Report of the EFTA Court

2000 – 2001

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Foreword

The EFTA Court was set up under the Agreement on the European Economic Area (the EEA Agreement) of 2 May 1992. This was originally a treaty between, on the one hand, the European Communities and their then twelve Member States and, on the other hand, the EFTA States Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland. The treaty 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 four 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 2000 to 31 December 2001*.

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.

Table of Contents

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.efta.int

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 2000 and 2001 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 Gunnar Selvik was appointed Registrar of the Court for a period of three years commencing 1 September 1998. Mr Lucien Dedichen was appointed Registrar of the Court for a period of three years commencing 1 September 2001.

On 24 October 1997, the ESA/Court Committee decided by common accord to approve for a three-year period a 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. The following *ad hoc* Judges were appointed:

Nominated by Iceland:
Mr Davíð Þór Björgvinsson, professor
Mr Stefán Már Stefánsson, professor

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

Nominated by Norway:
Mr Erling Selvig, professor
Ms Bjørg Ven, advokat

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. The following *ad hoc* Judges were appointed/reappointed:

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

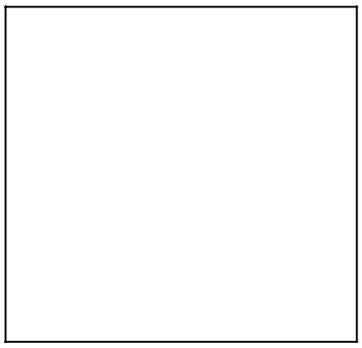
Nominated by Liechtenstein:
Mr Marzell Beck, Rechtsanwalt
Mr Martin Ospelt, Rechtsanwalt

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

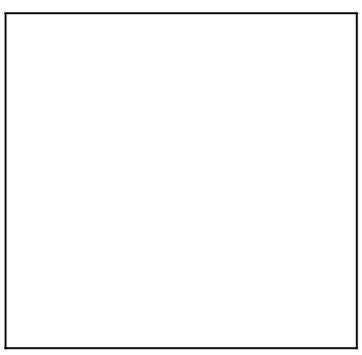
In addition to the Judges, the following persons were employed by the Court in 2000 and 2001:

Ms Svava ARADÓTTIR, Secretary
Mr Davíð Þór BJÖRGVINSSON, Legal Secretary
Ms Harriet BRUHN, Financial and Administrative Officer
Ms Evanthia COFFEE, Lawyer-Linguist (from 11 January until 14 May 2000)
Mr Lucien DEDICHEN, Registrar (from 1 September 2001)
Ms Hrafnhildur EYJÓLFSDÓTTIR, Administrative Assistant
Ms Sigrid HAUSER-MARTINSEN, Secretary
Ms Linda HELLAND, Lawyer-Linguist (from 1 December 2001)
Ms Janet JACKSON, Secretary
Mr Mads MAGNUSSEN, Legal Secretary
Mr Meinhard NOVAK, Legal Secretary
Mr Gilles PELLETIER, Caretaker-Messenger
Mr Gunnar SELVIK, Registrar (until 31 August 2001)
Ms Diana L. TORRENS, Lawyer-Linguist
Mr Nils-Ola WIDME, Lawyer-Linguist (until 31 October 2001)

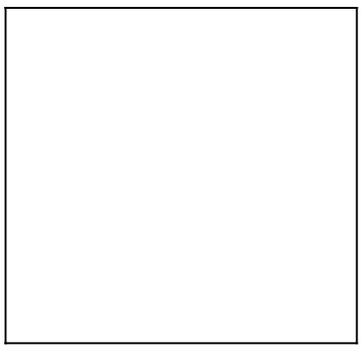
CURRICULA VITAE OF THE JUDGES AND THE REGISTRAR



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.



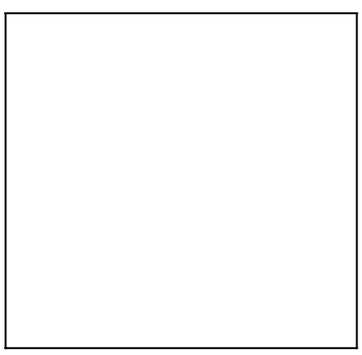
Per TRESSELT

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.

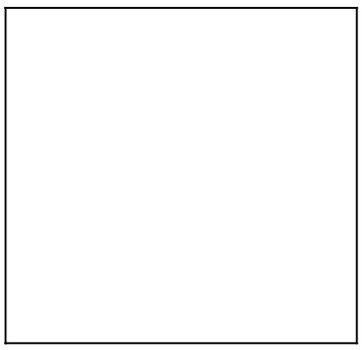


Gunnar SELVIK

Born 13 November 1963 in Bergen, Norway.

Studies: Norwegian Naval Academy 1982-1986, economic/logistic branch; University of Bergen and University of Oslo 1988-1992, cand jur; University of Oslo 1994, special subject EU-law.

Professional career: Paymaster on the Norwegian frigates Æger/Sleipner 1986-1987; Financial Officer Norwegian Element AFNORTH/NATO, Oslo 1987-1988; Group Leader Logistic System Design Office Norwegian Navy Materiel Command (SFK), Bergen 1988-1990; Branch Chief Logistic System Design Office SFK 1990-1991; Senior Contracts-specialist Contracts Department SFK 1991; Financial Officer (head of finance) Nato Air command Control Management Agency (NACMA), Brussels 1992-1998; Alumni Member of Rotary International; Member of Rotary International's Group Study Exchange Programme 1990; Chairman of Norwegian Naval Economists Association 1989-1991; Member of the Representative Committee of "Military Personnel Service" 1990-1991; Member of the Norwegian Lawyers' Society.



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-2/99

EFTA Surveillance Authority
v
Kingdom of Norway

(Failure of a Contracting Party to fulfil its obligations - Council Directive 92/51/EEC on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC)

Summary of the Judgment

1. Article 3 of the EEA Agreement imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Agreement.

2. The Contracting Parties are obliged to implement all acts referred to or contained in the Annexes to the EEA Agreement or in decisions of the EEA Joint Committee.

JUDGMENT OF THE COURT

22 June 2000

(Failure of a Contracting Party to fulfil its obligations - Council Directive 92/51/EEC on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC)

In Case E-2/99,

EFTA Surveillance Authority, represented by Anne-Lise H. Rolland, Officer in the Department of Legal and Executive Affairs, acting as Agent, assisted by Jonas Fr. Jonsson, Officer in the Department of Persons, Services and Capital Movements, 74 Rue de Trèves, Brussels,

applicant,

v

The Kingdom of Norway, represented by Helge Seland, Assistant Director General, Royal Ministry of Foreign Affairs, acting as Agent, 7. juni plass 1, Victoria Terrasse 0251, Oslo,

defendant,

APPLICATION for a declaration that, by failing to adopt, within the time-limit prescribed, the national provisions necessary to comply with Article 10(2) of the act referred to in point 1 a of Annex VII to the Agreement on the European Economic Area (the "EEA Agreement"), i.e. Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC (the "Directive"), as adapted by way of Protocol 1 to the EEA Agreement, with regard to the professions coming under the heading "3. Seafaring Sector" of Annex C to the Directive, the Kingdom of Norway has failed to fulfil its obligations under that Directive and Article 7 of the EEA Agreement,

THE COURT,

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

Registrar: Gunnar Selvik

having regard to the application and written pleadings of the parties

gives the following

Judgment

1 By application lodged at the Court Registry on 20 December 1999, the *EFTA Surveillance Authority* submitted, 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, an application for declaration that, by failing to adopt within the time-limit prescribed, the national provisions necessary to comply with Article 10(2) of the Directive, as adapted, with regard to the professions coming under the heading "3. Seafaring Sector" of Annex C to the Directive, the Kingdom of Norway has failed to fulfil its obligations under that Directive and Article 7 of the EEA Agreement.

2 Article 10(2) of the Directive provides *inter alia* for mutual recognition of medical certificates when they are required for taking up or pursuing a regulated profession. Under the relevant articles of the Norwegian Regulation of 3 February 1986 No. 237 concerning the medical examination of employees on ships, etc., health certificates shall be issued in Norway by a doctor authorized to practise in Norway, or abroad by a doctor who has been approved by a Norwegian foreign service career station.

3 In the opinion of the EFTA Surveillance Authority, this requirement amounts to a violation of Article 10(2) of the Directive.

4 The *Government of Norway* and the EFTA Surveillance Authority have consented to the oral procedure being dispensed with.

Facts and procedure

5 It follows from Article 17 of the Directive, as adapted, that Norway was to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 1 July 1994 and immediately to inform the EFTA Surveillance Authority of the measures which were taken.

6 In a written communication dated 18 April 1995, the EFTA Surveillance Authority asked the national authorities to provide the EFTA Surveillance Authority with the transposing legislation regarding each of the professions falling within the scope of the Directive. In its reply dated 31 May 1995, the Government of Norway indicated that not all the necessary national measures transposing the Directive had been adopted.

7 On 4 December 1995, the EFTA Surveillance Authority issued a letter of formal notice to the Government of Norway, stating that Norway had not adopted the national measures necessary to comply with the Directive and inviting the Government of Norway to submit its observations on the matter within two month of receipt.

8 Subsequent to the letter of formal notice, the Government of Norway adopted a number of transposition measures regarding different professions falling within the scope of the Directive and gave notice thereof to the EFTA Surveillance Authority. As regards *inter alia* the mutual recognition of medical certificates for professions referred to under the heading "3. Seafaring sector" in Annex C to the Directive, it was not transposed as required by Article 10(2).

9 Following further contacts, the EFTA Surveillance Authority delivered a reasoned opinion on 29 June 1998 in which it concluded *inter alia* that, by failing to amend its legislation relative to the professions referred to under the heading "3. Seafaring sector" in Annex C to the Directive in order for the legislation to comply fully with the provisions of Article 10(2), Norway had failed to fulfil its obligations under the legal act, as adapted, and Article 7 of the EEA-Agreement. The Government of Norway was asked to take the necessary measures to comply with the reasoned opinion within three months following notification thereof. The Government of Norway was notified of the reasoned opinion on 1 July 1998.

10 In its reply to the reasoned opinion, the Government of Norway maintained that the Norwegian legislation was in accordance with Article 10(2) of the Directive. Norway accepted medical certificates issued in other EEA States, in accordance with the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers ("the STCW Convention"). However, it continued to impose on EEA nationals its requirement that health certificates be issued in accordance with Norwegian provisions and by doctors approved by Norwegian authorities. Moreover, this approach had been endorsed at the meeting of a group of co-ordinators for the implementation of the Directive.

11 The Norwegian authorities and the EFTA Surveillance Authority had several more meetings and contacts, without reaching a solution.

12 The present application was then brought before the Court.

Law

13 The application of the EFTA Surveillance Authority is based on one plea of law, *viz.* that, by failing to adopt, within the prescribed time-limit, the national measures necessary to comply with Article 10(2) of the Directive, as adapted, Norway has failed to fulfil its obligations under Article 17 of that Directive and Article 7 of the EEA Agreement.

14 The time-limit for Norway to take the measures necessary to comply with the Directive expired on 1 July 1994. Norway did not implement such measures in respect of the seafaring sector, either at that time or by the time-limit set by the EFTA Surveillance Authority in its reasoned opinion.

15 In light of the foregoing, the EFTA Surveillance Authority asks the EFTA Court to grant the application and to order Norway to pay the costs of the proceedings.

16 The Government of Norway does not deny that the requisite measures had not been taken within the time limits established. However, it asks the EFTA Court to order each party to bear its own costs of the proceedings.

17 The *Court* notes that Norway was obliged to adopt national provisions necessary to comply with the Directive, as adapted, not later than 1 July 1994. On 1 October 1998, the date on which the time-limit given in the reasoned opinion of the EFTA Surveillance Authority expired, Norway had still not adopted national measures necessary to comply with the reasoned opinion.

18 The Court notes that Article 3 of the EEA Agreement imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Agreement (See Judgment of the EFTA Court in Case E-10/97 *EFTA Surveillance Authority* v *The Kingdom of Norway* [1998] EFTA Court Report 134, at paragraph 15).

19 Furthermore, the Contracting Parties are obliged to implement all acts referred to or contained in the Annexes to the EEA Agreement or in decisions of the EEA Joint Committee (See Judgment of the EFTA Court in Case E-7/97 *EFTA Surveillance Authority* v *The Kingdom of Norway* [1998] EFTA Court Report 62, at paragraph 17).

20 It must therefore be held that, by failing to adopt, within the time-limit prescribed, the national provisions necessary to comply with Article 10(2) of

Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, as adapted by way of Protocol 1 to the EEA Agreement, with regard to the professions coming under the heading "3. Seafaring Sector" of Annex C to the Directive, the Kingdom of Norway has failed to fulfil its obligations under Article 17 of that Directive and Article 7 of the EEA Agreement,

Costs

21 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 asked for the Kingdom of Norway to be ordered to pay the costs. Since the latter has been unsuccessful in its defence, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, by failing to adopt, within the time-limit prescribed, the national provisions necessary to comply with Article 10(2) of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, as adapted by way of Protocol 1 to the EEA Agreement, with regard to the professions coming under the heading "3. Seafaring Sector" of Annex C to the Directive, the Kingdom of Norway has failed to fulfil its obligations under that Directive and Article 7 of the EEA Agreement.

2. Orders the Kingdom of Norway to pay the costs of the proceedings.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 22 June 2000.

Gunnar Selvik
Registrar

Thór Vilhjálmsson
President

Case E-1/00

State Debt Management Agency
v
Íslandsbanki-FBA hf.

(Request for an Advisory Opinion from Héraðsdómur Reykjavíkur (Reykjavík District Court))

(Free movement of capital – State guarantees issued on financial loans – Different guarantee fees for foreign and domestic loans)

Summary of the Judgment

The taking of loans such as those at issue in the main proceedings constitutes movement of capital within the meaning of Article 40 EEA, as read with the Council Directive 88/361/EEC.

The imposition of higher guarantee fees on foreign loans than on domestic loans will necessarily render the former loans more expensive for the borrower than what would have been the case if the lower guarantee fees had been applicable to those loans. The same holds true for cases in which a borrower who is entitled to a State guarantee must pay a guarantee fee on loans from foreign lenders but not on loans from domestic lenders. National provisions such as those at issue in the main proceedings provide for an inherent difference in the treatment of loans from foreign lenders and loans from domestic lenders. All other terms being equal, that difference will render foreign loans more expensive than domestic ones.

Such differentiated treatment may dissuade borrowers from approaching lenders established in another EEA State. Therefore, it must be held that guarantee fee provisions such as those at issue in the main proceedings constitute a restriction on the free movement of capital.

The legislation in question may potentially dissuade borrowers from seeking loans in other EEA States. This is sufficient to establish a breach of Article 40 EEA. There is no requirement that an appreciable effect

Mál E-1/00

Lánasýsla ríkisins
gegn
Íslandsbanka-FBA hf.

(Beiðni um ráðgefandi álit frá Héraðsdómi Reykjavíkur)

(Frjálsir fjármagnsflutningar – ríkisábyrgð á lánum – mismunandi hátt ábyrgðargjald vegna erlendra og innlendra lána)

Samantekt

Lántökur eins og þær sem fjallað er um í málinu eru fjármagnsflutningar í skilningi 40. gr. EES-samningsins, sbr. og tilskipun ráðsins 88/361/EBE.

Álagning hærra ábyrgðargjalds af erlendum lánum í samanburði við ábyrgðargjald á innlend lán gerir það að verkum að erlend lán að verða dýrari en innlend. Hið sama er þegar lántakandi, sem á aðgang að ríkisábyrgð verður að greiða ábyrgðargjald vegna erlendra lána en ekki vegna innlendra lána. Ákvæði í landsrétti eins og þau sem um er fjallað í málinu fela í sér innbyggða mismunun milli lána frá erlendum og innlendum lánveitendum. Séu aðrir skilmálar hinir sömu, leiðir þessi munur til þess að erlend lán verða dýrari en innlend lán.

Slík mismunandi meðferð getur valdið því að lántakendur leiti ekki til lánveitenda í öðrum ríkjum á Evrópska efnahagssvæðinu. Af því leiðir að ákvæði um ábyrgðargjald eins og þau sem fjallað er um í aðalmálinu fela í sér takmörkun á frjálsum fjármagnsflutningum.

Lagareglan sem hér skiptir máli getur hugsanlega leitt til þess að lántakendur leiti ekki eftir lánum í öðrum ríkjum á Evrópska efnahagssvæðinu. Þetta nægir til að 40. gr. EES-samningsins hafi verið brotin. Ekki þarf að sýna fram á merkjanleg áhrif á fjármagnshreyfingar milli landa.

on the cross-border movement of capital be demonstrated.

National provisions of a Contracting Party to the EEA Agreement that provide that a borrower, who is entitled to a State guarantee, must pay a guarantee fee on loans from entities in other Contracting Parties but not on loans from domestic entities or that a borrower, who is entitled to a State guarantee, must pay a higher guarantee fee on loans from entities in other Contracting Parties compared to loans from domestic entities are incompatible with Article 40 EEA, read with Council Directive 88/361/EEC.

Ákvæði í landsrétti aðildarríkis að EES-samningnum sem mæla svo fyrir að lántakandi sem nýtur ríkisábyrgðar, skuli greiða ábyrgðargjald vegna lána frá aðilum í öðrum aðildarríkjum en ekki vegna lána frá innlendum aðilum eða að lántakandi, sem nýtur ríkisábyrgðar, skuli greiða hærri ábyrgðargjald vegna lána frá aðilum í öðrum aðildarríkjum en lána frá innlendum aðilum, eru ósamrýmanleg 40. gr. EES-samningsins, sbr. tilskipun ráðsins nr. 88/361/EBE.

JUDGMENT OF THE COURT

14 July 2000*

(Free movement of capital – State guarantees issued on financial loans – Different guarantee fees for foreign and domestic loans)

In Case E-1/00

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 Héraðsdómur Reykjavíkur (Reykjavík District Court) for an Advisory Opinion in the case pending before it between

State Debt Management Agency

and

Íslandsbanki-FBA hf.

on the interpretation of Articles 4, 40, 42 and 61 of the EEA Agreement.

THE COURT,

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

Registrar: Gunnar Selvik

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

DÓMUR EFTA-DÓMSTÓLSINS

14. júlí 2000*

(Frjálsir fjármagnsflutningar – ríkisábyrgð á lánum – mismunandi hátt ábyrgðargjald vegna erlendra og innlendra lána)

Mál E-1/00

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

Lánasýsla ríkisins

gegn

Íslandsbanka-FBA hf.

varðandi túlkun á 4., 40., 42 og 61. gr. EES-samningsins.

DÓMSTÓLINN,

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

dómritari: Gunnar Selvik

* Beiðni um ráðgefandi álit er á íslensku.

after considering the written observations submitted on behalf of:

– the Plaintiff, the State Debt Management Agency, represented by Sveinn Sveinsson, Supreme Court Attorney;

– the Defendant, the Íslandsbanki-FBA hf., represented by Baldur Guðlaugsson, Supreme Court Attorney;

– the Government of Iceland, represented by Högni S. Kristjánsson, 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 Peter Dyrberg, Director, Legal & Executive Affairs, acting as Agent;

– the Commission of the European Communities, represented by Christina Tufvesson and John Forman, Legal Advisors, Legal Service, acting as Agents.

having regard to the Report for the Hearing,

after hearing the oral observations of the State Debt Management Agency, the Íslandsbanki-FBA hf., the Government of Norway, the EFTA Surveillance Authority and the Commission of the European Communities at the hearing on 30 May 2000,

gives the following

Judgment

Facts and procedure

1 By an order dated 1 February 2000, registered at the Court 7 February 2000, Héraðsdómur Reykjavíkur (Reykjavík District Court) made a Request for an Advisory Opinion in a case pending before it between the State Debt Management Agency (Lánasýsla ríkisins) and the Icelandic Investment Bank hf. (Fjárfestingarbanka atvinnulífsins hf.). By a decision of 15 May 2000, the Icelandic Investment Bank hf. merged with Íslandsbanki hf. The merged entity, Íslandsbanki-FBA hf., assumed all rights and obligations of the Icelandic Investment Bank hf. As a result of this merger, the parties to the case pending before Héraðsdómur Reykjavíkur are now the State Debt Management Agency (hereinafter the "Plaintiff") and Íslandsbanki-FBA hf. (hereinafter the "Defendant").

hefur með tilliti til skriflegra greinargerða frá:

- Stefnanda, Lánsýslu ríkisins. Í fyrirsvari er Sveinn Sveinsson, hrl.

- Stefnda, Íslandsbanka-FBA hf. Í fyrirsvari er Baldur Guðlaugsson, hrl.

- Ríkisstjórn Íslands. Í fyrirsvari sem umboðsmaður er Högni S. Kristjánsson, lögfræðingur í utanríkisráðuneytinu.

- Ríkisstjórn Noregs. Í fyrirsvari sem umboðsmaður er Helge Seland, deildarstjóri í Konunglega utanríkisráðuneytinu.

- Eftirlitsstofnun EFTA. Í fyrirsvari sem umboðsmaður er Peter Dyrberg, deildarstjóri lagadeildar.

- Framkvæmdastjórn Evrópubandalaganna. Í fyrirsvari sem umboðsmenn eru Christina Tufvesson og John Forman, lögfræðilegir ráðgjafar hjá lagadeild.

með tilliti til skýrslu framsögumanns,

og munnlegs málflutnings Lánasýslu ríkisins, Íslandsbanka-FBA hf., ríkisstjórnar Noregs, Eftirlitsstofnunar EFTA og framkvæmdastjórnar Evrópubandalaganna þann 30. maí 2000,

kveðið upp svohljóðandi

dóm

Málsatvik og meðferð máls

1 Með beiðni dagsettri 1. febrúar 2000, sem skráð var í málaskrá dómstólsins 7. febrúar 2000, óskaði Héraðsdómur Reykjavíkur eftir ráðgefandi áliti í máli sem rekið er fyrir dómstólnum milli Lánasýslu ríkisins og Íslandsbanka-FBA hf. Samkvæmt ákvörðun frá 15. maí 2000 hafa Fjárfestingarbanki atvinnulífsins hf. og Íslandsbanki hf. sameinast. Hið nýja félag, Íslandsbanki-FBA hf., hefur tekið við öllum réttindum og skuldbindingum Fjárfestingarbanka atvinnulífsins hf. Vegna þessarar sameiningar eru aðilar málsins fyrir Héraðsdómi Reykjavíkur nú Lánasýsla ríkisins (hér eftir stefnandi) og Íslandsbanki-FBA hf. (hér eftir stefndi).

2 The dispute before Héraðsdómur Reykjavíkur concerns the guarantee fee provisions in the Icelandic legislation establishing a system of State guarantees. Until 1998, the legal framework of this system of State guarantees was found in Act no. 37/1961 on State Guarantees, as amended by Act no. 65/1988. On 1 January 1998, a new Act no. 121/1997 on State Guarantees entered into force.

3 Article 8 of the former Act no. 37/1961 on State Guarantees provided that banks, credit funds, financial institutions and others which, by law, were entitled to a State guarantee, were obliged to pay a guarantee fee to the State Treasury on loans from foreign entities. This fee was to be paid every three months and was to be fixed at 0.0625% of the average outstanding principal of assessable obligations for the relevant period.

4 Article 6 of the new Act no. 121/1997 on State Guarantees provides that guarantee fees are payable to the State Treasury on all loans, both foreign and domestic, benefiting from State guarantees. However, the guarantee fees payable on foreign loans are to equal 0.0625% every three months on the average outstanding principal of assessable obligations, while the guarantee fees payable on domestic loans are to equal 0.0375% every three months on the average outstanding principal of assessable obligations.

5 The Icelandic Investment Bank was established pursuant to Act No. 60/1997 and has operated since 1 January 1998. In accordance with Article 9 of Act No. 60/1997, the Icelandic Investment Bank assumed all then existing obligations of the Industrial Loan Fund, including certain loans granted by the Nordic Investment Bank, a joint financial institution established by the Governments of the five Nordic countries. The State Treasury had undertaken to guarantee all obligations of the Industrial Loan Fund and, accordingly, had issued State guarantees on the loans from the Nordic Investment Bank. Article 9 of Act No. 60/1997 provides that the State Treasury is to continue to guarantee all the obligations of the Industrial Loan Fund, which existed at the time of the establishment of the Icelandic Investment Bank, until such time as the underlying obligations are fulfilled.

6 The Plaintiff has overall responsibility for the administration of State guarantees, including the calculation, levying and collection of guarantee fees. In a letter dated 17 April 1998, the Plaintiff was informed by the Icelandic Investment Bank that the Industrial Loan Fund had not paid guarantee fees on its obligations to the Nordic Investment Bank since the middle of 1995. In the letter, the Icelandic Investment Bank expressed the view that the Nordic Investment Bank is not a foreign entity within the meaning of Article 6 of Act No. 121/1997 and that the guarantee fees payable should be those applicable to domestic loans.

7 On 23 January 1998, the Plaintiff made a request to the Ministry of Finance, asking it to decide whether obligations owed to the Nordic Investment Bank were obligations to a foreign entity for the purpose of calculating the guarantee fees. In its letter dated 9 March 1998, the Ministry of Finance confirmed that the Nordic Investment Bank should be considered a foreign entity and that the State

2 Ágreiningsefnið fyrir Héraðsdómi Reykjavíkur varðar íslensk lagaákvæði um ábyrgðargjald. Allt fram til ársins 1998 var reglur um ríkisábyrgð að finna í lögum um ríkisábyrgðir nr. 37/1961, eins og þeim var breytt með lögum nr. 65/1988. Hinn 1. janúar 1998 tóku gildi ný lög um ríkisábyrgðir, sbr. lög nr. 121/1997.

3 Í 8. gr. eldri laga um ríkisábyrgðir nr. 37/1961 sagði að bankar, lánasjóðir, lánastofnanir og aðrir þeir aðilar sem lögum samkvæmt nutu ábyrgðar ríkissjóðs, skyldu greiða ábyrgðargjald til ríkissjóðs af skuldbindingum sínum gagnvart erlendum aðilum. Gjald þetta skyldi greiða ársfjórðungslega og nema 0.0625% af höfuðstóli gjaldskyldra skuldbindinga eins og hann var að meðaltali á hverju tímabili.

4 Ákvæði 6. gr. nýju laganna um ríkisábyrgðir, sbr. lög nr. 121/1997, kveða á um að ábyrgðargjald skuli greiða vegna allra lána sem njóta ríkisábyrgðar, hvort sem þeirra er aflað innanlands eða erlendis. Þó skal ábyrgðargjald nema 0.0625% á ársfjórðungi af meðaltali höfuðstóls gjaldskyldra erlendra skuldbindinga á hverju tímabili, en 0.0375% á ársfjórðungi af meðaltali höfuðstóls gjaldskyldra innlendra skuldbindinga.

5 Stefndi, Fjárfestingarbanki atvinnulífsins hf., var stofnaður með lögum nr. 60/1997 og hefur verið starfræktur frá 1. janúar 1998. Í samræmi við 9. gr. nefndra laga, tók Fjárfestingarbanki atvinnulífsins hf. yfir allar þáverandi skuldbindingar Iðnlánasjóðs, þ.m.t. öll lán sem Norræni fjárfestingarbankinn hafði veitt, en sá banki var stofnaður sameiginlega af ríkisstjórnum Norðurlanda. Ríkissjóður hefur tekið á sig ábyrgð á öllum skuldbindingum Iðnlánasjóðs og þar af leiðandi einnig á lánum frá Norræna fjárfestingarbankanum. Í 9. gr. segir jafnframt að ríkissjóður skuli áfram ábyrgjast allar þær skuldbindingar Iðnlánasjóðs, sem ríkisábyrgð var á við stofnun Fjárfestingarbanka atvinnulífsins hf., þar til þær eru að fullu efndar.

6 Stefnandi, Lánasýsla ríkisins, er ábyrg fyrir ríkisábyrgðarsjóði, en sjóðurinn fer með málefni sem varða ríkisábyrgðir, m.a. útreikning, álagningu og innheimtu ábyrgðargjaldsins. Með bréfi, dagsettu 17. apríl 1998, upplýsti Fjárfestingarbanki atvinnulífsins hf. stefnanda um að Iðnlánasjóður hefði ekki greitt ríkisábyrgðargjaldið til ríkisábyrgðarsjóðs vegna skuldbindinga sinna við Norræna fjárfestingarbankann síðan um mitt ár 1995. Í bréfinu lýsti Fjárfestingarbanki atvinnulífsins hf. þeirri skoðun sinni að Norræni fjárfestingarbankinn væri ekki erlendur aðili í skilningi 6. gr. laga nr. 121/1997 og að greiða bæri ríkisábyrgðargjald eins og um skuldbindingar gagnvart innlendum aðila væri að ræða.

7 Hinn 23. janúar 1998 óskaði stefnandi eftir því að fjármálaráðuneytið úrskurðaði um það hvort líta bæri á skuldbindingar gagnvart Norræna fjárfestingarbankanum sem skuldbindingar gagnvart erlendum aðila við útreikning ríkisábyrgðargjaldsins. Í bréfi sínu, dagsettu 9. mars 1998, staðfesti fjármálaráðuneytið að líta bæri á Norræna fjárfestingarbankann sem erlendan

guarantee should be subject to the guarantee fees payable on loans from foreign entities.

8 The Icelandic Investment Bank did not accept the decision of the Ministry of Finance, and since 1 January 1998 the Icelandic Investment Bank hf. has paid guarantee fees on the obligations to the Nordic Investment Bank as if the obligations were in favour of a domestic entity.

9 The Plaintiff initiated proceedings before Héraðsdómur Reykjavíkur, making a claim for payment of guarantee fees on the assumption that the Nordic Investment Bank is a foreign entity.

10 In the proceedings before Héraðsdómur Reykjavíkur, several issues were raised concerning the compatibility of the State guarantee system imposing higher guarantee fees on loans from foreign lenders than domestic lenders with the EEA Agreement.

11 Héraðsdómur Reykjavíkur decided to submit a Request for an Advisory Opinion to the EFTA Court on the following question:

> *Is it compatible with the EEA Agreement, in particular Articles 4, 40, 42 and 61, when the national law of a Contracting Party provides:*
>
> *a. that a borrower, who is entitled to a state guarantee, shall pay a guarantee fee on loans from entities in other Contracting Parties to the EEA but not on domestic loans?*
>
> *b. that a borrower, who is entitled to a state guarantee, shall be subject to the payment of a higher guarantee fee on loans from entities in other Contracting Parties to the EEA compared to loans from domestic entities?*

12 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.

Findings of the Court

13 By its question, the national court is essentially asking whether the EEA Agreement, in particular Articles 4, 40, 42 and 61 EEA, precludes that entities benefiting from State guarantees are required under domestic law to pay higher guarantee fees on loans from lenders in other Contracting Parties to the EEA Agreement than from domestic lenders.

aðila og að ríkisábyrgðargjaldið skyldi lagt á eins og um ríkisábyrgð á lánum frá erlendum aðila væri að ræða.

8 Fjárfestingarbanki atvinnulífsins hf. féllst ekki á þessa niðurstöðu fjármálaráðuneytisins og hafði frá 1. janúar 1998 greitt ábyrgðargjaldið vegna skuldbindinga sinna við Norræna fjárfestingarbankann eins og um skuldbindingar gagnvart innlendum aðila væri að ræða.

9 Stefnandi hefur höfðað mál fyrir Héraðsdómi Reykjavíkur og gerir kröfu um greiðslu ábyrgðargjalds sem miðast við að Norræni fjárfestingarbankinn sé erlendur aðili.

10 Við meðferð málsins fyrir Héraðsdómi Reykjavíkur hefur stefndi haft uppi nokkrar málsástæður sem varða það hvort reglur um mismunandi hátt ríkisábyrgðargjald, eftir því hvort um erlendan eða innlendan lánveitanda er að ræða, fái samræmst EES-samningnum.

11 Héraðsdómur Reykjavíkur ákvað að senda EFTA-dómstólnum beiðni um ráðgefandi álit varðandi eftirfarandi spurningar:

> *"Er það samrýmanlegt samningnum um Evrópska efnahagssvæðið, einkum 4., 40., 42. og 61. gr. hans, að í landslögum ríkis sem aðild á að samningnum sé kveðið á um:*
>
> *a. Að lántakandi sem nýtur ábyrgðar ríkissjóðs skuli greiða ábyrgðargjald af lánum sem hann tekur hjá aðilum í öðrum aðildarríkjum samningsins en ekki af lánum sem hann tekur hjá innlendum aðilum?*
>
> *b. Að lántakandi sem nýtur ábyrgðar ríkissjóðs skuli greiða hærra ábyrgðargjald af lánum sem hann tekur hjá aðilum í öðrum aðildarríkjum samningsins en af lánum sem hann tekur hjá innlendum aðilum?"*

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

Álit dómstólsins

13 Kjarni spurningarinnar frá Héraðsdómi Reykjavíkur er hvort EES-samningurinn, einkum 4, 40, 42 og 61 gr. hans, útiloki að aðilar sem njóta góðs af ríkisábyrgðum, þurfi að greiða hærri ábyrgðargjöld vegna lána frá lánveitendum í öðrum aðildarríkjum samningsins en vegna lána frá innlendum lánveitendum.

Interpretation of Article 40 EEA

14 Freedom of movement of capital is one of the fundamental principles of the EEA Agreement. Chapter 4 of the EEA Agreement contains the principal treaty provisions relating to the movement of capital within the EEA. Article 40 EEA provides as follows:

> "Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article."

15 Annex XII to the EEA Agreement refers to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (hereinafter the "Directive"). The Directive was in force at the material time. Article 1 of the Directive provides as follows:

> "Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I."

16 The wording of Article 40 EEA is similar to that of the former Article 67(1) of the EC Treaty. The Treaty on European Union introduced new provisions on "Capital and payments" in the EC Treaty, including Article 73b which substantially reproduced the contents of Article 1 of Directive 88/361/EEC. After the Treaty of Amsterdam, Article 73b was renumbered as Article 56 EC.

17 Article 40 EEA and the Directive abolish restrictions on movements of capital between the Contracting Parties to the EEA Agreement.

18 It is firstly necessary for the Court to consider whether the making of loans such as those at issue in the main proceedings constitutes movement of capital within the meaning of Article 40 EEA.

19 The concept of movement of capital is not defined in Article 40 EEA or in the Directive. However, the Nomenclature of capital movements in Annex I of the Directive indicates the scope of capital movements for the purpose of Article 40 EEA and Article 1 of the Directive (see *inter alia* Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, at paragraph 21; and Case C-35/98 *Staatssecretaris van Financiën* v *B.G.M. Verkooijen* [2000] ECR I-0000, at paragraph 27).

20 Heading VIII of the Nomenclature lists "Financial loans and credits" as a category of capital movements. In the language of the introduction, capital movements include "- all the operations necessary for the purposes of capital movements: conclusion and performance of the transaction and related transfers."

Skýring 40 gr. EES-samningsins

14 Það er ein af meginreglum EES-samningsins að fjármagnsflutningar skuli vera frjálsir. Í 4. kafla samningsins er sett fram meginreglan um fjármagnsflutninga innan EES. Í 40. gr. samningsins segir:

> "Innan ramma ákvæða samnings þessa skulu engin höft vera milli samningsaðila á flutningum fjármagns í eigu þeirra sem búsettir eru í aðildarríkjum EB eða EFTA-ríkjum né nokkur mismunun, byggð á ríkisfangi eða búsetu aðila eða því hvar féð er notað til fjárfestingar. Í XII. viðauka eru nauðsynleg ákvæði varðandi framkvæmd þessarar greinar."

15 Í viðauka XII er vísað í tilskipun ráðsins 88/361/EBE frá 24. júní 1988 (hér eftir nefnd "tilskipun") um framkvæmd 67. gr. sáttmálans. Tilskipunin var í gildi á þeim tíma sem hér skiptir máli. Í 1. gr. hennar segir:

> "Aðildarríkin skulu, í samræmi við eftirfarandi ákvæði, aflétta hömlum á fjármagnsflutningum milli þeirra sem búsettir eru í aðildarríkjunum. Til að auðvelda beitingu þessarar tilskipunar skulu fjármagsnflutningar flokkaðir í samræmi við skrá í I. Viðauka."

16 Orðalag 40. gr. EES-samninsgins er sambærilegt við orðalag þeirrar greinar sem áður var 1. mgr. 67. gr. Rómarsáttmálans. Í samningnum um Evrópusambandið er gert ráð fyrir nýjum ákvæðum um "Fjármagn og greiðslur" sem skyldu verða hluti Rómarsáttmálans, þ.m.t. 73. gr. b, sem efnislega samsvarar 1. gr. tilskipunar ráðsins nr. 88/361/EBE. Eftir gildistöku Amsterdamsáttmálans verður 73. gr. b Rómarsáttmálans að 56. gr.

17 Með 40. gr. EES-samningsins og tilskipuninni eru afnumin höft á fjármagnsflutningum milli aðildarríkja samningsins.

18 Dómstóllinn þarf fyrst að taka afstöðu til þess hvort lánveitingar eins og um er fjallað í aðalmálinu eru fjármagnsflutningar í skilningi 40. gr. EES-samningsins.

19 Hugtakið "fjármagnsfluningar" er hvorki skilgreint í 40. gr. EES-samningsins né í tilskipuninni. Engu að síður má ráða umfang þess, sem í 40. gr. og 1. gr. tilskipunarinnar telst fjármagnsflutningur, af því sem fram kemur í skrá yfir fjármagnsflutninga í 1. viðauka við tilskipunina (sjá meðal annars málið C-222/97 *Trummer og Mayer* [1999] ECR I-1661, 21. liður; og málið Case C-35/98 *Staatssecretaris van Financiën* gegn *B.G.M. Verkooijen* [2000] ECR I-0000, 27. liður).

20 Í VIII. hluta skrárinnar eru peningalán og lánsfrestir talin ein tegund fjármagnsflutninga. Í inngangi segir að til fjármagnsflutninga teljist "- allar þær aðgerðir sem nauðsynlegar eru við fjármagnsflutninga: ákvörðun um viðskipti og framkvæmd þeirra og yfirfærslur tengdar þeim."

21 In addition, as the Court of Justice of the European Communities has previously held, the borrowing of money from a bank in another Contracting Party falls within the scope of capital movement within the meaning of the Directive (see insofar Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955).

22 The Court concludes from the foregoing that the taking of loans such as those at issue in the main proceedings constitute movement of capital within the meaning of Article 40 EEA, as read with the Directive.

23 Secondly, it is necessary for the Court to ascertain whether national rules which require entities benefiting from State guarantees to pay higher guarantee fees on loans from foreign lenders than from domestic lenders constitute a restriction on the free movement of capital.

24 National legislation that imposes higher guarantee fees in relation to loans from foreign lenders than loans from domestic lenders does not inevitably render foreign loans less attractive than domestic loans. Other factors, such as interest rates, may be decisive for borrowers when they are determining the most attractive lending offer. From the borrowers' point of view, favourable lending terms from foreign lenders may outweigh the disadvantages incurred by higher guarantee fees and consequently induce borrowers to contract loans with foreign lenders instead of domestic lenders.

25 However, the imposition of higher guarantee fees on foreign loans than those applicable to domestic loans will necessarily render the former loans more expensive for the borrower than what would have been the case if the lower guarantee fees had been applicable to those loans. The same holds true for cases in which a borrower who is entitled to a State guarantee must pay a guarantee fee on loans from foreign lenders but not on loans from domestic lenders. National provisions such as those at issue in the main proceedings provide for an inherent difference in the treatment of loans from foreign lenders and loans from domestic lenders. All other terms being equal, that difference will render foreign loans more expensive than domestic ones.

26 Such differentiated treatment may dissuade borrowers from approaching lenders established in another EEA State. Therefore, it must be held that guarantee fee provisions such as those at issue in the main proceedings constitute a restriction on the free movement of capital.

27 The Plaintiff has argued that the contested provisions of the Icelandic legislation do not constitute a restriction contrary to Article 40 EEA, since the differing guarantee fees do not, in practice, have substantial significance when borrowers are considering whether to contract loans with foreign lenders or with domestic lenders.

28 That argument cannot be accepted. The legislation in question may potentially dissuade borrowers from seeking loans in other EEA States. This is sufficient to

21 Að auki hefur dómstóll Evrópubandalaganna áður komist að þeirri niðurstöðu að peningalán frá banka í öðru aðildarríki sé fjármagnsflutningur í skilningi tilskipunarinnar (sjá málið C-484/93 *Svensson og Gustavsson* [1995] ECR I-3955).

22 Það er niðurstaða dómstólsins á grundvelli þess sem rakið var, að lántökur eins og þær sem fjallað er um í aðalmálinu séu fjármagnsflutningar í skilningi 40. gr. EES-samningsins, sbr. tilskipunina.

23 Í öðru lagi þarf dómstóllinn að ganga úr skugga um hvort það séu takmarkanir á frjálsum fjármagnsflutningum ef landsréttarreglur sem leggja á aðila, sem njóta góðs af ríkisábyrgðum, að greiða hærri ábyrgðargjöld vegna lána frá erlendum lánveitendum en innlendum.

24 Reglur í landsrétti sem mæla fyrir um hærri ábyrgðargjöld af lánum frá erlendum en innlendum lánveitendum hafa ekki óhjákvæmilega þau áhrif að erlend lán verði óhagstæðari en innlend. Önnur atriði, svo sem vaxtastig, geta ráðið úrslitum fyrir lántakendur þegar þeir taka afstöðu til lánstilboða. Fyrir þá geta hagkvæmir skilmálar sem erlendir lánveitendur bjóða skipt meiru en ókostir sem felast í hærri ábyrgðargjöldum. Þetta getur leitt til þess að lántakendur semji um lán við erlenda lánveitendur en ekki innlenda.

25 Engu að síður hljóta erlend lán að verða dýrari en innlend ef af þeim er tekið hærri ábyrgðargjald en ef lægra gjaldið væri á þau lagt. Hið sama er þegar lántakandi, sem á aðgang að ríkisábyrgð verður að greiða ábyrgðargjald vegna erlendra lána en ekki vegna innlendra lána. Ákvæði í landsrétti eins og þau sem um er fjallað í aðalmálinu fela í sér innbyggða mismunun milli lána frá erlendum og innlendum lánveitendum. Séu aðrir skilmálar hinir sömu, leiðir þessi munur til þess að erlend lán verða dýrari en innlend lán.

26 Slík mismunandi meðferð getur valdið því að lántakendur leiti ekki til lánveitenda í öðrum ríkjum á Evrópska efnahagssvæðinu. Af því leiðir að ákvæði um ábyrgðargjald eins og þau sem fjallað er um í aðalmálinu fela í sér takmörkun á frjálsum fjármagnsflutningum.

27 Stefnandi hefur haldið fram að hin umdeildu ákvæði í íslenskum lögum feli ekki í sér takmarkanir andstæðar 40. gr. EES-samningsins, þar sem mismunandi ábyrgðargjöld hafi í raun ekki þýðingu sem máli skipti þegar lántakendur meti hvort lán skuli tekin hjá erlendum eða innlendum lánveitendum.

28 Ekki verður á þessa röksemd fallist. Lagareglan sem hér skiptir máli getur hugsanlega leitt til þess að lántakendur leiti ekki eftir lánum í öðrum ríkjum á Evrópska efnahagssvæðinu. Þetta nægir til að 40. gr. EES-samningsins hafi verið

establish a breach of Article 40 EEA. There is no requirement that an appreciable effect on the cross-border movement of capital be demonstrated.

29 The reply to be given to the national court must therefore be that national provisions of a Contracting Party to the EEA Agreement which provide that a borrower, who is entitled to a State guarantee, must pay a guarantee fee on loans from entities in other Contracting Parties but not on loans from domestic entities or that a borrower, who is entitled to a State guarantee, must pay a higher guarantee fee on loans from entities in other Contracting Parties compared to loans from domestic entities are incompatible with Article 40 EEA, read with Council Directive 88/361/EEC.

