægt.

25 Í máli E-9/97 *Erla María Sveinbjörnsdóttir* [1998] Skýrsla EFTA-dómstólsins 95 (hér eftir "*Erla María Sveinbjörnsdóttir*"), komst EFTA-dómstóllinn að þeirri niðurstöðu að EES-samningurinn væri þjóðréttarsamningur sérstaks eðlis sem fæli í sér sérstakt og sjálfstætt réttarkerfi. Samruni sá sem samningurinn mæli fyrir um gangi ekki jafn langt og sé ekki eins víðfeðmur og sá samruni sem samningurinn um Evrópubandalagið stefni að. Hins vegar gangi markmið EES-samningsins lengra og gildissvið hans sé víðtækara en venjulegt sé um þjóðréttarsamninga (sjá *Erla María Sveinbjörnsdóttir*, lið 59). Í því máli komst EFTA-dómstóllinn að þeirri niðurstöðu að það sé meginregla samkvæmt EES-samningnum að EES-ríki beri skylda til að sjá til þess að það tjón fáist bætt sem einstaklingar verða fyrir vegna vanefnda á skuldbindingum samkvæmt EES-samningnum og sem viðkomandi ríki beri ábyrgð á. EES-samningurinn feli ekki í sér framsal löggjafarvalds, en meginreglan um skaðabótaábyrgð ríkisins sé hins vegar hluti EES-samningsins (sjá *Erla María Sveinbjörnsdóttir*, liðir 62 og 63). Á þetta er bent í dómi dómstóls Evrópubandalaganna í máli C-140/97 *Rechberger o.fl.* [1999] ECR I-3499, lið 39.

26 Ríkisstjórn Noregs hefur haldið því fram að meginreglan um skaðabótaábyrgð ríkisins í bandalagsrétti, eins og hún hefur verið mótuð í dómaframkvæmd dómstóls Evrópubandalaganna verði ekki skilin frá meginreglunni um bein réttaráhrif. Meginreglurnar um bein réttaráhrif og skaðabótaábyrgð ríkisins séu hluti af hinu yfirþjóðlega eðli bandalagsréttarins, sem ekki sé til staðar í EES-

The Government of Norway has stated that "it would be contrary to the expressed views of both the [Court of Justice of the European Communities] and the [EFTA] Court to establish a principle of State liability which in [] effect is similar to the principle of direct effect…."

27 This line of argument cannot succeed. It is correct, as the Government of Norway has pointed out, that the principle of State liability under Community law is regarded as a necessary corollary of the direct effect of Community provisions (see Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029 (hereinafter, "*Brasserie du Pêcheur*"), at paragraph 22). However, this cannot mean that the finding of a principle of State liability, based directly on the EEA Agreement as such, is in any way contingent upon recognition of a corollary principle of direct effect of EEA rules.

28 It follows from Article 7 EEA and Protocol 35 to the EEA Agreement that EEA law does not entail a transfer of legislative powers. Therefore, EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts. At the same time, it is inherent in the general objective of the EEA Agreement of establishing a dynamic and homogeneous market, in the ensuing emphasis on the judicial defence and enforcement of the rights of individuals, as well as in the public international law principle of effectiveness, that national courts will consider any relevant element of EEA law, whether implemented or not, when interpreting national law.

29 The absence of recognition of direct effect for EEA rules does not preclude the existence of an obligation on the State to provide for compensation for loss and damage caused to individuals and economic operators as a result of breaches of obligations under the EEA Agreement for which that State can be held responsible.

30 The finding that the principle of State liability is an integral part of the EEA Agreement differs, as it must, from the development in the case law of the Court of Justice of the European Communities of the principle of State liability under EC law. Therefore, the application of the principles may not necessarily be in all respects coextensive.

31 The Defendant, supported by the Government of Norway, has argued that the concept of State liability under the EEA Agreement must in any circumstances be limited to incorrect implementation of directives. It contends that the EEA Agreement does not require that an EEA State be held liable for breach of the main part of the EEA Agreement.

32 That argument must be rejected. An EEA State can be held responsible for breaches of its obligations under EEA law where three conditions are met: first, the rule of law infringed must be intended to confer rights on individuals; second, the breach must be sufficiently serious; and third, there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured party (see *Sveinbjörnsdóttir*, at paragraph 66). The three

samningnum. Ríkisstjórn Noregs heldur því fram "að það væri ósamrýmanlegt framkomnum skoðunum dómstóls Evrópubandalaganna og EFTA-dómstólsins að mæla fyrir um meginreglu um skaðabótaábyrgð ríkisins sem í raun sé svipuð meginreglunni um bein réttaráhrif".

27 Þessi röksemdafærsla fær ekki staðist. Það er rétt, eins og bent er á af hálfu ríkisstjórnar Noregs, að reglan um skaðabótaábyrgð ríkisins samkvæmt bandalagsrétti er talin vera nauðsynleg viðbót við regluna um bein réttaráhrif ákvæða bandalagsréttar (sjá sameinuð mál C-46/93 og C-48/93 *Brasserie du Pêcheur og Factortame* [1996] ECR I-1029 (hér eftir, "*Brasserie du Pêcheur*"), lið 22). Þó getur ekki falist í þessu að meginreglan um skaðabótaábyrgð ríkisins, sem byggð er á EES-samningnum sjálfum, sé á nokkurn hátt háð því að viðurkennd sé afleidd meginregla um bein réttaráhrif EES-reglna.

28 Það leiðir af 7. gr. EES og bókun 35 við EES-samninginn að EES-réttur felur ekki í sér framsal löggjafarvalds. Af því leiðir að EES-réttur gerir ekki kröfu til þess að einstaklingar og aðilar í atvinnurekstri geti byggt beinan rétt fyrir dómstólum aðildarríkis á ákvæðum EES-réttar sem ekki hafa verið innleidd í landsrétt. Um leið leiðir það af þeim almennu markmiðum EES-samningsins, að koma á fót öflugum og einsleitum markaði, þar sem ítrekuð áhersla er lögð á möguleika einstaklinga til að leita réttar síns fyrir dómstólum og til að fá fullnægt réttindum sínum samkvæmt samningnum, sem og af meginreglunni um virka framkvæmd þjóðaréttar, að dómstólar aðildarríkja hljóta við skýringu landsréttar að taka mið af EES-réttinum í heild, hvort sem ákvæði hans hafa verið lögfest eða ekki.

29 Þótt ekki sé miðað við að EES-reglur hafi bein réttaráhrif útilokar það ekki skyldu ríkisins til að bæta það tjón sem einstaklingar og aðilar í atvinnurekstri verða fyrir vegna vanefnda á skuldbindingum sínum samkvæmt EES-samningnum og sem viðkomandi EFTA-ríki ber ábyrgð á.

30 Af þessu leiðir að sú niðurstaða að meginreglan um skaðabótaábyrgð ríkisins sé hluti EES-samningsins er, eðli málsins samkvæmt, frábrugðin þróuninni í dómaframkvæmd dómstóls Evrópubandalaganna að því er varðar regluna um skaðabótaábyrgð ríkisins samkvæmt bandalagsrétti. Beiting þessara reglna og gildissvið þeirra þarf þess vegna heldur ekki að vera að öllu leyti hið sama.

31 Stefndi, með stuðningi ríkisstjórnar Noregs, heldur því fram að reglan um skaðabótaábyrgð ríkisins samkvæmt EES-samningnum eigi aðeins við ranga lögfestingu tilskipana. Hann heldur því fram að EES-samningurinn geri ekki kröfu til þess að EES-ríki sé skaðabótaskylt vegna brota á ákvæðum í meginmáli EES-samningsins.

32 Þessari röksemd verður að hafna. EES-ríki getur orðið skaðabótaskylt vegna brota á skuldbindingum samkvæmt EES-rétti að þremur skilyrðum uppfylltum: Í fyrsta lagi verður að felast í reglunni sem brotin er að einstaklingar öðlist tiltekin réttindi; í öðru lagi verður að vera um nægilega alvarlega vanrækslu á skuldbindingum ríkisins að ræða, og í þriðja lagi verður að vera orsakasamband

conditions for State liability must be satisfied both where the loss or damage for which compensation is sought is the result of a failure to act on the part of the EEA State, and where it is the result of the adoption of a legislative or administrative act in breach of EEA law (see, for comparison, Case C-424/97 *Haim* [2000] ECR I-5213 (hereinafter, "*Haim*"), at paragraph 37). Under the EEA Agreement, an EEA State may, in principle, be held liable for breaches of its obligations under both secondary acts of EEA legislation and the main part of the EEA Agreement.

33 Subject to the existence of an obligation under EEA law of the State to provide for compensation, and where the conditions for State liability for breach of EEA law are met, compensation by the State for the loss and damage caused must be based on national liability law. The conditions for compensation of loss and damage laid down by national law must not be less favourable than those relating to similar domestic claims and must not be framed so as to make it in practice impossible or excessively difficult to obtain compensation (see, for comparison, *Haim*, at paragraph 33).

34 The answer to the second question must therefore be that an EEA State will, under the EEA Agreement, be liable to a prospective importer of alcoholic beverages for loss or damage incurred as a result of the maintenance of a State monopoly on the import of alcoholic beverages, provided that the conditions for State liability are fulfilled. Where those conditions are fulfilled, compensation by the State for such loss and damage must be based on national liability law. The rules on compensation laid down by national law must not be less favourable than those relating to similar domestic claims and must not be framed so as to make it in practice impossible or excessively difficult to obtain compensation.

The third question

35 By its third question, the Héraðsdómur Reykjavíkur is asking whether the conditions for State liability under the EEA Agreement are fulfilled in the case before it.

36 It is, in principle, for the national court to assess the facts, and to determine whether the conditions for State liability for breach of EEA law are met. The EFTA Court may nevertheless indicate certain circumstances and considerations that the national court may take into account in its evaluation (see, to that effect, Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-0493 (hereinafter "*Stockholm Lindöpark*"), at paragraph 38).

The first condition

37 As regards the condition that the rule of law infringed must be intended to confer rights on individuals, the Court has previously held that such is the case when the

milli vanrækslu ríkisins á skuldbindingum sínum og þess tjóns sem tjónþoli verður fyrir (sjá *Erla María Sveinbjörnsdóttir*, lið 66). Þessi þrjú skilyrði verða að vera uppfyllt hvort sem tjón það sem krafist er bóta fyrir er að rekja til athafnaleysis að hálfu EES-ríkis eða til setningar laga eða almennra stjórnsýslufyrirmæla sem andstæð eru EES-rétti (sjá til samanburðar mál C-424/97 *Haim* [2000] ECR I-5213 (hér eftir, "*Haim*"), lið 37). Samkvæmt EES-samningnum getur EFTA-ríki, að meginstefnu til, verið skaðabótaskylt samkvæmt EES-samningnum, hvort sem um er að ræða brot á skuldbindingum sem leiða af afleiddri löggjöf eða skuldbindingar samkvæmt meginmáli EES-samningsins.

33 Að því gefnu að ríki sé skaðabótaskylt samkvæmt EES-samningnum og þar sem skilyrði skaðabótaskyldu eru uppfyllt, verður að ákvarða bætur vegna tjóns í samræmi við skaðabótareglur landsréttar. Skilyrði fyrir skaðabótum samkvæmt landsrétti við þessar aðstæður mega ekki vera strangari en þau sem gilda um hliðstæðar innlendar kröfur og mega ekki vera sett þannig fram að það verði í reynd ómögulegt eða óhæfilega erfitt að fá bætur (sjá til hliðsjónar *Haim*, lið 33).

34 Svarið við annarri spurningunni verður því það, að EES-ríki verður skaðabótaskylt gagnvart mögulegum innflytjanda áfengis vegna tjóns sem hann hefur orðið fyrir vegna þess að einkarétti ríkisins á innflutningi var viðhaldið, að því gefnu að skilyrði fyrir skaðabótaskyldu séu uppfyllt. Þar sem þessi skilyrði eru uppfyllt, ber að ákvarða bætur á grundvelli skaðabótareglna landsréttar. Reglur um skaðabætur sem mælt er fyrir um í landsrétti mega ekki fela í sér lakari réttarstöðu en gildir um hliðstæðar innlendar kröfur og mega ekki vera settar þannig fram að það verði í reynd ómögulegt eða óhæfilega erfitt að fá bætur.

Þriðja spurning

35 Í þriðju spurningunni spyr Héraðsdómur Reykjavíkur hvort skilyrði fyrir skaðabótaskyldu ríkisins séu uppfyllt í fyrirliggjandi máli.

36 Það kemur, að meginstefnu til, í hlut dómstóls aðildarríkis að meta staðreyndir málsins og ákvarða hvort skilyrðin fyrir skaðabótaskyldu ríkisins eru uppfyllt. EFTA-dómstóllinn getur samt sem áður sett fram almenn atriði og sjónarmið sem dómstóll aðildarríkis tekur mið af við þetta mat (sjá um þetta mál C-150/99 *Stockholm Lindöpark* [2001] ECR I-0493 (hér eftir "*Stockholm Lindöpark*"), lið 38).

Fyrsta skilyrðið

37 Hvað snertir fyrsta skilyrðið fyrir skaðabótaskyldu ríkisins, um að reglan sem brotin mæli svo fyrir að einstaklingar öðlist tiltekin réttindi, hefur dómstóllinn áður komist að þeirri niðurstöðu að svo sé þegar reglan sem um ræðir er nægilega

relevant provision is unconditional and sufficiently precise (see *Restamark*, at paragraph 77). The Court has also found that this condition is satisfied in the case of Article 16 EEA. Article 16 EEA imposes an obligation on the EEA States to adjust their statutory commercial monopolies so as to exclude any discrimination between nationals of EEA States with respect to the procurement and marketing of goods. Article 16 EEA constitutes an obligation with a precise objective, and that obligation is not subject to any condition (see *Restamark*, at paragraphs 79 and 80, and *Manghera*, at paragraphs 15 and 16). Since Article 16 has been implemented in Icelandic law, that provision confers rights on individuals for which they may seek the protection of national courts.

The second condition

38 As regards the condition that the breach must be sufficiently serious, the Court has already held that this depends on whether, in the exercise of its legislative powers, an EEA State has manifestly and gravely disregarded the limits on the exercise of its powers. In order to determine whether this condition is met, the national court hearing a claim for compensation must take into account all the factors that characterise the situation before it. Those factors include, *inter alia*, the clarity and precision of the rule infringed; the measure of discretion left by that rule to the national authorities; whether the infringement, and the damage caused, was intentional or involuntary; and whether any error of law was excusable or inexcusable (see *Sveinbjörnsdóttir*, at paragraphs 68 and 69).

39 It is clear from the judgment of the EFTA Court in *Restamark*, that Iceland, by maintaining its State import monopoly on alcoholic beverages, was in breach of Article 16 EEA from the entry into force of the EEA Agreement on 1 January 1994. That judgment was delivered on 16 December 1994 and relied essentially on the case law of the Court of Justice of the European Communities prior to the entry into force of the EEA Agreement, in particular the judgment in *Manghera*. The State monopoly on the import of alcoholic beverages was not abolished until 1 December 1995, nearly two years after the entry into force of the EEA Agreement.

40 However, the finding of a breach of EEA law is not in itself determinative. A mere infringement of EEA law by an EEA State does not necessarily constitute a sufficiently serious breach (see *Stockholm Lindöpark*, at paragraph 41). A breach will, however, be sufficiently serious if it has persisted despite settled case law from which it is clear that the conduct in question constituted an infringement (see, for comparison, *Brasserie du Pêcheur*, at paragraph 57).

41 The Plaintiff, supported by the EFTA Surveillance Authority and the Commission of the European Communities, has pointed out that, at the entry into force of the EEA Agreement, it had long been clear from the case law of the Court of Justice of the European Communities, in particular the judgment in *Manghera*, that national import monopolies of a commercial nature were

skýr og óskilyrt (sjá *Restamark*, lið 77). Dómstóllinn hefur einnig talið að þessu skilyrði sé fullnægt að því er 16. gr. EES varðar. Ákvæði 16. gr. EES leggur á herðar EES-ríki þá skyldu að breyta lögmæltum einkarétti þannig að enginn greinarmunur sé gerður á milli ríkisborgara EES-ríkjanna hvað snertir skilyrði til aðdrátta og markaðssetningar vara. Ákvæði 16. gr. hefur að geyma skuldbindingu sem hefur skýrt markmið og hún er ekki háð neinum skilyrðum (sjá *Restamark*, liðir 79 og 80, og *Manghera*, liðir 15 og 16). Þar sem ákvæði 16. gr. hefur verið lögfest á Íslandi mælir ákvæðið fyrir um rétt til handa einstaklingum sem þeir geta sótt fyrir dómstólum landsins.

Annað skilyrðið

38 Að því er varðar skilyrðið um að brotið verði að vera nægilega alvarlegt, hefur dómstóllinn áður komist að þeirri niðurstöðu að þetta sé háð því hvort samningsaðilinn með bersýnilegum og alvarlegum hætti leit fram hjá þeim takmörkunum sem eru á svigrúmi ríkisins til mats við ákvarðanatöku. Við mat á því hvort þetta skilyrði er uppfyllt, verður dómstóll sem fjallar um skaðabótakröfuna, að taka mið af öllum þeim þáttum sem einkenna þær aðstæður sem fyrir liggja. Þessir þættir varða m.a. það hversu skýrt og nákvæmt það ákvæði er sem farið er gegn, hversu mikið mat ákvæðið eftirlætur innlendum stjórnvöldum og hvort um er að ræða vísvitandi brot á samningsskuldbindingum sem leiddi til tjóns eða brot sem ekki var framið af ásetningi og þess hvort lögvilla var afsakanleg eða óafsakanleg (sjá *Erla María Sveinbjörnsdóttir*, liðir 68 og 69).

39 Það er ljóst af dómi EFTA-dómstólsins í *Restamark*, að Ísland, með því að viðhalda einkarétti ríkisins á innflutningi á áfengi, braut gegn 16. gr. EES frá og með þeim degi er EES-samningurinn gekk í gildi 1. janúar 1994. Sá dómur var kveðinn upp 16. desember 1994 og var í aðalatriðum byggður á dómaframkvæmd dómstóls Evrópubandalaganna fyrir gildistöku EES-samningsins, einkum dóminum í *Manghera*. Einkaréttur ríkisins á innflutningi áfengis var aftur á móti ekki afnuminn fyrr en 1. desember 1995, eða því sem næst tveimur árum eftir að EES-samningurinn gekk í gildi.

40 Á hinn bóginn er sú niðurstaða að EES-regla hafi verið brotin ekki ákvarðandi. Sú staðreynd að EES-regla hafi ekki verið virt þarf ekki að þýða að brot sé nægilega alvarlegt (sjá *Stockholm Lindöpark*, lið 41). Brot er aftur á móti nægilega alvarlegt ef það heldur áfram þrátt fyrir skýra dómaframkvæmd, sem skýrlega má af ráða að hegðun sú sem um ræðir fól í sér brot (sjá til hliðsjónar *Brasserie du Pêcheur*, lið 57).

41 Stefnandi, með stuðningi Eftirlitsstofnunar EFTA og Framkvæmdastjórnar Evrópubandalaganna, hefur bent á að við gildistöku EES-samningsins hafði það verið ljóst lengi af dómaframkvæmd dómstóls Evrópubandalaganna, einkum af dóminum í *Manghera*, að einkaréttur aðila í viðskiptum til innflutnings hafi verið ósamrýmanlegur þeim ákvæðum samningsins um Evrópubandalagið sem

incompatible with the provision of the EC Treaty corresponding to Article 16 EEA. On that basis, they argue that maintaining the Icelandic import monopoly on alcoholic beverages after the entry into force of the EEA Agreement constitutes a sufficiently serious breach of EEA law.

42 The Court observes that in *Manghera*, the Court of Justice of the European Communities ruled that every national monopoly of a commercial nature must be adjusted so as to eliminate any exclusive import rights. Even if it did not deal specifically with alcohol monopolies, it is clear from *Manghera* that an exclusive right to import alcoholic beverages constitutes an infringement of the provision of the EC Treaty corresponding to Article 16 EEA. Therefore, the Icelandic State could exercise no discretion in amending its legislation so as to eliminate the import monopoly on alcoholic beverages with effect from the entry into force of the EEA Agreement. The Icelandic State should have been aware of that judgment and its relevance for the interpretation of the EEA Agreement both during the EEA negotiations and at the time of signing the EEA Agreement on 2 May 1992.

43 This finding is not affected by the Declaration of the Governments of Finland, Iceland, Norway and Sweden on alcohol monopolies, annexed to the Final Act to the EEA Agreement, in which the declarant States recall "that their alcohol monopolies are based on important health and social policy considerations." The Declaration is made "without prejudice to the obligations arising under the Agreement." Even under general public international law, it does not amount to a formal reservation detracting from treaty obligations. The important health and social policy considerations referred to are not pertinent with respect to alcohol import monopolies.

44 The Icelandic State, supported by the Government of Norway, has argued that, following the entry into force of the EEA Agreement, amendments were sought to the contested national legislation in order to adapt to the EEA Agreement. They contend that the breach of EEA law was not sufficiently serious to entail State liability, since the period of time used to abolish the import monopoly was not excessive.

45 The Court observes that generally where a judgment of the EFTA Court or the Court of Justice of the European Communities has clarified previously uncertain obligations under the EEA Agreement, the EEA States must be allowed a reasonable time to adjust their legislation without incurring liability (see, to that effect, *Haim*, at paragraph 46, *et al.*). As held above, it was clear long before the entry into force of the EEA Agreement that an import monopoly could not be maintained. The Court finds that the Icelandic State, having negotiated, drafted, signed and ratified the EEA Agreement, was in the best position to assess the legislative amendments required to comply therewith and had an obligation so to do before the entry into force on 1 January 1994. It appears that the Icelandic State had sufficient time, between the signing of the EEA Agreement and its entry into force, to make the necessary amendments in its national legislation,

samsvara 16. gr. EES. Af þessum ástæðum er því haldið fram að þeirra hálfu að einkaréttur til innflutnings á áfengi til Íslands eftir gildistöku EES-samningsins hafi verið nægilega alvarlegt brot á EES-rétti.

42 Dómstóllinn bendir á að í *Manghera*, hafi dómstóll Evrópubandalaganna komist að þeirri niðurstöðu að ríkiseinkasölum í viðskiptum bæri að breyta þannig að afnuminn sé einkaréttur á innflutningi. Þótt ekki væri í málinu fjallað um áfengiseinkasölur sé ljóst af dóminum í *Manghera* að einkaréttur á innflutningi á áfengi felur í sér brot á þeim ákvæðum samningsins um Evrópubandalagið sem samsvara 16. gr. EES. Þess vegna gat íslenska ríkið ekki verið í neinum vafa um að því bar að breyta löggjöf sinni þannig að afnuminn yrði einkaréttur á innflutningi áfengis frá og með gildistöku EES-samningsins. Íslenska ríkinu hefði átt að vera kunnugt um þennan dóm og þýðingu hans fyrir skýringu EES-samningsins bæði meðan á samningaviðræðum fyrir EES-samninginn stóð og þegar hann var undirritaður 2. maí 1992.

43 Hin sameiginlega yfirlýsing ríkisstjórna Finnlands, Íslands, Noregs og Svíþjóðar varðandi áfengiseinkasölur, sem fylgir lokagerð samningsins, þar sem ríkin lýsa því yfir að "áfengiseinkasölur ríkjanna [séu] grundvallaðar á mikilvægum sjónarmiðum er varða stefnu þeirra í heilbrigðis- og félagsmálum" getur ekki breytt þessari niðurstöðu. Yfirlýsingin er gerð "með fyrirvara um skuldbindingar sem leiðir af samningnum" Jafnvel á grundvelli almenns þjóðaréttar felur hún ekki í sér formlegan fyrirvara um undanþágu frá samningsskuldbindingum. Hin mikilvægu sjónarmið varðandi heilbrigðis- og félagsmál sem vísað er til skipta ekki máli varðandi einkarétt á innflutningi.

44 Íslenska ríkið, með stuðningi ríkisstjórnar Noregs, hefur haldið því fram að þegar eftir gildistöku samningsins hafi verið gerðar ráðstafanir til að breyta hinni umdeildu löggjöf til að samræma hana EES-samningnum. Því er haldið fram að brot á EES-rétti hafi ekki verið nægilega alvarlegt til að skapa grundvöll að skaðabótaskyldu þar sem tíminn sem notaður var til að afnema einkarétt á innflutningi hafi ekki verið óhæfilega langur.

45 Dómstóllinn bendir á að almennt þegar dómur EFTA-dómstólsins eða dómstóla Evrópubandalaganna hafi orðið til að skýra réttarstöðu á grundvelli EES-samningsins sem áður var talinn óljós, verði að ætla EES-ríki hæfilegan tíma til að aðlaga löggjöf sína án þess að til skaðabótaskyldu stofnist (sjá um þetta, mál *Haim*, lið 46, *et al*.). Eins og fram hefur komið var það ljóst löngu fyrir gildistöku EES-samningsins að ekki yrði heimilt að viðhalda einkarétti á innflutningi. Dómstóllinn telur, að íslenska ríkinu, sem tekið hafði þátt í samningaviðræðunum fyrir EES-samninginn og samningu hans og síðan undirritað hann og fullgilt hafi verið í bestri aðstöðu til að meta hvaða lagabreytingar gera yrði til að fullnægja skuldbindingum samkvæmt samningnum áður enn hann gengi í gildi 1. janúar 1994. Íslenska ríkið virðist hafa haft nægilegan tíma frá því samningurinn var undirritaður og þar til hann tók gildi til að gera nauðsynlegar breytingar á innlendri löggjöf og þar með koma í veg fyrir brot á þeirri skyldu sinni að afnema einkarétt á innflutningi áfengis.

thereby preventing any breach of its obligation to abolish its import monopoly on alcoholic beverages.

46 Based on the above considerations, the Court concludes that the maintenance of the Icelandic import monopoly on alcoholic beverages after the entry into force of the EEA Agreement constitutes a sufficiently serious breach of EEA law to entail State liability, provided that the other conditions are fulfilled.

The third condition

47 As regards the condition that there must be a direct causal link between the breach of the obligation of the State and the damage sustained by the injured parties, the Court notes that this has to be determined by the national court (see, *inter alia*, Case C-5/94 *The Queen* v *MAFF, ex parte Hedley Lomas* [1996] ECR I-2553, at paragraph 30).

48 The answer to the third question must be that it is, in principle, for the national court to decide whether the conditions for State liability are fulfilled. In that assessment, the following considerations are to be taken into account: (1) Article 16 EEA is intended to confer rights on individuals; (2) the breach of Article 16 EEA is sufficiently serious to entail liability; (3) whether there is a direct causal link between the breach of Article 16 EEA and any damage sustained, is for the national court to decide.

III Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by Héraðsdómur Reykjavíkur by an order of 6 April 2001, hereby gives the following Advisory Opinion:

46 Á grundvelli þessara sjónarmiða er það niðurstaða dómstólsins að viðhald einkaréttar á innflutning áfengis á Íslandi eftir gildistöku EES-samningsins feli í sér nægilega alvarlegt brot til að leiða til skaðabótaskyldu, að því gefnu að önnur bótaskilyrði séu uppfyllt.

Þriðja skilyrðið

47 Að því er snertir skilyrðið um að vera þurfi beint orsakasamband milli vanefnda á skuldbindingum ríkisins og þess tjóns sem aðili hefur orðið fyrir, bendir dómstóllinn á að það er hlutverk dómstóls aðildarríkis að meta hvort svo sé (sjá, *m.a*, mál C-5/94 *The Queen* gegn *MAFF, ex parte Hedley Lomas* [1996] ECR I-2553, lið 30).

48 Svarið við þriðju spurningunni verður því það að mat á því hvort skilyrðum skaðabótaskyldu sé fullnægt eigi að meginstefnu til undir Héraðsdóm Reykjavíkur. Við það mat ber að taka mið af eftirfarandi atriðum: (1) Ákvæði 16. gr. er ætlað að veita einstaklingum beinan rétt; (2) brotið gegn 16. gr. er nægilega alvarlegt til að hafa í för með sér skaðabótaskyldu, (3) það kemur í hlut dómstóls aðildarríkis að meta hvort beint orsakasamband er milli vanefnda á skuldbindingum samkvæmt 16. gr. EES og tjóns sem orðið hefur.

III Málskostnaður

49 Ríkisstjórn Noregs, ríkisstjórn Svíþjóðar, Eftirlitsstofnun EFTA og Framkvæmdastjórn Evrópubandalaganna, sem hafa skilað greinargerðum til dómstólsins, skulu bera sinn málskostnað. Að því er lýtur að aðilum málsins verður að líta á málsmeðferð fyrir EFTA-dómstólnum sem þátt í meðferð málsins fyrir Héraðsdómi Reykjavíkur og kemur það í hlut þess dómstóls að kveða á um málskostnað.

Á þessum forsendum lætur

DÓMSTÓLLINN,

í té svohljóðandi ráðgefandi álit um spurningar þær sem Héraðsdómur Reykjavíkur beindi til dómstólsins með úrskurði frá 6. apríl 2001:

1. The maintenance after 1 January 1994 of a State monopoly on the import of alcoholic beverages is incompatible with Article 16 EEA.

2. An EEA State will, under the EEA Agreement, be liable to a prospective importer of alcoholic beverages for loss or damage incurred as a result of the maintenance of a State monopoly on the import of alcoholic beverages, provided that the conditions for State liability are fulfilled. Where those conditions are fulfilled, compensation by the State for such loss and damage must be based on national liability law. The rules on compensation laid down by national law must not be less favourable than those relating to similar domestic claims and must not be framed so as to make it in practice impossible or excessively difficult to obtain compensation.

3. It is, in principle, for the national court to decide whether the conditions for State liability are fulfilled. In that assessment, the following considerations are to be taken into account: (1) Article 16 EEA is intended to confer rights on individuals; (2) the breach of Article 16 EEA is sufficiently serious to entail liability; (3) whether there is a direct causal link between the breach of Article 16 EEA and any damage sustained, is for the national court to decide.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 30 May 2002.

Lucien Dedichen
Registrar

Thór Vilhjálmsson
President

1. Viðhald einkaréttar ríkisins á innflutningi áfengis eftir 1. janúar 1994 er ósamrýmanlegt 16. gr. EES-samningsins.

2. EES-ríki verður skaðabótaskylt gagnvart mögulegum innflytjanda áfengis vegna tjóns sem hann hefur orðið fyrir vegna þess að einkarétti ríkisins á innflutningi var viðhaldið, að því gefnu að skilyrði fyrir skaðabótaskyldu séu uppfyllt. Þar sem þessi skilyrði eru uppfyllt, ber að ákvarða bætur á grundvelli skaðabótareglna landsréttar. Reglur um skaðabætur sem mælt er fyrir um í landsrétti mega ekki fela í sér lakari réttarstöðu en gildir um hliðstæðar innlendar kröfur og mega ekki vera settar þannig fram að það verði í reynd ómögulegt eða óhæfilega erfitt að fá bætur.

3. Mat á því hvort skilyrðum skaðabótaskyldu ríkisins sé fullnægt á að meginstefnu til undir Héraðsdóm Reykjavíkur. Við það mat ber að taka mið af eftirfarandi atriðum: (1) Ákvæði 16. gr. er ætlað að veita einstaklingum beinan rétt; (2) brotið gegn 16. gr. er nægilega alvarlegt til að hafa í för með sér skaðabótaskyldu; (3) það kemur í hlut dómstóls aðildarríkis að meta hvort beint orsakasamband er milli vanefnda á skuldbindingum samkvæmt 16. gr. EES og tjóns sem orðið hefur.

Þór Vilhjálmsson Carl Baudenbacher Per Tresselt

Kveðið upp í heyranda hljóði í Lúxemborg 30. maí 2002.

Lucien Dedichen
Dómritari

Þór Vilhjálmsson
Dómsforseti

REPORT FOR THE HEARING
in Case E-4/01

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

Karl K. Karlsson hf.

and

The Icelandic State

on the interpretation of the EEA Agreement, in particular Articles 11 and 16 EEA.

I. Introduction

1. By an order dated 6 April 2001, registered at the Court on 12 April 2001, the Héraðsdómur Reykjavíkur (Reykjavík District Court) made a Request for an Advisory Opinion in the case pending before it between Karl K. Karlsson hf. (hereinafter the "Plaintiff") and the Icelandic State (hereinafter the "Defendant").

2. The dispute before the Héraðsdómur Reykjavíkur concerns the questions of whether the State monopoly on the import and wholesale distribution of alcoholic beverages in force in Iceland until 1 December 1995 was incompatible with the EEA Agreement, and, if so, whether a legal person prevented from importing alcoholic beverages is entitled to compensation from the State for financial loss incurred as a result of that monopoly.

SKÝRSLA FRAMSÖGUMANNS
í máli E-4/01

Beiðni um ráðgefandi álit EFTA-dómstólsins, samkvæmt 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls, frá Héraðsdómi Reykjavíkur í máli sem rekið er fyrir dómstólnum

Karl K. Karlsson hf.

gegn

íslenska ríkinu

varðandi túlkun EES-samningsins, einkum 11. og 16. gr.

I. Inngangur

1. Með beiðni dags. 6. apríl 2001, sem skráð var í málaskrá dómstólsins 12. apríl 2001, óskaði Héraðsdómur Reykjavíkur eftir ráðgefandi áliti í máli sem rekið er fyrir dómstólnum milli Karls K. Karlssonar hf. (stefnandi) og íslenska ríkisins (stefndi).

2. Ágreiningurinn fyrir Héraðsdómi Reykjavíkur varðar það hvort einkaréttur ríkisins á innflutningi og heildsölu áfengis, sem var við lýði á Íslandi til 1. desember 1995, var ósamrýmanlegur EES-samningnum, og ef svo er, hvort aðili sem hindraður var í að flytja inn áfengi eigi rétt til skaðabóta úr hendi ríkisins vegna þess fjártjóns sem hann varð fyrir vegna einkaréttarins.

II. Legal background

EEA law

3. The questions submitted by the national court concern, *inter alia*, the interpretation of Articles 11 and 16 EEA.

4. Article 11 EEA reads as follows:

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

5. Article 16 EEA reads as follows:

> *"1. The Contracting Parties shall ensure that any State monopoly of a commercial character be adjusted so that no discrimination regarding the conditions under which goods are procured and marketed will exist between nationals of EC Member States and EFTA States.*
>
> *2. The provisions of this Article shall apply to any body through which the competent authorities of the Contracting Parties, in law or in fact, either directly or indirectly supervise, determine or appreciably influence imports or exports between Contracting Parties. These provisions shall likewise apply to monopolies delegated by the State to others."*

National law

6. The national legislation contested before the Héraðsdómur Reykjavíkur is the Icelandic *Áfengislög nr. 82/1969* (Act No. 82/1969 on Alcoholic Beverages, hereinafter the "Alcoholic Beverages Act") and *Lög nr. 63/1969 um verslun með áfengi og tóbak* (Act No. 63/1969 on Trading with Alcoholic Beverages and Tobacco, hereinafter the "Alcoholic Beverages and Tobacco Trading Act").

7. At the time of the entry into force of the EEA Agreement, 1 January 1994, the Alcoholic Beverages Act provided that only the Icelandic State was permitted to import alcoholic beverages, and that the Áfengis- og tóbaksverslun ríkisins (State Alcohol and Tobacco Monopoly) was to handle imports and wholesale distribution of such products. The State monopoly on the import and wholesale distribution of alcoholic beverages was abolished and the right to such imports and wholesale distribution was liberalised as of 1 December 1995, by way of the adoption of *Lög nr. 94/1995 um breyting á áfengislögum* and *Lög nr. 95/1995 um breyting á lög um verslun með áfengi og tóbak*, amending the Alcoholic Beverages Act and the Alcoholic Beverages and Tobacco Trading Act, respectively. The Alcoholic Beverages Act has later been replaced by *Áfengislög nr. 75/1998* (Act No. 75/1998 on Alcoholic Beverages).

II. Löggjöf

EES-réttur

3. Spurningarnar frá Héraðdómi Reykjavíkur varða m.a. skýringu á 11. og 16. gr. EES.

4. Ákvæði 11. gr. EES er svohljóðandi:

> *"Magntakmarkanir á innflutningi, svo og allar ráðstafanir sem hafa samsvarandi áhrif, eru bannaðar milli samningsaðila."*

5. Ákvæði 16. gr. EES er svohljóðandi:

> *"1. Samningsaðilar skulu tryggja breytingar á ríkiseinkasölum í viðskiptum þannig að enginn greinarmunur sé gerður milli ríkisborgara aðildarríkja EB og EFTA-ríkja hvað snertir skilyrði til aðdrátta og markaðssetningar vara.*
>
> *2. Ákvæði þessarar greinar gilda um allar stofnanir sem þar til bær yfirvöld samningsaðilanna nota samkvæmt lögum eða í reynd, beint eða óbeint, til að hafa eftirlit með, ráða eða hafa umtalsverð áhrif á inn- eða útflutning milli samningsaðila. Þessi ákvæði gilda einnig um einkasölur sem ríki hefur fengið öðrum í hendur."*

Landsréttur

6. Lögin sem á reynir fyrir Héraðsdómi Reykjavíkur eru íslensku áfengislögin, sbr. *Áfengislög nr. 82/1969*, (hér eftir "áfengislögin") og *Lög nr. 63/1969 um verslun með áfengi og tóbak* (hér eftir "lög um verslun með áfengi og tóbak).

7. Þegar EES-samningurinn gekk í gildi 1. janúar 1994 var í áfengislögunum mælt svo fyrir að aðeins íslenska ríkinu skyldi vera heimilt að flytja inn áfengi og að Áfengis- og tóbaksverslun ríkisins skyldi annast innflutning og heildsöludreifingu áfengis. Með gildistöku laga nr. 94/1995, um breyting á áfengislögum og laga nr. 95/1995 um breyting á lögum um verslun með áfengi og tóbak, þann 1. janúar 1995, var einkaréttur ríkisins á innflutningi og heildsöludreifingu áfengis afnuminn og kveðið á um aukið frelsi í þeim efnum. Áfengislög nr. 75/1998 komu síðar í stað eldri áfengislaga.

III. Facts and procedure

8. It is stated in the Request for an Advisory Opinion that, prior to the entry into force of the EEA Agreement, the Plaintiff, Karl K. Karlsson hf., had taken measures to commence import and wholesale distribution of alcoholic beverages, and was appointed agent for many types of alcoholic beverages, including the French liqueur Cointreau, in Iceland.

9. Moreover, it follows from the Request for an Advisory Opinion that, from 1 January 1994, when the EEA Agreement entered into force, until 1 December 1995, when the State monopoly on the import and wholesale distribution of alcoholic beverages was abolished, the Plaintiff was prohibited from importing into Iceland the alcoholic beverages for which it was the agent, and distributing such products to retailers. The Plaintiff claims that it incurred a considerable financial loss as a result of that prohibition.

10. The Plaintiff brought proceedings against the Defendant, the Icelandic State, before the Héraðsdómur Reykjavíkur in order obtain a declaratory judgment to the effect that the Defendant is liable for compensation for the financial loss sustained by the Plaintiff because it was not permitted to import and distribute on a wholesale basis the French liqueur Cointreau. In the proceedings, the Plaintiff has raised questions concerning the compatibility with the EEA Agreement of the State monopoly on the import and wholesale distribution of alcoholic beverages in force in Iceland until 1 December 1995. The Plaintiff has, moreover, raised questions concerning possible entitlement under EEA law to compensation for financial loss incurred as a result of that monopoly. On 6 April 2001, Héraðsdómur Reykjavíkur decided to submit a Request for an Advisory Opinion to the EFTA Court.

IV. Questions

11. The following questions were referred to the EFTA Court:

> **1. Should the provisions of the EEA Agreement, in particular Articles 11 and 16, be interpreted as meaning that Iceland was obliged to abolish the State monopoly for the import and wholesale distribution of alcoholic beverages as of the commencement of the Agreement on 1 January 1994?**
>
> **2. If the aforementioned question is answered in the affirmative, is Iceland liable for compensation to a legal person which, at the time of entry into force of the Agreement, was the exclusive agent for a specific type of alcoholic beverage, for the financial loss it incurred due to the fact that the import and wholesale distribution of the alcoholic beverage was not permitted until nearly two years after the**

III. Málavextir og meðferð máls

8. Fram kemur í beiðni um ráðgefandi álit, að áður en EES-samningurinn gekk í gildi hafi stefnandi, Karl K. Karlsson hf., gert ráðstafanir til að hefja innflutning og heildsöludreifingu áfengis og hafi haft á Íslandi umboð fyrir fjölda áfengistegunda, þar á meðal hinn franska líkjör Cointreau.

9. Ennfremur kemur fram í beiðninni um ráðgefandi álit, að frá 1. janúar 1994, þegar EES-samningurinn gekk í gildi, til 1. desember 1995, þegar einkaréttur ríkisins á innflutningi og heildsöludreifingu áfengis var afnuminn, hafi stefnanda verið óheimilt að flytja inn til Íslands þær áfengistegundir sem hann hafði umboð fyrir og að dreifa þessum vörum til smásöluaðila. Stefnandi telur að vegna þessa banns hafi hann orðið fyrir talsverðu fjártjóni.

10. Stefnandi höfðaði mál gegn stefnda, íslenska ríkinu, fyrir Héraðsdómi Reykjavíkur til að fá viðurkennda skaðabótaskyldu stefnda vegna þess fjártjóns, sem stefnandi hefur orðið fyrir sökum þess að honum var óheimilt að flytja til landsins og dreifa í heildsölu franska líkjörnum Cointreau. Við meðferð málsins hefur stefnandi haft uppi málsástæður sem lúta að því hvort einkaréttur ríkisins á innflutningi og heildsöludreifingu áfengis, sem var við lýði á Íslandi til 1. desember 1995, hafi verið samrýmanlegur EES-samningnum. Stefnandi hefur ennfremur haft uppi málsástæður varðandi það hvort hann kynni á grundvelli EES-samningsins að eiga rétt til skaðabóta vegna fjártjóns sem hann varð fyrir vegna einkaréttarins. Þann 6. apríl 2001 ákvað Héraðsdómur Reykjavíkur að óska eftir ráðgefandi áliti EFTA-dómstólsins.

IV. Spurningar

11. Eftirfarandi spurningar voru bornar undir EFTA-dómstólinn:

1. Ber að skýra ákvæði EES-samningsins, einkum 11. og 16. gr., þannig að íslenska ríkinu hafi frá gildistöku samningsins 1. janúar 1994 verið skylt að afnema einkarétt ríkisins á innflutningi og heildsöludreifingu áfengis?

2. Sé svarið við ofangreindri spurningu jákvætt, er spurt hvort íslenska ríkið sé skaðabótaskylt gagnvart lögaðila, sem við gildistöku samningsins hafði aflað sér einkasölumboðs fyrir tiltekna áfengistegund, að því tilskildu að hann hafi orðið fyrir fjártjóni vegna þess að ekki var heimilaður innflutningur og heildsöludreifing áfengistegundarinnar, fyrr en tæpum tveimur árum eftir gildistöku

entry into force of the EEA Agreement, provided that the conditions for liability for compensation according to the case-law of the EFTA Court and Court of Justice of the European Communities are fulfilled?

3. If Questions 1 and 2 are answered in the affirmative, are the conditions for liability for compensation according to the case-law of the aforementioned courts fulfilled?

V. Written Observations

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

– the Plaintiff, Karl K. Karlsson hf., represented by Stefán Geir Þórisson, hæstaréttarlögmaður (Supreme Court Advocate);

– the Defendant, the Icelandic State, represented by Skarphéðinn Þórisson, Attorney General (Civil Affairs), assisted by Einar Karl Hallvarðsson, hæstaréttarlögmaður (Supreme Court Advocate), Office of the Attorney General (Civil Affairs);

– the Government of Norway, represented by Thomas Nordby, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent, and Frode Elgesem, Advocate, Office of the Attorney General (Civil Affairs), acting as Co-agent;

– the EFTA Surveillance Authority, represented by Bjarnveig Eiríksdóttir and Dóra Sif Tynes, Officers, Department of Legal & Executive Affairs, acting as Agents;

– the Commission of the European Communities, represented by Lena Ström, Legal Adviser, Legal Service, acting as Agent.

Karl K. Karlsson hf.

Question 1

13. The Plaintiff, Karl K. Karlsson hf., contends that the Icelandic State monopoly on the import and wholesale distribution of alcoholic beverages is contrary to Articles 11 and 16 EEA.

EES-samningsins, að fullnægðum bótaskilyrðum samkvæmt dómafordæmum EFTA-dómstólsins og Evrópudómstólsins?

3. Sé svarið við spurningum 1. og 2. jákvætt, er spurt, hvort fullnægt sé bótaskilyrðum samkvæmt dómafordæmum ofangreindra dómstóla?

V. Skriflegar greinargerðir

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

– Stefnanda, Karl K. Karlssyni hf. Í fyrirsvari er Stefán Geir Þórisson, hæstaréttarlögmaður;

– Stefnda, íslenska ríkinu. Í fyrirsvari sem umboðsmaður er Skarphéðinn Þórisson, ríkislögmaður, og honum til aðstoðar Einar Karl Hallvarðsson, hæstaréttarlögmaður, skrifstofu ríkislögmanns;

– Ríkisstjórn Noregs. Í fyrirsvari sem umboðsmenn eru Thomas Nordby og Frode Elgesem, lögmenn á skrifstofu ríkislögmanns;

– Eftirlitsstofnun EFTA. Í fyrirsvari sem umboðsmenn eru Bjarnveig Eiríksdóttir og Dóra Sif Tynes, lögfræðingar á lögfræði- og framkvæmdasviði;

– Framkvæmdastjórn Evrópubandalaganna. Í fyrirsvari sem umboðsmaður er Lena Ström, lögfræðingur hjá lagadeild.

Karl K. Karlsson hf.

Fyrsta spurning

13. Stefnandi, Karl K. Karlsson hf., heldur því fram að einkaréttur íslenska ríkisins á innflutningi og heildsöludreifingu áfengis sé andstæður 11. og 16. gr. EES.

14. With regard to Article 11 EEA, the Plaintiff, referring to *Procureur du Roi* v *Dassonville*[1] and *France* v *Commission*,[2] submits that the existence of a monopoly on the import and wholesale distribution of a product deprives a trader of the opportunity to carry on unrestricted distribution of such products. It is likely that such an exclusive right hinders trade between the EEA States.

15. The Plaintiff observes that Article 13 EEA, as a derogation from the basic principle of the free movement of goods, is to be interpreted narrowly. On this point, the Plaintiff refers to *Commission* v *Ireland*[3] and *Commission* v *Italy*.[4] The Plaintiff states that, in order to justify the contested monopoly under Article 13 EEA, it would be necessary for the Defendant to demonstrate that such an exclusive right is essential in order to protect the health and lives of humans, and that this aim could not be achieved by less restrictive means. The Plaintiff considers that the absence of any evidence to that effect was the reason for the Defendant's abolishing of the State monopoly on the import and wholesale distribution of alcoholic beverages.

16. With regard to Article 16 EEA, the Plaintiff points out that this rule applies to State institutions which, *de jure* or *de facto*, monitor, directly or indirectly, or determine or substantially influence, import or export between the EEA States. The Plaintiff asserts that the contested monopoly on the import and wholesale distribution of alcoholic beverages implies that the State is able to determine, or have a decisive influence on, what is actually imported, instead of such matters being in the hands of independent commercial operators. Referring to the judgments in *Pubblico Ministereo* v *Manghera*[5] and *Restamark*,[6] the Plaintiff contends that Article 16 EEA must be interpreted as prohibiting the Defendant from maintaining the contested State monopoly. The Plaintiff adds that this view is in accordance with the conclusion reached by the EFTA Surveillance Authority in its letter of formal notice of 20 July 1994, and its reasoned opinion of 22 February 1995 regarding the compatibility of that monopoly with Articles 11 and 16 EEA.

17. The Plaintiff claims that the Defendant was under an obligation to abolish the State monopoly at issue on the date of the entry into force of the EEA Agreement. In support of that view, the Plaintiff refers to the aforementioned reasoned opinion of the EFTA Surveillance Authority, in which it is stated that "since the EEA Agreement does not provide for any transitional period as regards the adjustment of the Icelandic alcohol monopoly, Iceland should have adapted

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1 Case 84/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837.

2 Case 90/82 *France* v *Commission* [1983] ECR 2011.

3 Case 113/80 *Commission* v *Ireland* [1981] ECR 1625.

4 Case 95/1981 *Commission* v *Italy* [1982] ECR 2187.

5 Case 59/75 *Pubblico Ministereo* v *Manghera* [1976] ECR 91.

6 Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 15 (hereinafter "*Restamark*").

14. Um 11. gr. EES, telur stefnandi, með vísan til *Procureur du Roi* gegn *Dassonville*[1] og *Frakkland* gegn *Framkvæmdastjórninni*[2] að einkaréttur til innflutnings og heildsöludreifingar vöru svipti viðskiptaaðila þeim möguleika að dreifa vörunni án hindrana. Líklegt sé að slíkur einkaréttur hindri viðskipti milli EES-ríkja.

15. Stefnandi bendir á að túlka beri 13. gr. EES þröngt þar sem hún feli í sér frávik frá grundvallarreglunni um frjálsa vöruflutninga. Um þetta atriði vísar stefnandi til máls *Framkvæmdastjórnarinnar* gegn *Írlandi*[3] og *Framkvæmdastjórnarinnar* gegn *Ítalíu*.[4] Stefnandi heldur því fram að til að réttlæta hinn umdeilda einkarétt á grundvelli 13. gr. þyrfti stefndi að sýna fram á að einkarétturinn hafi verið bráðnauðsynlegur í þeim tilgangi að vernda heilsu og líf manna og að engar aðrar ráðstafanir hafi verið tiltækar, sem fólu í sér minni takmörkun á frjálsum vöruviðskiptum. Stefnandi telur að stefnandi hafi ekki getað sýnt fram á þetta og það hafi verið ástæðan fyrir því að einkaréttur ríkisins á innflutningi og heildsöludreifingu áfengis var afnuminn.

16. Að því er varðar 16. gr. EES bendir stefnandi á að sú regla eigi við um ríkisstofnanir sem samkvæmt lögum eða í reynd hafa beint eða óbeint eftirlit með, ákveða eða hafa veruleg áhrif á innflutning eða útflutning milli ríkjanna. Stefnandi telur að hinn umdeildi einkaréttur á innflutningi og heildsöludreifingu áfengis feli það í sér að ríkið geti ákveðið eða haft afgerandi áhrif á hvað sé í raun flutt inn, í stað þess að sjálfstæðir rekstraraðilar hafi slíkt með höndum. Með vísan til dóma í *Pubblico Ministereo* gegn *Manghera*[5] og *Restamark*,[6] heldur stefnandi því fram að skýra verði 16. gr. EES þannig að stefnda hafi verið óheimilt að viðhalda hinum umdeilda einkarétti. Stefnandi bætir því við að þetta sjónarmið sé einnig í samræmi við þá niðurstöðu sem Eftirlitsstofnun EFTA hafi komist að í formlegri viðvörun frá 20. júlí 1994 og í rökstuddu áliti frá 22. febrúar 1995 varðandi það hvort einkarétturinn samræmdist 11. og 16. gr. EES-samningsins.

17. Stefnandi telur að stefndi hafi verið skuldbundinn til að afnema hinn umrædda einkarétt þegar EES-samningurinn gekk í gildi. Til stuðnings þessu sjónarmiði vísar stefnandi til fyrrgreinds rökstudds álits Eftirlitsstofnunar EFTA þar sem fram hafi komið að "þar sem EES-samningurinn geri ekki ráð fyrir neinum fresti til að aðlaga einkasölu á áfengi á Íslandi, hafi Íslandi borið að aðlaga ríkisáfengiseinkasöluna frá og með gildistöku samningsins, þ.e. frá 1. janúar 1994."

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1 Mál 84/74 *Procureur du Roi* gegn *Dassonville* [1974] ECR 837.

2 Mál 90/82 *Frakkland* gegn *Framkvæmdastjórninni* [1983] ECR 2011.

3 Mál 113/80 *Framkvæmdastjórnin* gegn *Írlandi* [1981] ECR 1625.

4 Mál 95/1981 *Framkvæmdastjórnin* gegn *Ítalíu* [1982] ECR 2187.

5 Mál 59/75 *Pubblico Ministereo* gegn *Manghera* [1976] ECR 91.

6 Mál E-1/94 *Restamark* [1994-1995] EFTA Court Report 15 (hér eftir "*Restamark*").

its alcohol monopoly as from the entry into force of the agreement, i.e. as from 1 January 1994".

Question 2

18. In answering the second question, the Plaintiff begins by referring to *Sveinbjörnsdóttir*,[7] in which the EFTA Court held that an EFTA State may incur liability under EEA law for incorrect implementation of secondary legislation forming part of the EEA Agreement. The plaintiff points out that the situation in the present case differs materially from the situation in *Sveinbjörnsdóttir* in two main respects. First, the present case involves an infringement of provisions of the main part of the EEA Agreement, and not provisions of secondary legislation. Second, the Plaintiff in the present case is a company, and not a private individual.