Article 36 EEA

30 The Government of Norway has suggested that a situation such as that in the main proceedings should be considered under Article 36 EEA. Since the Court has already concluded that the contested national legislation is contrary to Article 40 EEA, the Court will examine whether this renders Article 36 EEA inapplicable in this case.

31 Article 36 EEA requires the abolition of all restrictions on the provision of services, including financial services, within the EEA whereas Article 40 EEA prohibits all restrictions on the movement of capital within the EEA. It follows from the wording of these two provisions, as well as their placement in different chapters of the Agreement, that they were intended to regulate different situations.

32 The predominant feature of the case at hand is the free movement of capital. The provisions concerning the different guarantee fees leading to a more expensive guarantee for loans from foreign lenders constitute a national measure that directly restricts the cross-border flow of capital. They may also indirectly restrict the freedom to provide and receive services. On balance, however, the centre of gravity of the case lies with the free movement of capital.

33 Furthermore, Article 37 EEA states that activities are to be considered as "services" within the meaning of the EEA Agreement only "in so far as they are not governed by the provisions relating to freedom of movement of goods, capital and persons". One may conclude from that provision that Article 40 EEA and Article 36 EEA are, as a rule, not intended to apply simultaneously.

34 The present case must, therefore, be dealt with under Article 40 EEA.

brotin. Ekki þarf að sýna fram á merkjanleg áhrif á fjármagnshreyfingar milli landa.

29 Svarið til Héraðsdóms Reykjavíkur hlýtur því að vera, að reglur í landsrétti aðildarríkis að EES-samningnum séu í ósamræmi við 40. gr. EES-samningsins, sbr. tilskipun ráðsins 88/361/EBE, ef þær eru þess efnis, að lántakandi, sem á kost á ríkisábyrgð, verði að greiða ábyrgðargjald vegna lána frá aðilum í öðrum aðildarríkjum en ekki vegna lána frá innlendum aðilum. Hið sama er ef lántakandi, sem á kost á ríkisábyrgð, verður að sæta því að greiða hærri ábyrgðargjöld vegna lána frá aðilum í öðrum aðildarríkjum en vegna lána frá innlendum aðilum.

36. gr. EES-samningsins

30 Norska ríkisstjórnin hefur hreyft því að atvik eins og þau sem eru í aðalmálinu ætti að skoða á grundvelli 36. gr. EES-samningsins. Dómstóllinn hefur þegar komist að þeirri niðurstöðu að þær reglur landsréttar sem um er deilt séu andstæðar 40. gr. EES-samningsins. Þess vegna mun dómstóllinn taka afstöðu til þess hvort að af þessu leiði að 36. grein EES-samningsins verði ekki beitt í málinu.

31 Í 36. gr. EES-samningsins er mælt fyrir um að afnema skuli allar takmarkanir á að þjónusta sé veitt, þar á meðal fjármálaþjónusta, á Evrópska efnahagssvæðinu. Í 40. gr. er lagt bann við takmörkun á fjármagnsflutningum á svæðinu. Orðalag þessara tveggja ákvæða og skipan þeirra í mismunandi kafla í samningnum leiðir til þeirrar niðurstöðu að þeim sé ætlað að gilda um mismunandi atvik.

32 Megineinkenni þess máls sem hér er fjallað um er frjáls fjármagnsflutningur. Ákvæðin um mismundandi ábyrgðargjöld sem leiða til þess að ábyrgðin verður dýrari vegna lána frá erlendum lánveitendum fela í sér innlenda ráðstöfun sem með beinum hætti takmarkar fjármagnsflutninga milli landa. Ákvæðin geta einnig með óbeinum hætti takmarkað frelsi til að veita og þiggja þjónustu. Heildarmat á aðstæðum leiðir þó til þeirrar niðurstöðu, að þungamiðja málsins sé frjáls fjármagnsflutningur.

33 Þess er og að gæta, að í 37. gr. EES-samningsins segir: “Með “þjónustu” er í samningi þessum átt við þjónustu … að því leyti sem hún lýtur ekki ákvæðum um frjálsa vöruflutninga, frjálsa fjármagnsflutninga og frjálsa fólksflutninga.” Af þessu má ályktа að yfirleitt verði 40. gr. og 36. gr EES-samningsins ekki beitt saman.

34 Mál þetta verður þess vegna að fjalla um á grundvelli 40. gr. EES-samningsins.

The general prohibition of discrimination on grounds of nationality

35 Article 4 EEA provides as a general principle that, within the scope of application of the EEA Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. It follows from the case law of the Court that Article 4 EEA applies independently only to situations governed by EEA law for which the EEA Agreement lays down no specific rules prohibiting discrimination (see Case E-5/98 *Fagtún* [1999] EFTA Court Report 51, at paragraph 42).

36 The principle of non-discrimination has been given effect in the field of free movement of capital by Article 40 EEA. Consequently, it is not necessary to examine whether a situation such as that in the main proceedings is contrary to Article 4 EEA.

Interpretation of other provisions of the EEA Agreement

37 The national court has asked whether the contested legislation constitutes State aid contrary to Article 61 EEA. As shown by Case E-4/97 *Norwegian Bankers' Association* [1999] EFTA Court Report 1, at paragraphs 32 and 33, a State guarantee system for a publicly owned bank may constitute State aid within the meaning of Article 61 EEA. However, a national court does not have the competence to declare that State aid granted by an EFTA State is contrary to the EEA Agreement. Therefore, an answer to the part of the question relating to Article 61 EEA would not be of relevance to the national court in this case.

38 In view of the foregoing considerations on Article 40 EEA, it is not necessary to determine whether legislation such as that at issue in this case is incompatible with any of the other provisions in the EEA Agreement referred to in the Request for an Advisory Opinion or invoked by the parties in their pleadings.

Costs

39 The costs incurred by 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,

Hið almenna bann við mismunun vegna ríkisfangs

35 Í 4. gr. EES-samningsins kemur fram sú meginregla að á gildisviði samningsins og að teknu tilliti til allra sérreglna sem hann hefur að geyma, skuli bönnuð hverskonar mismunun eftir ríkisfangi. Í dómum dómstólsins kemur fram að 4. gr. gildir aðeins sjálfstætt um aðstæður sem ráðast af rétti Evrópska efnahagssvæðisins þegar ekki er að finna í EES-samningnum sérstakar reglur um þær sem banna mismunun (sjá málið E-5/98 *Fagtún* [1999] skýrsla EFTA dómstólsins bls. 51, 42. liður).

36 Meginreglan um bann við mismunun kemur fram í 40. gr. EES-samningsins að því er frjálsa fjármagnsflutninga varðar. Þess vegna er ekki þörf á að kanna hvort aðstæður eins og eru í aðalmálinu séu andstæðar 4. gr.

Skýring annarra ákvæða í EES-samningnum

37 Héraðsdómur Reykjavíkur hefur spurt hvort ríkisaðstoð samkvæmt 61. gr. EES-samningsins felist í lögunum sem um er deilt. Í máli E-4/97 *Samtök norskra banka* [1999] skýrsla EFTA dómstólsins 32. og 33. lið, kemur fram, að ríkisaðstoð í skilningi 61. gr. samningsins getur verið til staðar ef um er að ræða ríkisábyrgð til banka í opinberri eigu. Þrátt fyrir það brestur dómstóla í aðildarríkjunum hæfi til að lýsa ríkisaðstoð, sem EFTA-ríki veitir, andstæða EES-samningnum. Af því leiðir, að svar við þeim hluta spurningarinnar sem varðar 61. gr. EES-samningsins hefði ekki í þessu máli þýðingu fyrir Héraðsdóm Reykjavíkur.

38 Vegna þess sem fyrr er sagt um 40. gr. EES-samningsins er ekki þörf á að skera úr því, hvort lög eins og þau sem þetta mál fjallar um séu andstæð öðrum þeim ákvæðum í samningnum sem getið er um í beiðninni um ráðgefandi álit eða aðilar hafi vikið að í málflutningi sínum.

Málskostnaður

39 Ríkisstjórn Íslands, ríkisstjórn Noregs, Eftirlitsstofnun EFTA og Framkvæmdastjórn Evrópubandalaganna sem hafa skilað greinargerð 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.

Með vísan til framangreindra forsendna lætur,

THE COURT,

in answer to the question referred to it by Héraðsdómur Reykjavíkur by the reference of 1 February 2000, hereby gives the following Advisory Opinion:

National provisions of a Contracting Party to the EEA Agreement which provide

a. that a borrower, who is entitled to a State guarantee, must pay a guarantee fee on loans from entities in other Contracting Parties but not on loans from domestic entities

or

b. that a borrower, who is entitled to a State guarantee, must pay a higher guarantee fee on loans from entities in other Contracting Parties compared to loans from domestic entities

are incompatible with Article 40 EEA, read with Council Directive 88/361/EEC.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 14 July 2000.

Gunnar Selvik
Registrar

Thór Vilhjálmsson
President

DÓMSTÓLLINN,

uppi svohjóðandi ráðgefandi álit um spurningar þær sem Héraðsdómur Reykjavíkur beindi til dómstólsins 1. febrúar 2000:

Ákvæði í landsrétti aðildarríkis að EES-samningnum sem segja

a. að lántakandi sem nýtur ríkisábyrgðar, skuli greiða ábyrgðargjald vegna lána frá aðilum í öðrum aðildarríkjum en ekki vegna lána frá innlendum aðilum.

eða

b. að lántakandi, sem nýtur ríkisábyrgðar, skuli greiða hærri ábyrgðargjald vegna lána frá aðilum í öðrum aðildarríkjum en lána frá innlendum aðilum

eru ósamrýmanleg 40. gr. EES-samningsins, sbr. tilskipun ráðsins nr. 88/361/EBE.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Kveðið upp í heyrandi hljóði í Luxemborg 14. júlí 2000.

Gunnar Selvik
dómritari

Thór Vilhjálmsson
forseti

REPORT FOR THE HEARING
in Case E-1/00

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 Héraðsdómur Reykjavíkur (Reykjavik City Court) for an Advisory Opinion in the case pending before it between

The State Debt Management Agency (Lánasýsla ríkisins)

and

The Icelandic Investment Bank Ltd. (Fjárfestingarbanka atvinnulífsins hf.)

on the interpretation of Articles 4, 40, 42 and 61 of the EEA Agreement.

I. Introduction

1. By an order dated 1 February 2000, registered at the Court 7 February 2000, the Reykjavik City Court made a Request for an Advisory Opinion in a case pending before it between the State Debt Management Agency (hereinafter, the "Plaintiff") and the Icelandic Investment Bank Ltd. (hereinafter, the "Defendant").

2. The dispute before the Reykjavik City Court concerns a claim by the Plaintiff for payment of guarantee fees related to state guarantees issued on loans obtained by the Industrial Loan Fund from the Nordic Investment Bank and later assumed by the Defendant.

II. Legal background

3. The questions submitted by the national court concern the interpretation of Articles 4, 40, 42 and 61 EEA.

4. Article 4 EEA reads as follows:

SKÝRSLA FRAMSÖGUMANNS
í máli E-1/00

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

Lánasýsla ríkisins

gegn

Fjárfestingarbanka atvinnulífsins hf.

varðandi túlkun 4., 40., 42. og 61. gr. EES-samningsins.

I. Inngangur

1. Með beiðni dagsettri 1. febrúar 2000, sem skráð var í málaskrá dómstólsins 7. febrúar 2000, óskaði Héraðsdómur Reykjavíkur eftir ráðgefandi áliti í máli sem rekið er fyrir dómstólnum milli Lánasýslu ríkisins (hér eftir nefnd stefnandi) og Fjárfestingarbanka atvinnulífsins hf. (hér eftir nefndur stefndi).

2. Ágreiningsefnið fyrir Héraðsdómi Reykjavíkur varðar kröfu stefnanda um greiðslu ábyrgðargjalda í tengslum við ríkisábyrgðir vegna skuldbindinga Iðnlánasjóðs við Norræna fjárfestingarbankann sem síðar voru teknar yfir af stefnanda.

II. Löggjöf

3. Spurningar þær sem Héraðsdómur Reykjavíkur hefur óskað svara við varða túlkun á 4., 40., 42. og 61. gr. EES-samningsins.

4. 4. gr. EES-samningsins er svohljóðandi:

"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 40 EEA reads as follows:

"Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article."

6. Article 40 refers to Annex XII of the EEA Agreement. Section 1 of Annex XII contains Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty[1]. Article 1(1) of Council Directive 88/361/EEC reads as follows:

"Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I."

7. Article 42 EEA reads as follows:

"1. Where domestic rules governing the capital market and the credit system are applied to the movements of capital liberalized in accordance with the provisions of this Agreement, this shall be done in a non-discriminatory manner.

2. Loans for the direct or indirect financing of an EC Member State or an EFTA State or its regional or local authorities shall not be issued or placed in other EC Member States or EFTA States unless the States concerned have reached agreement thereon."

8. Article 61(1) EEA reads as follows:

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

9. In the written observations, additional questions are raised concerning Article 36(1) EEA. Article 36(1) EEA reads as follows:

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1 OJ No L 178, 8.7.1988, p. 5.

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

5. 40. gr. EES-samningsins er svohljóðandi:

"Innan ramma ákvæða samnings þessa skulu engin höft vera milli samningsaðila á flutningum fjármagns í eigu þeirra sem búsettir eru í aðildarríkjum EB eða EFTA-ríkjum né nokkur mismunun, byggð á ríkisfangi eða búsetu aðila eða því hvar féð er notað til fjárfestingar. Í XII. viðauka eru nauðsynleg ákvæði varðandi framkvæmd þessarar greinar."

6. Í 40. gr. er vísað til XII. viðauka við EES-samninginn. Í 1. hluta XII. viðauka er vísað til tilskipunar ráðsins nr. 88/361/EBE frá 24. júní 1988 um framkvæmd 67. greinar sáttmálans.[1] Ákvæði 1. gr. tilskipunar ráðsins er svohljóðandi:

"Aðildarríki skulu, í samræmi við eftirfarandi ákvæði, aflétta hömlum á fjármagnsflutningum milli þeirra sem búsettir eru í aðildarríkjunum. Til að auðvelda beitingu þessarar tilskipunar skulu fjármagnsflutningar flokkaðir í samræmi við skrá í I. viðauka."

7. 42. gr. EES-samningsins er svohljóðandi:

"1. Ef beitt er innlendum reglum um fjármagnsmarkað og lánsviðskipti í fjármagnsflutningum sem höftum hefur verið létt af samkvæmt ákvæðum samnings þessa skal það gert án mismununar.

2. Lán til beinnar eða óbeinnar fjármögnunar aðildarríkis EB eða EFTA-ríkis eða sveitarstjórna þess skulu ekki boðin út eða tekin í öðrum aðildarríkjum EB eða EFTA-ríkjum nema viðkomandi ríki hafi gert með sér samkomulag um það."

8. 1. mgr. 61. gr. EES samningsins er svohljóðandi:

"1. Ef ekki er kveðið á um annað í samningi þessum er hvers kyns aðstoð, sem aðildarríki EB eða EFTA-ríki veitir eða veitt er af ríkisfjármunum og raskar eða er til þess fallin að raska samkeppni með því að ívilna ákveðnum fyrirtækjum eða framleiðslu ákveðinna vara, ósamrýmanleg framkvæmd samnings þessa að því leyti sem hún hefur áhrif á viðskipti milli samningsaðila."

9. Í skriflegum athugasemdum er að auki vísað til 1. mgr. 36. gr. EES samningsins, sem er svohljóðandi:

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[1] Stjtíð EB nr L 178, 8.7.1988, bls. 5.

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

10. The contested Icelandic legislation in the case before the Reykjavik City Court is the guarantee fee provisions of the former Act on State Guarantees No. 37/1961, as amended by Act No. 65/1988, and the new Act on State Guarantees No. 121/1997, which entered into force 1 January 1998.

11. Article 8 of the former Act on State Guarantees No. 37/1961, as amended by Act No. 65/1988, reads as follows:

> *"Banks, credit funds, financial institutions, enterprises and others who, by law, are entitled to a state guarantee, regardless of whether entitlement is based on state ownership or on other grounds, shall pay a guarantee fee to the State Treasury on loans from foreign entities, including guarantees, see also Article 9.*
>
> *This fee shall be paid every three months and shall comprise 0.0625% of the average outstanding principal of assessable credits, for the relevant period, see also Article 10."*

12. Article 6 of the new Act on State Guarantees No. 121/1997 reads as follows:

> *"Banks, credit funds, financial institutions, enterprises and others who, by law, are or have been entitled to a state guarantee, regardless of whether entitlement is based on state ownership or on other grounds, shall pay a guarantee fee to the State Treasury on loans secured by state guarantees. General trade obligations and pension obligations shall be exempted from this fee.*
>
> *The fee, referred to in paragraph 1 shall be paid to the State Treasury every three months and shall be calculated as 0.0625% of the average outstanding principal of assessable foreign obligations and 0.0375% on domestic obligations, for the relevant period."* [2]

III. Facts and procedure

13. The Industrial Loan Fund had obtained loans from the Nordic Investment Bank, a joint financial institution established pursuant to an agreement between the Nordic countries.[3] Article 17 of Act No. 76/1987 provided that the State

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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 Reykjavik City Court.

[3] Agreement between Denmark, Finland, Iceland, Norway and Sweden concerning the Nordic Investment Bank, signed in Copenhagen 4 December 1975.

> *"Innan ramma ákvæða samnings þessa skulu engin höft vera á frelsi ríkisborgara aðildarríkja EB og EFTA-ríkja til að veita þjónustu á yfirráðasvæði samningsaðila enda þótt þeir hafi staðfestu í öðru aðildarríki EB eða EFTA-ríki en sá sem þjónustan er ætluð."*

10. Íslensku lögin sem reynir á í málinu fyrir Héraðsdómi Reykjavíkur eru ákvæðin um ríkisábyrgðargjald í eldri lögum um ríkisábyrgðir nr. 37/1961, eins og þeim var breytt með lögum nr. 65/1988, og nýju lögunum um ríkisábyrgðir nr. 121/1997, sem tóku gildi 1. janúar 1998.

11. Ákvæði 8. gr. eldri laga um ríkisábyrgðir nr. 37/1961, sbr. lög nr. 65/1988, eru svohljóðandi:

> *"Bankar, lánasjóðir, lánastofnanir, fyrirtæki og aðrir þeir aðilar, sem lögum samkvæmt njóta ábyrgðar ríkissjóðs, hvort sem hún byggist á eignaraðild ríkissjóðs eða öðru, skulu greiða ábyrgðargjald í ríkissjóð af skuldbindingum sínum gagnvart erlendum aðilum, þar með talið af ábyrgðum, sbr. þó 9. gr.*
>
> *Ábyrgðargjald skv. 1. mgr. skal greiða ársfjórðungslega og nemur það 0.0625% af höfuðstól gjaldskyldra skuldbindinga eins og hann er að meðaltali á hverju gjaldtímabili, sbr. 10.gr."*

12. Ákvæði 6. gr. nýju laganna um ríkisábyrgðir nr. 121/1998 eru svohljóðandi:

> *"Bankar, lánasjóðir, lánastofnanir, fyrirtæki og aðrir þeir aðilar sem lögum samkvæmt njóta, eða hafa notið, ábyrgðar ríkissjóðs, hvort sem hún er tilkomin vegna eignaraðildar ríkissjóðs eða annars, skulu greiða ábyrgðargjald af þeim skuldbindingum sínum sem ríkisábyrgð er á. Almennar viðskiptaskuldir og eftirlauna- og lífeyrisskuldbindingar skulu þó undanþegnar gjaldinu.*
>
> *Ábyrgðargjald skv. 1. mgr. nemur 0.0625% á ársfjórðungi af höfuðstól gjaldskyldra erlendra skuldbindinga og 0.0375% á ársfjórðungi af höfuðstól gjaldskyldra innlendra skuldbindinga eins og hann er að meðaltali á hverju gjaldtímabili, sbr. 8. gr. Gjaldið rennur í ríkissjóð."*[2]

III. Málavextir og meðferð málsins

13. Iðnlánasjóður hafði aflað lána frá Norræna fjárfestingarbankanum, fjármálastofnun sem sett var á fót með samningi milli Norðurlanda.[3] Í 17. gr. laga nr. 76/1987 sagði að ríkissjóður skyldi ábyrgjast allar lánsskuldbindingar

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[2] Þýðingu þessa ákvæðis í ensku útgáfu skýrslunnar hefur verið breytt frá því sem er að finna í ensku þýðingu beiðninnar um ráðgefandi álit.

[3] Samningur milli Danmerkur, Finnlands, Íslands, Noregs og Svíþjóðar um stofnun Norræna fjárfestingarbankans, undirritaður í Kaupmannahöfn 4. desember 1975.

Treasury was to guarantee all loans granted to the Industrial Loan Fund and accordingly, the State Treasury had issued state guarantees on the loans granted by the Nordic Investment Bank.

14. The Defendant, the Icelandic Investment Bank Ltd., was established pursuant to Act No. 60/1997 and has operated since 1 January 1998. In accordance with Article 9 of said Act, the Defendant assumed all then existing obligations of the Industrial Loan Fund, including the loans from the Nordic Investment Bank. Article 9 provides furthermore that the State Treasury shall continue to guarantee all the obligations of the Industrial Loan Fund, which existed at the time of the establishment of the Defendant, until such time as the underlying obligations are fulfilled.

15. The Plaintiff, the State Debt Management Agency, is responsible for the State Guarantee Fund, which is the body set up to administer the state guarantees. The State Guarantee Fund is, among other things, responsible for the calculation, levying and collection of the state guarantee fees.

16. By a letter dated 17 April 1998, the Defendant informed the Plaintiff that the Industrial Loan Fund had not paid guarantee fees to the State Guarantee Fund on its obligations to the Nordic Investment Bank since the middle of the year 1995. In the letter the Defendant expressed the view that the Nordic Investment Bank is not a foreign entity within the meaning of Article 6 of Act No. 121/1997 and that the guarantee fees payable should be those applicable to domestic loans.

17. On 23 January 1998 the Plaintiff requested the Ministry of Finance to decide upon whether obligations to the Nordic Investment Bank were obligations to a foreign entity for the purpose of calculating the guarantee fees. In its letter dated 9 March 1998, the Ministry of Finance confirmed that the Nordic Investment Bank should be considered a foreign entity and that the state guarantee should be subject to the guarantee fees payable on loans from foreign entities.

18. The Defendant has not accepted the decision by the Ministry of Finance, and since 1 January 1998 the Defendant has paid the guarantee fees on the obligations to the Nordic Investment Bank as if the obligations were in favour of a domestic entity.

19. The Plaintiff does not accept the Defendant's interpretation and has accordingly initiated proceedings before the Reykjavik City Court. The Plaintiff claims the payment of the guarantee fees on the assumption that the Nordic Investment Bank is a foreign entity.

20. In the proceedings before the Reykjavik City Court, the Defendant raised several issues concerning the compatibility with the provisions of the EEA Agreement, in particular Articles 4, 40, 42 and 61 EEA, of the system imposing

Iðnlánasjóðs. Í samræmi við það hefur ríkissjóður tekið á sig ábyrgð á lánum sem veitt hafa verið af Norræna fjárfestingarbankanum.

14. Stefndi, Fjárfestingarbanki atvinnulífsins hf., var stofnaður með lögum nr. 60/1997 og hefur verið starfræktur frá 1. janúar 1998. Í samræmi við 9. gr. nefndra laga, tók stefnandi yfir allar þáverandi skuldbindingar Iðnlánasjóðs, þ.m.t. öll lán sem Norræni fjárfestingarbankinn hafði veitt. Í 9. gr. er jafnframt sagt að ríkissjóður skuli áfram ábyrgjast allar þær skuldbindingar Iðnlánasjóðs, sem ríkisábyrgð var á við stofnun stefnanda, þar til þær eru að fullu greiddar.

15. Sefnandi; Lánasýsla ríkisins, er ábyrg fyrir ríkisábyrgðarsjóði, en sjóðurinn fer með málefni sem varða ríkisábyrgðir. Ríkisábyrgðarsjóður er m.a. ábyrgur fyrir útreikningi, álagningu og innheimtu ríkisábyrgðargjaldsins.

16. Með bréfi, dagsettu 17. apríl 1998, upplýsti stefndi stefnanda um að Iðnlánasjóður hefði ekki greitt ríkisábyrgðargjaldið til ríkisábyrgðarsjóðs vegna skuldbindinga sinna við Norræna fjárfestingarbankann síðan um mitt ár 1995. Í bréfinu lýsti stefndi þeirri skoðun sinni að Norræni fjárfestingarbankinn væri ekki erlendur aðili í skilningi 6. gr. laga nr. 121/1997 og að greiða bæri ríkisábyrgðargjald eins og um skuldbindingar gagnvart innlendum aðila væri að ræða.

17. Hinn 23. janúar 1998 óskaði stefnandi eftir því að fjármálaráðuneytið úrskurðaði um það hvort líta bæri á skuldbindingar gagnvart Norræna fjárfestingarbankanum sem skuldbindingar gagnvart erlendum aðila við útreikning ríkisábyrgðargjaldsins. Í bréfi sínu, dagsettu 9. mars 1998, staðfesti fjármálaráðuneytið að líta bæri á Norræna fjárfestingarbankann sem erlendan aðila og að ríkisábyrgðargjaldið skyldi lagt á eins og um ríkisábyrgð á lánum frá erlendum aðila væri að ræða.

18. Stefndi fellst ekki á þessa niðurstöðu fjármálaráðuneytisins og hefur frá 1. janúar 1998 greitt ábyrgðargjaldið vegna skuldbindinga sinna við Norræna fjárfestingarbankann eins og um skuldbindingar gagnvart innlendum aðila væri að ræða.

19. Stefnandi fellst ekki á túlkun stefnda og hefur í samræmi við það höfðað mál fyrir Héraðsdómi Reykjavíkur. Stefndandi krefst greiðslu ríkisábyrgðargjalds á þeim grundvelli að Norræni fjárfestingarbankinn sé erlendur aðili.

20. Við meðferð málsins fyrir Héraðsdómi Reykjavíkur hefur stefndi haft uppi nokkrar málsástæður sem varða það hvort reglur um mismunandi hátt ríkisábyrgðargjald, eftir því hvort um erlendan eða innlendan lánveitanda er að

different guarantee fees depending on whether the lender is a foreign or a domestic entity. On 14 December 1999, the Reykjavik City Court decided to submit a Request for an Advisory Opinion to the EFTA Court.

IV. Question

21. The following question was referred to the EFTA Court:

> **"Is it compatible with the EEA Agreement, in particular Articles 4, 40, 42 and 61, when the national law of a Contracting Party provides:**
>
> **a. that a borrower, who is entitled to a state guarantee, shall pay a guarantee fee on loans from entities in other Contracting Parties to the EEA but not on domestic loans?**
>
> **b. that a borrower, who is entitled to a state guarantee, shall be subject to the payment of a higher guarantee fee on loans from entities in other Contracting Parties to the EEA compared to loans from domestic entities?"**[4]

V. Written Observations

22. 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 State Debt Management Agency, represented by Sveinn Sveinsson, Supreme Court Attorney;

– the Defendant, the Icelandic Investment Bank Ltd., represented by Baldur Guðlaugsson, Supreme Court Attorney;

– the Government of Iceland, represented by Högni S. Kristjánsson, 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 Peter Dyrberg, Director, Legal & Executive Affairs, acting as Agent;

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[4] The translation has been adjusted from the text that appears in the translation of the Request for an Advisory Opinion from the Reykjavik City Court.

ræða, fái samræmst EES-samningnum, einkum 4., 40., 42. og 61. gr. Hinn 14. desember 1999 ákvað Héraðsdómur Reykjavíkur að senda EFTA-dómstólnum beiðni um ráðgefandi álit.

IV. Álitaefni

21. Eftirfarandi spurning var borin undir EFTA-dómstólinn:

> **"Er það samrýmanlegt samningnum um Evrópska efnahagssvæðið, einkum 4., 40., 42. og 61. gr. hans, að í landslögum ríkis sem aðild á að samningnum sé kveðið á um:**
>
> **a. Að lántakandi sem nýtur ábyrgðar ríkissjóðs skuli greiða ábyrgðargjald af lánum sem hann tekur hjá aðilum í öðrum aðildarríkum samningsins en ekki af lánum sem hann tekur hjá innlendum aðilum?**
>
> **b. Að lántakandi sem nýtur ábyrgðar ríkissjóðs skuli greiða hærra ábyrgðargjald af lánum sem hann tekur hjá aðilum í öðrum aðildarríkjum samningsins en af lánum sem hann tekur hjá innlendum aðilum?"**[4]

V. Greinargerðir

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

- Stefnanda, Lánsýslu ríkisins. Í fyrirsvari er Sveinn Sveinsson, hrl.

- Stefnda, Fjárfestingarbanka atvinnulífsins hf. Í fyrirsvari er Baldur Guðlaugsson, hrl.

- Ríkisstjórn Íslands. Í fyrirsvari sem umboðsmaður er Högni S. Kristjánsson, lögfræðingur í utanríkisráðuneytinu.

- Ríkisstjórn Noregs. Í fyrirsvari sem umboðsmaður er Helge Seland, deildarstjóri í Konunglega utanríkisráðuneytinu.

- Eftirlitsstofnun EFTA. Í fyrirsvari sem umboðsmaður er Peter Dyrberg, deildarstjóri lögfræði- og framkvæmdasviðs.

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[4] Þýðingu spurninga í ensku útgáfu skýrslunnar hefur verið breytt frá því sem er að finna í ensku þýðingu beiðninnar um ráðgefandi álit.

– the Commission of the European Communities, represented by Christina Tufvesson and John Forman, Legal Advisors, Legal Service, acting as Agents.

The State Debt Management Agency

23. The Plaintiff begins by observing that the issuance of a guarantee by the State Treasury may be authorized in different ways. The State Treasury may issue a guarantee on behalf of certain entities based on specific legislation relating particularly thereto. Furthermore, the State Treasury may issue a guarantee on behalf of state institutions merely on the basis of its ownership thereof.

24. The Plaintiff goes on to state that the disputed guarantee fee relates only to guarantees of the State Treasury in respect of obligations of state institutions and companies owned by the State. Thus, the guarantee fee is only paid to the State Treasury on loans provided to state entities. According to Article 6 of Act No. 121/1997 on State Guarantees, the guarantee fee is never paid to the State Guarantee Fund by anyone other than state entities.

25. The Plaintiff also asserts that the change in the guarantee fee provisions made during the parliamentary process to the bill that later became Act No. 121/1997, was made in response to a suggestion from the Defendant.

26. The Plaintiff submits that Articles 4, 40, 42 and 61 EEA are not applicable to the present dispute.

27. The Plaintiff points out that Article 4 EEA only applies where entities of different nationalities are treated differently. According to the Plaintiff, this is not the case in the present dispute, since only state entities are entitled to state guarantees and subject to the payment of the guarantee fees referred to in Article 8 of Act No. 37/1961 and Article 6 of Act No. 121/1997.

28. The Plaintiff states that Article 40 EEA concerns discrimination or restrictions on the free movement of capital, which are based on residence or nationality. The Plaintiff asserts that this does not cover the levying of different state guarantee fees depending on whether the lender is domestic or foreign. Only Icelandic State institutions can be subject to the payment of a state guarantee fee. Foreign residents will never be subject to the payment of different guarantee fees.

29. According to the Plaintiff, Article 42 EEA is not applicable to this dispute. To substantiate this, the Plaintiff first proclaims that Article 42 EEA provides that the principle of non-discrimination shall apply when the capital market and the credit system are liberalized in accordance with the EEA Agreement. Furthermore, the Plaintiff states that all citizens of EEA States shall enjoy this

- Framkvæmdastjórn Evrópubandalaganna. Í fyrirsvari sem umboðsmenn eru Christina Tufvesson og John Forman, lögfræðilegir ráðgjafar hjá lagadeild.

Lánasýsla ríkisins

23. Stefnandi bendir fyrst á að ríkisábyrgð á fjárskuldbindingum sé veitt með ýmsum hætti. Þannig geti ríkissjóður tekist á hendur ríkisábyrgð á lánum tiltekinna aðila á grundvelli sérstakrar lagaheimdilar hverju sinni. Ennfremur geti ríkissjóður tekist á hendur ábyrgð á skuldbindingum ríkisstofnana og fyrirtækja á grundvelli eignarhalds ríksins.

24. Stefnandi heldur því einnig fram að ábyrgðargjald það sem ágreiningur er um eigi einungis við um ábyrgðir sem ríkissjóður ber vegna skuldbindinga stofnana sinna og fyrirtækja í eigu þess. Þannig séu það eingöngu ríkisaðilar sem greiða ábyrgðargjaldið til ríkissjóðs vegna lána sem þeir hafa aflað. Ábyrgðargjaldið samkvæmt 6. gr. laga nr. 121/1997 um ríkisábyrgðir greiðist aldrei af öðrum aðilum til ríkisábyrgðarsjóðs.

25. Stefnandi heldur því jafnframt fram að breyting sú sem gerð var á ákvæðunum um ríkisábyrgðargjaldið við þinglega meðferð frumvarps þess sem síðar varð að lögum nr. 121/1997, hafi verið gerð í samræmi við tillögur frá stefnda.

26. Stefnandi heldur því fram að ákvæði 4., 40., 42. og 61. gr. EES-samningsins eigi ekki við í málinu.

27. Stefnandi bendir á að í 4. gr. EES-samningsins eigi aðeins við þegar aðilum sé mismunað vegna mismunandi ríkisfangs. Hann telur að sú sé ekki raunin í þessu máli, þar sem aðeins ríkisaðilar eigi rétt á ríkisábyrgð og séu þar af leiðandi skyldugir til greiðslu ríkisábyrgðargjalds þess sem vísað sé til í 8. gr. laga nr. 37/1961 og 6. gr. laga nr. 121/1997.

28. Stefnandi heldur því fram að 40. gr. EES samningsins taki til mismununar og hafta á frelsi til fjármagnsflutninga sem byggð sé á búsetu eða ríkisfangi. Stefnandi telur að þetta eigi ekki við um álagningu mismunandi ríkisábyrgðargjalds eftir því hvort lánveitandi er innlendur eða erlendur. Aðeins íslenskar ríkisstofnanir geti þurft að greiða ríkisábyrgðargjaldið. Aðilar búsettir erlendis verði aldrei í þeirri aðstöðu að þurfa að greiða mismunandi hátt ríkisábyrgðargjald.

29. Stefnandi telur því að 42. gr. EES-samningsins eigi ekki við í málinu. Til að rökstyðja þetta heldur hann því fyrst fram að 42. gr. mæli svo fyrir að bann við mismunun eigi við þegar höftum sé aflétt á fjármagns- og lánsmarkaði vegna EES-samningsins. Þá heldur stefnandi því jafnframt fram að allir ríkisborgarar

liberalization. On this basis, the Plaintiff argues that Article 42 does not apply to the disputed state guarantee fee, which has been provided for by Icelandic legislation since 1987.

30. In relation to Article 61 EEA, the Plaintiff states that it does not see how this provision can apply to a state guarantee fee. According to the Plaintiff, the differing guarantee fees at issue cannot be considered the granting of state aid within the meaning of that provision.

31. The Plaintiff submits that, if the argument of incompatibility with Article 61 EEA relates to the fact that the guarantee fees on domestic loans are lower than the guarantee fees on loans from the Nordic Investment Bank, the state guarantee fee cannot be considered in isolation. An overall assessment of the relevant operating conditions must be made as to whether there has been discrimination against the relevant entities. According to the Plaintiff, the Nordic Investment Bank is favoured in many ways. The Plaintiff observes that the agreement establishing the Nordic Investment Bank provides that it shall be exempted from all direct taxation and certain other duties and charges. Icelandic banks are, however, subject to such taxes, duties and charges. The Plaintiff states that the advantages afforded the Nordic Investment Bank outweigh the minimal and immeasurable discrimination that may follow from the differing guarantee fees.

32. However, if the argument of incompatibility with Article 61 EEA is based on the view that foreign credit institutions in general, are treated in a less favourable manner than domestic credit institutions in so far as concerns the conditions for lending to Icelandic State entities, the Plaintiff contends that nothing indicates that this is the case and no proof has been submitted in support thereof. The Plaintiff asserts that, on the contrary, both Icelandic State institutions and companies have found it very easy to obtain favourable loans abroad, notwithstanding the system of differing state guarantee fees, and until recently, state institutions and companies have fulfilled all their loan requirements by borrowing from foreign lenders. Therefore, the Plaintiff submits that the differing guarantee fees do not have substantial significance when assessing the overall credit terms. According to the Plaintiff, an overall assessment must be made as to whether the business opportunities of foreign lenders are less favourable than those of domestic lenders. The Plaintiff asserts that the relevant provisions do not, in any way, discriminate against foreign lenders.

33. In the event that the Court concludes that the disputed guarantee fees are discriminatory, the Plaintiff declares that the Defendant has no direct interest in having this discrimination abolished, since it has in no manner suffered therefrom.

aðilarríkja EES-samninsgins skuli njóta afléttingar. Á þessum grundvelli heldur stefnandi því fram að 42. gr. eigi ekki við um hið umdeilda ríkisábyrgðargjald, sem kveðið hafi verið á um í íslenskum lögum allt frá 1987.

30. Að því er varðar 61. gr. EES-samningsins segir stefnandi að hann fái ekki séð hvernig það ákvæði geti átt við um ríkisábyrgðargjald. Stefnandi telur að ekki sé unnt að líta á hið mismunandi háa ríkisábyrgðargjald sem ríkisaðstoð í skilningi þess ákvæðis.

31. Ef átt sé við að ákvæðin um ríkisábyrgðargjaldið séu andstæð 61. gr. EES-samningins vegna þess að ríkisábyrgðargjaldið sé lægra á innlendum lánum samanborið við lán frá Norræna fjárfestingarbankanum, bendir stefnandi á að að ekki megi skoða ábyrgðargjaldið eitt og sér. Meta verði heildstætt öll rekstrarskilyrði við mat á því hvort um sé að ræða mismunun gagnvart viðkomandi aðilum. Samkvæmt því sem stefndandi heldur fram nýtur Norræni fjárfestingarbankinn margs konar hagræðis. Hann bendir á að samningurinn um stofnun Norræna fjárfestingarbankans geri ráð fyrir að bankinn skuli undanþeginn allri beinni skattlagningu og ýmsum öðrum gjöldum. Íslenskir bankar verði aftur á móti að greiða slíka skatta og gjöld. Stefnandi heldur því fram að hagræðið sem bankinn nýtur vegi fyllilega upp á móti hinni óverulegu og ómælanlegu mismunun sem kunni að leiða af mismunandi háu ábyrgðargjaldi.

32. Ef röksemdin um ósamræmi við 61. gr. er á hinn bóginn byggð á því að erlendar lánastofnanir almennt hafi lakari stöðu en innlendar að því er varðar lánveitingar til íslenskra ríkisaðila, segir stefnandi að ekkert bendi til að svo sé og engin sönnunargögn hafi verið lögð fram því til stuðnings. Stefnandi bendir á, að þvert á móti hafi það reynst íslenskum ríkisstofnunum og fyrirtækjum mjög auðvelt að afla hagstæðra lána erlendis frá, þrátt fyrir reglur um mismunandi ríkisábyrgðargjald, og þar til nýlega hafi ríkisstofnanir og fyrirtæki fullnægt allri lánsfjárþörf sinni með lánum frá erlendum aðilum. Af þessari ástæðu telur stefnandi að mismunandi hátt ríkisábyrgðargjald hafi ekki verulegt vægi við mat á lánskjörum. Stefnandi heldur því fram að fara verði fram heildstætt mat á því hvort viðskiptatækifæri erlendra lánveitenda séu lakari en innlendra lánveitenda. Stefnandi telur að viðkomandi lagaákvæði feli ekki í sér mismunun gagnvart erlendum lánveitendum.

33. Ef EFTA-dómstóllinn kemst að þeirri niðurstöðu að hið umdeilda ábyrgðargjald feli í sér mismunun, heldur stefnandi því fram að stefndi hafi engra beinna hagsmuna að gæta af því að þessi mismunun verði afnumin, þar sem hann hefur á engan hátt liðið fyrir hana.

34. On the basis of the above mentioned arguments, The Plaintiff is of the opinion that the Icelandic system of differing state guarantee fees is compatible with the EEA Agreement, in particular Articles 4, 40, 42 and 61.

The Icelandic Investment Bank Ltd.

35. The Defendant begins by observing the objectives and fundamental principles of the EEA Agreement, as laid down in Article 1 EEA. According to the Defendant, the Icelandic rules laying down different guarantee fees depending on whether a loan is provided by a foreign or a domestic entity, are clearly contrary to the aim of homogeneity inherent in the EEA Agreement. A lending institution of another EEA State wishing to provide loans to Icelandic entities enjoying state guarantees, is in a less favourable competitive position than Icelandic lending institutions.

36. The Defendant submits that the Icelandic legislation at issue is contrary to the general prohibition against discrimination on grounds of nationality, laid down in Article 4 EEA. According to the legislative history of Act No. 121/1997, the state guarantee fee is paid to the State Treasury to offset the general risk of the State Treasury deriving from the guarantees. This is not reflected in the provisions concerning the guarantee fees, which are based entirely on whether the lender is a domestic entity or a foreign entity. Neither the Act nor the legislative history explains or justifies this difference.

37. The Defendant argues that, prior to the adoption of the contested legislation, the Icelandic authorities had already realized that it was incompatible with the EEA Agreement to provide for different state guarantee fees depending on whether domestic or foreign lenders were involved. To support this argument, the Defendant refers to the official comments on Article 6 in the explanatory report of the bill that later became Act No. 121/1997, wherein it is stated:

> *"This provision proposes a change to the effect that the special 0.0625% quarterly guarantee fee levied on state entities shall also be applicable to their domestic obligations, other than deposits. The credit market has undergone comprehensive changes since this provision was originally implemented through Act No. 65/1988 amending Act No. 37/1961 on State Guarantees, as amended. Funds are now borrowed either from domestic or foreign entities depending on who has the best obtainable terms each time. The discrimination provided for in the present rules between domestic and foreign creditors is questionable in light of the obligations Iceland has undertaken by the EEA Agreement."*

38. The Defendant adds that the discrimination inherent in the Icelandic legislation, laying down the amount of guarantee fee payable on state guarantees, is not based on any provision of the EEA Agreement allowing for a derogation from the basic rule of Article 4 EEA. The Defendant therefore concludes that the

34. Í samræmi við þær röksemdir sem fram hafa komið telur stefnandi að íslensku reglurnar um mismunandi hátt ríkisábyrgðargjald sé samrýmanlegar ákvæðum EES-samningsins, einkum, 4., 40., 42. og 61. gr.

Fjárfestingarbanki atvinnulífsins hf.

35. Stefndi byrjar á því að vekja athygli á markmiðum og grundvallarreglum EES-samningsins, eins og þær eru settar fram í 1. gr. hans. Stefndi heldur því fram að hinar íslensku reglur sem gera ráð fyrir mismunandi háu ábyrgðargjaldi, eftir því hvort lánveitandi er erlendur eða innlendur aðili, séu augljóslega andstæðar einsleitnismarkmiðinu sem felist í EES-samningnum. Lánastofnun í öðru aðildarríki EES-samningsins, sem hyggst veita lán til íslenskra aðila sem njóta ríkisábyrgðar, hefur lakari samkeppnisstöðu í samanburði við íslenskar lánastofnanir.