19. As regards the first issue, the Plaintiff refers to *Brasserie du Pêcheur and Factortame*[8] and other case-law[9] of the Court of Justice of the European Communities establishing State liability for infringements of the main part of the EC Treaty. The main part of the EEA Agreement contains the basic principles, and the Plaintiff asserts that an infringement of provisions of the main part is more serious than an infringement of secondary legislation.

20. As regards the second issue, the Plaintiff claims, in essence, that legal persons and physical persons have equal rights to compensation under the principle of State liability for breach of EEA law. That was confirmed, *inter alia*, in *Brasserie du Pêcheur and Factortame*.

21. The Plaintiff adds that the principle of State liability under Community law applies to breaches of both directly effective provisions and provisions that do not have such direct effect. On this point, the Plaintiff again refers to the judgment in *Brasserie du Pêcheur and Factortame*.

22. The Plaintiff concludes, in essence, that, under EEA law, a State may incur liability for compensation to a legal person for breaches of the main part of the EEA Agreement.

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7 Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Court Report 95 (hereinafter "*Sveinbjörnsdóttir*").

8 Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029 (hereinafter "*Brasserie du Pêcheur and Factortame*").

9 Joined Cases C-192/95 to C-218/95 *Comateb and Others* v *Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165; Case C-242/95 *GT-Link* v *DSB* [1997] ECR I-4449; Case C-90/96 *Petrie and Others* v *Università di Verona and Bettoni* [1997] ECR I-6527; Case C-302/97 *Konle* [1999] ECR I-3099; and Case C-424/97 *Haim* [2000] ECR I-5123.

Önnur spurning

18. Að því er snertir svarið við annarri spurningunni vísar stefnandi fyrst til máls *Erlu Maríu Sveinbjörnsdóttur*,[7] þar sem EFTA-dómstóllinn hafi komist að þeirri niðurstöðu að EFTA-ríki geti orðið skaðabótaskylt samkvæmt EES-rétti vegna rangrar innleiðingar afleiddrar löggjafar sem sé hluti samningsins. Stefnandi bendir á að aðstæður í þessu máli séu að tvennu leyti efnislega ólíkar þeim sem voru fyrir hendi í máli *Erlu Maríu Sveinbjörnsdóttur*. Í fyrst lagi varði þetta mál brot á ákvæðum sem sé að finna í meginmáli EES-samningsins, en ekki á ákvæðum afleiddrar löggjafar. Í öðru lagi sé stefnandi í þessu máli fyrirtæki, en ekki einstaklingur.

19. Að því er fyrra atriðið varðar vísar stefnandi til *Brasserie du Pêcheur and Factortame*[8] og annarra dóma[9] dómstóls Evrópubandalaganna sem mæla fyrir um skaðabótaskyldu vegna brota á ákvæðum í meginmáli Rómarsamningsins. Meginmál EES-samningsins hafi að geyma sömu grundvallarreglurnar og samkvæmt því sem stefnandi heldur fram, séu brot á ákvæðum, sem meginmál EES-samningsins hafi að geyma, alvarlegri en brot á afleiddri löggjöf.

20. Að því er síðara atriðið varðar, heldur stefnandi því í stuttu máli fram, að einstaklingar og lögpersónur eigi jafnan rétt til skaðabóta samkvæmt meginreglunni um skaðabótaskyldu ríkisins vegna brota á EES-rétti. Þetta hafi m.a. verið staðfest í *Brasserie du Pêcheur and Factortame*.

21. Stefnandi bætir því við að meginreglan um skaðabótaskyldu ríkisins samkvæmt bandalagsrétti eigi bæði við um ákvæði sem hafi bein réttaráhrif og ákvæði sem ekki hafi bein réttaráhrif. Aftur vísar stefnandi til dómsins í *Brasserie du Pêcheur and Factortame*.

22. Niðurstaða stefnanda er í stuttu máli sú, að samkvæmt EES-rétti geti ríki orðið skaðabótaskylt gagnvart lögpersónu vegna brota á meginmáli EES-samningsins.

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7 Mál E-9/97 *Erla María Sveinbjörnsdóttir* [1998] EFTA Court Report 95 (hér eftir "*Erla María Sveinbjörnsdóttir*").

8 Sameinuð mál C-46/93 og C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029 (hér eftir "*Brasserie du Pêcheur and Factortame*").

9 Sameinuð mál C-192/95 til C-218/95 *Comateb and Others* gegn *Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165; Mál C-242/95 *GT-Link* gegn *DSB* [1997] ECR I-4449; mál C-90/96 *Petrie and Others* gegn *Università di Verona and Bettoni* [1997] ECR I-6527; mál C-302/97 *Konle* [1999] ECR I-3099; og mál C-424/97 *Haim* [2000] ECR I-5123.

Question 3

23. In considering whether the conditions for State liability are met in the present case, the Plaintiff begins by stating that the conditions for liability for compensation established by the EFTA Court in *Sveinbjörnsdóttir* is in complete conformity with the conditions laid down by the Court of Justice of the European Communities in *Brasserie du Pêcheur and Factortame*.

24. As regards the condition that the EEA rule breached must be intended to confer rights on individuals, the Plaintiff refers to *Brasserie du Pêcheur and Factortame*, in which the provision of the EC Treaty corresponding to Article 11 EEA was held to be intended to confer rights on individuals.

25. As regards the condition that the infringement must be sufficiently serious to entail liability for compensation, the Plaintiff states that, in the present case, it is only necessary to consider one specific issue, namely, whether the Defendant has continuously perpetrated the infringement, despite the existence of clear case-law of the Court of Justice of the European Communities or the EFTA Court to the effect that the conduct of the Defendant indeed constitutes an infringement. If so, it follows from *Brasserie du Pêcheur and Factortame* and *Haim*[10] that the conduct is sufficiently serious to fulfil the condition of State liability.

26. Referring to the judgments in *The Queen* v *MAFF, ex parte Hedley Lomas*[11] and *Norbrook Laboratories* v *MAFF*,[12] the Plaintiff observes that when the EEA State committing the infringement has only very little or even no discretion as to how it designs its legislation, the mere existence of an infringement of EEA law can be enough to establish that the condition of a sufficiently serious breach is fulfilled.

27. The Plaintiff does not share the Defendant's view that uncertainty prevailed regarding the compatibility with the EEA Agreement of the State monopoly on the import and wholesale distribution of alcoholic beverages. The Plaintiff acknowledges that there may have been uncertainty with regard to the legality of the retail monopoly, but it rejects the possibility that the sources referred to by the Defendant indicate any legitimate uncertainty with regard to the import and wholesale distribution monopoly. On that point, the Plaintiff adds that the judgment in *Franzén*[13] concerns the right to retail sales of alcoholic beverages.

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10 Case C-424/97 *Haim* [2000] ECR I-5213.

11 Case C-5/94 *The Queen* v *MAFF, ex parte Hedley Lomas* [1996] ECR I-2553.

12 Case C-127/95 *Norbrook Laboratories* v *MAFF* [1998] ECR I-1531.

13 Case C-189/95 *Franzén* [1997] ECR I-5909.

Þriðja spurning

23. Við mat á því hvort skilyrði skaðabótaábyrgðar séu fyrir hendi í þessu máli bendir stefnandi fyrst á að skilyrði skaðabótaábyrgðar eins og þau hafi verið sett fram af EFTA-dómstólnum í máli *Erlu Maríu Sveinbjörnsdóttur* séu í fullkomnu samræmi við þau skilyrði sem dómstóll Evrópubandalaganna hafi mælt fyrir um í *Brasserie du Pêcheur and Factortame*.

24. Að því er snertir það skilyrði, að EES-reglan sem brotin hafi verið verði að vera til þess ætluð að veita einstaklingum réttindi, vísar stefnandi til *Brasserie du Pêcheur and Factortame*, þar sem talið hafi verið að ákvæði Rómarsamningsins, sem samsvari 11. gr. EES hafi haft það markmið að veita einstaklingum réttindi.

25. Að því er snertir skilyrðið um að brotið verði að vera nægilega alvarlegt til að leiða til skaðabótaskyldu heldur stefnandi því fram, að í máli því sem liggur fyrir sé nægilegt að hafa eitt tiltekið atriði í huga, þ.e. hvort stefnandi hafi viðhaldið brotinu, þó að fyrir lægi skýr dómaframkvæmd dómstóls Evrópubandalaganna eða EFTA-dómstólsins, þess efnis að hegðun stefnda fæli í sér brot. Ef svo sé, leiði það af *Brasserie du Pêcheur and Factortame* og *Haim*[10] að hegðunin sé nægilega alvarleg til að fullnægja skilyrðum fyrir skaðabótaábyrgð ríkisins.

26. Stefnandi vísar til dóma í *The Queen* gegn *MAFF, ex parte Hedley Lomas*[11] og *Norbrook Laboratories* gegn *MAFF*,[12] og bendir á að þegar EES-ríki sem hafi gerst brotlegt hafi haft lítið eða ekkert svigrúm til að ákveða hvernig það hagar löggjöf sinni gæti tilvist brotsins ein og sér verið nægileg til að líta svo á að skilyrðið um að brot sé nægilega alvarlegt sé uppfyllt.

27. Stefnandi er ósammála stefnda um að óvissa hafi ríkt um það hvort einkaréttur ríkisins á innflutningi og heildsöludreifingu áfengis hafi verið samrýmanlegur EES-samningnum. Stefnandi fellst á að óvissa kunni að hafa verið ríkjandi um lögmæti einkaréttar á smásölu, en hafnar því að þau gögn sem stefndi vísi til gefi til kynna réttmæta óvissu að því er varðar einkarétt á innflutningi og heildsöludreifingu. Að því er þetta atriði varðar bætir stefnandi því við að dómurinn í *Franzén*[13] fjalli um rétt til smásölu á áfengi.

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10 Mál C-424/97 *Haim* [2000] ECR I-5213.

11 Mál C-5/94 *The Queen* gegn *MAFF, ex parte Hedley Lomas* [1996] ECR I-2553.

12 Mál C-127/95 *Norbrook Laboratories* gegn *MAFF* [1998] ECR I-1531.

13 Mál C-189/95 *Franzén* [1997] ECR I-5909.

28. The Plaintiff contends that, at the time of the negotiations of the EEA Agreement, clear and consistent case-law of the Court of Justice of the European Communities, *inter alia* the judgment in *Pubblico Ministereo* v *Manghera*,[14] confirmed the view that an exclusive import right violated the provisions of the EC Treaty corresponding to Articles 11 and 16 EEA. The Plaintiff claims that the Defendant was fully aware of that case-law and its relevance for the interpretation of the EEA Agreement under Article 6 EEA, both during the negotiations on the EEA Agreement, and at the time of signing that Agreement on 2 May 1992. In the view of the Plaintiff, the Defendant cannot maintain that the time between the signing of the EEA Agreement and its entry into force on 1 January 1994 was too short to rectify its legislation.

29. The Plaintiff submits that lack of understanding with regard to the significance of EEA rules, or lack of knowledge in the relevant field of law, does not constitute grounds for arguing that the condition of a sufficiently serious breach has not been met. The Defendant's misapprehension of Articles 11 and 16 EEA has nothing in common with the understandable confusion regarding the interpretation of Community law that occurred in the cases *The Queen* v *H. M. Treasury, ex parte British Telecommunications*[15] and *Denkavit Internationaal and Others* v *Bundesamt für Finanzen*.[16]

30. The Plaintiff acknowledges that it follows from *Brasserie du Pêcheur and Factortame* that it is for the party who invokes the general principle of State liability to demonstrate that the State has manifestly and gravely disregarded the limits on its discretion. It also follows from the case-law[17] of the Court of Justice of the European Communities that if it has all the information necessary, that Court will make its own assessment of the seriousness of an infringement. The Plaintiff believes that the EFTA Court has all the information necessary in order to make such an assessment in the present case.

31. In *Brasserie du Pêcheur and Factortame*, the Court of Justice of the European Communities mentioned certain factors that may be taken into account in the consideration of whether an infringement is sufficiently serious to entail State liability. In applying those factors in the present case, the Plaintiff submits that: the rule which was violated was perfectly clear; it permitted the national authorities no discretion; any error of law is inexcusable; and no EFTA or Community institution contributed to the infringement.

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14 See footnote 5.

15 Case C-392/93 *The Queen* v *H. M. Treasury, ex parte British Telecommunications* [1996] ECR I-1631.

16 Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit Internationaal and Others* v *Bundesamt für Finanzen* [1996] ECR I-5063.

17 Case C-392/93 *The Queen* v *H. M. Treasury, ex parte British Telecommunications* [1996] ECR I-1631; Case C-319/96 *Brinkmann Tabakfabriken* v *Skatteministeriet* [1998] ECR I-5255; Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit Internationaal and Others* v *Bundesamt für Finanzen* [1996] ECR I-5063; and Case C-140/97 *Rechberger and Others* [1999] ECR I-3499.

28. Stefnandi heldur því fram að þegar samningaviðræður um EES-samninginn áttu sér stað hafi legið fyrir skýr og stöðug dómaframkvæmd dómstóls Evrópubandalaganna, m.a. dómurinn í *Pubblico Ministereo* gegn *Manghera*,[14] sem staðfesti það sjónarmið að einkaréttur á innflutningi væri brot á þeim ákvæðum Rómarsamningsins sem samsvara 11. og 16. gr. EES. Stefnandi heldur því fram að stefndi hafi þekkt vel til þessarar dómaframkvæmdar og þá þýðingu sem hún hefði fyrir skýringu á EES-samningnum samkvæmt 6. gr. hans, bæði meðan á samningaviðræðunum stóð og á þeim tíma þegar samningurinn var undirritaður 2. maí. Skoðun stefnanda er sú að stefndi geti ekki með réttu haldið því fram, að tíminn frá undirritun EES-samningsins og til gildistöku hans 1. janúar 1994 hafi verið of stuttur til að breyta löggjöfinni.

29. Stefnandi telur að skortur á skilningi á mikilvægi EES-reglna, eða skortur á þekkingu á viðkomandi réttarsviði, geti ekki verið röksemd fyrir því að skilyrðið um að brot sé nægilega alvarlegt, sé ekki uppfyllt. Misskilningur stefnanda að því er varðar 11. og 16. gr. EES eigi ekkert skylt við afsakanlega óvissu varðandi skýringu bandalagsréttar sem var til umfjöllunar í málunum *The Queen* gegn *H. M. Treasury, ex parte British Telecommunications*[15] og *Denkavit Internationaal and Others* gegn *Bundesamt für Finanzen*.[16]

30. Stefnandi fellst á að það leiði af *Brasserie du Pêcheur and Factortame* að það sé hlutverk þess sem ber fyrir sig meginregluna um skaðabótaskyldu ríkisins að sýna að ríkið hafi augljóslega og gróflega farið út fyrir mörk matskenndra heimilda sem það hefur. Það leiði ennfremur af dómaframkvæmd dómstóls Evrópubandalaganna[17], að hafi dómstóllinn allar nauðsynlegar upplýsingar leggi dómstóllinn sjálfur mat á hve alvarlegt brotið sé. Stefnandi sé á þeirri skoðun að EFTA-dómstóllinn hafi allar nauðsynlegar upplýsingar til að meta þetta í þessu máli.

31. Í *Brasserie du Pêcheur and Factortame*, hafi dómstóll Evrópubandalaganna tilgreint nokkur atriði sem taka megi mið af þegar metið sé hvort brot sé nægilega alvarlegt til þess að leiða til skaðabótaskyldu ríkisins. Stefnandi telur, að þegar þessi atriði séu metin í ljósi þessa máls að eftirfarandi verði að hafa í huga; að reglan sem brotið var gegn hafi verið fullkomlega skýr, hún hafi ekki eftirlátið íslenska ríkinu neitt svigrúm, lögvilla sé óafsakanleg og að stofnanir EFTA eða bandalagsins stuðluðu ekki að brotinu.

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14 Sjá nmgr. 5.

15 Mál C-392/93 *The Queen* gegn *H. M. Treasury, ex parte British Telecommunications* [1996] ECR I-1631.

16 Sameinuð mál C-283/94, C-291/94 and C-292/94 *Denkavit Internationaal and Others* gegn *Bundesamt für Finanzen* [1996] ECR I-5063.

17 Mál C-392/93 *The Queen* gegn *H. M. Treasury, ex parte British Telecommunications* [1996] ECR I-1631; Mál C-319/96 *Brinkmann Tabakfabriken* gegn *Skatteministeriet* [1998] ECR I-5255; Sameinuð mál C-283/94, C-291/94 og C-292/94 *Denkavit Internationaal and Others* gegn *Bundesamt für Finanzen* [1996] ECR I-5063; og mál C-140/97 *Rechberger o.fl.* [1999] ECR I-3499.

32. The Plaintiff points out that the Declaration of the Governments of Finland, Iceland, Norway and Sweden on alcohol monopolies, annexed to the Final Act, as referred to by the Defendant, is a unilateral declaration and, therefore, has very limited significance as a source of law. It was made without prejudice to the obligations arising under the EEA Agreement and refers to grounds similar to those in the derogation provided for in Article 13 EEA. Whether a State entity or a private party imports alcoholic beverages and distributes such products on a wholesale level is of no relevance for the health and social policy considerations invoked by the Defendant. The Plaintiff is of the view that the said Declaration is of no significance for the assessment of the seriousness of the infringement.

33. The Plaintiff concludes that the condition that the breach must be sufficiently serious is fulfilled in the present case.

34. As regards the condition that there must be a causal link between the breach and the loss suffered, the Plaintiff refers to the judgment in *Brinkmann Tabakfabriken* v *Skatteministeriet* [18] and *Rechberger and Others*,[19] from which it follows that the EFTA Court may assess whether a causal link exists if it considers that it has all the information necessary to make that assessment.

35. The Plaintiff considers that there is a causal link between the Defendant's breach of Articles 11 and 16 EEA and the loss sustained by the Plaintiff. If the Defendant had abolished the contested State monopoly as of 1 January 1994, the Plaintiff would not have sustained the loss of profits on the import and wholesale distribution of the alcoholic beverage Cointreau during the period from 1 January 1994 to 1 December 1995.

The Icelandic State

Question 1

36. The Defendant, the Icelandic State, points out that prior to, and for a period of time after, the entry into force of the EEA Agreement, the Defendant was firmly of the view that the State monopoly on the import and wholesale distribution of alcoholic beverages was in conformity with the EEA Agreement. That view was based on, *inter alia*, the assertion that the arrangement was flexible enough not to restrict imports within the meaning of Article 11 EEA, and that it ensured equal treatment of EEA nationals as regards the conditions under which the products are procured and marketed as required by Article 16 EEA. In addition, the Defendant considered that Article 13 EEA enabled it to impose certain restrictions on the importation of alcoholic beverages on grounds related

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18 Case C-319/96 *Brinkmann Tabakfabriken* v *Skatteministeriet* [1998] ECR I-5255.

19 Case C-140/97 *Rechberger and Others* [1999] ECR I-3499.

32. Stefnandi bendir á að yfirlýsing ríkisstjórna Finnlands, Íslands, Noregs og Svíþjóðar um áfengiseinkasölur, sem fylgt hafi lokagerð samningsins og sem stefndi vísi til, sé einhliða yfirlýsing og hafi þar með mjög takmarkaða þýðingu sem réttarheimild. Þessi yfirlýsing hafi verið gefin með fyrirvara um skuldbindingar sem leiða af samningnum og vísi til röksemda sem svipi til þeirrar undanþágu sem fram komi í 13. gr. EES. Það hafi enga þýðingu fyrir hin heilbrigðislegu og félagslegu sjónarmið sem stefndi vísi til hvort það er ríkisfyrirtæki eða einkaaðili sem flytur inn áfengi og dreifir því í heildsölu. Stefnandi er á þeirri skoðun að nefnd yfirlýsing hafi enga þýðingu við mat á því hve alvarlegt brotið er.

33. Niðurstaða stefndanda er að skilyrðið um að brot þurfi að vera nægilega alvarlegt sé uppfyllt í máli þessu.

34. Að því er varðar skilyrðið um að til staðar þurfi að vera orsakasamband milli brotsins og tjóns sem tjónþoli varð fyrir, vísar stefnandi til dómsins í *Brinkmann Tabakfabriken* gegn *Skatteministeriet*[18] og *Rechberger and Others*,[19] en af honum leiði að EFTA-dómstóllinn geti metið hvort orsakasamband sé þar á milli ef hann telur að hann hafi allar nauðsynlegar upplýsingar til að meta það.

35. Stefnandi telur að orsakasamband sé milli brots stefnda á 11. og 16. gr. EES og tjóns sem stefnandi hefur orðið fyrir. Ef stefndi hefði afnumið hinn umdeilda einkarétt ríkisins þegar 1. janúar 1994, hefði stefnandi ekki orðið fyrir þeim missi hagnaðar vegna innflutnings- og heildsöludreifingar á áfengistegundinni Cointreau sem hann varð fyrir á tímabilinu 1. janúar 1994 til 1. desember 1995.

Íslenska ríkið

Fyrsta spurning

36. Stefndi, íslenska ríkið, bendir á að bæði fyrir, og í ákveðinn tíma, eftir gildistöku EES-samningsins, hafi stefndi ekki talið vafa leika á að einkaréttur ríkisins á innflutningi og heildsöludreifingu á áfengi væri í samræmi við EES-samninginn. Þessi skoðun var m.a. byggð á þeirri forsendu að þetta fyrirkomulag væri nægilega sveigjanlegt til þess að það takmarkaði ekki innflutning í skilningi 11. gr. EES, og að það tryggði að ríkisborgarar Evrópska efnahagssvæðisins sætu við sama borð hvað snertir aðdrátt og markaðssetningu eins og krafist sé í 16. gr. EES. Að auki taldi stefnandi að 13. gr. gerði kleift að setja vissar skorður við innflutningi áfengis m.a. með vísan til þess að með því væri verið að vernda líf og heilsu manna. Til stuðnings þessu sjónarmiði sem var við lýði vísar stefndi

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18 Mál C-319/96 *Brinkmann Tabakfabriken* gegn *Skatteministeriet* [1998] ECR I-5255.

19 Mál C-140/97 *Rechberger and Others* [1999] ECR I-3499.

to, *inter alia*, the protection of health and life of humans. In support of the view taken at that time, the Defendant refers to the Declaration of the Governments of Finland, Iceland, Norway and Sweden on alcohol monopolies, annexed to the Final Act, which reads as follows:

> *"Without prejudice to the obligations arising under this Agreement, Finland, Iceland, Norway and Sweden recall that their alcohol monopolies are based on important health and social policy considerations."*

37. The Defendant recalls that the position taken in that Declaration did not elicit any reaction by the other Contracting Parties when the EEA Agreement was concluded.

38. The Defendant submits that there are other examples which demonstrate that it had, at that time, reasons to believe that the contested State monopoly did not conflict with the EEA Agreement. The Defendant mentions the explanatory report of the bill that later became *Lög nr. 2/1993 um Evrópska efnahagssvæðið* (Act No. 2/1993 on the European Economic Area, hereinafter the "EEA Act"), which contains the following statement on Article 37 of the EC Treaty (now, after amendment, Article 31 EC) and the corresponding Article 16 EEA:

> *"Interpretation of this provision within the EC must be taken into account. There, it has been emphasised that so-called collateral importation must always be possible, in order to bring competition to bear on the holder of a monopoly. During the EEA negotiations, the Nordic countries within the EFTA, who all maintain State monopolies for the sale of alcoholic beverages, have not considered that the undertakings contained in the agreement provide an occasion to alter the sales arrangement, provided the monopolies undertake not to discriminate between brands according to place of origin. It has been noted that, in fact, the arrangement in effect is a retail sale arrangement and, consequently, is an internal matter rather than a matter directly concerned with international trade. During the negotiations, the EC Commission has not challenged this interpretation."*

39. According to the Defendant, the State monopoly on the import and wholesale distribution of alcoholic beverages was abolished in 1995 as a result of both the administrative procedure initiated by the EFTA Surveillance Authority under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter the "ESA/Court Agreement") regarding that monopoly, and the judgment of the EFTA Court in *Restamark*. The conclusion arrived at by the EFTA Surveillance Authority and the EFTA Court convinced the Defendant that the EEA Agreement was to be interpreted so as not to allow for restrictions on the importation of alcoholic beverages.

40. The Defendant makes the point that it does not follow expressly from the wording of any of the provisions of EEA Agreement that the State monopoly on the import and wholesale distribution of alcoholic beverages had to be abolished.

einnig til yfirlýsingar ríkisstjórna Finnlands, Íslands, Noregs of Svíþjóðar um áfengiseinkasölur, sem fylgdi lokagerð EES-samningsins, en hún hljóðar svo:

> *"Með fyrirvara um skuldbindingar sem leiðir af samningnum árétta Finnland, Ísland, Noregur og Svíþjóð að áfengiseinkasölur ríkjanna eru grundvallaðar á mikilvægum sjónarmiðum er varða stefnu þeirra í heilbrigðis- og félagsmálum."*

37. Stefndi bendir á að sú afstaða sem fram komi í yfirlýsingunni hafi ekki laðað fram nein viðbrögð frá hinum samningsríkjunum þegar EES-samningurinn var gerður.

38. Stefndi heldur því fram að benda megi á önnur atriði sem sýni að hann hafi á þessum tíma haft ástæðu til að ætla að hin umdeildi einkaréttur ríkisins hafi ekki verið andstæður EES-samningnum. Stefndi nefnir greinargerð með frumvarpi því sem síðar varð að lögum nr. 2/1993 um Evrópska efnahagssvæðið, þar sem sé að finna eftirfarandi í athugasemdum við 37. Rómarsamningsins (nú eftir breytingar 31. gr.) og samsvarandi ákvæði í 16. gr. EES:

> *"Taka verður tillit til þess hvernig ákvæðið hefur verið túlkað innan EB en þar hefur áherslan verið lögð á það að ávallt verði að vera hægt að stunda svokallaðan samhliða innflutning og veita einkaréttarhafanum þar með samkeppni. Í samningaviðræðum um EES hafa Norðurlöndin öll innan EFTA, sem öll hafa með hendi ríkiseinkasölu á áfengi, ekki talið að skuldbindingar samningsins gefi ástæðu til þess að breyta fyrirkomulagi áfengissölu, svo fremi einkasölurnar ábyrgist það að þær mismuni ekki áfengistegundum eftir uppruna þeirra. Bent hefur verið á að í raun sé um að ræða fyrirkomulag smásölu og því innanríkismál fremur en mál sem beint snerti alþjóðaviðskipti. Framkvæmdastjórn EB hefur í samningaviðræðum ekki dregið þessa túlkun í efa."*

39. Samkvæmt því sem fram kemur hjá stefnda var einkaréttur ríkisins á innflutningi og heildsöludreifingu áfengis afnuminn á árinu 1995, bæði vegna málsmeðferðar sem Eftirlitsstofnun EFTA hóf samkvæmt 31. gr. Samningsins um stofnun eftirlitsstofnunar og dómstóls að því er varðaði þennan einkarétt og vegna dóms EFTA-dómstólsins í *Restamark*-málinu. Niðurstaðan sem Eftirlitsstofnun EFTA og EFTA-dómstóllinn komust að sannfærðu stefnda um að EES-samninginn bæri að túlka þannig að hann heimilaði ekki takmarkanir á innflutningi áfengis.

40. Stefndi bendir á þá staðreynd að það leiði ekki augljóslega af orðalagi neins af ákvæðum EES-samningsins að borið hafi að afnema einkarétt ríkisins á innflutningi og heildsöludreifingu áfengis. Niðurstaðan sem Eftirlitsstofnun

The conclusion arrived at by the EFTA Surveillance Authority and the EFTA Court was based on a detailed legal examination and interpretation of the provisions of the EEA Agreement, and was not evident in advance.

41. The Defendant considers, in essence, that the now-accepted understanding of the EEA Agreement, as preventing the maintenance of a State monopoly on the import and wholesale distribution of alcoholic beverages, was unknown at the time of its entry into force. That understanding became clear at a later date, and the Defendant then amended its legislation accordingly, in order to fulfil the requirements of uniform interpretation provided for in the EEA Agreement. On this point, the Defendant adds that the EEA Agreement sets out no time-limit for the achievement of uniform interpretation.

42. Based on these considerations, the Defendant contends that it was under no obligation to abolish the State monopoly on import and wholesale distribution of alcoholic beverages upon the entry into force of the EEA Agreement, 1 January 1994. That duty arose at a later date, after the legal situation had become clear from the decisions of the EFTA Surveillance Authority and the EFTA Court. At that time, the obligation was fulfilled as soon as possible, by the adoption of appropriate legislation.

Question 2

43. The Defendant begins by observing that, pursuant to section 2 of the Icelandic Constitution, only national courts have jurisdiction to determine whether the Defendant is liable for compensation under Icelandic law. Only Icelandic sources of law are relevant in that assessment.

44. The Defendant states that the position taken by the Plaintiff seems to be based on the view that the provisions of the EEA Agreement may acquire status of national law without any action on the part of the national legislator, and take precedence over provisions of conflicting national law. The Defendant regards this view as untenable.

45. In the negotiations leading up to the EEA Agreement, clear reservations were made to the effect that it would not affect the legislative autonomy of the EFTA States. Legislative powers have not been transferred to any EEA institutions, as can clearly be inferred from the Preamble, Article 7 EEA and Protocol 35. In Iceland, the main part of the EEA Agreement was made part of national law by the adoption of section 2 of the EEA Act. The Defendant contends, in essence, that the rule of interpretation found in section 3 of the said Act fulfils the requirement of the EFTA States under Protocol 35 to introduce a statutory provision to the effect that EEA rules are to prevail in the event of conflict between implemented EEA rules and other statutory provisions. In *Restamark*, Protocol 35 was interpreted as imposing a duty on the EFTA States to give precedence to implemented EEA rules that are sufficiently clear and

EFTA og EFTA-dómstóllinn hafi komist að, hafi byggst á nákvæmri lögfræðilegri rannsókn og skýringu á ákvæðum EES-samningsins, og hafi ekki verið augljós fyrirfarm.

41. Stefndi telur, í stuttu máli, að sá skilningur á EES-samningnum, að hann banni að viðhaldið sé einkarétti ríkisins á innflutningi og heildsöludreifingu áfengis, sem nú sé viðtekin, hafi ekki legið fyrir þegar EES-samningurinn tók gildi. Sá skilningur hafi orðið ljós síðar, og stefndi hafi þá breytt löggjöf sinni í samræmi við það til að fullnægja kröfunni um samræmda skýringu samningsins sem EES-samningurinn mæli fyrir um. Að því er þetta atriði varðar bætir stefndi því við að EES-samningurinn mæli ekki fyrir um það á hvaða tímamarki markmiði um samræmda skýringu hafi átt að vera náð.

42. Á grundvelli þessara sjónarmiða telur stefndi að hann hafi ekki verið skuldbundinn til að afnema einkarétt ríkisins á innflutningi og heildsöludreifingu áfengis þegar við gildistöku EES-samningsins 1. janúar 1994. Sú skylda hafi stofnast síðar, þegar réttarstaðan varð skýr eftir ákvarðanir Eftirlitsstofnunar EFTA og EFTA-dómstólsins. Skyldan var uppfyllt á sínum tíma með viðeigandi lagasetningu svo fljótt sem kostur var.

Önnur spurning

43. Stefndi byrjar á að benda á að samkvæmt 2. gr. íslensku stjórnarskrárinnar séu það aðeins innlendir dómstólar sem hafi lögsögu til að ákveða hvort stefndi er skaðabótaskyldur samkvæmt íslenskum rétti. Aðeins íslenskar réttarheimildir komi til skoðunar við mat á því álitaefni.

44. Stefndi bendir á að afstaða stefnanda virðist byggð á því sjónarmiði að ákvæði EES-samningsins geti fengið stöðu landsréttar án nokkurs tilverknaðar af hálfu innlenda löggjafans, og eigi jafnframt að ganga framar ósamrýmanlegum ákvæðum landsréttar. Stefndi telur þetta ekki fá staðist.

45. Í samningaviðræðunum fyrir EES-samninginn voru gerðir skýrir fyrirvarar um það að hann myndi ekki skerða sjálfsákvörðunarrétt löggjafa EFTA-ríkjanna. Löggjafarvald hafi ekki verið framselt til EES-stofnana, eins og glöggt megi greina af inngangsorðum samningsins, 7. gr. hans og bókun 35. Á Íslandi hafi meginmál EES-samningsins verið lögfest sem hluti landsréttar með 2. gr. EES-laganna. Stefndi heldur því fram, í stuttu máli, að lögskýringarregla í 3. gr. laganna, fullnægi þeirri skuldbindingu EFTA-ríkjanna í bókun 35, að tryggja að EES-reglur gangi framar þegar þær rekast á aðrar reglur landsréttar. Í *Restamark*, hafi bókun 35 verið skýrð þannig að í henni fælist skylda EFTA-ríkjanna til að tryggja lögfestum EES-reglum, sem séu nægilega skýrar og óskilyrtar, forgang.

unconditional. The Defendant states that the rule of interpretation in section 3 of the EEA Act is not applicable unless these conditions are fulfilled.

46. The Defendant contends, in essence, that only if the relevant provision of the EEA Agreement is clear and unconditional, and consequently, unequivocal, may it create a basis for individual rights. A right to compensation on the same basis requires an even higher degree of clarity. The Defendant is of the view that the basis of the Plaintiff's claim of liability for compensation fails to fulfil this prerequisite of clarity.

47. It appears from the written submissions that the Defendant is of the view that the implementation of the main part of the EEA Agreement may not entail any liability for compensation. The Defendant acknowledges that the introduction of secondary national legislation may give rise to liability for compensation if that legislation is in conflict with a sufficiently clear and unequivocal provision of the EEA Agreement. However, that is not the case here, as the Defendant in fact abolished the State monopoly on the import and wholesale distribution of alcoholic beverages. The interpretation of the EEA Agreement with regard to restrictions on the import of alcoholic beverages was not clear until after the EFTA Surveillance Authority and the EFTA Court had expressed their views. The period of time used by the Defendant to adapt to the position of the EFTA Surveillance Authority and the EFTA Court by abolishing the contested State monopoly cannot be regarded as excessive.

Question 3

48. Referring to the principle of State liability laid down in *Sveinbjörnsdóttir*, the Defendant contends, in essence, that it must be a prerequisite for such liability that secondary acts referred to in the Annexes to the EEA Agreement have not properly been made part of national law as set out in Article 7 EEA. The Defendant points out that amendments were, in fact, made to the Alcoholic Beverages Act and the Alcoholic Beverages and Tobacco Trading Act in order to adapt to the EEA Agreement, following the position taken by the EFTA Surveillance Authority and the EFTA Court with regard to restrictions on the import of alcoholic beverages. The basic prerequisite for liability is, therefore, lacking.

49. The Defendant adds that none of the three conditions for State liability set out in *Sveinbjörnsdóttir* are fulfilled. First, there was no clear provision prohibiting a State monopoly on the import and wholesale distribution of alcoholic beverages. That prohibition only became evident after the position taken by the EFTA Surveillance Authority and the EFTA Court. Second, the Defendant did not breach its obligations seriously. The Contracting Parties were fully aware of the attitude of the Defendant, and the Declaration of the Governments of Finland, Iceland, Norway and Sweden on alcohol monopolies, annexed to the Final Act, did not elicit any objections. That, together with the

Stefndi telur að lögskýringarreglunni í 3. gr. EES-laganna verði ekki beitt nema það skilyrði sé uppfyllt.

46. Stefndi telur, í stuttu máli, að aðeins þegar viðkomandi regla EES-samningsins sé skýr og óskilyrt, og þar með vafalaus, geti hún orðið grundvöllur að réttindum til handa einstaklingum. Réttur til skaðabóta á sama grundvelli gerir kröfu til jafnvel enn meiri skýrleika. Stefndi er á þeirri skoðun að grundvöllur að skaðabótakröfu stefnanda fullnægi ekki þessu grundvallarskilyrði um skýrleika.

47. Af skriflegri greinargerð stefnda má sjá að stefndi er á þeirri skoðun að lögfesting meginmáls samningsins leiði ekki til þess að um skaðabótaskyldu sé að ræða. Stefndi viðurkennir að lögfesting afleiddrar innlendrar löggjafar geti leitt til skaðabótaskyldu ef sú löggjöf er andstæð nægjanlega skýrum og óskilyrtum ákvæðum EES-samningsins. Það sé aftur á móti ekki svo í þessu máli, þar sem stefndi hafi afnumið einkarétt ríkisins á innflutningi og heildsöludreifingu áfengis. Skýring EES-samningsins, að því er varðar takmarkanir á innflutningi áfengis hafi ekki legið skýrt fyrir fyrr en Eftirlitsstofnun EFTA og EFTA-dómstóllinn hafi lýst sjónarmiðum sínum. Ekki sé unnt að líta svo á að tíminn sem stefndi hafi notað til laga sig að afstöðu Eftirlitsstofnunar EFTA og EFTA-dómstólsins hafi verið óhóflega langur.

Þriðja spurning

48. Með vísan til meginreglunnar um skaðabótaskyldu sem fram komi í máli *Erlu Maríu Sveinbjörnsdóttur*, heldur stefndi því fram, í stuttu máli, að það hljóti af vera forsenda fyrir slíkri skaðabótaskyldu að afleiddar gerðir sem vísað sé til í viðaukum við EES-samninginn hafi ekki verið teknar upp í landsrétt á réttan hátt eins og mælt sé fyrir um í 7. gr. EES. Stefndi bendir á að í reynd hafi verið gerðar breytingar á áfengislögunum og lögunum um verslun með áfengi og tóbak til að þau samræmdust EES-samningnum, í samræmi við þá afstöðu sem Eftirlitsstofnun EFTA og EFTA-dómstóllinn hafi tekið að því er varðar takmarkanir á innflutningi áfengis. Það vanti því grundvallarforsendu þess að til skaðabótaskyldu geti stofnast.

49. Stefndi bætir því einnig við að ekkert hinna þriggja skilyrða fyrir skaðabótaskyldu sem fram komi í máli *Erlu Maríu Sveinbjörnsdóttur* séu uppfyllt. Í fyrsta lagi séu engin skýr ákvæði sem bönnuðu einkarétt ríkisins á innflutningi og heildsöludreifingu áfengis. Það bann varð þá fyrst ljóst þegar afstaða Eftirlitsstofnunar EFTA og EFTA-dómstólsins hafi legið fyrir. Í öðru lagi hafi brot stefnda ekki verið alvarlegt. Samningsaðilar hafi haft fulla vitneskju um afstöðu stefnda, og yfirlýsing ríkisstjórna Finnlands, Íslands, Noregs og Svíþjóðar um áfengiseinkasölur, sem fylgt hafi lokagerð samningsins, hafi ekki laðað fram nein andmæli. Þetta, auk þess sem ekki sé til staðar neitt skýrt ákvæði

lack of any clear provision or precedent indicating the illegality of a State monopoly on the import and wholesale distribution of alcoholic beverages, and the later abolition of that monopoly, shows that no sufficiently serious breach exists. Third, the Plaintiff has not demonstrated any loss caused by the fact that the contested provisions of the Alcoholic Beverages Act and the Alcoholic Beverages and Tobacco Trading Act remained in force for a period of time after the entry into force of the EEA Agreement.

The Government of Norway

Question 1

50. The Government of Norway contends that the first question should be ruled inadmissible. The basis for that submission is Article 96(3) of the Rules of Procedure of the EFTA Court, providing that the Request for an Advisory Opinion is to be accompanied by, *inter alia*, a summary of the case before the national court, including a description of the facts of the case, necessary to enable the Court to assess the question to which a reply is sought. In the view of the Government of Norway, the Request for an Advisory Opinion from Héraðsdómur Reykjavíkur does not contain a sufficient account for the factual circumstances and specifics of the case, rendering it virtually impossible for the EEA States and interested parties to submit relevant observations. In support of that position, the Government of Norway refers to the judgments in *Telemarsicabruzzo*[20] and *Holdijk*.[21]

Question 2

51. The Government of Norway contends that the EEA Agreement does not contain a sufficient legal basis to establish a principle of State liability.

52. There is no explicit provision in the EEA Agreement establishing a basis for State liability towards individuals for breaches of the EEA Agreement. Moreover, no such obligation can be derived from the EEA Agreement.

53. The Government of Norway acknowledges that the EFTA Court, in *Sveinbjörnsdóttir*, held that an EEA State could, under certain conditions, be obliged to pay compensation to individuals who have suffered loss or damage due to incorrect implementation of a directive. However, the Government of Norway considers that the EFTA Court in that case did not take sufficient account of the special characteristics of the EEA Agreement.

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20 Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo* [1993] ECR I-393.

21 Joined Cases 141-143/81 *Holdijk* [1982] ECR 1299.

sem gefi til kynna að einkaréttur ríkisins á innflutningi og heildsöludreifingu hafi verið ólögmætur og afnám þessa einkaréttar, sýni að ekki hafi verið til staðar nægilega alvarlegt brot. Í þriðja lagi hafi stefnandi ekki sýnt fram á neitt tjón sem hann hafi orðið fyrir vegna þess að áfengislögin og lögin um verslun með áfengi og tóbak giltu óbreytt um tíma eftir gildistöku EES-samningsins.

Ríkisstjórn Noregs

Fyrsta spurning

50. Ríkisstjórn Noregs heldur því fram að vísa beri fyrstu spurningunni frá. Ástæðan fyrir þeirri skoðun sé sú að 3. mgr. 96. gr. starfsreglna EFTA-dómstólsins mæli svo fyrir að beiðni um ráðgefandi álit skuli m.a. fylgja samantekt um mál það sem rekið er fyrir viðkomandi dómstóli samningsríkis, þar sem fram komi lýsing á atvikum þess, sem nauðsynleg sé til að gera dómstólnum kleift að meta þær spurningar sem leitað er svars við. Það er skoðun ríkisstjórnar Noregs, að beiðnin frá Héraðsdómi Reykjavíkur hafi ekki að geyma nægjanlega lýsingu á atvikum og sérkennum málsins, sem geri það í reynd ókleift fyrir EFTA-ríkin og aðra þá aðila sem vilja láta sig málið varða, að gera viðeigandi athugasemdir. Til stuðnings þessu sjónarmiði vísar ríkisstjórn Noregs til dómanna í *Telemarsicabruzzo*[20] og *Holdijk*.[21]

Önnur spurning

51. Ríkisstjórn Noregs telur að EES-samningurinn sé ekki nægilegur lagagrundvöllur til að kveða á um meginreglu um skaðabótaskyldu ríkisins.

52. Í EES-samningnum sé ekki neitt skýrt ákvæði um skaðabótaskyldu ríkisins gagnvart einstaklingum vegna brota á EES-samningnum. Þá verði slík skylda ekki leidd af samningnum.

53. Ríkisstjórn Noregs viðurkennir að EFTA-dómstóllinn hafi í máli *Erlu Maríu Sveinbjörnsdóttur*, komist að þeirri niðurstöðu, að við vissar aðstæður, geti EFTA-ríki verið skylt að greiða skaðabætur til einstaklinga sem hafi orðið fyrir tjóni vegna rangrar lögfestingar tilskipunar. Ríkisstjórn Noregs telur aftur á móti að EFTA-dómstóllinn hafi ekki í því máli tekið nægjanlegt tillit til sérstaks eðlis EES-samningsins.

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20 Sameinuð mál C-320/90, C-321/90 og C-322/90 *Telemarsicabruzzo* [1993] ECR I-393.

21 Sameinuð mál 141-143/81 *Holdijk* [1982] ECR 1299.

54. The Government of Norway argues that the principle of State liability under Community law, as developed by the Court of Justice of the European Communities, is inseparable from the fundamental principle of direct effect. The principle of State liability was established as a direct prolongation of the doctrine of direct effect. It follows from *Brasserie du Pêcheur and Factortame* that State liability is "the necessary corollary of the direct effect of the Community provisions". The principles of direct effect and State liability constitute complementary elements of the supranational Community law, which is absent in the EEA. The Government of Norway maintains that it would be contrary to the expressed views of both the Court of Justice of the European Communities and the EFTA Court to establish a principle of State liability under the EEA Agreement which in its effect is similar to the principle of direct effect.

55. The Government of Norway observes that in *Sveinbjörnsdóttir*, the EFTA Court stated that the depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty. Referring to the judgment *Van Gend en Loos*,[22] the Government of Norway points out that a characteristic feature of Community law is the transfer to the Community of sovereign rights and legislative powers from the Member States. Such a transfer of sovereign rights and legislative powers was deliberately and explicitly excluded from the EEA Agreement. The Government of Norway refers to *Opinion 1/91*,[23] in which the Court of Justice of the European Communities stated that the EEA Agreement "merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up."

56. In support of the position that individuals cannot rely on EEA rules unless they have been correctly implemented in national law, the Government of Norway also refers to Article 7 EEA and Protocol 35 to the EEA Agreement. Based on those provisions, the EFTA Court, in *Sveinbjörnsdóttir*, emphasised that "the EEA Agreement does not entail a transfer of legislative powers". The Government of Norway contends that the EFTA Court thereby clearly stated that EEA provisions do not have direct effect, neither horizontally nor vertically, and endorsed the position of the Court of Justice of the European Communities in *Opinion 1/91*.[24]

57. The Government of Norway observes that, when they ratified the EEA Agreement, all the Nordic EFTA States (Norway, Sweden, Finland and Iceland) assumed that the EEA Agreement would not entail any transfer of legislative powers and would not affect the dualistic principle as regards the relationship between treaty obligations and national law.[25] It was presupposed that, in the

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22 Case 26/62 *Van Gend en Loos* [1963] ECR 1.

23 *Opinion 1/91* [1991] ECR I-6079.

24 See footnote 23.

25 Norway: Proposition to the Storting No. 100 1991-92, pages 37-38 and pages 317-318; and Recommendation to the Storting No. 248 1991-92, pages 84-85. Sweden: Proposition of the

54. Ríkisstjórn Noregs færir fyrir því rök að meginreglan um skaðabótaskyldu ríkisins, eins og hún hefur verið þróuð af dómstól Evrópubandalaganna, sé órjúfanlega tengd grundvallarreglunni um bein réttaráhrif. Meginreglan um skaðabótaskyldu hafi verið þróuð sem viðbót við regluna um bein réttaráhrif. Það leiði af *Brasserie du Pêcheur and Factortame* að skaðabótaskyldan "sé nauðsynleg og rökrétt viðbót við bein réttaráhrif." Meginreglurnar um bein réttaráhrif og skaðabótaskyldu ríkisins séu samstæður hluti af hinum yfirþjóðlega bandalagsrétti, sem ekki séu til staðar í EES-samningnum. Ríkisstjórn Noregs heldur því fram að það sé í andstöðu við viðhorf sem komið hafi fram bæði hjá dómstól Evrópubandalaganna og EFTA-dómstólnum að mæla fyrir meginreglu um skaðabótaskyldu á grundvelli EES-samningsins, sem hafi sambærileg áhrif og meginreglan um bein réttaráhrif.

55. Ríkisstjórn Noregs bendir á að í máli *Erlu Maríu Sveinbjörnsdóttur* hafi EFTA-dómstóllinn talið að samruni á grundvelli EES-samningsins sé ekki eins víðtækur og á grundvelli Rómarsamningsins. Með vísan til dómsins í *Van Gend en Loos*,[22] bendir ríkisstjórn Noregs á að megineinkenni bandalagsréttar felist í framsali fullveldis og löggjafarvalds frá aðildarríkjunum til bandalagsins. Slíkt framsal fullveldis og löggjafarvalds hafi með vilja og skýrlega verið undanskilið frá EES-samningnum. Ríkisstjórn Noregs vísar til *álits 1/91*,[23] þar sem dómstóll Evrópubandalaganna hafi haldið því fram að samningurinn "skapi aðeins réttindi og skyldur milli samningsaðila og geri ekki ráð fyrir framsali fullveldis til þeirra alþjóðlegu stofnana sem hann mælir fyrir um."

56. Til stuðnings þeirri afstöðu að einstaklingar geti ekki byggt á EES-reglum nema þær hafi verið réttilega innleiddar í landsrétt bendir ríkisstjórn Noregs einnig á 7. gr. EES og bókun 35 við EES-samninginn. Með vísan til þessara ákvæða lagði EFTA-dómstóllinn í máli *Erlu Maríu Sveinbjörnsdóttur* áherslu á að "EES-samningurinn fæli ekki í sér framsal ríkisvalds.". Ríkisstjórn Noregs heldur því fram að þar með hafi EFTA-dómstóllinn skýrlega tekið fram að EES-samningurinn ætti ekki að hafa bein réttaráhrif, hvorki lárétt né lóðrétt og þannig gert að sínum þau sjónarmið sem fram koma hjá dómstól Evrópubandalaganna í *áliti 1/91*.[24]

57. Ríkisstjórn Noregs bendir á að þegar þau fullgiltu EES-samninginn hafi öll norrænu EFTA ríkin (Noregur, Svíþjóð, Finnland og Ísland) gengið út frá því að EES-samningurinn myndi ekki fela í sér neitt framsal löggjafarvalds og myndi ekki hafa áhrif á meginregluna um tvíeðli að því er varðar tengsl þjóðaréttarlegra skuldbindinga og landsréttar.[25] Gengið var út frá því, í þeim ríkjum þar sem

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22 Mál 26/62 *Van Gend en Loos* [1963] ECR 1.

23 *Álit 1/91* [1991] ECR I-6079.

24 *Sjá nmgr.* 23.

25 Noregur: Frumvarp til Stórþingsins nr.100 1991-92, bls. 37-38 og bls. 317-318; og tilmæli til Stórþingsins nr. 248 1991-92, bls. 84-85. Svíþjóð: Frumvarp ríkisstjórnarinnar nr. 170 1991-92. Finnland: Frumvarp ríkisstjórnarinnar nr. 95 1992. Ísland: Greinargerð með frumvarpi sem síðar varð að lögum nr. 2/1993 um evrópska efnahagssvæðið.

dualistic EFTA States, the EEA rules would not form the basis for any individual rights without formal implementation. In Norway, that follows from Proposition to the Storting No. 100 1991-92 on ratification of the EEA Agreement, in which it is stated that EEA rules "will not have direct effect here as in the EC".[26] It was also confirmed by Recommendation to the Storting No. 248 1991-92 on ratification of the EEA Agreement, in which it is stated that the EEA Agreement only entails a transfer of powers with regard to the enforcement of the competition rules, and that the "EEA Agreement on all other points is an international agreement".[27] As for the principle of State liability established in *Francovich and Others*,[28] it is stated in the Proposition to the Odelsting No. 62 1991-92[29] that it can be seen as a "reflection of the EC law principle of direct effect, which is not to be applicable under the EEA Agreement."

58. The Government of Norway adds that a principle of State liability within the EEA would be even more far-reaching than the principle of State liability within the EU. The fact that EEA rules, including directives, do not have direct effect means that State liability within the EEA would, to a certain extent, replace the principle of vertical direct effect of directives within the EU. This illustrates that the consequence of the principle established in *Sveinbjörnsdóttir* is, in effect, similar to the principle of direct effect within the EU.

59. The Government of Norway contests the position taken by the EFTA Court in *Sveinbjörnsdóttir* that the homogeneity objective, the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities, and the loyalty obligations of the EEA States under Article 3 EEA, may create a basis for a principle of State liability. The mere reference to Article 1(1) EEA and the Preamble of the EEA Agreement in *Sveinbjörnsdóttir* cannot constitute the leading argument for State liability.

60. As regards the homogeneity objective, the Government of Norway recognises the importance of that objective for the achievement of a functioning European Economic Area. However, the homogeneity objective cannot reach as far as being a basis for establishing a principle of State liability when the legal systems of the EU and EEA are fundamentally different.

61. The Government of Norway contends, in essence, that homogeneity is sufficiently provided for by other means. First, homogeneity is secured by the incorporation of the main part of the EEA Agreement and secondary legislation into the national legal orders of the EFTA States, by decisions of the EEA Joint

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Government No. 170 1991-92. Finland: Proposition of the Government No. 95 1992. Iceland: Explanatory report of the bill that later became Act No. 2/1993 on the European Economic Area.

26 Proposition to the Storting No. 100 1991-92 on ratification of the EEA Agreement, page 318.

27 Recommendation to the Storting No. 248 1991-92 on ratification of the EEA Agreement, pages 84-85.

28 Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357.

29 Proposition to the Odelsting No. 62 1991-92, page 7.

reglan um tvíeðli gildir, að EES-reglur gætu ekki verið grundvöllur að réttindum til handa einstaklingum án formlegrar lögleiðingar. Í Noregi leiði þetta af frumvarpi sem lagt var fyrir Stórþingið nr. 100 1991-92 um fullgildingu EES-samningsins, þar sem það komi fram að EES-reglur "muni ekki hafa bein réttaráhrif hér eins og innan EB."[26] Það var einnig staðfest í tillögu til Stórþingsins nr. 248 1991-92 um fullgildingu EES-samningsins, þar sem fram komi að EES-samningur "feli aðeins í sér framsal ríkisvalds að því er varðar framkvæmd og fullnustu samkeppnisreglna, og að EES-samningurinn, sé að öllu öðru leyti þjóðréttarsamningur."[27] Að því er varðar meginregluna um skaðabótaskyldu ríkisins sem fram komi í *Francovich o.fl.*,[28] sé tekið fram í frumvarpi til Óðalsþingsins nr. 62 1991-92[29] að hana megi líta á sem "spegilmynd meginreglunnar um bein réttaráhrif í EB-rétti".