36. Stefndi heldur því fram að hin íslenska löggjöf sem fjallað sé um í málinu sé andstæð hinu almenna banni við mismunun á grundvelli ríkisfangs sem kveðið sé á um í 4. gr. EES-samningsins. Í athugasemdum í greinargerð með frumvarpi til laga nr. 121/1997 kemur fram að ábyrgðargjaldið sé greitt til ríkissjóðs til að mæta þeirri almennu áhættu sem leiðir af ábyrgðum ríkissjóðs. Þetta endurspeglast þó ekki í reglunum sjálfum þar sem fjárhæð ábyrgðargjaldsins ræðst eingöngu af því hvort lánveitandi er innlendur eða erlendur aðili. Hvorki lögin sjálf né lögskýringargögn skýra eða réttlæta þennan mun

37. Stefndi færir að því rök að, áður en umrædd löggjöf var sett, hafi íslensk yfirvöld þegar gert sér grein fyrir að það var ekki í samræmi við EES-samninginn að gera ráð fyrir mismunandi háu ábyrgðargjaldi eftir því hvort um var að ræða innlenda eða erlenda lánveitendur. Þessu til stuðnings vísar stefndi til athugasemda við 6. gr. í greinargerð með frumvarpi því sem síðar varð að lögum nr. 121/1997, þar sem segir:

> *"Hér er lögð til sú breyting, að hið sérstaka 0.0625% ársfjórðungslega ábyrgðargjald sem ríkisaðilum er gert að greiða, nái nú einnig til innlendra skuldbindinga þeirra annarra en innlána. Miklar breytingar hafa orðið á lánamarkaðnum síðan þetta ákvæði var upphaflega sett með lögum nr. 65/1988 um breyting á lögum nr. 37/1961, um ríkisábyrgðir, með síðari breytingum. Lán eru fengin innan lands eða utan, eftir því hvaða kjör bjóðast hverju sinni. Sú mismunun sem felst í núgildandi reglum á milli innlendra og erlendra lánveitenda er hæpin með tilliti til þeirra skuldbindinga sem íslenska ríkið hefur undirgengist með samningnum um EES."*

38. Stefndi telur ennfremur að sú mismunun sem felist í íslensku lagareglunum, sem mæli fyrir um fjárhæð ábyrgðargjaldsins sem greiða ber vegna ríkisábyrgða, sé ekki ekki byggð á neinu ákvæði í EES-samningnum sem heimili frávik frá meginreglunni í 4. gr. hans. Stefndi kemst að þeirri niðurstöðu að íslensku reglurnar sem fjallað sé um leiði til mismununar á grundvelli

Icelandic rules in question give rise to discrimination on grounds of nationality, contrary to Article 4 EEA.

39. The Defendant goes on to observe that the principle of freedom to provide services embodied in Article 36 EEA also applies in respect of service providers established in an EEA State other than that of the person for whom the services are intended. The Defendant submits that the Icelandic legislation in question must be viewed as a restriction on the freedom to provide services in the financial sector. It is incompatible with Article 36 EEA to subject those who enjoy state guarantees to the payment of different guarantee fees, depending on whether the lenders are established in Iceland or in other EEA States.

40. Furthermore, the Defendant considers that the contested Icelandic legislation on state guarantees is incompatible with the principle of free movement of capital laid down in Article 40 EEA. According to the Defendant, the system of differentiated guarantee fees on state guarantees constitutes a restriction on the free movement of capital and discrimination based on nationality and place of residence.

41. In the Defendant's view, the contested rules are also incompatible with Article 42(1) EEA, inasmuch as they constitute discrimination on grounds of nationality.

42. As regards Article 61 EEA, the Defendant contends that the lower fee payable on state guarantees issued on domestic loans must be considered as aid through state resources, which distorts or threatens to distort competition by favouring domestic lenders and affects trade between EEA States. This aid is therefore incompatible with the functioning of the EEA Agreement.

43. Finally, the Defendant suggests that by not harmonizing the guarantee fees on loans from domestic lenders and lenders from other EEA States, the Icelandic State is in breach of its obligations under Article 3 EEA.

44. On the basis of the above mentioned arguments, The Defendant is of the opinion that the Icelandic system of differing state guarantee fees is incompatible with the EEA Agreement, in particular Articles 3, 4, 36, 40, 42 and 61.

The Government of Iceland

45. The Government of Iceland supports the submissions of the Plaintiff.

ríkisfangi sem andstæð sé 4. gr. EES-samningsins.

39. Stefndi bendir einnig á að meginreglan um frjálsa þjónustustarfsemi sem fram komi í 36. gr. eigi einnig við um þjónustuaðila sem hafa staðfestu í öðru EES-ríki en sá aðili sem þjónustan er ætluð. Stefndi heldur því fram að líta verði á íslensku löggjöfina sem um sé deilt sem höft á frelsi til að veita þjónustu á sviði lánveitinga. Það sé ósamrýmanlegt 36. gr. EES-samningsins að skylda þá sem njóta ríkisábyrgðar til greiðslu á mismunandi háu ríkisábyrgðargjaldi eftir því hvort lánveitendur hafa staðfestu á Íslandi eða í öðru EES ríki.

40. Stefndi lítur ennfremur svo á hin umrædda íslenska löggjöf um ríkisábyrgðir sé ósamrýmanleg meginreglunni um frjálsa fjármagnsflutninga sem kveðið sé á um í 40. gr. EES-samningsins. Stefndi telur að í fyrirkomulaginu um mismunandi hátt ríkisábyrgðargjald felist höft á frjálsa fjármagnsflutninga og mismunun sem byggð sé á ríkisfangi og búsetu.

41. Þá er það skoðun stefnda að hinar umræddu reglur sé einnig ósamrýmanlegar 1. mgr. 42. gr. EES-samningsins, að því leyti sem þær fela í sér mismunun á grundvelli ríkisfangs.

42. Að því er varðar 61. gr. EES-samningsins heldur stefndi því fram að það fyrirkomulag að hafa lægra gjald vegna ábyrgða á lánum sem veitt séu af innlendum aðilum feli í sér aðstoð sem veitt sé af ríkisfjármunum sem raskar, eða er til þess fallin að raska, samkeppni með því að ívilna innlendum lánveitendum og sem hefur áhrif á viðskipti milli aðildarríkjanna. Þessi aðstoð sé þar af leiðandi andstæð framkvæmd EES-samningsins.

43. Að lokum bendir stefndi á, að með því að með því að samræma ekki ábyrgðargjaldið á lánum frá innlendum láveitendum annars vegar og lánveitendum í öðrum aðildarríkjum EES-samningsins hins vegar, brjóti íslenska ríkið gegn skuldbindingum sínum samkvæmt 3. gr. EES-samningsins.

44. Á grundvelli framangreindra röksemda, er stefndi á þeirri skoðun að hinar íslensku reglur um mismunandi hátt ábyrgðargjald sé ósamrýmanlegar EES-samningnum, einkum 3., 4., 36., 40., 42. og 61. gr.

Ríkisstjórn Íslands

45. Ríkisstjórn Íslands styður röksemdir stefnanda.

The Government of Norway

46. Referring in particular to Sections V and VIII of Annex I to Council Directive 88/361/EEC, the Government of Norway begins by stating that the inflow of capital through a loan from a foreign financial institution must be considered as "movement of capital" for the purposes of Article 40 EEA.

47. In assessing whether the differentiated guarantee premiums at issue constitute a restriction on the movement of capital within the meaning of Article 40 EEA, the Government of Norway first states that a guarantee fee may constitute a restriction on the granting of loans from foreign entities. However, the Government of Norway emphasizes that there must be a connection between the restriction and the movement of capital. In considering whether there is such a connection in the present case, the Government of Norway submits that the main purpose of Article 40 is to address restrictions that relate to the acquisition of assets and to the transfer of the capital itself. The Government of Norway claims that this follows both from Council Directive 88/361/EEC and the judgment of the European Court of Justice in *Bordessa*.[5] Differing guarantee premiums do not fall into either of these categories, but function as an indirect restriction on the free movement of capital, by restricting the freedom to provide cross-border financial services. Referring to the judgments by the European Court of Justice in *Bachmann*[6] and *Safir*[7], the Government of Norway argues that Article 40 EEA does not apply to indirect restrictions which at the same time constitute a direct restriction on one of the other fundamental freedoms. Consequently, the Government of Norway concludes that Article 40 is not applicable in the present case.

48. As regards Article 42 EEA, the Government of Norway is of the opinion that the contested system of state guarantees can be seen as part of the Icelandic domestic rules governing the capital market and the credit system. However, the Government of Norway maintains that since Article 40 EEA is not applicable, the same is true for Article 42 EEA.

49. The Government of Norway considers that the Icelandic system of differentiated guarantee premiums must be assessed in the context of possible restrictions on the freedom to provide services within the meaning of Article 36 EEA.

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5 Joined Cases C-358/93 and C-416/93 *Criminal proceedings against Aldo Bordessa and Others* [1995] ECR I-361.

6 Case C-204/90 *Hanns-Martin Bachmann* v *Belgian State* [1992] ECR I-249.

7 Case C-118/96 *Jessica Safir* v *Skattemyndigheten i Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län* [1998] ECR I-1897.

Ríkisstjórn Noregs

46. Ríkisstjórn Noregs segir í upphafi að innflutningur fjármagns vegna láns frá erlendri fjármálastofnun verði að teljast "flutningur fjármagns" í skilningi 40. gr. EES-samningsins. Er þetta einkum byggt á 1. viðauka V og VIII í tilskipun ráðsins 88/361/EBE.

47. Í mati sínu á því hvort þau mismunandi háu ábyrgðargjöld, sem um er deilt, séu höft á fjármagnsflutningum í skilningi 40. gr. EES-samningsins, segir ríkisstjórn Noregs fyrst að ábyrgðargjald geti verið höft á lánveitingum frá erlendum aðilum. Engu að síður leggur ríkisstjórn Noregs áherslu á að tengsl þurfi að vera milli haftanna og fjármagnsflutningsins. Við athugun á því, hvort slík tengsl séu í málinu, heldur ríkisstjórn Noregs því fram, að aðaltilgangur 40. gr. sé að fjalla um höft á kaupum á eignum og sjálfa yfirfærsluna á fjármagni. Heldur ríkisstjórn Noregs því fram að þetta leiði bæði af tilskipun ráðsins 88/361/EBE og dómi Evrópudómstólsins í *Bordessa* málinu[5]. Mismunandi há ábyrgðargjöld séu í hvorugum málaflokknum. Slík gjöld hafi þó áhrif sem óbein höft á frjálsum fjármagnsflutningum með því að skerða frelsi til að veita fjármálaþjónustu landa í milli. Ríkisstjórn Noregs vísar í dóma Evrópudómstólsins í málum *Bachmann*[6] og *Safir*[7] og telur að 40. gr. EES-samningsins verði ekki beitt um óbein höft sem einnig eru bein höft á öðrum meginflokki fjórfrelsis. Af þessu dregur ríkisstjórn Noregs þá ályktun að 40. gr. verði ekki beitt í máli þessu.

48. Skoðun ríkisstjórnar Noregs á 42. gr. EES-samningsins er sú að það fyrirkomulag á ríkisábyrgðum sem deilt er um megi líta á sem hluta íslensks innanlandsréttar um fjármálamarkaðinn og lánakerfið. Engu að síður heldur ríkisstjórn Noregs því fram, að 40. gr. EES-samningsins verði ekki beitt og því gildi hið sama um 42. gr.

49. Ríkisstjórn Noregs telur að kerfið á Íslandi með mismunandi reglum um ábyrgðargjöld verði að meta á grundvelli hugsanlegra hafta á frelsi til að veita þjónustu í skilningi 36. gr. EES-samningsins.

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5 Sameinuð mál C-358/93 og C-416/93 *sakamál gegn Aldo Bordessa o.fl.* [1995] ECR I-361.

6 Mál C-204/90 *Hanns-Martin Bachmann gegn belgíska ríkinu* [1992] ECR I-249.

7 Mál C 118/96 *Jassica Safir gegn Skattemyndigheten i Dalarnas Län*, áður *Skattemyndigheten i Kopparbergs Län* [1998] ECR I-1897.

50. The Government of Norway takes the view that the provision of a loan constitutes a service within the meaning of Article 36. To support this view, it refers *inter alia* to Council Regulation 73/183/EEC.

51. The Government of Norway states that one must take a very broad view of what constitutes a measure that may hinder or restrict trade within the internal market. The Government of Norway suggests that the principles laid down by the European Court of Justice in relation to the free movement of goods, *inter alia* in *Dassonville*[8], apply equally to the freedom to provide services.

52. Referring to the judgments by the European Court of Justice in *Safir*[9] and *Commission* v *France*[10], the Government of Norway states that Article 59 of the EC Treaty (now, after amendment, Article 49 EC), which corresponds to Article 36 EEA, precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services exclusively within one Member State.

53. Referring to the judgement by the European Court of Justice in *Van Binsbergen*[11], the Government of Norway observes that distinguishing service providers based on their place of residence is prohibited unless there is an objective justification. On that basis, the Government of Norway concludes that provisions requiring a financial institution to be established in a Member State as a condition for the borrower to benefit from certain fee reductions in that State, operate to deter those seeking a loan from financial institutions established in another Member State, and thus constitute a restriction on the latter's freedom to provide services. The Icelandic system thus constitutes a restriction on the freedom to provide financial services within the meaning of Article 36.

54. The Government of Norway adds that no *de minimis* doctrine is available under Article 36. Even a very small restriction is still a restriction prohibited by the provisions on the freedom to provide services. The principles laid down by the European Court of Justice on the free movement of goods, *inter alia* in *Prantl*[12], should be equally valid in respect of the freedom to provide services.

55. The Government of Norway further adds that it does not exclude the possibility that there may be objective justifications for having a system of

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8 Case 8/74 *Procureur du Roi* v *Benoît and Gustave Dassonville* [1974] ECR 837.

9 Case C-118/96 *Jessica Safir* v *Skattemyndigheten i Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län* [1998] ECR I-1897.

10 Case C-381/93 *Commission of the European Communities* v *French Republic* [1994] ECR I-5145.

11 Case 33/74 *Johannes Henricus Maria van Binsbergen* v *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

12 Case 16/83 *Criminal proceedings against Karl Prantl* [1984] ECR 1299.

50. Ríkisstjórn Noregs er þeirrar skoðunar að lánveiting sé þjónusta í skilningi 36. gr. Þessu til stuðnings vísar ríkisstjórnin meðal annars til reglugerðar ráðsins 73/183/EBE.

51. Ríkisstjórn Noregs segir að líta verði svo á að mjög víðtækt viðhorf hljóti að ráða þegar virða skal hvaða ráðstafanir geti hindrað eða takmarkað frjáls viðskipti á innri markaðnum. Ríkisstjórn Noregs hreyfir því að þær meginreglur sem Evrópudómstóllinn hefur mótað um frjálsa vöruflutninga, meðal annars í *Dassonville* málinu[8], eigi með sama hætti að gilda um frjálsa þjónustustarfsemi.

52. Ríkisstjórn Noregs vísar í dóma Evrópudómstólsins í *Safir* málinu[9] og í máli *Framkvæmdastjórnarinnar gegn Frakklandi*[10] og segir að 59. gr. Rómarsáttmálans (nú, eftir breytingar, 49. gr.), sem er hliðstæð 36. gr. EES-samningsins, útiloki að beitt verði innanlandslöggjöf, ef hún leiðir til þess að meiri erfiðleikum er bundið að veita þjónustu milli aðildarríkjanna en innan aðildarríkis.

53. Ríkisstjórn Noregs vísar í dóm Evrópudómstólsins í *Van Binsbergen* málinu[11] og gerir þá athugasemd að óheimilt sé að gera greinarmun á þeim sem þjónustu veita eftir heimilisfangi nema hlutlægar ástæður réttlæti það. Af þessum sökum kemst ríkisstjórn Noregs að þeirri niðurstöðu að ákvæði þess efnis að fjármálastofnun þurfi að fá staðfestu í aðildarríki til þess að lántakandi njóti góðs af tilteknum lækkunum gjalda þar í landi sé hindrun í vegi þeirra sem leita eftir láni frá fjármálastofnun sem hefur staðfestu í öðru aðildarríki. Með því móti er ákvæðið skerðing á frelsi fjármálastofnunarinnar til að veita þjónustu. Íslenska kerfið er því haft á frelsi til að veita fjármálaþjónustu í skilningi 36. gr.

54. Ríkisstjórn Noregs bætir því við að *de minimis* reglu verði ekki beitt í tengslum við 36. gr. Jafnvel smávægileg höft eru höft sem bönnuð eru eftir ákvæðunum um frjálsa þjónustustarfsemi. Meginreglur þær sem fram koma í dómum Evrópudómstólsins um frjálsa vöruflutninga, meðal annars í *Prantl* málinu[12], ættu að hafa sama gildi varðandi frelsi til þjónustustarfsemi.

55. Ríkisstjórn Noregs bætir því ennfremur við að hún útiloki ekki að til staðar geti verið hlutlægar ástæður því til réttlætingar að byggt sé á kerfi

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8 Mál 8/74 *Procureur du Roi gegn Benoit og Gustave Dassonville* [1974] ECR 837.

9 Sjá 7. neðanmálsgrein.

10 Mál C-381/93 *Framkvæmdastjórn Evrópubandalaganna gegn Frakklandi* [1994] ECR I-5145.

11 Mál 33/74 *Johannes Henricus Maria van Binsbergen gegn Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

12 Mál 16/83 *sakamál gegn Karl Prantl* [1984] ECR 1299.

differentiated guarantee premiums, but maintains that no such justification has been presented in the dispute at hand.

56. Referring to the judgments by the European Court of Justice in *Mora Romero*[13] and *Commission* v *Greece*[14], the Government of Norway submits that it is not necessary for the Court to address the question of whether the Icelandic system of differentiated guarantee premiums constitutes a breach of Article 4 EEA, since Article 4 EEA applies independently only to situations where no specific provision prohibiting discrimination is found.

57. As regards Article 61 EEA, the Government of Norway, in substance, contends that there are not enough facts available to assess the compatibility of the system of differentiated guarantee premiums with the state aid provisions.

58. However, the Government of Norway questions whether the disputing parties have any legal interest in the answer to such a question, since it has no bearing on the outcome of the proceedings before the national court. The recipients of any subsidy would be Icelandic lenders, which gain an advantage not accorded to foreign lenders. Neither Icelandic lenders nor foreign lenders are parties to the dispute before the Reykjavik City Court. The Government of Norway therefore submits that the Court should decline to answer the question regarding Article 61 EEA.

59. The Government of Norway, referring *inter alia* to the judgment by the European Court of Justice in *FNCE*[15], adds that a national court cannot rule on the compatibility of the subsidy with the internal market, this being a matter only for the EFTA Surveillance Authority or the Commission of the European Communities.

60. The Government of Norway proposes the following answer to the question:

> *"A system of state guarantees which provides that a borrower, who is entitled to a state guarantee, shall pay a guarantee fee on foreign loans that differs from the guarantee fee payable on domestic loans is not compatible with Article 36 of the EEA Agreement."*

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13 Case C-131/96 *Carlos Mora Romero* v *Landesversicherungsanstalt Rheinprovinz* [1997] ECR I-3680.

14 Case 305/87 *Commission of the European Communities* v *Hellenic Republic* [1989] ECR 1461.

15 Case C-354/90 *Féderation Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon* v *French State* [1991] ECR I-5505.

mismunandi ábyrgðargjalda, en heldur fast við að engin slík réttlæting hafi komið fram í deilumáli því sem hér er fjallað um.

56. Með tilvísun til dóma Evrópudómstólsins í máli *Mora Romero*[13] og máli *Framkvæmdastjórnarinnar gegn Grikklandi*[14] heldur ríkisstjórn Noregs því fram að ekki sé þörf á því að dómstóllinn fjalli um þá spurningu hvort kerfið á Íslandi, sem felur í sér mismunun varðandi ábyrgðargjöld, sé brot á 4. gr. EES-samningsins, þar sem þessari grein verði aðeins beitt sjálfstætt þegar engar sérreglur eru sem banna mismunun.

57. Ríkisstjórn Noregs heldur því fram, efnislega, um 61. gr. EES-samningsins að ekki séu til staðar upplýsingar sem nægi ef meta skal hvort kerfið sem geri ráð fyrir mismunandi ábyrgðargjöldum fái samrýmst ákvæðunum um ríkisaðstoð.

58. Ríkisstjórn Noregs dregur engu að síður í efa hvort deiluaðilar hafi lagahagsmuni af að þessari spurningu sé svarað, þar sem svarið skipti engu fyrir málsúrslit á Íslandi. Aðstoð myndi ganga til íslenskra lánveitenda sem fá myndu hagnað sem erlendir lánveitendur njóta ekki. Hvorki íslenskir né erlendir lánveitendur eru málsaðilar fyrir Héraðsdómi Reykjavíkur. Af þessum sökum telur ríkisstjórn Noregs að EFTA-dómstóllinn eigi að neita að svara spurningunni varðandi 61. gr. EES-samningsins.

59. Ríkistjórn Noregs bætir því við og vísar meðal annars til dóms Evrópudómstólsins í *FNCE* málinu[15] að dómstóll í aðildarríki geti ekki kveðið upp úr um hvort aðstoð samrýmist innri markaðnum. Um það geti Eftirlitsstofnun EFTA ein fjallað eða Framkvæmdastjórn Evrópubandalaganna.

60. Ríkisstjórn Noregs leggur til að spurningunni sé svarað þannig:

> *"Kerfi ríkisábyrgða sem felur í sér að lántakandi, sem á rétt á ríkisábyrgð, skuli greiða gjald vegna erlendra lána sem er ekki hið sama og vegna innlendra lána samræmist ekki 36. gr. EES-samningsins."*

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13 Mál C 131/96 *Carlos Mora Romero gegn Landesversicherungsanstalt Rheinprovinz* [1997] ECR I-3680.

14 Mál 305/87 *Framkvæmdastjórn Evrópubandalaganna gegn Grikklandi* [1989] ECR 1461

15 Mál C-354/90 *Féderation Nationale du Commerce Extérieur des Produits Alimentaires og Syndicat National des Négociants et Transformateurs de Saumon gegn franska ríkinu* [1991] ECR I-5505.

The EFTA Surveillance Authority

61. The EFTA Surveillance Authority begins by observing that Article 40 EEA corresponds largely to Article 67 of the EC Treaty as it stood before the Treaty on European Union, and that the content of Council Directive 88/361/EEC was reproduced in substance in the new provisions on capital movement inserted into the EC Treaty by the Treaty on European Union as Articles 73b-g.[16] Referring to the importance of homogeneity within the EEA, the EFTA Surveillance Authority submits that the Court must pay due account to the case law of the European Court of Justice relating to Articles 73b-g of the EC Treaty (now Articles 56-60 EC).

62. In relation to Article 40 EEA, the EFTA Surveillance Authority points out that the Annex of Council Directive 88/361/EEC explicitly states that the capital movements listed in the Annex cover operations carried out by any natural or legal person, including operations in respect of the assets or liabilities of Member States or of other public administrations and agencies. Heading VIII of the Annex covers financial loans and credits.

63. Referring to the judgment by the European Court of Justice in *Svensson*[17], the EFTA Surveillance Authority takes the view that the relevant Icelandic rules are liable to dissuade those concerned from approaching credit institutions in other EEA States, since they impose a higher fee on state guarantees in respect of foreign loans than in respect of loans considered to be domestic.

64. The EFTA Surveillance Authority concludes that the Icelandic system of differentiated state guarantee fees constitutes an obstacle to capital movements and is incompatible with Article 40 EEA.

65. The EFTA Surveillance Authority also submits that the differentiation of state guarantee fees is contrary to Article 36. The EFTA Surveillance Authority points out that it is not aware of any grounds for justification. Consequently, it concludes that these rules are incompatible with Article 36 EEA.

66. According to the EFTA Surveillance Authority, Article 42 EEA is not relevant in the present case, since Article 42(1) EEA concerns legislation on the capital market and the credit system, such as rules relating to the liquidity of banks, control of prudential requirements and the organisation of financial markets, and Article 42(2) EEA concerns the public raising of capital, for instance through the issuance of bonds.

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[16] Case C-222/97 *Manfred Trummer and Peter Mayer* [1999] ECR I-1661; and Joined Cases C-358/93 and C-416/93 *Criminal proceedings against Aldo Bordessa and Others* [1995] ECR I-361.

[17] Case C-484/93 *Peter Svensson and Lena Gustavsson* v *Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955.

Eftirlitsstofnun EFTA

61. Eftirlitsstofnun EFTA segir í upphafi að 40. gr. EES-samningsins svari að mestu til 67. gr. Rómarsáttmálans eins og þetta ákvæði var fyrir samninginn um Evrópusambandið. Segir stofnunin að efni tilskipunar ráðsins 88/361/EBE hafi verið tekið upp efnislega í hin nýju ákvæði um fjármagnsflutninga sem sett voru í Rómarsáttmálans með samningnum um Evrópusambandið og var þar 73. gr. b-g.[16] Eftirlitsstofnun EFTA minnir á mikilvægi einsleitni í EES og heldur því fram að dómstóllinn verði að taka viðeigandi tillit til fordæma Evrópudómstólsins varðandi 73. gr. b-g í Rómarsáttmálanum (nú 56.- 60. gr. sáttmálans).

62. Að því er varðar 40. gr í EES-samningnum bendir Eftirlitsstofnun EFTA á að viðaukinn við tilskipun ráðsins 88/361/EBE taki fram berum orðum að fjármagnsflutningar sem upp eru taldir í viðaukanum nái til ráðstafana sem gerðar eru af öllum mönnum eða lögaðilum þar á meðal ráðstafana sem varða eignir eða skuldbindingar aðildarríkja eða annarra stjórnsýsluaðila og opinberra stofnana. VIII. liður í viðaukanum nær til lána og skulda í peningum.

63. Eftirlitsstofnun EFTA vísar til dóms Evrópudómstólsins í *Svensson* málinu[17] og lýsir þeirri skoðun að þær íslensku reglur sem máli skipta séu til þess fallnar að draga úr vilja þeirra sem hlut eiga að máli til að setja sig í samband við lánastofnanir í öðrum aðildarríkjum þar sem reglurnar mæla fyrir um hærra gjald á ríkisábyrgðum ef lánið er tekið erlendis en af lánum sem talin eru innlend.

64. Eftirlitsstofnun EFTA kemst að þeirri niðurstöðu að íslenska kerfið um mismunandi gjöld af ríkisábyrgðum standi fjármagnshreyfingum í vegi og sé andstætt 40. gr. EES-samningsins.

65. Eftirlitsstofnun EFTA heldur því einnig fram að mismununin varðandi gjald af ríkisábyrgðum sé andstæð 36. gr. Eftirlitsstofnunin bendir á að hún sjái engar réttlætingarástæður. Af þeim sökum er niðurstaða hennar sú að þessar reglur séu andstæðar 36. gr. EES-samningsins.

66. Að áliti Eftirlitsstofnunar EFTA skiptir 42. gr. EES-samningsins engu í máli þessu þar sem 42. gr. 1. mgr. samningsins fjalli um löggjöf um fjármagnsmarkaðinn og lánakerfið t.d. reglur sem varða lausafjárstöðu banka, eftirlit með kröfum til aðgæslu og skipulagningu fjármagnsmarkaða og 42. gr. 2. mgr. samningsins fjalli um opinbera fjármögnun t.d. með útgáfu skuldabréfa.

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16 Mál C-222/97 *Manfred Trummer og Peter Mayer* [1999] ECR I-1661; og sameinuðu málin C-358/93 og C-416/93 *sakamál gegn Aldo Bordessa og fl.* [1995] ECR I-361.

17 Mál C-484/93 *Peter Svensson og Lena Gustavsson gegn Ministre du Logement et de l´Urbanisme* [1995] ECR I-3955.

67. In relation to Article 4 EEA, the EFTA Surveillance Authority, referring to the judgment by the European Court of Justice in *Commission* v *Greece*[18], contends that if a discriminatory state measure is caught by one of the specific provisions of the EC Treaty, there is no need to examine whether the same measure may be caught by the general prohibition against discrimination on grounds of nationality. Consequently, the EFTA Surveillance Authority submits that there is no need to deal with the referred question in so far as it concerns Article 4 EEA.

68. As regards Article 61 EEA, the EFTA Surveillance Authority's principal submission is that there is no need to answer the question regarding this provision, since state aid may not, in any case, be contrary to the specific provisions of the EEA Agreement, hereunder Article 40 EEA. To support this view, the EFTA Surveillance Authority refers to the judgment by the European Court of Justice in *Commission* v *Italy*[19].

69. The EFTA Surveillance Authority adds that an evaluation of whether the Icelandic measures in question constitute aid, is hardly possible, as the reference is short on information, for instance, on the question of whether the relevant measure threatens to distort competition and affects trade between EEA States. However, the EFTA Surveillance Authority states that if the absence of a fee constitutes aid, then the subsequent imposition of a fee, albeit at a lower level than the fee applicable in respect of foreign loans, constitutes a reduction of aid.

70. Alternatively, in the event that the Court considers it relevant to deal with Article 61 EEA, the EFTA Surveillance Authority contends that, under Article 61 EEA, a national judge has no jurisdiction to decide an action for a declaration that aid is incompatible with the EEA Agreement. National courts may establish whether or not a given measure is state aid. However, referring to the judgment by the European Court of Justice in *Steinike*[20], the EFTA Surveillance Authority submits that, if the measure is qualified as state aid, national courts cannot assess the question of whether the aid is in conformity with the EEA Agreement.

71. The EFTA Surveillance Authority proposes the following answer to the question:

> *"Article 40 of the EEA Agreement must be interpreted so as to preclude national measures that provide that a borrower, who is entitled to a State guarantee for loans taken, shall pay a guarantee fee on loans from entities established in another EEA State but not on loans from domestic entities, as well as national measures that provide that a borrower, who is entitled to a State guarantee for*

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18 Case C-305/87 *Commission of the European Communities* v *Hellenic Republic* [1989] ECR 1461.

19 Case 73/79 *Commission of the European Communities* v Italian Republic [1980] 1533.

20 Case 78/76 *Firma Steinike und Weinlig* v *Federal Republic of Germany* [1977] ECR 595.

67. Um 4. gr. EES-samningsins heldur Eftirlitsstofnun EFTA því fram og vísar í dóm Evrópudómstólsins í máli *Framkvæmdastjórnarinnar gegn Grikklandi*[18] að ekki þurfi að kanna, ef svo stendur á að ríkisráðstöfun sem felur í sér mismunun falli undir tiltekið ákvæði í EES-samningnum, hvort sama ráðstöfun kunni að falla undir hið almenna bann við mismunun vegna þjóðernis. Af þessum sökum heldur Eftirlitsstofnun EFTA því fram að óþarft sé að fjalla um spurninguna í málinu á grundvelli 4. gr. EES-samningsins.

68. Um 61. gr. EES-samningsins er aðalröksemd Eftirlitsstofnunar EFTA sú að óþarft sé að svara spurningunni varðandi þetta ákvæði þar sem ríkisaðstoð megi ekki, hvernig sem á stendur, vera andstæð sérstökum ákvæðum EES-samningsins þar á meðal 40. gr. Til stuðnings þessari skoðun vísar Eftirlitsstofnun EFTA til dóms Evrópudómstólsins í máli *Framkvæmdastjórnarinnar gegn Ítalíu*[19].

69. Eftirlitsstofnun EFTA bætir því við að vart verði komist að niðurstöðu um það hvort hinar íslensku ráðstafanir sem í málinu greinir séu aðstoð þar sem málsskotsskjalið innihaldi litlar upplýsingar t.d. um þá spurningu hvort ráðstafanirnar séu til þess fallnar að raska samkeppni og hafa áhrif á viðskipti milli ríkja á Evrópska Efnahagssvæðinu. Þó heldur Eftirlitsstofnun EFTA því fram að sé gjaldtaka engin og það teljist aðstoð þá sé álagning gjalds síðar lækkun aðstoðar þótt gjaldið sé lægra en gjaldið sem tekið er af erlendum lánum.

70. Til vara heldur Eftirlitsstofnun EFTA því fram, ef dómstóllinn telur máli skipta að fjalla um 61. gr. EES-samningsins, að eftir 61. gr. hafi dómari í aðildarríki ekki lögsögu til að kveða á um yfirlýsingu þess efnis að aðstoð sé ósamrýmanleg EES-samningnum. Þessir dómstólar geti kveðið á um hvort ráðstöfun feli í sér ríkisaðstoð eða ekki. Samt sem áður heldur Eftirlitsstofnun EFTA því fram með því að vísa í dóm Evrópudómstólsins í máli *Steinike*[20] að dómstólar í aðildarríkjunum geti ekki metið það hvort aðstoð sé samrýmanleg EES-samningnum þó að ráðstöfun sé talin ríkisaðstoð.

71. Eftirlitsstofnun EFTA leggur til að spurningunni sé svarað þannig:

> *"40. gr. EES-samningsins verður að skýra þannig að hún banni ráðstafanir í aðildarríkjunum sem fela í sér að lántakandi sem á rétt á ríkisábyrgð fyrir láni skuli greiða ábyrgðargjald vegna lána frá aðilum sem hafa staðfestu í öðru aðildarríki en ekki vegna lána frá innlendum aðilum. Hið sama er um ráðstafanir í aðildarríkjum sem mæla svo fyrir að lántakandi sem á rétt á*

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18 Mál C-305/*87 Framkvæmdastjórn Evrópubandalaganna gegn Grikklandi* [1989] ECR 1461.

19 Mál 73/*79 Framkvæmdastjórn Evrópubandalaganna gegn Ítalíu* [1980] 1533.

20 Mál 78/76 *Firma Steinike und Weinlig gegn Þýska Sambandslýðveldinu* [1977] ECR 595.

loans taken, shall pay a higher guarantee fee on loans from entities established in another EEA State than on loans taken from domestic entities."

The Commission of the European Communities

72. Referring to Sections I, VII, VIII and XI of Annex I to Council Directive 88/361/EEC, the Commission of the European Communities considers that the taking of loans by Icelandic residents from residents of other States that are Contracting Parties to the EEA Agreement, is a capital movement for the purposes of Article 40 EEA.

73. The Commission submits that the costs for issuing a bank guarantee such as that at issue, are calculated mainly on the basis of the credit risk and the market risk involved, and will generally not depend on whether the lender is domestic or foreign.

74. The Commission contends that the Icelandic legislation providing for higher fees for state guarantees issued in relation to loans obtained from foreign lenders than loans obtained from domestic lenders, will most likely render the former loans more expensive than the latter loans. Referring to the judgments by the European Court of Justice in *Svensson*[21] and *Trummer*[22], the Commission argues that the Icelandic legislation may dissuade domestic institutions from obtaining loans in other EEA States.

75. The Commission concludes that the Icelandic legislation in question is contrary to Article 40 EEA, since the difference in guarantee fees, depending on whether the lender is domestic or foreign, would constitute a restriction on the free movement of capital between Icelandic residents and residents of other EEA States.

76. The Commission contends that neither Articles 4, 42 or 61 EEA are relevant in this case.

77. The Commission, referring to Article 6 of the EC Treaty (now, after amendment, Article 12 EC) and related case law[23] of the European Court of Justice and the EFTA Court, takes the view that Article 4 EEA applies only in the

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21 Case C-484/93 *Peter Svensson and Lena Gustavsson* v *Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955.

22 Case C-222/97 *Manfred Trummer and Peter Mayer* [1999] ECR I-1661.

23 Case C-179/90, *Merci convenzionali porto di Genova Spa* v *Siderurgica Gabrielli SpA* [1991] ECR I-5889; Opinion of Mr. Advocate General Tesauro delivered on 23 September 1997 in Case C-118/96 *Jessica Safir* v *Skattemyndigheten i Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län* [1998] ECR I-1897; Case E-5/98 *Fagtún efh* v *Byggingarnefnd Borgarholtsskóla, the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær*, Advisory Opinion of 12 May 1999 (not yet published).

ríkisábyrgð vegna lána skuli greiða hærri ábyrgðargjöld á lánum frá aðilum sem hafa staðfestu í öðru aðildarríki en á lánum teknum frá aðilum í heimaríki."

Framkvæmdastjórn Evrópubandalaganna

72. Með tilvísun til fyrsta viðauka I, VII, VIII og XI í tilskipun ráðsins 88/361/EBE er Framkvæmdastjórn Evrópubandalaganna þeirrar skoðunar að um sé að ræða fjármagnsflutninga í skilningi 40. gr. EES-samningsins þegar aðilar búsettir á Íslandi taka lán frá aðilum sem búsettir eru í öðrum aðildarríkjum samningsins.

73. Framkvæmdastjórnin heldur því fram að kostnaður við útgáfu bankaábyrgðar eins og hér er um að ræða sé aðallega reiknaður á grundvelli lánsáhættu og áhættu á þeim markaði sem við á og sé venjulega ekki háð því hvort lánveitandi sé innlendur eða erlendur.

74. Framkvæmdastjórnin heldur því fram að íslenska löggjöfin um hærri gjöld fyrir ríkisábyrgðir vegna lána frá erlendum lánveitendum en lána frá innlendum lánveitendum leiði mjög líklega til þess að lánin í fyrri flokknum verði dýrari en í seinni flokknum. Hún vísar í dóma Evrópudómstólsins í málum *Svensson*[21] og *Trummer*[22] og telur að íslensku réttarreglurnar kunni að leiða til þess að stofnanir á Íslandi leiti síður lána í öðrum aðildarríkjum.

75. Framkvæmdastjórnin kemst að þeirri niðurstöðu að íslenska löggjöfin sem um er deilt sé andstæð 40. gr. EES-samningsins þar sem mismunur á ábyrgðargjöldum eftir því hvort lánveitandinn er innlendur eða erlendur myndi fela í sér höft á frjálsum flutningi fjármagns milli þeirra sem búsettir eru á Íslandi og í öðrum EES löndum.

76. Framkvæmdastjórnin heldur því fram að 4. gr., 42. gr. og 61. gr. EES-samningsins hafi ekki þýðingu í málinu.

77. Framkvæmdastjórnin vísar til 6. gr. Rómarsáttmálans (nú, eftir breytingar, 12. gr. sáttmálans) og fordæmi varðandi hana[23] frá Evrópudómstólnum og EFTA-dómstólnum. Framkvæmdastjórnin lýsir þeirri skoðun að 4. gr. EES-samningsins

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21 Sjá 17. neðanmálsgrein.

22 Sjá 16. neðanmálsgrein.

23 Mál C-179/90, *Merci Convenzionali Porto di Genova Spa gegn Siderurgica Gabrielli SpA* [1991] ECR I-5889; álitsgerð Tesauro lögsögumanns frá 23. september 1997 í *Safir-málinu* (sjá neðanmálsgrein 7); mál E-5/98 *Fagtún efh gegn Byggingarnefnd Borgarholtsskóla, íslenska ríkinu, Reykjavíkurborg og Mosfellsbæ*, ráðgefandi álit 12. maí 1999 (enn óbirt).

absence of provisions prohibiting discriminatory treatment in specific sectors. Consequently, the Commission considers that the relevant Icelandic provision must be dealt with under the specific provisions of Article 40 EEA.

78. According to the Commission, Article 42 is not applicable in this case, since it is concerned with the non-discriminatory application of general rules governing the financial system and capital markets, and not with specific requirements on how fees are charged for credit guarantees. To support this argument, the Commission refers to Articles 2 and 4 of Council Directive 88/361/EEC.

79. In relation to Article 61(1) EEA, the Commission points out that the question of whether the measures at issue involve state aid, depends, *inter alia*, on whether the fees paid in respect of the guarantees represent market premiums. The Commission is of the opinion that the facts available are insufficient to determine that question.

80. The Commission of the European Communities proposes the following answer to the question:

> *"Article 40 of the EEA Agreement precludes the application of national rules such as those at issue in the main proceedings and which provide:*
>
> *- that a borrower, who is entitled to a state guarantee on loans, is required to pay a guarantee fee on a loan from an entity in another Contracting Party to the EEA Agreement but not on a loan from a domestic entity, or ;*
>
> *- that such a borrower is required to pay a guarantee fee which is higher on the former than on the latter."*

Per Tresselt
Judge-Rapporteur

eigi aðeins við þegar engin ákvæði banna mismunun á einstökum sviðum. Framkvæmdastjórnin telur þess vegna að hið umdeilda íslenska ákvæði beri að fjalla um á grundvelli hinna sérstöku reglna í 40. gr. EES-samningsins.

78. Að áliti framkvæmdastjórnarinnar verður 42. gr. ekki beitt í þessu máli þar sem hún fjallar um beitingu án mismununar á almennum reglum um fjármálakerfi og fjármagnsmarkaði en ekki um sérstakar kröfur til þess hvernig gjalds verður krafist fyrir ábyrgðir á lánum. Til stuðnings þessari röksemd vísar framkvæmdastjórnin í 2. og 4. gr. tilskipunar ráðsins 88/361/EBE.

79. Um 61. gr. 1. mgr. EES-samningsins bendir framkvæmdastjórnin á að sú spurning hvort hin umdeilda ráðstöfun feli í sér ríkisábyrgð fari meðal annars eftir því hvort gjöldin sem greidd eru vegna ábyrgðarinnar séu almenn markaðsgjöld. Framkvæmdastjórnin telur að fyrirliggjandi upplýsingar séu ekki nægar til að segja til um þetta atriði.

80. Framkvæmdastjórn Evrópubandalaganna leggur til að spurningunni sé svarað þannig:

> *“40. gr. EES-samningsins útilokar beitingu reglna í aðildarríkjunum eins og þær reglur eru sem deilt er um fyrir Héraðsdómi Reykjavíkur og mæla fyrir um að:*
>
> *- lántakandi sem rétt á til ríkisábyrgðar á lánum þurfi að greiða ábyrgðargjald vegna láns frá aðila í öðru aðildarríki EES-samningsins en ekki vegna láns frá innlendum aðila, eða;*
>
> *- að slíkur lántakandi þurfi að greiða ábyrgðargjald sem er hærra á láni í fyrra flokknum en í síðara. “*

Per Tresselt
framsögumaður

Case E-2/00

Allied Colloids and Others
v
The Government of Norway, represented by the Ministry of Local Government and Regional Development

(Request for an Advisory Opinion from Oslo byrett, Norway)

(Free movement of goods – Directives on dangerous substances and preparations – Joint Statements of the EEA Joint Committee)

Summary of the Judgment

According to Point 1 of Annex II, Chapter XV to the EEA Agreement, the applicability of 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, as amended (hereinafter the "Substances Directive") and 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, as amended, to the EFTA States is contingent on a further decision of the Joint Committee.

It is on the basis of Point 1 of Annex II, Chapter XV to the EEA Agreement that the Joint Statements of 22 June 1995, concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous substances and of 26 March 1999, concerning the same, have been adopted.

By the Joint Statement of 1995, Norway has accepted the existing Community *acquis* with effect as of 1 July 1995, but with derogations in specific areas. These derogations are listed in Annex II to the Joint Statement of 1995. In the Joint Statement of 1995, it is further stated that a new review of the situation was to take place during 1998. This

Sak E-2/00

Allied Colloids med flere
mot
Den norske regjering, ved Kommunal- og regionaldepartementet

(Anmodning om en rådgivende uttalelse fra Oslo byrett)

(Fri bevegelighet av varer – direktivene om farlige stoffer og preparater – EØS-komiteens felleserklæringer)

Sammendrag av avgjørelsen

I følge EØS-avtalens vedlegg II kapittel XV punkt 1, er anvendbarheten av rådsdirektiv 67/548/EØF av 27 juni 1967 om tilnærming av lover og forskrifter om klassifisering, emballering og merking av farlige stoffer, som endret, heretter "stoffdirektivet" og rådsdirektiv 88/179/EØF av 7 juni 1988 om tilnærming av medlemsstatenes lover og forskrifter om klassifisering, emballering og merking av farlige preparater, som endret, for EFTA statene avhengig av en nærmere beslutning av EØS-komiteen.

Det er på grunnlag av EØS-avtalens vedlegg II kapittel XV punkt 1 at felleserklæringene av 22 juni 1995, vedrørende EØS-avtalens vedlegg II kapittel XV om bestemmelser om ny gjennomgåelse på området farlige stoffer og av 26 mars 1999, vedrørende det sammen, er blitt vedtatt.

Norge har ved felleserklæringen av 1995 akseptert det eksisterende fellesskapsregelverk med virkning fra 1 juli 1995, men med unntak for visse områder. Disse unntakene er oppført i tillegg II til felleserklæringen av 1995. I felleserklæringen av 1995 er det videre uttalt at en ny gjennomgåelse av situasjonen skulle skje i løpet av 1998. Denne gjennomgangen førte til vedtagelsen av felleserklæringen av 1999.

review led to the adoption of the Joint Statement of 1999.

The wording "(...) different criteria for classification and labelling of carcinogenic substances as given in section 4.2.1. of Annex VI to the Substance Directive" leaves no doubt that Norway may adopt its own system for the classification and labelling of carcinogenic substances. Norway has availed itself of this derogation by adopting its own system for the classification of carcinogenic substances, see most recently Section 24 of Norwegian Regulation No. 1497 of 23 December 1997. However, the wording of point 1(a)(ii), while not a model of clarity, does not give Norway the right to classify substances as carcinogens that may not be classified as such at all under the system laid down in the two Directives together. Such a broad interpretation of the wording of point 1(a)(ii) would amount to an exception allowing Norway to classify (within the limits of proportionality) any substance whatsoever as carcinogenic. An interpretation that would give Norway the power to classify as carcinogenic any substance containing a carcinogenic impurity in whatever low concentration would also go beyond the wording of point 1(a)(ii). In this context, it is noted that point 1(a)(i) and point 1(b) of Annex II to the Joint Statement of 1995 refer to concentration.

The derogation allowing Norway not to apply certain provisions of the Substances Directive constitutes an exception to the fundamental principle of free movement of goods laid down in Part II of the EEA Agreement (see also recitals 1 and 3 of the Preamble to and Article 30 of the Directive). Such exceptions are, as a rule, to be interpreted narrowly.

Annex II to the Joint Statement of 1995 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.

On the basis of the Joint Statement of 1999 Norway may set its own rules regarding concentration limits for carcinogenic substances as impurities in other substances. It follows that Norway may set a lower concentration limit for the carcinogenic substance acrylamide as an impurity and thus classify polyacrylamide as carcinogenic if the concentration of acrylamide is equal to or greater than that provided for by its rules. Thus, the conclusion is that Norway may, with reference to point 1(a)(ii) of the Annex to the Joint Statement of 1999, classify polyacrylamide as carcinogenic if it contains acrylamide as an impurity in a concentration equal to or greater than 0.01%.

Formuleringen "kriteriene for klassifisering og merking av kreftfremkallende stoffer som nevnt i stoffdirektivets vedlegg VI avsnitt 4.2.1." etterlater ikke noen tvil om at Norge kan vedta sitt eget system for klassifisering og merking av kreftfremkallende stoffer. Norge har benyttet seg av dette unntaket ved å vedta sitt eget system for klassifisering av kreftfremkallende stoffer, jf senest forskrift nr 1497 av 23 desember 1997 §24. Imidlertid gir ikke formuleringen - som ikke er mønstergyldig i sin klarhet - av punkt 1 bokstav a) nr ii) Norge adgang til å klassifisere som kreftfremkallende stoffer som ikke i det hele tatt kan klassifiseres slik etter systemet fastsatt i de to direktivene. En slik vid tolkning av ordlyden i punkt 1 bokstav a) nr ii) vil utgjøre et unntak som gir Norge adgang til (innenfor proporsjonalitetsgrensene) å klassifisere et hvilket som helst stoff som kreftfremkallende. En tolkning som ville gi Norge adgang til å klassifisere som kreftfremkallende ethvert stoff som inneholder en kreftfremkallende urenhet, uansett i hvor lav konsentrasjon, ville også gå utover ordlyden i punkt 1 bokstav a) nr ii). I denne sammenheng bemerkes det at punkt 1 bokstav a) nr i) og punkt 1 bokstav b) i tillegg II til felleserklæringen av 1995 henviser til konsentrasjonsgrenser.

Unntaket som tillater Norge å unnlate å anvende visse bestemmelser i stoffdirektivet, utgjør et unntak fra det grunnleggende prinsipp om fri bevegelighet av varer fastsatt i del II av EØS-avtalen (se også første og tredje ledd av fortalen og direktivets artikkel 30). Slike unntak skal som hovedregel tolkes snevert.

Tillegg II til felleserklæringen av 1995 om bestemmelser om ny gjennomgåelse på området farlige stoffer, må tolkes slik at det ikke tillater Norge å kreve merking av polyakrylamid med lavere konsentrasjon av akrylamid enn 0,1% av totalvolumet som kreftfremkallende.

På grunnlag av Felleserklæringen av 1999 kan Norge fastsette sine egne regler om konsentrasjonsgrenser for kreftfremkallende stoffer som urenheter i andre stoffer. Det følger at Norge kan fastsette en lavere konsentrasjonsgrense for det kreftfremkallende stoffet akrylamid som en urenhet, og derved klassifisere polyakrylamid som kreftfremkallende hvis konsentrasjonen av akrylamid er lik eller større enn det reglene bestemmer. Det slås derfor fast at Norge, under henvisning til tillegget til felleserklæringen av 1999, punkt 1 bokstav a) nr ii), kan klassifisere polyakrylamid som kreftfremkallende hvis det inneholder akrylamid som en urenhet i en konsentrasjon som er lik eller større enn 0,01%.

JUDGMENT OF THE COURT

14 July 2000*

(Free movement of goods – Directives on dangerous substances and preparations – Joint Statements of the EEA Joint Committee)

In Case E-2/00

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 Oslo byrett (Oslo City Court) for an Advisory Opinion in the case pending before it between

Allied Colloids and Others

and

The Government of Norway, represented by the Ministry of Local Government and Regional Development

on the interpretation of the Agreement on the European Economic Area (hereinafter variously "EEA" and "EEA Agreement"), with particular reference to the following Acts:

– the Act referred to in Point 1 of Annex II, Chapter XV (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, as amended, hereinafter the "Substances Directive");

– the Act referred to in Point 10 of Annex II, Chapter XV (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

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

DOMSTOLENS DOM

14 juli 2000*

(Fri bevegelighet av varer - direktivene om farlige stoffer og preparater - EØS-komiteens felleserklæringer)

I sak E-2/00

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 Oslo Byrett i saken for denne domstol mellom

Allied Colloids med flere

og

Den norske regjering, ved Kommunal- og regionaldepartementet

om tolkningen av Avtale om Det europeiske økonomiske samarbeidsområde (heretter enten "EØS" eller "EØS-avtalen") med særlig henvisning til følgende rettsakter:

– rettsakten som det er henvist til i vedlegg II kapittel XV, punkt 1 (rådsdirektiv 67/548/EØF av 27 juni 1967 om tilnærming av lover og forskrifter om klassifisering, emballering og merking av farlige stoffer, som endret, heretter "stoffdirektivet");

– rettsakten som det er henvist til i vedlegg II kapittel XV, punkt 10 (rådsdirektiv 88/179/EØF av 7 juni 1988 om tilnærming av medlemsstatenes lover og forskrifter om klassifisering, emballering og

* Språket i anmodningen om en rådgivende uttalelse: Norsk.

classification, packaging and labelling of dangerous preparations, as amended, hereinafter the "Preparations Directive");

(hereinafter collectively the "Directives");

– 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, 11.1.96), in particular Annex II to that Joint Statement, setting up certain derogations concerning Norway, hereinafter the "Joint Statement of 1995";

– 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, 1.7.1999), in particular the Annex to that Joint Statement, setting up certain derogations concerning Norway, hereinafter the "Joint Statement of 1999";

THE COURT,

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

Registrar: Gunnar Selvik,

after considering the written observations submitted on behalf of:

– the Plaintiffs, Allied Colloids and Others, represented by Counsel Wilhelm Matheson, Wiersholm, Mellbye & Bech;

– the Defendant, The Government of Norway, represented by the Ministry of Local Government and Regional Development, represented by Counsel Hanne Bjurstrøm and Counsel Morten Goller, Office of the Attorney General (Civil Affairs);

– the Government of Iceland, represented by Högni S. Kristjánsson, Legal Officer, Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Anne-Lise H. Rolland, Officer, Legal & Executive Affairs, acting as Agent;

– the Commission of the European Communities, represented by Richard B. Wainwright, Principal Legal Adviser and Lena Ström, Legal Adviser, Legal Service, acting as Agents;

merking av farlige preparater, som endret, heretter "preparatdirektivet");

(heretter samlet "direktivene");

– 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 (EFT nr C 6, 11.1.1996 s 7; EØS-tillegget nr 2, 11.1. 1996 s 23.), særlig tillegg II, som fastsetter visse unntak for Norge (heretter "felleserklæringen av 1995");

– felleserklæring vedtatt på EØS-komiteens møte 26 mars 1999 om EØS-avtalens vedlegg II kapittel XV om bestemmelser om ny vurdering på området farlige stoffer (EFT nr C, 185 1.7. 1999 s 6; EØS-tillegget nr 29, 1.7.1999 s 1.), særlig tillegg til felleserklæringen, som fastsetter visse unntak for Norge (heretter "felleserklæringen av 1999");

DOMSTOLEN,

sammensatt av: President Thór Vilhjálmsson (saksforberedende dommer) og dommerne Carl Baudenbacher og Per Tresselt

Justissekretær: Gunnar Selvik

etter å ha vurdert de skriftlige saksfremstillinger inngitt av:

– saksøkerne, Allied Colloids med flere, representert ved advokat Wilhelm Matheson, Advokatfirmaet Wiersholm, Mellbye & Bech;

– saksøkte, Den norske regjering, ved Kommunal- og regionaldepartementet, representert ved advokat Hanne Bjurstrøm og advokat Morten Goller, Regjeringsadvokatens kontor;

– Den islandske regjering, representert ved Högni S. Kristjánsson, juridisk saksbehandler, Utenriksdepartementet, som partsrepresentant;

– EFTAs overvåkningsorgan, representert ved Anne-Lise H. Rolland, saksbehandler, avdeling for juridiske saker og eksekutivsaker, som partsrepresentant;

– Kommisjonen for De europeiske fellesskap, representert ved Richard B. Wainwright, førsterådgiver og Lena Ström, juridisk rådgiver ved Kommisjonen, som partsrepresentanter,

having regard to the Report for the Hearing,

after hearing the oral observations of the Plaintiffs, the Defendant, the Government of Iceland, the EFTA Surveillance Authority and the Commission of the European Communities, represented by Michael Shotter, Legal Adviser, Legal Service, acting as Agent, at the hearing on 22 June 2000,

gives the following

Judgment

Facts and procedure

1 By a reference dated 22 February 2000, registered at the Court on 25 February 2000, Oslo byrett made a Request for an Advisory Opinion in a case pending before it between Allied Colloids and Others (hereinafter the "Plaintiffs") and the Government of Norway, represented by the Ministry of Local Government and Regional Government (hereinafter the "Defendant"). The dispute before the national court concerns 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 is equal to or greater than 0.01% by volume.

2 The Plaintiffs Allied Colloids, BASF Aktiengesellschaft, CYTEC Industries B.V., Nalco Chemical B.V., SNF Floerger and Betz Dearborn Europe NV are manufacturers of polyacrylamide, whilst the Plaintiffs Nalco Norge AS, Paus & Paus AS, Norsk Hydro and Dyno Oil Field Chemicals are importers and distributors of polyacrylamide.

3 The Ministry of Local Government and Regional Development is responsible for the Directorate of Labour Inspection (hereinafter the "Labour Inspection"), which administers Chapter XIII of the Act relating to Worker Protection and Working Environment (Act No. 4 of 4 February 1977 relating to Worker Protection and Working Environment, hereinafter the "Working Environment Act"). The Labour Inspection adopts *inter alia* administrative regulations and decisions concerning the classification, labelling, etc. of dangerous chemicals under regulations adopted pursuant to *inter alia* Section 18(3) and Section 74(1), third paragraph of the Working Environment Act.

4 On 9 April 1997, the Labour Inspection ordered the importers of polyacrylamide to classify and label polyacrylamide products containing 0.01% or more by volume of the chemical substance acrylamide with a poison symbol and a text stating that the product may cause cancer. The deadline for compliance was 1 June 1997. This order was contested by the Plaintiffs in a letter of 21 May 1997, in which they requested permission for deferral of compliance with the labelling order. The Labour Inspection granted permission for deferral of compliance by

med henvisning til rettsmøterapporten,

og etter å ha hørt de muntlige innleggene fra saksøkerne, saksøkte, Den islandske regjering, Den norske regjering, EFTAs overvåkningsorgan og Kommisjonen for De europeiske fellesskap, representert ved Michael Shotter, juridisk rådgiver, under høringen den 22 juni 2000,

avsier slik

Dom

Faktum og prosedyre

1 Ved beslutning datert 22 februar 2000, mottatt ved Domstolen den 25 februar 2000, har Oslo byrett anmodet om en rådgivende uttalelse i en sak innbrakt for denne av Allied Colloids med flere (heretter "saksøkerne") mot Den norske regjering, ved Kommunal- og regionaldepartementet, (heretter "saksøkte"). Saken for den nasjonale domstol 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% av volumet.

2 Saksøkerne Allied Colloids, BASF Aktiengesellschaft, CYTEC Industries B.V, Nalco Chemical B.V, SNF Floerger, Betz Dearborn Europe NV og Stockhausen Gmbh & Co er produsenter av polyakrylamid, mens saksøkerne Nalco Norge AS, Paus & Paus AS, Norsk Hydro og Dyno Oil Field Chemicals er importører og distributører av polyakrylamid.

3 Kommunal- og regionaldepartementet er ansvarlig for Direktoratet for arbeidstilsynet (heretter "Arbeidstilsynet"), som forvalter kapittel XIII i lov om arbeidervern og arbeidsmiljø (Lov av 4 februar 1977 nr 4 om arbeidervern og arbeidsmiljø m.v., heretter "arbeidsmiljøloven"). Arbeidstilsynet treffer blant annet vedtak om klassifisering, merking mv av farlige kjemikalier i henhold til forskrifter fastsatt med hjemmel i blant annet arbeidsmiljøloven § 18 nr 3 og § 74 nr 1 tredje ledd.

4 Arbeidstilsynet vedtok den 9 april 1997 et pålegg til importørene av polyakrylamid om å klassifisere og merke polyakrylamidprodukter som inneholder mer enn 0,01% av volumet av det kjemiske stoffet akrylamid med et giftsymbol og en advarselssetning om kreftfare. Frist for gjennomføring var 1 juni 1997. Dette vedtaket ble påklaget av saksøkerne ved brev av 21 mai 1997, med begjæring om oppsettende virkning på gjennomføringen av merkevedtaket. Arbeidstilsynet innvilget oppsettende virkning på vedtaket den 27 mai 1997.

an order of 27 May 1997. On 19 August 1998, the Ministry of Local Government and Regional Development upheld the order of the Labour Inspection.

5 Subsequently, the Plaintiffs brought an action in Oslo byrett, requesting that the order of the Ministry of Local Government and Regional Development be declared null and void, on the grounds that the order was contrary to EEA law. Contemporaneously, the Plaintiffs applied for an injunction to defer compliance with the order until such time as a final judgment had been rendered in the main proceedings. On 30 November 1998, Oslo byrett issued an interlocutory order rejecting the application on the grounds that it had not been demonstrated that the order was in breach of EEA law. The Plaintiffs appealed the interlocutory order to Borgarting lagmannsrett (Borgarting Court of Appeal), which affirmed the lower court's decision by an order dated 25 March 1999. However, the appeal court did not deal with the issue of EEA law in the case. It found that there was no danger of irreparable harm and that, therefore, it was not necessary to decide the question of law. This second order was not appealed.

6 While the above proceedings have run their course, the Labour Inspection has re-issued its labelling order, first with a compliance deadline of 18 May 1999 and later with a deadline of 1 July 1999, subject to a fine for non-compliance.

7 The above-mentioned 1997 regulations entered into force on 1 January 1998, which means that the legal basis for the labelling order was an earlier regulation of 1993. However, there is no material difference between the 1993 and 1997 regulations in so far as the disputed points are concerned. The parties are, therefore, in agreement that a judicial review of the order can take place with respect to the 1997 regulations

8 The following question was referred 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?*

Legal background

9 The question submitted by the national court concerns the interpretation of various provisions of relevant EEA legislation.

10 The EEA Agreement Annex II, Chapter XV, Point 1 states *inter alia*:

Kommunal- og regionaldepartementet opprettholdt Arbeidstilsynets vedtak den 19 august 1998.

5 Saksøkerne anla etter dette søksmål ved Oslo byrett med påstand om at Kommunal- og regionaldepartementets vedtak skulle kjennes ugyldig, på det grunnlag at vedtaket var uforenlig med EØS-retten. Saksøkerne krevet samtidig med saksanlegget at det ved midlertidig forføyning skulle gis oppsettende virkning med gjennomføringen av pålegget frem til hovedsaken var rettskraftig avgjort. Oslo byrett avsa den 30 november 1998 kjennelse som avviste kravet på det grunnlag at det ikke var sannsynliggjort at vedtaket var i strid med EØS-retten. Saksøkerne påkjærte avgjørelsen til Borgarting lagmannsrett, som stadfestet byrettens avgjørelse ved kjennelse den 25 mars 1999. Lagmannsretten tok imidlertid ikke stilling til det EØS-rettslige spørsmålet i saken. Lagmannsretten konstaterte at det ikke forelå sikringsgrunn, og at det derfor var unødvendig å ta stilling til det materielle rettsspørsmålet. Denne andre kjennelsen ble ikke påkjært.

6 Mens saken verserte gjentok Arbeidstilsynet pålegget om merking med gjennomføringsfrist til 18 mai 1999, og senere med en tvangsmulktbelagt frist til 1 juli 1999.

7 De ovenfor nevnte forskriftene fra 1997 trådte i kraft 1 januar 1998, som betyr at det rettslige grunnlaget for merkepålegget var en tidligere forskrift fra 1993. Det er imidlertid ingen innholdsmessig forskjell mellom 1993- og 1997-forskriftene når det gjelder de omstridte punkter. Det er derfor enighet mellom partene om at en prøving av påleggets lovlighet kan finne sted i forhold til 1997-forskriftene.

8 Følgende spørsmål ble forelagt 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?*

Rettslig bakgrunn

9 Spørsmålet fra den nasjonale domstolen gjelder tolkningen av forskjellige bestemmelser i relevant EØS lovgivning.

10 I EØS-avtalens vedlegg II kapittel XV punkt 1 heter det blant annet:

"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."

11 Article 2(1)(a) to (c) of the Substances Directive reads as follows:

"(a) "substances" means chemical elements and their compounds in the natural state or obtained by any production process, including any additive necessary to preserve the stability of the products and any impurity deriving from the process used, but excluding any solvent which may be separated without affecting the stability of the substance or changing its composition.

(b) "preparations" means mixtures or solutions composed of two or more substances.

(c) "polymer" means a substance (...)."

12 Article 4 of the Substances Directive reads as follows:

"Classification

1. Substances shall be classified on the basis of their intrinsic properties according to the categories laid down in Article 2(2). In the classification of substances, impurities shall be taken into account as far as the concentration(s) of the latter exceed the concentration limits specified in paragraph 4 of this Article and in Article 3 of Directive 88/379/EEC.

2. The general principles of the classification and labelling of substances and preparations shall be applied according to the criteria in Annex VI, save where contrary requirements for dangerous preparations are specified in separate Directives.

3. Annex I contains the list of substances classified in accordance with the principles outlined in paragraphs 1 and 2, together with their harmonized classification and labelling. The decision to place a substance in Annex I together with the harmonized classification and labelling shall be taken in accordance with the procedure laid down in Article 29.

4. The dangerous substances listed in Annex I shall, where appropriate, be characterized by concentration limits or any other parameter enabling an assessment to be made of the health or environmental hazard of preparations containing the said dangerous substances or substances containing other dangerous substances as impurities."

13 Article 30 of the Substances Directive reads as follows:

"Free movement clause

Member States may not prohibit, restrict or impede the placing on the market of substances which comply with the requirements of this Directive, on grounds relating to notification, classification, packaging or labelling within the meaning of this Directive."

"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."

11 Artikkel 2 nr 1 bokstav a) til c) i stoffdirektivet lyder som følger:

"a) "stoffer", grunnstoffer og deres forbindelser, i naturlig tilstand eller fremstilt industrielt, herunder ethvert tilsetningsstoff som er nødvendig for å bevare produktets stabilitet, samt enhver urenhet som følge av fremstillingsprosessen, men med unntak av ethvert løsemiddel som kan utskilles uten å påvirke stoffets stabilitet eller endre dets sammensetning,

b) "preparater", blandinger eller løsninger som er sammensatt av to eller flere stoffer,

c) "polymer", et stoff (...)".

12 Artikkel 4 i stoffdirektivet lyder som følger:

"Klassifisering

1. Stoffer skal klassifiseres på grunnlag av deres stofflige egenskaper i henhold til kategoriene fastsatt i artikkel 2 nr. 2. Ved klassifisering av stoffer skal det tas hensyn til urenheter i den grad urenhetenes konsentrasjon(er) overstiger konsentrasjonsgrensene fastsatt i nr. 4 i denne artikkel og i artikkel 3 i direktiv 88/379/EØF.

2. De alminnelige prinsipper for klassifisering og merking av stoffer og preparater får anvendelse i henhold til kriteriene i vedlegg VI, med mindre det er fastsatt andre krav for farlige preparater i særskilte direktiver.

3. Vedlegg I inneholder listen over stoffer klassifisert i henhold til prinsippene i nr. 1 og 2, sammen med deres harmoniserte klassifikasjon og merking. Beslutningen om å plassere et stoff i vedlegg I sammen med den harmoniserte klassifikasjonen og merkingen skal treffes etter fremgangsmåten fastsatt i artikkel 29.

4. Farlige stoffer oppført i vedlegg I skal eventuelt karakteriseres ved konsentrasjonsgrensene eller et annet parameter som gjør det mulig å foreta en vurdering av helse– og miljøfarer ved preparater som inneholder nevnte farlige stoffer eller stoffer som inneholder andre farlige stoffer som urenheter."

13 Artikkel 30 i stoffdirektivet lyder som følger:

"Klausul om fri bevegelighet

Medlemsstatene kan ikke med begrunnelse i melding, klassifisering, emballering eller merking som definert i dette direktiv, forby, begrense eller hindre markedsføring av stoffer som oppfyller kravene i dette direktiv."

14 Section 1.7.2.1 of Annex VI to the Substances Directive regarding "[c]lassification of substances containing impurities, additives or individual constituents," states, in consonance with the above, that:

> "Where impurities, additives or individual constituents of substances have been identified, they shall be taken into account if their concentration is greater than or equal to the limits specified:
>
> - 0,1% for substances classified as … carcinogenic (category 1 or 2)…
>
> unless lower values have been specified in Annex I to Directive 67/548/EEC. [Annex I contains the List of Dangerous Substances]"

15 Section 4.2.1 of Annex VI to the Substances Directive regarding criteria for classification reads as follows:

> "4.2.1. Carcinogenic substances. For the purpose of classification and labelling, and having regard to the current state of knowledge, such substances are divided into three categories:
>
> Category 1. Substances known to be carcinogenic to man. There is sufficient evidence to establish a causal association between human exposure to a substance and the development of cancer.
>
> Category 2. Substances which should be regarded as if they are carcinogenic to man. There is sufficient evidence to provide a strong presumption that human exposure to a substance may result in the development of cancer, generally on the basis of:
>
> - appropriate long-term animal studies,
>
> - other relevant information.
>
> Category 3. Substances which cause concern for man owing to possible carcinogenic effects but in respect of which the available information is not adequate for making a satisfactory assessment. There is some evidence from appropriate animal studies, but this is insufficient to place the substance in Category 2."

16 Article 3(5)(j) of the Preparations Directive states that preparations are to be regarded as carcinogenic:

> "(…) if they contain a substance producing such effects (…) in a concentration equal to or exceeding:
>
> - either the concentration specified in Annex I to Directive 67/548/EEC for the substance under consideration, or
>
> - the concentration specified at point 6 of Annex I (Table VI) to this Directive where the substance or substances do not appear in Annex I to Directive 67/548/EEC or appear in it without concentration limits."

14 Stoffdirektivets vedlegg VI, avsnitt 1.7.2.1[1] om "[k]lassificering af stoffer, som indeholder urenheder, tilsætningstoffer eller enkeltbestanddele," fastsetter i tråd med det ovenstående at:

> "Såfremt urenheder, tilsætningsstoffer eller enkeltbestanddele i stoffer er blevet identificeret, skal der tages hensyn hertil, såfremt deres koncentration er større eller lig med de fastsatte koncentrationsgrænser:
>
> - 0,1% for stoffer der klassificeres som (...) kategori 1 eller 2 kræftfremkallende(...)
>
> med mindre der er fastsatt lavere værdier i bilag I til direktiv 67/548/EØF. [Vedlegg I inneholder stofflisten.]"

15 Stoffdirektivets vedlegg VI, avsnitt 4.2.1 (i dansk versjon) om kriterier for klassifisering lyder som følger:

> "4.2.1. Kræftfremkaldende stoffer. Ved klassificering og etikettering inddeles disse stoffer under hensyntagen til den nuværende viden i tre kategorier:
>
> Kategori 1. Stoffer, der vides at fremkalde kræft hos mennesket. Der foreligger tilstrækkelige beviser for en årsagssammenhæng mellem menneskets udsættelse for stoffet og udvikling af kræft.
>
> Kategori 2. Stoffer, der bør anses for at fremkalde kræft hos mennesket. Der foreligger tilstrækkelige beviser til at nære stærk formodning om, at stoffets påvirkning af mennesker kan fremkalde kræft, generelt på grundlag af:
>
> - egnede langtidsforsøg i dyr
>
> - andre relevante oplysninger.
>
> Kategori 3. Stoffer, der giver anledning til betænkelighed, da de muligvis kan fremkalde kræft hos mennesket, men for hvilke der ikke foreligger tilstrækkelige oplysninger til at foretage en tilfredsstillende vurdering. Der er visse tegn fra relevante dyreforsøg, men disse er utilstrækkelige til at placere dem i kategori 2."

16 Preparatdirektivets artikkel 3 nr 5 bokstav j) slår fast at preparater skal betraktes som kreftfremkallende;

> "når de inneholder et stoff som fremkaller slik virkning (...) i en konsentrasjon som er lik eller overskrider:
>
> - enten konsentrasjonen fastsatt i vedlegg I til direktiv 67/548/EØF for stoffet det gjelder, eller
>
> - konsentrasjonen fastsatt i nr. 6 i vedlegg I (tabell VI) til dette direktiv når stoffet ikke er oppført i vedlegg I til direktiv 67/548/EØF eller er oppført i dette uten konsentrasjonsgrenser."

[1] Teksten gjengis på dansk, siden vedlegg VI ikke er publisert i norsk oversettelse.

17 Point 6 of Annex I (Table VI) to the Preparations Directive sets out a concentration limit of minimum 0.1% for carcinogenic substances in Category 1 or 2 which are not listed in Annex I to the Substances Directive with a specific concentration limit.

18 The relevant text of the Joint Statement of 1995 reads 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 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 [Directives 67/548/EEC and 88/379/EEC] 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. (…)"

The relevant parts of Annex (Appendix) II read as follows:

> "The following provisions shall not apply to Norway:
>
> 1. As regards Council Directive 67/548/EEC of 27 June 1967 on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances:
>
> (a) Article 30, in conjunction with Articles 4 and 5, with respect to:
>
> (i) the requirements for the classification, labelling and/or specific concentration limits for the substances or groups of substances listed in Annex I to the Directive and shown in the following list. Norway may require the use of different classification, labelling and/or specific concentration limits for these substances. (...)
>
> (ii) the criteria for classification and labelling of carcinogenic substances as given in Section 4.2.1 of Annex VI to the Directive. Norway may apply different criteria for classification, and different requirements for the application of certain R-phrases.
>
> (b) Article 30 in conjunction with Articles 4 and 6, with respect to the requirements for the classification, labelling and/or specific concentration limits for the substances or groups of substances not listed in Annex I to the Directive and shown in the following list. Norway may require the use of classification, labelling and/or specific concentration limits for these substances;
>
> (...)
>
> 2. As regards 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:
>
> (...)
>
> (c) Article 13, in conjunction with Articles 3 and 7, with respect to preparations containing substances as defined in points 1(a) to (d)."

17 Preparatdirektivets vedlegg I nr 6 tabell VI angir en konsentrasjonsgrense på minimum 0,1% for kreftfremkallende stoffer i kategori 1 eller 2, som ikke er oppført i stoffdirektivets vedlegg I med en særlig konsentrasjonsgrense.

18 Den relevante teksten i felleserklæringen av 1995 lyder som følger:

> "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 [direktivene 67/548/EØF og 88/379/EØF] 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."

De relevante deler av tillegg II til felleserklæringen av 1995 lyder som følger:

> "Følgende bestemmelser får ikke anvendelse for Norge:
>
> 1. Med hensyn til rådsdirektiv 67/548/EØF av 27. juni om tilnærming av lover og forskrifter om klassifisering, emballering og merking av farlige stoffer:
>
> a) Artikkel 30, sammenholdt med artikkel 4 og 5, med hensyn til:
>
> (i) krav til klassifisering, merking og/eller bestemte konsentrasjonsgrenser for stoffer eller grupper av stoffer oppført i direktivets vedlegg I og vist i listen nedenfor. Norge kan kreve bruk av en annen klassifisering og merking og/eller andre konsentrasjonsgrenser for disse stoffene; (...)
>
> (ii) kriteriene for klassifisering og merking av kreftfremkallende stoffer som nevnt i direktivets vedlegg VI avsnitt 4.2.1. Norge kan anvende andre kriterier for klassifisering og andre krav til bruk av visse R-setninger.
>
> (b) Artikkel 30, sammenholdt med artikkel 4 og 6, med hensyn til krav til klassifisering, merking og/eller bestemte konsentrasjonsgrenser for stoffer eller grupper av stoffer som ikke er oppført i direktivets vedlegg I og er vist i listen nedenfor. Norge kan kreve klassifisering, merking og/eller bestemte konsentrasjonsgrenser for disse stoffene; (...)
>
> (...)
>
> 2. Med hensyn til rådsdirektiv 88/379/EØF av 7. juni 1988 om tilnærming av medlemsstatenes lover og forskrifter om klassifisering, emballering og merking av farlige preparater:
>
> (...)
>
> c) Artikkel 13, sammenholdt med artikkel 3 og 7, med hensyn til preparater som inneholder stoffer angitt under nr. 1 bokstav a) til d) ovenfor."

19 The relevant text of the Joint Statement of 1999 reads 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 areas as set out in its Appendix, the provisions shall not apply to it unless the EEA Joint Committee agrees on another solution. (…)"

The relevant parts of the Annex to the Joint Statement of 1999 read as follows:

> "The following provisions shall not apply to Norway:
>
> 1. As regards Council Directive 67/548/EEC of 27 June on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances:
>
> (a) Article 30, in conjunction with Articles 4 and 5, with respect to:
>
> (i) the requirements for the classification, labelling and/or specific concentration limits for the substances or groups of substances listed in Annex I to the Directive and shown in the following list. Norway may require the use of different classification, labelling and/or specific concentration limits for these substances; (...)
>
> (ii) the criteria for classification and labelling of carcinogenic substances as given in Section 4.2.1 of Annex VI to the Directive. Norway may apply different criteria for classification, and provisions regarding impurities, additives or individual constituents in Section 1.7.2.1 of Annex VI to the Directive with regard to substances classified as carcinogens, and different requirements for the application of certain R-phrases.
>
> (b) Article 30 in conjunction with Articles 4 and 6, with respect to the requirements for the classification, labelling and/or specific concentration limits for the substances or groups of substances not listed in Annex I to the Directive and shown in the following list. Norway may require the use of classification, labelling and/or specific concentration limits for these substances; (...)
>
> (...)
>
> 2. As regards 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:
>
> (...)
>
> (c) Article 13, in conjunction with Articles 3 and 7, with respect to preparations containing substances as defined in points 1(a) to (d)."

19 Den relevante teksten i felleserklæringen av 1999 lyder som følger:

> "Norge har på grunnlag av den vurdering som har funnet sted, besluttet å godta det eksisterende regelverk i Fellesskapet med virkning fra 1. januar 1999, 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 1. januar 2001. En ny vurdering 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."

De relevante deler av tillegget til felleserklæringen av 1999 lyder som følger:

> "Følgende bestemmelser får ikke anvendelse for Norge:
>
> 1. Med hensyn til rådsdirektiv 67/548/EØF av 27. juni om tilnærming av lover og forskrifter om klassifisering, emballering og merking av farlige stoffer:
>
> a) Artikkel 30, sammenholdt med artikkel 4 og 5, med hensyn til:
>
> (i) krav til klassifisering, merking og/eller bestemte konsentrasjonsgrenser for stoffer eller grupper av stoffer oppført i direktivets vedlegg I og vist i listen nedenfor. Norge kan kreve bruk av en annen klassifisering og merking og/eller andre konsentrasjonsgrenser for disse stoffene; (...)
>
> (ii) kriteriene for klassifisering og merking av kreftfremkallende stoffer som nevnt i direktivets vedlegg VI avsnitt 4.2.1. Norge kan anvende andre kriterier for klassifisering og andre bestemmelser for urenheter, tilsetningsstoffer eller enkeltstående bestanddeler i direktivets vedlegg VI avsnitt 1.7.2.1 med hensyn til stoffer klassifisert som kreftfremkallende, og andre krav til bruk av visse R-setninger.
>
> (b) Artikkel 30, sammenholdt med artikkel 4 og 6, med hensyn til krav til klassifisering, merking og/eller bestemte konsentrasjonsgrenser for stoffer eller grupper av stoffer som ikke er oppført i direktivets vedlegg I og er vist i listen nedenfor. Norge kan kreve klassifisering, merking og/eller bestemte konsentrasjonsgrenser for disse stoffene; (...)
>
> (...)
>
> 2. Med hensyn til rådsdirektiv 88/379/EØF av 7. juni 1988 om tilnærming av medlemsstatenes lover og forskrifter om klassifisering, emballering og merking av farlige preparater:
>
> (...)
>
> c) Artikkel 13, sammenholdt med artikkel 3 og 7, med hensyn til preparater som inneholder stoffer angitt under nr. 1 bokstav a) til d) ovenfor."

20 Reference is made to the Report for the Hearing for a more complete 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.

Findings of the Court

21 The national court seeks in essence to know whether the Joint Statement of 1995, with subsequent amendments, gives Norway the power to introduce a requirement that the substance polyacrylamide must be labelled as carcinogenic when it contains the residual acrylamide in a concentration of less than 0.1%.

22 The above question mentions "subsequent amendments" to the Joint Statement of 1995. The *Court* takes this to mean a reference to the Joint Statement of 1999. Both statements must, therefore, be taken into consideration when the question is answered.

The 1995 Joint Statement

23 In the view of the *Plaintiffs*, the *EFTA Surveillance Authority* and the *Commission of the European Communities*, the Joint Statement of 1995 does not give Norway the power to introduce the contested labelling requirement for polyacrylamide when it contains a concentration of less than 0.1% of the residual substance acrylamide. They base their conclusion mainly on a strict interpretation of point 1(a)(ii) of Annex II to the Joint Statement of 1995. In the view of the EFTA Surveillance Authority, however, Norway has this power under the Joint Statement of 1999. The Commission of the European Communities supported this view at the oral hearing. According to the *Defendant* and the *Government of Iceland*, both Joint Statements allow Norway to introduce this requirement.

24 The EEA rules regarding the classification, packaging and labelling of dangerous substances and preparations are to be found in the Substances Directive and in the Preparations Directive.

25 According to Point 1 of Annex II, Chapter XV to the EEA Agreement, the applicability of the Community acts on dangerous substances and preparations, i.e. the Substances Directive and the Preparations Directive, to the EFTA States is contingent on a further decision of the Joint Committee. It is on the basis of this provision that the two Joint Statements of 1995 and 1999 have been adopted. In the Joint Statement of 1995, it is stated that Norway accepts the existing Community *acquis* with effect as of 1 July 1995, with derogations in specific areas as listed in Annex II to that Joint Statement. This provision is repeated in the Joint Statement of 1999, except for the date of entry into force, which is 1 January 1999.

20 Det vises til rettsmøterapporten for en fyldigere beskrivelse av den rettslige rammen, de faktiske forhold, saksgangen og de skriftlige saksfremstillinger fremlagt for Domstolen, som i det følgende bare vil bli omtalt og drøftet så langt det er nødvendig for Domstolens begrunnelse.

Domstolens bemerkninger

21 Den nasjonale domstolen søker i hovedsak å få brakt på det rene hvorvidt fellesærklæringen av 1995 med senere endringer gir Norge adgang til å oppstille et krav om at stoffet polyakrylamid skal merkes som kreftfremkallende når det inneholder reststoffet akrylamid i en konsentrasjon som er lavere enn 0,1%.

22 Spørsmålet ovenfor omtaler "senere endringer" til felleserklæringen av 1995. *Domstolen* forstår dette som en henvisning til felleserklæringen av 1999. Begge felleserklæringer må derfor tas i betrakting når spørsmålet skal besvares.

Felleserklæringen av 1995

23 Etter *saksøkernes*, *EFTAs overvåkningsorgans* og *Kommisjonen for de europeiske fellesskaps* syn, gir ikke felleserklæringen av 1995 Norge adgang til å innføre det omstridte merkekravet for polyakrylamid når det inneholder en konsentrasjonen av reststoffet akrylamid som er lavere enn 0,1%. De bygger hovedsakelig deres konklusjon på en snever tolkning av punkt 1 bokstav a) nr ii av tillegg II til felleserklæringen av 1995. Etter EFTAs overvåkningsorgans syn har imidlertid Norge denne adgangen etter felleserklæringen av 1999. Kommisjonen for de europeiske fellesskap støttet dette syn på den muntlige høringen. I følge *saksøkte* og *Den islandske regjering* gir begge felleserklæringene Norge adgang til å innføre dette kravet.

24 EØS-reglene om klassifisering, emballering og merking av farlige stoffer og preparater finnes i stoffdirektivet og i preparatdirektivet.

25 I følge EØS-avtalens vedlegg II kapittel XV punkt 1, er anvendbarheten av fellesskapsregelverket på området farlige stoffer og preparater, dvs stoffdirektivet og preparatdirektivet, for EFTA statene avhengig av en nærmere beslutning av EØS-komiteen. Det er på grunnlag av denne bestemmelsen at felleserklæringene av 1995 og 1999 er blitt vedtatt. I felleserklæringen av 1995 framgår det at Norge aksepterer det eksisterende fellesskapsregelverk med virkning fra og med 1 juli 1995, med unntak for visse områder, som er særlig angitt i tillegg II av denne felleserklæringen. Denne formuleringen gjentas i felleserklæringen av 1999, med unntak av ikrafttredelsesdatoen, som er 1 januar 1999.

26 Article 2(1) of the Substances Directive defines “substances” and “preparations”. According to these definitions, both polyacrylamide and acrylamide are substances, not preparations. It is also clear that acrylamide, as a residual substance in polyacrylamide, is an impurity. Article 2(2) of the Directive defines categories of dangerous substances and preparations. According to Article 2(2), point l, one of the categories is carcinogenic substances and preparations. Carcinogenic substances and preparations are defined as substances or preparations which, if they are inhaled or ingested or if they penetrate the skin, may induce cancer or increase its incidence.

27 Article 4(1) of the Substances Directive requires substances to be classified on the basis of their intrinsic properties, according to the categories laid down in Article 2(2). Furthermore, it is stated that, in the classification of substances, impurities are to be taken into account in so far as concentration(s) of the latter exceed the concentration limits specified in Article 4(4) and Article 3 of the Preparations Directive. Article 4(4) of the Substances Directive states that, where appropriate, the dangerous substances listed in Annex I thereof are to be characterized by concentration limits or any other parameter enabling an assessment to be made of the health and environmental hazard of preparations containing the said dangerous substances or substances containing other substances as impurities. Acrylamide is listed as a dangerous substance in Annex I to the Substances Directive, but with no specific concentration limit. Polyacrylamide is not listed at all as a dangerous substance.

28 Section 4.2.1 of Annex VI to the Substances Directive defines different categories of carcinogenic substances. According to the classification on the basis of Section 4.2.1, acrylamide is a carcinogenic substance falling in Category 2. Section 1.7.2.1 of Annex VI concerns the classification of substances containing carcinogenic substances as impurities. The section states that a Category 1 or Category 2 carcinogenic substance as an impurity is not to be taken into account unless the concentration thereof is equal to or greater than 0.1% by volume. From this it is clear that, according to the rules set out in the Substances Directive, acrylamide as an impurity is not to affect the classification of polyacrylamide when acrylamide constitutes less than 0.1% of the total volume. Thus, it is clear that, under the rules laid down in the Substances Directive, polyacrylamide is not classified as a carcinogenic substance when the concentration of acrylamide is less than 0.1% by volume.

29 The Court notes that, according to Article 3(5)(j) of the Preparations Directive, preparations are to be considered as carcinogenic if they contain a substance producing such effect in concentrations equal to or exceeding either the concentration limits in Annex I to the Substances Directive or the concentration limit specified in point 6 of Annex I (Table VI) to the Preparations Directive, where the substances do not appear in Annex I to the Substances Directive or appear there without concentration limits. According to point 6 of Annex I (Table VI), the concentration limit for a carcinogenic substance in Category 1 is 0.1%.

26 Stoffdirektivets artikkel 2 nr 1 definerer "stoffer" og "preparater". I følge disse definisjonene er både polyakrylamid og akrylamid stoffer, ikke preparater. Det er også klart at akrylamid, som et reststoff i polyakrylamid, er en urenhet. Direktivets artikkel 2 nr 2 definerer kategorier av farlige stoffer og preparater. I følge artikkel 2 nr 2 punkt 1 er en av kategoriene kreftfremkallende stoffer og preparater. Kreftfremkallende stoffer og preparater er definert som stoffer eller preparater som kan forårsake kreft eller økt kreftforekomst dersom de innåndes, svelges eller opptas gjennom huden.

27 Stoffdirektivets artikkel 4 nr 1 krever at stoffer skal klassifiseres på grunnlag av deres stofflige egenskaper i følge kategoriene fastsatt i artikkel 2 nr 2. Videre er det uttalt at ved klassifisering av stoffer, skal det tas hensyn til urenheter i den grad disses konsentrasjon(er) overskrider konsentrasjonsgrensene fastsatt i artikkel 4 nr 4 og preparatdirektivets artikkel 3. Stoffdirektivets artikkel 4 nr 4 uttaler at farlige stoffer oppført i dets vedlegg I eventuelt skal karakteriseres ved konsentrasjonsgrenser eller et annet parameter som gjør det mulig å foreta en vurdering av helse- og miljøfarer ved preparater som inneholder de nevnte farlige stoffer eller stoffer som inneholder andre farlige stoffer som urenheter. Akrylamid er oppført som et farlig stoff i stoffdirektivets vedlegg I, men uten en særlig konsentrasjonsgrense. Polyakrylamid er ikke oppført som et farlig stoff i det hele tatt.

28 Stoffdirektivets vedlegg VI, avsnitt 4.2.1 definerer forskjellige kategorier av kreftfremkallende stoffer. I henhold til klassifiseringen på grunnlag av avsnitt 4.2.1 er akrylamid et kreftfremkallende stoff som faller i kategori 2. Vedlegg VI avsnitt 1.7.2.1 angår klassifisering av stoffer som inneholder kreftfremkallende stoffer som urenheter. Vedlegget uttaler at et kreftfremkallende stoff i kategori 1 eller kategori 2 som en urenhet ikke skal tas i betraktning dersom ikke konsentrasjonen av denne er lik eller større enn 0,1% av volumet. Herav følger klart at i følge reglene gitt i stoffdirektivet, skal akrylamid som en urenhet ikke påvirke klassifiseringen av polyakrylamid, når akrylamid utgjør mindre enn 0,1% av totalvolumet. Således er det klart at etter reglene fastsatt i stoffdirektivet er ikke polyakrylamid klassifisert som et kreftfremkallende stoff når konsentrasjonen av akrylamid er lavere enn 0,1% av volumet.