58. Ríkisstjórn Noregs bætir því við að meginreglan um skaðabótaábyrgð ríkisins á Evrópska efnahagssvæðinu myndi verða víðtækari en sambærileg meginregla innan ESB. Sú staðreynd að EES-reglur, þ.m.t. tilskipanir, hafi ekki bein réttaráhrif þýði að skaðabótaábyrgð á grundvelli EES-reglna leysi að vissu marki af hólmi lóðrétt bein réttaráhrif innan EB. Þetta sýni að afleiðingar þeirrar reglu sem mótuð hafi verið í máli *Erlu Maríu Sveinbjörnsdóttur* séu, í reynd, svipaðar og af meginreglunni um bein réttaráhrif innan ESB.

59. Ríkisstjórn Noregs andmælir þeirri afstöðu sem EFTA-dómstóllinn tók í máli *Erlu Maríu Sveinbjörnsdóttur* að einsleitnismarkmiðið, markiðið um að mæla fyrir um rétt einstaklinga og aðila í atvinnurekstri til sömu meðferðar og jafnra tækifæra og trúnaðarskylda EES-ríkjanna samkvæmt 3. gr. EES, skapi grundvöll til að byggja á regluna um skaðabótaskyldu ríkisins. Tilvísun til 1. mgr. 1. gr. og inngangsorða samningsins ein og sér geti ekki verið meginröksemd fyrir skaðabótaskyldu ríkisins.

60. Að því er snertir markmiðið um einsleitni viðurkennir Ríkisstjórn Noregs mikilvægi þess fyrir góða framkvæmd EES-samningsins. Á hinn bóginn sé ekki hægt að teygja einsleitnimarkmiðið svo langt að það geti orðið grundvöllur til að móta meginreglu um skaðabótaskyldu ríkisins, þegar réttarkerfi ESB og EES eru í grundvallaratriðum ólík.

61. Ríkisstjórn Noregs heldur því fram, í stuttu máli, að einsleitni verði nægjanlega náð með öðrum hætti. Í fyrsta lagi sé einsleitni tryggð með innleiðingu meginmáls EES-samningsins og afleiddrar löggjafar í landsrétt EFTA-ríkjanna, með ákvörðunum sameiginlegu EES-nefndarinnar samkvæmt

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26 Frumvarp til Stórþingsins nr. 100 1991-92 um fullgildingu EES-samningsins, bls. 318.

27 Tilmæli til Stórþingsins nr.. 248 1991-92 um fullgildingu EES-samningsins, bls. 84-85.

28 Sameinuð mál C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357.

29 Frumvarp til Óðalsþingsins nr. 62 1991-92, bls. 7.

Committee under Article 102 EEA, and by decisions of the national legislative bodies in the dualistic EFTA States under Article 7 EEA.

62. Second, the EEA Agreement establishes mechanisms with a view to ensuring homogeneous interpretation and application of the incorporated EEA provisions, in particular the principles of interpretation set out in Article 6 EEA and Article 3 ESA/Court Agreement. The Government of Norway adds that the rulings of the Court of Justice of the European Communities on State liability cannot be considered "relevant" to the question of a possible legal basis for State liability under the EEA Agreement, due to the fundamental differences between EEA law and EC law. The Government of Norway finds support for that contention in *Sveinbjörnsdóttir*, in which the EFTA Court found a legal basis for State liability without referring to the said case-law.

63. As regards the rights of individuals and economic operators, the Government of Norway submits that those rights must be ensured by the implementation of the EEA rules in national legislation, and the principle of interpretation embodied in Protocol 35 to the EEA Agreement, as implemented in national law.

64. As regards Article 3 EEA, the Government of Norway contends that the obligations in that provision must be read in the light of the fundamental differences between the EEA Agreement and EC Treaty. The corresponding Article 10 EC has been the cornerstone in the establishment of direct effect and supremacy under Community law. The principle of State liability is a corollary to direct effect, which clearly is not present in the EEA Agreement.

65. Based on the above considerations, the Government of Norway maintains that neither the objectives of homogeneity and protection of individual rights nor the obligations in Article 3 EEA can create a legal basis for State liability.

66. The Government of Norway concludes that the EEA Agreement does not require that an EEA State be held liable towards an individual for a breach of the EEA Agreement.

67. In the alternative, if the EFTA Court were to conclude that State liability is part of the EEA Agreement, the Government of Norway submits that the concept of State liability under the EEA Agreement must be limited to incorrect implementation of directives. That contention is based on two main arguments. First, there are important differences between the present case and the situation in *Sveinbjörnsdóttir*. Second, it follows from the legal character of the EEA Agreement that liability for a breach of the main part of the EEA Agreement cannot be established.

68. With regard to the first argument, the Government of Norway points out that the ruling in *Sveinbjörnsdóttir* is explicitly limited to incorrect implementation of directives.

102. gr. EES og með ákvörðunum löggjafarstofnana í EFTA-ríkjunum, þar sem reglan um tvíeðli gildi, samkvæmt 7. gr. EES.

62. Í öðru lagi geri EES-samningurinn ráð fyrir ákveðnum leiðum sem eigi að tryggja einsleita túlkun og beitingu innleiddra EES-reglna, einkum og sérílagi reglan sem sett er fram í 6. gr. EES og 3. gr. Samningsins um stofnun eftirlitsstofnunar og dómstóls. Ríkisstjórn Noregs bætir því við að dómar dómstóls Evrópubandalaganna varðandi skaðabótaskyldu ríkisins geti ekki talist "eiga við" varðandi álitamálið um hugsanlegan grundvöll skaðabótaskyldu ríkisins vegna þess grundvallarmunar sem sé á EES-rétti og EB-rétti. Ríkisstjórn Noregs telur þetta sjónarmið fá stuðning í máli *Erlu Maríu Sveinbjörnsdóttur*, þar sem EFTA-dómstóllinn fann lagalegan grundvöll fyrir skaðabótaskyldu ríkisins án þess að vísa til nefndrar dómaframkvæmdar.

63. Að því er varðar réttindi einstaklinga og aðila í atvinnurekstri telur ríkisstjórn Noregs að þau hljóti að vera nægilega tryggð með lögfestingu EES-reglna í landsrétt, og með skýringareglunni sem felist í bókun 35 varðandi EES-samninginn, eins og hún er lögfest í landsrétti.

64. Að því er varðar 3. gr. EES heldur ríkisstjórn Noregs því fram að skyldur í því ákvæði verði að lesa út frá þeim grundvallarmun sem sé á EES-samningnum og Rómarsáttmálanum. Samsvarandi ákvæði í 10. gr. Rómarsamningsins hafi verið hornsteinn í mótun reglunnar um bein réttaráhrif og forgangsáhrif samkvæmt bandalagsrétti. Meginreglan um skaðabótaskyldu ríkisins sé í rökréttu samhengi við bein réttaráhrif, sem augljóslega séu ekki hluti EES-samningsins.

65. Á grundvelli þeirra sjónarmiða sem sett eru fram hér að framan heldur ríkisstjórn Noregs því fram að hvorki markmið um einsleitni og vernd réttinda einstaklinga né skuldbindingar samkvæmt 3. gr. EES geti verið lagalegur grundvöllur undir skaðabótaskyldu ríkisins.

66. Ríkisstjórn Noregs kemst að þeirri niðurstöðu að EES-samningurinn geri ekki ráð fyrir að EES-ríki sé skaðabótaskylt gagnvart einstaklingum vegna brota á EES-samningnum.

67. Ef EFTA-dómstóllinn kemst að þeirri niðurstöðu að reglan um skaðabótaskyldu ríkisins sé hluti EES-samningsins, heldur ríkisstjórn Noregs því fram til vara að takmarka verði regluna um skaðabótaskyldu ríkisins á grundvelli EES-samningsins við þær aðstæður þar sem tilskipanir hafi verið ranglega lögfestar. Þessi skoðun sé byggð á tvenns konar rökum. Í fyrsta lagi sé mikilvægur munur á málsatvikum í þessu máli og málsatvikum í máli *Erlu Maríu Sveinbjörnsdóttur*. Í öðru lagi verði það ekki leitt af lagalegu eðli EES-samningsins að brot á meginmáli hans leiði til skaðabótaskyldu.

68. Að því er fyrri röksemdina varðar bendir ríkisstjórn Noregs á að niðurstaðan í máli *Erlu Maríu Sveinbjörnsdóttur* sé augljóslega takmörkuð við ranga lögfestingu tilskipana.

69. The Government of Norway asserts that State liability is not necessary in order to ensure effective fulfilment of the obligations of the EFTA States as set out in the main part of the EEA Agreement. That has been sufficiently provided for by the implementation of the main part of the EEA Agreement in the national laws of the EFTA States. The main part of the EEA Agreement is an integral part of national law, and can be relied upon by individuals before national courts. It follows from Protocol 35 to the EEA Agreement, as interpreted in *Restamark*, that implemented EEA rules are to prevail in case of conflict, provided they are unconditional and sufficiently precise. The Government of Norway adds that it follows from the judgment in *Restamark* that Article 16 EEA fulfils that requirement of being unconditional and sufficiently precise.

70. With regard to the second argument, the Government of Norway reiterates that the case-law of the Court of Justice of the European Communities is not "relevant" within the meaning of Article 6 EEA and Article 3 ESA/Court Agreement. Accordingly, the Government of Norway is of the view that the EFTA Court, in the present case, cannot rely on the judgment in *Brasserie du Pêcheur and Factortame*, in which the Court of Justice of the European Communities established a principle of State liability for breach of rules derived from the EC Treaty. The Government adds that, even if that ruling were to be regarded as relevant, it was handed down after the date of signature of the EEA Agreement, which means that the EFTA Court, in accordance with Article 3(2) ESA/Court Agreement, is only required to take "due account" thereof.

71. The Government of Norway adds that the manner in which the Court of Justice of the European Communities established the legal basis for State liability in *Brasserie du Pêcheur and Factortame* confirms the lack of sufficient legal basis for State liability under the EEA Agreement. In that case, the reasoning of that Court was strongly connected to the direct effect of the EC Treaty. It formulated State liability as "the necessary corollary of the direct effect of the Community provisions". The Government of Norway emphasises again that the principle of direct effect does not exist within the EEA.

72. Moreover, the Government of Norway contends that, in *Brasserie du Pêcheur and Factortame*, the Court of Justice of the European Communities based its finding of State liability on the existence of liability for the Community institutions under Article 288 EC. The Government of Norway points out that neither the EEA Agreement nor the ESA/Court Agreement contain any provision comparable to Article 288 EC.

73. The Government of Norway concludes that the EEA Agreement does not require that an EEA State be held liable towards an individual for breach of the main part of the EEA Agreement.

74. In the alternative, if the EFTA Court concludes that the EEA Agreement provides a sufficient legal basis for State liability for breach of the main part of the EEA Agreement, the Government of Norway proposes a more narrow

69. Ríkisstjórn Noregs er á þeirri skoðun að reglan um skaðabótaskyldu ríkisins sé ekki nauðsynleg til að tryggja virka fullnustu þeirra skuldbindinga sem EFTA-ríkin hafi tekið á sig, eins og mælt sé fyrir um þær í meginmáli EES-samningsins. Hún hafi verið tryggð með lögfestingu meginmáls EES-samningsins í landsrétt EFTA-ríkjanna. Meginmál EES-samningsins sé hluti af landsréttinum og geti einstaklingar byggt á þeim réttindi fyrir dómstólum samningsríkjanna. Það leiði af bókun 35 við EES-samninginn, eins og hún hafi verið skýrð í *Restamark*, að lögfestar EES-reglur eigi að ganga framar þegar um sé að ræða árekstur, að því gefnu að þær séu óskilyrtar og nægilega skýrar. Ríkisstjórn Noregs bætir því við að það leiði af dóminum í *Restamark* að 16. gr. EES fullnægi því skilyrði að vera óskilyrt og nægilega skýr.

70. Varðandi síðari röksemdina ítrekar Ríkisstjórn Noregs að dómaframkvæmd dómstóls Evrópubandalaganna "eigi ekki við" í skilningi 6. gr. EES og 3. gr. Samningsins um stofnun eftirlitsstofnunar og dómstóls. Ríkisstjórn Noregs telur af þeim sökum að í þessu máli geti EFTA-dómstóllinn ekki byggt á dóminum í *Brasserie du Pêcheur and Factortame*, þar sem dómstóll Evrópubandalaganna mótaði regluna um skaðabótaskyldu ríkisins vegna brota á reglum sem byggðust á Rómarsáttmálanum. Ríkisstjórnin bætir við að þótt sá dómur teldist skipta máli hafi hann verið kveðinn upp eftir undirritun EES-samningsins sem þýði að samkvæmt 2. mgr. 3. gr. Samningsins um stofnun eftirlitsstofnunar og dómstóls að aðeins beri að "taka tilhlýðilegt tillit" til hans.

71. Ríkisstjórn Noregs bætir því við að sá háttur sem dómstóll Evrópubandalaganna hafði á því að móta lagagrundvöll fyrir skaðabótaskyldu ríkisins í *Brasserie du Pêcheur and Factortame* staðfesti skort á nægilegum lagaforsendum fyrir skaðabótaskyldu ríkisins á grundvelli EES-samningsins. Í því máli hafi rökstuðningur tengst mjög náið beinum réttaráhrifum Rómarsamningsins. Hann hafi mælt fyrir um skaðabótaskyldu ríkisins þannig að hún væri í "nauðsynlegu og rökréttu samhengi við bein réttaráhrif ákvæða bandalagsréttar". Ríkisstjórn Noregs áréttar eina ferðina enn að reglan um bein réttaráhrif sé ekki hluti EES-samningsins.

72. Ennfremur heldur Ríkisstjórn Noregs því fram að í málinu *Brasserie du Pêcheur and Factortame*, hafi dómstóll Evrópubandalaganna byggt niðurstöðu sína um skaðabótaskyldu ríkisins á tilvist skaðabótaskyldu stofnana bandalagsins á grundvelli 288. gr. Rómarsamningsins. Ríkisstjórn Noregs bendir á að hvorki EES-samningurinn né Samningurinn um stofnun eftirlitsstofnunar og dómstóls hafi að geyma ákvæði sem samsvari 288. gr. Rómarsamningsins.

73. Ríkisstjórn Noregs ályktar að EES-samningurinn mæli ekki fyrir um skaðabótaskyldu ríkisins gagnvart einstaklingi vegna brots á ákvæðum í meginmáli hans.

74. Ef EFTA-dómstóllinn kemst að þeirri niðurstöðu að EES-samningurinn sé nægilegur lagagrundvöllur til að kveða á um skaðabótaskyldu ríkisins vegna brota á ákvæðum í meginmáli hans, leggur Ríkisstjórn Noregs til, til vara, að það

interpretation under EEA law than under Community law of the condition that there must be a "sufficiently serious" breach in order to establish State liability.

75. Referring to *Brasserie du Pêcheur and Factortame*, the Government of Norway recalls that the decisive test of whether a breach is sufficiently serious under Community law is whether the State has "manifestly and gravely disregarded the limits on its discretion".

76. The Government of Norway considers that the EFTA Court, when applying that condition, must take into account the distinctive characteristics of the EEA Agreement. The fact that no legislative powers have been transferred under the EEA Agreement indicates that a breach can be regarded sufficiently serious only in extraordinary situations.

77. Referring to the judgments in *HNL* v *Council*,[30] *Brasserie du Pêcheur and Factortame*, *The Queen* v *MAFF, ex parte Hedley Lomas*[31] and *Zuckerfabrik Schöppenstedt* v *Council*,[32] the Government of Norway notes that the position of the Court of Justice of the European Communities is that a State can incur liability for legislative measures only in exceptional and special circumstances. It follows from those judgments that the State has wide discretion when adopting legislative measures, in particular measures which are the result of choices of economic policy. The Government of Norway suggests that the same must hold true when national legislation concerns questions of national importance concerning public health and other policy objectives.

78. The Government of Norway notes that the Court of Justice of the European Communities, in *The Queen* v *H. M. Treasury, ex parte British Telecommunications*,[33] held that a breach is not sufficiently serious if the national interpretation is given "in good faith and on the basis of arguments which are not entirely devoid of substance". The Court of Justice of the European Communities has left considerable room for national interpretations, even if they are subsequently found to be erroneous.

79. In the present case, the Government of Norway considers that, when considering whether the breach is sufficiently serious, a distinction must be drawn between the situation before and after the EFTA Court handed down its judgment in *Restamark*.

80. The Government of Norway asserts that the compatibility with the EEA Agreement of a State monopoly on the import and wholesale distribution of alcoholic beverages was highly uncertain before the judgment in *Restamark*. That

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30 Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL* v *Council* [1978] ECR 1209.

31 See footnote 11.

32 Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975.

33 See footnote 15.

skilyrði skaðabótaskyldu ríkisins að brot sé "nægilega alvarlegt" verði skýrt þrengra á grundvelli EES-samningsins en gert er á grundvelli bandalagsréttar.

75. Með vísan til *Brasserie du Pêcheur and Factortame*, bendir ríkisstjórn Noregs á að hinn ákvarðandi mælikvarði á það hvort brot telst nægilega alvarlegt samkvæmt bandalagsrétti sé það hvort ríki með "bersýnilegum og alvarlegum hætti leit framhjá þeim takmörkunum sem eru á svigrúmi ríkisins til mats við ákvarðanatöku".

76. Ríkisstjórn Noregs telur að þegar EFTA-dómstóllinn beitir þessu skilyrði verði að taka mið af sérstöku eðli EES-samningsins. Sú staðreynd að ekki sé um að ræða neitt framsal löggjafarvalds bendi til þess að brot geti aðeins talist nægilega alvarlegt við mjög sérstakar aðstæður.

77. Með vísan til dómanna í *HNL* gegn *Council*,[30] *Brasserie du Pêcheur and Factortame*, *The Queen* gegn *MAFF, ex parte Hedley Lomas*[31] og *Zuckerfabrik Schöppenstedt* gegn *Council*,[32] bendir ríkisstjórn Noregs á að afstaða dómstóls Evrópubandalaganna sé sú að ríkið geti aðeins orðið skaðabótaskylt í sérstökum undantekningartilvikum. Það leiði af þessum dómum að ríkið hafi mikið svigrúm til mats við lagasetningu, einkum þegar um sé að ræða rástafanir til að framfylgja efnahagsstefnu. Ríkisstjórn Noregs telur að hið sama eigi við þegar lagasetningin varði mikilsverða þjóðfélagshagmuni sem tengjast almennu heilbrigði og öðrum stefnumálum.

78. Ríkisstjórn Noregs bendir á að dómstóll Evrópubandalaganna hafi í *The Queen* gagn *H. M. Treasury, ex parte British Telecommunications*,[33] talið að brot væri ekki nægilega alvarlegt ef mat aðildarríkis "er í góðri trú og sé byggt á röksemdum sem séu ekki með öllu haldlausar." Dómstóll Evrópubandalaganna hefur eftirlátið aðildarríkjum mikið svigrúm til mats, þótt síðar kunni að koma í ljós að það mat var rangt.

79. Í því máli sem hér liggur fyrir telur ríkisstjórn Noregs að við mat á því hvort brot sé nægilega alvarlegt, verði að gera greinarmun á aðstæðum fyrir og eftir að EFTA-dómstóllinn kvað upp dóm sinn í *Restamark*.

80. Ríkisstjórn Noregs er á þeirri skoðun að áður en EFTA-dómstóllinn kvað upp dóm sinn í *Restamark* hafi ríkt mikil óvissa um það hvort einkaréttur á innflutningi og heildsöludreifingu áfengis væri samrýmanlegur EES-

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30 Sameinuð mál 83 and 94/76, 4, 15 og 40/77 *HNL* gegn *ráðinu* [1978] ECR 1209.

31 *Sjá nmgr.* 11.

32 Mál 5/71 *Zuckerfabrik Schöppenstedt* gegn *ráðinu* [1971] ECR 975.

33 Sjá nmgr. 15.

assertion is supported by the Declaration of the Governments of Finland, Iceland, Norway and Sweden on alcohol monopolies, annexed to the Final Act. The Government of Norway also refers to the fact that Article 13 EEA explicitly acknowledges health protection as a ground of derogation from the rules on the free movement of goods. Moreover, the Court of Justice of the European Communities had, at that time, never considered whether an import monopoly was justified due to public health objectives.

81. The Government of Norway claims that the uncertainty surrounding the lawfulness of a State monopoly on the import and wholesale distribution of alcoholic beverages was confirmed by both the EFTA Court in *Restamark* and the Court of Justice of the European Communities in *Franzén*.[34]

82. The Government of Norway considers that the Defendant in the present case did not "manifestly and gravely" disregard the limits on its discretion in interpreting the EEA Agreement as allowing for the contested State monopoly.

83. According to the Government of Norway, the judgment in *Restamark* does not indicate that a State monopoly on the import and wholesale distribution of alcoholic beverages is *per se* unlawful. By opening up for the possibility of exceptions based on public health, the EFTA Court signalled that each monopoly must be considered separately.

84. Where an uncertain legal situation is clarified by a ruling of the EFTA Court, the EEA State in question must be given a reasonable time to adjust its legislation without incurring liability. Moreover, it follows from *Sveinbjörnsdóttir* and *Brasserie du Pêcheur and Factortame* that the assessment of whether a breach is sufficiently serious must take into account "whether the infringement and the damage caused was intentional or involuntarily" and "whether any error of law was excusable or inexcusable". The State cannot be held liable if responding loyally to a ruling of the EFTA Court. On this point, the Government of Norway refers to the Opinion of the Advocate General in *Brasserie du Pêcheur and Factortame*, from which it follows, *inter alia*, that the State can only incur liability if it does not repair the breach "reasonably quickly". It also refers to Article 21 of Annex 2 to the Agreement Establishing the World Trade Organization, which states that the Members are to have a "reasonable period of time" to comply with decisions of the Dispute Settlement Body, if immediate compliance is impracticable.

85. The Government of Norway contends, in essence, that the Defendant abolished its State monopoly on the import and wholesale distribution of alcoholic beverages within a reasonable time after the judgment in *Restamark*. The Government of Norway adds that the monopoly at issue constituted an important and integral part of Iceland's national health policy, and that the changes in national legislation necessitated by the judgment in *Restamark* must

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[34] See footnote 13.

samningnum. Þessi skoðun styðjist við yfirlýsingu ríkisstjórna Finnlands, Íslands, Noregs og Svíþjóðar um áfengiseinkasölur, sem fylgt hafi lokagerð samningsins. Ríkisstjórn Noregs bendir einnig á þá staðreynd að 13. gr. EES vísi sérstaklega til þess að vernd heilsu manna geti réttlætt frávik frá reglunum um frjálsa vöruflutninga. Ennfremur hafði dómstóll Evrópubandalaganna á þessum tíma ekki dæmt um það hvort einkaréttur á innflutningi kynni að réttlætast af heilsuverndarmarkmiðum.

81. Ríkisstjórn Noregs heldur því fram að óvissan um lögmæti einkaréttar ríkisins á innflutningi og heildsöludreifingu áfengis hafi verið staðfest bæði af EFTA-dómstólnum í *Restamark* og dómstóli Evrópubandalaganna í *Franzén*.[34]

82. Ríkisstjórn Noregs telur að stefndi í þessu máli hafi ekki "bersýnilega og alvarlega" litið framhjá takamörkunum þeim sem voru á svigrúmi hans til að skýra EES-samninginn þegar hann taldi að samningurinn heimilaði hinn umdeilda einkarétt.

83. Ríkisstjórn Noregs telur að dómurinn í *Restamark* feli ekki í sér að einkaréttur ríkisins á innflutningi og heildsöludreifingu hafi sem slíkur verið ólögmætur. Með því að gera ráð fyrir mögulegum frávikum á grundvelli sjónarmiða um almennt heilbrigði hafi dómstóllinn gefið til kynna að skoða yrði hvert einstakt tilvik sérstaklega.

84. Þegar greitt er úr lagalegri óvissu með dómi EFTA-dómstólsins verði að ætla viðkomandi EFTA-ríki hæfilegan tíma til að breyta löggjöf sinni án þess að það verði skaðabótaskylt. Það leiði af dóminum í máli *Erlu Maríu Seinbjörnsdóttur* og *Brasserie du Pêcheur and Factortame,* að við mat á því, hvort brot er nægilega alvarlegt, verði að taka mið af því "hvort um er að ræða vísvitandi brot eða brot sem ekki var framið af ásetningi" eða hvort lögvillan var "afsakanleg eða óafsakanleg." Ríkið verði ekki talið skaðabótaskylt ef það hefur af heilindum brugðist við dómi EFTA-dómstólsins. Að því er þetta atriði varðar vísar Ríkisstjórn Noregs til álits lögsögumanns í *Brasserie du Pêcheur and Factortame*, en af því leiði m.a. að ríki getur aðeins orðið skaðabótaskylt ef það leiðréttir ekki brotið innan "hæfilegs tíma" Ríkisstjórnin vísar einnig til 21. gr. viðauka 2 við samninginn um stofnun Alþjóðaviðskiptastofnunarinnar, þar sem kveðið sé á um að ríkjum skuli ætlaður hæfilegur tími til að laga sig að ákvörðunum nefndar til launsar ágreiningsefnum, sé ekki unnt að laga sig að þeim þegar í stað.

85. Ríkisstjórn Noregs heldur því í stuttu máli fram, að stefndi hafi afnumið einkarétt ríkisins á innflutningi og heildsöludreifingu áfengis innan hæfilegs tíma eftir að dómurinn í *Restamark* féll. Þá telur ríkisstjórn Noregs að hinn umdeildi einkaréttur hafi verið mikilvægur hluti af almennum stefnumiðum Íslands í heilbrigðismálum og að breytinguna sem nauðsynlegt reyndist að gera vegna dómsins í *Restamark* verði að líta á sem mikilsverða. Ætla verði ríkinu nægilegan

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[34] Sjá nmgr. 13.

be considered as significant. A State must be given sufficient time to find alternative methods for fulfilling the public health objective if its traditional State monopoly is found to be unlawful. The Defendant's adoption of a new legislative regime within approximately one year must be considered to be within a reasonable period of time. One year is considerably shorter than the usual legislative process.

Question 3

86. Based on the abovementioned conclusions, the Government of Norway states that there is no need to address the third question.

87. The Government of Norway does point out, however, that the EFTA Court is only competent to advise on the interpretation of the EEA Agreement. Referring to the judgment in *Holdijk*,[35] the Government of Norway contends, in effect, that it is for the national court to apply the EEA rules to the facts of the case.

The EFTA Surveillance Authority

Question 1

88. The EFTA Surveillance Authority begins by observing that it follows from Article 8(3)(b) EEA that the provisions of the EEA Agreement apply to products specified in Protocol 3. Article 1 of Protocol 3 provides that the provisions in the Agreement are to apply to products listed in Tables I and II. Liqueurs containing more than 5% by weight of added sugar are listed in Table I under Heading 22.08 of the Harmonized Commodity Description and Coding System. The EFTA Surveillance Authority therefore submits that Articles 11 and 16 EEA apply to the product at issue in the main proceedings, Cointreau. The EFTA Surveillance Authority adds that this conclusion cannot be changed by the fact that the Contracting Parties have not yet finalised Protocol 3.

89. In considering whether the contested State monopoly on the import and wholesale distribution of alcoholic beverages is contrary to Articles 11 and 16 EEA, the EFTA Surveillance Authority simply refers to the conclusions arrived at in its letter of formal notice 20 July 1994 and its reasoned opinion of 22 February 1995 to the Defendant regarding the compatibility of that monopoly with the said provisions of the EEA Agreement. The EFTA Surveillance Authority states that those conclusions remain unchanged.

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35 See footnote 21.

tíma til að leita annarra leiða til ná sínum markmiðum í heilbrigðismálum eftir að fyrir lá að hinn hefðbundinn einkaréttur var ólögmætur. Með því að ný lög hafi tekið gildi eftir um það bil eitt ár verði að telja að brugðist hafi verið við innan hæfilegs tíma. Eitt ár sé mun styttri tími en almennt gerist þegar ný löggjöf sé undirbúin.

Þriðja spurning

86. Með vísan til þess sem að framan greinir telur ríkisstjórn Noregs að ekki sé nein þörf á að svara þriðju spurningunni.

87. Ríkisstjórn Noregs bendir á hinn bóginn á að EFTA-dómstóllinn hafi aðeins lögsögu til að segja álit sitt varðandi túlkun EES-samningsins. Með vísan til dómsins í *Holdijk*,[35] heldur Ríkisstjórn Noregs því fram að það sé hlutverk dómstóls samningsríkis að beita EES-reglunum á atvik málsins.

Eftirlitsstofnun EFTA

Fyrsta spurningin

88. Eftirlitsstofnun EFTA bendir fyrst á að það leiði af b-lið 3. mgr. 8. gr. EES að ákvæði samningsins taki til framleiðsluvara sem tilgreindar séu í bókun 3. Ákvæði 1. gr. bókunar 3 mæli svo fyrir, að ákvæði samningsins gildi um framleiðsluvörur sem taldar séu upp í töflu I og II. Líkjörar, sem innihaldi meira en 5% af viðbættum sykri séu taldir upp undir númeri 22.08 í töflu I í samræmdu vörulýsingar- og vörumerkjaskránni. Eftirlitsstofnun EFTA telur þess vegna að 11. og 16. gr. taki til þeirrar framleiðsluvöru sem um sé fjallað í málinu, þ.e. Cointreau. Eftirlitsstofnun EFTA bætir því við að það geti ekki breytt þessu þótt samningsaðilar hafi ekki enn lokið við bókun 3.

89. Við mat á því hvort einkaréttur á innflutningi og heildsöludreifingu áfengis er andstæður 11. og 16. gr. EES-samningsins, vísar Eftirlitsstofnun EFTA til niðurstöðu þeirrar sem stofnunin hafi komist að í formlegri viðvörun sinni frá 20. júlí 1994 og í rökstuddu áliti sínu 22. febrúar 1995 til stefnda varðandi það hvort einkarétturinn væri samrýmanlegur EES-samningnum. Eftirlitsstofnun EFTA segir að sú niðurstaða standi ennþá óbreytt.

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35 Sjá nmgr. 21.

90. As regards Article 11 EEA, the EFTA Surveillance Authority refers to *Commission* v *France*,[36] in which the Court of Justice of the European Communities ruled that the existence of exclusive importing and marketing rights deprives traders of the opportunity of having their products purchased by consumers. Based on that ruling and the ruling by the EFTA Court in *Restamark*, the EFTA Surveillance Authority asserts that the exclusive rights at issue in the main proceedings are incompatible with Article 11 EEA.

91. Referring again to the judgment in *Restamark*, the EFTA Surveillance Authority adds that the State monopoly on the import and wholesale distribution of alcoholic beverages cannot be justified under Article 13 EEA merely because they formed part of an alcohol policy aimed at minimising the harmful effects to health caused by the consumption of alcoholic beverages. That objective could be achieved by means less restrictive of the free movement of goods.

92. As regards Article 16 EEA, the EFTA Surveillance Authority refers to *Pubblico Ministereo* v *Manghera*,[37] from which it follows that the aim of the obligation laid down in Article 16 EEA is to ensure compliance with the fundamental rule of the free movement of goods throughout the common market. In that case, the Court of Justice of the European Communities held that exclusive import rights constituted discrimination prohibited by the provision of the EC Treaty corresponding to Article 16 EEA. Every national monopoly of a commercial character must be adjusted so as to eliminate the exclusive right to import from other EEA States. Moreover, in *Restamark*, the EFTA Court held that a statutory State monopoly that enjoys exclusive rights to all imports of certain products thereby also holds the discretionary right to determine the supply of those products on the domestic market and may consequently also determine their price.

93. Based on the above judgments, the EFTA Surveillance Authority concludes that the national rules providing for the exclusive right of the State to import and distribute alcoholic beverages on a wholesale basis is contrary to Article 16 EEA. The EFTA Surveillance Authority asserts that, in order not to render the prohibition on exclusive import rights ineffective, the prohibition must be considered to cover exclusive rights to wholesale distribution.

94. The EFTA Surveillance Authority adds that it follows from *Franzén*[38] that it is only necessary to examine rules relating to the existence and operation of a monopoly with reference to Article 16 EEA, since that provision is specifically applicable to the exercise of exclusive rights by a domestic commercial monopoly.

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36 Case C-202/88 *Commission* v *France* [1991] ECR I-1223.

37 See footnote 5.

38 See footnote 13.

90. Að því er varðar 11. gr. EES-samningsins vísar Eftirlitsstofnun EFTA til málsins *Framkvæmdastjórnin* gegn *Frakklandi*,[36] þar sem dómstóll Evrópubandalaganna komst að þeirri niðurstöðu að tilvist einkaréttar á innflutningi og markaðssetningu svipti viðskiptaaðila tækifæri til að fá neytendur til að kaupa vörur þeirra. Á grundvelli þessa dóms og dóms EFTA-dómstólsins í *Restamark*, heldur Eftirlitsstofnun EFTA því fram að einkaréttur sá sem fjallað sé um í málinu sé andstæður 11. gr. EES.

91. Með því að vísa aftur til dómsins í *Restamark*, bætir Eftirlitsstofnun EFTA því við að einkaréttur ríkisins á innflutningi og heildsöludreifingu áfengis verði ekki réttlættur með vísan til 13. gr. EES, eingöngu vegna þess að hann sé liður í áfengisstefnu sem hafi að markmiði að draga úr þeim skaðlegu áhrifum á heilsu manna sem áfengisneysla hafi í för með sér. Því markmiði sé unnt að ná með ráðstöfunum sem takmarki frjálsa vöruflutninga ekki eins mikið.

92. Að því er varðar 16. gr. EES, vísar Eftirlitsstofnun EFTA til dómsins í *Pubblico Ministereo* gegn *Manghera*,[37] en af honum leiði að markmið þeirrar skuldbindingar sem felist í 16. gr. EES sé að tryggja að farið sé eftir grundvallarreglunni um frjálsa vöruflutninga á öllum hinum sameiginlega markaði. Í málinu hafi dómstóll Evrópubandalaganna talið að einkaréttur á innflutningi fæli í sé mismunun sem bönnuð væri samkvæmt því ákvæði Rómarsamningsins sem samsvarar 16. gr. EES. Öllum ríkiseinkasölum í viðskiptum verði að breyta í því skyni að afnema einkarétt á innflutningi á vörum frá öðrum EES-ríkjum. Ennfremur taldi EFTA-dómstóllinn í *Restamark* að ríkiseinkasala sem hafi einkarétt til alls innflutnings á tiltekinni vörutegund sé þar með í aðstöðu til að ákveða að vild framboð á þeirri vöru á heimamarkaði og geti þar með ákvarðað verð á þeim.

93. Með vísan til ofnagreindra dóma kemst Eftirlitsstofnun EFTA að þeirri niðurstöðu að reglur landsréttar sem mæla fyrir um einkarétt ríkisins til innflutnings og heildsöludreifingar áfengis séu andstæður 16. gr. EES-samningsins Eftirlitsstofnun EFTA heldur því fram að til þess að gera ákvæðin um einkarétt til innflutnings óvirk verði bannið einnig að ná til einkaréttar til heildsöludreifingar.

94. Eftirlitsstofnun EFTA bætir því við að það leiði af dóminum í *Franzén*[38] að aðeins sé nauðsynlegt að taka til skoðunar reglur sem varði tilvist og framkvæmd einkaréttar með vísan til 16. gr. EES, þar sem það ákvæði eigi sérstaklega við um framkvæmd einkaréttar af hálfu innlendrar ríkiseinkasölu í viðskiptum.

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36 Mál C-202/88 *Framkvæmdastjórnin* gegn *Frakklandi* [1991] ECR I-1223.

37 Sjá nmgr. 5.

38 Sjá nmgr. 13.

95. The EFTA Surveillance Authority concludes that the contested national legislation providing for a State monopoly on the import and wholesale distribution of alcoholic beverages is incompatible with Articles 11 and 16 EEA, and that the Defendant was under an obligation to abolish the said monopoly as of the entry into force of the EEA Agreement on 1 January 1994.

Questions 2 and 3

96. The EFTA Surveillance Authority recalls the finding of the EFTA Court in *Sveinbjörnsdóttir* to the effect that it is a principle of the EEA Agreement that the EEA States are obliged to provide for compensation for loss caused to individuals by a breach of the obligations under the EEA Agreement for which those States can be held responsible. The conditions for such State liability are, first, that the rule of law infringed must have been intended to confer rights on individuals, second, that the breach must be sufficiently serious, and, third, that there must be a direct causal link between the breach of the obligation resting on the State and the loss or damage sustained by the injured parties. The EFTA Surveillance Authority points out that those conditions are the same as the conditions established in the case law[39] of the Court of Justice of the European Communities with regard to State liability for breach of Community law.

97. As to the first condition, the EFTA Surveillance Authority contends that it follows from *Restamark* that Article 16 EEA fulfils the implicit criteria of Protocol 35 to the EEA Agreement of being sufficiently clear and precise to be relied upon by individuals.

98. As to the second condition, the EFTA Surveillance Authority observes that it is for the national court to apply the criteria establishing the existence of a sufficiently serious breach, in accordance with the guidelines provided by the EFTA Court and the Court of Justice of the European Communities. The EFTA Surveillance Authority acknowledges that a mere infringement of EEA law does not necessarily constitute a sufficiently serious breach. Referring to the judgment in *Brasserie du Pêcheur and Factortame*, the EFTA Surveillance Authority mentions that the factors the national court must take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national authorities, whether the infringement was intentional or involuntary, whether the error of law is excusable and whether the position taken by an EC or EFTA institution may have contributed towards the omission.

99. The EFTA Surveillance Authority recalls the conclusion in *Restamark*, where the EFTA Court held that a monopoly on the import of alcoholic beverages constitutes a clear infringement of Article 16 EEA. Moreover, the

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[39] *Brasserie du Pêcheur and Factortame*; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* v *Federal Republic of Germany* [1996] ECR I-4845; and Case C-424/97 *Haim* [2000] ECR I-5123.

95. Eftirlitsstofnun EFTA kemst að þeirri niðurstöðu að hinar umdeildu reglur landsréttar sem geri ráð fyrir einkarétti á innflutningi og heildsöludreifingu áfengis séu ósamrýmanlegar 11. og 16. gr. EES, og að stefndi hafi verið skuldbundinn til að afnema umræddan einkarétt frá og með gildistöku EES-samningsins 1. janúar 1994.

Önnur og þriðja spurning

96. Eftirlitsstofnun EFTA bendir á að sú niðurstaða í máli *Erlu Maríu Sveinbjörnsdóttur* að það sé meginregla EES-samningsins að samningsaðilum ber skylda til að sjá til þess að það tjón fáist bætt sem einstaklingar verða fyrir vegna vanefnda ríkisins á skuldbindingum sínum samkvæmt EES-samningnum og sem viðkomandi EFTA-ríki ber ábyrgð á. Skilyrði skaðabótaábyrgðar séu; í fyrsta lagi að felast verði í reglunni sem brotin er að einstaklingar öðlist tiltekin réttindi, í öðru lagi að vanefndin verði að vera nægilega alvarleg , og í þriðja lagi, að það verði að vera orsakasamband milli vanefnda ríkisins á skuldbindingum sínum og þess tjóns sem tjónþoli verður fyrir. Eftirlitsstofnun EFTA tekur fram að þessi skilyrði séu þau sömu og fram komi í dómaframkvæmd dómstóls Evrópubandalaganna vegna brota á bandalagsrétti.[39]

97. Að því er fyrsta skilyrðið varðar heldur Eftirlitsstofnun EFTA því fram að það leiði af dóminum í *Restamark* að 16. gr. EES fullnægi því innbyggða skilyrði í bókun 35 við EES-samninginn að vera nægilega skýr og nákvæm til þess að einstaklingar geti byggt á henni.

98. Varðandi annað skilyrðið bendir Eftirlitsstofnun EFTA á að það sé hlutverk dómstóls samningsríkis, í samræmi við þau leiðbeiningarsjónarmið sem fram komi hjá EFTA-dómstólnum og dómstól Evrópubandalaganna, að meta það hvort brot teljist nægilega alvarlegt. Eftirlitsstofnun EFTA fellst á að vanefndir einar og sér hafi ekki alltaf í för með sér að vanefnd sé nægilega alvarleg. Með vísan til dómsins í *Brasserie du Pêcheur and Factortame*, nefnir Eftirlitsstofnun EFTA að meðal þeirra atriða sem dómstóll í aðildarríki verði að hafa í huga sé skýrleiki og nákvæmni þeirra ákvæða sem brotin hafi verið, svigrúmið sem yfirvöld samningsríkis hafi haft samkvæmt ákvæðinu og hvort vanefndin hafi verið vísvitandi eða ekki, hvort lögvilla hafi verið afsakanleg eða óafsakanleg og hvort sjónarmið sem fram hafi komið af hálfu Evrópusambandsins eða stofnana EES-samningsins hafi stuðlað að yfirsjóninni.

99. Eftirlitsstofnun EFTA bendir á að niðurstaðan í *Restamark*, þar sem EFTA-dómstóllinn taldi að einkaréttur á innflutningi áfengis fæli í sér skýrt brot á 16. gr. EES. Ennfremur færir Eftirlitsstofnun EFTA fyrir því rök að við gildistöku EES-samningsins hafi legið fyrir ótvíræð dómaframkvæmd frá

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[39] *Brasserie du Pêcheur and Factortame*; Sameinuð mál C-178/94, C-179/94, C-188/94, C-189/94 og C-190/94 *Dillenkofer o.fl.* gegn *Þýska sambandslýðveldinu* [1996] ECR I-4845; og Mál C-424/97 *Haim* [2000] ECR I-5123.

EFTA Surveillance Authority argues that, at the time of entry into force of the EEA Agreement, it was clearly established in the case-law of the Court of Justice of the European Communities that the provision of the EC Treaty corresponding to Article 16 EEA must be interpreted as meaning that every national monopoly must be adjusted so as to eliminate the exclusive right to import from other Member States. It follows from *Brasserie du Pêcheur and Factortame* that a breach will clearly be sufficiently serious if it has persisted despite the existence of settled case-law from which it is clear that the conduct in question constitutes an infringement.

100. Referring to the judgment in *The Queen* v *MAFF, ex parte Hedley Lomas*,[40] the EFTA Surveillance Authority submits, in essence, that where the EEA State has little or no discretion to act, a mere infringement of EEA law may be sufficient to establish the existence of a sufficiently serious breach. The existence and scope of discretion must be determined by reference to EEA law.

101. The EFTA Surveillance Authority also points out that it initiated infringement proceedings by sending a letter of formal notice to the Defendant as early as 20 July 1994. It would, therefore, appear unlikely that an excusable error in law could be established subsequent to that date or that the EFTA Surveillance Authority's position could somehow have contributed towards the infringement.

102. As to the third condition, the EFTA Surveillance Authority observes that it is for the national court to determine whether there is a direct causal link between the Defendant's breach of its obligations and the alleged loss incurred by the Plaintiff. It follows from *Brasserie du Pêcheur and Factortame* that the State must make reparation for the consequences of the loss caused, in accordance with the domestic rules on liability, provided that such rules do not render it impossible or excessively difficult to obtain reparation.

The Commission of the European Communities

Question 1

103. As a preliminary issue, the Commission of the European Communities (hereinafter the "Commission") raise the question of whether the product at issue in the main proceedings, the alcoholic beverage Cointreau, is covered by the material scope of the EEA Agreement.

104. The Commission refers to the annual report 1999/2000 of Rémy Cointreau, from which it follows that Cointreau is a bitter-orange liqueur with an alcohol level of 40%. In answering the question of whether Cointreau is covered by the EEA Agreement, the Commission begins by referring to Article 8 EEA,

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[40] See footnote 11.

dómstóli Evrópubandalaganna um að ákvæði Rómarsamningsins sem samsvari 16. gr. EES hafi borið að skýra þannig að ríkiseinkasölum hafi borið að breyta þannig að afnumin væri einkaréttur til innflutnings frá öðrum aðildarríkjum. Það leiði af *Brasserie du Pêcheur and Factortame* að vanefnd sé augljóslega nægilega alvarleg ef henni er viðhaldið þótt fyrir liggi ótvíræð dómaframkvæmd sem ljóst megi vera af að sú hegðun sem um sé rætt feli í sér brot.

100. Með vísan til dómsins í *The Queen* v *MAFF, ex parte Hedley Lomas*,[40] heldur Eftirlitsstofnun EFTA því fram, í stuttu máli, að þar sem EFTA-ríki hefur lítið eða ekkert svigrúm fyrir eigin ráðstafanir, geti vanefnd sem slík falið í sér að til staðar sé nægilega alvarlegt brot. Hvort til staðar er svigrúm og hversu rúmt það er verði að ákvarða á grundvelli EES-réttar.

101. Eftirlitsstofnun EFTA bendir einnig á að stofnunin hafi hafið málsmeðferð vegna vanefnda með því að senda formlega viðvörun til stefnda þegar 20. júlí 1994. Það virðist því ósennilegt að eftir þann dag geti verið um afsakanlega lögvillu að ræða eða að aðgerðir Eftirlitsstofnunar EFTA hafi á einhvern hátt getað stuðlað að viðhaldi vanefndarinnar.

102. Að því er þriðja skilyrðið varðar bendir Eftirlitsstofnun EFTA á að það sé hlutverk dómstóls samningsríkis að ákvarða hvort um sé að ræða beint orsakasamband milli vanefnda stefnda og hins meinta tjóns sem stefnandi hafi orðið fyrir. Það leiði af *Brasserie du Pêcheur and Factortame* að ríkið verði að bæta fyrir afleiðingar tjónsins sem orðið hafi, í samræmi við reglur landsréttar um skaðabætur að því gefnu að slíkar reglur geri það ekki ókleift eða óhóflega erfitt að fá bætur.

Framkvæmdastjórn Evrópubandalaganna

Fyrsta spurningin

103. Framkvæmdastjórn Evrópubandalaganna (hér eftir framkvæmdastjórnin) telur, áður en lengra er haldið, að spyrja verði hvort framleiðsluvara sú sem um sé fjallað, þ.e. áfengistegundinni Cointreau, falli undir gildissvið EES-samningsins.

104. Framkvæmdastjórnin vísar til ársskýrslu 1999/2000 Rémy Cointreau, þar sem fram komi að Cointreau sé appelsínulíkjör sem innihaldi 40% alkohól. Þegar svarað er þeirri spurningu hvort Cointreau falli undir EES-samninginn vísar framkvæmdastjórnin fyrst til 8. gr. hans sem sé aðal ákvæðið sem varði gildissvið EES-samningsins og ennfremur til dóms EFTA-dómstólsins í *Restamark*.

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40 Sjá nmgr. 11.

which is the basic provision dealing with the material scope of the EEA Agreement, and the judgment of the EFTA Court in *Restamark*.

105. With regard to the product coverage of Article 16 EEA, the Commission states that Cointreau does not fall within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System. Furthermore, the EEA Agreement does not appear to contain any specific provision which could apply to Cointreau. The EEA agreement can, therefore, be applicable to Cointreau only if this product is covered by Protocol 3. The Commission submits that, even if there is no subheading expressly covering such liqueur, it is very likely that Protocol 3 covers Cointreau. The Commission refers, *inter alia*, to Table I of Protocol 3, which covers "liqueurs containing more than 5% by weight of added sugar".

106. With regard to the material scope of Article 11 EEA, the Commission points out that it applies only to products originating in the EEA. The Commission assumes that Cointreau is produced within the EEA and therefore fulfils that condition, but states that it is for the national court to make that assessment.

107. Based on the abovementioned consideration, the Commission takes the view that the product at issue in the main proceedings is covered by Articles 11 and 16 EEA.

108. In considering whether the State monopoly on the import of alcoholic beverages at issue is incompatible with Article 16 EEA, the Commission begins by referring to the judgment by the EFTA Court in *Restamark*. The Commission also refers to the judgments by the Court of Justice of the European Communities in *Commission* v *France*[41] and *Pubblico Ministereo* v *Manghera*,[42] from which it follows that there is no obligation to abolish a monopoly of commercial character, but only to adjust it in order to eliminate discrimination.

109. Based on the judgments in *Commission* v *France*[43] and *Commission* v *Netherlands*,[44] the Commission asserts that exclusive import rights, by their nature, give rise to discrimination and is *per se* incompatible with Article 16 EEA.

110. The Commission takes the position that the only way to adjust an import monopoly sufficiently is to abolish the exclusive import rights. By doing so, the import monopoly is abolished. Such an abolition should have been made as of the entry into force of the EEA Agreement on 1 January 1994. The fact that the Alcoholic Beverages Act and the Alcoholic Beverages and Tobacco Trading Act

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41 Case C-159/94 *Commission* v *France* [1997] ECR I-5815.

42 See footnote 5.

43 See footnote 41.

44 Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699.

105. Að því varðar þær framleiðsluvörur sem 16. gr. EES telur framkvæmdastjórnin að Cointreau falli ekki undir kafla 25 til 97 í samræmdu vörulýsingar- og vörumerkjaskránni. Ennfremur virðist sem EES-samningurinn hafi ekki að geyma nein sérstök ákvæði sem gætu átt við um Cointreau. EES-samningurinn getur því aðeins tekið til Cointreau að sú framleiðsluvara falli undir bókun 3. Framkvæmdastjórnin telur að, þótt engin undirfyrirsögn taki beint til slíks líkjörs, sé það engu að síður mjög líklegt að bókun 3 taki til Cointreau. Framkvæmdastjórnin vísar m.a. til Töflu I í bókun 3, sem tekur til "líkjöra sem innihalda meira en 5% af viðbættum sykri".

106. Að því er varðar efnissvið 11. gr. EES bendir framkvæmdastjórnin á að hún eigi við framleiðsluvörur sem upprunnar séu í EES. Framkvæmdastjórnin gerir ráð fyrir að Cointreau sé framleiddur innan EES og fullnægi þar með því skilyrði, en bendir á að það sé ekki hlutverk dómstóls samningsríkis að meta það.

107. Á grundvelli þessara sjónarmiða er Framkvæmdastjórnin á þeirri skoðun að framleiðsluvaran sem fjallað sé um í málinu falli undir 11. og 16. gr. EES.

108. Þegar skoðað er hvort einkaréttur ríkisins á innflutningi og heildsöludreifingu áfengis er samrýmanlegur 16. gr. EES bendir framkvæmdastjórnin fyrst á dóm EFTA-dómstólsins í *Restamark*. Þá vísar framkvæmdastjórnin einnig til dóma dómstóls Evrópubandalaganna í *Framkvæmdastjórnin* gegn *Frakklandi*[41] og *Pubblico Ministereo* gegn *Manghera*,[42] þar sem fram komi að ekki sé skylt að afnema einkarétt í viðskiptum, heldur aðeins að breyta honum til að eyða mismunun.

109. Með vísan til dómanna í *Framkvæmdastjórnin* gegn *Frakklandi*[43] og *Framkvæmdastjórnin* gegn *Hollandi*,[44] telur framkvæmdastjórnin að einkaréttur til innflutnings leiði, eðli málsins samkvæmt, til mismununar og sé þar með sjálfkrafa ósamrýmanlegur 16. gr. EES.

110. Afstaða framkvæmdastjórnarinnar er sú að eina leiðin til að aðlaga einkarétt á innflutningi nægilega sé að afnema hann. Þar með sé hann ekki lengur til staðar. Slíkt afnám hefði átt að eiga sér stað við gildistöku EES-samningsins 1. janúar 1994. Sú staðreynd að áfengislögunum og lögunum um verslun með áfengi og tóbak hafi ekki verið breytt fyrr en seint á árinu 1995 feli í sér að nauðsynleg aðlögun hafi ekki verið gerð nægilega tímanlega.

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41 Mál C-159/94 *Framkvæmdastjórnin* gegn *Frakklandi* [1997] ECR I-5815.

42 Sjá nmgr. 5.

43 Sjá nmgr. 41.

44 Mál C-157/94 *Framkvæmdastjórnin* gegn *Hollandi* [1997] ECR I-5699.

were not amended until late 1995 imply that the necessary adjustment was not performed in time.

111. The Commission submits, with reference to *Commission* v *France*,[45] that no factual information or circumstances have been presented in the present case to allow for a conclusion that the contested State monopoly is justified under Article 59(2) EEA.

112. Referring again to *Commission* v *France*,[46] the Commission considers that there is no reason to examine whether the State monopoly at issue complies with Article 11 EEA, since the monopoly is found to be contrary to Article 16 EEA. However, the Commission states that it sees no reason to depart from the assessment made by the EFTA Court in *Restamark*, and also points to the reasoning in the judgment in *Franzén*.[47]

113. The Commission adds that the Request for an Advisory Opinion from Héraðsdómur Reykjavíkur does not give sufficient information on how the wholesale distribution monopoly was operated, so as to allow for an assessment to be made of the compatibility with the EEA Agreement.