29 Domstolen bemerker at i følge preparatdirektivets artikkel 3 nr 5 bokstav j) skal preparater anses som kreftfremkallende dersom de inneholder et stoff med en slik virkning, i en konsentrasjon som er lik eller overskrider enten konsentrasjonsgrensene i stoffdirektivets vedlegg I eller konsentrasjonsgrensen fastsatt i preparatdirektivets vedlegg I punkt 6 (tabell VI), hvor stoffer ikke er oppført i stoffdirektivets vedlegg I eller er oppført der uten konsentrasjonsgrenser. I følge vedlegg I punkt 6 (tabell VI) er konsentrasjonsgrensen 0,1% for et kreftfremkallende stoff i kategori 1.

30 Articles 23 to 25 of the Substances Directive provide for rules regarding the labelling of dangerous substances. Article 23(1) provides that necessary measures must be taken to ensure that dangerous substances cannot be placed on the market unless the labelling on their packaging fulfils the requirements set out therein. It is clear from the rules regarding labelling that they must be interpreted in the context of the rules regarding the classification of dangerous substances. Thus, the purpose of labelling must be to reflect accurately the danger of the relevant substance and its classification, in line with the categories laid down in the Directive. Furthermore, the Substances Directive provides for total harmonization in the field of labelling of dangerous substances.

31 Consequently, on the basis of the rules set out in the Substances Directive, the presence of acrylamide as an impurity does not give rise to polyacrylamide having to be labelled as carcinogenic, since it constitutes less than 0.1% of the total volume. It must also be emphasized that both Directives aim at laying down an exhaustive set of rules governing the classification, packaging and labelling of substances and that they have not left the Contracting Parties any scope to introduce other measures in their national legislation, see Case 278/85 *Commission* v *Denmark* [1987] ECR 4069, at paragraph 12.

32 According to the observations submitted by the Plaintiffs, the Defendant, the Government of Iceland, the EFTA Surveillance Authority and the Commission of the European Communities, there does not seem to be any disagreement as to the interpretation of the rules set out in the Directives on this point. Thus, the dispute in the case is limited to the scope of the derogations granted to Norway as provided for in the two Joint Statements.

33 As stated above, Norway has, by the Joint Statement of 1995, accepted the existing Community *acquis* with effect as of 1 July 1995, but with derogations in specific areas. These derogations are listed in Annex II to the Joint Statement of 1995. In the Joint Statement of 1995, it is further stated that a new review of the situation was to take place during 1998. This review led to the adoption of the Joint Statement of 1999.

34 Annex II to the Joint Statement of 1995 refers to the provisions of the two Directives that are not to apply to Norway. The Court agrees with the observations made by the EFTA Surveillance Authority and the Commission of the European Communities that only point 1(a)(ii) is relevant in the present case.

35 As regards the Substances Directive, point 1(a)(ii) of Annex II to the Joint Statement of 1995 states that the criteria for the classification and labelling of carcinogenic substances as given in section 4.2.1 of Annex VI to the Directive are not to apply to Norway. It is furthermore stated that Norway may apply different criteria for classification and different requirements for the application of certain R-phrases.

36 The Court is of the view that the wording "(...) different criteria for classification and labelling of carcinogenic substances as given in section 4.2.1. of Annex VI to

30 Stoffdirektivets artikler 23 til 25 gir regler om merking av farlige stoffer. Artikkel 23 nr 1 bestemmer at nødvendige tiltak skal treffes for å sikre at farlige stoffer ikke kan bringes i omsetning med mindre merkingen på emballasjen oppfyller kravene den fastsetter. Det er etter reglene om merking klart at disse må tolkes i sammenheng med reglene om klassifisering av farlige stoffer. Formålet med merking må derfor være å avspeile nøyaktig det relevante stoffets farlighet og klassifisering i tråd med kategoriene fastsatt i direktivet. Forøvrig fastsetter stoffdirektivet en fullstendig harmonisering på området merking av farlige stoffer.

31 På grunnlag av reglene gitt i stoffdirektivet fører derfor ikke forekomsten av akrylamid som en urenhet til at polyakrylamid må merkes som kreftfremkallende, siden det utgjør mindre enn 0,1% av total volumet. Det må også legges vekt på at begge direktivene søker å gi et uttømmende regelsett om klassifisering, emballering og merking av stoffer, og at de således ikke har gitt avtalepartene noe rom for å innføre andre tiltak i deres nasjonale lovgivning, se Sak 278/85 *Kommisjonen* v *Danmark* [1987] ECR 4069 premiss 12.

32 I følge innleggene fra saksøkerne, saksøkte, Den islandske regjering, EFTAs overvåkningsorgan og Kommisjonen for de europeiske fellesskap synes det ikke å være noen uenighet om tolkningen av reglene fastsatt i direktivene på dette punkt. Uenigheten i saken er derfor begrenset til omfanget av unntakene Norge er gitt i de to felleserklæringene.

33 Som angitt ovenfor har Norge ved felleserklæringen av 1995 akseptert det eksisterende fellesskapsregelverk med virkning fra 1 juli 1995, men med unntak for visse områder. Disse unntakene er oppført i tillegg II til felleserklæringen av 1995. I felleserklæringen av 1995 er det videre uttalt at en ny gjennomgåelse av situasjonen skulle skje i løpet av 1998. Denne gjennomgangen førte til vedtagelsen av felleserklæringen av 1999.

34 Tillegg II til felleserklæringen av 1995 henviser til de bestemmelsene i de to direktivene som ikke skal komme til anvendelse for Norge. Domstolen er enig i innleggene fra EFTAs overvåkningsorgan og Kommisjonen for de europeiske fellesskap om at bare punkt 1 bokstav a) nr ii) er relevant for den foreliggende sak.

35 Når det gjelder stoffdirektivet uttaler artikkel 1 bokstav a) nr ii av tillegg II til felleserklæringen av 1995 at kriteriene for klassifisering og merking av kreftfremkallende stoffer som nevnt i direktivets vedlegg VI avsnitt 4.2.1, ikke skal komme til anvendelse for Norge. Videre er det uttalt at Norge kan anvende andre krav til klassifisering, og andre vilkår for bruk av visse R-setninger.

36 Domstolen er av den oppfatning at formuleringen "kriteriene for klassifisering og merking av kreftfremkallende stoffer som nevnt i direktivets vedlegg VI avsnitt

the Directive" leaves no doubt that Norway may adopt its own system for the classification and labelling of carcinogenic substances. Norway has availed itself of this derogation by adopting its own system for the classification of carcinogenic substances, see most recently Section 24 of Norwegian Regulation No. 1497 of 23 December 1997. However, the wording of point 1(a)(ii), while not a model of clarity, does not give Norway the right to classify substances as carcinogens that may not be classified as such at all under the system laid down in the two Directives. Such a broad interpretation of the wording of point 1(a)(ii) would amount to an exception allowing Norway to classify (within the limits of proportionality) any substance whatsoever as carcinogenic. An interpretation that would give Norway the power to classify as carcinogenic any substance containing a carcinogenic impurity in whatever low concentration would also go beyond the wording of point 1(a)(ii). In this context, it is noted that point 1(a)(i) and point 1(b) of Annex II to the Joint Statement of 1995 refer to concentration limits, while such limits are not mentioned in point 1(a)(ii). The specific reference to section 4.2.1. supports this interpretation of point 1(a)(ii).

37 The Court notes furthermore that the derogation allowing Norway not to apply certain provisions of the Substances Directive constitutes an exception to the fundamental principle of free movement of goods as laid down in Part II of the EEA Agreement (see also recitals 1 and 3 of the Preamble to and Article 30 of the Directive). As held by the Court on previous occasions and as pointed out by the Plaintiffs, the EFTA Surveillance Authority and the Commission of the European Communities, exceptions are, as a rule, to be interpreted narrowly (see Case E-5/96 *Ullensaker kommune and others* v *Nille AS* [1997] EFTA Court Report 30, at paragraph 33; Case E-9/97 *Erla María Sveinbjörnsdóttir* v *The Government of Iceland* [1998] EFTA Court Report 95, at paragraph 38; and Case E-1/99 *Storebrand Skadeforsikring AS* v *Veronika Finanger* [1999] EFTA Court Report 119, at paragraph 33).

38 This interpretation is also supported by the fact that point 1(a)(ii) of the Annex to the Joint Statement of 1999 is specific in this regard in stating that Norway has the right not only to apply different criteria for classification, but also different "provisions regarding impurities, additives or individual constituents in Section 1.7.2.1 of Annex VI" to the Substances Directive.

39 The Court concludes that point 1(a)(ii) of the Joint Statement of 1995 does not create a sufficient legal basis for Norway to classify polyacrylamide as carcinogenic, even though it contains the carcinogenic substance acrylamide as an impurity, if the concentration of acrylamide is less than 0.1% by total volume.

40 On the basis of the foregoing, the Court finds that 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.

4.2.1." ikke etterlater noen tvil om at Norge kan vedta sitt eget system for klassifisering og merking av kreftfremkallende stoffer. Norge har benyttet seg av dette unntaket ved å vedta sitt eget system for klassifisering av kreftfremkallende stoffer, jf senest forskrift nr 1497 av 23 desember 1997 §24. Imidlertid gir ikke formuleringen - som ikke er mønstergyldig i sin klarhet - av punkt 1 bokstav a) nr ii) Norge adgang til å klassifisere som kreftfremkallende stoffer som ikke i det hele tatt kan klassifiseres slik etter systemet fastsatt i de to direktivene. En slik vid tolkning av ordlyden i punkt 1 bokstav a) nr ii) vil utgjøre et unntak som gir Norge adgang til (innenfor proporsjonalitetsgrensene) å klassifisere et hvilket som helst stoff som kreftfremkallende. En tolkning som ville gi Norge adgang til å klassifisere som kreftfremkallende ethvert stoff som inneholder en kreftfremkallende urenhet, uansett i hvor lav konsentrasjon, ville også gå utover ordlyden i punkt 1 bokstav a) nr ii). I denne sammenheng bemerkes det at punkt 1 bokstav a) nr i) og punkt 1 bokstav b) i tillegg II til felleserklæringen av 1995 henviser til konsentrasjonsgrenser, mens slike grenser ikke er nevnt i punkt 1 bokstav a) nr ii). Den særlige henvisningen til avsnitt 4.2.1 støtter denne tolkningen av punkt 1 bokstav a) nr ii).

37 Domstolen bemerker videre at unntaket som tillater Norge å unnlate å anvende visse bestemmelser i stoffdirektivet, utgjør et unntak fra det grunnleggende prinsipp om fri bevegelighet av varer fastsatt i del II av EØS-avtalen (se også første og tredje ledd av fortalen og direktivets artikkel 30). Som fastslått av Domstolen ved tidligere anledninger og som påpekt av saksøkerne, EFTAs overvåkningsorgan og Kommisjonen for de europeiske fellesskap, skal unntak som hovedregel tolkes snevert (se sakene E-5/96 *Ullensaker kommune med flere* v *Nille AS* [1997] EFTA Court Report 30, premiss 33, E-9/97 *Erla María Sveinbjörnsdóttir* v *The Government of Iceland* [1998] EFTA Court Report 95, premiss 38 og E-1/99 *Storebrand Skadeforsikring AS* v *Veronika Finanger*, [1999] EFTA Court Report 119, premiss 33).

38 Denne tolkningen støttes også av det faktum at tillegget til felleserklæringen av 1999 punkt 1 bokstav a) nr ii) er presist i denne henseende, idet det uttales at Norge har adgang ikke bare til å anvende andre kriterier for klassifisering, men også andre "bestemmelser om urenheter, tilsetningsstoffer eller enkeltstående bestanddeler i direktivets vedlegg VI avsnitt 1.7.2.1".

39 Domstolen slutter at felleserklæringen av 1995 punkt 1 bokstav a) nr ii) ikke danner et tilstrekkelig rettslig grunnlag til at Norge kan klassifisere polyakrylamid som kreftfremkallende, selv om det inneholder det kreftfremkallende stoffet akrylamid som en urenhet, dersom konsentrasjonen av akrylamid er lavere enn 0,1% av totalvolumet.

40 På grunnlag av det foregående finner Domstolen at 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 det ikke tillater Norge å kreve merking av polyakrylamid med lavere konsentrasjon av akrylamid enn 0,1% av totalvolumet som kreftfremkallende.

The 1999 Joint Statement

41 As stated above, in the Court's view, the question submitted by the national court also refers to the Joint Statement of 1999.

42 Point 1(a)(ii) of the Annex to the Joint Statement of 1999 states that the criteria for the classification and labelling of carcinogenic substances as set out in Section 4.2.1 of Annex VI to the Substances Directive are not to apply to Norway. This sentence reads exactly the same as the one in the corresponding point of Annex II to the Joint Statement of 1995. However, the next sentence states that Norway may apply different criteria for classification, and provisions regarding impurities, additives or individual constituents in Section 1.7.2.1 of Annex VI to the Substances Directive with regard to substances classified as carcinogens, and different requirements for the application of certain R-phrases. A comparison of these two corresponding points shows that the Annex to the Joint Statement of 1999 is, by its wording, wider in scope, since a special reference to Section 1.7.2.1 of Annex VI to the Substances Directives has been added. As mentioned above, that Section contains rules on when impurities are to be taken into account for the purposes of classifying a substance. Special reference is made to the concentration limits for carcinogenic substances.

43 The Court is of the view that, from this, it is clear that Norway may set its own rules regarding concentration limits for carcinogenic substances as impurities in other substances. It follows that Norway may set a lower concentration limit for the carcinogenic substance acrylamide as an impurity and thus classify polyacrylamide as carcinogenic if the concentration of acrylamide is equal to or greater than that provided for by its rules. Thus, the conclusion is that Norway may, with reference to point 1(a)(ii) of the Annex to the Joint Statement of 1999, classify polyacrylamide as carcinogenic if it contains acrylamide as an impurity in a concentration equal to or greater than 0.01%.

44 From the foregoing, it must be concluded that 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.

Costs

45 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

Felleserklæringen av 1999

41 Som nevnt ovenfor angår spørsmålet fra den nasjonale domstolen etter Domstolens syn også felleserklæringen av 1999.

42 Tillegget til felleserklæringen av 1999 punkt 1 bokstav a) nr ii) uttaler at kriteriene for klassifisering og merking av kreftfremkallende stoffer som fastlagt i direktivets vedlegg VI avsnitt 4.2.1 ikke skal få anvendelse for Norge. Denne setningen lyder akkurat likt den i det tilsvarende punktet i tillegg II til felleserklæringen av 1995. Den neste setningen sier imidlertid at Norge kan anvende andre kriterier for klassifisering og bestemmelser om urenheter, tilsetningsstoffer eller enkeltstående bestanddeler i stoffdirektivets vedlegg VI avsnitt 1.7.2.1 med hensyn til stoffer klassifisert som kreftfremkallende, og andre krav til bruk av visse R-setninger. En sammenligning av disse to tilsvarende punktene viser at tillegget til felleserklæringen av 1999 etter sin ordlyd har et videre anvendelsesområde, ved at en særlig henvisning til stoffdirektivets vedlegg VI, avsnitt 1.7.2.1 er tilføyet. Dette avsnittet inneholder, som angitt ovenfor, regler om når urenheter skal tas i betraktning med sikte på klassifisering av et stoff. En særlig henvisning er gjort til konsentrasjonsgrensene for kreftfremkallende stoffer.

43 Domstolen er av den oppfatning at det utfra dette er klart at Norge kan fastsette sine egne regler om konsentrasjonsgrenser for kreftfremkallende stoffer som urenheter i andre stoffer. Det følger at Norge kan fastsette en lavere konsentrasjonsgrense for det kreftfremkallende stoffet akrylamid som en urenhet, og derved klassifisere polyakrylamid som kreftfremkallende hvis konsentrasjonen av akrylamid er lik eller større enn det reglene bestemmer. Det slås derfor fast at Norge, under henvisning til tillegget til felleserklæringen av 1999, punkt 1 bokstav a) nr ii), kan klassifisere polyakrylamid som kreftfremkallende hvis det inneholder akrylamid som en urenhet i en konsentrasjon som er lik eller større enn 0,01%.

44 Av det foregående må det konkluderes med at tillegget 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 Norge har adgang til å kreve merking av polyakrylamid som kreftfremkallende hvis det inneholder akrylamid i en konsentrasjon som er lik eller større enn 0,01% av totalvolumet.

Saksomkostninger

45 Omkostninger som er påløpt for Den islandske regjering, EFTAs overvåkningsorgan og Kommisjonen for De europeiske fellesskap, som har gitt saksfremstillinger for Domstolen, kan ikke kreves dekket. Siden rettergangen her, for partene i hovedsaken, utgjør en del av rettergangen for den nasjonale

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 the order of 22 February 2000, hereby gives the following Advisory Opinion:

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.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 14 July 2000.

Gunnar Selvik
Registrar

Thór Vilhjálmsson
President

domstolen, er avgjørelsen av saksomkostninger en sak for den nasjonale domstolen.

På dette grunnlag avgir

DOMSTOLEN,

som svar på spørsmålet som er forelagt av Oslo Byrett ved beslutning av 22 februar 2000, følgende rådgivende uttalelse:

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.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Avsagt i åpen rett i Luxembourg den 14 juli 2000.

Gunnar Selvik
Justissekretær

Thór Vilhjálmsson
President

REPORT FOR THE HEARING
in Case E-2/00
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 Oslo byrett (Oslo City Court) for an Advisory Opinion in the case pending before it between

Allied Colloids and Others

and

The Government of Norway, represented by the Ministry of Local Government and Regional Development

on the interpretation of the Agreement on the European Economic Area (hereinafter variously "EEA" and "EEA Agreement"), with particular reference to the following Acts:

– the Act referred to in Point 1 of Annex II Chapter XV (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, as amended, hereinafter the "Substances Directive");

– the Act referred to in Point 10 of Annex II Chapter XV (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, as amended, hereinafter the "Preparations Directive");

– 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

* The fourth indent of legislation at the top of page 2 and points 10, 39 and 85

1 OJ 1996 C 6, p. 7, 11.1.96.

RETTSMØTERAPPORT
i sak E-2/00
-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 Oslo byrett i saken for denne domstol mellom

Allied Colloids med flere

og

Den norske regjering, ved Kommunal- og regionaldepartementet

om tolkningen av Avtale om Det europeiske økonomiske samarbeidsområde (heretter enten "EØS" eller "EØS-avtalen") med særlig henvisning til følgende rettsakter:

– rettsakten som det er henvist til i punkt 1 av vedlegg II kapittel XV (rådsdirektiv 67/548/EØF av 27 juni 1967 om tilnærming av lover og forskrifter om klassifisering, emballering og merking av farlige stoffer, som endret, heretter "stoffdirektivet".)

– rettsakten som det er henvist til i punkt 10 av vedlegg II, kapittel XV (rådsdirektiv 88/179/EØF av 7 juni 1988 om tilnærming av medlemsstatenes lover og forskrifter om klassifisering, emballering og merking av farlige preparater, som endret, heretter "preparatdirektivet".)

– felleserklæring vedtatt på EØS-komiteens møte 22 juni 1995 om EØS-avtalens vedlegg II kapittel XV,[1] om bestemmelser om ny gjennomgåelse på området farlige stoffer, særlig tillegg II, som gir visse unntak for Norge

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[*] Avsnittene 10, 39 og 85.

[1] EFT nr C 6, 11.1.1996 s 7; EØS-tillegget nr 2, 11.1. 1996 s 23.

to that Joint Statement, setting up certain derogations concerning Norway, hereinafter the "Joint Statement of 1995";

– 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".

I. Introduction

1. By a reference dated 22 February 2000, registered at the Court on 25 February 2000, Oslo byrett made a Request for an Advisory Opinion in a case pending before it between Allied Colloids and Others (hereinafter the "Plaintiffs") and the Government of Norway, 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.

II. Legal background

3. The question submitted by the national court concerns the interpretation of various provisions of relevant EEA legislation.

4. The EEA Agreement 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."*

5. Article 2(1)(a) to (c) of the Substances Directive reads as follows:

> *"(a)"substances" means chemical elements and their compounds in the natural state or obtained by any production process, including any additive necessary to preserve the stability of the products and any impurity deriving from the process*

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2 OJ 1999 C 185, p. 6, 1.7.1999.

3 Annex I contains the List of Dangerous Substances.

(heretter "felleserklæringen av 1995").

– 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, særlig tillegg til felleserklæringen, som gir visse unntak for Norge2 (heretter "felleserklæringen av 1999").

I. Innledning

1. Ved en beslutning datert 22 februar 2000, mottatt ved Domstolen den 25 februar 2000, anmodet Oslo byrett om en rådgivende uttalelse i en sak innbrakt for denne mellom Allied Colloids med flere (heretter "saksøkerne") og Den norske regjering, ved Kommunal- og regionaldepartementet (heretter "saksøkte").

2. Saken for den nasjonale domstol gjelder spørsmålet om EØS-avtalen tillater saksøkte å 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.

II. Rettslig bakgrunn

3. Spørsmålet fra den nasjonale domstolen gjelder tolkningen av forskjellige bestemmelser i relevant EØS lovgivning.

4. 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."*

5. Artikkel 2 nr 1 bokstav a) til c) i stoffdirektivet lyder som følger:

> *"a) "stoffer", grunnstoffer og deres forbindelser, i naturlig tilstand eller fremstilt industrielt, herunder ethvert tilsetningsstoff som er nødvendig for å bevare produktets stabilitet, samt enhver urenhet som følge av fremstillingsprosessen,*

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2 EFT nr C, 185 1.7. 1999 s 6; EØS-tillegget nr 29, 1.7.1999 s 1.

used, but excluding any solvent which may be separated without affecting the stability of the substance or changing its composition.

(b)"preparations" means mixtures or solutions composed of two or more substances.

(c)"polymer" means a substance (...)".

6. Article 4 of the Substances Directive reads as follows:

"Classification

1. Substances shall be classified on the basis of their intrinsic properties according to the categories laid down in Article 2(2). In the classification of substances, impurities shall be taken into account as far as the concentration(s) of the latter exceed the concentration limits specified in paragraph 4 of this Article and in Article 3 of Directive 88/379/EEC.

2. The general principles of the classification and labelling of substances and preparations shall be applied according to the criteria in Annex VI, save where contrary requirements for dangerous preparations are specified in separate Directives.

3. Annex I contains the list of substances classified in accordance with the principles outlined in paragraphs 1 and 2, together with their harmonized classification and labelling. The decision to place a substance in Annex I together with the harmonized classification and labelling shall be taken in accordance with the procedure laid down in Article 29.

4. The dangerous substances listed in Annex I shall, where appropriate, be characterized by concentration limits or any other parameter enabling an assessment to be made of the health or environmental hazard of preparations containing the said dangerous substances or substances containing other dangerous substances as impurities."

7. Article 30 of the Substances Directive reads as follows:

"Free movement clause

Member States may not prohibit, restrict or impede the placing on the market of substances which comply with the requirements of this Directive, on grounds relating to notification, classification, packaging or labelling within the meaning of this Directive."

8. Section 1.7.2.1 of Annex VI to the Substances Directive regarding "[c]lassification of substances containing impurities, additives or individual constituents," states, in consonance with the above, that:

men med unntak av ethvert løsemiddel som kan utskilles uten å påvirke stoffets stabilitet eller endre dets sammensetning,

b) "preparater", blandinger eller løsninger som er sammensatt av to eller flere stoffer,

c) "polymer", et stoff (...)".

6. Artikkel 4 i stoffdirektivet lyder som følger:

"Klassifisering

1. Stoffer skal klassifiseres på grunnlag av deres stofflige egenskaper i henhold til kategoriene fastsatt i artikkel 2 nr. 2. Ved klassifisering av stoffer skal det tas hensyn til urenheter i den grad urenhetenes konsentrasjon(er) overstiger konsentrasjonsgrensene fastsatt i nr. 4 i denne artikkel og i artikkel 3 i direktiv 88/379/EØF.

2. De alminnelige prinsipper for klassifisering og merking av stoffer og preparater får anvendelse i henhold til kriteriene i vedlegg VI, med mindre det er fastsatt andre krav for farlige preparater i særskilte direktiver.

3. Vedlegg I inneholder listen over stoffer klassifisert i henhold til prinsippene i nr. 1 og 2, sammen med deres harmoniserte klassifikasjon og merking. Beslutningen om å plassere et stoff i vedlegg I sammen med den harmoniserte klassifikasjonen og merkingen skal treffes etter fremgangsmåten fastsatt i artikkel 29.

4. Farlige stoffer oppført i vedlegg I skal eventuelt karakteriseres ved konsentrasjonsgrensene eller et annet parameter som gjør det mulig å foreta en vurdering av helse– og miljøfarer ved preparater som inneholder nevnte farlige stoffer eller stoffer som inneholder andre farlige stoffer som urenheter."

7. Artikkel 30 i stoffdirektivet lyder som følger:

"Klausul om fri bevegelighet

Medlemsstatene kan ikke med begrunnelse i melding, klassifisering, emballering eller merking som definert i dette direktiv, forby, begrense eller hindre markedsføring av stoffer som oppfyller kravene i dette direktiv.."

8. Stoffdirektivets vedlegg VI, avsnitt 1.7.2.1 om "[k]lassificering af stoffer, som indeholder urenheder, tilsætningstoffer eller enkeltbestanddele,"[3] fastsetter i tråd med det ovenstående at:

[3] Teksten gjengis på dansk, siden vedlegg VI er ikke publisert i norsk oversettelse.

"Where impurities, additives or individual constituents of substances have been identified, they shall be taken into account if their concentration is greater than or equal to the limits specified:

- *0,1% for substances classified as … carcinogenic (category 1 or 2)…*

unless lower values have been specified in Annex I[3] to Directive 67/548/EEC."

9. Section 4.2.1 of Annex VI to the Substances Directive regarding criteria for classification reads as follows:

"4.2.1. Carcinogenic substances. For the purpose of classification and labelling, and having regard to the current state of knowledge, such substances are divided into three categories:

Category 1. Substances known to be carcinogenic to man. There is sufficient evidence to establish a causal association between human exposure to a substance and the development of cancer.

Category 2. Substances which should be regarded as if they are carcinogenic to man. There is sufficient evidence to provide a strong presumption that human exposure to a substance may result in the development of cancer, generally on the basis of:

- *appropriate long-term animal studies,*

- *other relevant information.*

Category 3. Substances which cause concern for man owing to possible carcinogenic effects but in respect of which the available information is not adequate for making a satisfactory assessment. There is some evidence from appropriate animal studies, but this is insufficient to place the substance in Category 2."

10. The relevant text of the Joint Statement of 1995 reads 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 July 1995, but with derogations in specific areas. These derogations are listed in Appendix II.*

"Såfremt urenheder, tilsætningsstoffer eller enkeltbestanddele i stoffer er blevet identificeret, skal der tages hensyn hertil, såfremt deres koncentration er større eller lig med de fastsatte koncentrationsgrænser:

- 0,1% for stoffer der klassificeres som (...) kategori 1 eller 2 kræftfremkallende(...)

med mindre der er fastsatt lavere værdier i bilag I[4] *til direktiv 67/548/EØF."*

9. Stoffdirektivets vedlegg VI, avsnitt 4.2.1 om kriterier for klassifisering lyder som følger:

"4.2.1. Kræftfremkaldende stoffer. Ved klassificering og etikettering inddeles disse stoffer under hensyntagen til den nuværende viden i tre kategorier:

Kategori 1. Stoffer, der vides at fremkalde kræft hos mennesket. Der foreligger tilstrækkelige beviser for en årsagssammenhæng mellem menneskets udsættelse for stoffet og udvikling af kræft.

Kategori 2. Stoffer, der bør anses for at fremkalde kræft hos mennesket. Der foreligger tilstrækkelige beviser til at nære stærk formodning om, at stoffets påvirkning af mennesker kan fremkalde kræft, generelt på grundlag af:

- egnede langtidsforsøg i dyr

- andre relevante oplysninger.

Kategori 3. Stoffer, der giver anledning til betænkelighed, da de muligvis kan fremkalde kræft hos mennesket, men for hvilke der ikke foreligger tilstrækkelige oplysninger til at foretage en tilfredsstillende vurdering. Der er visse tegn fra relevante dyreforsøg, men disse er utilstrækkelige til at placere dem i kategori 2."

10. Den relevante teksten av felleserklæringen av 1995 lyder som følger:

"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.

[4] Vedlegg I inneholder stofflisten.

The Contracting Parties take note of these conclusions and agree on the objective that the abovementioned Community acts[4] *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. (…)"* [footnote added]

The relevant parts of Annex (Appendix) II read as follows:

"The following provisions shall not apply to Norway:

1. As regards Council Directive 67/548/EEC of 27 June 1967 on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances:

(a) Article 30, in conjunction with Articles 4 and 5, with respect to:

(i) the requirements for the classification, labelling and/or specific concentration limits for the substances or groups of substances listed in Annex I to the Directive and shown in the following list. Norway may require the use of different classification, labelling and/or specific concentration limits for these substances. (...)

(ii) the criteria for classification and labelling of carcinogenic substances as given in Section 4.2.1 of Annex VI to the Directive. Norway may apply different criteria for classification, and different requirements for the application of certain R-phrases.

(b) Article 30 in conjunction with Articles 4 and 6, with respect to the requirements for the classification, labelling and/or specific concentration limits for the substances or groups of substances not listed in Annex I to the Directive and shown in the following list. Norway may require the use of classification, labelling and/or specific concentration limits for these substances;

(...)

2. As regards 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:

(...)

(c) Article 13, in conjunction with Articles 3 and 7, with respect to preparations containing substances as defined in points 1(a) to (d)."

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4 Directives 67/548/EEC and 88/379/EEC.

Avtalepartene merker seg dette og slutter seg til siktemålet om at ovennevnte fellesskapsrettsakter[5] *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." (Fotnote er lagt til).*

De relevante deler av tillegg II til felleserklæringen av 1995 lyder som følger:

"Følgende bestemmelser får ikke anvendelse for Norge:

1. Med hensyn til rådsdirektiv 67/548/EØF av 27. juni om tilnærming av lover og forskrifter om klassifisering, emballering og merking av farlige stoffer:

a) Artikkel 30, sammenholdt med artikkel 4 og 5, med hensyn til:

(i) krav til klassifisering, merking og/eller bestemte konsentrasjonsgrenser for stoffer eller grupper av stoffer oppført i direktivets vedlegg I og vist i listen nedenfor. Norge kan kreve bruk av en annen klassifisering og merking og/ eller andre konsentrasjonsgrenser for disse stoffene; (...)

(ii) kriteriene for klassifisering og merking av kreftfremkallende stoffer som nevnt i direktivets vedlegg VI avsnitt 4.2.1. Norge kan anvende andre kriterier for klassifisering og andre krav til bruk av visse R-setninger.

(b) Artikkel 30, sammenholdt med artikkel 4 og 6, med hensyn til krav til klassifisering, merking og/ eller bestemte konsentrasjonsgrenser for stoffer eller grupper av stoffer som ikke er oppført i direktivets vedlegg I og er vist i listen nedenfor. Norge kan kreve klassifisering, merking og/eller bestemte konsentrasjonsgrenser for disse stoffene;

(...)

2. Med hensyn til rådsdirektiv 88/379/EØF av 7. juni 1988 om tilnærming av medlemsstatenes lover og forskrifter om klassifisering, emballering og merking av farlige preparater:

(...)

c) Artikkel 13, sammenholdt med artikkel 3 og 7, med hensyn til preparater som inneholder stoffer angitt under nr. 1 bokstav a) til d) ovenfor."

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5 Direktivene 67/548/EØF og 88/379/EØF.

The relevant text of the Joint Statement of 1999 reads 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 areas as set out in its Appendix, the provisions shall not apply to it unless the EEA Joint Committee agrees on another solution. (…)"

The relevant parts of the Annex to the Joint Statement of 1999 read as follows:

"The following provisions shall not apply to Norway:

1. As regards Council Directive 67/548/EEC of 27 June on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances:

(a) Article 30, in conjunction with Articles 4 and 5, with respect to:

(i) the requirements for the classification, labelling and/or specific concentration limits for the substances or groups of substances listed in Annex I to the Directive and shown in the following list. Norway may require the use of different classification, labelling and/or specific concentration limits for these substances; (...)

(ii) the criteria for classification and labelling of carcinogenic substances as given in Section 4.2.1 of Annex VI to the Directive. Norway may apply different criteria for classification, and provisions regarding impurities, additives or individual constituents in Section 1.7.2.1 of Annex VI to the Directive with regard to substances classified as carcinogens, and different requirements for the application of certain R-phrases.

(b) Article 30 in conjunction with Articles 4 and 6, with respect to the requirements for the classification, labelling and/or specific concentration limits for the substances or groups of substances not listed in Annex I to the Directive and shown in the following list. Norway may require the use of classification, labelling and/or specific concentration limits for these substances; (...)

(...)

2. As regards 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:

Den relevante teksten av felleserklæringen av 1999 lyder som følger:

"Norge har på grunnlag av den vurdering som har funnet sted, besluttet å godta det eksisterende regelverk i Fellesskapet med virkning fra 1. januar 1999, 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 1. januar 2001. En ny vurdering 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."

De relevante deler av tillegget til felleserklæringen av 1999 lyder som følger:

"Følgende bestemmelser får ikke anvendelse for Norge:

1. Med hensyn til rådsdirektiv 67/548/EØF av 27. juni om tilnærming av lover og forskrifter om klassifisering, emballering og merking av farlige stoffer:

(a) Artikkel 30, sammenholdt med artikkel 4 og 5, med hensyn til:

(i) krav til klassifisering, merking og/eller bestemte konsentrasjonsgrenser for stoffer eller grupper av stoffer oppført i direktivets vedlegg I og vist i listen nedenfor. Norge kan kreve bruk av en annen klassifisering og merking og/ eller andre konsentrasjonsgrenser for disse stoffene; (...)

(ii) kriteriene for klassifisering og merking av kreftfremkallende stoffer som nevnt i direktivets vedlegg VI avsnitt 4.2.1. Norge kan anvende andre kriterier for klassifisering og andre bestemmelser for urenheter, tilsetningsstoffer eller enkeltstående bestanddeler i direktivets vedlegg VI avsnitt 1.7.2.1 med hensyn til stoffer klassifisert som kreftfremkallende, og andre krav til bruk av visse R-setninger.

(b) Artikkel 30, sammenholdt med artikkel 4 og 6, med hensyn til krav til klassifisering, merking og/ eller bestemte konsentrasjonsgrenser for stoffer eller grupper av stoffer som ikke er oppført i direktivets vedlegg I og er vist i listen nedenfor. Norge kan kreve klassifisering, merking og/eller bestemte konsentrasjonsgrenser for disse stoffene; (...)

(...)

2. Med hensyn til rådsdirektiv 88/379/EØF av 7. juni 1988 om tilnærming av medlemsstatenes lover og forskrifter om klassifisering, emballering og merking av farlige preparater:

(...)

(c) Article 13, in conjunction with Articles 3 and 7, with respect to preparations containing substances as defined in points 1(a) to (d).”

11. Article 3(5)(j) of the Preparations Directive states that preparations shall be regarded as carcinogenic:

“if they contain a substance producing such effects…in a concentration equal to or exceeding:

- either the concentration specified in Annex I to Directive 67/548/EEC for the substance under consideration, or

- the concentration specified at point 6 of Annex I (Table VI) to this Directive where the substance or substances do not appear in Annex I to Directive 67/548/EEC or appear in it without concentration limits.”

12. Point 6 of Annex I (Table VI) to the Preparations Directive sets out a concentration limit of minimum 0.1% for carcinogenic substances in category 1 or 2 which are not listed in Annex I to the Substances Directive with a specific concentration limit.

13. The contested Norwegian legislation in the case before the national court is Regulation No. 996 of 21 August 1997 relating to the classification, labelling, etc. of dangerous chemicals, and Regulation No. 1497 of 23 December 1997 relating to criteria for the classification of dangerous chemicals.

14. Section 3 of Regulation No. 996 of 21 August 1997 relating to the classification, labelling etc. of dangerous chemicals contains the following definitions:

“Substances: chemical elements and their compounds in the natural state or obtained by any production process. This also includes any additive necessary to preserve the stability of the products and any impurity deriving from the process used, but excluding any solvent which may be separated without affecting the stability of the substance or changing its composition.

Preparations: solutions or solid, liquid or gaseous mixtures composed of two or more substances.”

15. Section 4 of the same regulation states:

“Substances shall be classified on the basis of their intrinsic properties, and shall be placed in one or more of the danger categories laid down in section 6.”

16. Section 18 of Regulation No. 1497 of 23 December 1997 relating to criteria for the classification of dangerous chemicals provides with respect to the “Classification of substances containing impurities and/or additives”:

(...)

c) Artikkel 13, sammenholdt med artikkel 3 og 7, med hensyn til preparater som inneholder stoffer angitt under nr. 1 bokstav a) til d) ovenfor."

11. Preparatdirektivets artikkel 3 nr 5 bokstav j) slår fast at preparater skal betraktes som kreftfremkallende;

"når de inneholder et stoff som fremkaller slik virkning (...) i en konsentrasjon som er lik eller overskrider:

- enten konsentrasjonen fastsatt i vedlegg I til direktiv 67/548/EØF for stoffet det gjelder, eller

- konsentrasjonen fastsatt i nr. 6 i vedlegg I (tabell VI) til dette direktiv når stoffet ikke er oppført i vedlegg I til direktiv 67/548/EØF eller er oppført i dette uten konsentrasjonsgrenser."

12. Preparatdirektivets vedlegg I nr 6 tabell VI angir en konsentrasjonsgrense på minimum 0,1% for kreftfremkallende stoffer i kategori 1 eller 2, som ikke er oppført i stoffdirektivets vedlegg I med en særlig konsentrasjonsgrense.

13. Det omstridte norske regelverket i saken som står for den nasjonale domstol er forskrift av 21 august 1997 nr 996 om klassifisering, merking m.v. av farlige kjemikalier, og forskrift av 23 desember 1997 nr 1497 om kriterier for klassifisering av farlige kjemikalier.

14. Forskrift av 21 august 1997 nr 996 om klassifisering, merking m.v. av farlige kjemikalier § 3, inneholder følgende definisjoner:

"Kjemiske stoffer: Grunnstoffer og deres kjemiske forbindelser med andre grunnstoffer, slik de forekommer naturlig eller industrielt fremstilt. Dette omfatter også de tilsetningsstoffer som er nødvendig for å bevare stoffenes stabilitet, samt slike urenheter som oppstår fra den produksjonsprosess som benyttes, unntatt løsemidler som kan utskilles uten at det påvirker stoffets stabilitet eller endrer dets sammensetning.

Stoffblandinger: Oppløsninger eller faste, flytende og gassformige blandinger som består av to eller flere kjemiske stoffer."

15. Samme forskrifts § 4 lyder som følger:

"Stoffer skal klassifiseres på grunnlag av deres iboende egenskaper, og plasseres i en eller flere av fareklassene som er angitt i §6."

16. Forskrift av 23 desember 1997 nr 1497 om kriterier for klassifisering av farlige stoffer § 18 bestemmer med hensyn til "Klassifisering av stoffer som inneholder urenheter, og/eller tilsetningsstoffer";

"With the exception of the substances appearing in the List of Dangerous Substances, classification with respect to health hazards of substances containing impurities, additives or individual constituents shall be carried out in the same way as for preparations (…)".

17. Section 24 of the same regulation provides with respect to "Classification of substances and preparations with respect to carcinogenic properties" in Point 1, second and third paragraphs:

"The classification of carcinogenic substances is divided into two steps: firstly, a substance is evaluated to determine whether or not it is carcinogenic on the basis of any results available from studies, and secondly the dose-response relationship is assessed to decide the potency of the substance as a carcinogen. On the basis of these results, carcinogenic substances are classified in three groups (K1, K2 and K3).

Preparations are classified solely on the basis of the concentrations of their constituents and the classification of these. Tests of preparations on animals may not be used as a basis for classification."

18. With respect to the classification of preparations, Section 24, Point 3 states:

"Classification of preparations with respect to carcinogenic effects shall always be based on the classification of their constituent substances in accordance with subsection 2 above and their concentrations in the preparation.

Carcinogenic substances shall be taken into account in the classification of a preparation if their concentrations in the preparation are equal to or greater than:

- *0.01 % for substances classified in group K1*
- *0.1 % for substances classified in group K2*
- *1.0% for substances classified in group K3*

unless specific concentration limits are given in the List of Dangerous Substances."

III. Facts and procedure

19. Polyacrylamide is a chemical substance produced through a polymerization of the substance acrylamide. The presence of acrylamide in polyacrylamide is residual from the chemical production of polyacrylamide. Both the European Union (EU) and Norway consider acrylamide to be a carcinogenic substance.

"Med unntak av de stoffer som er oppført i Stofflisten, skal helsefareklassifisering av stoffer med urenheter, tilsetningsstoffer eller enkeltbestanddeler utføres som for stoffblandinger(…)".

17. Samme forskrifts § 24 bestemmer med hensyn til "[k]lassifisering av stoffer og stoffblandinger m.h.t. kreftfremkallende egenskaper " i punkt 1 andre og tredje ledd:

"Ved klassifiseringen av kreftfremkallende stoffer skal man først vurdere om et stoff er kreftfremkallende eller ikke ut fra foreliggende undersøkelser, og deretter vurderer de foreliggende dose-respons-forhold for å bestemme hvor sterkt kreftfremkallende stoffet er. Ut fra disse resultatene klassifiseres kreftfremkallende stoffer i tre grupper (K1, K2, K3).

Stoffblandinger klassifiseres utelukkende ut fra de inngående stoffenes konsentrasjon i stoffblandingen og deres klassifisering. Testing av stoffblandinger i dyreforsøk kan ikke brukes som grunnlag for klassifisering."

18. Med hensyn til klassifisering av preparater lyder § 24 nr 3:

"Klassifisering for kreftfare ved stoffblandinger skal alltid gjøres ut fra de inngående stoffenes klassifisering i samsvar med pkt. 2 ovenfor og deres konsentrasjon i stoffblandingen.

Kreftfremkallende stoffer skal tas med ved klassifisering av stoffblandinger dersom de inngår i stoffblandingen i konsentrasjon som er lik eller større enn:

- *0,01% for stoffer klassifisert i gruppe K1*
- *0,1% for stoffer klassifisert i gruppe K2*
- *1,0% for stoffer klassifisert i gruppe K3*

dersom ikke spesifikke klassifiseringsgrenser er angitt i Stofflisten."

III. Faktum og prosedyre

19. Polyakrylamid er et kjemisk stoff som fremstilles ved en polymerisering av stoffet akrylamid. Forekomsten av akrylamid i polyakrylamid er en overlevning fra den kjemiske fremstillingen av polyakrylamid. Akrylamid er ansett for å være et kreftfremkallende stoff både i den Europeiske Union (EU) og i Norge.

20. Polyacrylamide is produced and distributed all over the world and has numerous areas of application. It is used in particular in the process industries, mainly in the cleansing of industrial and municipal wastewater and in the wood-processing industry. In Europe, the product is also used for the purification of drinking water.

21. The plaintiffs Allied Colloids, BASF Aktiengesellschaft, CYTEC Industries B.V., Nalco Chemical B.V., SNF Floerger and Betz Dearborn Europe NV are manufacturers of polyacrylamide, whilst the plaintiffs Nalco Norge AS, Paus & Paus AS, Norsk Hydro and Dyno Oil Field Chemicals are importers and distributors of the product.

22. The Ministry of Local Government and Regional Development is responsible for the Directorate of Labour Inspection (hereinafter "the Labour Inspection"), which administers Chapter XIII of the Act relating to Worker Protection and Working Environment[5] (hereinafter "the Working Environment Act"). The Labour Inspection adopts *inter alia* administrative regulations and decisions concerning classification, labelling, etc. of dangerous chemicals under regulations adopted pursuant to *inter alia* Section 18(3) and Section 74(1), third paragraph of the Working Environment Act.

23. On 9 April 1997, the Labour Inspection ordered the importers of polyacrylamide to classify and label polyacrylamide products containing more than 0.01% by weight of the chemical substance acrylamide with a poison symbol and a text stating that the product may cause cancer. The deadline for compliance was 1 June 1997.

24. The order was contested by the Plaintiffs in a letter of 21 May 1997, in which they requested permission for deferral of compliance with the labelling order. The Labour Inspection granted permission for deferral of compliance by an order of 27 May 1997. On 19 August 1998, the Ministry of Local Government and Regional Development upheld the order of the Labour Inspection.

25. Subsequently, the Plaintiffs brought an action in Oslo byrett, requesting that the order of the Ministry of Local Government and Regional Development be declared null and void, on the grounds that the order is contrary to EEA law.

26. Contemporaneously, the Plaintiffs applied for an injunction to defer compliance with the order until such time as a final judgment had been rendered in the main proceedings. On 30 November 1998, Oslo byrett issued an interlocutory order rejecting the application on the grounds that it had not been demonstrated that the order was in breach of EEA law.

27. The Plaintiffs appealed the interlocutory order to Borgarting lagmannsrett (Borgarting Court of Appeal), which affirmed the lower court's decision by an

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[5] Act No. 4 of 4 February 1977 relating to Worker Protection and Working Environment.

20. Polyakrylamid produseres og omsettes over hele verden, og har en rekke bruksområder. Det benyttes særlig innenfor prosessindustrien, i hovedsak til rensing av industrielt og kommunalt avløpsvann samt i treforedlingsindustrien. I Europa benyttes produktet også til rensing av drikkevann.

21. Saksøkerne Allied Colloids, BASF Aktiengesellschaft, CYTEC Industries B.V, Nalco Chemical B.V, SNF Floerger og Betz Dearborn Europe NV er produsenter av polyakrylamid, mens saksøkerne Nalco Norge AS, Paus & Paus AS, Norsk Hydro og Dyno Oil Field Chemicals er importører og distributører av produktet.

22. Kommunal- og regionaldepartementet er ansvarlig for Direktoratet for arbeidstilsynet (heretter "Arbeidstilsynet"), som forvalter kapittel XIII i lov om arbeidervern og arbeidsmiljø mv[6] (heretter "arbeidsmiljøloven"). Arbeidstilsynet treffer blant annet vedtak om klassifisering, merking mv av farlige kjemikalier i henhold til forskrifter fastsatt med hjemmel i blant annet arbeidsmiljøloven § 18 nr 3 og § 74 nr 1 tredje ledd.

23. Arbeidstilsynet vedtok den 9 april 1997 et pålegg til importørene av polyakrylamid om å klassifisere og merke polyakrylamid produkter som inneholder mer enn 0,01 vektprosent av det kjemiske stoffet akrylamid. Frist for gjennomføring var 1 juni 1997.

24. Vedtaket ble påklaget av saksøkerne ved brev av 21 mai 1997, med begjæring om oppsettende virkning på gjennomføringen av merkevedtaket. Arbeidstilsynet innvilget oppsettende virkning på vedtaket den 27 mai 1997. Kommunal- og regionaldepartementet opprettholdt Arbeidstilsynets vedtak den 19 august 1998.

25. Saksøkerne anla etter dette søksmål ved Oslo byrett med påstand om at Kommunal- og regionaldepartementets vedtak skulle kjennes ugyldig, på det grunnlag at vedtaket er uforenlig med EØS-retten.

26. Saksøkerne krevet samtidig med saksanlegget at det ved midlertidig forføyning skulle gis oppsettende virkning med gjennomføringen av pålegget frem til hovedsaken var rettskraftig avgjort. Oslo byrett avsa den 30 november 1998 kjennelse som avviste kravet på det grunnlag at det ikke var sannsynliggjort at vedtaket var i strid med EØS-retten.

27. Saksøkerne påkjærte avgjørelsen til Borgarting lagmannsrett, som stadfestet byrettens avgjørelse ved kjennelse den 25 mars 1999. Lagmannsretten

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6 Lov av 4 februar 1977 nr 4 om arbeidervern og arbeidsmiljø m.v.

order dated 25 March 1999. However, the appeal court did not deal with the issue of EEA law in the case. It found that there was no danger of irreparable harm and that, therefore, it was not necessary to decide the question of law. This second order was not appealed.

28. While the above proceedings have run their course, the Labour Inspection has re-issued its labelling order, first with a compliance deadline of 18 May 1999 and later with a deadline of 1 July 1999, subject to a coercive fine.

29. The above-mentioned 1997 regulations entered into force on 1 January 1998, which means that the legal basis for the labelling order was an earlier regulation of 1993. However, there is no material difference between the 1993 and 1997 regulations in so far as the disputed points are concerned. The parties are, therefore, in agreement that a judicial review of the order can take place with respect to the 1997 regulations.

30. Against this background, Oslo byrett decided to submit a request for an Advisory Opinion to the EFTA Court.

IV. Question

The following question was referred 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?**

V. Written Observations

31. 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 Plaintiffs, Allied Colloids and Others, represented by Counsel Wilhelm Matheson, Wiersholm, Mellbye & Bech;

– the Defendant, The Government of Norway, represented by the Ministry of Local Government and Regional Development, represented by Counsel

tok imidlertid ikke stilling til det EØS-rettslige spørsmålet i saken. Lagmannsretten konstaterte at det ikke forelå sikringsgrunn, og at det derfor var unødvendig å ta stilling til det materielle rettsspørsmålet. Denne andre kjennelsen ble ikke påkjært.

28. Mens saken verserte gjentok Arbeidstilsynet pålegget om merking med gjennomføringsfrist til 18 mai 1999, og senere med en tvangsmulktbelagt frist til 1 juli 1999.

29. De ovenfor nevnte forskriftene fra 1997 trådte i kraft 1 januar 1998, som betyr at det rettslige grunnlaget for merkepålegget var en tidligere forskrift fra 1993. Det er imidlertid ingen innholdsmessig forskjell mellom 1993- og 1997-forskriftene når det gjelder de omstridte punkter. Det er derfor enighet mellom partene om at en prøving av påleggets lovlighet kan finne sted i forhold til 1997-forskriftene.

30. På denne bakgrunn har Oslo byrett besluttet å anmode om en rådgivende uttalelse fra EFTA-domstolen.

IV. Spørsmål

Følgende spørsmål ble forelagt 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?**

V. Skriftlige saksfremstillinger

31. I medhold av Vedtektene for EFTA-domstolen artikkel 20 og Rettergangsordningen artikkel 97, er skriftlige saksfremstillinger mottatt fra:

– saksøkerne, Allied Colloids med flere, representert ved advokat Wilhelm Matheson, Advokatfirmaet Wiersholm, Mellbye & Bech;

– saksøkte, Den norske regjering, ved Kommunal- og regionaldepartementet, representert ved advokat Hanne Bjurstrøm og

Hanne Bjurstrøm and Counsel Morten Goller, Office of the Attorney General (Civil Affairs);

– the Government of Iceland, represented by Högni S. Kristjánsson, Legal Officer, Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Anne-Lise H. Rolland, Officer, Legal & Executive Affairs, acting as Agent;

– the Commission of the European Communities, represented by Richard B. Wainwright, Principal Legal Adviser and Lena Ström, Legal Adviser, acting as Agents.

Allied Colloids and Others

32. The Plaintiffs note that Point 1(a)(ii) of the Joint Statement of 1999 exempts Norway from having to comply with the requirement for the classification and labelling of carcinogenic substances as set out in Section 4.2.1 of Annex VI to the Substances Directive. The provision is not only a statement of the inapplicability of certain provisions of the Directive, but also an indication of the lawful scope of differences in national regulation in the area.

33. The Plaintiffs point out several grounds on which Norway is precluded from imposing a labelling requirement for polyacrylamide that contains a concentration of under 0.1% of the residual substance acrylamide.

34. Firstly, it is important to take into consideration that, unlike Point 1(a)(i), which allows the use of "specific concentration limits", Point 1(a)(ii) only subjects "classification and labelling" to requirements which are different from those of the Directive. A comparison of the wording of Points (i) and (ii) shows that the possibility of applying different requirements for classification and labelling does not allow room for applying different *concentration limits* which have an impact on the classification.[6] If this had been the intention of the drafters, it would not have been necessary to refer specifically to the alteration of concentration limits in Point 1(a)(i).

35. Secondly, this interpretation is supported by the amplification to the same effect in Point 1(b) which, unlike Point 1(a)(ii), also distinguishes between different classification, labelling and specific concentration limits.

36. Thirdly, prior to the Joint Statement of 1999, the exemption was limited to the application of criteria for classification of carcinogens which differ from those set out in Section 4.2.1 of the Directive, and from requirements for the application of certain R-phrases. In the view of the Plaintiffs, it is obvious that

[6] Reference is made to Article 4(1) and (4) of the Substances Directive.

advokat Morten Goller, Regjeringsadvokatens kontor;

– Den islandske regjering, representert ved Högni S. Kristjánsson, juridisk saksbehandler, Utenriksdepartementet, som partsrepresentant;

– EFTAs overvåkningsorgan, representert ved Anne-Lise H. Rolland, saksbehandler, avdeling for juridiske saker og eksekutivsaker, som partsrepresentant;

– Kommisjonen for De europeiske fellesskap, representert ved Richard B. Wainwright, førsterådgiver og Lena Ström, juridisk rådgiver ved Kommisjonen, som partsrepresentanter.

Allied Colloids med flere

32. Saksøkerne bemerker at felleserklæringen av 1999 punkt 1 bokstav a) nr ii), fritar Norge fra å måtte følge de kravene til klassifisering og merking av kreftfremkallende stoffer som er gitt i stoffdirektivet vedlegg VI, avsnitt 4.2.1. Bestemmelsen er ikke bare et uttrykk for at visse av direktivets bestemmelser er uanvendelige, men også en angivelse av hva som er det tillatte avvik for nasjonale forskrifter på området.

33. Saksøkerne peker på flere grunner for hvorfor unntaket ikke gir Norge adgang til å anvende et merkekrav for polyakrylamid som inneholder en konsentrasjon av reststoffet akrylamid som er under 0,1%.

34. For det første er det viktig å ta hensyn til at, i motsetning til punkt 1 bokstav a) nr i), som gir adgang til bruk av "andre konsentrasjonsgrenser", kan bare "klassifisering og merking" i følge punkt 1 bokstav a) nr ii) være gjenstand for andre krav enn det som følger av direktivet. En sammenligning av ordlyden i punktene i) og ii) viser at muligheten for å anvende forskjellige vilkår for klassifisering og merking, ikke er vid nok til å omfatte adgang til å anvende forskjellige konsentrasjonsgrenser med virkning på klassifiseringen.[7] Hvis dette hadde vært forhandlernes mening, hadde det ikke vært nødvendig å henvise særskilt til bruken av andre konsentrasjonsgrenser i punkt 1 bokstav a) nr i).

35. For det andre understøttes denne tolkningen av den lignende poengteringen i punkt 1 bokstav b), som til forskjell fra punkt 1 bokstav a) nr ii) også sondrer mellom fravikende klassifisering, merking og andre konsentrasjonsgrenser.

36. For det tredje var unntaket før felleserklæringen av 1999 begrenset til anvendelsen av kriterier for klassifisering av kreftfremkallende stoffer som er avvikende fra de som er angitt i direktivets avsnitt 4.2.1, og fra andre krav til bruk av visse R-setninger. Etter saksøkernes mening er det åpenbart at

[7] Det henvises til stoffdirektivets artikkel 4 nr 1) og nr 4).

Point 1(a)(ii) of the Joint Statement of 1995 did not give Norway the latitude to maintain concentration limits other than those following from the Preparations Directive. It is not disputed that the wording of the Joint Statement of 1995 has been amended. It has, however, never been demonstrated that the purpose was to alter the meaning of the provision. If the intention was to make way for other concentration limits for carcinogenic impurities etc., reference should have been made to the basic provision in Article 3(5)(j) of the Preparations Directive. This is the only provision relevant to the classification of carcinogens pursuant to Article 4(1) and (4) of the Substances Directive, and is only reflected in the subordinated provision in Section 1.7.2.1 of Annex VI to the Substances Directive.

37. As to the applicability of Point 2(c), which makes a derogation from *inter alia* Article 3 of the Preparations Directive, to polyacrylamide, the Plaintiffs argue that this substance is not "defined in Points 1(a) to (d)" within the meaning of that provision. The substance is not listed in any of the derogations in Points 1(a)(i) or (b) to (d). Point 1(a)(ii), however, encompasses "carcinogenic substances as given in Section 4.2.1 of Annex VI to the [Substances] Directive". It is the opinion of the Plaintiffs that, in light of the vagueness of this passage compared to the preciseness of Points 1(a)(i), 1(b) and 1(d), a narrow interpretation is necessary and that, consequently, Point 1(a)(ii) does not suffice as a definition of "substances".

38. In support of this interpretation, the Plaintiffs argue that the reference to the substances listed in Points 1(a) and 1(b) is necessary due to the interrelation between the Substances Directive and the Preparations Directive. The references to Points 1(c) and 1(d) have to be considered as a basis for applying the differing labelling provisions on preparations as well.

39. In support of such a narrow interpretation, the Plaintiffs point out that if Norway could decide on a different concentration limit for any carcinogenic substance appearing in the List of Substances, in addition to the other specially listed substances (which may also be classified as carcinogens, see e.g. the Norwegian classification of Ethyl acrylate and Trichlorometan in Norway's list of Substances), then the power to derogate would be extremely broad indeed. This would obviously be incompatible with the Joint Statement of 1999, which permits derogations only under defined circumstances. Additionally, if the derogation were to be so broad, it would be difficult to understand why the Preparations Directive was to apply to Norway.

40. The Plaintiffs argue that any different national legislation on the subject-matter would restrict the free movement of chemicals which fulfils the harmonized requirements as set out in the different directives. The free movement of goods is one of the four freedoms contained in the EEA Agreement and is explicitly provided for in Article 11 EEA. It is a general interpretation principle of EEA law that preference should be given to the interpretation that

felleserklæringen av 1995 punkt 1 bokstav a) nr ii) ikke gav Norge adgang til å introdusere andre konsentrasjonsgrenser enn de som følger av preparatdirektivet. Det er uomtvistet at ordlyden i felleserklæringen av 1995 har blitt endret. Det er imidlertid aldri påvist at formålet var å endre bestemmelsens innhold. Hvis meningen var å åpne for andre konsentrasjonsgrenser for kreftfremkallende urenheter etc., burde det vært gjort en henvisning til den grunnleggende bestemmelsen i preparatdirektivets artikkel 3 nr 5 bokstav j). Dette er den eneste bestemmelsen som er relevant for klassifiseringen av kreftfremkallende stoffer i henhold til stoffdirektivets artikkel 4 nr 1 og nr 4, og er bare avspeilet i den underordnede bestemmelsen i stoffdirektivets vedlegg VI, avsnitt 1.7.2.1.

37. Med hensyn til hvorvidt punkt 2 bokstav c), som gjør unntak fra blant annet preparatdirektivets artikkel 3, blir å anvende for polyakrylamid, argumenterer saksøkerne med at dette stoffet ikke er "angitt under nr. 1 bokstav a) til d)" i denne bestemmelsens betydning. Stoffet er ikke opplistet i noen av unntakets punkter 1 bokstav a) nr i) eller bokstav b) til d). Punkt 1 bokstav a) nr ii), omfatter imidlertid "kreftfremkallende stoffer som nevnt i [stoff]direktivets vedlegg VI avsnitt 4.2.1". Det er saksøkernes oppfatning at i lys av denne passusens vaghet sammenlignet med presisjonen i punktene 1 bokstav a) nr i), 1 bokstav b) og 1 bokstav d), er en snever tolkning nødvendig, og at punkt 1 bokstav a) nr ii) følgelig ikke utgjør en tilstrekkelig definisjon av "stoffer".

38. Til støtte for denne tolkningen argumenterer saksøkerne med at henvisningen til de opplistede stoffer i punktene 1 bokstav a) og 1 bokstav b) er nødvendig på grunn av sammenhengen mellom stoffdirektivet og preparatdirektivet. Henvisningen til punktene 1 bokstav c) og 1 bokstav d) må anses som et middel for å anvende avvikende merkebestemmelser også for preparater.

39. Til støtte for en slik snever tolkning påpeker saksøkerne at dersom Norge kunne fastsette en annen konsentrasjonsgrense for ethvert kreftfremkallende stoff som finnes på stofflisten, i tillegg til de andre særlig nevnte stoffer (som også kan klassifiseres som kreftfremkallende stoffer, se f eks den norske klassifisering av ethyl acrylat og trichlorometan i den norske stofflisten), så ville adgangen til å gjøre unntak bli ekstremt omfattende. Dette ville åpenbart være uforenlig med felleserklæringen av 1999, som tillater unntak kun i særlig angitte tilfeller. I tillegg, dersom unntaket skulle være så omfattende, ville det være vanskelig å forstå hvorfor preparatdirektivet skulle gjelde for Norge.

40. Saksøkerne anfører at enhver ulik nasjonal lovgivning på området vil begrense den frie bevegelighet av kjemikalier som oppfyller de kravene som er harmonisert i de ulike direktivene. Fri bevegelighet av varer er en av de fire friheter som omfattes av EØS-avtalen og er eksplisitt fastslått i artikkel 11 EØS. Det er et generelt tolkningsprinsipp i EØS-retten at det skal gis fortrinn til det tolkningsresultat som gjør bestemmelsen best forenlig med traktaten, fremfor det

renders the provision consistent with the Agreement, rather than the interpretation that leads to its being incompatible with the Agreement.[7] Any ambiguity in the Joint Statement of 1999 is subject to this interpretation principle, which must apply equally to exceptions to harmonized areas and to the provisions of the Agreement.

41. The Plaintiffs add that no papers have been produced demonstrating that the views of the Defendant are the Contracting Parties' joint views. Unilateral declarations of intention are not relevant for interpretative purposes.8

42. As to the question of whether the Plaintiffs' submissions will lead to a different regulation of deliberate additions of carcinogenic substances and of carcinogenic substances that turn out to be unavoidable impurities, the Plaintiffs argue that this will not be the case. The Plaintiffs refer to their previous argument and submit that no different concentration limits may be adopted with respect to substances which are not defined in Point 2(c). Thus, the concentration limit will remain the same regardless of whether the acrylamide is a deliberate addition or an unavoidable impurity.

43. The Plaintiffs propose that the question be answered as follows:

> *"The Joint Statement adopted at the meeting of the EEA Joint Committee of 22 June 1995 concerning Annex II Chapter VI, Annex II with subsequent amendments, to the EEA Agreement, does not 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%, see 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."*

The Government of Norway, represented by the Ministry of Local Government and Regional Development

44. It is the view of the Defendant that both the negotiation process and the information exchanged between Norway and the Commission, as well as the text of the Joint Statements, show that Norway is entitled to set a concentration limit for the presence of acrylamide in polyacrylamide which is different from the one applicable in the EU. The Defendant holds that it is Point 1(a)(ii), as it stands in the Joint Statement of 1999, which forms the legal basis for the Norwegian rules and the contested order.

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7 References are made to Case E-1/94 *Ravintoloitsijain Kunstannus Oy Restamark* [1994-1995] EFTA Court Report 15, paragraph 56; Case 46/76 *Bauhuis* v *Netherlands* [1977] ECR-5, paragraph 15; Case 252/83 *Commission* v *Belgium* [1986] ECR-3742, paragraph 12; and *EU Karnov* (sixth edition, 1999), at p. 1855.

8 Reference is made to Gulmann/Hagel-Særensen, *EU-ret* (third edition), at p. 159.

tolkningsresultat som leder til at den blir uforenlig med traktaten.[8] Enhver uklarhet i felleserklæringen av 1999 vil måtte løses etter dette tolkningsprinsipp, som må få tilsvarende anvendelse på unntak fra harmoniserte områder som fra traktatbestemmelsene.

41. Saksøkerne legger til at det ikke er blitt fremlagt dokumenter som viser at saksøktes oppfatning er avtalepartenes felles oppfatning. Ensidige intensjonserklæringer er ikke en relevant tolkningsfaktor.[9]

42. Til spørsmålet om hvorvidt saksøkernes anførsler vil føre til ulik regulering av bevisste tilsetninger av kreftfremkallende stoffer og kreftfremkallende stoffer som oppstår som en uunngåelig urenhet, hevder saksøkerne at dette ikke vil være tilfelle. Saksøkerne henviser til deres foregående argument og hevder at forskjellige konsentrasjonsgrenser ikke kan anvendes på stoffer som ikke er angitt i punkt 2 bokstav c). Derfor vil konsentrasjonsgrensen forbli den samme uansett om akrylamid er en bevisst tilsetning, eller en uunngåelig urenhet.

43. Saksøkerne foreslår spørsmålet besvart slik:

> *"Felleserklæringen til protokollen for EØS-komiteens møte av 22 juni 1995 om EØS-avtalens vedlegg II kapittel XV, tillegg II med senere endringer, gir ikke Norge adgang til å innføre et merkekrav for polyakrylamid som inneholder en konsentrasjon av reststoffet akrylamid som er lavere enn 0,1 %, jf rådsdirektiv 67/548/EØF av 27 juni 1967 med senere endringer og rådsdirektiv 88/379/EØF av 7 juni 1988 med senere endringer."*

Den norske regjering, ved Kommunal- og regionaldepartementet

44. Det er saksøktes oppfatning at både forhandlingsprosessen, informasjonsutvekslingen mellom Norge og Kommisjonen for De europeiske fellesskap, og ordlyden i felleserklæringene viser at Norge er gitt adgang til å fastsette en annen konsentrasjonsgrense for innholdet av akrylamid i polyakrylamid, enn den som gjelder i EU. Saksøkte mener at det er punkt 1 bokstav a) nr ii) i felleserklæringen av 1999, som utgjør det rettslige grunnlag for de norske reglene og det omstridte vedtaket.

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8 Det henvises til sak E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Court Report 15 premiss 56, sak 46/76 *Bauhuis* v *Netherlands* [1977] ECR-5 premiss 15, sak 252/83 *Commission* v *Denmark* [1986] ECR-3713 premiss 15 og *EU Karnov* (6. utgave, 1999) s. 1855.

9 Det henvises til Gulman/Hagel-Sørensen, *EU-ret* (3. utgave), s 159.

45. The Defendant is of the view that the derogation in Point 1(a)(ii) is to be regarded as an umbrella provision that grants Norway a derogation in relation to all substances characterized as carcinogenic, cf. Section 4.2.1 of Annex VI to the Substances Directive. This derogation gives Norway the power to have a system of classification different from the one used in the EU, with the consequence that Norway may classify substances as carcinogenic even if they are not classified as such in the EU.

46. The Defendant notes that the wording of the provision gives Norway a derogation for "the criteria for classification and labelling of carcinogenic substances", without explicitly mentioning "concentration limits". This does not, however, prevent Norway from having its stringent concentration limit for substances containing high-potency carcinogenic impurities. Such an interpretation would be overly narrow, as account must also be taken of both the connection between the derogations in the Joint Statement of 1999 and the way it is structured. Furthermore, importance must be attached to the connection between the EU Substances Directive and Preparations Directive and the respective classification systems in the EU and Norway.

47. Point 1(a)(ii) is a derogation that refers exclusively to the Substances Directive. This Directive contains the specific concentration limits, whereas the Preparations Directive contains the general concentration limits. Norway has been granted a derogation for four specific substances, which appear in the Substances Directive with specific concentration limits, cf. Point 1(a)(i) of the Annex.

48. Otherwise, there are no provisions in the Substances Directive regarding concentration limits for substances. The reason for this is that substances, cf. Article 2(1)(a) of the Substances Directive, are by definition pure substances, and it is thus not relevant to apply concentration limits in respect of them.

49. The need for concentration limits arises only when the carcinogenic substances occur together with other substances in some form of mixture, and then in order to establish a "cut-off point" at which the preparation is to be classified, on the basis of the classification of the carcinogenic substance.[9]

50. Accordingly, acrylamide, which is not shown with a specific concentration limit on the List of Dangerous Substances, is to be classified on the basis of the general concentration limit in the Preparations Directive.[10]

51. Norway has a derogation from this limit for preparations containing carcinogenic substances which are specified under Point 1(a) to (d) of the Joint Statement of 1999. The Defendant points out that polyacrylamide contains the

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[9] Reference is made to Article 3 of the Preparations Directive.

[10] Reference is made to Point 2(c) of the Annex to the Joint Statement of 1999.

45. Saksøkte mener at unntaket i punkt 1 bokstav a) nr ii) er å anse som en samlebestemmelse som gir Norge et unntak for alle stoffer som kan karakteriseres som kreftfremkallende, jf stoffdirektivets Vedlegg VI, avsnitt 4.2.1. Dette unntaket gir Norge adgang til å ha et ulikt system for klassifisering i forhold til det som brukes i EU, med den konsekvens at Norge kan klassifisere stoffer som kreftfremkallende selv om de ikke er klassifisert slik i EU.

46. Saksøkte påpeker at bestemmelsens ordlyd gir Norge et unntak for "kriteriene for klassifisering og merking av kreftfremkallende stoffer" uten at den eksplisitt nevner "konsentrasjonsgrenser". Dette forhindrer imidlertid ikke Norge fra å ha sine strenge konsentrasjonsgrenser for stoffer som inneholder høypotente kreftfremkallende urenheter. En slik fortolkning vil være altfor snever, siden både sammenhengen mellom unntakene i felleserklæringen av 1999 og måten den er strukturert på må tas i betraktning. Videre må sammenhengen i EU mellom stoffdirektivet og preparatdirektivet, og de respektive klassifiseringssystemene i EU og Norge vektlegges.

47. Punkt 1 bokstav a) nr ii) er et unntak som bare angår stoffdirektivet. Dette direktivet inneholder særlige konsentrasjonsgrenser, mens preparatdirektivet inneholder de generelle konsentrasjonsgrensene. Norge er gitt et unntak for fire bestemte stoffer, som i stoffdirektivet er oppført med særlige konsentrasjonsgrenser, jf vedleggets punkt 1 bokstav a) nr i).

48. Forøvrig er det ingen bestemmelser i stoffdirektivet som angår konsentrasjonsgrenser for stoffer. Grunnen til dette er at stoffer, jf stoffdirektivets artikkel 2 nr 1 bokstav a) per definisjon er rene stoffer, og således er det ikke aktuelt å anvende konsentrasjonsgrenser i forhold til dem.

49. Behovet for konsentrasjonsgrenser oppstår bare når de kreftfremkallende stoffene opptrer sammen med andre stoffer i en form for blanding, og da for å etablere et skjæringspunkt for å klassifisere et preparat på grunnlag av klassifiseringen av det kreftfremkallende stoffet.[10]

50. Følgelig skal akrylamid, som ikke er oppført med en særlig konsentrasjonsgrense i stofflisten, klassifiseres på grunnlag av den generelle konsentrasjonsgrensen i preparatdirektivet.[11]

51. Norge har et unntak fra denne grensen for preparater som inneholder kreftfremkallende stoffer som er angitt under felleserklæringen av 1999 punkt 1 bokstav a) til d). Saksøkte påpeker at polyakrylamid inneholder urenheten

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[10] Det henvises til preparatdirektivets artikkel 3.

[11] Det henvises til tillegg til felleserklæringen av 1999 punkt 2 bokstav c).

impurity acrylamide, which is a substance referred to under Point 1(a)(ii) of the derogation.

52. Since under Point 2(c) Norway may prescribe a more stringent concentration limit than the EU limit of 0.1% set out in the Preparations Directive, Norway must be allowed to apply different rules for the classification and labelling of both carcinogenic preparations and substances, including acrylamide.

53. The Defendant is of the view that Point 1(a)(ii) must be interpreted in conjunction with Point 2(c), so as to give equal treatment to preparations with acrylamide deliberately added and substances where acrylamide occurs as an unintended result of the production process.

54. The Defendant argues that an attempt is made in the directives to achieve this uniform treatment and that there would be little consistency between the rules if substances containing impurities were to be treated differently from preparations containing deliberately-added substances. Moreover, there are no health-related reasons to differentiate between concentration limits in this context.

55. In addition to being illogical, applying different concentration limits for substances or substances with impurities and preparations would also be at variance with both the EU and the Norwegian systems for classifying carcinogenic chemicals. Consequently, the derogation in Point 1(a)(ii) of the Annex to the Joint Statement of 1999 must mean that Norway may derogate from the rules governing the classification of substances that contain impurities.[11]

56. The Defendant goes on to point out that the Joint Statement of 1999 refers to Section 1.7.2.1 of Annex VI to the Substances Directive and not to Article 3(5)(j) of the Preparations Directive. This reference was added to the Joint Statement of 1999 as a more precise specification of the scope of the derogation.

57. The 1999 derogation is worded in general terms: Norway has a derogation with respect to “provisions regarding impurities”. This supports the proposition that the derogation in respect of impurities is a general one, i.e. it is not limited to classification, meaning that it also covers provisions regarding concentration limits. Referring to the above arguments concerning equal treatment of deliberately-added acrylamide and acrylamide as an impurity, the Defendant maintains that there is nothing justifying a more narrow interpretation.

58. The specification, which does not imply any extension of the derogation on this point, contains special rules for the classification of substances that contain carcinogenic impurities. Under Section 1.7.2.1, impurities are to have the same concentration limit as preparations, which is 0.1% for carcinogenic

[11] Section 1.7.2.1 of Annex VI to the Substances Directive.

akrylamid, som er et stoff angitt under unntakets punkt 1 bokstav a) nr ii).

52. Siden Norge under punkt 2 bokstav c) kan foreskrive en strengere konsentrasjonsgrense enn EU grensen på 0,1% i preparatdirektivet, må Norge ha anledning til å anvende ulike regler for klassifisering og merking av både kreftfremkallende preparater og stoffer, inkludert akrylamid.

53. Saksøkte mener at punkt 1 bokstav a) nr ii) må tolkes i sammenheng med punkt 2 bokstav c), slik at det fører til lik behandling av preparater med bevisst tilsetning av akrylamid, og stoffer hvor akrylamid oppstår som et utilsiktet resultat av produksjonsprosessen.

54. Saksøkte hevder at slik ensartet behandling er forsøkt oppnådd i direktivene, og at det vil være liten sammenheng mellom reglene hvis stoffer som inneholder urenheter skulle behandles annerledes enn preparater med stoffer som er bevisst tilsatt. Det er heller ikke noen helsemessige grunner til å anvende ulike konsentrasjonsgrenser i denne sammenheng.

55. I tillegg til å være ulogisk, vil det å anvende ulike konsentrasjonsgrenser for stoffer eller stoffer med urenheter, og preparater også være i strid med både EUs og det norske systemet for klassifisering av kreftfremkallende kjemikalier. Derfor må unntaket i vedlegget til felleserklæringen av 1999 punkt 1 bokstav a) nr ii) bety at Norge kan gjøre unntak fra reglene om konsentrasjonsgrenser av stoffer som inneholder urenheter.[12]

56. Saksøkte påpeker videre at felleserklæringen av 1999 henviser til stoffdirektivets vedlegg VI, avsnitt 1.7.2.1 og ikke til preparatdirektivets artikkel 3 nr 5 bokstav j). Denne henvisningen ble lagt til i felleserklæringen av 1999 som en mer presis angivelse av unntakets virkeområde.

57. 1999-unntaket er formulert i generell språkbruk; Norge har et unntak fra "bestemmelser om urenheter". Dette støtter det synspunkt at unntaket for urenheter er generelt, dvs at det ikke er begrenset til klassifisering, noe som innebærer at det også omfatter bestemmelser om konsentrasjonsgrenser. Under henvisning til de ovenstående argumenter om lik behandling av bevisste tilsetninger av akrylamid og akrylamid som en urenhet, fastholder saksøkte at det ikke er noe som begrunner en mer snever tolkning.

58. Presiseringen, som ikke innebærer noen utvidelse av unntaket på dette punkt, inneholder særlige regler for klassifisering av stoffer som inneholder kreftfremkallende urenheter. I følge avsnitt 1.7.2.1, skal urenheter ha den samme konsentrasjonsgrense som preparater, som er 0,1% for kreftfremkallende stoffer i

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12 Stoffdirektivets vedlegg VI, avsnitt 1.7.2.1.

substances in EU categories 1 and 2.[12] The Defendant cannot see any grounds for maintaining that Norway is bound by this limit for impurities.

59. The rules in Section 1.7.2.1 of Annex VI to the Substances Directive relating to "Classification of substances which contain impurities, additives or individual constituents" are in conformity with the rules laid down in the directives.13 There is no conflict between the respective rules set out in the Substances Directive and the Preparations Directive. The Defendant argues in effect that the derogation would not have been interpreted any differently had there been a reference to Article 3(5)(j) of the Preparations Directive instead of to Section 1.7.2.1 of Annex VI of the Substances Directive. The Defendant argues, with reference to Section 1.7.2.1, that there are no grounds to interpret the derogation more narrowly as there is nothing in Article 3 of the Preparations Directive that is not also in Section 1.7.2.1 of Annex VI to the Substances Directive.

60. The Defendant also refers to the fact that it is in Annex VI to the Substances Directive that the criteria for the classification of carcinogenic chemicals are regulated in detail. It is therefore logical to refer to the relevant Section of the Annex to the directive, i.e. Section 1.7.2.1. According to its wording, Annex VI to the Substances Directive determines "general criteria", i.e. the general principles for the classification of substances and preparations which are dealt with in Article 4 of the Substances Directive and Article 3 of the Preparations Directive, cf. Section 1.2 of Annex VI. Furthermore, it is the annexes to the Substances Directive that contain the substantive content of the directive. The subsequent amendments that have been made to the directive were made to the annexes to the directive and not to the text of the directive itself.

61. Accordingly, the Defendant asserts that Point 1(a)(ii) of the Joint Statement of 1999 amounts to an explicit authorization for Norway to prescribe rules for the classification and labelling of carcinogenic impurities, including concentration limits, which differ from the EU rules.

62. Any other interpretation would render the reference to Section 1.7.2.1 of Annex VI pointless and this, in the view of the Defendant, is unlikely. The Defendant argues that it is logical, on the basis of the EU system, to make the limit for impurities the same as the limit for preparations. It is equally logical for the derogations to allow Norway to maintain that the reference to Section 1.7.2.1 is to be accorded substantive weight. The derogation granted to Norway must also encompass this limit.

63. In the view of the Defendant, it is clear that even before this explicit specification was included in the Joint Statement of 1999, Norway had a general

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[12] Reference is made to the classification system, i.e. to Section 4.2.1 of Annex VI, which sets out the EU classification system.

[13] Article 4 (1) of the Substances Directive, cf. Article 3 (5)(j) of the Preparations Directive.

EU kategorier 1 og 2.[13] Saksøkte kan ikke se noen grunner til å fastholde at Norge er bundet av denne grensen for urenheter.

59. Reglene i stoffdirektivets vedlegg VI, avsnitt 1.7.2.1 om "[k]lassificering af stoffer, som indeholder urenheder, tilsætningstoffer eller enkeltbestanddele" er i samsvar med reglene fastsatt i direktivene. Det er ingen konflikt mellom reglene i henholdsvis stoff- og preparatdirektivene.14 Saksøkte hevder at unntaket ikke ville ha blitt tolket annerledes om det hadde vært en henvisning til preparatdirektivets artikkel 3 nr 5 bokstav j) istedenfor til stoffdirektivets vedlegg VI, avsnitt 1.7.2.1. Saksøkte hevder, under henvisning til avsnitt 1.7.2.1, at det ikke er grunn til å tolke unntaket mer snevert ettersom det ikke er noe i preparatdirektivets artikkel 3 som ikke også er i stoffdirektivets vedlegg VI, avsnitt 1.7.2.1.

60. Saksøkte henviser også til det forhold at det er i stoffdirektivets vedlegg VI at kriteriene for klassifisering av kreftfremkallende stoffer er regulert i detalj. Det er derfor logisk å henvise til det relevante avsnitt av direktivets vedlegg, dvs til avsnitt 1.7.2.1. Etter sin ordlyd angir stoffdirektivets vedlegg VI "almindelige kriterier", dvs de alminnelige prinsipper for klassifisering av stoffer og preparater som er omhandlet i stoffdirektivets artikkel 4 og preparatdirektivets artikkel 3, jf avsnitt 1.2 av vedlegg VI. Videre er det vedleggene til stoffdirektivet som inneholder det substansielle i direktivet. De løpende endringer som har blitt gjort i direktivet har skjedd i direktivets vedlegg og ikke i direktivteksten selv.

61. Følgelig hevder saksøkte at felleserklæringen av 1999 punkt 1 bokstav a) nr ii) utgjør en eksplisitt godkjennelse av at Norge kan fastsette regler for klassifisering og merking av kreftfremkallende urenheter, inkludert konsentrasjonsgrenser, som fraviker EU-reglene.

62. Enhver annen tolkning vil gjøre henvisningen til vedlegg VI, avsnitt 1.7.2.1 poengløs, og dette er etter saksøktes mening lite sannsynlig. Saksøkte hevder at det er logisk, på grunnlag av EU systemet, å la grensen for urenheter være den samme som grensen for preparater. Det er like logisk at unntaket gir Norge rett til å opprettholde at henvisningen til avsnitt 1.7.2.1 skal tillegges substansiell vekt. Unntaket Norge har fått må også omfatte denne grensen.

63. Etter saksøktes syn er det klart at selv før den eksplisitte henvisningen ble inkludert i felleserklæringen av 1999 hadde Norge et generelt unntak med hensyn

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13 Det henvises i denne sammenheng til klassifiseringssystemet, dvs til avsnitt 4.2.1 av vedlegg VI, som angir EUs klassifiseringssystem.

14 Stoffdirektivets artikkel 4 nr 1, jf preparatdirektivets artikkel 3 nr 5 bokstav j).

derogation with respect to concentration limits for carcinogenic preparations, substances and substances containing impurities. This is particularly true since the Contracting Parties were aware when the EEA Agreement was entered into that Norway applied a limit of 0.01% to carcinogenic substances.

64. The Defendant asserts that the Norwegian limit of 0.01% is authorized by the derogation in the Joint Statements of 1995 and 1999. In interpreting these derogations, importance should be attached to the fact that Norway previously had a total derogation. At the time of the negotiations, which resulted in the Joint Statement of 1995, the EU was aware that Norway needed derogations due to its particularly high safety standards and that this was of great political importance to Norway.

65. In support of the above, the Defendant notes that Point 1(b) of the Joint Statement of 1999 gives Norway the power to have different criteria for the classification and labelling of, and different concentration limits for, certain substances which do not appear on the List of Dangerous Substances. This derogation does not apply to substances that have been classified as carcinogenic, since these substances are regulated by the general derogation in Point 1(a)(ii), but to substances that are classified as toxic, sensitizing to skin, very toxic, etc. Consequently, this provision cannot be interpreted as exclusively regulating the power to prescribe different/more stringent concentration limits for acrylamide in polyacrylamide.

66. The Defendant further argues that the fact that Point 2(c) of the Joint Statement of 1999 only covers "preparations" is not decisive in this case, although polyacrylamide is a substance with an impurity. The substance is to be treated in the same way, regardless of whether it is a deliberate addition/preparation or an impurity, since they would have the same classification.

67. In the view of the Defendant, it would be an error to interpret Point 2(c) as being a derogation only for preparations that contain substances on the List of Dangerous Substances, since this would leave different concentration limits to apply to preparations and to substances containing impurities. Such an interpretation would also eliminate any practical application of the derogation with respect to carcinogenic substances, since no carcinogenic substances appear on any list under Point 1. Such an interpretation would be at variance with the intention and premisses for the negotiations on the derogations.[14]

68. The Defendant proposes that the question be answered as follows:

> *"The Joint Statement adopted at the meeting of EEA Joint Committee of 22 June 1995 concerning Annex II Chapter XV, Annex II with subsequent amendments,*

[14] Reference is made *inter alia* to quotations of *travaux préparatoires* relating to the EEA Agreement.

til konsentrasjonsgrenser for kreftfremkallende preparater, stoffer og stoffer med urenheter. Dette gjelder særlig fordi avtalepartene på den tiden da EØS-avtalen ble inngått, var klar over at Norge benyttet en grense på 0,01% for kreftfremkallende stoffer.

64. Saksøkte hevder at den norske grensen på 0,01% er godkjent ved unntaket i felleserklæringene av 1995 og 1999. I tolkningen av disse unntakene må det vektlegges at Norge tidligere hadde et fullt unntak. På forhandlingstidspunktet, som resulterte i felleserklæringen av 1995, var EU klar over at Norge trengte unntak på grunn av de særlig høye sikkerhetsstandarder, og at dette var av stor politisk betydning for Norge.

65. Til støtte for det ovenstående bemerker saksøkte at felleserklæringen av 1999 punkt 1 bokstav b) gir Norge adgang til å ha ulike kriterier for klassifisering og merking av, og ulike konsentrasjonsgrenser for, visse stoffer som ikke finnes på stofflisten. Dette unntaket gjelder ikke for stoffer som er klassifisert som kreftfremkallende, siden disse stoffene er regulert ved det generelle unntaket i punkt 1 bokstav a) nr ii), men for stoffer som er klassifisert som giftige, sensibiliserende, meget giftige, etc. Følgelig kan ikke denne bestemmelsen tolkes slik at den bare regulerer adgangen til å nedlegge ulike/strengere konsentrasjonsgrenser for akrylamid i polyakrylamid.

66. Saksøkte hevder videre at det forhold at felleserklæringen av 1999 punkt 2 bokstav c) bare dekker "preparater" ikke er avgjørende i denne saken, selv om polyakrylamid er et stoff med en urenhet. Stoffet skal behandles på samme måte uansett om det er en bevisst tillegg/preparat eller en urenhet, siden de vil ha den samme klassifisering.

67. Etter saksøktes syn vil det være feil å tolke punkt 2 bokstav c) som et unntak bare for preparater som inneholder stoffer på stofflisten, siden dette ville føre til at ulike konsentrasjonsgrenser kommer til anvendelse på preparater og på stoffer som inneholder urenheter. En slik tolkning vil også eliminere enhver praktisk anvendelse av unntaket med hensyn til kreftfremkallende stoffer, siden ingen kreftfremkallende stoffer forekommer på noen liste under punkt 1. En slik tolkning vil være i strid med formål og forutsetninger for forhandlingene om unntakene.[15]

68. Saksøkte foreslår spørsmålet besvart slik:

> *"Felleserklæringen til protokollen for EØS-komiteens møte av 22 juni 1995 om EØS-avtalens vedlegg II kapittel XV, tillegg II med senere endringer, gir Norge*

[15] Det henvises blant annet til sitater fra forarbeider til EØS-avtalen

to the EEA Agreement does 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%."

The Government of Iceland

69. The Government of Iceland emphasizes that the aim of the derogations clearly was to allow Norway to apply, for a limited period of time, different rules than those contained in the directives.

70. The Government of Iceland submits that the Norwegian application of the rules in question can be based on Point 1(a)(ii) of the Joint Statement of 1999. This provision should be interpreted as an umbrella provision that regulates all substances that are classified as carcinogenic.[15]

71. The word "criteria" in the provision must be interpreted so as to allow Norway to use concentration limits other than those contained in the directives as a basis for imposing a labelling requirement for carcinogenic substances.