114. The Commission points out that a wholesale distribution monopoly is, to a certain extent, subject to the same general reasoning as the import monopoly under Articles 16 and 11 EEA. However, a wholesale distribution monopoly cannot be regarded as by nature being discriminatory and *per se* incompatible with Article 16 EEA. A wholesale distribution monopoly may not be incompatible with Article 16 EEA if the trade in goods from other EEA States is not put at a disadvantage, in law or in fact, in relation to trade in domestic goods.

Questions 2 and 3

115. The Commission asserts that, as the first question may only partly be answered in the affirmative since all elements for a final assessment are not known, the answers to questions 2 and 3 will, accordingly, to a large extent be hypothetical.

116. The Commission begins by pointing out that it is important to decide whether there is a breach of Article 16 EEA or Article 11 EEA, because that conclusion may be decisive for the issue of who could be entitled to damages.

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45 See footnote 41.

46 See footnote 41.

47 See footnote 13.

111. Framkvæmdastjórnin heldur því fram með vísan til málsins *Framkvæmdastjórnin* v *Frakklandi*,[45] að ekkert hafi komið fram um atvik eða ástæður í máli því sem hér sé til meðferðar sem bendi til þess að réttlæta megi umdeildan einkarétt ríkisins á grundvelli 2. mgr. 59. gr. EES.

112. Með því að vísa aftur til málsins *Framkvæmdastjórnin* gegn *Frakklandi*,[46] telur framkvæmdastjórnin að það sé engin ástæða til að skoða sérstaklega hvort einkaréttur ríkisins sem um sé fjallað samrýmist 11. gr. EES, þar sem einkaréttur þessi teljist ósamrýmanlegur 16. gr. EES. Á hinn bóginn telur framkvæmdastjórnin að ekki sé ástæða til að hverfa frá mati því sem fram komi í dómi EFTA-dómstólsins í *Restamark*, og bendir einnig á röksemdafærsluna í dóminum í *Franzén*-málinu.[47]

113. Framkvæmdastjórnin bætir því við að í beiðninni um ráðgefandi álit frá Héraðsdómi Reykjavíkur sé ekki að finna nægilegar upplýsingar um það hvernig einkarétti á heildsöludreifingu hafi verið háttað, til þess að unnt sé að meta hvort hann hafi verið samrýmanlegur EES-samningnum.

114. Framkvæmdastjórnin bendir á að um einkarétt á heildsöludreifingu gildi að nokkru sömu almennu sjónarmið og um einkarétt á innflutningi að því er varðar 16. og 11. gr. EES. Á hinn bóginn verði ekki litið svo á að einkaréttur á heildsöludreifingu feli eðli málsins samkvæmt í sér mismunun og sé einn og sér ósamrýmanlegur 16. gr. EES. Verið geti að einkaréttur á heildsöludreifingu sé ekki andstæður 16. gr. ef viðskipti með vörur frá EES-ríkjum séu ekki gerð torveldari, samkvæmt lögum eða í reynd, í samanburði við innlendar vörur.

Önnur og þriðja spurning

115. Framkvæmdastjórnin telur að þar sem ekki sé unnt að svara fyrstu spurningunni að öllu leyti jákvætt þar sem öll atriði sem skipta máli fyrir endanlegt svar séu ekki kunn, hljóti svörin við annarri og þriðju spurningunni að verða byggðar á tilgátum.

116. Framkvæmdastjórnin bendir fyrst á að mikilvægt sé að ákveða hvort um sé að ræða brot á 16. eða 11. gr. vegna þess að sú niðurstaða geti verið ákvarðandi um það hver geti átt rétt á skaðabótum.

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45 Sjá nmgr. 41.

46 Sjá nmgr. 41.

47 Sjá nmgr. 13.

117. The Commission refers to the case-law[48] of the Court of Justice of the European Communities in which the main principle on State liability for damages caused by a violation of Community law is laid down and developed. The Commission observes that the Court of Justice of the European Communities has consistently held that the principle that an EC Member State may incur liability for loss and damage caused to individuals as a result of a breach of Community law for which it can be held responsible is inherent in the system of the EC Treaty, and that Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. The Court of Justice of the European Communities has ruled, *inter alia* in *Stockholm Lindöpark*,[49] that, in principle, it is up to the national courts to decide whether the conditions are fulfilled.

118. It follows from the Commission's submissions that it is of the view that a breach of the provisions of the EC Treaty corresponding to Articles 11 and 16 EEA would, in principle, give rise to a right to damages, provided that the appurtenant conditions are met.

119. The Commission suggests that the abolition of exclusive import rights almost two years after the obligation was imposed by the entry into force of the EEA Agreement must be considered a sufficiently serious breach. The fact that the Defendant, on its own initiative, remedied the situation with effect from 1 December 1995 indicates that the Defendant was aware that the monopoly had to be adjusted in order to be in conformity with Article 16 EEA.

120. Whether the principle established by the EFTA Court in *Sveinbjörnsdóttir* also applies to violations of provisions of the main part of the EEA Agreement requires a further analysis. The Commission finds that such an analysis would be based on hypothetical arguments, as all the circumstances related to the first question are not known. The Commission therefore sees no reason to submit any further observations, neither on that issue in particular nor on the second and third question in general.

Per Tresselt
Judge-Rapporteur

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48 *Brasserie du Pêcheur and Factortame*; Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357; Case C-392/93 *The Queen* v *H. M. Treasury, ex parte British Telecommunications* [1996] ECR I-1631; Case C-5/94 *The Queen* v *MAFF, ex parte Hedley Lomas* [1996] ECR I-2553; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* v *Federal Republic of Germany* [1996] ECR I-4845; Case C-302/97 *Konle* [1999] ECR I-3099; Case C-424/97 *Haim* [2000] ECR I-5123; and Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-0493.

49 Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-0493.

117. Framkvæmdastjórnin vísar til dómaframkvæmdar dómstóls Evrópubandalaganna[48] þar sem meginreglan um skaðabótaskyldu ríkisins vegna tjóns sem leiðir af brotum á bandalagsrétti er mótuð og þróuð. Framkvæmdastjórnin bendir á að dómstóll Evrópubandalaganna hafi ítrekað talið að meginreglan um að aðildarríki bandalagsins geti orðið skaðabótaskylt vegna tjóns sem einstaklingar kunna að verða fyrir vegna brota á bandalagsrétti sem ríkið verður talið bera ábyrgð á, sé innbyggð í það kerfi sem Rómarsamningurinn kveði á um. Bandalagsréttur geri ráð fyrir skaðabótum að þremur skilyrðum uppfylltum: reglan sem brotin er verði að vera þannig að einstaklingar öðlist tiltekin réttindi, vanefndin verði að vera nægilega alvarleg og að það verði að vera orsakasamband milli vanefnda ríkisins á skuldbindingum sínum og þess tjóns sem tjónþoli verði fyrir. Dómstóll Evrópubandalaganna hafi komist að þeirri niðurstöðu m.a. í *Stockholm Lindöpark*,[49] að það sé að meginstefnu til hlutverk dómstóls samningsríkis að ákveða hvort skilyrðum þessum sé fullnægt.

118. Það leiðir af greinargerð framkvæmdastjórnarinnar að hún er á þeirri skoðun að brot á ákvæðum Rómarsamningsins, sem samsvara ákvæðum 11. og 16. gr. EES geti, að meginstefnu til, haft í för með sér rétt til skaðabóta að því gefnu að viðeigandi skilyrði séu uppfyllt.

119. Framkvæmdastjórnin telur að líta verði svo á, að afnám einkaréttar, því sem næst tveimur árum eftir gildistöku EES-samningsins, feli í sér vanefnd sem sé nægilega alvarleg. Sú staðreynd, að stefndi, að eigin frumkvæði, bætti úr frá og með 1. desember 1995 bendi til þess að stefnda hafi verið ljóst að breyta yrði einkaréttinum til að tryggja samræmi við EES-samninginn.

120. Það krefst frekari skoðunar hvort reglan sem mótuð var í máli *Erlu Maríu Sveinbjörnsdóttur* eigi einnig við vegna vanefnda á ákvæðum í meginmáli EES-samningsins. Framkvæmdastjórnin telur að slík skoðun hljóti að byggjast á röksemdum sem reistar séu á tilgátum þar sem öll atriði sem varða fyrstu spurninguna séu ekki ljós. Framkvæmdastjórnin sér þess vegna ekki ástæðu til að gera frekari athugasemdir um það atriði sérstaklega né heldur varðandi aðra og þriðju spurninguna almennt.

Per Tresselt
Framsögumaður

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48 *Brasserie du Pêcheur and Factortame*; Sameinuð mál C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357; Mál C-392/93 *The Queen* gegn *H. M. Treasury, ex parte British Telecommunications* [1996] ECR I-1631; Mál C-5/94 *The Queen* gegn *MAFF, ex parte Hedley Lomas* [1996] ECR I-2553; Sameinuð mál C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* gegn *Þýska sambandslýðveldinu* [1996] ECR I-4845; Mál C-302/97 *Konle* [1999] ECR I-3099; Mál C-424/97 *Haim* [2000] ECR I-5123; and Mál C-150/99 *Stockholm Lindöpark* [2001] ECR I-0493.

49 Mál C-150/99 *Stockholm Lindöpark* [2001] ECR I-0493.

Case E-6/01

CIBA Speciality Chemicals Water Treatment Ltd and Others
v
The Norwegian State, represented by the Ministry of Labour and Government Administration

(Rules of procedure – Admissibility – Jurisdiction of the Court – Competence of the EEA Joint Committee)

Summary of the Judgment

1. A national court, having received an advisory opinion, may make a further reference to the Court in the same case, *inter alia*, when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law, or when it submits new considerations which might lead to a different answer to a question submitted earlier; however, it is not permissible to use the right to refer questions as a means of contesting the validity of the earlier judgment.

2. Questions may be answered by way of a reasoned order according to Article 97(3) of the Rules of Procedure where, *inter alia*, the answer may be clearly deduced from existing case law. In any event, the Court has the discretion to render its decision by way of an advisory opinion.

3. The Court has jurisdiction to give advisory opinions on the interpretation of provisions of the EEA Agreement concerning the functioning of the EEA Joint Committee.

4. The wording of Article 92(1) EEA must not be interpreted as constituting a narrow definition of the competence of the EEA Joint Committee. The powers of the EEA Joint Committee are not limited to those matters where specific powers or functions have been set out.

The meaning of "agreement" in the sense of Article 102(3) EEA cannot be restricted to a mere adoption of secondary Community legislation.

The EEA Joint Committee is designed to function as an institution working in the pursuit of the common interest of the Community side and the EFTA side. A decision of the EEA Joint Committee

Sak E-6/01

CIBA Speciality Chemicals Water Treatment Ltd med flere
v
Den norske stat, representert ved Arbeids- og administrasjonsdepartementet

(Prosessregler – avvisning – jurisdiksjon – EØS-komiteens kompetanse)

Sammendrag av avgjørelsen

1. En nasjonal domstol kan, etter å ha mottatt en rådgivende uttalelse, be EFTA-domstolen om en ytterligere rådgivende uttalelse i den samme saken, blant annet dersom den nasjonale domstolen har vanskeligheter med å forstå eller anvende dommen, dersom den forelegger et nytt rettsspørsmål, eller dersom den fremfører nye elementer for vurderingen som kan tenkes å lede til et annet svar på et tidligere forelagt spørsmål; det er imidlertid ikke adgang til å bruke retten til å forelegge spørsmål som et middel for å bestride gyldigheten av den tidligere avgjørelsen.

2. Spørsmål kan besvares ved begrunnet beslutning etter artikkel 97(3) EØS blant annet hvor svaret klart kan utledes av rettspraksis. I alle tilfelle kan EFTA-domstolen skjønnsmessig treffe sin avgjørelse i form av en rådgivende uttalelse.

3. EFTA-domstolen har kompetanse til å avgi rådgivende uttalelser om tolkningen av EØS-avtalens bestemmelser om EØS-komiteens funksjoner.

4. Ordlyden i artikkel 92(1) EØS kan ikke tolkes slik at den utgjør en snever definisjon av EØS-komiteens kompetanse. EØS-komiteens kompetanse er ikke begrenset til de forhold hvor den uttrykkelig er tildelt kompetanse eller funksjoner.

Den praktiske målsetning i artikkel 102(3) er at avtalepartene skal "komme til enighet". En slik enighet ikke være begrenset til utelukkende å gjelde vedtakelse av Fellesskapets sekundærlovgivning.

EØS-komiteen er ment å fungere som et organ som skal forfølge de felles interessene både på Fellesskapets side og på EFTAs side. En beslutning av EØS-komiteen kan utgjøre en forenklet

may constitute a simplified form of an international agreement between the Community and its Member States on the one hand, and the EFTA States party to the EEA Agreement on the other.

The maintenance of homogeneity within the EEA market and securing the protection of the rights of individuals and economic operators in that market constitute fundamental policy objectives of the Contracting Parties.

To attain these objectives, the competence of the EEA Joint Committee must not be overly restricted. However, the competence of the EEA Joint Committee is not unlimited. It must, in particular, be exercised within the boundaries of the EEA Agreement and with due respect for essential procedural requirements.

form for en internasjonal avtale mellom Fellesskapet og dets medlemsstater på den ene siden, og de EFTA-statene som er part i EØS-avtalen på den andre siden.

Opprettholdelse av rettsenhet innen EØS-markedet og å sikre beskyttelsen av rettighetene til enkeltpersoner og markedsdeltakere i dette markedet utgjør grunnleggende formål for avtalepartene.

For å oppnå disse formålene må EØS-komiteens kompetanse ikke være alt for begrenset. EØS-komiteens kompetanse er imidlertid ikke ubegrenset. Den må særlig utøves innenfor EØS-avtalens grenser og med tilbørlig respekt for vesentlige saksbehandlingsregler.

JUDGMENT OF THE COURT

9 October 2002*

(Rules of procedure – Admissibility – Jurisdiction of the Court – Competence of the EEA Joint Committee)

In Case E-6/01,

REQUEST to the EFTA 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 byrett (Oslo City Court) for an Advisory Opinion in the case pending before it between

CIBA Speciality Chemicals Water Treatment Ltd and Others

and

The Norwegian State, represented by the Ministry of Labour and Government Administration

on the interpretation of:

- Articles 92, 93, 98 and 102 of the EEA Agreement;

- Article 97 of the Rules of Procedure of the Court;

- Articles 1 and 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter, the "Surveillance and Court Agreement");

- Annex II, Chapter XV (Dangerous substances), Point 1, in particular the statement concerning possible derogations by an EFTA State from the

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

EFTA-DOMSTOLENS DOM

9 oktober 2002*

(Prosessregler – avvisning – jurisdiksjon – EØS-komiteens kompetanse)

I sak E-6/01,

ANMODNING til EFTA-domstolen om rådgivende uttalelse i medhold av artikkel 34 i Avtale mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol fra Oslo byrett i saken for denne domstol mellom

CIBA Speciality Chemicals Water Treatment Ltd med flere

og

Den norske stat, representert ved Arbeids- og administrasjonsdepartementet

om tolkningen av:

- artikkel 92, 93, 98 og 102 i EØS-avtalen;
- artikkel 97 i EFTA-domstolens rettergangsordning;
- artikkel 1 og 34 i Avtale mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol (heretter "ODA");
- vedlegg II, kapittel XV (Farlige stoffer), punkt 1, særlig erklæringen vedrørende mulige unntak for en EFTA-stat fra fellesskapsrettsaktene

* Språket i anmodningen om en rådgivende uttalelse: Engelsk.

Community acts relating to classification and labelling of dangerous substances;

- Joint Statement by the EEA Joint Committee adopted on 22 June 1995, concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous substances (OJ 1996 C 6, p. 7) (hereinafter, the "1995 Joint Statement"), in particular Annex II to that Joint Statement, providing for certain derogations by Norway; and,

- Joint Statement by the EEA Joint Committee adopted on 26 March 1999, concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous substances (OJ 1999 C 185, p. 6) (hereinafter, the "1999 Joint Statement"), in particular the Annex to that Joint Statement, providing for certain derogations by Norway,

THE COURT,

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

Registrar: Lucien Dedichen,

having considered the written observations submitted on behalf of:

– the Plaintiffs, CIBA Speciality Chemicals Water Treatment Ltd and Others, represented by Wilhelm Matheson, advokat;

– the Defendant, the Norwegian State, represented by Thomas Nordby, advokat, Office of the Attorney General (Civil Affairs);

– the Government of Iceland, represented by Magnús K. Hannesson, Legal Adviser, Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Peter Dyrberg, Director, Legal and Executive Affairs, acting as Agent, assisted by Bjarnveig Eiríksdóttir, Senior Officer, and Per Andreas Bjørgan, Officer, Legal and Executive Affairs;

– the Commission of the European Communities, represented by John Forman, Legal Adviser, Legal Service, acting as Agent;

having regard to the Report for the Hearing; and,

knyttet til klassifisering og merking av farlige stoffer;

- Felleserklæring vedtatt på EØS-komiteens møte 22 juni 1995 om EØS-avtalens vedlegg II kapittel XV, med bestemmelser om ny gjennomgåelse på området farlige stoffer (EFT 1996 C 6, s 7) (heretter "1995-erklæringen"), særlig tillegg II, som gir visse unntak for Norge; og

- Felleserklæring vedtatt på EØS-komiteens møte 26 mars 1999 om EØS-avtalens vedlegg II kapittel XV, med bestemmelser om ny gjennomgåelse på området farlige stoffer (EFT 1999 C 185, s 6) (heretter "1999-erklæringen"), særlig tillegg II, som gir visse unntak for Norge,

EFTA-DOMSTOLEN,

sammensatt av: president Thór Vilhjálmsson, (saksforberedende dommer) og dommerne Carl Baudenbacher og Per Tresselt,

Justissekretær: Lucien Dedichen

etter å ha vurdert de skriftlige saksfremstillinger inngitt av:

– saksøkerne, CIBA Speciality Chemicals Water Treatment Ltd med flere, representert ved advokat Wilhelm Matheson;

– saksøkte, Den norske stat, representert ved advokat Thomas Nordby, Regjeringsadvokatembetet;

– Den islandske regjering, representert ved Magnús K. Hannesson, juridisk rådgiver, Utenriksdepartementet, som partsrepresentant;

– EFTAs overvåkningsorgan, representert ved Peter Dyrberg, juridisk direktør ved avdeling for juridiske saker og eksekutivsaker, som partsrepresentant, assistert av Bjarnveig Eiríksdóttir, senior saksbehandler, og Per Andreas Bjørgan, saksbehandler ved samme avdeling;

– Kommisjonen for De europeiske fellesskap, representert ved John Forman, juridisk rådgiver, rettsavdelingen, som partsrepresentant,

med henvisning til rettsmøterapporten; og

having heard the oral argument of the Plaintiff, represented by Wilhelm Matheson; the Defendant, represented by Thomas Nordby; the EFTA Surveillance Authority, represented by Bjarnveig Eiríksdóttir; and the Commission of the European Communities, represented by John Forman, at the hearing on 30 May 2002;

gives the following

Judgment

I Facts and procedure

1 By a reference dated 22 August 2001, registered at the Court on 31 August 2001, Oslo byrett made a request for an advisory opinion in a case pending before it between CIBA Speciality Chemicals Water Treatment Ltd and Others (hereinafter, the "Plaintiffs") and the Norwegian State, represented by the Ministry of Labour and Government Administration (hereinafter, the "Defendant").

2 The dispute before the national court involves the issue of whether the EEA Agreement prevents the Defendant from requiring the Plaintiffs to label the substance polyacrylamide as carcinogenic if it contains acrylamide as a residual substance in a concentration of less than 0.1% by weight.

3 The Court has previously dealt with a request for an advisory opinion from Oslo byrett in the same case, Case E-2/00 *Allied Colloids and Others* v *The Norwegian State*, judgment of 14 July 2000, not yet reported (hereinafter, "*Allied Colloids*"). Allied Colloids have meanwhile been succeeded by CIBA Speciality Chemicals Water Treatment Ltd.

4 In *Allied Colloids*, Oslo byrett referred the following question to the EFTA Court:

> *Does the Joint Statement adopted at the meeting of the EEA Joint Committee of 22 June 1995 concerning Annex II Chapter XV, Annex II with subsequent amendments, to the EEA Agreement give Norway the power to introduce a labelling requirement for polyacrylamide that contains a concentration of the residual substance acrylamide which is lower than 0.1%, cf. Council Directive 67/548/EEC of 27 June 1967 with subsequent amendments and Council Directive 88/379/EEC of 7 June 1988, with subsequent amendments?*

5 The advisory opinion in *Allied Colloids* reads as follows:

> *Annex II to the Joint Statement adopted at the meeting of the EEA Joint Committee on 22 June 1995 concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous*

etter å ha hørt de muntlige innleggene fra saksøkerne, representert ved Wilhelm Matheson; saksøkte, representert ved Thomas Nordby; EFTAs Overvåkningsorgan, representert ved Bjarnveig Eiríksdóttir; og Kommisjonen for De europeiske fellesskap, representert ved John Forman, under høringen den 30 mai 2002;

avsier slik

Dom

I Faktum og prosedyre

1 Ved en beslutning datert 22 august 2001, mottatt ved EFTA-domstolen den 31 august 2001, anmodet Oslo byrett om en rådgivende uttalelse i en sak innbrakt for denne mellom CIBA Speciality Chemicals Water Treatment Ltd med flere (heretter "saksøkerne") og Den norske stat, ved Arbeids- og administrasjonsdepartementet (heretter "saksøkte").

2 Saken for den nasjonale domstolen gjelder spørsmålet om EØS-avtalen hindrer saksøkte i å pålegge saksøkerne å merke stoffet polyakrylamid som kreftfremkallende hvis det inneholder mindre enn 0,1 vektprosent akrylamid som reststoff.

3 EFTA-domstolen har tidligere behandlet en anmodning om rådgivende uttalelse fra Oslo byrett i samme sak, sak E-2/00 *Allied Colloids med flere* v *Den norske stat*, dom av 14 juli 2000, ennå ikke publisert (heretter "*Allied Colloids*"). Allied Colloids er i mellomtiden blitt etterfulgt av CIBA Speciality Chemicals Water Treatment Ltd.

4 I *Allied Colloids* henviste Oslo byrett følgende spørsmål til EFTA-domstolen:

> *Gir Felleserklæringen til protokollen for EØS-komiteens møte av 22 juni 1995 om EØS-avtalens vedlegg II kapittel XV, tillegg II med senere endringer, Norge adgang til å innføre et merkekrav for polyakrylamid som inneholder en konsentrasjon av reststoffet akrylamid som er lavere enn 0,1%, jfr Rådsdirektiv 67/548/EØF av 27 juni 1967 med senere endringer og Rådsdirektiv 88/379/EØF av 7 juni 1988 med senere endringer?*

5 Den rådgivende uttalelsen i Allied Colloids lyder som følger:

> *Tillegg II til felleserklæringen vedtatt på EØS-komiteens møte 22 juni 1995 om EØS-avtalens vedlegg II kapittel XV, om bestemmelser om ny gjennomgåelse på området farlige stoffer, må tolkes slik at den ikke gir*

substances, must be interpreted as not giving Norway the power to require polyacrylamide to be labelled as carcinogenic if it contains acrylamide as a residual substance in a concentration of less than 0.1% by total volume.

The Annex to the Joint Statement adopted at the meeting of the EEA Joint Committee on 26 March 1999 concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous substances, must be interpreted as giving Norway the power to require polyacrylamide to be labelled as carcinogenic if it contains acrylamide as a residual substance in a concentration of equal to or greater than 0.01% by total volume.

6 In the subsequent proceedings before Oslo byrett, the Plaintiffs have argued that the Court's judgment (advisory opinion) regarding the interpretation of the 1999 Joint Statement gives rise to a supplementary question concerning the legal basis for that Statement. The Plaintiffs have argued that the EEA Joint Committee lacked the competence to adopt for Norway any derogation that is wider in scope than that provided for in the 1995 Joint Statement.

7 Against this background, Oslo byrett decided to submit a second Request for an Advisory Opinion on the following question:

Is the EEA Joint Committee after the adoption of the Joint Statement of 22 June 1995, empowered to decide that Norway may adopt derogations from existing Community acquis, such as the derogations contained in the Joint Statement of 26 March 1999 of the EEA Committee as interpreted by the EFTA Court in Allied Colloids?

8 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 EFTA Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

II Findings of the Court

9 By its question, Oslo byrett seeks to ascertain whether, in view of the 1995 Joint Statement as interpreted by the Court in *Allied Colloids*, the EEA Joint Committee was competent to adopt the 1999 Joint Statement authorising certain derogations for Norway in respect of the relevant Community rules on the classification and labelling of dangerous substances.

Admissibility

10 The Defendant has argued that the question from Oslo byrett should be declared inadmissible. Referring to Case 69/85 *Wünsche* v *Germany* [1986] ECR 947, at

Norge adgang til å kreve merking av polyakrylamid som kreftfremkallende hvis det inneholder akrylamid som reststoff i en konsentrasjon som er lavere enn 0,1% av totalvolumet.

Tillegg til felleserklæringen vedtatt på EØS-komiteens møte 26 mars 1999 om EØS-avtalens vedlegg II kapittel XV, om bestemmelser om ny vurdering på området farlige stoffer skal tolkes slik at den gir Norge adgang til å kreve merking av polyakrylamid som kreftfremkallende hvis det inneholder akrylamid som reststoff i en konsentrasjon som er lik eller større enn 0,01% av totalvolumet.

6 I den påfølgende saksgangen for Oslo byrett har saksøkerne anført at EFTA-domstolens dom (rådgivende uttalelse) vedrørende tolkningen av 1999-erklæringen gjør det nødvendig å stille supplerende spørsmål vedrørende det rettslige grunnlaget for denne felleserklæringen. Saksøkerne har anført at EØS-komiteen manglet kompetanse til å vedta unntak som er mer vidtfavnende enn de som ble fastsatt ved 1995-erklæringen.

7 På denne bakgrunn besluttet Oslo byrett å anmode om nok en rådgivende uttalelse fra EFTA-domstolen med følgende spørsmål:

Har EØS-komiteen, etter vedtakelsen av felleserklæringen av 22 juni 1995, kompetanse til å beslutte at Norge kan gjøre unntak fra gjeldende fellesskapslovgivning, slik som unntaket gitt ved EØS-komiteens felleserklæring av 26 mars 1999, slik dette er tolket av EFTA-domstolen i Allied Colloids?

8 Det vises til rettsmøterapporten for en fyldigere beskrivelse av den rettslige rammen, de faktiske forhold, saksgangen og de skriftlige saksfremstillingene fremlagt for EFTA-domstolen, som i det følgende bare vil bli omtalt og drøftet så langt det er nødvendig for domstolens begrunnelse.

II EFTA-domstolens bemerkninger

9 Ved sitt spørsmål søker Oslo byrett å bringe på det rene hvorvidt EØS-komiteen, i betraktning av 1995-erklæringen slik denne ble tolket av EFTA-domstolen i *Allied Colloids*, hadde kompetanse til å vedta 1999-erklæringen som tillater visse unntak for Norge fra de relevante fellesskapsreglene for klassifisering og merking av farlige stoffer.

Avvisning

10 Saksøkte har anført at spørsmålet fra Oslo byrett må avvises av EFTA-domstolen. Under henvisning til sak 69/85 *Wünsche* v *Germany* [1986] ECR 947, avsnitt 15, hevder saksøkte at svaret på dette spørsmålet allerede følger av *Allied*

paragraph 15, the Defendant contends that the answer to that question is already implied in *Allied Colloids* and therefore the question essentially contests the validity of that opinion.

11 As grounds for submitting a second request for an advisory opinion in the case before it, Oslo byrett explains that the parties disagree as to whether the EEA Joint Committee was competent to adopt the 1999 Joint Statement; Oslo byrett has found no guidance on this point in *Allied Colloids*.

12 The issue of whether a national court, having received an advisory opinion, may make a further reference to the Court in the same case, has not previously been dealt with by the Court. The Court of Justice of the European Communities has held that under Community law, a further reference to that Court may be justified, *inter alia*, when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law, or when it submits new considerations which might lead to a different answer to a question submitted earlier; however, it is not permissible to use the right to refer questions as a means of contesting the validity of the earlier judgment (*Wünsche* v *Germany*, paragraph 15). The Court finds that this line of reasoning also applies in relation to the advisory opinion procedure under Article 34 of the Surveillance and Court Agreement.

13 In *Allied Colloids*, the Court drew a specific and operative conclusion based on an interpretation of the 1999 Joint Statement, thereby implicitly providing guidance on the issue of the competence of the EEA Joint Committee to adopt that Joint Statement. The advisory opinion does not discuss separately the issue of competence, or explicitly pronounce thereon. The issue of the competence of the EEA Joint Committee has become a central issue in the subsequent national proceedings, and has caused the national court to submit the current request for an advisory opinion. Since the Court did not explicitly discuss the matter in *Allied Colloids*, the present request must be considered as raising a fresh question of law. The question submitted cannot be considered as contesting the validity of the advisory opinion in *Allied Colloids*.

14 Based on the above, the Court concludes that the question is admissible.

Form of the opinion of the Court

15 The Defendant has further argued, with reference to Article 97(3) of the Rules of Procedure of the Court, that the Court should give its response to the second request for an advisory opinion from Oslo byrett by way of a reasoned order simply referring to the judgment (advisory opinion) in *Allied Colloids*.

16 Article 97(3) of the Rules of Procedure provides that where a question referred to the Court for an advisory opinion is manifestly identical to a question on which the Court has already ruled or given an opinion, the Court may give its decision

Colloids og at spørsmålet derfor i realiteten innebærer en bestridelse av denne rådgivende uttalelsens gyldighet.

11 Oslo byrett begrunner sin andre anmodning om en rådgivende uttalelse i saken med at partene er uenige om hvorvidt EØS-komiteen hadde kompetanse til å vedta 1999-erklæringen, og at den ikke har funnet veiledning på dette punkt i *Allied Colloids*.

12 Spørsmålet om hvorvidt en nasjonal domstol, etter å ha mottatt en rådgivende uttalelse, kan be EFTA-domstolen om en ytterligere rådgivende uttalelse i den samme saken, har ikke tidligere vært behandlet av EFTA-domstolen. Domstolen for De europeiske fellesskap er kommet til at en ytterligere foreleggelse for denne domstolen i henhold til fellesskapsretten kan være begrunnet blant annet dersom den nasjonale domstolen har vanskeligheter med å forstå eller anvende dommen, dersom den forelegger et nytt rettsspørsmål, eller dersom den fremfører nye elementer for vurderingen som kan tenkes å lede Domstolen for De europeiske fellesskap til å avgi et endret svar på et tidligere forelagt spørsmål; det er imidlertid ikke adgang til å bruke retten til å forelegge spørsmål som et middel for å bestride gyldigheten av den tidligere avgjørelsen (*Wünsche* v *Germany*, avsnitt 15). EFTA-domstolen anser at dette resonnementet kan anvendes også ved anmodninger om rådgivende uttalelser i medhold av artikkel 34 ODA.

13 I *Allied Colloids* trakk EFTA-domstolen en konkret og praktisk konklusjon basert på en tolkning av 1999-erklæringen, som implisitt ga veiledning til spørsmålet om EØS-komiteens kompetanse til å vedta denne erklæringen. Den rådgivende uttalelsen tar ikke opp spørsmålet om kompetanse til særskilt drøftelse og uttaler seg heller ikke uttrykkelig om det. Spørsmålet om EØS-komiteens kompetanse er blitt et sentralt spørsmål i den etterfølgende nasjonale saksgangen, og har foranlediget den anmodning om en rådgivende uttalelse som nå behandles. Siden EFTA-domstolen ikke uttrykkelig drøftet dette spørsmålet i *Allied Colloids* må den foreliggende anmodningen anses å inneholde et nytt rettsspørsmål. Spørsmålet som er forelagt EFTA-domstolen kan ikke anses å bestride gyldigheten av den rådgivende uttalelsen i *Allied Colloids.*

14 På denne bakgrunnen konkluderer EFTA-domstolen med at spørsmålet kan fremmes.

Formen for EFTA-domstolens uttalelse

15 Med henvisning til rettergangsordningens artikkel 97(3) har saksøkte videre anført at EFTA-domstolen må avgi sitt svar på den andre anmodningen om en rådgivende uttalelse fra Oslo byrett i form av en begrunnet beslutning der det vises til den tidligere dommen (rådgivende uttalelsen) i *Allied Colloids*.

16 Det heter i rettergangsordningens artikkel 97(3) at dersom et spørsmål som er forelagt EFTA-domstolen for en rådgivende uttalelse åpenbart er identisk med et

by way of a reasoned order in which reference is made to its previous judgment or opinion.

17 Article 97(3) of the Rules of Procedure largely corresponds with Article 104(3) of the Rules of Procedure of the Court of Justice of the European Communities. It follows from the latter provision that questions may be answered by way of a reasoned order where, *inter alia*, the answer may be clearly deduced from existing case law.

18 As already stated, the advisory opinion given in *Allied Colloids* does not expressly deal with the competence of the EEA Joint Committee to adopt the 1999 Joint Statement. The question addressed in *Allied Colloids* can therefore not be said to be manifestly identical to the question at hand. In any event, the Court has the discretion to render its decision by way of an advisory opinion.

19 Based on the above, the Court will give its response to Oslo byrett by way of an advisory opinion.

The jurisdiction of the Court

20 The Defendant has also contended that Articles 31, 32, 34 to 37 and 39 to 41 of the Surveillance and Court Agreement, establishing the jurisdiction of the EFTA Court, are exhaustive and do not confer the competence to rule on the validity of a decision by the EEA Joint Committee; and, consequently that the Court may not rule on the question referred by Oslo byrett, as that question concerns the competence of the EEA Joint Committee to adopt the 1999 Joint Statement and consequently the validity of that Joint Statement.

21 The Court finds that the question referred by Oslo byrett relates to the interpretation of the provisions of the EEA Agreement concerning the competences of the EEA Joint Committee and to the interpretation of the provision contained in Annex II Chapter XV, Point 1. The Court has not been asked to rule on the validity of the 1999 Joint Statement of the EEA Joint Committee.

22 According to Article 34 of the Surveillance and Court Agreement, the Court has jurisdiction to give advisory opinions on the "interpretation of the EEA Agreement." Pursuant to Article 1(a) of the Surveillance and Court Agreement, the term "EEA Agreement" includes "the main part of the EEA Agreement, its Protocols and Annexes as well as the acts referred to therein." Nothing in the EEA Agreement, the Surveillance and Court Agreement or other relevant legal instruments suggests that any provision governing the functioning of the EEA Joint Committee is excluded from the jurisdiction of the Court under Article 34 of the Surveillance and Court Agreement.

23 It follows from the above that the Court has jurisdiction to give advisory opinions on the interpretation of provisions of the EEA Agreement concerning the

spørsmål som domstolen allerede har avgjort eller gitt uttalelse om, kan EFTA-domstolen treffe sin avgjørelse ved begrunnet beslutning der den viser til sin tidligere dom eller uttalelse.

17 Rettergangsordningens artikkel 97(3) tilsvarer i hovedsak artikkel 104(3) i rettergangsordningen for Domstolen for De europeiske fellesskap. Det følger av den sistnevnte bestemmelsen at spørsmål kan besvares ved begrunnet beslutning blant annet hvor svaret klart kan utledes av rettspraksis.

18 Som allerede uttalt, behandler den rådgivende uttalelsen i *Allied Colloids* ikke uttrykkelig EØS-komiteens kompetanse til å vedta 1999-erklæringen. Spørsmålet forelagt i *Allied Colloids* kan derfor ikke anses å være åpenbart identisk med det foreliggende spørsmålet. I alle tilfelle kan EFTA-domstolen skjønnsmessig treffe sin avgjørelse i form av en rådgivende uttalelse.

19 På denne bakgrunn vil EFTA-domstolen gi sitt svar til Oslo byrett i form av en rådgivende uttalelse.

EFTA-domstolens jurisdiksjon

20 Saksøkte har også anført at artikkel 31, 32, 34 til 37 og 39 til 41 ODA, som omhandler EFTA-domstolens jurisdiksjon, er uttømmende og ikke gir kompetanse til å prøve gyldigheten av et vedtak truffet av EØS-komiteen; og at EFTA-domstolen derfor ikke kan behandle spørsmålet forelagt av Oslo byrett, siden dette omhandler EØS-komiteens kompetanse til å vedta 1999-erklæringen og gyldigheten av denne erklæringen.

21 EFTA-domstolen finner at spørsmålet forelagt av Oslo byrett angår tolkningen av EØS-avtalens bestemmelser om EØS-komiteens kompetanse og tolkningen av bestemmelsen i vedlegg II kapittel XV, punkt 1. EFTA-domstolen er ikke blitt bedt om å prøve gyldigheten av EØS-komiteens 1999-erklæring.

22 Ifølge artikkel 34 i ODA hører det under EFTA-domstolen å gi rådgivende uttalelser om "fortolkningen av EØS-avtalen". Begrepet "EØS-avtalen" omfatter i henhold til artikkel 1(a) i ODA "EØS-avtalens hoveddel, dens protokoller og vedlegg samt de rettsakter som er omhandlet i dem". Ingenting i EØS-avtalen, ODA eller andre relevante rettsgrunnlag antyder at bestemmelser som fastsetter EØS-komiteens funksjoner er unntatt EFTA-domstolens jurisdiksjon etter artikkel 34 i ODA.

23 Det følger av det foregående at EFTA-domstolen har kompetanse til å avgi rådgivende uttalelser om tolkningen av EØS-avtalens bestemmelser om EØS-

functioning of the EEA Joint Committee. The Court will therefore answer the question referred by Oslo byrett on the competence of the EEA Joint Committee to adopt the 1999 Joint Statement.

The question

24 The Plaintiffs have argued that the EEA Joint Committee did not have the competence to adopt the 1999 Joint Statement, since that decision provides for a derogation from the relevant Community rules on the classification and labelling of dangerous substances that is wider in scope than the derogation provided for in the 1995 Joint Statement. In the Plaintiffs' view, the Joint Committee's competence is, according to Article 102 EEA, limited to taking decisions on the amendment of Annexes to the EEA Agreement as closely as possible to new Community legislation.

25 The Court notes at the outset that Annex II, Chapter XV, Point 1 to the EEA Agreement, provides *inter alia*:

> "The Contracting Parties agree on the objective that the provisions of the Community acts on dangerous substances and preparations should apply by 1 January 1995. […] If an EFTA State concludes that it will need any derogation from the Community acts relating to classification and labelling, the latter shall not apply to it unless the EEA Joint Committee agrees on another solution."

26 The Court referred to that provision in *Allied Colloids*, and confirmed that the applicability of the relevant Community acts on dangerous substances to the EFTA States is contingent upon a further decision of the EEA Joint Committee. The Court further observed that the Joint Statements of 1995 and 1999 were adopted on the basis of that provision (see *Allied Colloids*, at paragraph 25).

27 As stated in Annex II, Chapter XV, Point 1, an EFTA State may conclude that it will need a derogation from the Community acts relating to classification and labelling of dangerous substances. In that situation, those acts shall not apply to the EFTA State unless the EEA Joint Committee agrees on another solution. That solution may comprise an extension of the transitional period applicable for the relevant Community acts, or other appropriate modifications.

28 Annex II, Chapter XV, Point 1, on the function of the EEA Joint Committee in relation to possible derogations from the Community acts on the classification and labelling of dangerous substances, must be read in conjunction with the general provisions of the main part of the EEA Agreement relating to the competence of the EEA Joint Committee.

29 Article 92(1) EEA provides that the EEA Joint Committee shall ensure the effective implementation and operation of the EEA Agreement. To this end, the EEA Joint Committee shall, *inter alia*, take decisions in the cases provided for in the EEA Agreement. Decisions shall, pursuant to Article 93(2) EEA be taken by

komiteens funksjoner. EFTA-domstolen vil derfor besvare det spørsmål som er forelagt den av Oslo byrett om EØS-komiteens kompetanse til å vedta 1999-erklæringen.

Spørsmålet

24 Saksøkerne har anført at EØS-komiteen ikke hadde kompetanse til å vedta 1999-erklæringen, siden dette vedtaket fastsetter et unntak fra de relevante fellesskapsreglene for klassifisering og merking av farlige stoffer som er mer vidtfavnende enn unntaket fastsatt i 1995-erklæringen. Det er saksøkernes oppfatning at EØS-komiteens kompetanse etter artikkel 102 EØS er begrenset til å treffe beslutninger om endring av vedleggene så nær som mulig opp til ny fellesskapslovgivning.

25 Som utgangspunkt bemerker EFTA-domstolen at EØS-avtalens vedlegg II, kapittel XV, punkt 1 blant annet uttaler:

> "Avtalepartene er enige om den målsetting at bestemmelsene i fellesskapsrettsaktene om farlige stoffer og produkter skal få anvendelse innen 1. januar 1995. (…) Dersom en EFTA-stat mener at den vil ha behov for unntak fra fellesskapsrettsaktene om klassifisering og merking, skal rettsaktene ikke få anvendelse for denne staten med mindre EØS-komiteen kommer frem til en annen løsning."

26 EFTA-domstolen viste til denne bestemmelsen i *Allied Colloids* og bekreftet at anvendelsen av de relevante fellesskapsrettsaktene for farlige stoffer i EFTA-statene er betinget av en ytterligere beslutning av EØS-komiteen. EFTA-domstolen bemerket videre at felleserklæringene av 1995 og 1999 ble vedtatt på grunnlag av denne bestemmelsen (se *Allied Colloids*, avsnitt 25).

27 Som uttalt i vedlegg II, kapittel XV, punkt 1, kan en EFTA-stat komme til at den har behov for unntak fra fellesskapsrettsaktene om klassifisering og merking av farlige stoffer. I en slik situasjon skal rettsaktene ikke få anvendelse for denne EFTA-staten med mindre EØS-komiteen kommer fram til en annen løsning. Denne løsningen kan omfatte en forlengelse av overgangsperioden som gjelder for vedkommende fellesskapsrettsakt, eller andre passende endringer.

28 Vedlegg II, kapittel XV, punkt 1 om EØS-komiteens funksjoner i forhold til mulige unntak fra fellesskapsrettsaktene om klassifisering og merking av farlige stoffer må leses i sammenheng med de alminnelige bestemmelsene i EØS-avtalens hoveddel om EØS-komiteens kompetanse.

29 Det følger av artikkel 92(1) EØS at EØS-komiteen skal sikre en effektiv gjennomføring av EØS-avtalen og se til at avtalen virker. For dette formål skal EØS-komiteen blant annet treffe beslutninger i de tilfeller som følger av EØS-avtalen. Beslutninger skal i henhold til artikkel 93(2) EØS treffes ved enighet

agreement between the Community, on the one hand, and the EFTA States speaking with one voice, on the other.

30 Article 98 EEA provides that the Annexes to the EEA Agreement and several of the Protocols may be amended by a decision of the EEA Joint Committee in accordance with the procedure laid down in Articles 93(2), 99, 100, 102 and 103 EEA.

31 With regard to amendments to the Annexes to the EEA Agreement, Article 102(1) EEA provides that the EEA Joint Committee shall take timely decisions with a view to simultaneous application of the amendments of the Annexes and of the corresponding new Community legislation. Article 102(3) EEA further provides that the Contracting Parties shall make all efforts to agree on matters relevant to the EEA Agreement. Moreover, Article 102(4) envisages that in the event an agreement cannot be reached, the EEA Joint Committee shall take any decision necessary to maintain the good functioning of the EEA Agreement.

32 The mandate of the EEA Joint Committee under Article 92(1) EEA includes the taking of decisions in "cases provided for in this Agreement." Contrary to the Plaintiffs' contention, the wording of that provision must not be interpreted as constituting a narrow definition of the competence of the EEA Joint Committee. It cannot be assumed that the powers of the EEA Joint Committee are limited to those matters where specific powers or functions have been set out. The Court finds support for this finding, *inter alia*, in Article 102(3) EEA. The reference in that provision to "matters relevant to this Agreement" must also cover matters that are not specifically dealt with in the texts of the EEA main Agreement, its Protocols and Annexes, but nevertheless are capable of affecting the good functioning of the EEA Agreement. The operative goal under Article 102(3) EEA is to "arrive at an agreement." For this to carry any practical meaning in relation to the effective implementation and operation of the EEA Agreement, such an agreement cannot be restricted to a mere adoption of secondary Community legislation.

33 The EEA Joint Committee is designed to function as an institution working in the pursuit of the common interest of the Community side and the EFTA side. As pointed out by the Commission of the European Communities at the oral hearing, a decision of the EEA Joint Committee may constitute a simplified form of an international agreement between the Community and its Member States on the one hand, and the EFTA States party to the EEA Agreement on the other. This supports the finding that the competence of the EEA Joint Committee cannot be restricted to adopting the relevant Community acts into the EEA legal order. The Court notes in this context that the maintenance of homogeneity within the EEA market and securing the protection of the rights of individuals and economic operators in that market constitute fundamental policy objectives of the Contracting Parties. To attain these objectives, the competence of the EEA Joint Committee must not be overly restricted. However, the competence of the EEA Joint Committee is not unlimited. It must, in particular, be exercised within the

mellom Fellesskapet på den ene side og EFTA-statene, som opptrer samstemt, på den annen side.

30 Det følger av artikkel 98 EØS at vedleggene til EØS-avtalen og flere av protokollene kan endres ved beslutning av EØS-komiteen i samsvar med prosedyren i artikkel 93(2), 99, 100, 102 og 103 EØS.

31 Med hensyn til endringer i vedleggene til EØS-avtalen, følger det av artikkel 102(1) EØS at EØS-komiteen skal ta beslutninger så nær som mulig i tid etter at Fellesskapet har vedtatt tilsvarende nytt regelverk med sikte på samtidig iverksettelse av endringene i vedleggene og det tilsvarende nye fellesskapsregelverket. Det følger videre av artikkel 102(3) at avtalepartene skal bestrebe seg på å komme til enighet i saker som er relevante for EØS-avtalen. Videre forutsetter artikkel 102(4) at dersom det ikke oppnås enighet, skal EØS-komiteen treffe enhver beslutning som er nødvendig for at EØS-avtalen fortsatt skal kunne virke tilfredsstillende.

32 EØS-komiteens mandat i henhold til artikkel 92(1) EØS omfatter å treffe beslutninger "i saker i henhold til avtalen". I motsetning til hva saksøkerne anfører, kan denne bestemmelsens ordlyd ikke tolkes slik at den utgjør en snever definisjon av EØS-komiteens kompetanse. Det kan ikke antas at EØS-komiteens kompetanse er begrenset til de forhold hvor den uttrykkelig er tildelt kompetanse eller funksjoner. EFTA-domstolen finner støtte for en slik fortolkning blant annet i artikkel 102(3) EØS. Henvisningen i den bestemmelsen til "saker som er relevante for denne avtale" må også omfatte saker som ikke er gitt særlig behandling i tekstene i EØS-avtalens hoveddel, protokollene og vedleggene, men som likevel kan ha betydning for at EØS-avtalen virker på en tilfredsstillende måte. Den praktiske målsetning i artikkel 102(3) er at avtalepartene skal "komme til enighet". For at dette skal ha praktisk betydning for den effektive gjennomføringen og virkningen av EØS-avtalen, kan en slik enighet ikke være begrenset til utelukkende å gjelde vedtakelse av Fellesskapets sekundærlovgivning.

33 EØS-komiteen er ment å fungere som et organ som skal forfølge de felles interessene både på Fellesskapets side og på EFTAs side. Som påpekt av Kommisjonen for De europeiske fellesskap under høringen, kan en beslutning av EØS-komiteen utgjøre en forenklet form for en internasjonal avtale mellom Fellesskapet og dets medlemsstater på den ene siden, og de EFTA-statene som er part i EØS-avtalen på den andre siden. Dette støtter den slutning at EØS-komiteens kompetanse ikke kan være begrenset til å innta de relevante fellesskapsrettsaktene i EØS-retten. EFTA-domstolen bemerker i denne sammenheng at opprettholdelse av rettsenhet innen EØS-markedet og å sikre beskyttelsen av rettighetene til enkeltpersoner og markedsdeltakere i dette markedet utgjør grunnleggende formål for avtalepartene. For å oppnå disse formålene må EØS-komiteens kompetanse ikke være alt for begrenset. EØS-komiteens kompetanse er imidlertid ikke ubegrenset. Den må særlig utøves

boundaries of the EEA Agreement and with due respect for essential procedural requirements.

34 From the above considerations, the Court concludes that the EEA Joint Committee had the competence to adopt the contested decision.

35 The answer to the question asked by Oslo byrett must therefore be that the EEA Joint Committee was competent to adopt the Joint Statement of 26 March 1999, authorising certain derogations for Norway in respect of the relevant Community rules concerning classification and labelling of dangerous substances.

III Costs

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

On those grounds,

THE COURT,

in answer to the question referred to it by Oslo byrett by an order of 22 August 2001, hereby gives the following Advisory Opinion:

The EEA Joint Committee was competent to adopt the Joint Statement of 26 March 1999, authorising certain derogations for Norway in respect of the relevant Community rules concerning classification and labelling of dangerous substances.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 9 October 2002.

innenfor EØS-avtalens grenser og med tilbørlig respekt for vesentlige saksbehandlingsregler.

34 På denne bakgrunn konkluderer EFTA-domstolen med at EØS-komiteen hadde kompetanse til å treffe det omtvistede vedtaket.

35 Svaret på spørsmålet fra Oslo byrett må derfor bli at EØS-komiteen var kompetent til å vedta felleserklæringen av 26 mars 1999, som tillater visse unntak for Norge fra de relevante fellesskapsreglene om klassifisering og merking av farlige stoffer.

III Saksomkostninger

36 Omkostninger som er påløpt for Den islandske regjering, EFTAs Overvåkningsorgan og Kommisjonen for De europeiske fellesskap, som har gitt saksfremstillinger for EFTA-domstolen, kan ikke kreves dekket. Siden rettergangen her, for partene i hovedsaken, utgjør en del av rettergangen for den nasjonale domstolen, er avgjørelsen av saksomkostninger en sak for den nasjonale domstolen.

På dette grunnlag avgir

EFTA-DOMSTOLEN,

som svar på spørsmålet som er forelagt av Oslo byrett ved beslutning av 22 august 2001, følgende rådgivende uttalelse:

EØS-komiteen var kompetent til å vedta Felleserklæringen av 26 mars 1999, som tillater særlige unntak for Norge fra de relevante fellesskapsreglene om klassifisering og merking av farlige stoffer.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Avsagt i åpen rett i Luxembourg den 9 oktober 2002.

Lucien Dedichen
Registrar

Thór Vilhjálmsson
President

Lucien Dedichen
Justissekretær

Thór Vilhjálmsson
President

REPORT FOR THE HEARING

in Case E-6/01

– revised[*] –

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 Oslo byrett (Oslo City Court) for an Advisory Opinion in the case pending before it between

CIBA Speciality Chemicals Water Treatment Ltd and Others

and

The Norwegian State, represented by the Ministry of Local Government and Regional Development

on the interpretation of the Agreement on the European Economic Area, specifically

- Articles 92, 93, 98 and 102 EEA;

- Annex II, Chapter XV (Dangerous substances), in particular the provision under point 1 concerning derogation from the Community acts relating to classification and labelling;

- Joint Statement by the EEA Joint Committee adopted on 22 June 1995, concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous substances,[1] in particular Annex II to that Joint Statement, setting up certain derogations concerning Norway, (hereinafter, the "Joint Statement of 1995" or the "1995 Joint Statement"); and,

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[*] Amendments to paragraph 66 and to the name of the defendant. In conformity with the designation of the parties in the case before the national court, the name of the defendant has been amended throughout to read "the Norwegian State."

[1] OJ 1996 C 6, p. 7.

RETTSMØTERAPPORT
i sak E-6/01
- revidert[*] -

ANMODNING til EFTA-domstolen om rådgivende uttalelse i medhold av artikkel 34 i Avtale mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol fra Oslo byrett i saken for denne domstol mellom

CIBA Speciality Chemicals Water Treatment Ltd med flere

og

Den norske stat, ved Kommunal- og regionaldepartementet

om tolkningen av Avtale om Det europeiske økonomiske samarbeidsområde, med særlig henvisning til følgende rettsakter:

- Artikkel 92, 93, 98 og 102 EØS;

- vedlegg II, kapittel XV (Farlige stoffer), særlig bestemmelsen under punkt 1 vedrørende unntak fra fellesskapslovgivningen knyttet til klassifisering og merking;

- felleserklæring vedtatt på EØS-komiteens møte 22 juni 1995 om EØS-avtalens vedlegg II kapittel XV, om bestemmelser om ny gjennomgåelse på området farlige stoffer,[1] særlig tillegg II, som gir visse unntak for Norge (heretter "felleserklæringen av 1995" eller ”1995-erklæringen”); og,

[*] Endring i avsnitt 66.

[1] EFT 1996 C 6, s.7.

- Joint Statement by the EEA Joint Committee adopted on 26 March 1999, concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous substances,[2] in particular the Annex to that Joint Statement, setting up certain derogations concerning Norway, (hereinafter, the "Joint Statement of 1999" or the "1999 Joint Statement").

I. Introduction

1. By a reference dated 22 August 2001, registered at the Court on 31 August 2001, the Oslo byrett made a Request for an Advisory Opinion in a case pending before it between CIBA Speciality Chemicals Water Treatment Ltd and Others (hereinafter the "Plaintiffs") and the Norwegian State, represented by the Ministry of Local Government and Regional Development (hereinafter the "Defendant").

2. The dispute before the national court involves the issue of whether the EEA Agreement allows the Defendant to require the Plaintiffs to label polyacrylamide as carcinogenic when the content of the residual substance acrylamide exceeds 0.01% by weight. The limit in the rest of the European Economic Area is 0.1% by weight.

3. The Court has on a prior occasion received a request for an advisory opinion in the same case. This was done by reference dated 22 February 2000, registered at the EFTA Court on 25 February of the same year as Case E-2/00, *Allied Colloids* v *The Government of Norway*, judgment of 14 July 2000, not yet reported (hereinafter "*Allied Colloids*"). That request concerned, *inter alia*, the 1995 and 1999 Joint Statements. This will be further described in Chapter II of this Report. Allied Colloids have now been succeeded by CIBA Speciality Chemicals Water Treatment Ltd.

II. Facts and procedure

4. The factual and procedural background of the case before the Oslo byrett is sufficiently described in the Report for the Hearing in *Allied Colloids* and will only be repeated here to the extent necessary for the purpose of this case.

5. In its reference in *Allied Colloids* the Oslo byrett referred the following question to the EFTA Court:

> *Does the Joint Statement adopted at the meeting of the EEA Joint Committee of 22 June 1995 concerning Annex II Chapter XV, Annex II with subsequent*

[2] OJ 1999 C 185, p. 6.

- felleserklæring vedtatt på EØS-komiteens møte 26 mars 1999, om EØS-avtalens vedlegg II kapittel XV, om bestemmelser om ny gjennomgåelse på området farlige stoffer,[2] særlig tillegget til erklæringen, som gir visse unntak for Norge (heretter "felleserklæringen av 1999" eller "1999-erklæringen").

I. Innledning

1. Ved en beslutning datert 22 august 2001, mottatt ved EFTA-domstolen den 31 august 2001, anmodet Oslo byrett om en rådgivende uttalelse i en sak innbrakt for denne mellom CIBA Speciality Chemicals Water Treatment Ltd med flere (heretter "saksøkerne") og Den norske stat, ved Kommunal- og regionaldepartementet (heretter "saksøkte").

2. Saken for den nasjonale domstolen gjelder spørsmålet om EØS-avtalen tillater saksøkte å stille krav til saksøkerne om å merke polyakrylamid som kreftfremkallende når innholdet av reststoffet akrylamid overstiger 0,01 vektprosent. Grensen i resten av Det europeiske økonomiske samarbeidsområde er 0,1 vektprosent.

3. EFTA-domstolen har ved en tidligere anledning mottatt en anmodning om en rådgivende uttalelse i samme sak. Dette ble gjort ved henvisning av 22 februar 2000, registrert ved EFTA-domstolen 25 februar samme år som sak E-2/00 *Allied Colloids,* dom av 14 juli 2000, foreløpig ikke publisert i EFTA Court Report (heretter *"Allied Colloids").* Denne anmodningen gjaldt, blant annet, felleserklæringene av 1995 og 1999, og vil bli nærmere gjennomgått i kapittel II av denne rapporten. Allied Colloids er siden blitt etterfulgt av CIBA Speciality Chemicals Water Treatment Ltd.

II. Faktum og prosedyre

4. Faktum og bakgrunnen for saken for Oslo byrett er tilstrekkelig beskrevet i rettsmøterapporten i *Allied Colloids*, og vil bare bli gjentatt her i den utstrekning det er nødvendig for denne saken.

5. I sin anmodning i *Allied Colloids* forela Oslo byrett følgende spørsmål for EFTA-domstolen:

> *Gir Felleserklæringen til protokollen for EØS-komiteens møte av 22 juni 1995 om EØS-avtalens vedlegg II kapittel XV, tillegg II med senere endringer, Norge*

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[2] EFT 1999 C 185, s. 6.

amendments, to the EEA Agreement give Norway the power to introduce a labelling requirement for polyacrylamide that contains a concentration of the residual substance acrylamide which is lower than 0.1%, cf. Council Directive 67/548/EEC of 27 June 1967 with subsequent amendments and Council Directive 88/379/EEC of 7 June 1988, with subsequent amendments?

6. The EFTA Court delivered its judgment on 14 July 2000. The operative part of the judgment reads as follows:

Annex II to the Joint Statement adopted at the meeting of the EEA Joint Committee on 22 June 1995 concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous substances, must be interpreted as not giving Norway the power to require polyacrylamide to be labelled as carcinogenic if it contains acrylamide as a residual substance in a concentration of less than 0.1% by total volume.

The Annex to the Joint Statement adopted at the meeting of the EEA Joint Committee on 26 March 1999 concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous substances, must be interpreted as giving Norway the power to require polyacrylamide to be labelled as carcinogenic if it contains acrylamide as a residual substance in a concentration of equal to or greater than 0.01% by total volume.

7. In the subsequent proceedings before the Oslo byrett, the Plaintiffs have argued that the EFTA Court's judgment regarding the interpretation of the 1999 Joint Statement gives rise to a supplementary question to clarify the legal basis for that Statement. This is considered relevant to the main proceedings since the Plaintiffs have pleaded that the EEA Joint Committee lacked the authority to adopt for Norway an alleged broadening of the derogations originally provided for in the 1995 Joint Statement.

8. The Plaintiffs submit, *inter alia*, that in the judgment in *Allied Colloids*, the EFTA Court does not address the issue of the authority of the EEA Joint Committee to adopt the derogations provided for in the 1999 Joint Statement. They furthermore challenge the authority of the EEA Joint Committee to permit these derogations.

9. Against this background, the Oslo byrett decided to submit a Request for an Advisory Opinion to the EFTA Court.

III. Legal background

10. The legal background for *Allied Colloids* has been detailed in the Report for the Hearing in *Allied Colloids* and in the judgment of the Court of 14 July 2000. It is not necessary to repeat this here. The details supplied here relate only to what is considered relevant in connection with the supplementary question

adgang til å innføre et merkekrav for polyakrylamid som inneholder en konsentrasjon av reststoffet akrylamid som er lavere enn 0,1%, jfr Rådsdirektiv 67/548/EØF av 27 juni 1967 med senere endringer og Rådsdirektiv 88/379/EØF av 7 juni 1988 med senere endringer?

6. EFTA-domstolen avsa sin dom den 14 juli 2000. Den operative delen av dommen lyder som følger:

Tillegg II til felleserklæringen vedtatt på EØS komiteens møte 22 juni 1995 om EØS-avtalens vedlegg II kapittel XV, om bestemmelser om ny gjennomgåelse på området farlige stoffer, må tolkes slik at den ikke gir Norge adgang til å kreve merking av polyakrylamid som kreftfremkallende hvis det inneholder akrylamid som reststoff i en konsentrasjon som er lavere enn 0,1% av totalvolumet.

Tillegg til felleserklæringen vedtatt på EØS komiteens møte 26 mars 1999 om EØS-avtalens vedlegg II kapittel XV, om bestemmelser om ny vurdering på området farlige stoffer må tolkes slik at den gir Norge adgang til å kreve merking av polyakrylamid som kreftfremkallende hvis det inneholder akrylamid som reststoff i en konsentrasjon som er lik eller større enn 0,01% av totalvolumet.

7. I den påfølgende saksbehandlingen for Oslo byrett har saksøkerne anført at EFTA-domstolens dom vedrørende tolkningen av felleserklæringen av 1999 gjør det nødvendig å stille supplerende spørsmål for å klargjøre det rettslige grunnlaget for den nevnte erklæringen. Dette anses relevant for behandlingen av saken slik den står for byretten, siden saksøkerne har anført at EØS-komiteen manglet kompetanse til å vedta det de hevder innebærer en utvidelse av de unntakene Norge opprinnelig ble gitt ved felleserklæringen av 1995.

8. Saksøkerne anfører blant annet at EFTA-domstolen, i sin avgjørelse i *Allied Colloids*, ikke behandler spørsmålet om EØS-komiteens kompetanse til å vedta de unntakene 1999-erklæringen oppstiller. Videre bestrider de EØS-komiteens kompetanse til å tillate disse unntakene.

9. På denne bakgrunn besluttet Oslo byrett å anmode om en rådgivende uttalelse fra EFTA-domstolen.

III. Rettslig bakgrunn

10. Rettsmøterapporten i *Allied Colloids* og EFTA-domstolens avgjørelse av 14 juli 2000 gir en detaljert beskrivelse av sakens rettslige bakgrunn. Det er ikke nødvendig å gjenta dette her. Enkeltheter er her referert bare i den utstrekningen det er ansett relevant i forbindelse med det supplerende spørsmålet som er reist i denne saken med hensyn til EØS-komiteens kompetanse til å vedta 1999-erklæringen.

raised in this case concerning the power of the EEA Joint Committee to adopt the 1999 Statement.

11. The main provisions concerning the EEA Joint Committee are found in Part VII, Section 2 (Articles 92 - 94) EEA and read as follows:

Article 92

1. An EEA Joint Committee is hereby established. It shall ensure the effective implementation and operation of this Agreement. To this end, it shall carry out exchanges of views and information and take decisions in the cases provided for in this Agreement.

2. The Contracting Parties, as to the Community and the EC Member States in their respective fields of competence, shall hold consultations in the EEA Joint Committee on any point of relevance to the Agreement giving rise to a difficulty and raised by one of them.

3. The EEA Joint Committee shall by decision adopt its rules of procedure.

Article 93

1. The EEA Joint Committee shall consist of representatives of the Contracting Parties.

2. The EEA Joint Committee shall take decisions by agreement between the Community, on the one hand, and the EFTA States speaking with one voice, on the other.

Article 94

1. The office of President of the EEA Joint Committee shall be held alternately, for a period of six months, by the representative of the Community, i.e. the EC Commission, and the representative of one of the EFTA States.

2. In order to fulfil its functions, the EEA Joint Committee shall meet, in principle, at least once a month. It shall also meet on the initiative of its President or at the request of one of the Contracting Parties in accordance with its rules of procedure.

3. The EEA Joint Committee may decide to establish any subcommittee or working group to assist it in carrying out its tasks. The EEA Joint Committee shall in its rules of procedure lay down the composition and mode of operation of such subcommittees and working groups. Their tasks shall be determined by the EEA Joint Committee in each individual case.

4. The EEA Joint Committee shall issue an annual report on the functioning and the development of this Agreement.

12. Article 98 EEA reads as follows:

11. De sentrale bestemmelsene vedrørende EØS-komiteen står i EØS-avtalens del VII, avsnitt 2 (artikkel 92 – 94), og lyder som følger:

Artikkel 92

1. Det skal opprettes en EØS-komité. Den skal sikre en effektiv gjennomføring av denne avtale og se til at avtalen virker. Den skal for dette formål utveksle synspunkter og opplysninger og treffe beslutninger i saker i henhold til avtalen.

2. Avtalepartene - med hensyn til Fellesskapet og EFs medlemsstater, hver innen sitt myndighetsområde - skal holde rådslagninger i EØS-komiteen om alle saker av betydning for avtalen som forårsaker vanskeligheter, og som bringes opp av en av dem.

3. EØS-komiteen skal ved beslutning vedta sin forretningsorden.

Artikkel 93

1. The EEA Joint Committee shall consist of representatives of the Contracting Parties.

2. EØS-komiteens beslutninger skal treffes ved enighet mellom Fellesskapet på den ene side og EFTA-statene, som opptrer samstemt, på den annen side.

Artikkel 94

1. Representanten for Fellesskapet, dvs. EF-kommisjonen, og representanten for en av EFTA-statene skal etter tur være formann i EØS-komiteen i seks måneder.

2. For å oppfylle sine oppgaver skal EØS-komiteen som hovedregel møtes minst en gang i måneden. Videre skal den møtes på formannens initiativ eller etter anmodning fra en av avtalepartene i samsvar med forretningsordenen.

3. EØS-komiteen kan beslutte å nedsette underkomitéer eller arbeidsgrupper til å bistå den i å utføre sine oppgaver. EØS-komiteen skal i sin forretningsorden fastlegge sammensetningen og arbeidsmåten for underkomiteene og arbeidsgruppene. Deres oppgaver skal bestemmes av EØS-komiteen i hvert enkelt tilfelle.

4. EØS-komiteen skal utstede en årsberetning om hvordan avtalen virker og utvikler seg.

12. Artikkel 98 EØS lyder som følger:

The Annexes to this Agreement and Protocols 1 to 7, 9 to 11, 19 to 27, 30 to 32, 37, 39, 41 and 47, as appropriate, may be amended by a decision of the EEA Joint Committee in accordance with Articles 93 (2), 99, 100, 102 and 103.

13. Article 102 EEA reads as follows:

1. In order to guarantee the legal security and the homogeneity of the EEA, the EEA Joint Committee shall take a decision concerning an amendment of an Annex to this Agreement as closely as possible to the adoption by the Community of the corresponding new Community legislation with a view to permitting a simultaneous application of the latter as well as of the amendments of the Annexes to the Agreement. To this end, the Community shall, whenever adopting a legislative act on an issue which is governed by this Agreement, as soon as possible inform the other Contracting Parties in the EEA Joint Committee.

2. The part of an Annex to this Agreement which would be directly affected by the new legislation is assessed in the EEA Joint Committee.

3. The Contracting Parties shall make all efforts to arrive at an agreement on matters relevant to this Agreement.

The EEA Joint Committee shall, in particular, make every effort to find a mutually acceptable solution where a serious problem arises in any area which, in the EFTA States, falls within the competence of the legislator.

4. If, notwithstanding the application of the preceding paragraph, an agreement on an amendment of an Annex to this Agreement cannot be reached, the EEA Joint Committee shall examine all further possibilities to maintain the good functioning of this Agreement and take any decision necessary to this effect, including the possibility to take notice of the equivalence of legislation. Such a decision shall be taken at the latest at the expiry of a period of six months from the date of referral to the EEA Joint Committee or, if that date is later, on the date of entry into force of the corresponding Community legislation.

5. If, at the end of the time limit set out in paragraph 4, the EEA Joint Committee has not taken a decision on an amendment of an Annex to this Agreement, the affected part thereof, as determined in accordance with paragraph 2, is regarded as provisionally suspended, subject to a decision to the contrary by the EEA Joint Committee. Such a suspension shall take effect six months after the end of the period referred to in paragraph 4, but in no event earlier than the date on which the corresponding EC act is implemented in the Community. The EEA Joint Committee shall pursue its efforts to agree on a mutually acceptable solution in order for the suspension to be terminated as soon as possible.

6. The practical consequences of the suspension referred to in paragraph 5 shall be discussed in the EEA Joint Committee. The rights and obligations which individuals and economic operators have already acquired under this

Vedleggene til denne avtale og protokoll 1 til 7, 9 til 11, 19 til 27, 30 til 32, 37, 39, 41 og 47 kan endres ved beslutning av EØS-komiteen i samsvar med artikkel 93 nr. 2, 99, 100, 102 og 103.

13. Artikkel 102 EØS lyder som følger:

1. For å sikre rettssikkerhet og ensartethet innen EØS skal EØS-komiteen treffe beslutning om endring i et vedlegg til denne avtale så nær som mulig i tid etter at Fellesskapet har vedtatt tilsvarende nytt regelverk, med sikte på å gjøre det mulig med samtidig iverksettelse av det nye fellesskapsregelverk og endringene i vedleggene til denne avtale. For dette formål skal Fellesskapet så snart som mulig underrette de andre avtaleparter gjennom EØS-komiteen når det vedtar regelverk på et saksfelt som omfattes av denne avtale.

2. Det skal vurderes i EØS-komiteen hvilken del av et vedlegg til denne avtale som ville bli direkte berørt av det nye regelverk.

3. Avtalepartene skal bestrebe seg på å komme til enighet i saker som er relevante for denne avtale.

EØS-komiteen skal særlig bestrebe seg på å finne frem til en gjensidig godtagbar løsning dersom det oppstår et alvorlig problem på et område som i EFTA-statene hører inn under den lovgivende myndighets kompetanse.

4. Dersom EØS-komiteen, selv etter anvendelse av nr. 3, ikke kan komme til enighet om en endring i et vedlegg, skal den undersøke alle andre muligheter for at denne avtale fortsatt skal kunne virke tilfredsstillende, og treffe enhver beslutning for dette formål, herunder muligheten for å konstatere at lovgivningen skal anses likeverdig. Denne beslutningen skal tas senest seks måneder etter at saken er forelagt EØS-komiteen, eller den dag det tilsvarende fellesskapsregelverk trer i kraft dersom denne dag er senere.

5. Dersom EØS-komiteen ved utløpet av fristen etter nr. 4 ikke har tatt noen beslutning om å endre et vedlegg til denne avtale, skal den berørte del av vedlegget, slik det er fastslått i samsvar med nr. 2, betraktes som midlertidig satt ut av kraft, med mindre EØS-komiteen bestemmer det motsatte. Et slikt midlertidig opphør skal få virkning seks måneder etter utløpet av fristen etter nr. 4, men under ingen omstendigheter tidligere enn den dag det tilsvarende fellesskapsregelverk er gjennomført i Fellesskapet. EØS-komiteen skal fortsette sine bestrebelser på å komme til enighet om en gjensidig godtagbar løsning slik at opphøret kan avbrytes så snart som mulig.

6. De praktiske følger av opphøret etter nr. 5 skal drøftes i EØS-komiteen. Rettigheter og forpliktelser som personer og markedsdeltagere allerede har ervervet i henhold til denne avtale, skal fortsatt bestå. Avtalepartene skal

Agreement shall remain. The Contracting Parties shall, as appropriate, decide on the adjustments necessary due to the suspension.

14. The relevant provision of the EEA Agreement in Annex II Chapter XV Point 1 states *inter alia*:

The Contracting Parties agree on the objective that the provisions of the Community acts on dangerous substances and preparations should apply by 1 January 1995. (…) If an EFTA State concludes that it will need any derogation from the Community acts relating to classification and labelling, the latter shall not apply to it unless the EEA Joint Committee agrees on another solution.

15. The relevant part of the 1995 Joint Statement reads as follows:

Joint Statement concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous substances.

Point 1: Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ No L 196, 16. 8. 1967, p. 1); and

Point 10: Council Directive 88/379/EEC of 7 June 1988, on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations (OJ No L 187, 16. 7. 1988, p. 14)

The adaptations to these two acts in the EEA Agreement permit an EFTA State to conclude, as part of the review which took place in 1994, that it will need derogation from the Community acts relating to classification and labelling. If this is the case then the acts will not apply to it.

...

On the basis of the review which has taken place, Norway has concluded that it accepts the existing Community acquis, with effect from 1 July 1995, but with derogations in specific areas. These derogations are listed in Appendix II.

The Contracting Parties take note of these conclusions and agree on the objective that the abovementioned Community acts should apply fully by 1 January 1999. A new review of the situation will take place during 1998. If an EFTA State concludes that it will still need any derogation from the specific area as set out in its Appendix, the provisions shall not apply to it unless the EEA Joint Committee agrees on another solution.

If the Community acquis in this matter should be further amended or otherwise developed before 1 January 1999, the Contacting Parties shall make every effort to find appropriate solutions in order to integrate such acquis into the EEA

avgjøre de justeringer som måtte være nødvendige som følge av opphøret.

14. I de relevante bestemmelsene i EØS-avtalens vedlegg II kapittel XV punkt 1 heter det blant annet:

Avtalepartene er enige om den målsetting at bestemmelsene i fellesskapsrettsaktene om farlige stoffer og produkter skal få anvendelse innen 1. januar 1995. (…) Dersom en EFTA-stat mener at den vil ha behov for unntak fra fellesskapsrettsaktene om klassifisering og merking, skal rettsaktene ikke få anvendelse for denne staten med mindre EØS-komiteen kommer frem til en annen løsning.

15. Den relevante teksten av 1995-erklæringen lyder som følger:

Felleserklæring vedrørende EØS-avtalens vedlegg II, kapittel XV, om bestemmelser om ny gjennomgåelse på området farlige stoffer.

Nr. 1: Rådsdirektiv 67/548/EØF av 27 juni 1967 om tilnærming av lover og forskrifter om klassifisering, emballering og merking av farlige stoffer (EFT nr. L 196,16.8.1967, s. 1); og

Nr. 10: Rådsdirektiv 88/379/EØF av 7 juni 1988 om tilnærming av medlemslandenes lover og forskrifter om klassifisering, emballering og merking av farlige preparater (EFT nr. L 187, 16.7.1988, s. 14).

I tilpasningene til de to rettsaktene i EØS-avtalen er det fastsatt at en EFTA-stat, i forbindelse med gjennomgangen som fant sted i 1994, kan komme til at den vil ha behov for unntak fra fellesskapsrettsaktene om klassifisering og merking. Dersom dette er tilfellet, får rettsaktene ikke anvendelse for denne EFTA-staten.

...

Norge har på grunnlag av denne gjennomgåelsen besluttet å godta det eksisterende regelverk i Fellesskapet med virkning fra 1 juli 1995, men med krav om unntak på bestemte områder. Unntakene det gjelder er oppført i tillegg II.

Avtalepartene merker seg dette og slutter seg til siktemålet om at ovennevnte fellesskapsrettsakter bør få full anvendelse fra 1 januar 1999. En ny gjennomgåelse av situasjonen vil finne sted i løpet av 1998. Dersom en EFTA-stat kommer til at den fortsatt vil ha behov for unntak på bestemte områder omhandlet i dens respektive tillegg, får bestemmelsene det gjelder ikke anvendelse for denne EFTA-staten, med mindre EØS-komiteen kommer fram til en annen løsning.

Dersom Fellesskapets regelverk på dette området blir ytterligere endret eller utvidet før 1 januar 1999, skal avtalepartene gjøre sitt ytterste for å finne passende løsninger med sikte på å innlemme dette regelverket i EØS-avtalen. Framgangsmåten fastsatt i avtalens 97 til 104 får anvendelse.

Agreement. The procedures laid down in Articles 97 to 104 of the Agreement shall apply.

16. The Joint Statement of 1999 contains similar provisions. The amended paragraphs read as follows:

....

On the basis of the review which has taken place, Norway has concluded that it accepts the existing Community acquis, with effect from 1 January 1999, but with derogations in specific areas. These derogations are listed in the Annex.

The Contracting Parties take note of these conclusions and agree on the objective that the abovementioned Community acts should apply fully by 1 January 2001. A new review of the situation will take place during 2000. If an EFTA State concludes that it will still need any derogation from the specific area as set out in its Appendix, the provisions shall not apply to it unless the EEA Joint Committee agrees on another solution.

It the Community acquis in this matter should be further amended or otherwise developed before 1 January 2001, the Contacting Parties shall make every effort to find appropriate solutions in order to integrate such acquis into the EEA Agreement. The procedures laid down in Articles 97 to 104 of the Agreement shall apply.

IV. Question

17. The following question was submitted to the EFTA Court.

Is the EEA Joint Committee after the adoption of the Joint Statement of 22 June 1995, empowered to decide that Norway may adopt derogations from existing Community acquis, such as the derogations contained in the Joint Statement of 26 March 1999 of the EEA Committee as interpreted by the EFTA Court in *Allied Colloids*?

V. Written Observations

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

– CIBA Speciality Chemicals Water Treatment Ltd and Others, represented by Counsel Wilhelm Matheson, Wiersholm, Mellbye & Bech;

– the Defendant, The Norwegian State, represented by Thomas Nordby, advocate, Office of the Attorney General (Civil Affairs);

16. Felleserklæringen av 1999 inneholder lignende bestemmelser. De endrede bestemmelsene lyder som følger:

> ....
>
> *Norge har på grunnlag av denne gjennomgåelsen besluttet å godta det eksisterende regelverk i Fellesskapet med virkning fra 01.01.99, men med krav om unntak på bestemte områder. Unntakene det gjelder er oppført i vedlegget.*
>
> *Avtalepartene merker seg dette og slutter seg til siktemålet om at ovennevnte fellesskapsrettsakter bør få full anvendelse fra 01.01.01. En ny gjennomgåelse av situasjonen vil finne sted i løpet av 2000. Dersom en EFTA-stat kommer til at den fortsatt vil ha behov for unntak på bestemte områder omhandlet i dens respektive tillegg, får bestemmelsene det gjelder ikke anvendelse for denne EFTA-staten, med mindre EØS-komiteen kommer fram til en annen løsning.*
>
> *Dersom Fellesskapets regelverk på dette området blir ytterligere endret eller utvidet før 1 januar 2001, skal avtalepartene gjøre sitt ytterste for å finne passende løsninger med sikte på å innlemme dette regelverket i EØS-avtalen. Framgangsmåten fastsatt i avtalens 97 til 104 får anvendelse.*

IV. Spørsmål

17. Følgende spørsmål ble forelagt EFTA-domstolen:

> **Har EØS-komiteen, etter vedtakelsen av felleserklæringen av 22 juni 1995, kompetanse til å beslutte at Norge kan gjøre unntak fra gjeldende fellesskapslovgivning, slik som unntaket gitt ved EØS-komiteens felleserklæring, av 26 mars 1999, slik dette er fortolket av EFTA-domstolen i *Allied Colloids?***

V. Skriftlige saksfremstillinger

18. I medhold av Vedtektene for EFTA-domstolen artikkel 20 og Rettergangsordningen artikkel 97, er skriftlige saksfremstillinger mottatt fra:

– Saksøkerne, CIBA Speciality Chemicals Water Treatment Ltd med flere, representert ved advokat Wilhelm Matheson, Advokatfirmaet Wiersholm, Mellbye & Bech;

– saksøkte, Den norske stat, representert ved advokat Thomas Nordby, Regjeringsadvokatens kontor;

– the Government of Iceland, represented by Magnús K. Hannesson, Legal Adviser, Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Peter Dyrberg, Director of its Legal and Executive Affairs, acting as Agent, assisted by Ms. Bjarnveig Eiríksdóttir and Per Andreas Bjørgan, respectively Senior Legal Officer and Legal Officer in the same department; and,

– the Commission of the European Communities, represented by John Forman, Legal Adviser and acting as Agent.

CIBA Speciality Chemicals and Others

19. The Plaintiffs emphasise the EFTA Court's previous finding in *Allied Colloids*, that the 1999 Joint Statement, by its wording, is broader in scope than the former derogation provided for in the 1995 Joint Statement. This, they argue, means, that the 1999 Joint Statement contained a new legal rule and thus altered the level of integration provided for by the 1995 Joint Statement. It is further submitted that the EEA Joint Committee was legally barred from adopting broader exemptions than those adopted in 1995. It is also submitted that the EFTA Court does not appear to have considered the question of lack of authority.

20. The Plaintiffs are of the view that neither under the main provisions of the EEA Agreement, nor under Chapter XV of Annex II, nor under the Joint Statement of 1995 does the EEA Committee derive the power to alter the legal standing which follows from the Joint Statement of 1995 and to introduce the broadening inherent in the interpretation of the wording of the Joint Statement of 1999.

21. The Plaintiffs argue that the authority of the EEA Joint Committee provided for in Articles 98 and 102 EEA must be interpreted narrowly. It is submitted that it follows clearly from said Articles (read in conjunction with the spirit of the whole of Part VII of the EEA Agreement) that said procedure only applies to cases concerning implementation of and adaptation to new Community legislation. The EEA Joint Committee does not have any legislative autonomy outside the scope of Article 102 EEA. Thus, the EEA Joint Committee does not have any authority to create new international law obligations on behalf of the Contracting parties.

22. The Plaintiffs concluded that the EEA Joint Committee, in its 1999 Joint Statement, by broadening the scope of a previous derogation without any corresponding new Community legislation, reversed already integrated Community legislation. This is not covered by the scope of the simplified procedure. It must therefore follow that the Committee did not have the power to act as it had done.

– Den islandske regjering, representert ved Magnús K. Hannesson, juridisk rådgiver, Utenriksdepartementet, som partsrepresentant;

– EFTAs overvåkningsorgan, representert ved Peter Dyrberg, Juridisk direktør, avdeling for juridiske saker og eksekutivsaker, som partsrepresentant, assistert av Bjarnveig Eiríksdóttir og Per Andreas Bjørgan, henholdsvis senior saksbehandler og saksbehandler ved samme avdeling; og,

– Kommisjonen for De europeiske fellesskap, representert ved John Forman, juridisk rådgiver, som partsrepresentant.

CIBA Speciality Chemicals med flere

19. Saksøkerne legger vekt på at EFTA-domstolen i sin tidligere avgjørelse i *Allied Colloids*, kom til at felleserklæringen av 1999, etter sin ordlyd, er mer vidtfavnende enn det tidligere unntaket gitt ved felleserklæringen av 1995. Dette innebærer at 1999-erklæringen inneholdt en ny rettsregel, og således endret graden av integrasjon fastlagt ved 1995-erklæringen. Det er også anført at EØS-komiteen ikke hadde hjemmel til å vedta videre unntak enn dem som ble vedtatt i 1995. Det anføres også at EFTA-domstolen ikke synes å ha vurdert spørsmålet om manglende kompetanse.

20. Saksøkerne er av den oppfatningen at det ikke kan utledes verken av hovedbestemmelsene i EØS-avtalen, kapittel XV i det aktuelle vedlegg II, eller felleserklæringen av 1995 at EØS-komiteen har kompetanse til å endre den rettsstillingen som følger av felleserklæringen av 1995 eller innføre en utvidelse basert på en tolkning av felleserklæringens ordlyd.

21. Saksøkerne hevder at fullmakten gitt EØS-komiteen i artikkel 98 og 102 EØS må tolkes snevert. Det er anført at det følger klart av nevnte artikler (lest i sammenheng med resten av EØS-avtalens del VII) at nevnte prosedyre bare gjelder saker vedrørende implementeringen og godkjennelsen av ny fellesskapslovgivning. EØS-komiteen er ikke gitt lovgivningsmyndighet utover det som følger av artikkel 102 EØS. EØS-komiteen har således ikke kompetanse til å skape nye folkerettslige forpliktelser på vegne av de kontraherende parter.

22. Saksøkerne konkluderer med at EØS-komiteen, i sin 1999-erklæring, ved å utvide rekkevidden av et tidligere unntak uten noen tilsvarende fellesskapslovgivning, reverserte allerede integrert lovgivning. Dette er ikke omfattet av rekkevidden for den forenklede prosedyren. Konklusjonen må derfor bli at EØS-komiteen ikke hadde kompetanse til å opptre slik den gjorde.

23. It is further submitted by the Plaintiffs that the lack of authority outlined above is neither repaired by any proxy implied in Chapter XV of Annex II nor implied in the 1995 Joint Statement; both of which reflect the efforts to further integration, not to regress therefrom.

24. The Plaintiffs are of the view that the Annex shows, as does the subsequent 1995 Joint Statement, that the Contracting parties, at the time they concluded the EEA Agreement, agreed to achieve the goal of full application of Community legislation within the relevant area in the course of a short time. It was, however, also agreed that an EFTA State Government might be exempted from the provisions of the Community legislation by way of agreement in the EEA Joint Committee. The Annex provides no grounds to derogate at a later stage from those parts of the regulatory framework that had already been integrated as a part of the EEA Agreement.

25. The Plaintiffs also contend that no authority to broaden the scope of the derogation in the 1995 Joint Statement at a later stage can be based on that Statement. In that Statement it is expressly stated that Norway has accepted the relevant Directives with certain specified derogations. No further derogation can now be adopted.

26. Further, it is evident from the 1995 Joint Statement that the objective was for Community legislation to apply fully within the EEA as from 1 January 1999. Its objective was not to take a step back by broadening the earlier derogations and allowing an additional derogation from a regulatory framework, which had already been integrated. Consequently, there is, in the opinion of the Plaintiffs, no basis in the 1995 Joint Statement for maintaining that the parties have agreed by way of the Joint Statement that by way of subsequent revisions it should be possible to alter the integration of the regulatory framework on which agreement had already been reached.

27. Moreover, the Plaintiffs are of the opinion that the supplementary question is admissible. They dispute the Norwegian State's assertion that the question has already been decided. They argue that the EEA Joint Committee's authority was never an issue during the written proceedings of the earlier case, although the point was raised in support of their interpretation.

28. The Plaintiffs submit that the EFTA Court has, pursuant to Article 34 of the ESA/Court Agreement, the express power to interpret the EEA Agreement, including the provisions regarding the authority of the EEA Joint Committee.

The Norwegian State

29. The Norwegian State's main submission is that the question in the request from the Oslo byrett should be declared inadmissible since it contests the validity

23. Det er videre anført av saksøkerne at den manglende kompetansen omtalt ovenfor ikke er reparert verken ved fullmakt forutsatt i vedlegg II, kapittel XV, eller ved fullmakt forutsatt i felleserklæringen av 1995; begge gjenspeiler forsøk på å øke graden av integrasjon, og ikke å redusere den.

24. Saksøkerne er av den oppfatningen at såvel vedlegget som den etterfølgende 1995-erklæringen viser at avtalepartene, på tidspunktet for EØS-avtalens inngåelse, ble enige om å oppnå målet om fullstendig anvendelse av fellesskapslovgivningen innen det aktuelle området i løpet av kort tid. Det var imidlertid også enighet om at en EFTA-stat kunne unntas fra bestemmelser i fellesskapslovgivningen ved enighet i EØS-komiteen. Vedlegget gir ikke grunnlag for unntak på et senere tidspunkt fra de deler av rammelovgivningen som allerede har blitt integrert som en del av EØS-avtalen.

25. Saksøkerne hevder også at ingen myndighet til å utvide rekkevidden av unntaket i 1995-erklæringen kan baseres på denne erklæringen på et senere tidspunkt. I den erklæringen er det uttrykkelig uttalt at Norge har akseptert de relevante direktivene med visse særlige unntak. Ytterligere unntak kan ikke bli vedtatt senere.

26. Videre følger det klart av 1995-erklæringen at formålet var at fellesskapslovgivningen skulle gjelde fullt ut innen EØS fra og med 1 januar 1999. Dens formål var ikke å ta et skritt tilbake ved å utvide de tidligere unntakene og tillate et ytterligere unntak fra en rammelovgivning som allerede hadde blitt integrert. Følgelig er det, etter saksøkernes oppfatning, ikke grunnlag i 1995-erklæringen for å fastholde at partene gjennom felleserklæringen har blitt enige om at det ved senere endringer skulle være mulig å forandre integreringen av den rammelovgivningen som det allerede var oppnådd enighet om.

27. Saksøkerne er videre av den oppfatningen at det supplerende spørsmålet kan fremmes for EFTA-domstolen. De bestrider statens påstand om at spørsmålet allerede er avgjort. De hevder at EØS-komiteens kompetanse aldri var tema under den skriftlige saksbehandlingen i den tidligere sak, selv om dette poenget ble anvendt til støtte for deres tolkning.

28. Saksøkerne anfører at det fremgår klart av Overvåknings- og domstolsavtalens artikkel 34 at EFTA-domstolen har kompetanse til å tolke EØS-avtalen, herunder bestemmelsene vedrørende EØS-komiteens myndighet.

Den norske stat

29. Den norske stats prinsipale anførsel er at spørsmålet i Oslo byretts anmodning skal avvises fordi det bestrider gyldigheten av dommen i *Allied*

of the judgment in *Allied Colloids*. If the Court concludes that the question is admissible, the Norwegian State is of the opinion that the answer may be clearly deduced from existing case law and thus that the Court should give its decision by reasoned order in which reference is made to its previous judgment, cf. Article 97(3) of the Rules of Procedure.

30. The Norwegian State submits that, although it should be possible to request two or more advisory opinions in the same case before the national court, it is not permissible to use this measure to contest the validity of the previously delivered judgment (see *inter alia*, Case 69/85 *Wünsche* v *Germany*, [1986] ECR 947, paragraph 15).

31. The Norwegian State contends that it follows from the reasoning of the Court of Justice of the European Communities that a supplementary request may be justified (1) when the national court encounters difficulties in understanding or applying the judgment, (2) when it refers a fresh question of law to the court, or (3) when it submits new considerations which might lead the court to give a different answer to a question submitted earlier. In the opinion of the Norwegian State, none of these alternatives apply to the case at hand.

32. As to the first alternative, the Norwegian State points out that there is no dispute that, according to the earlier judgment in *Allied Colloids*, Norway has the power to impose the contested labelling requirements.

33. As to the second alternative, the question in the case at hand can not be considered a fresh question of law since all the relevant law, both national and EEA law, was presented to the Court in the earlier case.

34. As to the third alternative, the Norwegian State points out that the scope of the authority of the EEA Joint Committee was undoubtedly discussed during the oral hearing in the previous case. The judgment in that case must therefore be interpreted as meaning that the Court assumed, correctly, that the EEA Joint Committee has the necessary authority. Thus, there are no new considerations in this case that could lead the Court to conclude that the EEA Joint Committee did not have the authority to adopt the 1999 Joint Statement.

35. Furthermore, such a conclusion would, in the view of the Norwegian State, in fact set aside the judgment handed down by the Court in *Allied Colloids*. That being the case, the Norwegian State submits that the request should be declared inadmissible.

36. If the Court concludes that the request is admissible, it is submitted that the Court should give its decision by reasoned order in which reference is made to its previous judgment, in accordance with the procedure laid down in Article 97(3) of the Rules of Procedure, since it is manifestly identical to a question on which the Court has already ruled or given an opinion. A reference is made to the judgment of the Court of Justice of the European Communities in Case C-307/99

Colloids. Dersom EFTA-domstolen kommer til at spørsmålet kan fremmes, er staten av den oppfatningen at svaret på spørsmålet kan utledes klart fra tidligere rettspraksis, og at EFTA-domstolen således kan treffe sin avgjørelse ved begrunnet beslutning der den viser til sin tidligere avgjørelse, jf Rettergangsordningen artikkel 97(3).

30. Staten hevder at, selv om det skulle være mulig for en nasjonal domstol å anmode om to eller flere rådgivende uttalelser i den samme saken, er det ikke tillatt å bruke dette middelet til å bestride gyldigheten av den tidligere avsagte dommen (se for eksempel sak 69/85 *Wünsche Handelsgesellschaft* v *Germany* [1986] ECR 947, avsnitt 15).

31. Staten anfører at det følger av EF-domstolens rettspraksis at det kan være grunnlag for en supplerende anmodning (1) når den nasjonale domstolen støter på vanskeligheter ved forståelsen eller anvendelsen av dommen, (2) når den forelegger et nytt rettsspørsmål til EFTA-domstolen, eller (3) når den fremlegger nye opplysninger som kan lede EFTA-domstolen til å avgi et annet svar på et tidligere forelagt spørsmål. Etter statens oppfatning er ingen av disse alternativene aktuelle i den foreliggende saken.

32. Når det gjelder det første alternativet, fremhever staten at det ikke er bestridt at staten, i henhold til den tidligere avgjørelsen i *Allied Colloids*, har kompetanse til å pålegge de omstridte merkekravene.

33. Når det gjelder det andre alternativet, kan spørsmålet i den foreliggende saken ikke anses som et nytt rettsspørsmål siden all relevant lovgivning, såvel nasjonal rett som EØS-rett, ble presentert for EFTA-domstolen under den tidligere saken.

34. Når det gjelder det tredje alternativet, påpeker staten at grensene for EØS-komiteens kompetanse utvilsomt ble diskutert under den muntlige høringen i den tidligere saken. Avgjørelsen i den saken må derfor tolkes slik at EFTA-domstolen korrekt forutsatte at EØS-komiteen hadde den nødvendige kompetansen. Det er således ingen nye hensyn i denne saken som vil kunne lede EFTA-domstolen til den konklusjonen at EØS-komiteen ikke hadde kompetanse til å vedta 1999-erklæringen.

35. En slik konklusjon vil dessuten, etter statens oppfatning, i realiteten sette EFTA-domstolens avgjørelse i *Allied Colloids* til side. Staten anfører derfor at anmodningen må avvises.

36. Dersom EFTA-domstolen kommer til at anmodningen kan fremmes, er det anført at EFTA-domstolen bør treffe sin avgjørelse ved begrunnet beslutning der den viser til sin tidligere avgjørelse, i henhold til prosedyren som er foreskrevet i Rettergangsordningen artikkel 97(3), siden den er åpenbart identisk med et spørsmål som EFTA-domstolen tidligere har avgjort. Det vises til EF-domstolens avgjørelse i sak C-307/99 *OGT Fruchthandelgesellschaft* [2001] ECR I-3159

OGT Fruchthandelgesellschaft [2001] ECR I-3159 concerning an interpretation of Article 104(3) of the Rules of Procedure for that Court, where it held that a question is manifestly identical when a question can be clearly deduced from existing case law. In such cases it is appropriate to give a decision by reasoned order.

37. The Norwegian State submits that the *de facto* content of the question in *Allied Colloids* is such that the question in the present case can be clearly deduced therefrom.

38. If the main submission is rejected, the Norwegian State's view is that the EEA Joint Committee was authorised to adopt the Joint Statement of 1999. Furthermore, the Norwegian State submits that the EFTA Court lacks the power to set aside the whole or part of the EEA Joint Committee's decision.

39. The Norwegian State contends that it is of no consequence to the case whether the 1999 Joint Statement represents a broadening of the derogations in the 1995 Joint Statement or a clarification thereof. The adoption of the 1999 Joint Statement is within the competence of the EEA Joint Committee.

40. The Norwegian State refers to Article 92 EEA, from which it follows that the EEA Joint Committee has the authority to make legally binding decisions in the areas covered by the EEA Agreement. A decision on a special derogation in connection with the incorporation of a legislative act into the EEA Agreement is clearly within the competence of the EEA Joint Committee.

41. The Norwegian State also refers to Article 98 EEA and submits that the EEA Joint Committee is authorised under international law to amend the annexes to the EEA Agreement including, *inter alia*, a general authority to lay down new EEA provisions within the framework of Article 98 EEA. It is not limited to new legislative acts or purely technical modifications.

42. The Norwegian State also refers to Article 93(2) EEA and submits that it follows from that Article that all decisions taken by the EEA Joint Committee are unanimous. Thus, the Committee is a typical organ of international law, and every new decision made by the Committee creates new obligations under international law for the parties.

43. The Norwegian State refers to Article 102(3) EEA and the Plaintiff's submission that this provision does not introduce the right to reverse the integration already agreed upon unless the conditions for the application of Articles 112 – 113 EEA exist. It argues that on the basis of the wording "agreement on matters relevant" there is no doubt that the Committee was competent to adopt the 1999 Joint Statement. Furthermore, it is argued that the safeguard measures in Articles 112 and 113 EEA are of a completely different nature and do not apply in the case at hand.

vedrørende tolkningen av artikkel 104(3) i EF-domstolens rettergangsordning, der EF-domstolen kom til at et spørsmål er åpenbart identisk når svaret på spørsmålet klart kan utledes av eksisterende rettspraksis. I slike tilfeller er det hensiktsmessig å treffe avgjørelse ved begrunnet beslutning.

37. Staten hevder at det faktiske innholdet i spørsmålet i *Allied Colloids* er slik at svaret i den foreliggende saken kan utledes klart fra svaret i den saken.

38. Hvis den prinsipale påstanden ikke tas til følge, er det statens oppfatning at EØS-komiteen hadde kompetanse til å vedta felleserklæringen av 1999. Videre anfører staten at EFTA-domstolen ikke har kompetanse til å sette til side hele eller deler av EØS-komiteens vedtak.

39. Staten fremholder at det er uten betydning for saken hvorvidt 1999-erklæringen utgjør en utvidelse av unntakene i 1995-erklæringen eller en presisering av disse. Vedtakelsen av 1999-erklæringen er innenfor EØS-komiteens kompetanse.

40. Staten viser til artikkel 92 EØS, hvor det fremgår at EØS-komiteen har kompetanse til å treffe rettslig bindende beslutninger på de områdene som dekkes av EØS-avtalen. En beslutning om et særskilt unntak i forbindelse med at en rettsakt inntas i EØS-avtalen er klart innenfor EØS-komiteens kompetanse.

41. Staten viser også til artikkel 98 EØS og anfører at EØS-komiteen er gitt myndighet etter folkeretten til å endre vedleggene til EØS-avtalen, herunder, blant annet, en generell myndighet til å vedta nye EØS-bestemmelser innenfor de rammene som følger av artikkel 98 EØS. Denne myndigheten er ikke begrenset til nye rettsakter eller rene tekniske endringer.

42. Staten viser også til artikkel 93(2) EØS og hevder at det følger av denne bestemmelsen at alle beslutninger truffet av EØS-komiteen skal være enstemmige. EØS-komiteen er altså et typisk folkerettslig organ, og enhver ny beslutning truffet av komiteen skaper nye folkerettslige forpliktelser for partene.

43. Staten viser til artikkel 102(3) EØS og saksøkernes anførsler om at denne bestemmelsen ikke innfører en rett til å reversere integrasjon som det allerede har vært enighet om, hvis ikke vilkårene for anvendelse av artikkel 112 – 113 EØS er oppfylt. Den hevder at det som følge av ordlyden, ”enighet i saker som er relevante”, er utvilsomt at EØS-komiteen hadde kompetanse til å vedta 1999-erklæringen. Det hevdes videre at beskyttelsestiltakene i artikkel 112 og 113 EØS er av en helt annen art, og ikke kommer til anvendelse i den foreliggende saken.

44. As to the submission that the authority of the EEA Joint Committee only applies to new Community legislation, the Norwegian State submits that the EEA Joint Committee is competent to amend an Annex to the EEA Agreement independently of whether this has been initiated by the EU and independently of whether this broadens or narrows the scope of a prior decision.

45. The Norwegian State also refers to Article 102(4) EEA where its states that if "agreement on an amendment of an Annex [] cannot be reached, the EEA Joint Committee shall examine all further possibilities to maintain the good functioning of this Agreement and take any decision necessary to this effect, including the possibility to take notice of the equivalence of legislation." In the view of the Norwegian State, this clearly shows that the Contracting Parties may agree on something that is different from incorporating new EC acquis.

46. The Norwegian State further argues that neither the Annex nor the 1995 Joint Statement limit the authority of the EEA Joint Committee. The wording of the Annex does not impose a time limit on an EFTA State's right to consider the need for derogations. It only expresses the aim that the legislation should be applied by 1 January 1995. It is furthermore argued that the Joint Statement of 1995 expressly permits derogations, cf. "If an EFTA State concludes that it will still need any derogation from the specific area as set out in its Appendix, the provisions shall not apply to it unless the EEA Joint Committee agrees on another solution."

47. The Norwegian State submits that in any case, the EFTA Court has no power to set aside in whole or in part the decision of the EEA Joint Committee. The Court's tasks are exhaustively listed in Articles 31 – 41 of the ESA/Court Agreement. The power to set aside the decisions of the EEA Joint Committee can not be derived from these provisions.

48. The Norwegian State submits that the request should be found inadmissible. If it is found admissible, the Norwegian State is of the opinion that the Court should give its decision by a reasoned order in which reference is made to its previous judgment.

49. If the Court is of the opinion that the competence of the EEA Joint Committee is to be considered, the question should be answered as follows:

> *"The EEA Joint Committee was empowered to adopt the Joint Statement of 26 March 1999."*

The Government of Iceland

50. The Government of Iceland supports the submissions made by the Norwegian State to the effect that the EFTA Court is in this case asked to reconsider the foundation and validity of its judgment in *Allied Colloids*. Thus,

44. Når det gjelder anførselen om at EØS-komiteens kompetanse bare gjelder ny fellesskapslovgivning, anfører staten at EØS-komiteen har kompetanse til å endre vedleggene til EØS-avtalen uavhengig av om det er EU som har tatt initiativet til endringene, og uavhengig av om endringene utvider eller innsnevrer rekkevidden av en tidligere avgjørelse.

45. Staten viser også til artikkel 102(4) EØS, hvor det heter at dersom EØS-komiteen "ikke kan komme til enighet om en endring i et vedlegg, skal den undersøke alle andre muligheter for at denne avtale fortsatt skal kunne virke tilfredsstillende, og treffe enhver beslutning for dette formål, herunder muligheten for å konstatere at lovgivningen skal anses likeverdig." Etter statens oppfatning viser dette klart at avtalepartene kan bli enige om noe annet enn å innta ny fellesskapslovgivning.

46. Staten hevder videre at verken vedlegget eller 1995-erklæringen begrenser EØS-komiteens myndighet. Vedleggets ordlyd oppstiller ingen tidsfrist for en EFTA-stats rett til å vurdere behovet for unntak. Det uttrykker kun målet om at rettsakten skal gjelde innen 1 januar 1995. Det hevdes dessuten at felleserklæringen av 1995 uttrykkelig tillater unntak, jf "Dersom en EFTA-stat kommer til at den fortsatt vil ha behov for unntak på bestemte områder omhandlet i dens respektive tillegg, får bestemmelsene det gjelder ikke anvendelse for denne EFTA-staten, med mindre EØS-komiteen kommer fram til en annen løsning".

47. Staten anfører at EFTA-domstolen under enhver omstendighet ikke har kompetanse til å sette en beslutning av EØS-komiteen helt eller delvis til side. EFTA-domstolens oppgaver er uttømmende opplistet i Overvåknings- og domstolsavtalens artikkel 31 – 41. Kompetansen til å sette til side beslutninger av EØS-komiteen kan ikke utledes av disse bestemmelsene.

48. Staten anfører at anmodningen må avvises. Dersom anmodningen behandles, er staten av den oppfatningen at EFTA-domstolen må treffe sin avgjørelse ved begrunnet beslutning der den viser til sin tidligere avgjørelse.

49. Dersom EFTA-domstolen er av den oppfatning at EØS-komiteens kompetanse må vurderes, må spørsmålet besvares som følger:

> *"EØS-komiteen hadde kompetanse til å vedta felleserklæringen av 26 mars 1999."*

Den islandske regjering

50. Den islandske regjering støtter Den norske stats anførsler om at EFTA-domstolen i denne saken er bedt om å revurdere grunnlaget for, og gyldigheten av sin dom i *Allied Colloids*. Anmodningen må således avvises. For det tilfelle at

the request should be declared inadmissible. Further, the Government of Iceland supports the view that, if the request is admitted, the request is manifestly identical to a question on which the Court has already ruled and that the procedure provided for in Article 97(3) of the Rules of Procedure should be applied.

51. As to the authority of the EEA Joint Committee, the Government of Iceland points out that it is envisaged in Article 102 EEA that the EEA Joint Committee might have to reach an agreement in order to adopt new legislation. It is also emphasised that the Committee shall make every effort to find a mutually acceptable solution when a serious problem arises.

52. The Government of Iceland continues by pointing out that an obvious example of reaching an agreement in cases of disunity would be to allow the EFTA States (partial) exception from the material scope of new Community legislation.

53. The EEA Joint Committee has the general task of ensuring effective implementation and operation of the EEA Agreement. Nothing in the wording of the EEA provisions relating to the Committee, limits its authority in matters such as those at issue in the present case.

54. The Government of Iceland concludes that the EEA Joint Committee has the authority to amend its previously adopted legislation since nothing in the text of the EEA Agreement prevents it from doing so. Thus, the EEA Joint Committee had the authority to adopt the 1999 Joint Statement.

55. As to the competence of the EFTA Court, the Government of Iceland fully subscribes to the view and arguments expressed by the Norwegian State, i.e., that the Court does not have the power to set aside all or part of the EEA Joint Committee's decision.

The EFTA Surveillance Authority

56. The EFTA Surveillance Authority refers to Article 92 EEA and submits that the wording of that provision indicates that the EEA Joint Committee has broad authority. Even so, it is not unlimited since the Committee can only exert the authority that has been assigned to it.

57. The EFTA Surveillance Authority also refers to Article 98 EEA. It submits that on the basis of that provision it must be assumed that the EEA Joint Committee is not entitled to amend, for instance Protocols 8 and 33. On the other hand, all the Annexes to the EEA Agreement may be amended by a decision of the EEA Joint Committee.

anmodningen tas til behandling, støtter Den islandske regjering den oppfatningen at anmodningen er klart identisk med et spørsmål som EFTA-domstolen allerede har tatt stilling til, og at prosedyren foreskrevet i Rettergangsordningen artikkel 97(3) må anvendes.

51. Når det gjelder EØS-komiteens kompetanse, gjør Den islandske regjering oppmerksom på at det er forutsatt i artikkel 102 EØS at EØS-komiteen må bestrebe seg på å løse uenighet for å innta nye rettsakter. Det er også fremhevet at komiteen skal bestrebe seg på å finne en gjensidig godtagbar løsning når et alvorlig problem oppstår.

52. Den islandske regjering fremhever videre at et typisk eksempel på å komme til enighet i stridstilfeller, ville være å tillate EFTA-statene (delvis) unntak fra det materielle anvendelsesområdet for ny fellesskapslovgivning.

53. EØS-komiteen har den generelle oppgaven med å sikre effektiv gjennomføring og anvendelse av EØS-avtalen. Ordlyden i EØS-avtalens bestemmelser vedrørende EØS-komiteen begrenser ikke dens myndighet i spørsmål av den art som er til behandling i den foreliggende saken.

54. Den islandske regjering konkluderer med at EØS-komiteen har kompetanse til å endre sin tidligere vedtatte lovgivning siden ingenting i EØS-avtalens tekster er til hinder for dette. EØS-komiteen hadde således myndighet til å vedta 1999-erklæringen.