72. The Government of Iceland also points out that the Norwegian rules are based on Point 2(c) of the Joint Statement of 1999, since acrylamide is regarded as a carcinogenic substance which is covered by Point 1(a)(ii) referred to in Point 2(c).

73. The Government of Iceland proposes that the question be answered as follows:

"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 gives 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."

The EFTA Surveillance Authority

74. The EFTA Surveillance Authority notes that the Joint Statement of 1995 formed the legal basis for the labelling order issued by the Labour Inspection on 9 April 1997, and points out that this text does not mention concentration limits set for impurities in Section 1.7.2.1 of Annex VI to the Substances Directive.

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[15] Reference is made to Annex VI, Section 4.2.1 of the Substances Directive.

adgang til å innføre et merkekrav for polyakrylamid som inneholder en konsentrasjon av reststoffet akrylamid som er lavere enn 0,1%."

Den islandske regjering

69. Den islandske regjering vektlegger at unntakets siktemål klart var å gi Norge adgang til å anvende andre regler enn de som finnes i direktivene, for en begrenset tidsperiode.

70. Den islandske regjering hevder at den norske anvendelsen av de aktuelle reglene kan baseres på felleserklæringen av 1999 punkt 1 bokstav a) nr ii). Denne bestemmelsen må tolkes som en samlebestemmelse, som regulerer alle stoffer som er klassifisert som kreftfremkallende.[16]

71. Uttrykket "kriterier" i bestemmelsen må tolkes slik at den tillater Norge å anvende andre konsentrasjonsgrenser enn de i direktivene, som grunnlag for å pålegge et merkekrav for kreftfremkallende stoffer.

72. Den islandske regjering peker også på at de norske reglene har grunnlag i felleserklæringen av 1999 punkt 2 bokstav c), siden akrylamid er ansett som et kreftfremkallende stoff, som er angitt under punkt 1 bokstav a) nr ii), som henvist til i punkt 2 bokstav c).

73. Den islandske regjering foreslår spørsmålet besvart slik:

"Felleserklæringen til protokollen for EØS-komiteens møte av 22 juni 1995 om EØS-avtalens vedlegg II kapittel XV, tillegg II med senere endringer, gir Norge adgang til å innføre et merkekrav for polyakrylamid som inneholder en konsentrasjon av reststoffet akrylamid som er lavere enn 0,1 %, jf rådsdirektiv 67/548/EØF av 27 juni 1967 med senere endringer og rådsdirektiv 88/379/EØF av 7 juni 1988 med senere endringer."

EFTAs overvåkningsorgan

74. EFTAs overvåkningsorgan legger til grunn at felleserklæringen av 1995 dannet det rettslige grunnlag for merkepålegget utstedt av Arbeidstilsynet 9 april 1997, og poengterer at denne teksten ikke nevner konsentrasjonsgrenser for urenheter i stoffdirektivets vedlegg VI, avsnitt 1.7.2.1.

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16 Det henvises til stoffdirektivets vedlegg VI, avsnitt 4.2.1.

75. This omission is, in the view of the EFTA Surveillance Authority, all the more noteworthy as the derogation possibilities under Points 1(a)(i) and 1(b) specifically mention the possibility of using different concentration limits for the listed substances. Thus, the wording of this derogation and its context clearly point in favour of considering that Norway may not deviate from the concentration limits set out in the Substances Directive.

76. The EFTA Surveillance Authority also points out that it seems probable that Norway intended to be able to deviate from the concentration limits set out in Section 1.7.2.1 of Annex VI to the Substances Directive. It is also possible to argue that classification of substances is closely linked to the question of applicable concentration limits and that, therefore, the derogation in Point 1(a)(ii) should be interpreted broadly so as to include concentration limits.

77. However, the EFTA Court has previously been confronted with the situation where the wording of an exception clause for an EFTA State does not reflect the wide scope of application that the EFTA State possibly intended it to have.[16] In that case, the EFTA Court upheld a literal interpretation.

78. The EFTA Surveillance Authority also points out that a strict interpretation will not make the exception possibly granted through Point 1(a)(ii) objectively void of its purpose, as Norway will still undoubtedly be allowed to classify carcinogenic substances based on different criteria than those found in the directives.

79. As the rules in Annex VI are addressed not only to national authorities, but also concern manufacturers and importers, a strict interpretation would be in line with the principle of legal certainty common to all EEA States. The European Court of Justice has repeatedly held that Community legislation must be certain and its application must be foreseeable for individuals.[17] A strict interpretation would also be in line with the principle *patere legem quam ipse fecisti*.[18] Furthermore, in line with the consistent case law of the EFTA Court and the European Court of Justice, derogations have to be interpreted restrictively.

80. The EFTA Surveillance Authority is of the opinion that the Joint Statement of 1995 does not cover the Norwegian labelling instruction. However, the added reference in the Joint Statement of 1999 to Section 1.7.2.1 of Annex VI to the Substances Directive leads to the conclusion that the Joint Statement of 1999 covers the instruction.

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16 Reference is made to Case E-9/97 *Erla María Sveinbjörnsdóttir* v *The Government of Iceland* [1998] EFTA Court Report 95.

17 Reference is made to Case T-115/94 *Opel Austria* v *Council* [1997] ECR II-39, paragraph 26; and Case 70/83 *Gerda Kloppenburg* v *Finanzamt Leer* [1984] ECR 1075, paragraph 1.

18 Reference is made to Case T-331/94 *IPK* v *Commission* [1997] ECR II-1665, paragraph 45; and Case C-39/93 P *SFEl* v *Commission* [1994] ECR I-2681, paragraph 18.

75. Denne utelatelsen er i følge EFTAs overvåkningsorgans syn desto mer betydningsfull fordi unntaksmulighetene under punktene 1 bokstav a) nr i) og 1 bokstav b) særlig nevner muligheten til å anvende ulike konsentrasjonsgrenser for de opplistede stoffer. Derfor taler både formuleringen av dette unntaket og dets kontekst klart i favør av å anta at Norge ikke kan fravike de konsentrasjonsgrenser som er gitt i stoffdirektivet.

76. EFTAs overvåkningsorgan poengterer også at det virker sannsynlig at Norge hadde til hensikt å kunne få adgang til å fravike de konsentrasjonsgrenser som er fastsatt i stoffdirektivets vedlegg VI, avsnitt 1.7.2.1. Det er også mulig å argumentere for at klassifisering av stoffer henger så nært sammen med spørsmålet om hvilke konsentrasjonsgrenser som er anvendbare, og at unntaket i punkt 1 bokstav a) nr ii) derfor bør tolkes vidt, slik at det også inkluderer konsentrasjonsgrenser.

77. Imidlertid har EFTA-domstolen tidligere hatt til behandling et tilfelle hvor formuleringen av en unntaksklausul for en EFTA-stat ikke reflekterer den vide anvendelsen som EFTA-staten muligvis mente at den skulle ha.[17] I den saken foretok EFTA-domstolen en bokstavelig tolkning.

78. EFTAs overvåkningsorgan poengterer også at en snever tolkning ikke vil gjøre unntaket som muligens er gitt i punkt 1 bokstav a) nr ii) ubrukelig for sitt formål, siden Norge utvilsomt fortsatt vil kunne klassifisere kreftfremkallende stoffer basert på ulike kriterier enn de som finnes i direktivene.

79. Siden reglene i vedlegg VI er rettet ikke bare mot nasjonale myndigheter, men også angår produsenter og importører, vil en snever tolkning være i tråd med det rettssikkerhetsprinsipp som er felles for alle EØS-stater. Domstolen for De europeiske fellesskap har gjentatte ganger uttalt at fellesskapslovgivningen må være klar, og at dens anvendelse må være forutberegnelig for individene.[18] En snever tolkning vil også være i tråd med prinsippet *patere legem quam ipse fecerti*.[19] Videre, i tråd med fast rettspraksis fra EFTA-domstolen og Domstolen for De europeiske fellesskap, må unntak tolkes snevert.

80. EFTAs overvåkningsorgan er av den oppfatning at felleserklæringen av 1995 ikke dekker det norske merkepålegget. Den tilføyde henvisningen i felleserklæringen av 1999 til stoffdirektivets vedlegg VI, avsnitt 1.7.2.1 leder imidlertid til den konklusjon at felleserklæringen av 1999 dekker pålegget.

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17 Det henvises til sak E-9/97 *Erla María Sveinbjörnsdóttir* v *The Government of Iceland* [1998] EFTA Court Report 95.

18 Det henvises til sak T-115/94 *Opel Austria* v *Council* [1997] ECR II-39, premiss 26, og sak 70/83 *Kloppenburg* v *Finanzamt Leer* [1984] ECR 1075, premiss 11.

19 Det henvises til sak T-331/94 *IPK* v *Commission* [1997] ECR II-1665 premiss 45 og sak C-39/93 P *SFEI* v *Commission* [1994] ECR I-2681 premiss 18.

81. The EFTA Surveillance Authority proposes that the question be answered as follows:

> *"Annex II of the Joint Statement adopted at the meeting of the EEA Joint Committee of 22 June 1995 concerning Annex II Chapter XV to the EEA Agreement is to be interpreted so as not to permit the introduction of 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.*
>
> *The Annex of the Joint Statement adopted at the meeting of the EEA Joint Committee of 26 March 1999 concerning Annex II Chapter XV to the EEA Agreement is to be interpreted so as to permit such a labelling requirement."*

The Commission of the European Communities

82. The Commission of the European Communities refers initially to the derogation set out in Annex II Chapter XV to the EEA Agreement, which recognizes that the standards for dangerous substances and preparations were more stringent in some EFTA Contracting Parties, and that EU legislation was intended to evolve towards higher standards as more scientific evidence evolved. The position was therefore left open-ended, leaving to each of the EFTA Contracting Parties the right to decide for itself whether it requires a derogation from the Community legislation on classification and labelling.

83. Since the Joint Statement of 1995 formed the legal basis for the labelling order issued by the Labour Inspection on 9 April 1997, the Commission takes this as the basis for its legal assessment.

84. According to the Commission, this derogation permits Norway to set labelling standards at more stringent levels than are permitted under EC legislation.

85. The Commission is of the opinion that polyacrylamide is a substance according to the definitions in the Substances Directive and the Preparations Directive. With reference to Article 4 and Section 1.7.2.1 of Annex VI to the Substances Directive, the Commission observes that impurities may affect the classification and labelling of a substance if the concentration exceeds a certain limit based on either the specific concentration limits in the List of Dangerous Substances in Annex I to the Substances Directive, or the general limit in Article 3 of the Preparations Directive, or Section 1.7.2.1 of Annex VI to the Substances Directive.

81. EFTAs overvåkningsorgan foreslår spørsmålet besvart slik:

> *"Tillegg II av felleserklæringen vedtatt på EØS komiteens møte 22 juni 1995 om EØS-avtalens vedlegg II kapittel XV skal tolkes slik at den ikke tillater å oppstille et krav om merking av polyakrylamid som inneholder en konsentrasjon av reststoffet akrylamid som er lavere enn 0,1%, jf rådsdirektiv 67/548/EØF av 27 juni 1967 med senere endringer og rådsdirektiv 88/379/EØF av 7 juni 1988 med senere endringer.*
>
> *Tillegget til felleserklæringen vedtatt på EØS komiteens møte 26 mars 1999 om EØS-avtalens vedlegg II kapittel XV skal tolkes slik at den tillater et slikt krav om merking"*

Kommisjonen for De europeiske fellesskap

82. Kommisjonen henviser innledningsvis til unntaket gitt i vedlegg II kapittel XV til EØS-avtalen, som anerkjenner at standardene for farlige stoffer og preparater var strengere i noen av EFTA-avtalepartene, og at EUs regelverk var ment å utvikle seg mot høyere standarder ettersom mer vitenskapelig bevis fremkom. Forholdet ble derfor stående uavklart, med rett for hver av EFTA-avtalepartene til å bestemme for seg selv hvorvidt den behøvde et unntak fra fellesskapsregelverket om klassifisering og merking.

83. Siden felleserklæringen av 1995 var det rettslige grunnlag for merkepålegget utstedt av Arbeidstilsynet den 9 april 1997, legger Kommisjonen denne til grunn for sin rettslige vurdering.

84. I følge Kommisjonen tillater dette unntaket Norge å ha strengere standarder for merking enn tillatt under EUs regelverk.

85. Kommisjonen er av den oppfatning at polyakrylamid er et stoff i følge definisjonene i stoffdirektivet og preparatdirektivet. Med henvisning til stoffdirektivets artikkel 4 og vedlegg VI avsnitt 1.7.2.1, legger Kommisjonen til grunn at urenheter kan påvirke klassifiseringen og merkingen av et stoff hvis konsentrasjonen overskrider en viss grense basert på enten de særlige konsentrasjonsgrenser i stofflisten i stoffdirektivets vedlegg I, eller den alminnelige grensen i preparatdirektivets artikkel 3, eller stoffdirektivets vedlegg VI, avsnitt 1.7.2.1.

86. Acrylamide is listed in the Dangerous Substances List, but without a specific concentration limit. It is classified as carcinogenic, category 2, in accordance with the criteria laid down in Section 4.2.1 of Annex VI to the Substances Directive. Therefore the classification and labelling will be linked to the 0.1% concentration limit for impurities in substances of such classification, as given in Section 1.7.2.1 of Annex VI. This is the same limit as the general limit in Article 3 of the Preparations Directive.

87. The Norwegian derogation as laid down in the Joint Statement of 1995, in particular Point 1(a)(ii), allows Norway to apply criteria for classification and labelling of carcinogenic substances which differ from those given in Section 4.2.1 of Annex VI to the Substances Directive.

88. The Norwegian criteria for the classification of carcinogens do deviate from the Community criteria, since Norway classifies acrylamide as a carcinogen in "K1", which is the group with the carcinogens of the highest potency. Norway has also established its own concentration limits with respect to preparations in accordance with the derogation under Point 2(c) of the Joint Statement of 1995.

89. The Commission states that the derogation in the Joint Statement of 1995 can be interpreted in two ways. One interpretation is that, since Norway can derogate from the criteria for classification in Section 4.2.1 to Annex VI to the Substances Directive, it must as a consequence be able to derogate from the concentration limits laid down in Section 1.7.2.1 of Annex VI. The other possibility is to read the derogation narrowly, and conclude that since the provision in Section 1.7.2.1 of Annex VI is not explicitly exempted, it still applies. Similarly, it can be argued that the renegotiated Joint Statement of 1999 specifically adds a reference to Section 1.7.2.1 of Annex VI to the Substance Directive and can therefore be seen as constituting a widening of Norway's derogation.

90. The EEA Agreement has as its objective to establish a homogeneous European Economic Area and to maintain uniform interpretation and application of the EEA Agreement. Article 6 EEA provides that the Agreement shall be interpreted in conformity with the relevant rulings of the European Court of Justice. The European Court of Justice has consistently held that derogations shall be interpreted narrowly.

91. The Commission is therefore of the view that polyacrylamide cannot, according to the wording of the Joint Statement of 1995, be classified and labelled contrary to the concentration limits provided for in Section 1.7.2.1 of Annex VI to the Substances Directive.

92. The Commission of the European Communities proposes that the question be answered as follows:

86. Akrylamid er på stofflisten, men uten en særlig konsentrasjonsgrense. Det er klassifisert som kreftfremkallende, kategori 2, i henhold til de kriterier som er fastsatt i stoffdirektivets vedlegg VI, avsnitt 4.2.1. Derfor vil klassifiseringen og merkingen være knyttet til den 0,1% konsentrasjonsgrense for urenheter i stoffer med slik klassifisering som fastsatt i avsnitt 1.7.2.1 av vedlegg VI. Dette er den samme grensen som den generelle grensen i preparatdirektivets artikkel 3.

87. Det norske unntaket som fastsatt i felleserklæringen av 1995, særlig punkt 1 bokstav a) nr ii), gir Norge anledning til å anvende kriterier for klassifisering og merking av kreftfremkallende stoffer som fraviker dem som er gitt i stoffdirektivets vedlegg VI, avsnitt 4.2.1.

88. De norske kriteriene for klassifisering av kreftfremkallende stoffer fraviker Fellesskapets kriterier siden Norge klassifiserer akrylamid som et kreftfremkallende stoff i "K1", som er gruppen med de kreftfremkallende stoffer av høyest potens. Norge har også fastsatt egne konsentrasjonsgrenser med hensyn til preparater i henhold til unntaket under felleserklæringen av 1995 punkt 2 bokstav c).

89. Kommisjonen uttaler at unntaket i felleserklæringen av 1995 kan tolkes på to måter. En tolkning er at siden Norge kan gjøre unntak fra kriteriene for klassifisering i stoffdirektivets vedlegg VI, avsnitt 4.2.1, må det følgelig være adgang til å gjøre unntak fra de konsentrasjonsgrenser som er fastsatt i vedlegg VI, avsnitt 1.7.2.1. Den andre muligheten er å lese unntaket snevert, og konkludere med at siden bestemmelsen i vedlegg VI avsnitt 1.7.2.1 ikke er eksplisitt unntatt, gjelder den fortsatt. Samtidig kan det hevdes at den reforhandlede felleserklæringen av 1999 eksplisitt legger til en henvisning til stoffdirektivets vedlegg VI, avsnitt 1.7.2.1, og kan derfor anses som å utgjøre en utvidelse av Norges unntak.

90. EØS-avtalen har som sitt formål å etablere et ensartet europeisk økonomisk samarbeidsområde og å ivareta enhetlig tolkning og anvendelse av EØS-avtalen. Artikkel 6 EØS fastslår at avtalen skal tolkes i tråd med de relevante avgjørelser av Domstolen for De europeiske fellesskap. Domstolen for De europeiske fellesskap har konsekvent fastholdt at unntak skal tolkes snevert.

91. Kommisjonen er derfor av den oppfatning at polyakrylamid i henhold til ordlyden i felleserklæringen av 1995, ikke kan klassifiseres og merkes i strid med de konsentrasjonsgrenser fastsatt i stoffdirektivets vedlegg VI, avsnitt 1.7.2.1.

92. Kommisjonen for De europeiske fellesskap foreslår spørsmålet besvart slik:

"Annex II of the Joint Statement concerning the EEA Agreement - Annex II, Chapter XV - adopted at the meeting of EEA Joint Committee on 22 June 1995, as regards Council Directive 67/548/EEC as amended and Council Directive 88/379/EEC as amended, does not give Norway the power to introduce a requirement concerning the labelling of polyacrylamide as carcinogenic where it contains a concentration of the residual substance acrylamide which is lower than 0,1% by weight."

Thór Vilhjálmsson
Judge-Rapporteur

"Tillegg II av felleserklæringen om EØS-avtalen - vedlegg II, kapittel XV - vedtatt på EØS komiteens møte 22 juni 1995, som angår rådsdirektiv 67/548/EØF som endret og rådsdirektiv 88/379/EØF som endret, gir ikke Norge adgang til å introdusere krav om merking av polyakrylamid som kreftfremkallende hvor det inneholder en konsentrasjon av reststoffet akrylamid som er lavere enn 0,1 vektprosent"

Thór Vilhjálmsson
Saksforberedende dommer

Case E-3/00

EFTA Surveillance Authority
v
Kingdom of Norway

(Failure of a Contracting Party to fulfil its obligations – Fortification of foodstuffs with iron and vitamins – Protection of public health – Precautionary principle)

Summary of the Judgment

1. The question of whether a State has failed to fulfil its obligations must be determined by reference to the situation at the end of the time-limit for responding to the reasoned opinion, and the Court is precluded from taking into account any subsequent changes in that situation.

2. In the absence of harmonisation of rules regarding foodstuff fortification, when there is uncertainty as to the current state of scientific research, it is for the Contracting Parties to decide what degree of protection of human health they intend to assure, having regard to the fundamental requirements of EEA law, notably, the free movement of goods within the European Economic Area. This means that a risk management decision rests with each Contracting Party. It is within the discretion of the Contracting Party to make a policy decision as to what level of risk it considers appropriate. Under those conditions, a Contracting Party may invoke the precautionary principle, according to which it is sufficient to show that there is relevant scientific uncertainty with regard to the risk in question. That measure of discretion must, however, be exercised subject to judicial review.

3. Measures taken by a Contracting Party must be based on scientific evidence; they must be proportionate, non-discriminatory, transparent, and consistent with similar measures already taken.

4. Under the requirement of proportionality, the question of nutritional need with regard to additives to foodstuffs in any given population may have a proper place. However, the

need to safeguard public health must be balanced against the principle of the free movement of goods. The mere finding by a national authority, of the absence of a nutritional need will not justify an import ban, a most restrictive measure, on a product that is freely traded in other EEA States.

5. The national authority must address the issue of the protection of health and life of humans. A purely hypothetical or academic consideration will not suffice. It is not only the specific effects of the marketing of a single product with a set amount of additives that are relevant. It may be appropriate to take into account the aggregate effect of the presence in the market of a number of natural or artificial supply sources of a given nutrient, and of the possibility of future additional sources that can reasonably be foreseen.

6. In many cases, the assessment of such questions will show that there is a great measure of scientific and practical uncertainty linked to the issue under consideration. A proper application of the precautionary principle presupposes, firstly, an identification of potentially negative health consequences arising, and, secondly, a comprehensive evaluation of the risk to health based on the most recent scientific information.

7. When the insufficiency, or the inconclusiveness, or the imprecise nature of the conclusions to be drawn from those considerations make it impossible to determine with certainty the risk or hazard, but the likelihood of considerable harm still persists were the negative eventuality to occur, the precautionary principle would justify the taking of restrictive measures.

8. Such restrictive measures must be non-discriminatory and objective, and must be applied within the framework of a policy based on the best available scientific knowledge at any given time. The precautionary principle can never justify the adoption of arbitrary decisions. Neither can the pursuit of the objective of “zero risk” be justified except in the most exceptional circumstances.

JUDGMENT OF THE COURT

5 April 2001

(Failure of a Contracting Party to fulfil its obligations – Fortification of foodstuffs with iron and vitamins – Protection of public health – Precautionary principle)

In Case E-3/00,

EFTA Surveillance Authority, represented by Peter Dyrberg, Director, Legal & Executive Affairs, acting as Agent; assisted by Bjarnveig Eiríksdóttir, Senior Officer, Legal and Executive Affairs Department, 74 Rue de Trèves, Brussels, Belgium,

applicant,

v

The Kingdom of Norway, represented by Fanny Platou Amble, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent, and Beate Berglund Ekeberg, Assistant Director General, Ministry of Foreign Affairs, acting as Co-agent, Office of the Attorney General (Civil Affairs), P.O. Box 8012 Dep., 0030 Oslo, Norway,

defendant,

supported by the **Government of Denmark**, represented by Jørgen Molde, Head of Department, Ministry of Foreign Affairs, acting as Agent, and Nina Holst Christensen, Head of Department, Ministry of Justice, assisted by Asger Kroll, Head of Section, Ministry of Foreign Affairs,

intervener,

APPLICATION for a declaration that, by applying its legislation so as to prohibit the import and marketing in Norway of corn flakes, fortified per 100 g with 1 mg thiamine, 1 mg riboflavin, 10 mg niacin and 7 mg iron, which have been lawfully manufactured and marketed in other EEA States, the Kingdom of Norway has failed to fulfil its obligations under Article 11 EEA.

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties and the intervener, the written observations of the Government of France, represented by Ms Kareen Rispal-Bellanger, acting as Agent, and Ms Régine Loosli-Surrans, acting as Co-agent, the written observations of the Government of the Netherlands, represented by Mr Ivo van der Steen, acting as Agent, and the written observations of the Commission of the European Communities, represented by Mr Michael Shotter, Member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing oral argument from the applicant, represented by Peter Dyrberg, Agent for the EFTA Surveillance Authority, the defendant, represented by Fanny Platou Amble, Agent for the Norwegian Government, the intervener, represented by Jørgen Molde, Agent for the Government of Denmark and the Commission of the European Communities, represented by Michael Shotter, Agent for the Commission of the European Communities, at the hearing on 14 February 2001,

gives the following

Judgment

Facts and procedure

1 By an application lodged at the Court Registry on 10 April 2000, the EFTA Surveillance Authority submitted a request for a declaration that, by its legislation so as to prohibit the import and marketing in Norway of corn flakes, fortified per 100 g with 1 mg thiamine, 1 mg riboflavin, 10 mg niacin and 7 mg iron, which have been lawfully manufactured and marketed in other EEA States, the Kingdom of Norway has failed to fulfil its obligations under Article 11 EEA.

2 By a letter of 4 July 1997, the Norwegian Food Control Authority (*Statens Næringsmiddeltilsyn*) refused the application of Nordisk Kellogg's A/S (hereinafter "Kellogg's"), a company incorporated under Danish law, for authorisation to sell fortified corn flakes in Norway, on the grounds that the addition of nutrients is only authorised if there is a nutritional need in the Norwegian population. Furthermore, the Norwegian Food Control Authority stated that extensive use of fortification would lead to an unbalanced addition of nutrients, with a high intake of substances added to many products. It would also be misleading for consumers if emphasis were to be placed on the nutrients instead of on the total nutritional quality of the product. Basic foodstuffs should be produced by raw materials of high nutritional value, which should not be lost during the manufacturing process, and nutrients should only be added when the authorities recommend that a product carry a nutrient for which a deficiency may arise in the population. Lastly, the Norwegian Food Control Authority noted that the addition of nutrients to breakfast cereals was not obligatory in any Nordic country and that, consequently, harmonised production could be attained by marketing the non-fortified variety of the cereal in all countries.

3 Kellogg's lodged an administrative complaint against the refusal. By letter of 6 February 1998, the Ministry of Health and Social Affairs dismissed the complaint. The Ministry stated that the starting point of the considerations had to be a global evaluation based on a total consumption of fortified products in a

situation of free fortification of foodstuffs. It pointed out that the number of fortified products on the market would create a risk for public health. Therefore, it was not decisive that the fortification in question did not represent any risk to public health. Furthermore, the administrative law principle of non-discrimination would lead to a situation in which all applications for fortifications would have to be granted if fortification was allowed for one single product. The result of such a free fortification practice would be that an unknown number of fortified products were on the market and the recommended intake in the population could be exceeded. Another problem with free fortification, in the view of the Ministry, is the imbalance in the intake of nutrients when only some nutrients are added.

4 Kellogg's then filed a complaint with the EFTA Surveillance Authority. Following contacts with the Norwegian authorities, the EFTA Surveillance Authority sent a letter of formal notice to the Government of Norway on 29 January 1999. It contended that, in order to have the ban on imports of fortified corn flakes justified under Article 13 EEA, Norway must demonstrate that the product constitutes a health risk. Since the Government of Norway had not submitted any evidence on this point, Norway had failed to fulfil its obligations under Article 11 EEA.

5 In answering the letter of formal notice, the Government of Norway argued that it would be sufficient to produce documentation that, according to the present state of scientific research, the fortification in question might be a health hazard when eaten in uncontrollable and unforeseen amounts. With regard to the fortification with iron, the Government of Norway referred to the risks associated with excessive iron intake, especially for adult men and postmenopausal women. Special precautions had to be taken for persons with hereditary iron overload (haemochromatosis). For the vitamins, there was no need in Norway, and large doses of niacin could cause adverse effects. Furthermore, the precautionary principle should be applied to fortification with these vitamins. Less restrictive measures, such as labelling, were not possible because, for them to work, the consumer would have to have knowledge of the nutritional content of all dietary sources in order to calculate the risk of an excessive and unbalanced intake of nutrients.

6 On 8 October 1999, the EFTA Surveillance Authority sent a reasoned opinion to the Government of Norway, maintaining its position as expressed in the letter of formal notice, and asking Norway to take the necessary measures to comply with the reasoned opinion within two months following notification thereof.

7 The Government of Norway responded to the reasoned opinion on 14 January 2000, reiterating its position that the prohibition of fortified cornflakes for import and marketing in Norway was justified under Article 13 EEA, and declaring that the prohibition would be maintained. Furthermore, the Government of Norway stated that it was not possible to prove that the fortified product alone gave rise to health hazards. However, there was sufficient evidence to support the view that some vitamins and minerals in larger doses, although not acutely toxic, could cause a health hazard, by themselves and through their interactive effects. Because the mineral iron carries a higher risk than the vitamins used, the risk evaluation was limited to that substance. According to the conclusions of the evaluation, the main hazard identified with iron fortification was increasing iron stores due to small needs and a limited ability to excrete iron. The main risk groups in Norway are 20 000 homozygous and between 500 000 and 600 000 heterozygous individuals with primary haemochromatosis, adult healthy men and postmenopausal women. The Government of Norway added that a precautionary attitude towards fortification was reasonable, because of the unknown causal relation between iron levels in the body and certain diseases.

8 Since measures had not been taken to comply with the reasoned opinion, the EFTA Surveillance Authority filed the application which has given rise to the present case.

9 By order of 7 September 2000, the Government of Denmark was given leave to intervene in support of the defendant.

Arguments of the parties

10 The application is based on one plea in law, namely, that Norway has failed to comply with its obligations under Article 11 EEA by applying its legislation so as to prohibit the import and marketing of fortified corn flakes which have been lawfully manufactured and marketed in other EEA States, and that the prohibition is not justified under Article 13 EEA.

11 It is not disputed that the product concerned is covered by the EEA Agreement and that the Norwegian measure to ban the marketing of the product in question constitutes a barrier to trade within the meaning of Article 11 EEA. It is, furthermore, not disputed that an EEA State is entitled to maintain rules prohibiting, without prior authorisation, the marketing of fortified or enriched foodstuffs, if the conditions of Article 13 EEA are met. Moreover, it is not

disputed that, in assessing the issues at hand, the Norwegian authorities must have regard to the nutritional habits of the Norwegian population and the aggregate of the vitamins and minerals available to it through the general consumption of foodstuffs.

12 However, it is disputed between the parties whether the authorisation may be refused on the grounds of lack of nutritional need in the population, regardless of whether there is a real danger to public health.

13 The Government of Norway argues that it is for the national health authorities to decide what vitamins and minerals should be added to what foodstuffs and in what quantities. National authorities may refuse to grant an authorisation allowing fortified food to be marketed on grounds of lack of nutritional need in the population.

14 The Government of Denmark is of the view that, for practical reasons, the national authorities are only required to authorise the introduction of additives in a product if there is a need in the population for the additive in question. It would be too heavy a burden for the national administration to carry out a risk evaluation in each case.

15 In the view of the Commission of the European Communities and the EFTA Surveillance Authority, the relevant requirement for justification is that of public health. Nutritional need is not such a requirement in itself. Examination by the national authorities as to whether there is nutritional need may play an important role, but only because it may enable the applicant to establish that the product can be presumed safe.

16 The EFTA Surveillance Authority argues, in substance, that the fortification policy of the Norwegians authorities is inconsistent, since they have, for many years, allowed iron fortification of domestically-produced whey cheese and other whey products. Whey cheese is fortified with 10 mg iron per 100 g. Furthermore, Norway allows or imposes fortification of products with vitamins for which safety margins are lower than the one for iron.

17 Furthermore, it is disputed whether the refusal to grant the marketing authorisation may be justified under Article 13 EEA.

18 The Government of Norway has stated that the refusal to grant the marketing authorisation is justified under Article 13 EEA, in view of the health risk connected to the particular fortification in the case at hand.

19 The Government of France is of the view that, in a field of law which is not harmonised, it is sufficient that a Government justifies its data with the work of national experts, provided that the work is not totally inconsistent with findings made by experts in other Member States.

20 The Government of the Netherlands submits that the question of whether the addition of vitamins and minerals is safe must be answered according to the most recent scientific information, followed by a risk assessment.

21 The EFTA Surveillance Authority is of the view that a ban on the marketing of a product in order to protect the interests laid down in Article 13 EEA must be based on international scientific research and the prevailing eating habits in the importing State. A general reference to a potential health risk cannot justify a ban on a product.

22 The Commission of the European Communities states that it would not be justified under Article 13 EEA to base a rejection of an application for authorisation to market a fortified food product solely on the absence of nutritional need for the addition in question.

Findings of the Court

23 The Court notes that, pursuant to Article 11 EEA, quantitative restrictions on imports and all measures having equivalent effect are prohibited between the Contracting Parties. Article 13 EEA states that Article 11 EEA does not preclude prohibitions justified on grounds of *inter alia* protection of human health, as long as a given prohibition does not constitute a means of arbitrary discrimination or a disguised restriction on trade.

24 With regard to Article 36 of the EC Treaty (now, after amendment, Article 30 EC), the Court of Justice of the European Communities has held that the power of a Member State to prohibit the import of goods lawfully produced in other Member States is limited to what it necessary for attaining the legitimate aim of protecting public health, and that it must authorise the marketing of fortified products when that is compatible with the need to protect health (Case 174/82 *Sandoz BV* [1983] ECR 2443, at paragraph 18, hereinafter "*Sandoz*"). That ruling is, pursuant to Article 6 EEA, relevant for the judgment of the EFTA Court in the case at hand.

25 EEA law in this area may be summarised as follows. In the absence of harmonisation of rules, when there is uncertainty as to the current state of scientific research, it is for the Contracting Parties to decide what degree of protection of human health they intend to assure, having regard to the fundamental requirements of EEA law, notably, the free movement of goods within the European Economic Area. This means that a risk management decision rests with each Contracting Party. It is within the discretion of the Contracting Party to make a policy decision as to what level of risk it considers appropriate. Under those conditions, a Contracting Party may invoke the precautionary principle, according to which it is sufficient to show that there is relevant scientific uncertainty with regard to the risk in question. That measure of discretion must, however, be exercised subject to judicial review.

26 Measures taken by a Contracting Party must be based on scientific evidence; they must be proportionate, non-discriminatory, transparent, and consistent with similar measures already taken. With regard to the proportionality principle, the Court of Justice of the European Communities observed in *Sandoz* that, even in areas of foodstuff treatment in which there has been some degree of harmonisation within the Community (in that case referring specifically to colouring, preservatives and dietary food products), the Community legislature has shown considerable prudence regarding the potential harmfulness of additives, and, where uncertainty persists, a wide discretion has been left to the Member States.

27 The need to safeguard public health has been recognised as, and remains, a primary concern, and the level of protection chosen by the Contracting Parties should not be placed in question. However, the principle of proportionality must be respected.

28 In that process, the question of nutritional need with regard to additives to foodstuffs in any given population may have a proper place. Indeed, the most authoritative definition of “fortification and enrichment” is directly linked to this element (See Codex Alimentarius General Principles for The Addition of Essential Nutrients To Foods, doc. CAC/GL 09-1987 (amended 1989, 1991), Section 2). However, under the requirement of proportionality, the need to safeguard public health must be balanced against the principle of the free movement of goods. The mere finding by a national authority of the absence of a nutritional need will not justify an import ban, a most restrictive measure, on a product which is freely traded in other EEA States.

29 The national authority must address the issue of the protection of health and life of humans. A purely hypothetical or academic consideration will not suffice. It is not only the specific effects of the marketing of a single product with a set amount of additives that are relevant. It may be appropriate to take into account the aggregate effect of the presence in the market of a number of natural or artificial supply sources of a given nutrient, and of the possibility of future additional sources that can reasonably be foreseen.

30 In many cases, the assessment of such questions will show that there is a great measure of scientific and practical uncertainty linked to the issue under consideration. A proper application of the precautionary principle presupposes, firstly, an identification of potentially negative health consequences arising, in the present case, from a proposed fortification, and, secondly, a comprehensive evaluation of the risk to health based on the most recent scientific information.

31 When the insufficiency, or the inconclusiveness, or the imprecise nature of the conclusions to be drawn from those considerations make it impossible to determine with certainty the risk or hazard, but the likelihood of considerable harm still persists were the negative eventuality to occur, the precautionary principle would justify the taking of restrictive measures.

32 Such restrictive measures must be non-discriminatory and objective, and must be applied within the framework of a policy based on the best available scientific knowledge at any given time. The precautionary principle can never justify the adoption of arbitrary decisions, and the pursuit of the objective of "zero risk" only in the most exceptional circumstances.

33 On the basis of the information which has been made available to the Court during the course of the present proceedings, in particular the indication that a proposal is forthcoming for the rescission of the authorisation for the fortification of whey cheese with iron, it has not been shown that Norwegian authorities have exercised their authority in the matter of the application from Kellogg's in a manner which would, at the time of giving judgment, constitute a material breach by Norway of its obligations under Article 11 EEA. There is, at this time, no indication of an inappropriate use of the precautionary principle as a disguised form of trade protectionism.

34 However, the Court has to consider whether the Government of Norway dealt with Kellogg's application in an appropriate manner, when applying EEA law to the question of granting or denying an authorisation for enrichment of corn flakes.

35 The initial refusal by the Norwegian Food Control Authority to grant authorisation was based chiefly on the grounds that no nutritional need was present in the Norwegian population. The accompanying comments did not address the essential element under Article 13 EEA, namely whether a concrete assessment of all relevant circumstances showed that the fortification in question would present any danger to public health (see Case 304/84 *Ministère public* v *Muller* ECR [1986] 1521, at paragraph 23).

36 In dismissing the appeal by Kellogg's, the Ministry of Health and Social Affairs did address the public health issue, but not by demonstrating that a comprehensive risk assessment had been made. Instead, the decision rested chiefly on the assumption that if the enrichment of corn flakes were authorised, the authorities would in the future be constrained, under a principle of equality of treatment, to grant all applications for the introduction of similar additives to foodstuffs, and that this would have deleterious effects on public health.

37 The Court views this assumption as mistaken, in that the authorities would at any subsequent time be in a position to assess new applications on their merits, and have regard to a broad evaluation of all additives present in the Norwegian dietary spectrum at that time. This mistaken assumption must also be regarded as constituting a projection which is too hypothetical and conjectural to form the basis of a weighing of the concerns for the protection of public health under Article 13 EEA against the requirements of the principle of the free movement of goods under Article 11 EEA.

38 This administrative procedure did not correctly address the question of risk assessment in the manner required by EEA law. The defects were not, in the Court's view, materially remedied by the broader documentation that was submitted by the Government of Norway to the EFTA Surveillance Authority in its reply to the reasoned opinion. A scientific paper entitled "Risk Evaluation of Iron" was annexed to the reply. The Ministry of Health and Social Affairs simply stated that the prohibition of the marketing of fortified corn flakes was justified, and that the competent body kept the need to add nutrients to foods under continuous review, and would evaluate the authorisation to fortify whey cheese with iron. Thus, there had not, by the expiry of the time-limit set in the reasoned opinion, as extended, that is, 14 January 2000, been a concrete assessment of all relevant circumstances in the matter of Kellogg's application, which showed that the fortification in question would present a danger to public health.

39 The question of whether a State has failed to fulfil its obligations must be determined by reference to the situation obtaining at the end of the time-limit for responding to the reasoned opinion, and the Court is precluded from taking into account any subsequent changes in that situation (most recently confirmed in Case C-355/98 *Commission* v *Belgium*, judgment of 9 March 2000, not yet reported, at paragraph 22).

40 The Court must draw its conclusions in the light of this procedural background. The Court takes into consideration that the fortification policy of the Norwegian authorities, as presented at the relevant time, did not fulfil the requirements of EEA law.

41 Firstly, it was inconsistent in that, on the one hand, authorisation to market fortified cornflakes had been refused because of a lack of need, while on the other hand, Norway maintained as a matter of policy fortification of brown whey cheese with up to 10 mg of iron per 100 of cheese to be freely sold in the country.

42 Secondly, it had not been demonstrated that a comprehensive risk assessment had been carried out by the Norwegian authorities in response to Kellogg's submission of its application for authorisation. A comprehensive risk assessment was only carried out in the course of the proceedings before the Court.

43 It must therefore be held that the Kingdom of Norway, by applying its legislation so as to prohibit the import and marketing in Norway of corn flakes, fortified per 100 g with 1 mg thiamine, 1 mg riboflavin, 10 mg niacin and 7 mg iron, which have been lawfully manufactured and marketed in other EEA States, the Kingdom of Norway had, at the relevant time, i.e. 14 January 2000, failed to fulfil its obligations under Article 11 EEA.

Costs

44 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 asked for the Kingdom of Norway to be ordered to pay the costs. Since the latter has been unsuccessful in its defence, it must be ordered to pay the costs. The costs incurred by the Government of Denmark, the Government of France, the Government of the

Netherlands and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

On those grounds,

THE COURT

hereby:

1. Declares that, by applying its legislation so as to prohibit the import and marketing in Norway of corn flakes, fortified per 100 g with 1 mg thiamine, 1 mg riboflavin, 10 mg niacin and 7 mg iron, which have been lawfully manufactured and marketed in other EEA States, the Kingdom of Norway had, at the relevant time, i.e. 14 January 2000, failed to fulfil its obligations under Article 11 EEA.

2. Orders the Kingdom of Norway to pay the costs of the proceedings.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 5 April 2001.

Gunnar Selvik
Registrar

Thór Vilhjálmsson
President

REPORT FOR THE HEARING
in Case E-3/00

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

supported by the **Government of Denmark**, as intervener,

seeking a declaration that, by applying its legislation so as to prohibit the import and marketing in Norway of corn flakes, fortified per 100 g with 1 mg thiamine, 1 mg riboflavin, 10 mg niacin and 7 mg iron, which have been lawfully manufactured and marketed in other EEA States, the Kingdom of Norway has failed to fulfil its obligations under Article 11 EEA.

I. Introduction

1. The case at hand concerns the cereal product corn flakes, fortified with certain vitamins and with the mineral iron. The product is manufactured in Germany by Kellogg's Europe for Nordisk Kellogg's A/S (hereinafter 'Kellogg's'), a company incorporated under Danish law. In April 1997, Kellogg's applied to the Norwegian Food Control Authority for authorisation to sell the fortified product in Norway. The Norwegian authorities oppose the import and the marketing on the grounds that there is no nutritional need in the Norwegian population for the fortification.

2. It is disputed between the parties whether the refusal to grant the selling authorisation can be justified under Article 13 of the Agreement on the European Economic Area (hereinafter variously 'EEA' and 'EEA Agreement'). It is not disputed that the product concerned is covered by the EEA Agreement and that the Norwegian measure to ban the marketing of the product in question constitutes a barrier to trade within the meaning of Article 11 EEA. It is, furthermore, not disputed that, in assessing a nutritional need, the Norwegian authorities must have regard to the Norwegian population, and that the EFTA States, in the absence of harmonisation of the fortification of foodstuffs, are entitled to take the measures they consider necessary to protect public health.

II. Legal background, pre-litigation procedure and procedure before the Court

Legal background

EEA law

3. The application is based on one plea in law, namely, that Norway has failed to comply with its obligations under Article 11 EEA by applying its legislation so as to prohibit the import and marketing of fortified corn flakes which have been lawfully manufactured and marketed in other EEA States, and that this prohibition is not justified under Article 13 EEA.

4. Article 11 EEA provides that quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Contracting Parties.

5. The dispute before the EFTA Court concerns the question of whether such a measure can be justified under Article 13 EEA. That Article provides *inter alia* that Article 11 EEA does not preclude prohibitions justified on grounds of protection of human health, as long as a given prohibition does not constitute a means of arbitrary discrimination or a disguised restriction on trade.

6. Since Articles 11 and 13 EEA are, in substance, the same as Articles 28 and 30 EC, they should be interpreted in a manner consistent with the relevant rulings of the Court of Justice of the European Communities, in accordance with Article 6 EEA and Article 3, paragraph 2 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

The contested national provisions

7. The Norwegian authorities' rejection of the application of Kellogg's was based on section 10(2) of Norwegian Regulation No. 1252 of 8 July 1983 concerning the production and supply of foodstuffs ('*Generell forskrift for produksjon og frambud m.v. av næringsmidler*'), adopted pursuant to the

Norwegian Food Act ('*Lov av 19 mai 1933 nr. 3 om tilsyn med næringsmidler*'). That provision forbids the fortification of foodstuffs in the absence of an authorisation granted by the Norwegian Food Control Authority. According to the Government of Norway, section 10(2) is administered in accordance with the Codex Alimentarius General Principles. This means that individual authorisations are granted where there is a need in a population group or in the population as a whole. The assessment of need is decided by the Norwegian National Council on Nutrition and Physical Activity ('*Statens råd for ernæring og fysisk aktivitet*') and the Norwegian Food Control Authority ('*Statens Næringsmiddeltilsyn'*).