55. Når det gjelder EFTA-domstolens kompetanse, støtter Den islandske regjering fullt ut den oppfatningen og de argumentene som er fremført av Den norske stat, det vil si at EFTA-domstolen ikke har kompetanse til å sette EØS-komiteens beslutninger helt eller delvis til side.

EFTAs overvåkningsorgan

56. EFTAs overvåkningsorgan viser til artikkel 92 EØS og anfører at bestemmelsens ordlyd indikerer at EØS-komiteen har bred myndighet. Den er likevel ikke ubegrenset siden EØS-komiteen bare kan utøve den myndigheten den har fått seg tildelt.

57. EFTAs overvåkningsorgan viser også til artikkel 98 EØS. Det anfører at det på grunnlag av denne bestemmelsen må antas at EØS-komiteen ikke er berettiget til å endre, for eksempel protokollene 8 og 33. Alle vedleggene til EØS-avtalen kan imidlertid endres ved beslutning i EØS-komiteen.

58. As regards amendments to an Annex, the EFTA Surveillance Authority submits that Article 102 (1) EEA together with Article 98 EEA contain a general mandate for the EEA Joint Committee to amend Annexes in order to make new Community legislation part of the EEA Agreement. While, as a matter of homogeneity and legal security this should be accomplished as closely as possible to the adoption of the legislation in the Community, there are no specific time limits laid down. Nor are there any provisions preventing the Committee from taking possible adaptation measures when adopting a Community act. Such adaptation may even be adopted subsequent to taking over the Community act concerned. In further support of its position, the EFTA Surveillance Authority refers to the practices of the EEA Joint Committee.

59. The EFTA Surveillance Authority contends that against this background, it must be concluded that under the provisions of the EEA Agreement, the EEA Joint Committee enjoys a broad discretion as to how and when it exerts its authority.

60. As to the authority of the EEA Joint Committee in the present case, the EFTA Surveillance Authority refers to the relevant part of Annex II (cited above in paragraph 14). It is pointed out that the foreseen review resulted in the 1995 Joint Statement and subsequently in the 1999 Joint Statement.

61. Nothing in the text of the Annex or of the Statements appears to indicate that the EFTA State concerned should be prevented from claiming a broadening or clarification of earlier derogations as long as this is in line with the objective. Considerations of legal certainty cannot affect this result – any economic operator has to accept the fact that the legislative environment in which it operates may be modified or abolished by the legislator.

62. As to the EFTA Court's jurisdiction, the EFTA Surveillance Authority offers an analysis of the rules concerning the jurisdiction of the Court of Justice of the European Communities and of the case law of that Court in relation to international agreements, with the aim of establishing whether that Court might have jurisdiction to rule on the validity of the decisions of the EEA Joint Committee.

63. It is *inter alia* pointed out that it is established case law[3] that the Court of Justice of the European Communities has jurisdiction under Article 234 EC to interpret acts adopted by bodies set up under such agreements concluded by the Communities. The same applies to so-called mixed agreements, such as the EEA Agreement. Thus, it is submitted by the EFTA Surveillance Authority that the Court of Justice of the European Communities has, without doubt, the power to interpret the decisions of the EEA Joint Committee.

[3] See for instance, Case C-192/89 *Sevince* [1990] ECR I-3461.

58. Når det gjelder endringer av et vedlegg, anfører EFTAs overvåkningsorgan at artikkel 102(1) EØS sammen med artikkel 98 EØS inneholder en generell fullmakt for EØS-komiteen til å endre vedlegg for å gjøre ny fellesskapslovgivning til en del av EØS-avtalen. Selv om dette av hensyn til homogenitet og rettssikkerhet burde foretas så raskt som mulig etter vedtagelsen av lovgivningen i Fellesskapet, er det ikke oppstilt bestemte tidsfrister. Det er heller ingen bestemmelser som hindrer EØS-komiteen i å gjøre tilpasninger ved vedtakelsen av en fellesskapsrettsakt. Slik tilpasning kan til og med vedtas etter at den aktuelle fellesskapsrettsakten er inntatt. Til ytterligere støtte for sitt syn viser EFTAs overvåkningsorgan til EØS-komiteens praksis.

59. EFTAs overvåkningsorgan hevder at det på denne bakgrunn må konkluderes med at EØS-komiteen, i henhold til bestemmelsene i EØS-avtalen, kan utøve et bredt skjønn med hensyn til hvordan og når den utøver sin myndighet.

60. Når det gjelder EØS-komiteens myndighet i den foreliggende saken, viser EFTAs overvåkningsorgan til de relevante deler av vedlegg II (sitert ovenfor i avsnitt 14). Det er påpekt at den der forutsatte gjennomgåelsen resulterte i 1995-erklæringen og senere 1999-erklæringen.

61. Ingenting i vedleggets eller erklæringenes ordlyd synes å indikere at vedkommende EFTA-stat skulle være forhindret fra å kreve en utvidelse eller en presisering av tidligere unntak så lenge dette er i overensstemmelse med formålet. Hensynet til rettssikkerhet kan ikke påvirke dette resultatet – enhver aktør i næringslivet må akseptere det forhold at de juridiske betingelsene de opererer under kan bli endret eller opphevet av lovgiveren.

62. Når det gjelder EFTA-domstolens kompetanse, gir EFTAs overvåkningsorgan en vurdering av reglene om EF-domstolens kompetanse og av denne domstolens rettspraksis med hensyn til internasjonale avtaler, med det formål å fastslå hvorvidt EF-domstolen kan ha kompetanse til å dømme i saker vedrørende gyldigheten av EØS-komiteens beslutninger.

63. Det er blant annet påpekt at det er etablert rettspraksis[3] at EF-domstolen, i henhold til artikkel 234 EF, har kompetanse til å tolke rettsakter vedtatt av organer etablert i henhold til avtaler inngått av De europeiske fellesskap. Det samme gjelder såkalte blandede avtaler, slik som EØS-avtalen. Det er således anført av EFTAs overvåkningsorgan at EF-domstolen utvilsomt har kompetanse til å tolke vedtak truffet av EØS-komiteen.

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[3] Se for eksempel sak C-192/89 *Sevince* [1990] ECR I-3416.

64. As to the question of whether the Court of Justice of the European Communities would have jurisdiction to rule on the validity of international agreements or acts adopted by bodies established by such agreements, there appears to be no relevant case law. The position in legal theory, however, seems to be that the Court of Justice of the European Communities has such jurisdiction.

65. Furthermore, in referring to *France* v *Commission*[4], the EFTA Surveillance Authority submits that this ruling would seem to support the view that in reality the Court seeks to have jurisdiction to review international agreements, while it may formally refrain from pronouncing their invalidity.

66. The EFTA Surveillance Authority submits that if the scheme of *France* v *Commission*, cited above, were to be applied to the scenario where the Court of Justice of the European Communities was confronted with the question as to the validity of a Joint Committee Decision, the outcome could be that the Court, finding that the Decision was not in accordance with the EEA Agreement and that therefore the EEA Joint Committee acted *ultra vires*, could invalidate the implicit decision of the Commission that empowered its officials to participate in the act of making the Decision. The consequence could be that formally the Decision would stand, but it could not be applied within the Community. The EFTA Surveillance Authority refers to this as the "preliminary" approach where the question of the authority of the EEA Joint Committee seems to be preliminary to the question of the authority of the Commission. The EFTA Surveillance Authority extends this reasoning to the case at hand, stating that the authority of the EEA Joint Committee seems to be preliminary to the question of whether the Norwegian authorities were entitled to issue the order attacked by the undertakings in the main proceedings, and arguing that the Norwegian authorities must accept the Decision but may invalidate the Norwegian implementing measures. Moreover, a possible finding by the EFTA Court that the Joint Committee, by adopting a Decision, has acted *ultra vires*, cannot affect the legality of the Community Act, which normally is a part of the Decision, within the Community legal order. Only the Court of Justice of the European Communities can invalidate a Community Act within the Community legal order.

67. The EFTA Surveillance Authority also recalls that in *Foto-Frost* the Court of Justice of the European Communities ruled that a national court that considers setting aside a Community act is obliged to refer the question of validity to the Court.[5] It is alleged that this result was based on the need to ensure uniform application of Community legislation. Likewise, a national court in a Member State that considers setting aside a Joint Committee decision must be obliged to refer the question of the validity of the decision to the Court of Justice.

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[4] Case C-327/91 *France* v *Commission* [1994] ECR I-3641.

[5] Case C-314/85 *Foto-Frost* [1987] ECR 4199.

64. Når det gjelder spørsmålet om hvorvidt EF-domstolen ville ha kompetanse til å dømme i spørsmål vedrørende gyldigheten av internasjonale avtaler eller rettsakter vedtatt av organer opprettet ved slike avtaler, synes det ikke å foreligge noe relevant rettspraksis. Oppfatningen i juridisk teori synes imidlertid å være at EF-domstolen har slik kompetanse.

65. Videre anfører EFTAs overvåkningsorgan, ved henvisning til *France* v *Commission*,[4] at denne dommen ser ut til å støtte det syn at EF-domstolen i virkeligheten anser at den har kompetanse til å vurdere internasjonale avtaler, mens den formelt avstår fra å uttale seg om deres gyldighet.

66. EFTAs overvåkningsorgan anfører at dersom vurderingen i *France v Commission*, nevnt ovenfor, skulle blitt anvendt i en sak hvor EF-domstolen ble stilt overfor spørsmålet om gyldigheten av EØS-komiteens beslutning, ville resultatet bli at domstolen, dersom den kom til at beslutningen ikke var i overensstemmelse med EØS-avtalen, og at EØS-komiteen derfor gikk utover sin myndighet, kunne kjenne ugyldig det underforståtte vedtaket i Kommisjonen for De europeiske fellesskap som bemyndiget dens representanter til å treffe en slik beslutning. Konsekvensen kunne bli at beslutningen formelt ble stående, men at den ikke kunne anvendes innen Fellesskapet. EFTAs overvåkningsorgan viser til at spørsmålet om EØS-komiteens myndighet synes å ha sammenheng med spørsmålet om kommisjonens myndighet. EFTAs overvåkningsorgan overfører dette resonnementet til den foreliggende saken, og anfører at spørsmålet om EØS-komiteens myndighet synes å ha sammenheng med hvorvidt norske myndigheter var berettiget til å utstede pålegget som er angrepet av selskapene i hovedsaken, og argumenterer med at norske myndigheter må akseptere beslutningen, men at de norske gjennomføringstiltakene kan kjennes ugyldig. Videre hevdes det at dersom EFTA-domstolen skulle komme til at EØS-komiteen har gått utover sin myndighet ved vedtakelsen av en beslutning, kan dette ikke få betydning for gyldigheten av en fellesskapsrettsakt som er en del av denne beslutningen. Det er bare EF-domstolen som kan kjenne en fellesskapsrettsakt ugyldig med virkning innen fellesskapets rettsorden.

67. EFTAs overvåkningsorgan viser også til at EF-domstolen i *Foto-Frost*[5] kom til at en nasjonal domstol som vurderer å sette til side en fellesskapsrettsakt er forpliktet til å henvise gyldighetsspørsmålet til EF-domstolen. Det er hevdet at dette resultatet er basert på behovet for å sikre ensartet anvendelse av fellesskapsretten. Likeledes må en nasjonal domstol i en medlemsstat som vurderer å sette til side en beslutning av EØS-komiteen være forpliktet til å henvise spørsmålet om beslutningens gyldighet til EF-domstolen.

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4 Sak C-327/91 *France* v *Commission* [1994] ECR I-3641.

5 Sak C-314/85 *Foto-Frost* [1987] ECR 4199.

68. The EFTA Surveillance Authority submits that it follows from the above that it appears likely that the Court of Justice, in reality, may review Joint Committee decisions; that the economic operators in the Community are afforded judicial protection against possible illegal action of the Joint Committee; and, that national courts are offered guidance in deciding whether the Joint Committee has acted *ultra vires*.

69. Furthermore, there are no constraining arguments to the effect that economic operators and national courts in the EFTA States should not be afforded the same protection and guidance from the EFTA Court. On the contrary, it appears sensible that the EFTA Court provides guidance to national courts that are deciding whether the EEA Joint Committee acts outside the scope of its authority.

70. The EFTA Surveillance Authority proposes that the referred question should be answered as follows:

> *The examination of the question submitted has not revealed any element indicating that by adopting the Joint Statement of 26 March 1999 the EEA Joint Committee has acted outside the competences conferred upon it by the EEA Agreement.*

The Commission of the European Communities

71. Firstly, the Commission of the European Communities offers some thoughts regarding the authority of the EEA Joint Committee.

72. By reference to Article 92(1) and 102(1), (3) and (4) EEA, and the EFTA Court's judgment in *Jæger* v *Opel Norge*[6] the Commission of the European Communities submits that the decision-making role of the EEA Joint Committee is not limited to amending the Annexes to the EEA Agreement, but also includes amending a majority of the Protocols, cf. Article 98 EEA.

73. Then the Commission of the European Communities turns to the question of the jurisdiction of the EFTA Court. It points out that Article 34 of the ESA/Court Agreement only provides the EFTA Court with jurisdiction to give Advisory Opinions on the interpretation of the EEA Agreement. There is no equivalent in the EEA Agreement to the act of reviewing the legality of Community acts contained in Article 230 EC. Article 36 of the ESA/Court Agreement extends the jurisdiction of the EFTA Court to reviewing the acts of the EFTA Surveillance Authority.

74. On this basis, the Commission of the European Communities submits that the legality of the decisions of the EEA Joint Committee is not subject to review

[6] Case E-3/97, *Jæger* v *Opel Norge* [1998] EFTA Court Report, 4, paragraph 30.

68. EFTAs overvåkningsorgan hevder at det følger av ovennevnte at det er sannsynlig at EF-domstolen kan vurdere EØS-komiteens beslutninger; at næringsdrivende i Fellesskapet er gitt rettslig beskyttelse mot EØS-komiteens mulige ulovlige handlinger; og at nasjonale domstoler er gitt retningslinjer ved vurderingen av hvorvidt EØS-komiteen har handlet utenfor sin myndighet.

69. Det er ingen tvingende argumenter som innebærer at ikke EFTA-statene skulle gi næringsdrivende den samme beskyttelsen og nasjonale domstoler i EFTA-statene den samme veiledningen. Tvert imot synes det naturlig at EFTA-domstolen tilbyr nasjonale domstoler veiledning om hvorvidt EØS-komiteen handler utenfor sin myndighet.

70. EFTAs overvåkningsorgan foreslår at spørsmålet besvares slik:

> *Gjennomgangen av det forelagte spørsmålet har ikke avslørt noe som tilsier at EØS-komiteen, ved å vedta felleserklæringen av 26 mars 1999 har handlet utenfor den kompetansen som den er tildelt ved EØS-avtalen.*

Kommisjonen for De europeiske fellesskap

71. Først foretar Kommisjonen for De europeiske fellesskap en vurdering av EØS-komiteens myndighet.

72. Med henvisning til artikkel 92(1) og 102(1), (3) og (4) EØS, og til EFTA-domstolens avgjørelse i *Jæger* v *Opel Norge*,[6] anfører kommisjonen at EØS-komiteens rolle som beslutningstaker ikke er begrenset til å endre EØS-avtalens vedlegg, men også omfatterer kompetanse til å endre de fleste av protokollene, jf artikkel 98 EØS.

73. Kommisjonen vurderer videre spørsmålet om EFTA-domstolens kompetanse. Den påpeker at artikkel 34 i Overvåknings- og domstolsavtalen bare gir EFTA-domstolen kompetanse til å gi rådgivende uttalelser vedrørende tolkningen av EØS-avtalen. Det er ingen parallell i EØS-avtalen til bestemmelsen om å prøve lovligheten av fellesskapsrettsakter i artikkel 230 i EF-traktaten. Artikkel 36 i Overvåknings- og domstolsavtalen strekker EFTA-domstolens kompetanse til å prøve lovligheten av rettsakter truffet av EFTAs overvåkningsorgan.

74. På dette grunnlaget anfører kommisjonen at lovligheten av EØS-komiteens beslutninger ikke er underlagt EFTA-domstolens kontroll. Når et

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6 Sak E-3/97 *Jæger* v *Opel Norge* [1998] EFTA Court Report 4, avsnitt 30.

by the EFTA Court. On the other hand, when a question such as the one in the present case is raised, the EFTA Court is restricted to setting out its position on the interpretation of the EEA Agreement with respect thereto.

75. The Commission of the European Communities contends that the EFTA Court is therefore able to confirm what it decided in its earlier Advisory Opinion as regards the amendments made to Annex II of Chapter XV of the EEA Agreement.

Thór Vilhjálmsson
Judge-Rapporteur

spørsmål som det i den foreliggende saken er forelagt EFTA-domstolen, er domstolens kompetanse begrenset til å ta stilling til tolkningen av EØS-avtalen med hensyn til dette spørsmålet.

75. Kommisjonen hevder at EFTA-domstolen derfor er i stand til å stadfeste sin avgjørelse i sin tidligere rådgivende uttalelse med hensyn til endringene i EØS-avtalens vedlegg II kapittel XV.

Thór Vilhjálmsson
Saksforberedende dommer

Case E-7/01

Hegelstad Eiendomsselskap Arvid B. Hegelstad and Others
v
Hydro Texaco AS

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

Summary of the Judgment

1. Where an agreement between a supplier of motor fuels and lubricants and an independent service station operator is concluded for a period of ten years and is automatically renewed for a period of five years, unless terminated by the supplier, Article 12(1)(c) of Regulation 1984/83 prevents the application of the block exemption on exclusive purchasing agreements.

2. Whether an exclusive purchasing agreement restricts competition, and thereby infringes Article 53(1) EEA, is a legal question that must be examined in the light of economic considerations. In assessing whether an exclusive purchasing agreement is prohibited, the Court of Justice and the Court of First Instance of the European Communities have favoured a flexible interpretation of the corresponding provision in Article 81(1) EC.

Exclusive purchasing agreements must be appraised in the economic and legal context in which they occur and where they might combine with others to have a cumulative effect on competition. It is therefore necessary to analyse the effect of such an agreement, taken together with other agreements of the same type, on the opportunities of national competitors or those from other EEA States to gain access to the relevant market or to increase their market share.

In that connection, it is necessary to examine the nature and extent of all similar agreements that tie a large number of points of sale to various suppliers. It is further necessary to examine whether there are real concrete possibilities for a new competitor to enter the network of contracts. Finally, it is necessary to consider the conditions under which competitive forces operate in the relevant market.

Sak E-7/01

Hegelstad Eiendomsselskap Arvid B. Hegelstad med flere
mot
Hydro Texaco AS

(Konkurranse – Avtale om eksklusiv kjøpsplikt – Bensinstasjonsavtale – Artikkel 53 EØS – Forordning 1984/83 – Ugyldighet)

Sammendrag av avgjørelsen

1. En avtale mellom en leverandør av motordrivstoff og smøreprodukter og en uavhengig bensinstasjonsforhandler, som fastsetter en eksklusiv kjøpsforpliktelse som ikke kan bringes til opphør av forhandleren i løpet av et tidsrom på 15 år, omfattes ikke av gruppeunntaket for avtaler om eksklusiv kjøpsplikt i forordning 1984/83, jf forordningens artikkel 12(1)(c).

2. Hvorvidt en avtale begrenser konkurransen, og derfor er i strid med artikkel 53(1) EØS, er et rettslig spørsmål som må vurderes på bakgrunn av økonomiske betraktninger. Ved vurderingen av om en avtale om eksklusiv kjøpsplikt er forbudt, har Domstolen for De europeiske fellesskap og Domstolen i første instans for De europeiske fellesskap gått inn for en fleksibel tolkning av den tilsvarende bestemmelsen i artikkel 81 (1) EF.

Avtaler om eksklusiv kjøpsplikt må bedømmes ut fra den økonomiske og rettslige sammenhengen de fungerer i og hvor de, kombinert med andre avtaler, kan ha en samlet innvirkning på konkurransen. Det er derfor nødvendig å analysere hvordan samarbeidsavtalen, sett i sammenheng med andre liknende avtaler, påvirker muligheten for innenlandske konkurrenter eller konkurrenter fra EØS-statene til å komme inn på det relevante markedet eller til å øke sine markedsandeler.

I denne sammenheng er det nødvendig å vurdere arten og omfanget av alle liknende avtaler som binder et stort antall forhandlere til ulike leverandører. Det er videre nødvendig å undersøke hvorvidt det er reelle og konkrete muligheter for en ny konkurrent til å slutte seg til nettverket av avtaler. Endelig er det nødvendig å ta hensyn til

If an examination of all similar agreements reveals that it is difficult to gain access to the relevant market, it is necessary to assess the extent to which the agreements entered into by the supplier concerned contribute to the cumulative effect produced by the totality of the agreements. Under Article 53(1) EEA, responsibility for such an effect of closing off the market must be attributed to the suppliers who make an appreciable contribution thereto. In order to assess the extent of the contribution of the agreements concluded by a supplier to the cumulative sealing-off effect, the market position of the parties must be taken into consideration. That contribution also depends on the duration of the agreements.

Fixed term contracts concluded for a number of years are more likely to restrict access to the market than those which may be terminated upon short notice at any time. The restrictive effect of the duration of fixed term contracts must also be assessed in the light of the over-all economics of the relevant market. If the duration is manifestly excessive in relation to the average duration of contracts generally concluded in the relevant market, the individual agreement falls under the prohibition laid down in Article 53(1) EEA.

3. The automatic nullity provided for in Article 53(2) EEA applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself. The legal effect of the nullity on the provisions not affected by the prohibition is not governed by EEA law.

de øvrige konkurranseforholdene på det relevante markedet.

Dersom en gjennomgang av alle liknende avtaler viser at det er vanskelig å få adgang til det relevante markedet, er det nødvendig å avgjøre i hvilken grad vedkommende leverandørs avtaler bidrar til den samlede virkningen av alle disse avtalene. I henhold til artikkel 53(1) EØS må ansvaret for at adgangen til markedet hindres tilskrives de produsentene som bidrar merkbart til dette. Ved vurderingen av i hvilken grad én produsents leveringsavtaler bidrar til den samlede hindringen av adgangen til markedet, må det tas hensyn til avtalepartenes markedsposisjon. Vurderingen avhenger også av varigheten av avtalene.

Tidsbegrensede avtaler inngått for flere år kan i høyere grad hindre adgangen til markedet enn slike som til enhver tid kan bringes til opphør på kort varsel. Den konkurransebegrensende virkningen av varigheten av avtaler med bestemt løpetid må også bedømmes i lys av de generelle økonomiske forholdene på det relevante markedet. Dersom varigheten åpenbart er uforholdsmessig lang i forhold til den gjennomsnittlige varigheten i de øvrige avtalene på markedet, omfattes den enkelte avtalen av forbudet i artikkel 53(1) EØS.

3. Ugyldigheten i henhold til artikkel 53(2) EØS gjelder bare for de delene av avtalen som berøres av forbudet i artikkel 53(1), eller for avtalen i sin helhet dersom disse delene ikke kan adskilles fra resten av avtalen. Ugyldighetens rettsvirkninger for de bestemmelsene som ikke berøres av forbudet er ikke regulert av EØS-retten.

JUDGMENT OF THE COURT

18 October 2002*

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

In Case E-7/01,

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

Hegelstad Eiendomsselskap Arvid B. Hegelstad and Others

and

Hydro Texaco AS

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

THE COURT,

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

Registrar: Lucien Dedichen,

having considered the written observations submitted on behalf of:

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

EFTA-DOMSTOLENS DOM

18 oktober 2002*

(Konkurranse – Avtale om eksklusiv kjøpsplikt – Bensinstasjonsavtale – Artikkel 53 EØS – Forordning 1984/83 – Ugyldighet)

i sak E-7/01

ANMODNING til EFTA-domstolen om rådgivende uttalelse i medhold av artikkel 34 i Avtale mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol fra Gulating lagmannsrett i saken for denne domstol mellom

Hegelstad Eiendomsselskap Arvid B. Hegelstad med flere

og

Hydro Texaco AS

om tolkningen av artikkel 53 i Avtale om Det europeiske økonomiske samarbeidsområde,

EFTA-DOMSTOLEN,

sammensatt av: president Thór Vilhjálmsson og dommerne Carl Baudenbacher (saksforberedende dommer) og Per Tresselt,

Justissekretær: Lucien Dedichen,

etter å ha vurdert de skriftlige saksfremstillinger inngitt av:

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* Språket i anmodningen om en rådgivende uttalelse: Norsk.

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

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

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

having regard to the Report for the Hearing,

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

gives the following

Judgment

I Facts and procedure

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

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

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

4 The Respondent's business activities consist *inter alia* of the sale of motor fuels and lubricants through a network of service stations. On 1 January 1995, the

– Hydro Texaco AS, representert ved Trym Landa, advokat;

– EFTAs overvåkningsorgan, representert ved Michael Sánchez Rydelski og Per Andreas Bjørgan, saksbehandlere, avdeling for juridiske saker og eksekutivsaker, som partsrepresentanter;

– Kommisjonen for De europeiske fellesskap, representert ved Anthony Whelan og Wouter Wils, juridiske rådgivere, rettsavdelingen, som partsrepresentanter;

med henvisning til rettsmøterapporten; og

etter å ha hørt de muntlige innleggene fra Hegelstad Eiendomsselskap Arvid B. Hegelstad med flere, representert ved Ian Anders Tobiassen, advokat; Hydro Texaco AS, representert ved Trym Landa; EFTAs Overvåkningsorgan, representert ved Per Andreas Bjørgan; og Kommisjonen for De europeiske fellesskap, representert ved Wouter Wils, under høringen 25 juni 2002,

avsier slik

Dom

I Faktum og prosedyre

1 Ved en beslutning datert 27 september 2001, mottatt ved EFTA-domstolen 3 oktober 2001, anmodet Gulating lagmannsrett om en rådgivende uttalelse i en sak innbrakt for denne mellom Hegelstad Eiendomsselskap Arvid B. Hegelstad med flere (heretter "ankende parter") og Hydro Texaco AS (heretter "ankemotparten").

2 Saken for den nasjonale domstolen gjelder spørsmålet om ankemotparten har rett til å leie en bensinstasjon eiet av de ankende parter i henhold til bestemmelsene i en bensinsstasjonsavtale inngått mellom partene.

3 Hegelstad Eiendomsselskap Arvid B. Hegelstad (heretter "Hegelstad") er et personlig selskap for Arvid B. Hegelstad. Arvid B. Hegelstad og hans to sønner er de tre andre ankende parter i saken for Gulating lagmannsrett. Hegelstad eier en eiendom i Ålgård i Gjesdal kommune, Norge, hvor det har vært drevet en bensinstasjon i flere år. Fra november 1990 drev Ålgård Servicesenter AS (heretter "Ålgård") bensinstasjonen som eies av Hegelstad. Ålgård eies også av Arvid B. Hegelstad.

4 Ankemotpartens forretningsvirksomhet består blant annet i salg av motordrivstoff og smøreprodukter gjennom et nettverk av bensinstasjoner. Ankemotparten

Respondent assumed all rights and obligations of its predecessor, Norsk Texaco AS, when this latter company merged with Hydro Olje AS and changed its name to Hydro Texaco AS.

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

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

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

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

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

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

6 By order of 7 December 1994 of the probate and bankruptcy court, Ålgård entered into bankruptcy proceedings. The bankruptcy estate ran the petrol station from the commencement of bankruptcy proceedings until 7 January 1995. Subsequently, the Respondent exercised its rights under Clause 10 of the cooperation agreement to lease and run the petrol station. The Respondent did

overtok alle rettigheter og forpliktelser til Norsk Texaco AS etter 1 januar 1995, da selskapet fusjonerte og skiftet navn til Hydro Texaco AS.

5 17 november 1992 inngikk Hegelstad (som forhandler) og ankemotparten (som leverandør) en "Samarbeidsavtale" om levering av motordrivstoff og smøreprodukter (heretter "samarbeidsavtalen"). Avtalen inneholder følgende bestemmelser av betydning for den foreliggende saken:

- Punkt 1 gir leverandøren en enerett til å levere motordrivstoff og smøreprodukter til forhandlerens bensinstasjon i avtaleperioden. Som følge av dette fastsetter punkt 5 at forhandleren skal kjøpe motordrivstoff og smøreprodukter utelukkende fra leverandøren.

- Punkt 2.1 fastsetter at leverandøren skal yte forhandleren et lån på NOK 4 760 000 som skal avskrives av leverandøren med like store årlige beløp over 15 år og ha pantesikkerhet i forhandlerens faste eiendom. Dersom avtalen skulle opphøre før 15 år er gått, plikter forhandleren å tilbakebetale til leverandøren den delen av lånet som på det tidspunktet ikke er avskrevet.

- Punkt 9 fastsetter at avtalen skal løpe i 10 år beregnet fra tidspunktet for første levering av motordrivstoff, og automatisk fornyes for 5 år på uendrede betingelser så fremt leverandøren ikke innen 3 måneder før utløpet av tiårsperioden sier opp avtalen.

- Punkt 10 fastsetter at leverandørens leveringsforpliktelse opphører ved åpning av gjeldsforhandling eller konkurs hos forhandleren. I så fall har leverandøren rett til å overta eiendomsretten til bensinstasjonen mot å innfri forhandlerens tinglyste gjeld på NOK 4 millioner. Alternativt kan leverandøren kreve å leie bensinstasjonen omgående for en tid korresponderende med samarbeidsavtalens varighet og for en leie tilsvarende vanlig forrentning av NOK 4 millioner.

- Punkt 10 i avtalen nevner også at eiendommen for tiden er utleid til Ålgård. Dersom det åpnes gjeldsforhandling eller konkurs hos leietakeren, utløses leverandørens kjøpsrett, alternativt leierett på vilkår som nevnt ovenfor, hvilket ble akseptert av Ålgård ved særskilt påtegning i avtalen.

6 Ålgård ble tatt under konkursbehandling ved skifterettens kjennelse av 7 desember 1994. Bensinstasjonen ble drevet av konkursboet fra konkursåpningen til 7 januar 1995. Etter denne datoen utøvet ankemotparten sin rett etter punkt 10 i samarbeidsavtalen til å leie og drive bensinstasjonen. Ankemotparten fikk ikke medhold i sitt krav om å overta eiendomsretten til

not succeed in its claim to assume ownership of the station but continues to lease the petrol station, and is thus both the tenant of and the supplier of motor fuels and lubricants to the petrol station.

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

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

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

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

stasjonen, men leier fortsatt bensinstasjonen, og er derved både leietaker og leverandør av motordrivstoff og smøreprodukter til bensinstasjonen.

7 Ved stevning av 3 april 1998 anla de ankende parter søksmål mot ankemotparten ved Sandnes herredsrett med krav om fravikelse av eiendommen og erstatning for lidt tap. Ankemotparten påsto seg frifunnet.

8 Sandnes herredsrett avsa 23 februar 1999 dom hvor ankemotparten ble gitt medhold. Dommen ble påanket til Gulating lagmannsrett.

9 Gulating lagmannsrett ønsker å klargjøre hvorvidt avtalen, og særlig dens punkt 10, er ugyldig i henhold til EØS konkurransereglene, og forela EFTA-domstolen følgende spørsmål:

> *1. Vil en samarbeidsavtale mellom en selvstendig bensinstasjonsforhandler som eier stasjonen og en leverandør av motordrivstoff og smøreolje som inneholder klausuler om*
>
> *– leverandørens enerett til levering av motordrivstoff og smøreolje til forhandlerens stasjon i avtaleperioden,*
>
> *– leverandørens rett til å tre inn som eier av bensinstasjonen til en tinglyst pris på kr 4 mill., alternativt en leieopsjon til fast pris korresponderende med avtaleperioden ved gjeldsforhandling eller konkurs hos forhandleren,*
>
> *– at avtaleperioden er uoppsigelig og undergitt uendrede betingelser for stasjonseieren/forhandleren med varighet i 15 år og at leverandøren innen 3 måneder forut for 10 års perioden kan si opp kontrakten,*
>
> *omfattes av gruppefritaket i artikkel 53(3) EØS jf forskrift 4 desember 1992 nr 964 kapittel II artikkel 10?*
>
> *2. Dersom gruppefritaket i artikkel 53(3) EØS ikke kommer til anvendelse, vil samarbeidsavtalen være i strid med artikkel 53(1) EØS?*
>
> *3. Hva blir de rettslige konsekvenser av eventuell motstrid, og hvilken varighetsbegrensning må eventuelt legges til grunn?*

II Legal background

10 Article 53 EEA reads as follows:

> "1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
>
> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
>
> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>
> — any agreement or category of agreements between undertakings;
>
> —any decision or category of decisions by associations of undertakings;
>
> —any concerted practice or category of concerted practices;
>
> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
>
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

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

II Rettslig bakgrunn

10 EØS-avtalens artikkel 53 lyder som følger:

> "1. Enhver avtale mellom foretak, enhver beslutning truffet av sammenslutninger av foretak og enhver form for samordnet opptreden som kan påvirke handelen mellom avtalepartene, og som har til formål eller virkning å hindre, innskrenke eller vri konkurransen innen det territorium som er omfattet av denne avtale, skal være uforenlige med denne avtales funksjon og forbudt, særlig slike som består i
>
> a) å fastsette på direkte eller indirekte måte innkjøps- eller utsalgspriser eller andre forretningsvilkår,
>
> b) å begrense eller kontrollere produksjon, avsetning, teknisk utvikling eller investeringer,
>
> c) å dele opp markeder eller forsyningskilder,
>
> d) å anvende overfor handelspartnere ulike vilkår for likeverdige ytelser og derved stille dem ugunstigere i konkurransen,
>
> e) å gjøre inngåelsen av kontrakter avhengig av at medkontrahentene godtar tilleggsytelser som etter sin art eller etter vanlig forretningspraksis ikke har noen sammenheng med kontraktsgjenstanden.
>
> 2. Avtaler eller beslutninger som er forbudt i henhold til denne artikkel, skal ikke ha noen rettsvirkning.
>
> 3. Det kan imidlertid erklæres at bestemmelsene i nr. 1 ikke skal anvendes på
>
> - avtaler eller grupper av avtaler mellom foretak,
> - beslutninger eller grupper av beslutninger truffet av sammenslutninger av foretak, og
> - samordnet opptreden eller grupper av slik opptreden,
>
> som bidrar til å bedre produksjonen eller fordelingen av varene eller til å fremme den tekniske eller økonomiske utvikling, samtidig som de sikrer forbrukerne en rimelig andel av de fordeler som er oppnådd, og uten
>
> a) å pålegge vedkommende foretak restriksjoner som ikke er absolutt nødvendige for å nå disse mål, eller
>
> b) å gi disse foretak mulighet til å utelukke konkurranse for en vesentlig del av de varer det gjelder."

11 I følge EØS-avtalens vedlegg XIV nr 3 er kommisjonsforordning (EØF) nr 1984/83, EFT 1983 L 173, s 5, som korrigert ved EFT 1983 L 281, s 24, om anvendelse av artikkel 53(3) EØS på grupper av avtaler om eksklusiv kjøpsplikt (heretter "gruppeunntaket for eksklusiv kjøpsplikt" eller "forordning 1984/83") del av EØS-retten. Henvisningen til gruppeunntaket for eksklusiv kjøpsplikt i EØS-avtalens vedlegg XIV punkt 3 ble strøket ved EØS-komiteens beslutning nr 18/2000 (EFT 2001 L 103, s 179), som trådte i kraft 29 januar 2000. Rettsakten

18/2000 (OJ 2001 L 103, p. 179), which entered into force on 29 January 2000. The act referred to in point 2 of Annex XIV to the EEA Agreement, Commission Regulation (EC) No. 2790/1999, OJ 1999 L 336, p. 21, on the application of Article 53(3) to categories of vertical agreements and concerted practices (hereinafter "the block exemption for vertical restraints" or "Regulation 2790/1999"), replaced the block exemption on exclusive purchasing agreements. According to Article 12 of Regulation 2790/1999, Regulation 1984/83 remained in force until 31 May 2000.

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

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

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

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

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

III Findings of the Court

The first question

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

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

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

som det nå henvises til i EØS-avtalens vedlegg XIV punkt 2, kommisjonsforordning (EF) nr 2790/1999, EFT 1999 L 336, s 21, om anvendelse av artikkel 53(3) på grupper av vertikale avtaler og samordnet opptreden (heretter "gruppeunntaket for vertikale avtaler" eller "forordning 2790/1999") har erstattet gruppeunntaket for eksklusiv kjøpsplikt. I følge artikkel 12 i forordning 2790/1999, gjaldt forordning 1984/83 til og med 31 mai 2000.

12 Artikkel 10 i forordning 1984/83 fastsetter at artikkel 53(1) EØS ikke kommer til anvendelse på

> "avtaler mellom bare to foretak der den ene parten, videreforhandleren, overfor den annen part, leverandøren, som vederlag for økonomiske og finansielle fordeler forplikter seg til å kjøpe utelukkende fra leverandøren, tilknyttede foretak eller et annet foretak som har i oppdrag å distribuere leverandørens varer, visse typer oljebasert drivstoff for motorvogner eller visse typer oljebasert drivstoff for motorvogner og visse andre typer oljebasert brennstoff som angitt i avtalen med sikte på videresalg fra en bensinstasjon angitt i avtalen."

13 Artikkel 12(1)(c) i forordning 1984/83 fastsetter at

> "Artikkel 10 får ikke anvendelse når: …avtalen er inngått for et ubestemt tidsrom eller for en periode på mer enn 10 år…"

14 Det vises til rettsmøterapporten for en fyldigere beskrivelse av den rettslige rammen, de faktiske forhold, saksgangen og de skriftlige saksfremstillingene fremlagt for EFTA-domstolen, som i det følgende bare vil bli omtalt og drøftet så langt det er nødvendig for domstolens begrunnelse.

III EFTA-domstolens bemerkninger

Det første spørsmålet

15 Ved sitt første spørsmål søker Gulating lagmannsrett hovedsaklig å bringe på det rene hvorvidt en avtale som den det dreier seg om i hovedsøksmålet omfattes av gruppeunntaket for avtaler om eksklusiv kjøpsplikt i forordning 1984/83.

16 Siden de relevante faktiske omstendighetene inntraff mens forordning 1984/83 om eksklusiv kjøpsplikt fortsatt var i kraft og spørsmålet fra Gulating lagmannsrett bare viser til denne forordningen, vil EFTA-domstolen ikke behandle forordning 2790/1999 om vertikale avtaler.

17 Innledningsvis bemerker EFTA-domstolen at anvendelsen av artikkel 53(1) EØS eller forordning 1983/84 ikke utelukkes som følge av at den omtvistede samarbeidsavtalen ble inngått før ikrafttredelsen av EØS-avtalen. Disse reglene kommer til anvendelse i henhold til overgangsreglene i EØS-avtalens protokoll 21, artikkel 5 til 13.

18 The Appellants, supported by the EFTA Surveillance Authority and the Commission of the European Community, have argued that the contested cooperation agreement is not exempted under Regulation 1983/84 since that agreement must be deemed to have a duration exceeding ten years.

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

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

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

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

The second question

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

24 In answering that question, the Court finds it appropriate to first consider the argument of the Respondent that, given the circumstances by which the Respondent claimed immediate lease of the service station pursuant to Clause 10 of the cooperation agreement, the agreement was converted into a lease agreement. The Respondent has contended that the exclusive purchase obligation

18 De ankende parter støttet av EFTAs overvåkningsorgan og Kommisjonen for De europeiske fellesskap, har anført at den omtvistede samarbeidsavtalen ikke er unntatt etter forordning 1983/84 siden den må anses å ha en varighet på mer enn 10 år.

19 EFTA-domstolen bemerker at forordning 1984/83 inneholder særlige regler for bensinstasjonsavtaler. Disse reglene finnes i artikkel 10 til 13, og avviker fra de generelle bestemmelsene for avtaler om eksklusiv kjøpsplikt. Det følger av artikkel 10 at forbudet i artikkel 53(1) EØS ikke får anvendelse på bensinstasjonsavtaler dersom vilkårene i artikkel 11 til 13 er oppfylt. Artikkel 12(1)(c) fastsetter at avtaler som er inngått for et ubestemt tidsrom eller for en periode på mer enn 10 år ikke omfattes av gruppeunntaket.

20 Det er den nasjonale domstolens oppgave å tolke samarbeidsavtalen som er omtvistet i saken for denne domstolen. I følge opplysningene fra Gulating lagmannsrett er samarbeidsavtalen inngått for en periode på 10 år med automatisk fornyelse for en periode på fem år dersom leverandøren ikke sier opp avtalen. I slike tilfeller er anvendelsen av gruppeunntaket for avtaler om eksklusiv kjøpsplikt forhindret etter artikkel 12(1)(c). Forhandleren har ikke rett til å avslutte avtalen ved utløpet av den opprinnelige tiårsperioden og er derfor bundet av avtalen for en bestemt periode på 15 år. Avtalen oppfyller derfor ikke vilkårene for unntak etter forordning 1984/83.

21 At gruppeunntaket for avtaler om eksklusiv kjøpsplikt ikke kommer til anvendelse har ikke betydning for samarbeidsavtalens gyldighet. Hvorvidt avtalen er forbudt må avgjøres ved en særskilt analyse av vilkårene i artikkel 53(1) EØS. Dette forholdet vil bli behandlet i EFTA-domstolens svar på det andre og tredje spørsmålet.

22 Svaret på det første spørsmålet må derfor bli at en avtale mellom en leverandør av motordrivstoff og smøreprodukter og en uavhengig bensinstasjonsforhandler, som fastsetter en eksklusiv kjøpsforpliktelse som ikke kan bringes til opphør av forhandleren i løpet av et tidsrom på 15 år, ikke omfattes av gruppeunntaket for avtaler om eksklusiv kjøpsplikt i forordning 1984/83.

Det andre spørsmålet

23 Ved sitt andre spørsmål søker Gulating lagmannsrett å bringe på det rene hvorvidt den omtvistede samarbeidsavtalen er forenlig med artikkel 53(1) EØS.

24 Ved besvarelsen av dette spørsmålet finner EFTA-domstolen det hensiktsmessig først å behandle ankemotpartens anførsel om at avtalen, som følge av at ankemotparten omgående krevde å tre inn i leieforholdet for bensinstasjonen i henhold til punkt 10 i samarbeidsavtalen, ble endret til en leieavtale. Ankemotparten har anført at den eksklusive kjøpsplikten er gjenstandsløs og at forbudet i artikkel 53(1) EØS derfor er uten relevans.

is without object and that the prohibition in Article 53(1) EEA is without relevance.

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

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

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

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

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

25 Med hensyn til dette argumentet er det tilstrekkelig å bemerke at etter prosedyren i artikkel 34 ODA er det den nasjonale domstolens oppgave å avgjøre hvilke spørsmål det er nødvendig at EFTA-domstolen besvarer for at den skal kunne avsi dom i saken. Spørsmålet om hvorvidt avtalen ble endret til en leieavtale er uten innvirkning på EFTA-domstolens vurderinger. Det følger av spørsmålene som er forelagt EFTA-domstolen at den nasjonale domstolen i hovedsak søker veiledning om en avtale om eksklusiv kjøpsplikt, ikke en leieavtale.

26 Artikkel 53(1) EØS kan komme til anvendelse på en avtale om eksklusiv kjøpsplikt. Selv om en slik avtale ikke har som formål å begrense konkurransen i henhold til artikkel 53(1) EØS, er det like fullt nødvendig å klargjøre hvorvidt dens virkning er å hindre, innskrenke eller vri konkurransen og om den kan påvirke handelen mellom avtalepartene.

27 Hvorvidt en avtale begrenser konkurransen, og derfor er i strid med artikkel 53(1) EØS, er et rettslig spørsmål som må vurderes på bakgrunn av økonomiske betraktninger (se sak E-8/00 *Landsorganisasjonen i Norge and Others* v *Kommunenes Sentralforbund and Others,* dom (rådgivende uttalelse) av 22 mars 2002, avsnitt 77). Ved vurderingen av om en avtale om eksklusiv kjøpsplikt er forbudt, har Domstolen for De europeiske fellesskap og Domstolen i første instans for De europeiske fellesskap gått inn for en fleksibel tolkning av den tilsvarende bestemmelsen i artikkel 81 EF (se sak T-112/99 *Métropole télévision* [2001] ECR II-2459, avsnitt 75 og de dommene av Domstolen for De europeiske fellesskap og Domstolen i første instans for De europeiske fellesskap som det er referert til her).

28 Fordelene forbundet med avtaler om eksklusiv kjøpsplikt for partene, særlig forbedringen i distribusjonen, blant annet ved reduserte distribusjonskostnader og forbedret mulighet til planlegging for både leverandør og forhandler, og for forbrukere, nyter bred aksept (se for sammenligning Domstolen for De europeiske fellesskaps dom i sak C-234/89 *Delimitis* [1991] ECR-935, avsnitt 11 og 12, og fortalen til forordning 1984/83, avsnitt 5 til 7 og 13 til 17).

29 Ved vurderingen av om en avtale begrenser konkurransen må først det relevante markedet defineres. Det relevante produktmarkedet omfatter alle produkter som etter forbrukerens oppfatning er innbyrdes substituerbare eller ombyttelige utfra produktenes egenskaper, pris og bruksområde. Etter omstendighetene kan også substituerbarheten på leverandørsiden bli tatt i betraktning. Det følger av opplysningene fra Gulating lagmannsrett at den økonomiske virksomheten i saken for den nasjonale domstolen er detaljsalg av motordrivstoff og smøreprodukter. Det er den nasjonale domstolens oppgave å definere de adskilte markedene for disse produktene, basert på de fakta som foreligger.

30 The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products and in which the conditions of competition are sufficiently homogeneous, and can be distinguished from neighbouring areas because the conditions of competition are appreciably different. It is for the national court to assess whether the separate geographic markets for motor fuels and lubricants, are national, regional or local.

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

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

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

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

35 According to the information presented to the Court, there were a total of 1995 service stations in Norway in 2001. The Respondent was the main or sole supplier of motor fuels to 401 (about 20.1%), Shell to 614 (about 30.8%), Esso to 458 (about 23.0%), Statoil to 453 (about 22.7%), Rema to 35 (about 1.8%) and Jet to 34 (about 1.7%) service stations. Thus, most service stations were tied to

30 Det relevante geografiske markedet omfatter det området der de berørte foretak tilbyr produkter, der konkurransevilkårene er tilstrekkelig ensartede, og som kan holdes atskilt fra tilgrensende områder særlig fordi konkurransevilkårene der er merkbart forskjellige. Det er den nasjonale domstolens oppgave å vurdere hvorvidt de adskilte geografiske markedene for motordrivstoff og smøreprodukter er nasjonale, regionale eller lokale.

31 Avtaler om eksklusiv kjøpsplikt må bedømmes ut fra den økonomiske og rettslige sammenhengen de fungerer i og hvor de, kombinert med andre avtaler, kan ha en samlet innvirkning på konkurransen (se, for sammenligning, Domstolen for De europeiske fellesskaps dommer i sak 23/67 *Brasserie de Haecht* v *Wilkin* [1967] ECR 407 og *Delimitis*, avsnitt 14). Det er derfor nødvendig å analysere hvordan samarbeidsavtalen, sett i sammenheng med andre liknende avtaler, påvirker muligheten for innenlandske konkurrenter eller konkurrenter fra EØS-statene til å komme inn på det relevante markedet eller til å øke sine markedsandeler (se for sammenligning, *Delimitis* avsnitt 15; og sak C-214/99 *Neste Markkinointi* [2000] ECR I-11121, avsnitt 25).

32 I denne sammenheng er det nødvendig å vurdere arten og omfanget av alle liknende avtaler som binder et stort antall forhandlere til ulike leverandører. Virkningen av disse avtalenettverkene på adgangen til markedet avhenger særlig av antallet salgssteder som er bundet til etablerte produsenter sett i forhold til antall salgssteder som ikke er bundet, varigheten av de inngåtte avtalene, mengden av drivstoff og smøreprodukter som disse avtalene gjelder sammenholdt med det totale salgsvolumet for slike produkter (se *Delimitis*, avsnitt 19).

33 Det er videre nødvendig å undersøke hvorvidt det er reelle og konkrete muligheter for en ny konkurrent til å slutte seg til nettverket av avtaler (se, for sammenligning, *Delimitis*, avsnitt 21). Mulige måter å få adgang til markedet på kan være oppkjøp av produsenter som allerede er etablert på markedet sammen med deres nettverk av bensinstasjonsavtaler, eller omgåelse av avtalenettverket ved å åpne nye salgssteder. Ved vurderingen av om slike muligheter eksisterer, er det nødvendig å ta i betraktning rettsreglene og vilkårene for erverv av selskaper og etablering av salgssteder, og til det laveste antall salgssteder som er nødvendig for lønnsom drift av et distribusjonssystem (se for sammenligning, *Delimitis*, avsnitt 21).

34 Endelig er det nødvendig å ta hensyn til de øvrige konkurranseforholdene på det relevante markedet (se for sammenligning, *Delimitis*, avsnitt 22 og *Neste Markkinointi*, avsnitt 26).

35 I følge informasjon fremlagt for EFTA-domstolen var det totalt 1995 bensinstasjoner i Norge i 2001. Ankemotparten var hovedleverandør eller eneleverandør av motordrivstoff til 401 (omtrent 20,1%), Shell til 614 (omtrent 30,8%), Esso til 458 (omtrent 23,0%), Statoil til 453 (omtrent 22,7%), Rema til 35 (omtrent 1,8%) og Jet til 34 (omtrent 1,7%) bensinstasjoner. De fleste bensinstasjonene var således knyttet til en av de fire største leverandørene. Av

one of the four major suppliers. Of the total volume of motor fuels sold at service stations in 2001, the share of the Respondent was 13.4%, Shell 29.9%, Esso 21.8%, Statoil 31.2%, and others 3.7%. The Court does not have information on the duration of the exclusive purchasing agreements entered into by the major suppliers, or other factors of relevance to the assessment of whether competitors may enter the markets. It is for the national court, based on the facts before it, to make the necessary assessments.

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

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

38 The type of cooperation agreement at issue in the main proceedings is distinguished from the Respondent's other exclusive purchasing agreements in that it has a duration of 15 years. Fixed term contracts concluded for a number of years are more likely to restrict access to the market than those which may be terminated upon short notice at any time (see, for comparison, *Neste Markkinointi*, paragraph 33). The restrictive effect of the duration of fixed term contracts must also be assessed in the light of the over-all economics of the relevant market. If the duration is manifestly excessive in relation to the average duration of contracts generally concluded in the relevant market, the individual agreement falls under the prohibition laid down in Article 53(1) EEA. It has been stated that all the other exclusive purchasing agreements entered into by the Respondent have been amended in order to come within the scope of the block exemption for exclusive purchasing agreements in Regulation 1984/83 or were

den totale mengden motordrivstoff solgt fra bensinstasjoner i 2001 var ankemotpartens andel 13,4%, Shells 29,9%, Essos 21,8%, Statoils 31,2%, og øvriges 3,7%. EFTA-domstolen har ikke informasjon om varigheten av avtalene om eksklusiv kjøpsplikt inngått av de største leverandørene, eller til andre forhold av betydning for vurderingen av hvorvidt konkurrenter kan få adgang til markedet. Det er den nasjonale domstolens oppgave, på grunnlag av foreliggende fakta, å foreta de nødvendige vurderingene.

36 Dersom en gjennomgang av alle liknende avtaler viser at det er vanskelig å få adgang til det relevante markedet, er det nødvendig å avgjøre i hvilken grad vedkommende leverandørs avtaler bidrar til den samlede virkningen av alle disse avtalene. I henhold til artikkel 53(1) EØS må ansvaret for at adgangen til markedet hindres tilskrives de produsentene som bidrar merkbart til dette. Avtaler inngått av leverandører hvis bidrag er ubetydelig for den samlede virkningen faller derfor ikke inn under forbudet i denne bestemmelsen. Ved vurderingen av i hvilken grad én produsents leveringsavtaler bidrar til den samlede hindringen av adgangen til markedet, må det tas hensyn til avtalepartenes markedsposisjon. Vurderingen avhenger også av varigheten av avtalene (se, for sammenligning, *Delimitis*, avsnitt 24 til 26 og *Neste Markkinointi*, avsnitt 27).

37 Dersom Gulating lagmannsrett kommer til at markedet er avstengt som følge av alle avtalene om eksklusiv kjøpsplikt på markedet, er det nødvendig å avgjøre hvorvidt avtalene inngått av ankemotparten har bidratt merkbart til den samlede virkningen, eller om dette bidraget er ubetydelig. De forholdene som må tas i betraktning ved vurderingen er nevnt i det foregående avsnittet. Betydningen av avtalens varighet for avstengningen av markedet er særlig viktig i bensinstasjonmarkedet, hvor det bare selges et merke ved hver enkelt bensinstasjon. For leverandøren er den avgjørende faktoren ved en slik avtale om eksklusiv kjøpsplikt ikke så meget selve eksklusivitetsklausulen, men heller varigheten av forhandlerens kjøpsforpliktelse (se *Neste Markkinointi*, avsnittene 31 og 32).

38 Den type samarbeidsavtale som er omtvistet i hovedsøksmålet adskiller seg fra ankemotpartens øvrige avtaler om eksklusiv kjøpsplikt ved at den har en varighet på 15 år. Tidsbegrensede avtaler inngått for flere år kan i høyere grad hindre adgangen til markedet enn slike som til enhver tid kan bringes til opphør på kort varsel (se, til sammenligning, *Neste Markkinointi*, avsnitt 33). Den konkurransebegrensende virkningen av varigheten av avtaler med bestemt løpetid må også bedømmes i lys av de generelle økonomiske forholdene på det relevante markedet. Dersom varigheten åpenbart er uforholdsmessig lang i forhold til den gjennomsnittlige varigheten i de øvrige avtalene på markedet, omfattes den enkelte avtalen av forbudet i artikkel 53(1) EØS. Det har vært hevdet at alle de andre avtalene om eksklusiv kjøpsplikt inngått av ankemotparten er blitt endret for å komme inn under gruppeunntaket for avtaler om eksklusiv kjøpsplikt i forordning 1984/83 eller allerede var unntatt etter forordningens artikkel 12(1)(c). Denne opplysningen er ikke blitt bestridt, og må etterprøves av Gulating lagmannsrett.

already exempted by virtue of Article 12(1)(c) of the regulation. This information has not been contested and is for Gulating lagmannsrett to verify.

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

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

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

The third question

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

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

39 Dersom den typen avtale som er omtvistet i hovedsøksmålet bare utgjør en liten andel av alle avtalene om eksklusiv kjøpsplikt inngått av ankemotparten, er det bare under helt spesielle omstendigheter at avtalen(e) kan anses å bidra betydelig til avskjerming av markedet, og således omfattes av forbudet i artikkel 53(1) EØS. Dette kan blant annet være tilfelle hvor begge parter har en særdeles sterk posisjon på markedet. Ut fra de fakta som foreligger, kan EFTA-domstolen ikke se at slike omstendigheter foreligger i denne saken.

40 EFTA-domstolen bemerker endelig at konkurransebegrensingene i en avtale om eksklusiv kjøpsplikt bare er forbudt etter EØS-retten dersom den kan påvirke handelen mellom avtalepartene. Den omtvistede samarbeidsavtalen synes å være en del av et avtalenettverk som binder et betydelig antall salgssteder innen en EØS-stat til fire store internasjonale leverandører. En slik avtale kan påvirke handelen mellom avtalepartene i henhold til artikkel 53(1) EØS (se Domstolen for De europeiske fellesskaps dom i sak 43/69 *Bilger* v *Jehle* [1970] ECR 127, avsnitt 5).

41 Svaret på det andre spørsmålet må derfor være at forbudet i artikkel 53(1) EØS ikke får anvendelse på en avtale om eksklusiv kjøpsplikt inngått mellom en leverandør av motordrivstoff og smøreprodukter og en bensinstasjonsforhandler for en bestemt periode på 15 år, dersom denne typen avtale bare i ubetydelig grad bidrar til den samlede avstengningen av markedet som forårsakes av det totale antallet avtaler på markedet.

Det tredje spørsmålet

42 Ved sitt tredje spørsmål søker Gulating lagmannsrett å få klarlagt de rettslige virkningene av et brudd på artikkel 53(1) EØS, særlig hvorvidt en konstatering av at en eksklusiv kjøpsforpliktelse er ugyldig, påvirker gyldigheten av resten av avtalen.

43 I følge artikkel 53(2) EØS skal avtaler eller beslutninger som er forbudt etter artikkel 53(1) ikke ha noen rettsvirkning. Som EFTA-domstolen tidligere er kommet til, gjelder dette for de delene av avtalen som berøres av forbudet, eller for avtalen i sin helhet dersom disse delene ikke kan adskilles fra resten av avtalen. Det er for den nasjonale domstolen å avgjøre, i overensstemmelse med relevant nasjonal rett, hvorvidt ugyldigheten påvirker gyldigheten av andre deler av avtalen (se sak E-3/97 *Jæger* v *Opel Norge* [1998] EFTA Court Report 1, avsnitt 77). Ugyldighetens rettsvirkninger for de bestemmelsene som ikke berøres av forbudet er ikke regulert av EØS-retten.

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

IV Costs

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

On those grounds,

THE COURT,

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

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

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

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

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

44 Svaret på det tredje spørsmålet må derfor være at ugyldigheten i henhold til artikkel 53(2) EØS bare gjelder for de delene av avtalen som berøres av forbudet i artikkel 53(1). Det er den nasjonale domstolens oppgave å avgjøre, i overensstemmelse med relevant nasjonal rett, hvorvidt ugyldigheten får betydning for andre deler av avtalen.

IV Saksomkostninger

45 Omkostninger som er påløpt for EFTAs Overvåkningsorgan og Kommisjonen for De europeiske fellesskap, som har gitt saksfremstillinger for EFTA-domstolen, kan ikke kreves dekket. Siden rettergangen her, for partene i hovedsaken, utgjør en del av rettergangen for den nasjonale domstolen, er avgjørelsen av saksomkostninger en sak for den nasjonale domstolen.

På dette grunnlag avgir

EFTA-DOMSTOLEN,

som svar på spørsmålene som er forelagt av Gulating lagmannsrett ved beslutning av 27 september 2001, følgende rådgivende uttalelse:

1 En avtale mellom en leverandør av motordrivstoff og smøreprodukter og en uavhengig bensinstasjonsforhandler, som fastsetter en eksklusiv kjøpsforpliktelse som ikke kan bringes til opphør av forhandleren i løpet av et tidsrom på 15 år, omfattes ikke av gruppeunntaket for avtaler om eksklusiv kjøpsplikt i forordning 1984/83.

2 Forbudet i artikkel 53(1) EØS får ikke anvendelse på en avtale om eksklusiv kjøpsplikt inngått mellom en leverandør av motordrivstoff og smøreprodukter og en bensinstasjonsforhandler for en bestemt periode på 15 år, dersom denne typen avtale bare i ubetydelig grad bidrar til den samlede avstengningen av markedet som forårsakes av det totale antallet avtaler på markedet.

3 Ugyldigheten i henhold til artikkel 53(2) EØS gjelder bare for de delene av avtalen som berøres av forbudet i artikkel 53(1). Det er den nasjonale domstolens oppgave å avgjøre, i overensstemmelse med relevant nasjonal rett, hvorvidt ugyldigheten får betydning for andre deler av avtalen.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 18 October 2002.

Lucien Dedichen
Registrar

Thór Vilhjálmsson
President

Avsagt i åpen rett i Luxembourg den 18 oktober 2002.

Lucien Dedichen
Justissekretær

Thór Vilhjálmsson
President

REPORT FOR THE HEARING
in Case E-7/01

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the *Gulating Lagmannsrett* (Gulating Court of Appeal) Bergen, Norway in a case pending before it between

Hegelstad Eiendomsselskap Arvid B. Hegelstad and others

and

Hydro Texaco AS

concerning the interpretation of Article 53 of the Agreement on the European Economic Area.

I. Introduction

1. By a reference dated 27 September 2001, registered at the Court on 3 October 2001, the Gulating Lagmannsrett made a request for an advisory opinion in a case pending before it between Hegelstad Eiendomsselskap Arvid B. Hegelstad and others (hereinafter the "Appellants") and Hydro Texaco AS (hereinafter the "Respondent").

II. Facts and procedure

2. The case concerns the issue of whether the Respondent is entitled to lease a petrol station owned by Hegelstad Eiendomsselskap (hereinafter "Hegelstad") after the operating company, Ålgård Servicesenter AS (hereinafter "Ålgård"), went bankrupt on 5 December 1994.

3. Hegelstad is a personal company for Arvid B. Hegelstad. Per Roar Hegelstad and Arne Marc Hegelstad are Arvid B. Hegelstad's sons. Hegelstad owns the property with land registration number (gnr) 7, property number (bnr) 663, section 1 in Gjesdal kommune. A petrol station has been operated on the

RETTSMØTERAPPORT
i sak E-7/01

ANMODNING til EFTA-domstolen om rådgivende uttalelse i medhold av artikkel 34 i Avtale mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol fra Gulating lagmannsrett i saken for denne domstol mellom

Hegelstad Eiendomsselskap Arvid B. Hegelstad med flere

og

Hydro Texaco AS

om tolkningen av artikkel 53 i Avtale om Det europeiske økonomiske samarbeidsområde.

I. Innledning

1. Ved en beslutning datert 27 september 2001, mottatt ved EFTA-domstolen 3 oktober 2001, anmodet Gulating lagmannsrett om en rådgivende uttalelse i en sak innbrakt for denne mellom Hegelstad Eiendomsselskap Arvid B. Hegelstad med flere (heretter "ankende parter") og Hydro Texaco AS (heretter "ankemotparten" eller "Hydro Texaco").

II. Faktum og prosedyre

2. Saken gjelder spørsmålet om Hydro Texaco har rett til å leie en bensinstasjon eiet av Hegelstad Eiendomsselskap Arvid B. Hegelstad (heretter "Hegelstad") etter at driftsselskapet Ålgård Servicesenter AS (heretter "Ålgård") gikk konkurs 5 desember 1994.

3. Hegelstad er et personlig selskap for Arvid B. Hegelstad. Per Roar Hegelstad og Arne Marc Hegelstad er Arvid B. Hegelstads sønner. Hegelstad eier eiendommen gnr 7 bnr 663 snr 1 i Gjesdal kommune. På eiendommen har det i flere år vært drevet bensinstasjon. Fra november 1990 ble bensinstasjonen drevet

property for several years. As of November 1990, Ålgård operated the petrol station, which is 100% owned by Arvid B. Hegelstad.

4. A cooperation agreement for the delivery of motor fuels and lubricants concluded by Norsk Texaco AS and Hegelstad on 17 November 1992 included the following provisions: (1) exclusive right for the supplier to supply motor fuels and lubricants to the distributor's petrol station during the period of the agreement; (2) a 10-year contract period, calculated from the time of the first delivery of motor fuels, etc., with automatic renewal for five years on unmodified terms, provided the supplier had not given notice of termination of the contract at least three months prior to the expiry of the 10-year period; (3) termination of the supplier's obligation to supply in the event of debt settlement proceedings or bankruptcy on the part of the distributor. A right for the supplier in such cases to assume ownership by subrogation in return for settling registered debts of NOK 4 million, or, as an alternative, claim immediate lease of the station with a fixed rental (return on NOK 4 million), corresponding in time with the duration of the cooperation agreement.

5. Clause 10 of the agreement provided that the distributor was to be Ålgård Servicesenter AS. Ålgård accepted this provision by way of separate signature on the agreement.

6. On 1 January 1995, the Respondent assumed all the rights and obligations of Norsk Texaco, when the company merged with another company and changed its name to Hydro Texaco AS.

7. Ålgård entered into bankruptcy proceedings by order of 7 December 1994 of the probate and bankruptcy court. The bankruptcy estate ran the petrol station from the commencement of bankruptcy proceedings until 7 January 1995. After that date, the Respondent exercised its rights under clause 10 of the cooperation agreement to lease and run the petrol station. The Respondent did not succeed in its claim to take over the station as owner. The Respondent continues to lease the petrol station, and is thus both the tenant of and the supplier of motor fuels and lubricants to the petrol station.

8. By a writ instituting proceedings of 3 April 1998, the Appellants brought an action against the Respondent, demanding vacation of the property, and compensation of up to NOK 10 million. The Respondent requested that the claim be dismissed, and brought a counterclaim against Per Roar Hegelstad, alleging that he was not entitled to use parts of the petrol station.

9. On 23 February 1999, Sandnes herredsrett (Sandnes District Court) handed down a judgment in favour of the Respondent. That judgment was appealed to the Gulating Lagmannsrett.

av Ålgård, som er 100% eiet av Arvid B. Hegelstad.

4. I samarbeidsavtale om levering av motordrivstoff og smøreprodukter inngått mellom Norsk Texaco og Hegelstad 17 november 1992, ble det inntatt bestemmelser om: (1) enerett for leverandøren til levering av motordrivstoff og smøreprodukter til forhandlerens bensinstasjon i avtaleperioden; (2) 10 års varighet for avtalen beregnet fra tidspunktet for første levering av drivstoff mv, og automatisk fornyelse for 5 år på uendrede betingelser så fremt leverandøren ikke innen 3 måneder før utløpet av 10 års perioden sier opp avtalen; (3) opphør av leverandørens leveringsforpliktelse ved gjeldsforhandling eller konkurs hos forhandleren. Rett for leverandøren i slike tilfeller til å tre inn som eier av bensinstasjonen mot å innfri forhandlerens tinglyste gjeld på NOK 4 millioner, alternativt rett til å leie bensinstasjonen for en tid korresponderende med samarbeidsavtalens varighet og for en leie tilsvarende vanlig forrentning av NOK 4 millioner.

5. I avtalens § 10 ble det bestemt at Ålgård skulle være forhandler. Dette punktet ble akseptert av Ålgård ved særskilt påtegning i avtalen.

6. Hydro Texaco overtok alle rettigheter og forpliktelser til Norsk Texaco etter 1 januar 1995, da selskapet fusjonerte og skiftet navn til Hydro Texaco.

7. Ålgård ble tatt under konkursbehandling ved skifterettens kjennelse av 7 desember 1994. Bensinstasjonen ble drevet av konkursboet fra konkursåpningen til 7 januar 1995. Etter denne dato trådte Hydro Texaco inn i sin rett etter § 10 i samarbeidsavtalen til å leie og drive bensinstasjonen. Hydro Texaco fikk ikke medhold i sitt krav om å overta stasjonen til eie. Hydro Texaco leier fortsatt bensinstasjonen, og er derved både leietaker og leverandør av motordrivstoff og smøreprodukter til bensinstasjonen.

8. Ved stevning av 3 april 1998 anla de ankende parter søksmål mot Hydro Texaco med krav om fravikelse av eiendommen og erstatning oppad begrenset til NOK 10 millioner. Hydro Texaco påsto seg frifunnet og tok i tillegg ut motsøksmål mot Per Roar Hegelstad med påstand om at han var uberettiget til å bruke deler av bensinstasjonen.

9. Sandnes herredsrett avsa 23 februar 1999 dom hvor Hydro Texaco ble gitt medhold. Dommen ble påanket til Gulating lagmannsrett.

III. Questions

10. The following questions were referred to the EFTA Court:

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

IV. Legal background

11. Chapter II, section 10 of the Norwegian Regulation No 964 of 4 December 1992 (hereinafter referred to as "Regulation No 964") incorporates into Norwegian law the Act previously referred to in point 3 of Annex XIV to the EEA Agreement (Commission Regulation (EEC) No 1984/83[1]) on the application of Article 53(3) of the EEA Agreement to categories of exclusive purchasing agreements (hereinafter referred to as "the block exemption on exclusive purchasing agreements" or "the Act").

12. The text of point 3 of Annex XIV to the EEA Agreement was deleted by EEA Joint Committee Decision No 18/2000, which entered into force on 29 January 2000. The Act now referred to in point 2 of Annex XIV to the EEA

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[1] OJ 1983 L 173, p. 5, as corrected by OJ 1983 L 281, p. 24.

III. Spørsmål

10. Følgende spørsmål ble forelagt EFTA-domstolen:

(1) Vil en samarbeidsavtale mellom en selvstendig bensinstasjonsforhandler som eier stasjonen og en leverandør av motordrivstoff og smøreolje som inneholder klausuler om

– leverandørens enerett til levering av motordrivstoff og smøreolje til forhandlerens stasjon i avtaleperioden,

– leverandørens rett til å tre inn som eier av bensinstasjonen til en tinglyst pris på NOK 4 millioner, alternativt en leieopsjon til fast pris korresponderende med avtaleperioden ved gjeldsforhandling eller konkurs hos forhandleren,

– at avtaleperioden er uoppsigelig og undergitt uendrede betingelser for stasjonseieren/forhandleren med varighet i 15 år. Leverandøren kan innen 3 måneder forut for 10 års perioden si opp kontrakten,

omfattes av gruppefritaket i artikkel 53(3) EØS jf forskrift 4 desember 1992 nr 964 kapittel II artikkel 10?

(2) Dersom gruppefritaket i artikkel 53(3) EØS ikke kommer til anvendelse, vil samarbeidsavtalen være i strid med artikkel 53(1) EØS?

(3) Hva blir de rettslige konsekvenser av eventuell motstrid, og hvilken varighetsbegrensning må eventuelt legges til grunn?

IV. Rettslig bakgrunn

11. Forordningen referert til i EØS-avtalens vedlegg XIV nr 3 (kommisjonsforordning (EØF) nr 1984/83)[1] om anvendelse av artikkel 53(3) EØS på grupper av avtaler om eksklusiv kjøpsplikt (heretter "gruppeunntaket for eksklusiv kjøpsplikt" eller "forordningen") er gjennomført i norsk rett ved forskrift av 4 desember 1992 nr 964 (heretter "forskriften"), kapittel II.

12. Teksten i EØS-avtalens vedlegg XIV nr 3 ble strøket ved EØS-komiteens beslutning nr 18/2000, som trådte i kraft 29 januar 2000. Forordningen som det nå henvises til i EØS-avtalens vedlegg XIV nr 2 (kommisjonsforordning (EF) nr 2790/1999)[2] om anvendelse av artikkel 53(3) på grupper av vertikale avtaler og

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1 EFT 1983 L 173, s 5, som endret ved EFT 1983 L 281, s 24.

2 EFT 1999 L 336, s 21.

Agreement (Commission Regulation (EC) No 2790/1999)[2] on the application of Article 53(3) to categories of vertical agreements and concerted practices (the block exemption on vertical restraints)[3] has replaced the block exemption on exclusive purchasing agreements.[4]

13. According to Article 12 of the block exemption regulation on vertical restraints the block exemption regulation on exclusive purchasing agreements continued to apply until 31 May 2000. For agreements already in force on 31 May 2000, which did not satisfy the conditions for exemption provided for in the new block exemption regulation on vertical restraints, there was a transitional period that ended on 31 December 2001.

14. Since the referral from the national court only deals with the applicability of the block exemption regulation on exclusive purchasing agreements in the past, the relationship to the block exemption regulation on vertical restraints is not an issue before the EFTA Court.

15. Article 53 EEA reads as follows:

> *"1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:*
>
> *(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
>
> *(b) limit or control production, markets, technical development, or investment;*
>
> *(c) share markets or sources of supply;*
>
> *(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
>
> *(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*
>
> *2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.*

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2 OJ 1999 L 336, p. 21.

3 Cf. Chapter I A of Regulation No 964.

4 Point 2 of Annex XIV to the EEA Agreement was amended by EEA Joint Committee Decision No 18/2000.

samordnet opptreden (heretter "gruppeunntaket for vertikale avtaler")[3] har erstattet gruppeunntaket for eksklusiv kjøpsplikt.[4]

13. I følge artikkel 12 i gruppeunntaket for vertikale avtaler skal gruppeunntaket for eksklusiv kjøpsplikt gjelde til og med 31 mai 2000. For avtaler som var i kraft den 31 mai 2000, og som ikke oppfylte vilkårene i det nye gruppeunntaket for vertikale avtaler, gjaldt en overgangsperiode frem til 31 desember 2001.

14. Fordi saken for den nasjonale domstolen bare gjelder anvendelsen av gruppeunntaket på avtaler om eksklusiv kjøpsplikt i fortiden, vil ikke forholdet mellom dette gruppeunntaket og gruppeunntaket for vertikale avtaler være et spørsmål for EFTA-domstolen.

15. EØS-avtalens artikkel 53 lyder som følger:

> *"1. Enhver avtale mellom foretak, enhver beslutning truffet av sammenslutninger av foretak og enhver form for samordnet opptreden som kan påvirke handelen mellom avtalepartene, og som har til formål eller virkning å hindre, innskrenke eller vri konkurransen innen det territorium som er omfattet av denne avtale, skal være uforenlige med denne avtales funksjon og forbudt, særlig slike som består i*
>
> *(a) å fastsette på direkte eller indirekte måte innkjøps- eller utsalgspriser eller andre forretningsvilkår,*
>
> *(b) å begrense eller kontrollere produksjon, avsetning, teknisk utvikling eller investeringer,*
>
> *(c) å dele opp markeder eller forsyningskilder,*
>
> *(d) å anvende overfor handelspartnere ulike vilkår for likeverdige ytelser og derved stille dem ugunstigere i konkurransen,*
>
> *(e) å gjøre inngåelsen av kontrakter avhengig av at medkontrahentene godtar tilleggsytelser som etter sin art eller etter vanlig forretningspraksis ikke har noen sammenheng med kontraktsgjenstanden.*
>
> *2. Avtaler eller beslutninger som er forbudt i henhold til denne artikkel, skal ikke ha noen rettsvirkning.*

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[3] Jf forskriften kapittel I A.

[4] EØS-avtalens vedlegg XIV nr 2 ble endret ved EØS-komiteens beslutning nr 18/2000.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

– *any agreement or category of agreements between undertakings;*

– *any decision or category of decisions by associations of undertakings;*

– *any concerted practice or category of concerted practices;*

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

16. The block exemption regulation on exclusive purchasing agreements contains special rules for service-station agreements. Those rules, which differ from the general provisions applicable to exclusive purchasing agreements, are contained in Articles 10, 11, 12 and 13.

17. Article 10 of the block exemption regulation on exclusive purchasing agreements, which corresponds to section 10 of the Norwegian Regulation No 964, stipulates that Article 53(1) EEA shall not apply to

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

18. Article 11 of the block exemption regulation on exclusive purchasing agreements, which corresponds with section 11 of Regulation No 964, provides for only a limited exemption for lubricants, applicable on the conditions that the supplier has made available or financed "a lubrication bay or other motor-vehicle lubrication equipment" and that the lubricants are only for the seller's "use."[5]

19. Article 12(1)(c) of the block exemption regulation on exclusive purchasing agreements, which corresponds to section 12(1)(c) of Regulation No

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[5] See Notice concerning the acts referred to in points 2 and 3 of Annex XIV to the EEA Agreement (Commission Reg. (EEC) No 1983/83 and (EEC) No 1984/83 on the application of Art. 53(3) of the EEA Agreement to categories of exclusive distribution and purchasing agreements), OJ 1994 L 153, p. 13 and EEA Supplement 1994 15, p. 12.

3. Det kan imidlertid erklæres at bestemmelsene i nr. 1 ikke skal anvendes på

- *avtaler eller grupper av avtaler mellom foretak,*

- *beslutninger eller grupper av beslutninger truffet av sammenslutninger av foretak, og*

- *samordnet opptreden eller grupper av slik opptreden,*

som bidrar til å bedre produksjonen eller fordelingen av varene eller til å fremme den tekniske eller økonomiske utvikling, samtidig som de sikrer forbrukerne en rimelig andel av de fordeler som er oppnådd, og uten

(a) å pålegge vedkommende foretak restriksjoner som ikke er absolutt nødvendige for å nå disse mål, eller

(b) å gi disse foretak mulighet til å utelukke konkurranse for en vesentlig del av de varer det gjelder."

16. Gruppeunntaket for avtaler om eksklusiv kjøpsplikt inneholder særskilte regler for bensinstasjonsavtaler. Disse reglene finnes i artiklene 10 til 13, og avviker fra de generelle bestemmelsene for avtaler om eksklusiv kjøpsplikt.

17. Artikkel 10 i gruppeunntaket for avtaler om eksklusiv kjøpsplikt, som tilsvarer § 10 i forskriftens kapittel II, fastsetter at artikkel 53(1) EØS ikke skal anvendes på

"avtaler mellom bare to foretak der den ene parten, videreforhandleren, overfor den annen part, leverandøren, som vederlag for økonomiske og finansielle fordeler forplikter seg til å kjøpe utelukkende fra leverandøren, tilknyttede foretak eller et annet foretak som har i oppdrag å distribuere leverandørens varer, visse typer oljebasert drivstoff for motorvogner eller visse typer oljebasert drivstoff for motorvogner og visse andre typer oljebasert brennstoff som angitt i avtalen med sikte på videresalg fra en bensinstasjon angitt i avtalen."

18. Artikkel 11 i gruppeunntaket for avtaler om eksklusiv kjøpsplikt, som tilsvarer § 11 i forskriftens kapittel II, gir bare et begrenset unntak for smøreprodukter betinget av at leverandøren "har stilt til videreforhandlerens rådighet eller finansiert et smøreanlegg eller annet utstyr til smøring av motorvogner" og at smøreoljene bare er til videreforhandlerens "bruk."[5]

19. Artikkel 12(1)(c) i gruppeunntaket for avtaler om eksklusiv kjøpsplikt, som tilsvarer § 12(1)(c) i forskriftens kapittel II, fastsetter at artikkel 10 ikke får

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[5] Se Kunngjøring fra EFTAs overvåkningsorgan om rettsaktene omhandlet i EØS-avtalens vedlegg XIV nr 2 og 3 (forordning (EØF) nr 1983/83 og 1984/83) om anvendelse av EØS-avtalens artikkel 53(3) på grupper av enedistribusjonsavtaler og avtaler om eksklusiv kjøpsplikt), EFT 1994 L 153, s 13 og EØS-tillegget 1994 15, s 12.

964, states that "[a]rticle 10 shall not apply where: …the agreement is concluded for an indefinite duration or for a period of more than 10 years…."

V. Written Observations

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

- Hydro Texaco AS, represented by Trym Landa, Advokatfirmaet Schjødt AS;

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

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

The Appellants did not present any written observations to the EFTA Court.

The first question

Hydro Texaco AS

21. The Respondent emphasises that subsequent to the lease agreement there has been no agreement on the delivery of motor fuels and/or lubricants between the Respondent and the Appellants. Prior to January 1995 the Respondent delivered motor fuels and/or lubricants to Ålgård, not the Appellants. Moreover, the Respondent has not delivered any motor fuels and/or lubricants to the Appellants outside the cooperation agreement of 17 November 1992.

22. By entering into the lease agreement, the Respondent found itself in a position where it delivered motor fuels and/or lubricants to itself, until the Respondent later appointed a franchisee to operate the petrol station. This implies that the Respondent delivers motor fuels and/or lubricants to the franchisee according to the agreement between the Respondent and franchisee, and not according to the cooperation agreement between the Appellants and the Respondent. In fact, the Respondent has never delivered any motor fuels and/or lubricants to the Appellants. The relationship between the Appellants and the Respondent has never been of a character that is comprised by the rules that the Appellants apply in this case.

23. The relationship between the Appellants and the Respondent is not under any circumstances of a character that is covered by Article 53 (1) of the EEA

anvendelse når avtalen er inngått for et ubestemt tidsrom eller for en periode på mer enn ti år.

V. Skriftlige saksfremstillinger

20. I medhold av Vedtektene for EFTA-domstolen artikkel 20 og Rettergangsordningen artikkel 97, er skriftlige saksfremstillinger mottatt fra:

– Ankemotparten, Hydro Texaco AS, representert ved Trym Landa, advokat, Advokatfirmaet Schjødt AS;

– EFTAs overvåkningsorgan, representert ved Michael Sánchez Rydelski og Per Andreas Bjørgan, saksbehandlere, avdeling for juridiske saker og eksekutivsaker, som partsrepresentant;

– Kommisjonen for De europeiske fellesskap, representert ved Anthony Whelan og Wouter Wils, juridiske rådgivere, som partsrepresentant.

De ankende parter, Hegelstad Eiendomsselskap Arvid B. Hegelstad med flere, har ikke inngitt skriftlig saksfremstilling til EFTA-domstolen.

Det første spørsmålet

Hydro Texaco AS

21. Hydro Texaco understreker at det ikke har blitt inngått noen avtale mellom Hydro Texaco og Hegelstad om levering av motordrivstoff og/eller smøreprodukter etter inngåelsen av leieavtalen. Før januar 1995 leverte Hydro Texaco motordrivstoff og/eller smøreprodukter til Ålgård, ikke til Hegelstad. Videre har Hydro Texaco ikke levert motordrivstoff og/eller smøreprodukter til Hegelstad utenfor samarbeidsavtalen av 17 november 1992.

22. Ved å inngå leieavtalen kom Hydro Texaco i en situasjon hvor den leverte motordrivstoff og/eller smøreprodukter til seg selv, frem til Hydro Texaco senere utpekte en franchisetaker til å drive bensinstasjonen. Dette innebærer at Hydro Texaco leverer motordrivstoff og/eller smøreprodukter til franchisetakeren i henhold til avtalen mellom Hydro Texaco og franchisetakeren, og ikke i henhold til samarbeidsavtalen mellom Hegelstad og Hydro Texaco. Hydro Texaco har i realiteten aldri levert motordrivstoff og/eller smøreprodukter til Hegelstad. Forholdet mellom Hegelstad og Hydro Texaco har aldri vært av en slik karakter at det omfattes av de reglene som Hegelstad viser til i denne saken.

23. Forholdet mellom Hegelstad og Hydro Texaco er under enhver omstendighet ikke av en slik art at det faller inn under artikkel 53(1) i EØS-

Agreement. When considering the relationship between the two parties in light of the parties' turnover, share of relevant market and the lack of effect on trade within the territory covered by the EEA Agreement, this seems to be the case. The agreement between the Appellants and the Respondent has no effect on competition in the relevant market.

24. The questions put before the EFTA Court by the national court seem to presuppose that delivery of motor fuels and lubricants has taken place between the parties. The formulation of the first question seems to indicate that the Appellants were a petrol station operator whilst the cooperation agreement between the parties was in force. In the event that the posed question can be construed in this manner, this is in the Respondent's opinion not a correct understanding of the facts in the case.

25. The EFTA Court should therefore consider whether or not the competition rules in the EEA Agreement apply to the cooperation agreement, as well as the questions issued by Gulating Lagmannsrett.

The EFTA Surveillance Authority

26. The EFTA Surveillance Authority notes that the question of applicability of a block exemption regulation is only relevant in so far as the agreement in question falls under Article 53(1) EEA.

27. Clause 9 of the cooperation agreement states that the contract period should be for 10 years and thereafter be automatically renewed for an additional 5 years unless terminated by the Respondent. Although the latter is in a position to terminate the cooperation agreement after 10 years, the Appellants, on the other hand, are not free to choose another supplier before the 15 year period lapses.

28. From a competition law point of view, it is the tying of a number of distributors to the existing suppliers that may have the effect of sealing-off the market. Furthermore, clause 2.1 of the cooperation agreement establishes the conditions for the granting of a loan to Hegelstad that "shall be written off by the Respondent in equal annual amounts over 15 years." This seems to indicate that both parties, and in particular the Respondent, envisaged from the outset that the contract period should be 15 years.

29. Reference is made to the Court of First Instance of the European Communities' judgments *Langnese* and *Schöller,*[6] in which the view was taken that exclusive purchasing agreements that specify a fixed term but are automatically renewable unless one of the parties gives notice to terminate the

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[6] Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533, paragraphs 137 and 138; Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, paragraphs 123 and 124.

avtalen. Dette fremgår dersom forholdet mellom partene vurderes i lys av partenes omsetning, markedsandel og at det ikke finner sted noen påvirkning av handelen innenfor det området som omfattes av EØS-avtalen. Avtalen mellom Hegelstad og Hydro Texaco har ingen innvirkning på konkurransen i det relevante markedet.

24. Spørsmålene som den nasjonale domstolen har stilt EFTA-domstolen synes å forutsette at det har funnet sted levering av motordrivstoff og smøreprodukter mellom partene. Formuleringen av det første spørsmålet synes å indikere at Hegelstad drev bensinstasjonen mens samarbeidsavtalen mellom partene gjaldt. Dersom den nasjonale domstolens spørsmål kan tolkes på denne måten, er dette, etter Hydro Texacos oppfatning, ikke i overensstemmelse med sakens faktum.

25. EFTA-domstolen bør derfor, i tillegg til spørsmålene reist av Gulating lagmannsrett, vurdere hvorvidt EØS-avtalens konkurranseregler i det hele tatt er anvendelige på samarbeidsavtalen.

EFTAs overvåkningsorgan

26. EFTAs overvåkningsorgan bemerker at spørsmålet om gruppeunntakets anvendelse bare er relevant dersom den aktuelle avtalen faller inn under artikkel 53(1) EØS.

27. Samarbeidsavtalens punkt 9 angir at avtalen løper for 10 år med automatisk fornyelse for ytterligere 5 år dersom den ikke sies opp av Hydro Texaco. Til tross for at Hydro Texaco har mulighet til å avslutte samarbeidsavtalen etter 10 år, er Hegelstad forhindret fra å velge en annen leverandør før utløpet av 15-årsperioden.

28. Fra et konkurranserettslig synspunkt er det bindingen av en mengde forhandlerer til den eksisterende leverandøren som kan ha som virkning en avstengning av markedet. Etter punkt 2.1 i samarbeidsavtalen skal lånet til Hegelstad avskrives av Hydro Texaco med like store årlige beløp over 15 år. Dette synes å indikere at begge partene, og særlig Hydro Texaco, forutsatte at kontraktsperioden skulle være 15 år.

29. Det vises til avgjørelsene av De europeiske fellesskaps domstol i første instans (heretter "Førsteinstansdomstolen") i *Langnese-Iglo* v *Commission* og *Schöller* v *Commission*,[6] hvor det ble lagt til grunn at avtaler om eksklusiv kjøpsplikt som fastsetter en bestemt løpetid, men som automatisk fornyes dersom

[6] Sak T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533, avsnittene 137 og 138 og sak T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, avsnittene 123 og 124.

contract, are to be considered to have been concluded for an indefinite period. Following the EFTA Surveillance Authority, under the circumstances, this jurisprudence has to be applied *a fortiori* to the present cooperation agreement. The agreement should therefore be deemed to have a duration exceeding the 10 year limit laid down in the block exemption regulation on exclusive purchasing agreements.

30. Concerning a special transitional treatment of the cooperation agreement, as it was already in existence when the EEA Agreement came into force, the EFTA Surveillance Authority refers in general to the case law of the Court of Justice of the European Communities.[7] However, although the cooperation agreement predates the entry into force of the EEA Agreement, it was clearly stated in point 3 of Annex XIV to the EEA Agreement[8] that the transitional regime in Article 15 of the Act should not apply. The EEA Agreement did therefore not provide for a transitional period, as the one in Article 15 of Commission Regulation (EEC) No 1984/83. Instead, Articles 5 et seq. of Protocol 21 to the EEA Agreement provide provisions of general application to deal with agreements which were in existence at the date of the entry into force of the EEA Agreement.[9] Where an agreement fell within the prohibition contained in Article 53(1) EEA and had not been previously notified to the Commission of the European Communities, there was a six-month adaptation period from the date of entry into force of the EEA Agreement. Within that period, undertakings were to modify their agreements so that they were no longer covered by the prohibition of Article 53(1) EEA or to comply with existing block exemption regulations, or to notify them in order to obtain an individual exemption under Article 53(3) EEA.

31. Furthermore, the EFTA Surveillance Authority points out that the Court of Justice of the European Communities has, in the context of beer supply agreements, clarified that the block exemption regulation is not applicable if the entirety of its conditions are not satisfied.[10]

32. The EFTA Surveillance Authority suggests to answer the question as follows:

> *"The cooperation agreement, referred to in the request for an advisory opinion, is not covered by the block exemption on exclusive purchasing agreements."*

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7 Case C-39/92 *Petrogal* [1993] ECR I-5659.

8 Prior to the amendment by EEA Joint Committee Decision No 18/2000.

9 Similar transitional provisions are contained in Chapter XIV of Protocol 4 to the Surveillance and Court Agreement.

10 Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 39.

ikke en av partene sier opp avtalen, skal anses å være inngått på ubestemt tid. EFTAs overvåkningsorgan anfører at denne forståelsen må anvendes *a fortiori* på den foreliggende samarbeidsavtalen. Avtalen må derfor anses å ha en varighet som overstiger grensen på 10 år i gruppeunntaket for avtaler om eksklusiv kjøpsplikt.

30. Når det gjelder anvendelse av særlige overgangsregler på samarbeidsavtalen som følge av at den allerede gjaldt da EØS-avtalen trådte i kraft, viser EFTAs overvåkningsorgan til rettspraksis av De europeiske fellesskaps domstol (heretter "EF-domstolen").[7] Selv om samarbeidsavtalen er datert forut for EØS-avtalens ikrafttreden, fremgår det uttrykkelig av EØS-avtalens vedlegg XIV nr 3[8] at overgangsordningen i forordningens artikkel 15 ikke skulle komme til anvendelse. EØS-avtalen opererer derfor ikke med noen overgangsperiode slik som artikkel 15 i kommisjonsforordning (EØF) nr 1984/83. I stedet oppstiller EØS-avtalens protokoll 21, artikkel 5 følgende, generelle bestemmelser for avtaler som forelå på tidspunktet for EØS-avtalens ikrafttreden.[9] For avtaler omfattet av forbudet i artikkel 53(1) EØS, og som ikke tidligere hadde blitt meldt til Kommisjonen for De europeiske fellesskap, gjaldt en seks måneders tilpassingsperiode fra tidspunktet for EØS-avtalens ikrafttreden. I løpet av denne perioden måtte foretakene enten endre sine avtaler slik at de ikke lenger var omfattet av forbudet i artikkel 53(1) EØS eller slik at de var omfattet av eksisterende gruppeunntak, eller melde avtalene med sikte på å oppnå individuelt fritak i henhold til artikkel 53(3) EØS.

31. Videre peker EFTAs overvåkningsorgan på at EF-domstolen har gjort det klart at gruppeunntaket ikke kan anvendes dersom ikke alle dets vilkår er oppfylt.[10]

32. EFTAs overvåkningsorgan foreslår at spørsmålet besvares som følger:

> *"Samarbeidsavtalen referert til i anmodningen om en rådgivende uttalelse omfattes ikke av gruppeunntaket for avtaler om eksklusiv kjøpsplikt."*

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7 Sak C-39/92 *Petrogal* [1993] ECR I-5659.

8 Forut for endringen som fulgte av EØS-komiteens beslutning nr 18/2000.

9 Kapittel XIV i protokoll 4 til Overvåknings- og domstolsavtalen inneholder liknende overgangsregler.

10 Sak C-234/89 *Delimitis* [1991] ECR I-935, avsnitt 39.

The Commission of the European Communities

33. The Commission of the European Communities submits that an agreement such as the contract of cooperation between the Respondent and Hegelstad, with the characteristics described in the first question, is not covered by the block exemption contained in Article 10 of Regulation No 964 of 4 December 1992. Article 12(c) of that Regulation excludes the application of the block exemption where the agreement is concluded for an indefinite duration or for a period of more than 10 years. The Commission took the view, in its Notice on the application of the corresponding EC block exemption,[11] that exclusive purchasing agreements that specify a fixed term but are automatically renewable unless one of the parties gives notice to terminate are to be considered to have been concluded for an indefinite period.

34. Reference is made to the judgments *Schöller* and *Langnese*.[12] The analysis therein applies *a fortiori* in the present case, due to a specific feature of the contractual terms in the present case: although the Respondent is free to terminate the contract after 10 years, thus preventing its automatic renewal, Hegelstad does not enjoy similar freedom of action. From the point of view of the latter, the contract is of indefinite duration or, in any event, of more than 10 years' duration, as it has no power to induce early termination other than in the event of serious unrectified breach of the contract by the Respondent. In the case of asymmetric contractual freedom, the position of the distributor is especially important, as market foreclosure comes about through the tying of a sufficient number of distributors to existing suppliers. Moreover, the freedom of action of Hegelstad was further reduced by the fact that outstanding loans would become payable, by virtue of clause 2.1 of the contract of cooperation, in the event that the contract was terminated before the lapse of 15 years.

35. The Commission of the European Communities also notes that, in the event that an agreement is not covered by the block exemption regulation by reason of its duration, it is not possible to apply the exemption during the first 10 years of the agreement, as suggested by the Respondent. The block exemption regulation is not applicable in any respect if the entirety of its conditions is not satisfied.[13] Otherwise, undertakings might be enabled to conclude agreements

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11 Paragraph 39, Commission Notice 84/C 101/02 concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements, OJ 1984 C 101, p. 2, as amended by Commission Notice 92/C 121/02, OJ 1992 C 121, p. 2.

12 See Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533, paragraphs 137 and 138 and Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, paragraphs 123 and 124.

13 See footnote 10, *Delimitis*. Although the contract of cooperation between the Respondent and Hegelstad predates the entry into force of the EEA Agreement, the Norwegian rules do not contain any provision equivalent to Article 15(4) of Regulation No 1984/83, applied in Case C-39/92 *Petrogal* [1993] ECR I-5659. Annex XIV to the EEA Agreement provides for the adoption of Regulation No 1984/83 pursuant to Article 60 EEA but states that Article 15 thereof shall not apply.

Kommisjonen for De europeiske fellesskap

33. Kommisjonen for De europeiske fellesskap (heretter "Kommisjonen") anfører at samarbeidsavtalen mellom Hydro Texaco og Hegelstad, med de egenskapene som er beskrevet i det første spørsmålet, ikke omfattes av gruppeunntaket omtalt i forskriftens § 10. Forskriftens § 12(c) utelukker anvendelse av gruppeunntaket på avtaler inngått på ubestemt tid eller med en varighet på mer enn 10 år. I sin kunngjøring om anvendelsen av gruppeunntaket tok Kommisjonen det standpunkt at avtaler om eksklusiv kjøpsplikt som fastsetter en bestemt løpetid, men som fornyes automatisk dersom ikke en av partene sier den opp, skal anses å ha blitt inngått på ubestemt tid.[11]

34. Det vises til avgjørelsene *Schöller* v *Commission* og *Langnese-Iglo* v *Commission*.[12] På grunn av følgende særtrekk ved avtalevilkårene i den foreliggende saken, kommer analysen anvendt i de nevnte avgjørelsene *a fortiori* til anvendelse på denne saken: Selv om Hydro Texaco står fritt til å avslutte avtalen etter 10 år, og således kan forhindre automatisk forlengelse av avtalen, har ikke Hegelstad den samme friheten. For Hegelstads del løper avtalen på ubestemt tid, eller, under enhver omstendighet, i mer enn 10 år, siden Hegelstad bare har mulighet til å avslutte avtaleforholdet tidligere dersom Hydro Texaco vesentlig misligholder avtalen, og ikke retter opp dette innen rimelig tid. Ved tilfeller av asymetrisk avtalefrihet er forhandlerens posisjon særlig viktig siden det er bindingen av et tilstrekkelig antall forhandlere til eksisterende leverandører som gjør at konkurrenter stenges ute fra markedet. Hegelstads handlefrihet var ytterligere begrenset ved det faktum at utestående lån, i henhold til samarbeidsavtalens artikkel 2.1, ville forfalle til betaling dersom avtalen ble avsluttet før utløpet av perioden på 15 år.

35. Kommisjonen bemerker at dersom en avtale, som følge av dens varighet, ikke omfattes av gruppeunntaket, er det ikke mulig å anvende gruppeunntaket på de 10 første årene av avtalen, slik som antydet av Hydro Texaco. Gruppeunntaket kommer ikke til anvendelse i det hele tatt dersom ikke alle vilkårene er oppfylt.[13] I motsatt fall ville det være mulig for foretak å inngå avtaler med konkurransebegrensninger utover det som er tillatt etter gruppeunntaket i visshet om at avtalene ville kunne fortolkes i overensstemmelse med vilkårene for

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11 Avsnitt 39 i Kommisjonens meddelelse 84/C 101/02 vedrørende forordningene (EØF) nr 1983/83 og 1984/83 av 22 juni 1983 om anvendelse av EF-traktatens artikkel 85(3) på grupper av enedistribusjonsavtaler og avtaler om eksklusiv kjøpsplikt, EFT 1984 C 101, s 2, endret ved Kommisjonens meddelelse 92/C 121/02, EFT 1992 C 121, s 2.

12 Sak T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533, avsnittene 137 og 138 og T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, avsnittene 123 og 124.

13 Se fotnote 10, Delimitis. Selv om samarbeidsavtalen mellom Hydro Texaco og Hegelstad er datert forut for EØS-avtalens ikrafttreden finnes det i det norske regelverket ikke en bestemmelse tilsvarende artikkel 15(4) i kommisjonsforordning (EØF) nr 1984/83, som ble anvendt i sak C-39/92 *Petrogal* [1993] ECR I-5659. EØS-avtalens vedlegg XIV foreskriver implementering av forordning nr 1984/83 i henhold til artikkel 60 EØS, men gjør unntak for forordningens artikkel 15.

whose restrictive effects exceed those permitted by the block exemption regulation, in the knowledge that the agreements could be interpreted in conformity with the conditions of exemption in the event of difficulty in enforcing their original terms.

36. Therefore, the Commission submits that the Court should reply to the first question in the negative.

The second question

The EFTA Surveillance Authority

37. According to the EFTA Surveillance Authority, the fact that the cooperation agreement does not satisfy the conditions for a block exemption regulation does not mean that Article 53(1) EEA "automatically" prohibits the contract. Whether the agreement in question is covered by the prohibition in Article 53(1) EEA depends on whether the conditions laid down in Article 53(1) EEA are fulfilled.

38. In principle, Article 53(1) EEA may apply to exclusive purchasing agreements as the reseller deprives himself of the freedom to obtain goods elsewhere, while at the same time other suppliers are denied an outlet for their products. This will depend on the legal and economic context of the agreement at stake. Even if an exclusive purchasing agreement does not have the objective of restricting competition, it is nevertheless necessary to ascertain whether it has the effect of preventing, restricting or distorting competition.[14]

39. In its judgment *Brasserie De Haecht*, the European Court of Justice held that the effects of such agreements had to be assessed in the context in which they occur and where they might combine with others to have a cumulative effect on competition.[15] It also follows from that ruling that the cumulative effect of several similar agreements constitutes one factor amongst others in ascertaining whether, by way of a possible alteration of competition, trade between the Contracting Parties is capable of being affected.

40. In the present case it is necessary to analyse the effects of the cooperation agreement, taken together with other contracts of the same type, on the opportunities of competitors from Contracting Parties to gain access to the market for motor fuels and lubricants consumption or to increase their market share.

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14 See footnote 10, *Delimitis*, paragraph 13.

15 Case 23/67 *Brasserie De Haecht* v *Wilkin* [1967] ECR 407 and footnote 10, *Delimitis*, paragraph 13.

unntak dersom det skulle oppstå vanskeligheter i forbindelse med håndhevelsen av avtalens opprinnelige bestemmelser.

36. Kommisjonen anfører derfor at EFTA-domstolen bør besvare det første spørsmålet benektende.

Det andre spørsmålet

EFTAs overvåkningsorgan

37. Ifølge EFTAs overvåkningsorgan betyr det faktum at samarbeidsavtalen ikke oppfyller vilkårene for gruppeunntak ikke at avtalen "automatisk" er forbudt etter artikkel 53(1) EØS. Hvorvidt den aktuelle avtalen omfattes av forbudet i artikkel 53(1) EØS avhenger av hvorvidt vilkårene i artikkel 53(1) EØS er oppfylt.

38. I prinsippet kan artikkel 53(1) EØS anvendes på avtaler om eksklusiv kjøpsplikt siden videreforhandleren fratas friheten til å få varer fra andre steder, og andre leverandører samtidig nektes en salgskanal for sine produkter. Dette vil avhenge av de rettslige og økonomiske omstendighetene rundt den aktuelle avtalen. Selv om en avtale om eksklusiv kjøpsplikt ikke har som formål å innskrenke konkurransen, er det ikke desto mindre nødvendig å bringe på det rene hvorvidt dens virkning er å hindre, innskrenke eller vri konkurransen.[14]

39. I avgjørelsen *Brasserie De Haecht* v *Wilkin* uttalte EF-domstolen at virkningene av slike avtaler må bedømmes ut fra den sammenhengen de fungerer i og at avtalene kombinert med andre avtaler kan ha en samlet innvirkning på konkurransen.[15] Det følger også av denne avgjørelsen at den samlede virkningen av flere like avtaler utgjør en av flere faktorer ved vurderingen av om eventuell endring av konkurransen er egnet til å påvirke handelen mellom EØS-statene.

40. I den foreliggende saken er det nødvendig å analysere hvordan samarbeidsavtalen, sett i sammenheng med andre liknende avtaler, påvirker muligheten for konkurrenter fra EØS-statene til å komme inn på markedet for forbruk av motordrivstoff og smøreolje eller til å øke sine markedsandeler.

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14 Se fotnote 10, *Delimitis*, avsnitt 13.

15 Sak 23/67 *Brasserie De Haecht* v *Wilkin* [1967] ECR 407 og fotnote 10, *Delimitis,* avsnitt 13.

41. In carrying out that analysis, it is necessary first to identify the relevant product and geographical market. Second, the nature and extent of all similar agreements in that market, tying distributors to various suppliers must be examined in order to assess whether it will be difficult for a new competitor to enter the market. Thirdly, the Respondent's position in that market must be examined to determine whether the Respondent's network of agreements significantly contributes to a foreclosure of the market. Finally, the actual agreement's contribution to the cumulative effect of the Respondent's network of agreements should be assessed.[16]

42. The relevant product market is defined on the basis of the nature of the economic activity in question, here the distribution of motor fuels and lubricants for sale in petrol stations. The relevant market is further defined by its geographical scope.[17] Although the Authority would assume that most of the exclusive purchasing agreements concerning motor fuels and lubricants are entered into at a national level, thus indicating that the relevant geographic market is national in scope, the request for an advisory opinion does not contain sufficient information on this point.

43. The cooperation agreement viewed in isolation will probably not have any effect on competition in the relevant market; neither will the agreement have any effect on trade. However, it follows from the above that the effect of an exclusive purchasing agreement must be evaluated in the legal and economic context in which the agreement functions and where it may combine with other agreements to have a cumulative effect on competition. The cumulative effect is also one factor amongst others to consider when determining whether trade between Member States is capable of being affected.[18]

44. In the cases *Bilger* and *Delimitis*, the European Court of Justice explained that it is necessary to examine the nature and extent of all similar contracts in their totality, comprising all similar contracts tying a large number of points of sale to several national producers.[19] However, even if the network of similar contracts has a considerable effect on the opportunities for gaining access to the market, it is not sufficient in itself to support a finding that the relevant market is inaccessible.[20] Other factors should be taken into account, such as the possibilities to acquire a supplier already established in the market, or to open up new petrol stations. Furthermore, the competitive forces in the market, including the number and size of suppliers, the degree of saturation of that market and brand loyalty among the distributors, need to be considered.

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16 See footnote 10, *Delimitis* and Case C-214/99 *Neste Markkinointi* [2000] ECR I-11121.

17 See footnote 10, *Delimitis*, paragraphs 16 to 18.

18 See footnote 10, *Delimitis*, paragraph 14.

19 Case 43/69 *Bilger* v *Jehle* [1970] ECR 127 and footnote 10, *Delimitis*, paragraph 19.

20 See footnote 15, *Brasserie De Haecht* v *Wilkin* and footnote 10, *Delimitis*, paragraph 20.

41. Ved gjennomføringen av denne analysen er det først nødvendig å definere det relevante produktmarkedet og det relevante geografiske markedet. Deretter må arten og omfanget av alle liknende avtaler i dette markedet som binder forhandlere til ulike leverandører undersøkes med sikte på å vurdere hvorvidt det vil være vanskelig for en ny konkurrent å komme inn på markedet. Videre må Hydro Texacos stilling i dette markedet vurderes for å avgjøre hvorvidt Hydro Texacos nettverk av avtaler i betydelig grad bidrar til å stenge konkurrenter ute fra markedet. Endelig må den aktuelle avtalens bidrag til den samlede virkningen av Hydro Texacos nettverk av avtaler vurderes.[16]

42. Det relevante produktmarkedet defineres på grunnlag av arten av den aktuelle økonomiske virksomheten, i dette tilfellet distribusjon av motordrivstoff og smøreprodukter for salg i bensinstasjoner. Definisjonen av det relevante markedet avhenger også av markedets geografiske omfang.[17] Selv om EFTAs overvåkningsorgan vil anta at de fleste avtalene for eksklusiv kjøpsplikt vedrørende motordrivstoff og smøreprodukter er inngått på nasjonalt nivå, og således indikerer at det relevante geografiske markedet er nasjonalt, inneholder anmodningen om en rådgivende uttalelse ikke tilstrekkelig informasjon på dette punktet.

43. Vurdert alene vil samarbeidsavtalen sannsynligvis ikke ha noen virkning på konkurransen i det relevante markedet. Avtalen vil heller ikke ha noen virkning på handelen. Det følger imidlertid av det ovenfor nevnte at i vurderingen av virkningen av en avtale om eksklusiv kjøpsplikt må tas hensyn til den rettslige og økonomiske sammenhengen den fungerer i og om avtalen sammen med andre avtaler kan ha en virkning på konkurransen. Den samlede effekten er også en av flere faktorer som avgjør hvorvidt handelen mellom EØS-statene kan påvirkes. [18]

44. I sakene *Bilger* v *Jehle* og *Delimitis* redegjorde EF-domstolen for nødvendigheten av å vurdere arten og omfanget av alle liknende avtaler under ett, herunder alle liknende avtaler som binder et større antall salgssteder til flere nasjonale produsenter.[19] Selv om nettverket av liknende avtaler har en betydelig innvirkning på mulighetene for å etablere seg på markedet, er dette ikke i seg selv tilstrekkelig til å komme til at adgang til det relevante markedet er forhindret.[20] Andre faktorer bør tas med i vurderingen, slik som mulighetene for å kjøpe opp en leverandør som allerede er etablert på markedet, eller å åpne nye bensinstasjoner. Videre må det tas hensyn til konkurranseforholdene på markedet, herunder leverandørenes størrelse, antall leverandører, markedets metningsgrad og varemerkelojaliteten blant forhandlerene.

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16 Se fotnote 10, *Delimitis* og sak C-214/99 *Neste Markkinointi* [2000] ECR I-11121.

17 Se fotnote 10, *Delimitis*, avsnittene 16 til 18.

18 Se fotnote 10, *Delimitis,* avsnitt 14.

19 Sak 43/69 *Bilger* v *Jehle* [1970] ECR 127 og fotnote 10, *Delimitis,* avsnitt 19.

20 Se fotnote 15, *Brasserie De Haecht* v *Wilkin* og fotnote 10, *Delimitis,* avsnitt 20.

45. If the examination shows that the totality of agreements does not have the cumulative effect of foreclosing the market and thereby denying access to new national and foreign competitors, the individual agreements comprising the bundle of agreements cannot be held to be contrary to Article 53(1) EEA.[21]

46. If the network of agreements deprives a new competitor of real concrete possibilities to gain access to the market, it is necessary to examine the extent to which the agreements entered into by the supplier in question contribute to the cumulative effect produced by the totality of the similar agreements found in that market.[22] Responsibility for such an effect of closing off the market must be attributed to the suppliers who make an appreciable contribution thereto. Contracts entered into by suppliers whose contribution to the cumulative effect is insignificant, do not therefore fall under the prohibition laid down in Article 53(1) EEA.[23]

47. In considering whether the agreements have an appreciable effect, the market position of the Respondent must be taken into account. That position is not only determined by the market share held by the supplier and any group to which it may belong, but also by the number of outlets tied to it or to its group, in relation to the total number of premises for the sale and consumption of motor fuels and lubricants found in the relevant market.[24] Furthermore, the contribution to the cumulative effect also depends on the duration of those agreements. If the duration manifestly exceeds the average duration of contracts generally concluded on the relevant market, the individual contract falls under the prohibition laid down in Article 53(1) EEA. This is because a supplier with a relatively small market share may make as significant a contribution to a foreclosure of the market as a supplier with a strong market position that regularly releases the distributors at shorter intervals.[25]

48. Reference is made to the *Guidelines on Vertical Restraints*,[26] which set out the principles for the assessment of vertical agreements under Article 53 EEA. The guidelines are non-binding and primarily aimed at helping undertakings to make their own assessment of vertical agreements under the EEA competition rules.

49. Agreements which are not capable of appreciably affecting trade between the Contracting Parties or capable of appreciably restricting competition are not caught by Article 53(1) EEA. Section II of the vertical guidelines deals with

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21 See footnote 10, *Delimitis*, paragraph 23.

22 See footnote 10, *Delimitis*, paragraph 24.

23 See footnote 16, *Neste Markkinointi*, paragraph 27.

24 See footnote 10, *Delimitis*, paragraph 25.

25 See footnote 10, *Delimitis*, paragraph 26 and footnote 16, *Neste Markkinointi*, paragraphs 27 to 30.

26 Guidelines on Vertical Restraints of 25.07.2001 (not yet published).

45. Dersom undersøkelsen viser at avtalene samlet ikke utelukker adgang til markedet og derved hindrer at nye nasjonale og utenlandske konkurrenter etablerer seg på markedet, kan en ikke komme til at de enkelte avtalene i dette nettverket av avtaler er uforenlig med artikkel 53(1) EØS.[21]

46. Dersom avtalenettverket fratar en ny konkurrent reelle muligheter til å komme inn på markedet, er det nødvendig å vurdere i hvilken grad de avtalene som er inngått av den aktuelle leverandøren bidrar til den samlede virkningen av alle liknende avtaler på markedet.[22] Ansvaret for en slik virkning i form av avstengning av markedet må tilskrives de leverandørene som bidrar betydelig til dette. Avtaler inngått av leverandører hvis bidrag ikke er av betydning for den samlede virkningen faller derfor ikke inn under forbudet i artikkel 53(1) EØS.[23]

47. Ved vurderingen av om avtalene har en betydelig virkning må det tas hensyn til Hydro Texacos markedsposisjon. Denne posisjonen avgjøres ikke bare av leverandørens eller eventuelt konsernets markedsandel, men også av antall tilknyttede salgssteder sett i forhold til det totale antall salgssteder for motordrivstoff og smøreprodukter på det relevante markedet.[24] Videre avhenger bidraget til den samlede virkningen av varigheten av disse avtalene. Dersom avtalens varighet åpenbart overstiger den gjennomsnittlige varigheten til avtalene på det relevante markedet i sin alminnelighet, omfattes den enkelte avtalen av forbudet i artikkel 53(1) EØS. Dette fordi en leverandør med en relativt liten markedsandel kan bidra like mye til å hindre adgang til markedet som en leverandør med en sterk markedsposisjon som regelmessig frigir distributørene med kortere intervaller.[25]

48. Det vises til *Retningslinjer for vertikale avtaler*,[26] som oppstiller prinsippene for bedømmelse av vertikale avtaler etter artikkel 53 EØS. Retningslinjene har primært som formål å hjelpe foretakene til å foreta en egen bedømmelse av vertikale avtaler i forhold til EØS-avtalens konkurranseregler og er ikke bindende.

49. Avtaler som ikke er egnet til å påvirke handelen mellom EØS-statene merkbart eller å begrense konkurransen omfattes ikke av artikkel 53(1) EØS. Del II i retningslinjene for vertikale avtaler omhandler avtaler som generelt faller utenfor artikkel 53(1) EØS og inneholder en henvisning til EFTAs overvåkningsorgans *de minimis*-kunngjøring fra 1998.[27] Denne erstattet EFTAs

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21 Se fotnote 10, *Delimitis,* avsnitt 23.

22 Se fotnote 10, *Delimitis,* avsnitt 24.

23 Se fotnote 16, *Neste Markkinointi*, avsnitt 27.

24 Se fotnote 10, *Delimitis,* avsnitt 25.

25 Se fotnote 10, *Delimitis,* avsnitt 26 og fotnote 16, *Neste Markkinointi,* avsnittene 27 til 30.

26 Retningslinjer for vertikale avtaler av 25.07.2001 (ennå ikke publisert).

27 Kunngjøring fra EFTAs overvåkningsorgan om avtaler av mindre betydning som ikke kommer inn under EØS-avtalens artikkel 53(1), EFT 1998 L 200 og EØS-tillegget 1998 28, s 13.

agreements that generally fall outside Article 53(1) EEA and contains a reference to the EFTA Surveillance Authority's *"de minimis"* notice from 1998.[27] This notice replaced the Authority's *"de minimis"* notice from 1994.[28] Both parties to the main dispute refer to the market share thresholds in this notice. However, neither that notice, nor the notice from 1998 applies where competition in the relevant market, as in the present case, is restricted by the cumulative effect of agreements entered into between several suppliers and distributors. However, the Commission's new *"de minimis"* notice[29] deals with the cumulative effect of agreements, and paragraph 8 suggests that a market share threshold of 5 %, i.e. where the supplier's market share is lower than 5 %, will not be deemed to contribute significantly to a cumulative foreclosure effect. The EFTA Surveillance Authority has not yet issued a similar notice.

50. The market share is only one factor when considering whether the Respondent's network has an appreciable effect on the possible foreclosure of the relevant market. Account must also be taken of the number of distributors tied to the Respondent with agreements of the kind at issue, and the duration of these agreements.

51. Finally, even if the supplier's network of agreements in total contributes significantly to the foreclosure of the relevant market, the national court should also consider the relevant agreement's contribution to that effect. If a supplier has entered into various categories of agreements, there might be agreements that must be regarded as making no significant contribution to the cumulative effect of sealing-off the market. Such subdividing of a supplier's network can be necessary in exceptional cases.[30] When considering if such subdividing is necessary the duration of the supply obligation assumed by the retailer is the decisive factor.[31]

52. If the agreement is considered to restrict competition in the relevant market within the meaning of Article 53(1) EEA, it must also be examined whether the agreement affects trade between the Contracting Parties. In order to determine whether an agreement between undertakings may affect trade between Contracting Parties, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade

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27 Notice on agreements of minor importance which do not fall under Article 53(1) of the EEA Agreement, OJ 1998 L 200 and EEA Supplement 1998 28, p. 13.

28 Notice on agreements of minor importance which do not fall under Article 53(1) of the EEA Agreement, OJ 1994 L 153 and EEA Supplement 1994 15, p. 31.

29 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis), OJ 2001 C 368, p. 13.

30 See footnote 16, *Neste Markkinointi*, paragraph 37.

31 See footnote 16, *Neste Markkinointi*, paragraph 32.

overvåkningsorgans *de minimis*-kunngjøring fra 1994.[28] Begge partene i hovedsaken viser til markedsandelstersklene i denne kunngjøringen. Verken denne kunngjøringen eller kunngjøringen av 1998 kommer imidlertid til anvendelse hvor konkurransen i det relevante markedet, slik som i denne saken, innskrenkes som følge av den samlede virkningen av avtaler inngått mellom flere leverandører og distributører. Kommisjonens nye *de minimis*-kunngjøring[29] omhandler imidlertid avtalers kumulative virkning, og avsnitt 8 foreslår en terskel på 5 % markedsandel. Hvor leverandørens markedsandel er lavere enn 5 %, vil denne ikke anses å bidra betydelig til en samlet begrensning av adgangen til markedet. EFTAs overvåkningsorgan har ennå ikke utstedt en liknende kunngjøring.

50. Markedsandelen er bare én faktor ved vurderingen av om Hydro Texacos avtalenettverk i betydelig grad bidrar til en begrensning av adgangen til det relevante markedet. Det må også tas hensyn til hvor mange distributører som er bundet til Hydro Texaco ved avtaler av den typen som er omhandlet her, og til varigheten av disse avtalene.

51. Endelig, selv om leverandørens avtalenettverk i betydelig grad bidrar til en begrensning av adgangen til det relevante markedet, må den nasjonale domstolen vurdere den konkrete avtalens bidrag til dette. Dersom en leverandør har inngått forskjellige typer avtaler, kan det være avtaler som ikke kan anses å bidra betydelig til en begrensning av adgangen til markedet. Slik sondring mellom en leverandørs avtaler kan være nødvendig i ekstraordinære tilfeller.[30] Ved avgjørelsen av om slik sondring er nødvendig er varigheten av forhandlerens kjøpsforpliktelse av avgjørende betydning.[31]

52. Dersom avtalen anses å innskrenke konkurransen i det relevante markedet i henhold til artikkel 53(1) EØS, må det også undersøkes om avtalen påvirker handelen mellom EØS-statene. For å avgjøre om en avtale mellom foretak kan påvirke handelen mellom EØS-statene må det være mulig, på grunnlag av objektive rettslige eller faktiske forhold, å forutse med en tilstrekkelig grad av sannsynlighet at den kan ha innvirkning, direkte eller indirekte, faktisk eller potensielt, på handelen mellom EØS-statene.[32] Den samlede virkningen av et nettverk av eksklusive avtaler som omfatter hele territoriet til en EØS-stat og en

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28 Kunngjøring fra EFTAs overvåkningsorgan om avtaler av mindre betydning som ikke kommer inn under EØS-avtalens artikkel 53(1), EFT 1994 L 153 og EØS-tillegget 1994 15, s 31.

29 Kommisjonens kunngjøring om avtaler av mindre betydning som ikke innebærer en merkbar begrensning av konkurransen i henhold til artikkel 81(1) i Traktaten om opprettelse av Det europeiske økonomiske fellesskap (*de minimis*), EFT 2001 C 368, s 13.

30 Se fotnote 16, *Neste Markkinointi,* avsnitt 37.

31 Se fotnote 16, *Neste Markkinointi,*avsnitt 32.

32 Se fotnote 6, *Langnese-Iglo* v *Commission*, avsnitt 119.

between Contracting Parties.[32] The cumulative effect of the existence of a network of exclusive agreements covering the whole territory of an EEA State and a large part of the relevant market, may prevent penetration by competitors from other EEA States.[33]

53. The EFTA Surveillance Authority submits to answer the second question as follows:

> *"The cooperation agreement, referred to in the request for an advisory opinion, is prohibited under Article 53(1) EEA if two cumulative conditions are met. First, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the relevant market. The fact that, in that market, the agreement at issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. Second, the network of similar agreements entered into by the supplier in question must contribute significantly to the sealing-off effect of the market. The extent of the contribution made by the individual supplier depends, inter alia, on the position of the supplier in the relevant market and on the duration of his agreements."*

The Commission of the European Communities

54. The fact that the contract of cooperation is not covered by the block exemption regulation does not necessarily imply that it is prohibited by Article 53(1) EEA. The block exemption regulation merely states that Article 53(1) shall not apply to agreements that meet its criteria. The third recital in the preamble to Regulation (EEC) No 1984/83 states merely that exclusive purchasing agreements may fall within the prohibition in Article 81(1) EC and that this may in particular be the case where an agreement between undertakings established in one Member State is one of a network of similar agreements. This statement reflects the ruling of the Court of Justice of the European Communities in *Brasserie de Haecht*[34] and is echoed by the reasoning of that Court in *Delimitis* and by that of the Court of First Instance of the European Communities in *Langnese* and *Schöller*.

55. Since the information of the national court does not extend beyond the market share of the Respondent in Norway, the Commission of the European Communities recalls broad principles that may assist the national court.

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32 See footnote 6, *Langnese-Iglo* v *Commission*, paragraph 119.

33 See footnote 6, *Langnese-Iglo* v *Commission*, paragraph 120.

34 See footnote 15.

stor del av det relevante markedet, kan hindre konkurrenter fra andre EØS-stater adgang til markedet.[33]

53. EFTAs overvåkningsorgan foreslår at det andre spørsmålet besvares som følger:

> *"Samarbeidsavtalen referert til i anmodningen om en rådgivende uttalelse er forbudt etter artikkel 53(1) EØS dersom to kumulative vilkår er oppfylt. For det første, tatt i betraktning de økonomiske og rettslige omstendigheter rundt den aktuelle avtalen, om det er vanskelig for konkurrenter å komme inn på eller å øke sin markedsandel på det relevante markedet. Det faktum at den foreliggende avtalen på dette markedet er én av flere liknende avtaler som har en samlet virkning på konkurransen utgjør bare én faktor blant flere ved bedømmelsen av om det faktisk er vanskelig å komme inn på dette markedet. For det andre må nettverket av liknende avtaler inngått av den aktuelle leverandøren i betydelig grad bidra til en utelukkelse fra markedet. Omfanget av den enkelte leverandørs bidrag avhenger, blant annet, av leverandørens posisjon på det relevante markedet og varigheten av hans avtaler."*

Kommisjonen for De europeiske fellesskap

54. Det faktum at samarbeidsavtalen ikke faller innenfor gruppeunntaket innebærer ikke nødvendigvis at den er forbudt etter artikkel 53(1) EØS. Gruppeunntaket erklærer bare at artikkel 53(1) ikke kommer til anvendelse på avtaler som oppfyller dets vilkår. Tredje ledd i fortalen til kommisjonsforordning (EØF) nr 1984/83 uttaler kun at eksklusive kjøpsavtaler kan falle innenfor forbudet i artikkel 81(1) EF og at dette særlig kan være tilfelle hvor en avtale mellom foretak etablert i en medlemsstat er en del av et nettverk av lignende avtaler. Denne uttalelsen reflekterer EF-domstolens avgjørelse i *Brasserie de Haecht* v *Wilkin*[34] og er gjentatt i EF-domstolens avgjørelse i *Delimitis* og i Førsteinstansdomstolens avgjørelser i *Langnese-Iglo* v *Commission* og *Schöller* v *Commission.*

55. Siden den nasjonale domstolen ikke har gitt opplysninger utover Hydro Texacos markedsandel i Norge, peker Kommisjonen på noen alminnelige prinsipper som kan hjelpe den nasjonale domstolen.

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33 Se fotnote 6, *Langnese-Iglo* v *Commission*, avsnitt 120.

34 Se fotnote 15.

56. It is first necessary to identify the relevant product and geographical markets.[35] General guidance in this regard may be sought in the Commission Notice on the definition of the relevant market for the purposes of Community competition law.[36] More specific guidance regarding the service station sector is furnished by Commission merger decisions concerning the sector, in particular that in Exxon/Mobil.[37] By reason of, in particular, supply-side substitutability in respect of different fuels and their common distribution, it appears that a single product market may be defined for branded and unbranded retail motor fuel sales. In certain circumstances, a separate market for toll motorway fuel retailing may be defined. Although the demand served by any given service station will be predominantly local, the chain-reaction effect of networks of stations, the organisation of advertising, supplies and price campaigns on a national level and the important effect of national taxes on retail prices may, in combination, permit the geographic market for motor fuel retailing to be defined as national in scope.

57. It cannot be inferred with any certainty that a network of exclusive purchasing agreements is automatically liable appreciably to prevent, restrict or distort competition or to affect trade between Contracting Parties merely because the ceilings referred to in the former Commission Notice on agreements of minor importance are exceeded.[38] In order to assess whether the existence of several exclusive purchasing agreements impedes access to the market, it is necessary to examine the nature and extent of those agreements in their totality, comprising all similar contracts tying a large number of points of sale to several producers. The effect of those networks of contracts on access to the market depends specifically on the number of outlets thus tied to producers in relation to the number of outlets which are not so tied, the duration of the commitments entered into, the quantities of product to which those commitments relate, and on the proportion between those quantities and the quantities sold by free distributors.[39] The tying-in of up to 30% of the market was considered to be acceptable by the Commission in the circumstances of *Schöller*.[40] The current Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the EC Treaty (*de minimis*) states that a cumulative foreclosure effect is unlikely to exist if less than 30% of the relevant market is covered by parallel (networks of) agreements having similar effects.[41]

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35 See footnote 10, *Delimitis*, paragraphs 16 to 18.

36 OJ 1997 C 372, p. 5.

37 Case M.1383 *Exxon/Mobil* Commission Decision of 29 September 1999, paragraphs 436 to 442. See also Case M.1628 *TotalFina/Elf Aquitaine* Commission Decision of 9 February 2000, paragraphs 157 to 188 of which analyse in detail the market for service stations on toll motorways.

38 See footnote 6, *Schöller* v *Commission*, paragraph 75.

39 See footnote 10, *Delimitis*, paragraph 19.

40 XV Report on Competition Policy (1985), paragraph 19; see footnote 6, *Schöller* v *Commission*, paragraph 81.

41 OJ 2001 C 368, p. 13, paragraph 8 of the Notice *in fine*.

56. Det er først nødvendig å definere det relevante produktmarkedet og det relevante geografiske markedet.[35] Generell veiledning i så henseendet kan finnes i Kommisjonens kunngjøring om avgrensning av det relevante markedet innen fellesskapets konkurranserett.[36] Særskilt veiledning med hensyn til bensinstasjonssektoren er gitt ved Kommisjonens fusjonsvedtak på dette området, særlig vedtaket i *Exxon/Mobil*.[37] Særlig på grunn av substituerbarheten på leverandørsiden for forskjellige typer drivstoff og den felles distribusjonen av drivstoff, må det antas at detaljsalg av motordrivstoff, uavhengig av merke, utgjør ett enkelt produktmarked. I særlige tilfeller kan markedet for detaljsalg av motordrivstoff på avgiftsbelagte motorveier utgjøre et separat marked. Selv om etterspørselen ved en bensinstasjon vil være overveiende lokal, kan den samlede effekten av et nettverk av stasjoner, organiseringen av reklame, leverings- og priskampanjer på nasjonalt nivå og den viktige effekten av nasjonale avgifter på detaljsalg, samlet tilsi at det geografiske detaljmarkedet for motordrivstoff er nasjonalt.

57. Det kan ikke med sikkerhet konkluderes med at et nettverk av eksklusive kjøpsavtaler automatisk vil kunne hindre, innskrenke eller vri konkurransen betydelig eller til å påvirke handelen mellom EØS-statene betydelig bare fordi tersklene referert til i den tidligere kunngjøringen fra Kommisjonen om avtaler av mindre betydning er overskredet.[38] For å kunne bedømme om eksistensen av flere eksklusive kjøpsavtaler vanskeliggjør adgang til markedet, er det nødvendig å vurdere arten og omfanget av disse avtalene i sin helhet, herunder alle liknende avtaler som binder et større antall salgssteder til flere produsenter. Virkningen av disse avtalenettverkene på adgangen til markedet avhenger særlig av antallet salgssteder som er bundet til produsenter sett i forhold til antall salgssteder som ikke er bundet, varigheten av avtalene som inngås, andelen produkter som disse avtalene gjelder sammenholdt med andelen produkter som selges av frie distributører.[39] Binding av opp til 30 % av markedet ble ansett akseptabelt av Kommisjonen i *Schöller*.[40] Den någjeldende Kunngjøring om avtaler av mindre betydning som ikke innebærer en merkbar begrensning av konkurransen i henhold til artikkel 81(1) i EF-traktaten (*de minimis*) uttaler at det er lite sannsynlig at en avtale hindrer adgang til markedet dersom mindre enn 30 % av det relevante markedet omfattes av parallelle (nettverk av) avtaler som har liknende virkninger.[41]

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35 Se fotnote 10, *Delimitis,* avsnittene 16 til 18.

36 EFT 1997 C 372, s 5.

37 Kommisjonsvedtak av 29 september 1999 i sak M 1383 *Exxon/Mobil*, avsnittene 436 til 442. Se også kommisjonsvedtak av 9 februar 2000 i sak M 1628 *TotalFina/Elf Aquitaine*, særlig avsnittene 157-188 der det gis en detaljanalyse av markedet for bensinstasjoner på avgiftsbelagte motorveier.

38 Se fotnote 6, *Schöller* v *Commission*, avsnitt 75.

39 Se fotnote 10, *Delimitis*, avsnitt 19.

40 XV Report on Competition Policy (1985), avsnitt 19; se fotnote 6, *Schöller* v *Commission,* avsnitt 81.

41 EFT 2001 C 368, s 13, avsnitt 8 av kunngjøringen.

58. The existence of a bundle of similar contracts, even if it has a considerable effect on the opportunities for gaining access to the market, is not, however, sufficient in itself to support a finding that the relevant market is inaccessible, inasmuch as it is only one factor, amongst others, pertaining to the economic and legal context in which an agreement must be appraised. The other factors to be taken into account are, in the first instance, also those relating to opportunities for access. In that connection it is necessary to examine whether there are concrete possibilities for a new competitor to penetrate the bundle of contracts by acquiring a producer already established on the market together with its network of sales outlets, or to circumvent the bundle of contracts by opening new outlets. For that purpose it is necessary to have regard to the legal rules and agreements on the acquisition of companies and the establishment of outlets, and to the minimum number of outlets necessary for the economic operation of a distribution system.[42] The presence of wholesalers not tied to producers who are active on the market is also a factor capable of facilitating a new producer's access to that market since he can make use of those wholesalers' sales networks to distribute his own product.[43]

59. Secondly, account must be taken of the conditions under which competitive forces operate in the relevant market. In that connection it is necessary to know not only the number and the size of producers present in the market, but also the degree of saturation of that market and customer fidelity to existing brands; for it is generally more difficult to penetrate a saturated market in which customers are loyal to a small number of large producers than a market in full expansion in which a large number of small producers are operating without any strong brand names.[44]

60. If an examination of all similar contracts entered into on the relevant market and the other factors relevant to the economic and legal context in which the contract must be examined shows that those agreements do not have the cumulative effect of denying access to that market to new domestic and foreign competitors, the individual agreements comprising the bundle of agreements cannot be held to restrict competition within the meaning of Article 53(1) EEA. They do not, therefore, fall under the prohibition laid down in that provision. If, on the other hand, such examination reveals that it is difficult to gain access to the relevant market, it is necessary to assess the extent to which the agreements entered into by the producer in question contribute to the cumulative effect produced in that respect by the totality of the similar contracts found on that market. Responsibility for such an effect of closing off the market must be attributed to the producers that make an appreciable contribution thereto. Supply

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42 See in this regard footnote 6, *Schöller* v *Commission*, paragraph 85.

43 See footnote 10, *Delimitis*, paragraphs 20 and 21.

44 See footnote 10, *Delimitis*, paragraph 22.

58. Eksistensen av en gruppe liknende avtaler er imidlertid ikke i seg selv tilstrekkelig til å begrunne den konklusjon at konkurrenter er hindret adgang til det relevante markedet. Dette har betydelig innvirkning på mulighetene til å få adgang til markedet, men er bare en av flere faktorer ved bedømmelsen av avtalen i dens økonomiske og rettslige sammenheng. De andre faktorene som også må tas i betraktning er særlig slike som relaterer seg til mulighetene for adgang til markedet. I denne sammenhengen er det nødvendig å vurdere hvorvidt det er konkrete muligheter for en ny konkurrent til å trenge gjennom nettverket av avtaler ved å kjøpe opp en produsent som allerede er etablert på markedet sammen med dennes nettverk av salgssteder, eller til å omgå avtalenettverket ved å åpne nye salgssteder. I en slik vurdering er det nødvendig å ta hensyn til rettsregler og avtaler vedrørende erverv av selskaper og etablering av salgssteder, og til det minimum antall salgssteder som er nødvendig for en lønnsom drift av et distribusjonssystem.[42] Tilstedeværelsen av grossister som ikke er bundet til produsenter som er aktive på markedet, er også en faktor som kan lette en ny produsents adgang til markedet, siden han kan benytte disse grossistenes salgsnettverk for å distribuere sitt eget produkt.[43]

59. Videre må det tas hensyn til konkurranseforholdene på det relevante markedet. I denne sammenhengen er det nødvendig å vite antallet og størrelsen på produsenter som opererer på markedet, kundelojaliteten til eksisterende merker og metningsgraden på markedet. Dette fordi det i alminnelighet er vanskeligere å trenge inn på et mettet marked hvor kundene er lojale mot et lite antall større produsenter, enn på et marked i utvikling, hvor et større antall små produsenter opererer uten sterke merkenavn.[44]

60. Dersom gjennomgangen av alle liknende avtaler inngått på det relevante markedet og de øvrige faktorene som er relevante for å vurdere avtalene i deres økonomiske og rettslige sammenheng, viser at disse avtalene ikke har som samlet virkning å hindre nye innenlandske og utenlandske konkurrenter adgang til markedet, kan de individuelle avtalene i avtalenettverket ikke anses å begrense konkurransen i henhold til artikkel 53(1) EØS. De faller derfor ikke inn under forbudet i denne bestemmelsen. Dersom gjennomgangen derimot viser at det er vanskelig å få adgang til det relevante markedet, er det nødvendig å avgjøre i hvilken grad vedkommende produsents avtaler bidrar til den samlede effekten av alle disse avtalene. Ansvaret for at adgangen til markedet hindres må tilskrives de produsentene som bidrar betydelig til dette. Leveringsavtaler inngått av produsenter hvis bidrag til den samlede effekten på markedet er ubetydelig, faller derfor ikke innenfor forbudet i artikkel 53(1) EØS.[45]

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42 Se fotnote 6, *Schöller* v *Commission*, avsnitt 85.

43 Se fotnote 10, *Delimitis,* avsnittene 20 og 21.

44 Se fotnote 10, *Delimitis,* avsnitt 22.

45 Se fotnote 10, *Delimitis,* avsnittene 23 og 24.

agreements entered into by producers whose contribution to the cumulative effect is insignificant do not therefore fall under the prohibition of Article 53(1).[45]

61. In order to assess the extent of the contribution of the supply agreements entered into by a producer to the cumulative sealing-off effect mentioned above, the market position of the contracting parties must be taken into consideration. That position is not determined solely by the market share held by the producer and any group to which it may belong, but also by the number of outlets tied to it or to its group, in relation to the total number of premises for the sale of motor fuel and lubricants found in the relevant market. The contribution of the individual contracts entered into by a producer to the sealing-off of that market also depends on their duration. If the duration is manifestly excessive in relation to the average duration of petrol supply agreements generally entered into on the relevant market, the individual contract falls under the prohibition under Article 53(1). A producer with a relatively small market share which ties its sales outlets for many years may make as significant a contribution to a sealing-off of the market as a producer in a relatively strong market position which regularly releases its sales outlets at shorter intervals.[46] However, in general, individual suppliers or distributors with a market share not exceeding 5% are not considered to contribute significantly to a cumulative foreclosure effect.[47]

62. The assessment of the effects of a network of similar agreements on competition and on trade applies to all the individual agreements making up the network; the effects of the agreements should not normally be examined separately.[48] However, it may be necessary to take a different approach where there are substantial material differences, for example as regards duration, between the different types of agreements concluded by a given producer. In that case, even if the network of agreements as a whole, taken together with other such networks of agreements concluded by other suppliers, has the effect of appreciably restricting competition, certain types of agreements in the network at issue do not make a significant contribution to that overall outcome.[49]

63. The Commission of the European Communities suggests to answer the second question as follows:

> *"The contract of cooperation at issue in the present case is prohibited by Article 53(1) of the EEA Agreement if two cumulative conditions are met. The first is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the*

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45 See footnote 10, *Delimitis*, paragraphs 23 and 24.

46 See footnote 10, *Delimitis*, paragraphs 25 and 26.

47 De minimis Notice, op. cit., paragraph 8; see also the Commission Guidelines on vertical restraints, OJ 2000 C 291, p. 1, paragraphs 73, 142, 143 and 189.

48 See footnote 6, *Schöller* v *Commission*, paragraphs 95 and 98.

49 See footnote 16, *Neste Markkinointi*, paragraphs 36 to 39.

61. Ved vurderingen av i hvilken grad en produsents leveringsavtaler bidrar til den kumulative avstegningseffekten nevnt ovenfor, må det tas hensyn til avtalepartenes markedsposisjon. Denne posisjonen avgjøres ikke bare av produsentens, eller eventuelt konsernets markedsandel, men også av antallet salgssteder bundet til produsenten eller konsernet sett i forhold til det totale antall salgssteder for salg av motordrivstoff og smøreprodukter på det relevante markedet. De enkelte avtalenes bidrag til avstegningen av markedet avhenger også av deres varighet. Dersom varigheten åpenbart overstiger den gjennomsnittlige varigheten av vanlige leveringsavtaler på markedet, faller den enkelte avtalen innenfor forbudet i artikkel 53(1) EØS. En produsent med en relativt liten markedsandel som binder sine salgssteder for mange år kan bidra like betydelig til å hindre adgang til markedet som en produsent med en relativt sterk markedsposisjon som regelmessig frigjør sine salgssteder med kortere intervaller.[46] Generelt anses imidlertid ikke individuelle leverandører eller distributører med en markedsandel på under 5% å bidra betydelig til en samlet avstegningseffekt.[47]

62. Vurderingen av et avtalenettverks innvirkning på konkurransen og handelen må omfatte alle de individuelle avtalene som utgjør en del av nettverket. Virkningen av avtalene bør normalt ikke vurderes enkeltvis.[48] Det kan imidlertid være nødvendig med en annen tilnærming dersom det er vesentlige materielle forskjeller mellom de ulike typene av avtaler inngått av en produsent, for eksempel med hensyn til varighet. Det kan vise seg at visse typer av avtaler i vedkommende nettverk ikke innebærer en merkbar begrensning av konkurransen, selv om avtalenettverket som helhet, vurdert sammen med andre slike nettverk av avtaler inngått av andre leverandører, har slik virkning.[49]

63. Kommisjonen foreslår å besvare det andre spørsmålet som følger:

> *"Samarbeidsavtalen i den foreliggende saken er forbudt etter artikkel 53(1) EØS dersom to kumulative vilkår er oppfylt. Det første vilkåret er at det, tatt i betraktning de økonomiske og rettslige omstendighetene rundt den aktuelle avtalen, er vanskelig for konkurrenter som kunne tenkes å gå*

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46 Se fotnote 10, *Delimitis,* avsnittene 25 og 26.

47 *De minimis*-kunngjøringen, op. cit., avsnitt 8; se også Kommisjonens retningslinjer for vertikale avtaler, EFT 2000 C 291, s 1, avsnittene 73, 142, 143 og 189.

48 Se fotnote 6, *Schöller* v *Commission*, avsnittene 95 og 98.

49 Se fotnote 16, *Neste Markkinoint,* avsnittene 36 til 39.

market or increase their market share to gain access to the relevant market. The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. The second condition is that the agreement in issue must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement."

The third question

The EFTA Surveillance Authority

64. The third question concerns the legal effects of a possible infringement of the EEA competition rules and what limitation period must be applied, if any. The EFTA Surveillance Authority assumes that the national court raises here the issue of the possible consequences of the duration clause being prohibited under Article 53(1) EEA.

65. Should the cooperation agreement be prohibited under Article 53(1) EEA, the consequence would be that the agreement would be automatically void pursuant to Article 53(2) EEA. However, the fact that the cooperation agreement might be in breach of Article 53(1) EEA does not necessarily mean that the whole agreement is void pursuant to Article 53(2) EEA.

66. It is only those aspects of the agreement, which are prohibited by Article 53(1) EEA that are void. The agreement as a whole is void only if those parts of the agreement are not severable from the agreement itself.[50] It is a matter of national law to determine whether other parts, which are not in themselves restrictive of competition, can be severed from the prohibited clauses and allowed to survive.[51] Thus, if the national court finds that the exclusive purchasing obligation in the cooperation agreement with the given duration falls within Article 53(1) EEA, but that this obligation, according to national law, is severable from the rest of the contract, including the financial and lease

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50 Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235 and footnote 10, *Delimitis*, paragraph 40.

51 See Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235, footnote 10, *Delimitis*, paragraph 40, Case 319/82 *Ciments* v *Kerpen* [1983] ECR 4173, paragraphs 10 to 12 and Case 10/86 *VAG France* v *Magne* [1986] ECR 4071, paragraph 14.

inn i markedet eller øke sin markedsandel å få adgang til det relevante markedet. Det faktum at den foreliggende avtalen er én av flere liknende avtaler i dette markedet som har en kumulativ virkning på konkurransen, utgjør bare én faktor blant flere ved bedømmelsen av om det faktisk er vanskelig å få adgang til markedet. Det andre vilkåret er at den foreliggende avtalen må bidra betydelig til den avstengningseffekten som til sammen skapes av disse avtalene i deres økonomiske og rettslige sammenheng. Omfanget av den enkelte avtales bidrag avhenger, blant annet, av avtalepartenes posisjon på det relevante markedet og varigheten av avtalen."

Det tredje spørsmålet

EFTAs overvåkningsorgan

64. Det tredje spørsmålet omhandler de rettslige konsekvenser av et eventuelt brudd på konkurranseregelene i EØS-avtalen, og hvilken varighetsbegrensning som eventuelt må legges til grunn. EFTAs overvåkningsorgan legger til grunn at den nasjonale domstolen her reiser spørsmål om mulige konsekvenser av at varighetsbestemmelsen anses forbudt etter artikkel 53(1) EØS.

65. Dersom samarbeidsavtalen er forbudt etter artikkel 53(1) EØS vil konsekvensen være at avtalen automatisk er uten rettsvirkning etter artikkel 53(2) EØS. Det faktum at samarbeidsavtalen kan være i strid med artikkel 53(1) EØS betyr imidlertid ikke at hele avtalen er uten rettsvirkning etter artikkel 53(2) EØS.

66. Det er bare de sidene ved avtalen som er forbudt etter artikkel 53(1) EØS som er uten rettsvirkning. Avtalen som helhet er uten rettsvirkning bare dersom disse delene av avtalen ikke kan skilles fra resten av avtalen.[50] Om andre deler, som ikke i seg selv er konkurransebegrensende, kan skilles fra de forbudte bestemmelsene og kan opprettholdes, må avgjøres etter nasjonal rett.[51] Dersom den nasjonale domstolen finner at den eksklusive kjøpsplikten i samarbeidsavtalen med den gitte varigheten faller innenfor artikkel 53(1) EØS, men at denne forpliktelsen etter nasjonal rett kan adskilles fra de delene av avtalen som ikke synes å være konkurransebegrensende, herunder de delene som

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50 Sak 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235; fotnote 10, *Delimitis*.

51 Sak 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235; fotnote 10, *Delimitis,* avsnitt 40, sak 319/82 *Ciments* v *Kerpen* [1983] ECR 4173, avsnittene 10 til 12 og sak 10/86 *VAG France* v *Magne* [1986] ECR 4071, avsnitt 14.

arrangements which do not appear to be anticompetitive, it could hold that only the exclusive purchasing obligation is void by virtue of Article 53(2) EEA.[52]

67. The EFTA Surveillance Authority suggests to answer the third question as follows:

> *"The consequence of the cooperation agreement being prohibited under Article 53(1) EEA is that those aspects of the agreement, which are prohibited by Article 53(1) EEA are void according to Article 53(2) EEA. The agreement as a whole is void only if those parts of the agreement, which are prohibited by Article 53(1) EEA, are not severable from the rest of the agreement. It is a matter of national law to determine whether other parts, which are not in themselves restrictive of competition, can be severed from the prohibited clauses."*

The Commission of the European Communities

68. The time period within which a party to an agreement that is void by virtue of its infringement of Article 53(1) EEA must introduce judicial proceedings in order to avoid the application of that agreement is, in principle, established by national law. This principle is subject to the requirements that such national procedural rules be no less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by the EEA Agreement (principle of effectiveness).[53] For the purpose of identifying the nearest equivalent form of domestic action, it is useful to note that breach of Article 81(1) EC is deemed to result in the absolute nullity of the agreement in question,[54] that such nullity has retroactive effect[55] and that enforcement of the

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52 Finally, in the event that the national court should somehow arrive at the conclusion that the part of the cooperation agreement concerning exclusive purchasing of motor fuels and lubricants is prohibited under Article 53(1) EEA and cannot be severed from the part concerning the lease of the petrol station, it should be pointed out that the parties have the possibility to request the EFTA Surveillance Authority to grant an individual exemption (Case 10/86 *VAG France* v *Magne* [1986] ECR 4071). According to Articles 4(2)(2)(a) and 6(2) of Chapter II read in combination with Article 1(2) of Chapter XVI of Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (Agreement of 11 May 2000 between the EFTA States to amend Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, which entered into force on 27 September 2000), vertical agreements can benefit from an exemption under Article 53(3) EEA from their date of entry into force, even if notification occurs after that date, provided that all four conditions of Article 53(3) EEA are fulfilled. The national court should therefore bear such an option in mind before declaring the cooperation contract void (see paragraphs 22 to 30 of the *Notice on cooperation between national courts and the EFTA Surveillance Authority in applying Article 53 and 54 of the EEA Agreement,* OJ 1995 C 112, p. 7, and paragraphs 63 and 64 of the EFTA Surveillance Authority's *Guidelines on Vertical Restraints).*

53 See, most recently, in the context of the EC competition rules, Case C-453/99 *Courage* v *Crehan*, [2001] ECR I-6297, paragraph 29.

54 Case 22/71 *Béguelin* [1971] ECR 949, paragraph 29.

gjelder finansiering og leie, kan den komme til at bare den eksklusive kjøpsplikten er uten rettsvirkning etter artikkel 53(2) EØS.[52]

67. EFTAs overvåkningsorgan foreslår å besvare det tredje spørsmålet som følger:

> *"Konsekvensen av at samarbeidsavtalen er forbudt etter artikkel 53(1) EØS er at de delene av avtalen som er forbudt etter artikkel 53(1) EØS er uten rettsvirkning i henhold til artikkel 53(2) EØS. Avtalen som helhet er uten rettsvirkning bare dersom de delene av avtalen som er forbudt etter artikkel 53(1) EØS ikke kan adskilles fra resten av avtalen. Det må avgjøres i henhold til nasjonal rett om andre deler, som ikke i seg selv er konkurransebegrensende, kan skilles fra de forbudte bestemmelsene."*

Kommisjonen for De europeiske fellesskap

68. Fristen for en avtalepart for å ta rettslige skritt med henblikk på å unngå anvendelse av en avtale som er uten rettsvirkning på grunn av brudd på artikkel 53(1) EØS reguleres i prinsippet av nasjonal rett. Dette gjelder under forutsetning av at slike nasjonale prosessregler ikke er mindre fordelaktige enn de reglene som gjelder for liknende nasjonale søksmål (likebehandlingsprinsippet) og at de ikke gjør det praktisk umulig eller uforholdsmessig vanskelig å utøve rettighetene gitt ved EØS-avtalen (effektivitetsprinsippet).[53] For å identifisere den tilsvarende formen for nasjonale søksmål er det nyttig å ta i betraktning at brudd på artikkel 81(1) EF er ansett å medføre absolutt ugyldighet for den avtalen det gjelder,[54] at slik ugyldighet har tilbakevirkende effekt[55] og at håndhevelse av forbudet er et forhold av vesentlig samfunnsinteresse.[56] Den siste konklusjonen baseres i

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52 Endelig, for det tilfellet at den nasjonale domstolen skulle konkludere med at den delen av samarbeidsavtalen som gjelder eksklusivt kjøp av motordrivstoff og smøreprodukter er forbudt etter artikkel 53(1), og ikke kan adskilles fra den delen som gjelder leie av bensinstasjonen, bør det påpekes at partene har anledning til å anmode EFTAs overvåkningsorgan om individuelt fritak (sak 10/86 *VAG France* v *Magne* [1986] ECR 4071). I henhold til artikkel 4(2)(2)(a) og 6(2) i kapittel II lest i sammenheng med artikkel 1(2) i kapittel XVI av protokoll 4 til Avtale mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol (Avtale av 11 mai 2000 mellom EFTA-statene om å endre protokoll 4 til Avtale mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol, med ikrafttreden 27 september 2000) kan vertikale avtaler nyte godt av fritak i henhold til artikkel 53(3) EØS fra ikrafttredelsesdatoen, selv om meddelelse kommer etter den datoen, dersom alle fire vilkårene i artikkel 53(3) EØS er oppfylt. Den nasjonale domstolen bør derfor ta dette alternativet i betraktning før den erklærer samarbeidsavtalen ugyldig (se avsnittene 22 til 30 i *Kunngjøring om samarbeid mellom nasjonale domstoler og EFTAs overvåkningsorgan ved anvendelse av EØS-avtalens artikkel 53 og 54,* EFT 1995 C 112, s 7, og avsnittene 63 og 64 i EFTAs overvåkningsorgans *Retningslinjer for vertikale avtaler*).

53 Se senest i tilknytning til EF's konkurranseregler, sak C-453/99 *Courage* v *Crehan* [2001] ECR I-6297, avsnitt 29.

54 Sak 22/71 *Béguelin* [1971] ECR 949, avsnitt 29.

55 Se fotnote 15, *Brasserie De Haecht* v *Wilkin*, avsnittene 25 til 27.

56 Sak C-126/97 *Eco Swiss* v *Benetton International* [1999] ECR I-3055, avsnitt 36.

prohibition is a matter of public policy.[56] The latter conclusion is founded principally on Article 3(1)(g) EC, to which Article 1(2)(e) EEA substantially corresponds.

69. In the event that the contract of cooperation between Hegelstad and the Respondent is found by the national court to contain terms prohibited by Article 53(1) EEA, at least those terms of the contract are automatically void. The consequences of the nullity of those provisions for all other parts of the agreement or for other obligations flowing from it are not a matter for Community law. The agreement as a whole, including the loan and loan-enforcement provisions, is void only if the prohibited terms are not severable from the agreement itself. It is a matter for national law to determine whether other terms, which are not in themselves restrictive of competition, can be severed from the prohibited terms and allowed to survive.[57] It may be instructive to observe, having regard to the Respondent's interest in recovering its loan, that national courts are not impeded by Community law from taking steps to ensure that the protection of rights conferred by it does not entail the unjust enrichment of those who enjoy them.[58]

70. Even if it were not possible to sever the loan provisions in the agreement from any prohibited terms, it is also possible for the parties to an agreement that does not enjoy the protection of a block exemption regulation, to request the grant of an individual exemption.[59] The question of which authority is competent to grant such an individual exemption is determined by Article 56 EEA.[60] Pursuant to either Article 5(2) of Regulation No 17/62, read with Articles 4(2) and 6(2) of that regulation,[61] or to Article 1 of Chapter XVI of Protocol 4 on the function and powers of the EFTA Surveillance Authority in the field of competition, attached to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice,[62] read with Articles 4(2) and 6(2) of Chapter II of that Protocol, it is possible for the

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55 See footnote 15, *Brasserie De Haecht* v *Wilkin*, paragraphs 25 to 27.

56 Case C-126/97 *Eco Swiss* v *Benetton International* [1999] ECR I-3055, paragraph 36.

57 See footnotes 50 and 51.

58 Joined Cases C-441/98 and C-442/98 *Michaïlidis* [2000] ECR I-7145, paragraph 31 and footnote 53, *Courage* v *Crehan*, paragraph 30.

59 See footnote 51, paragraph 13 and footnote 10, *Delimitis*, paragraph 41.

60 In the case that the notification is addressed to the wrong surveillance authority, the addressee shall forward it to the competent surveillance authority: Article 10(2), Protocol 23 to the EEA Agreement.

61 A s amended by Council Regulation (EC) No 1216/99 of 10 June 1999, OJ 1999 L 148, p. 5. This change has been extended to EEA matters, through an appropriate amendment of Protocol 21 to the EEA Agreement.

62 This provision confers powers on the EFTA Surveillance Authority equivalent to those of the Commission, as foreseen by the EEA Agreement.

hovedsak på artikkel 3(1)(g) EF, som i det vesentlige tilsvarer artikkel 1(2)(e) EØS.

69. Dersom den nasjonale domstolen finner at samarbeidsavtalen mellom Hegelstad og Hydro Texaco inneholder bestemmelser som er forbudt etter artikkel 53(1) EØS, er i hvert fall disse bestemmelsene automatisk uten rettsvirkning. Konsekvensene av disse bestemmelsenes ugyldighet for avtalens øvrige deler eller for andre forpliktelser som følger av denne, er ikke et spørsmål for EØS-retten. Avtalen som helhet, herunder bestemmelsene om lån og inndrivelse av lån, er ugyldig bare dersom de forbudte bestemmelsene ikke kan adskilles fra resten av avtalen. Om andre bestemmelser, som ikke i seg selv er konkurransebegrensende, kan skilles fra de forbudte bestemmelsene og kan opprettholdes, må avgjøres etter nasjonal rett.[57] Med hensyn til Hydro Texacos interesse i å få tilbakebetalt sitt lån, gjøres oppmerksom på at EØS-retten ikke hindrer nasjonale domstoler i å ta skritt for å sikre at beskyttelsen av rettigheter som EØS-retten gir ikke innebærer en uberettiget berikelse av dem som nyter godt av disse rettighetene.[58]

70. Selv om det ikke skulle være mulig å adskille avtalens lånebestemmelser fra de forbudte bestemmelsene, er det også mulig for partene i en avtale som ikke er beskyttet av et gruppeunntak å søke om individuelt fritak.[59] Spørsmålet om hvilken myndighet som har komeptanse til å gi et slikt individuelt fritak er regulert i artikkel 56 EØS.[60] I henhold til enten forordning nr 17/62 artikkel 5(2), lest i sammenheng med dens artikkel 4(2) og 6(2),[61] eller kapittel XVI artikkel 1 i protokoll 4 til Overvåknings- og domstolsavtalen[62] om oppgaver og myndighet for EFTAs overvåkningsorgan på konkurranserettens område, lest sammen med artikkel 4(2) og 6(2) i kapittel II i samme protokoll, er det mulig for det kompetente overvåkningsorgan å gi en avtale fritak med virkning fra et tidspunkt forut for underretning.

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57 Se fotnotene 50 og 51.

58 Forenede saker C-441/98 og C-442/98 *Michaïlidis* [2000] ECR I-7145, avsnitt 31 og fotnote 53, *Courage* v *Crehan*, avsnitt 30.

59 Se fotnote 51, avsnitt 13; fotnote 10, *Delimitis*, avsnitt 41.

60 Dersom meldingen er adressert til feil overvåkningsmyndighet skal mottakeren sende den videre til det kompetente overvåkningsorganet, EØS-avtalens protokoll 23, artikkel 10(2).

61 Endret ved Rådsforordning (EF) nr 1216/99 av 10 juni 1999, EFT 1999 L 148, s 5. Denne endringen har blitt overført til EØS-forhold ved tilsvarende endring av EØS-avtalens protokoll 21.

62 Denne bestemmelsen tildeler EFTAs overvåkningsorgan samme myndighet som Kommisjonen, som forutsatt i EØS-avtalen.

competent surveillance authority retroactively to exempt an agreement as from a date before its actual date of notification.

71. The Commission of the European Communities suggests to answer the third question as follows:

> *"The time period within which a party to an agreement which is void by virtue of Article 53(1) of the EEA Agreement must introduce judicial proceedings in order to avoid the application of that agreement is established by national law subject to the requirements that such national procedural rules be no less favourable than those governing similar domestic actions and that they do not render practically impossible or excessively difficult the exercise of rights conferred by the EEA Agreement."*

Carl Baudenbacher
Judge-Rapporteur

71. Kommisjonen foreslår å besvare det tredje spørsmålet som følger:

"Fristen for en avtalepart for å ta rettslige skritt med henblikk på å unngå anvendelse av en avtale som er uten rettsvirkning på grunn av EØS-avtalens artikkel 53(1) EØS reguleres av nasjonal rett, forutsatt at de nasjonale prosessreglene ikke er mindre fordelaktige enn de reglene som gjelder liknende nasjonale søksmål og at de ikke gjør det praktisk umulig eller uforholdsmessig vanskelig å utøve rettigheter etter EØS-avtalen."

Carl Baudenbacher
Saksforberedende dommer

CASES 1994 - 2001

	CASE	PARTIES	TYPE OF CASE	EFTA COURT REPORT
1	E-1/94	*Ravintoloitsijain Liiton Kustannus Oy Restamark*	*Request for an Advisory Opinion from Tullilautakunta, Finland* Admissibility – Free movement of goods – State monopolies of a commercial character – Import monopoly – Articles 11, 13 and 16 of the EEA Agreement – Unconditional and sufficiently precise	[1994-1995] p 15
2	E-2/94	*Scottish Salmon Growers Association Ltd* v *EFTA Surveillance Authority*	*Direct Action* Decision of the EFTA Surveillance Authority – Constituent Elements – Judicial Review – Statement of Reasons – Admissibility – Locus standi – Direct and Individual Concern	[1994-1995] p 59
3	E-3/94	*Alexander Flandorfer Friedmann and Others* v *Republic of Austria*	Jurisdiction – Procedure – Admissibility – Legal aid	[1994-1995] p 83
4	E-4/94	*Konsumentombudsmannen* v *De Agostini (Svenska) Förlag AB*	*Request for an Advisory Opinion from Marknadsdomstolen, Sweden* Withdrawn	[1994-1995] p 89
5	E-5/94	*Konsumentombudsmannen* v *TV-shop i Sverige AB*	*Request for an Advisory Opinion from Marknadsdomstolen, Sweden* Withdrawn	[1994-1995] p 93
6	E-6/94	*Reinhard Helmers* v *EFTA Surveillance Authority and Kingdom of Sweden*	*Direct Action* Procedure – Admissibility – Application for revision	[1994-1995] p 97 and p 103
7	E-7/94	*Data Delecta Aktiebolag and Ronnie Forsberg* v *MSL Dynamics Ltd*	*Request for an Advisory Opinion from Högsta domstolen, Sweden* Withdrawn	[1994-1995] p 109

8	Joined Cases E-8/94 and E-9/94	*Forbrukerombudet* v *Mattel Scandinavia A/S and Lego Norge A/S*	*Request for an Advisory Opinion from Markedsrådet, Norway* Admissibility – Free movement of services – Council Directive 89/552/EEC – Transmitting State principle – Televised advertising targeting children – Broadcasters/ Advertisers – Circumvention – Directed advertising – Council Directive 84/450/EEC	[1994-1995] p 113
9	E-1/95	*Ulf Samuelsson* v *Svenska staten*	*Request for an Advisory Opinion from Varbergs tingsrätt, Sweden* Admissibility – Council Directive 80/987/EEC – National measures to counter abuse – Proportionality	[1994-1995] p 145
10	E-2/95	*Eilert Eidesund* v *Stavanger Catering A/S*	*Request for an Advisory Opinion from Gulating lagmannsrett, Norway* Council Directive 77/187/EEC – Transfer of part of a business – Transfer of rights to pension benefits	[1995-1996] p 1
11	E-3/95	*Torgeir Langeland* v *Norske Fabricom A/S*	*Request for an Advisory Opinion from Stavanger byrett, Norway* Council Directive 77/187/EEC – Transfer of rights to pension benefits	[1995-1996] p 36
12	E-1/96	*EFTA Surveillance Authority* v *Republic of Iceland*	*Discontinuance of proceedings*	[1995-1996] p 63
13	E-2/96	*Jørn Ulstein and Per Otto Røiseng* v *Asbjørn Møller*	*Request for an Advisory Opinion from Inderøy herredsrett, Norway* Council Directive 77/187/EEC – Transfer of rights to pension benefits	[1995-1996] p 65
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