Pre-litigation procedure

8. By a letter of 4 July 1997, the Norwegian Food Control Authority refused the application of Kellogg's for authorisation to sell fortified corn flakes in Norway, on the grounds that the addition of nutrients is only authorised if there is a nutritional need. Furthermore, the Norwegian Food Control Authority stated that extensive use of fortification would lead to an unbalanced addition of nutrients, with a high intake of substances added to many products. It would also be misleading for consumers if emphasis were to be placed on the nutrients instead of on the total nutritional quality of the product. Basic foodstuffs should be produced by raw materials of high nutritional value, which should not be lost during the manufacturing process, and nutrients should only be added when the authorities recommend that a product carry a nutrient for which a deficiency may arise in the population. Lastly, the Norwegian Food Control Authority noted that the addition of nutrients to breakfast cereals was not obligatory in any Nordic country and that, consequently, harmonised production could be attained by marketing the non-fortified variety of the cereal in all countries.

9. Kellogg's appealed against the refusal. By letter of 6 February 1998, the Ministry of Health and Social Affairs dismissed the appeal. The Ministry stated that the starting point of the considerations has to be a global evaluation based on a total consumption of fortified products in a situation of free fortification of foodstuffs. It was pointed out that the number of fortified products on the market would create a risk for public health. Therefore, it was not decisive that the fortification in question did not represent any risk to public health. Furthermore, the principle of administrative law on non-discrimination would lead to a situation that all applications for fortifications have to be granted if fortification was allowed for one single product. The result of such a free fortification practice is that an unknown number of fortified products are on the market and the recommended intake in the population could be exceeded. Another problem with free fortification is the imbalance in the intake of nutrients when only some nutrients are added.

10. Kellogg's then filed a complaint with the EFTA Surveillance Authority. Following contacts with the Norwegian authorities, the EFTA Surveillance

Authority sent a letter of formal notice to the Government of Norway on 29 January 1999. The EFTA Surveillance Authority pointed out that, in order to get the ban on imports of fortified corn flakes justified under Article 13 EEA, the Government of Norway must demonstrate that the product constitutes a health risk. Since the Government of Norway had not submitted any evidence on this point, Norway had failed to fulfil its obligations under Article 11 EEA.

11. In answering this letter of formal notice, the Government of Norway argued that it would be sufficient to produce documentation that, according to the present state of scientific research, the fortification in question might be a health hazard when eaten in uncontrollable and unforeseen amounts. With regard to the fortification with iron, the Government of Norway referred to the risks associated with excessive iron intake, especially for adult men and postmenopausal women. Special precautions had to be taken for persons with hereditary iron overload (haemochromatosis). For the vitamins, there was no need in Norway, and large doses of niacin could cause adverse effects. Furthermore, the precautionary principle should be applied to the fortification with these vitamins. Less restrictive measures, such as labelling, were not possible because the consumer would have to have knowledge of the nutritional content of all dietary sources in order to calculate the risk of a too high and unbalanced intake of nutrients.

12. On 8 October 1999, the EFTA Surveillance Authority sent a reasoned opinion to the Government of Norway, maintaining its position as expressed in the letter of formal notice, and asking Norway to take the necessary measures to comply with the reasoned opinion within two months following notification thereof.

13. In its answer, the Government of Norway maintained its previous position and stated that it was not possible to prove that the fortified product alone gave rise to health hazards. However, there was sufficient evidence to support the view that some vitamins and minerals in larger doses, although not acutely toxic, could cause a health hazard, by themselves and through their interactive effects. Because the mineral iron carries a higher risk than the vitamins used, the risk evaluation was limited to that substance. According to the conclusions of the evaluation, the main hazard identified with iron fortification was increasing iron stores due to small needs and a limited ability to excrete iron. The main risk groups are 20 000 homozygous and between 500 000 and 600 000 heterozygous individuals with primary haemochromatosis, healthy adult men and postmenopausal women. A precautionary attitude towards fortification is reasonable because of the unknown causal relation between the iron level of the body and certain diseases.

Procedure before the Court

14. Since measures had not been taken to comply with the reasoned opinion, the EFTA Surveillance Authority filed the application in question here, which was registered at the Court Registry on 10 April 2000.

15. By order of 7 September 2000, the Government of Denmark was given leave to intervene in support of the defendant.

III. Forms of order sought by the parties

16. The EFTA Surveillance Authority claims that the Court should:

(i) declare that the Kingdom of Norway has failed to fulfil its obligations under Article 11 of the EEA Agreement, by applying its legislation so as to prohibit the import and marketing in Norway of corn flakes, fortified per 100 g with 1 mg thiamine, 1 mg riboflavin, 10 mg niacin and 7 mg iron, which are lawfully manufactured and marketed, in other EEA States;

(ii) order the Kingdom of Norway to pay the costs.

17. 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.

18. The Government of Denmark, as intervener, contends that the Court should:

(i) dismiss the application.

IV. Written procedure

19. Written arguments have been received from the parties:

– the EFTA Surveillance Authority represented by Peter Dyrberg, Director, Legal and Executive Affairs, acting as Agent, assisted by Bjarnveig Eiríksdóttir, Senior Officer, Legal and Executive Affairs Department;
– the Government of Norway, represented by Fanny Platou Amble, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent, and Beate Berglund Ekeberg, Assistant Director General, Ministry of Foreign Affairs, acting as Co-agent.

20. Pursuant to Article 89 of the Rules of Procedure of the EFTA Court, a statement in intervention has been received from:

– the Government of Denmark, represented by Jørgen Molde, Head of Department, Ministry of Foreign Affairs, acting as Agent, and Nina Holst Christensen, Head of Department, Ministry of Justice, assisted by Asger Kroll, Head of Section, Ministry of Foreign Affairs.

21. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

– the Government of France, represented by Kareen Rispal-Bellanger and Régine Loosli-Surrans, Ministry of Foreign Affairs, acting as Agents;
– the Government of the Netherlands, represented by Ivo van der Steen, Legal Affairs Department, European Law Division, acting as Agent;
– the Commission of the European Communities, represented by Michael Shotter, Member of its Legal Service, acting as Agent.

V. Summary of the pleas in law and arguments

The EFTA Surveillance Authority

22. The EFTA Surveillance Authority seeks to demonstrate that the ban on imports of fortified products cannot be justified under Article 13 EEA, because the Government of Norway has not substantiated its claim that the fortification in question would constitute a danger to public health.

23. According to the EFTA Surveillance Authority, the Government of Norway seems to rely upon an incorrect interpretation of the judgment of the Court of Justice of the European Communities in the *Sandoz*[1] case, *viz.*, that the judgment would appear to legitimise any ban on foodstuffs fortified with vitamins, as long as there is no nutritional need for those substances in the importing State, regardless of whether the fortification may constitute a risk to public health.

24. To the EFTA Surveillance Authority, it seems that the Government of Denmark, in its intervention, seeks to turn the obligation (following from the *Sandoz* judgment) to grant the authorisation when there is a real need into a right in the sense that the authorisation may be refused on the grounds of lack of need, regardless of whether there really is a danger to public health, and no matter how remote or hypothetical such a danger may be.

25. However, a ban on a product in order to protect the interests laid down in Article 13 EEA must be based on international scientific research and the prevailing eating habits in the importing State. A general reference to a potential health risk cannot justify a ban on a product.[2]

26. The EFTA Surveillance Authority submits that the concept of need must be assessed in the light of the raw materials used, bearing in mind the assessment made by the authorities of the Member States where the product is lawfully

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1 Case 174/82 *Sandoz BV* [1983] ECR 2445 (hereinafter '*Sandoz*').

2 Case 178/84 *Commission* v *Germany* [1987] ECR 1227.

manufactured and marketed, implying that one could not require the foreign trader to change to another production method or another, less risky addition.[3]

27. The Government of Denmark's interpretation of need leads to a situation in which the dietary habits are crystallised because the government will always tend to ensure that the needs of the population are met. Thus, if the national authorities are successful, there will be no room for a new market entrant. These consequences have been rejected by the Court of Justice of the European Communities.[4]

28. With respect to the *Toolex Alpha* judgment,[5] referred to by the Government of Denmark, concerning the wide discretion of Member States when there is scientific uncertainty surrounding the establishment of a threshold above which the product in question constitutes a serious risk to human health, the EFTA Surveillance Authority points out that the substance trichloroethylene has been classified as dangerous at the Community level, and that there is hard evidence of its carcinogenic effects on humans.

29. With respect to the administrative law principle of non-discrimination, it follows from the case-law of the Court of Justice of the European Communities that the EEA States cannot justify breaches of their obligations under the EEA Agreement by referring to matters of their internal legal order.[6]

30. The EFTA Surveillance Authority states that it is not arguing in favour of free fortification. It refers to the situation in other EEA States, where the allowance of a number of vitamins in certain foodstuffs or categories of foodstuffs has not led to markets being flooded with fortified foods.

31. With respect to vitamins, the EFTA Surveillance Authority notes that the precautionary principle does not exempt authorities from having to base their policy on a risk assessment. A proper risk assessment would have to be made with regard to the nutrients at issue in the present case, based on the actual intake among the population. Furthermore, any measure based on the precautionary principle must be non-discriminatory, proportionate, and not aim at zero risk.[7]

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3 Joined Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617; and Case 178/84 *Commission* v *Germany* [1987] ECR 1227.

4 *Ibid.*

5 Case C-473/98 *Kemikalieninspektionen* v *Toolex Alpha AB*, judgment of 11 July 2000, not yet reported.

6 Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417; Case 280/83 *Commission* v *Italy* [1983] ECR 2361.

7 See Communication from the Commission on the precautionary principle, of 2 February 2000, COM(2000)1.

32. Thiamine is commonly known as vitamin B1 and riboflavin as vitamin B2. There are two types of niacin: nicotinic acid[8] and nicotinamide. The latter is used in the fortification in question. The properties of these three vitamins and of iron are described in greater detail in the Reports of the Scientific Committee for Food – Nutrient and energy intakes for the European Community, published by the Commission of the European Communities in 1993.[9]

33. The nutritive value of a serving (30 g) of the fortified product is:

Energy	465 KJ (111 calories)
Proteins	2.1 g
Carbohydrates	24.6 g
Fat	0.30 g
Dietary fibres	0.75 g
Mineral sodium	0.36 g
Thiamine	0.3 mg
Riboflavin	0.3 mg
Niacin	3 mg
Iron	2.1 mg

34. The recommended daily intake (RDI)[10] of the vitamins in question is as follows:[11]

Thiamine	0.9 – 1.1 mg (0.7 mg)[12]
Riboflavin	1.3 – 1.6 mg (1.0 mg)

8 According to the American report referred to by the Government of Denmark, the particular reason for reviewing the upper level of niacin is flushing, caused by nicotonic acid. Nicotinamide does not appear to be associated with these effects. The Scientific Committee for Food was aware of these facts when setting the upper level for niacin.

9 The report is attached as Annex 3 to the application of the EFTA Surveillance Authority.

10 This is a measure which indicates the daily intake needed for the proper maintenance of physical functions.

11 The values set out are the average ones indicated in the report attached as Annex 3 to the application of the EFTA Surveillance Authority. The lower values are the ones for men and the upper ones for women. In Annex 3, more detailed tables are found, broken down according to age group and gender.

12 The amounts in brackets concern children (4 to 6 years of age), as presented in the defence of the Government of Norway.

Niacin	14 – 18 mg (11 mg)
Iron	9 – 20 mg (4 mg)

35. The upper daily intake level (UL)[13] is as follows:[14]

Thiamine	500 mg
Riboflavin	No maximum level set
Niacin	500 mg
Iron	30 – 100 mg

36. The EFTA Surveillance Authority also points out that, according to the above-mentioned Reports of the Scientific Committee for Food (SCF), there is 'no evidence of toxicity of thiamine taken by mouth, at intakes of up to 500 mg/day (for 1 month)'. As regards riboflavin, the Reports state that 'there is little or no accumulation or storage of the vitamin in the body, and there is no evidence of any toxicity of riboflavin taken by mouth'. As regards niacin, the Reports indicate that more than 500 mg/day of niacin may have harmful effects. A serving of the product in question has 3 mg. Therefore, it was not shown that the addition of these vitamins may put the Norwegian population's health at risk.

37. The EFTA Surveillance Authority observes that the Government of Denmark, which states that iron fortification is now being reviewed in Denmark in the light of new scientific knowledge, is not reviewing fortification with nicotinamide.

38. With respect to the mineral iron, the EFTA Surveillance Authority submits that there is a deficiency in the Norwegian population.[15] This is why iron fortification of domestically-produced whey cheese[16] and other whey products has been allowed for many years under the Norwegian fortification policy, as part of a 'targeted' addition of nutrients to foodstuffs, so as to reach those segments of the population who have low iron status or who wish to increase their iron intake.[17] Contrary to the view of the Government of Norway, the EFTA

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13 This is a measure which indicates the maximum safe intake or the intake without adverse effects, if the nutrient is taken over a certain period of time

14 The definition and the amounts are questioned by the Government of the Netherlands because the SCF does not make any observations on the safety levels of intake of micro-nutrients.

15 Reference is made to the risk evaluation (Enclosure 3 to Annex 5 to the application) and to an article written by Lars Johansson, *Dietary habits among Norwegian men and woman*, Scandinavian Journal of Nutrition, 1997 (Enclosure 9 to Annex 5 to the application).

16 Whey cheese is fortified with 10 mg of iron per 100 g of cheese. According to the EFTA Surveillance Authority's information, the annual per capita consumption of whey cheese in Norway is between 2 and 3 kg. The annual per capita consumption of corn flakes is approximately 300 g.

17 Since whey cheese does not contain iron prior to processing, one cannot speak of 'restoration'.

Surveillance Authority states that it is difficult to discern the 'targeted' aspect of adding iron to whey cheese. If whey cheese is part of the average household diet in Norway, it will also find its way to consumers who should not increase their iron intake. According to the risk evaluation conducted by the Norwegian authorities, hereditary iron overload cannot be prevented through dietary measures and is a task for the health care system.

39. The EFTA Surveillance Authority points out that a consumer who does not eat whey cheese should have the possibility of meeting his nutritional needs through, for example, fortified corn flakes.

40. The EFTA Surveillance Authority agrees with the finding of the Government of Norway to the effect that there are only small groups of the population that suffer from iron deficiency anaemia.[18]

41. With respect to the danger stemming from iron fortification ingested by people with iron overload, hereditary or otherwise, the EFTA Surveillance Authority points out that it did give sufficient attention to this problem. The report of the 'Nordic Nutritional Recommendations 1996' mentions haemochromatosis,[19] and a possible link between iron intake and cancer and cardiovascular diseases. However, newer studies have not been able to confirm the existence of such a relation.

42. The EFTA Surveillance Authority states that Norway allows for fortification of products with other vitamins for which the safety margin is lower than the one for iron. Fortification with vitamins A and D, for example, is allowed. Vitamin D fortification is allowed on the grounds that there is a deficiency in the elder part of the population and among immigrants and, consequently, margarine, edible oil, other edible fats, butter, and milk are all fortified with vitamin D. The Government of Norway has defended the vitamin D fortification by referring to the fact that an adult would have to drink more than 10 litres of milk per day to reach the upper limit of safe intake. The EFTA Surveillance Authority cannot see any justification for this different treatment of domestic and imported products. It follows from the case-law that national authorities may not seek to 'crystallise' given consumer habits.[20]

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18 Regarding the differences between iron deficiency and iron deficiency anaemia, reference is made to an Article written by Prof. Leif Hallberg (Attached as Annex 8 to the Reply).

19 Regarding the different figure for persons with haemochromatosis, reference is made to Enclosure 8 to the reply to the letter of formal notice indicating that 0.3 – 0.5% of the Norwegian population (12 000 – 16 000 individuals) have homozygote haemochromatosis and approximately 10 % (400 000) have heterozygote haemochromatosis, and to Enclosure 3 to the answer to the reasoned opinion (20 000 – 500 000 – 600 000 individuals).

20 Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417, at paragraph 14; Case 178/84 *Commission* v *Germany* [1987] ECR 1227, at paragraph 32.

43. The Government of Norway has produced an undated risk evaluation of iron,[21] seemingly prepared solely for the purposes of the present case. The evaluation is based on the hypothesis that the granting of an authorisation for fortification to Kellogg's would entail the fortification of flour. The EFTA Surveillance Authority notes that the doubling of iron intake as a consequence of such a fortification would come mainly from the fortification of bread, which is not at issue. Furthermore, there are no reports of excessive intake from countries where the fortification of flour is permitted.

44. Furthermore, the evaluation is highly hypothetical, because of the assumption that, once corn flakes are fortified, flour will be fortified as well. Moreover, the evaluation does not reflect individual eating patterns.

45. In the view of the EFTA Surveillance Authority, a labelling requirement would be sufficient to meet concerns about health. Labelling requirements are required under the present Norwegian rules governing those fortifications currently allowed under Norwegian law. The EFTA Surveillance Authority concludes by noting the paradox between the view of the Government of Norway on the dangers of iron and the fact that iron supplements are on free sale in Norway.

The Government of Norway and the Government of Denmark

46. The Government of Norway, supported by the Government of Denmark as intervener, has put forward the following pleas in law and arguments.

47. Although the prohibition on the import and marketing of fortified corn flakes in Norway, pursuant to section 10(2) of Norwegian Regulation No. 1252 of 8 July 1983, constitutes a measure having an effect equivalent to a quantitative restriction and is prohibited under Article 11 EEA, the measure is justified under Article 13 EEA.

48. The rejection of Kellogg's application, on the basis that there is no nutritional need in the Norwegian population for the fortification in question, is in accordance with legally adopted and consistently applied Norwegian nutrition policy. This policy is based on scientifically founded and internationally adopted nutrition recommendations, applied not only in Norway, but also in other EEA States. Excessive consumption of vitamins and minerals may have harmful effects. Scientific research is still not sufficiently advanced to be able to determine with certainty the upper levels of tolerable intake and the precise effects at different intake levels of the different vitamins and minerals. Thus, as long as there is no nutritional need for the vitamins and minerals, this may constitute a health risk. The Norwegian regulations are non-discriminatory and

[21] Attached as Enclosure 3 to the answer to the reasoned opinion, as part of Annex 7 to the application. The EFTA Surveillance Authority alleges that this evaluation was made between the date of the reasoned opinion and the date of the Government of Norway's answer thereto.

do not constitute a ban on nutrient fortification, and their sole purpose and aim is the protection of public health.

49. The fortification in question fails to satisfy a nutritional need in the Norwegian population. Further, it, and particularly the iron fortification, may actually constitute a health risk for large population groups. Thus, even if the Court should find that a prohibition based on lack of nutritional need due to the potential health risks inherent in any consumption of vitamins and minerals beyond nutritional need is not justified under Article 13 EEA, the prohibition on the fortification in question is, in any event, justified under that Article.

50. The Government of Norway argues that an overly simplified approach has been taken by the EFTA Surveillance Authority in its application with regard to the setting of tolerable, or safe, upper intake level values. The values are taken from an opinion from the Scientific Committee for Food, dated December 1992 (published 1993), and are not fully up to date.[22] Several scientific expert groups in Scandinavia, Europe, and the United States published upper levels for chronic intakes of selected nutrients in the 1990s. However, they have emphasised that the figures should be used with great caution, as they are based on insufficient data.

51. A generic model for risk assessment for biological and chemical agents was agreed upon at the FAO/WHO Expert consultation 'Application of risk analysis to food standards issues' in 1995, and this model is now the basis for discussions on risk assessment in the Codex Alimentarius Commission and the Commission of the European Communities.

52. In order to standardise procedures and establish more sound upper levels for nutrient intake, the US Food and Nutrition Board has recently developed a risk assessment model for establishing upper intake levels for nutrients.[23]

53. The Board defines the Tolerable Upper Intake Level (UL) as: the highest level of daily nutrient intake that is likely to pose no risk of adverse health effects to almost all individuals in the general population. As the intake increases above the UL, the risk of adverse effects increases. The UL applies to regular daily use. The Board emphasises that, for many nutrients, there are not sufficient data to develop a UL. This does not mean that there is no potential for adverse effects resulting from high intake. When data about adverse effects are extremely limited, extra caution may be warranted.

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22 Even though the NRN (Nordic Recommendations of Nutrients) upper level for iron is higher than that of the SCF, it is not tenable to conclude that there is a general scientific trend towards increasing levels for iron.

23 *Dietary reference intakes: A risk assessment model for establishing upper intake levels for nutrients*, Food and Nutrition Board, National Academy Press, Washington, D.C., 1998.

54. The term 'adverse effect' is defined as: any significant alteration in the structure or function of the human organism, or any impairment of a physiologically important function. In the case of nutrients, it is important to consider the possibility that the intake of one nutrient may adversely affect the health benefits conferred by another nutrient.

55. Furthermore, it is pointed out that the US model for risk assessment gives considerably lower figures for tolerable upper levels than those published earlier by Nordic and European expert groups.

56. The Scientific Committee for Food is also currently developing guidelines for setting upper intake levels for vitamins and minerals. In several cases, upper intake levels which were once considered to be safe have had to be substantially lowered in the light of new research. Similar significant changes in upper intake levels have been indicated for some of the nutrients that are at issue in the present case.

57. As regards niacin, the upper daily intake level for adults was 500 mg/d, as defined by European experts in 1993 and Nordic experts in 1996. However, according to the US Food and Nutrition Board 1998, the tolerable upper intake level for niacin as a supplement in fortified foods or a combination of the two is 35 mg/d for adults and 10 mg/d for children aged 1-3 years. The average intake of niacin from food by Norwegian men and women is 26 and 18 mg/d, respectively. Thus, four servings of fortified corn flakes would give an intake of niacin above the UL for the age group 1-3 years.

58. As regards riboflavin, the 1993 EU report states that there is no evidence of any toxicity for riboflavin taken by mouth. The EFTA Surveillance Authority therefore assumes that no maximum level has been set. In contrast, the US Food and Nutrition Board stated in 1998: 'No adverse effects have been associated with excess intake of riboflavin from food or supplements. This does not mean that there are no potential adverse effects resulting from high intakes. Because data on the adverse effects of riboflavin intake are limited, caution may be warranted'.

59. The US Food and Nutrition Board has not yet set a UL for iron because the lack of data makes it very difficult at present to specify a safe upper range for daily iron intake. Scientists therefore advise that, for the time being, dietary iron intake should not exceed recommended daily allowance (RDA) values. Thus, it may be argued that, for iron, the safe upper intake level is no higher than the recommended daily intake.[24] Because of the health risks associated with excess iron, the safer upper level for iron should not exceed the recommended daily

[24] The uncertainties surrounding UL indicate that the levels that have been suggested up to now are not suitable as tools in the risk assessment of foods included in the everyday diet of the entire population.

intake of this mineral, which implies that the safety margin for this mineral is, in fact, zero.[25]

60. It would not be appropriate for the Government of Norway to question the scientific or evidential weight of the documentation, on the grounds that these observations, comments and assessments have been prepared for the purpose of the case.

61. It follows from the *Sandoz* judgment of the Court of Justice of the European Communities that, when there is scientific uncertainty as to the critical quantities and the precise harmful effects of vitamins, and the harmful effects are dependent upon the quantities consumed as part of the general diet, which is impossible to monitor or foresee, a prohibition on the marketing of foodstuffs fortified with vitamins is justified on grounds of human health and in accordance with the principle of proportionality, provided that the marketing is authorised where the addition of vitamins to foodstuffs meets a real technical or nutritional need.

62. Consequently, it is not necessary to prove that each and every fortified product as such constitutes a risk to human health, as this would be impossible. This view is strongly supported by the Government of Denmark.

63. Furthermore, according to the Government of Denmark, it is sufficient to satisfy the principle of proportionality to establish that there is no nutritional need for the fortification in question.[26]

64. The Government of Denmark supports the view that it must be up to the Norwegian authorities to decide whether or not there is a need in the Norwegian population for the nutrients in question. Such an evaluation should only be questioned if the work of national experts is inconsistent.

65. The Government of Denmark does not agree with the interpretation made by the Commission of the European Communities of the *Sandoz* judgment, to the effect that the Court of Justice of the European Communities preferred to draw its conclusion based on the proportionality of the authorisation procedure as a whole, because the Court was faced with difficult technical questions. On the contrary, the conclusion of the Court in that case is evidently based on the very clear assumption that intake of excessive amounts of vitamins may cause health risks and, that, as intake cannot be controlled, it may exceed safe levels if additions to various foodstuffs are permitted without a prior authorisation procedure. This fact justifies that a State may maintain an authorisation procedure for the addition of vitamins in which decisions are made on a case-by-

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25 See Schümann, Klaus, *Safety aspects of iron in food* (to be published 2001), attached as Annex 3 to the rejoinder.

26 The judgment of the Court of Justice of the European Communities in *Sandoz* only concerned vitamins. Minerals do, however, have the same general characteristics as vitamins in terms of the possibility of harmful effects due to excessive consumption, and they are treated in the same manner as vitamins in the EC directives concerning foodstuffs for special nutritional purposes.

case-basis. This conclusion cannot be changed by reasoning that it would imply the legitimacy of a ban on other foodstuffs which do not really have a nutritional value. The comparison is not valid, because there is no reason to ban such products insofar as they do not contain toxic or other substances adverse to human health.

66. The Government of Norway adds that scientific uncertainty about the upper levels and the effects of excessive intake calls for an approach in accordance with the precautionary principle, as developed and applied internationally and within the Community. In cases of scientific uncertainty and in the absence of harmonisation, it is up to the national authorities to establish the level of exposure to risk they wish to allow. Excessive intake of iron over a long period of time carries a risk to human health. The needs in different groups of the population vary, and call for caution as to the allowance of fortification of foodstuffs with iron.

67. The Government of Norway goes on to state that the measures are proportionate and necessary to achieve the level of protection Norway wishes to provide against the risks in question. Other measures, such as the introduction of upper levels for the addition of these vitamins to foodstuffs and/or labelling requirements, would not effectively protect the health of the population against the risks.

68. Norwegian policy regarding the fortification of foods has formed an important part of Norway's health policy since the 1950s. For many years, the purposeful and targeted addition of nutrients to foods to prevent deficiencies in Norwegians, based on surveys and studies of the diet and health in the population, has been regarded as an important instrument for enhancing public health and avoiding health risks.

69. As the need for vitamins and minerals is fairly well documented, and has been for many years, the government has long acknowledged the usefulness of targeted fortification in order to improve public health. However, the health authorities have been aware that scientific knowledge of tolerable upper intake levels is still limited, and poorly documented, for many vitamins and minerals. New research underlines the uncertainty inherent in the upper levels, which have previously been considered tolerable upper levels. Similarly, the scientific knowledge of the health consequences of interaction between various nutrients is so far limited, and little studied. What is known, however, is that there is extensive interaction between nutrients at levels much lower than the tolerable upper intake level for the individual nutrient.[27] Consequently, as long as there is

[27] For example, iron in the diet may affect the uptake and/or transport of manganese, zinc and copper, and vitamin C may alter the excretion rate of copper and other minerals. Furthermore, there is extensive interaction between nutrients and *inter alia* toxic metals, see *Goyer* 1997 and *Peraza et al* 1998, cf. the reference list in Enclosure 2 to Annex 7 to the application.

no nutritional need for the fortification of foodstuffs with vitamins and minerals, fortification may constitute a health risk for large population groups.

70. The case at hand is about a situation where there, admittedly, does exist a nutritional need for iron in certain population groups, albeit small. There are, however, other population groups which are at risk of iron overload, population groups that are substantial in number and for whom the inherent health risks are of a serious nature. The passage from *Sandoz* referred to earlier does not address a situation where the addition of vitamins simultaneously meets a need and represents a health risk. Thus, it cannot be construed so as to oblige national authorities to always give preference to a nutritional need over health risk, regardless of the number of people in need and at risk, respectively, and the consequences of putting need before risk in each case.

71. As a result of this, a precautionary approach has been chosen, and the government has aimed at limiting fortification and ensuring that the system is transparent, so as to minimise the risks of adverse effects from excessive intake of vitamins and minerals. In its *Sandoz* judgment,[28] the Court of Justice of the European Communities also took a precautionary approach.

72. Reference is made to the Communication from the Commission on the precautionary principle.[29] The EC Treaty prescribes the application of that principle only in relation to the environment[30] but, in practice, its scope is much wider, particularly where preliminary objective scientific assessment indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, or on human, animal or plant health, may be inconsistent with the high level of protection chosen for the Community.

73. The importance of a precautionary attitude towards the fortification of foodstuffs with vitamins and minerals was also emphasised at the Kellogg's Satellite Symposium in Lillehammer in 1999.[31]

74. Nutrients should only be added to foods for health reasons, in order to counteract deficiencies in the population or in large population groups. The food in question must, moreover, be a suitable carrier of the nutrient to the sections of the population where there is a need.

75. Historically, vitamin and mineral deficiencies were relatively common, but they are now considered to be minor problems in the Norwegian population. The competent government body, the National Council on Nutrition and Physical Activity, keeps the need to add nutrients to foods under continuous review on the

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28 Paragraphs 11 and 18.

29 Communication from the Commission on the precautionary principle, of 2 February 2000, COM(2000)1.

30 Article 130 R of the EC Treaty (now Article 174 EC).

31 Published in Scandinavian Journal of Nutrition, Annex 2 to the application.

basis of updated documentation. It presented a comprehensive report on fortification of foods in 1994. Based on relevant research and survey material, the Council then found that the Norwegian diet provides sufficient amounts of most nutrients.

76. In accordance with the current recommendations of the National Council on Nutrition and Physical Activity, general permission to fortify foodstuffs pursuant to section 10(2) of Norwegian Regulation No. 1252 of 8 July 1983 is, on the basis of the above-mentioned principles, presently limited to four food groups (edible fats, low-fat milk, brown cheese/whey products and salt) and four nutrients (vitamins A and D, and iron and iodine).[32]

77. Permission to add iron to brown whey cheese was first given almost 30 years ago. The Government of Norway stresses that this must be seen in its proper historical context.

78. The problems concerning iron deficiency anaemia among children and women were the subject of much discussion in the 1960s. Different measures to prevent anaemia were debated, such as adding iron into infant foods, whey cheese and flour, or having a high extraction rate of flour, in order to preserve more of the vitamin and mineral content of the grain.

79. Around the same time, Norwegian paediatricians showed that iron fortification of infant foods was effective in lowering the risk of anaemia among children. Permission to add iron to selected infant foods was, therefore, given.

80. As brown whey cheese was and still is a popular sandwich spread among children, it was decided in 1972 to permit restoration of the iron content in whey cheese of up to 10 mg of iron per 100 g of cheese. The bioavailability of the added iron is good. The addition of iron to whey cheese has been considered an effective and targeted measure for those segments of the population who may have low iron status or wish to increase their iron intake from foods.

81. General fortification of flour with iron was debated, but rejected. Instead, a high extraction rate was recommended for Norwegian flour. The other Nordic countries chose to fortify flour with iron, but that was later found to be undesirable and was abolished in Denmark in 1987, in Finland in 1994, and in Sweden in 1995.

82. Since the 1960s, the iron status of the population in Norway has improved. Today in Norway, only small groups of the population have iron deficiency anaemia.[33] The proportion of women of childbearing age with iron deficiency

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32 Annex 5 to the application.

33 The Government of Norway does not agree with Prof. Hallberg's definition of iron deficiency to which the EFTA Surveillance Authority referred, because it is commonly acknowledged that iron deficiency must imply that, in addition to a serum ferritin value of 15 µg/L, other iron status indicators are abnormal.

anaemia has decreased from 10-12% in the 1960s to 4% in the 1990s. Furthermore, a large proportion of Norwegian men have high iron stores. In addition, genotyping (method available in 1996) has revealed that as many as 15% of the population may have heterozygous haemochromatosis, and thus problems related to excessive iron intakes. Consequently, the government's evaluation of the iron status of the population and the need for fortification is quite different today from what it was 30 years ago.

83. More recently, the Norwegian health authorities have advised against the general addition of iron to foodstuffs because they fear that it might be injurious to the health of certain segments of the population. Considering the improved iron status in the Norwegian population, the increased prevalence of iron overload, the difficulty of setting an upper safe level for iron intake, and the fact that an iron intake exceeding the recommended daily intake does not offer any health benefits but, on the contrary, may entail health risks, it is not advisable to increase the addition of iron to foods intended for the Norwegian market.

84. Furthermore, the National Council on Nutrition and Physical Activity established a working group with a mandate to re-evaluate the existing permission for restoration of whey cheese products with iron, in the light of new knowledge about the adverse effects of iron overload and the new data about the high prevalence of haemochromatosis in the Norwegian population.

85. The National Council on Nutrition and Physical Activity has, by a decision of 21 December 2000,[34] recommended that the present permission to fortify whey cheese be withdrawn. The summary of the working group, which is confirmed by the Council, states the following:

> ***'Evaluation and recommendation of the working group***[35]
>
> *Permission to add iron to brown cheese and whey products was given in the early 1970s with the purpose of preventing iron deficiency in segments of the population. Recent research indicates that the basis for this decision has changed significantly.*
>
> *Since then, several studies indicate that the prevalence of iron deficiency anaemia has decreased. This is probably related to changes in the composition of the diet over the past few decades, i.e. with higher consumption of fruit, vegetables and meat.*
>
> *On the other hand, recent surveys have shown that the prevalence of high iron stores is greater than previously assumed. Only since 1996 we have been aware*

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34 Supplementary information submitted by the Government of the Kingdom of Norway. The information presented herein is in addition to the submission already put forth in the written procedure.

35 Working group appointed by the National Council on Nutrition and Physical Activity.

that as many as 0.5% of the population are homozygous and 15% heterozygous for primary haemochromatosis.

Furthermore, since the 1970s, a new method for determining the size of the iron stores in the body has been introduced, i.e. analyses of serum ferritin, which makes it possible to assess more precisely an individual's iron status.

Today the vast majority of the population has a satisfactory iron status. Therefore there is no basis for a general iron enrichment of foods.

However, depleted iron stores and iron deficiency anaemia are still not uncommon among children and women of child-bearing age. Thus, measures to improve the iron status of these groups are considered advisable. These may include the targeted use of iron supplements or by addition of iron to selected foods, or by a combination of the two. It is recommended to continue fortification of flour used for baby cereals with iron, and that this iron has a high level of bioavailability.

One cannot preclude that a high intake of iron and large iron stores may have adverse effects on health. Accordingly, it is not desirable to increase the iron intake by adding iron to foods intended for the general population.

The working group recommends that the general permission to add iron to brown cheese and whey products should be withdrawn. However, it should be permitted to add iron to brown cheese and whey products that are marketed specifically for groups which need extra iron, particularly children and young women, on condition that information on the iron additive and the target groups is stated on the product packaging.

This type of iron additive would seem expedient since we know that the bioavailability of the iron added to brown cheese is high compared with other types of iron used to enrich foods. This is true despite the fact that brown cheese has a high calcium content, and that calcium has been shown to inhibit the bioavailability of iron in the diet. Moreover, brown cheese is a food which has traditionally been an important source of iron in the Norwegian diet, and one which is perceived as a source of iron by large segments of the population.'

86. According to the information supplied by the Government of Norway, the Norwegian Food Control Authority is the appropriate governmental body to revoke existing permissions to add iron to whey cheese products. Moreover, in the light of the status of the Council and previous governmental practice, it is highly unlikely that the Norwegian Food Control Authority will refrain from taking action in accordance with the Council's recommendation.

87. The implication of this supplementary information is that any submissions regarding allegedly different treatment between domestic and imported products must be dismissed as unfounded. Furthermore, the re-evaluation and withdrawal confirms that the government continuously evaluates its fortification practice to accommodate changes in nutritional need and new scientific research.

88. In this context, the Government of Norway points out that the new scientific knowledge concerning the problem of iron overload has also prompted other authorities to review their iron fortification practice. The Government of Norway refers to the situation in Denmark, where iron fortification of *inter alia* corn flakes is allowed. However, this practice is now under re-evaluation.

89. The Government of Denmark points out that the Danish Veterinary and Food Administration has established a working group with the mandate to review the actual iron intake with respect to iron deficiency and iron overload.

90. With respect to new research published after the date of a decision challenged under Article 11 EEA, the Government of Norway refers to the *Toolex Alpha* case.[36] That judgment shows that the Court of Justice of the European Communities is not only prepared, but has an obligation, to take into consideration new research published after the time of the decision. Another approach would be highly unsatisfactory for the parties to the case at hand, because the Norwegian health authorities would take an identical decision on the scientific basis currently available. The main point is that the issue in question is not the refusal as such, but rather the validity of section 10(2) of Norwegian Regulation No. 1252 of 8 July 1983.

91. The judgment by the Court of Justice of the European Communities in *Sandoz* means that, where the addition of vitamins to foodstuffs meets a real nutritional need in a Member State, the marketing of such fortified foodstuffs must be authorised under Community law.[37] The government has considered whether there is a need in the Norwegian population for the fortification which is the subject of the application by Kellogg's, but has found that this is not the case. For thiamine, riboflavin, and niacin, dietary surveys clearly indicate that the Norwegian population, in fact, consumes in excess of the recommended daily intakes of those vitamins.[38] The assessment is more complex for iron. In the opinion of the Government of Norway, however, it cannot be concluded that there is a need for general fortification of foods with iron in the Norwegian population as such.

92. The Codex Alimentarius General Principles state that fortification should be the responsibility of national authorities. Currently, the regulation of food fortification, as well as basic policy attitudes towards fortification, varies greatly from one EEA State to the next.[39] Steps have been taken within the Community to initiate harmonisation of national fortification policies. Reference is made to the Commission White Paper on Food Safety from January 2000. The White

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36 Case C-473/98 *Kemikalieninspektionen* v *Toolex Alpha AB*, judgment of 11 July 2000, not yet reported.

37 Paragraph 20 of the judgment.

38 The 1997 Norwegian dietary survey, Enclosure 9 to Annex 5 to the application, page 67, table 6.

39 Cloutier and Baffigo, *Addition of vitamins and minerals to foods: Review of regulations in EU Member States*, Annex 2 to the application, pages 119S-121S.

Paper addresses *inter alia* the fortification of food with vitamins and minerals. As part of this effort, scientific committees in the United States and the European Union have developed standardised risk assessment models for establishing upper intake levels for nutrients, and are in the process of reviewing various aspects of health risks related to high nutrient intakes, such as the hitherto-established tolerable upper intake levels for vitamins and minerals.

93. There are several aspects to consider and several possible models for harmonisation in this area.[40] Reference is made to a Preliminary Draft Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws of the Member States relating to the addition of nutrients to foods.

94. Present knowledge of optimal doses of vitamins and minerals is minimal, but there is even less knowledge about the interaction and optimal ratios between them and their interaction with other environmental factors. A precautionary approach is highly relevant in an area in which there is so much uncertainty, where no health benefits from a proposed fortification can be demonstrated and where there is considerable scientific evidence to support the hypothesis that random fortification that is not based on the health authorities' advice, may represent a health hazard to the population. It is, therefore, the view of the Government of Norway that the fortification policy is justified under Article 13 EEA. Furthermore, the Government of Norway is of the view that the legislation regarding fortification with nutrients, as applied in this case, fully meets the principles as established by the Court of Justice of the European Communities: (1) that the sole purpose of the legislation is to protect public health; (2) that the legislation in question does not impose a total ban on import and marketing of fortified nutrients; (3) that prohibition, when fortification does not meet a nutritional need and thus represents a potential danger to public health, is proportionate.

95. In conclusion, the rejection of Kellogg's application on the grounds that there is no nutritional need in the Norwegian population for the fortifications in question is in accordance with legally adopted and consistently applied Norwegian nutrition policy.

96. The Government of Norway is of the view that the rejection of the fortification in question, being in full compliance with long-standing Norwegian and international nutrition policy based on health need and health risk considerations, in light of the precautionary principle, is justified under Article 13 EEA.

97. The Government of Denmark states that, in a situation where scientific uncertainty exists, national rules prohibiting the marketing of foodstuffs with

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40 Paul Gray, *Perspectives on European (EU) legislation on fortified food*, Annex 2 to the application, pages 97S-100S.

added nutrients are justified, provided that authorisation to market is granted when they are compatible with the need to protect health. Reference is made to recent case-law of the Court of Justice of the European Communities, which confirms that Member States have wide discretion when there is scientific uncertainty regarding the establishment of the threshold above which the product in question constitutes a serious risk to human health.[41]

98. However, the proposed fortification, particularly with iron, if allowed, would constitute a health hazard to the Norwegian population, and prohibition is therefore, in any event, justified under Article 13 EEA.

99. Norway has accepted that even excess intake of fortified corn flakes in and of itself does not constitute a health risk to the population in general. However, the Government of Norway is of the opinion that this is not the relevant test under the judgment by the Court of Justice of the European Communities in *Sandoz*. The Court found that a risk could not be excluded in so far as the consumer absorbs additional quantities of vitamins from other foods and these are impossible to monitor or foresee.[42] Thus, it is not necessary to demonstrate that the quantities of B vitamins and iron Kellogg's has chosen as the appropriate quantities to be added to corn flakes are, in themselves, so large as to represent a risk to public health. It is sufficient to establish that excessive consumption of those vitamins and iron may have harmful effects, that scientific research is unable to determine with certainty the critical quantities and the precise effects, and that a risk to public health cannot, therefore, be excluded in so far as the consumer absorbs further quantities of those vitamins and iron in other foods, which is impossible to monitor or foresee.

100. With respect to the need for iron, the EFTA Surveillance Authority states that it is recognised that there is an iron deficiency in the Norwegian population. The Government of Norway does not agree with this assertion.

101. The mean iron intake among Norwegian men aged 16-30 years exceeds the recommended daily intake by as much as 60%,[43] whereas the mean iron intake among women is lower than the recommended daily intake, particularly among women of childbearing age. However, despite low intake, several studies over the last 15 years have shown that iron deficiency anaemia is a minor problem among women of childbearing age in Norway today. It should be noted that, since the 1960s, the proportion of women of childbearing age suffering from iron deficiency anaemia has, in fact, decreased substantially: from 10-12%[44] to 4% in

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41 Case C-473/98 *Kemikalieninspektionen* v *Toolex Alpha AB*, judgment of 11 July 2000, not yet reported, paragraph 45.

42 Paragraph 12 of the judgment in *Sandoz*.

43 Enclosure 9 to Annex 5 to the application, Lars Johansson et al., *Dietary habits among Norwegian men and women 1997*, page 67, table 6.

44 Natvig H, Vellar OD, Andersen J, *Hemoglobin, hematocrit and MCHC values among boys and girls aged 6-20 years in elementary and grammar schools*, Acta Med Scand 1967:182, pages

the 1990s. The low incidence of iron deficiency anaemia today is substantiated in the expert witness statement from Professor Berit Borch-Iohnsen, University of Oslo, with references.[45] Borch-Iohnsen also offers explanations for these findings, including changes in dietary habits, increased bioavailability of iron, and reduced menstrual losses due to new contraceptive devices.

102. Children have traditionally been considered a risk group for iron deficiency anaemia, because of the increased need for iron for growth. Children are not covered by the 1993-94 national dietary survey, but the issue of iron deficiency among children (beyond infancy) is discussed in Borch-Iohnsen's expert witness statement. There are no studies available indicating that iron deficiency is a problem among children, and the incidence among adolescents aged 13-15 years is only 3%.[46]

103. The judgments of the Court of Justice of the European Communities in cases concerning German beer[47] and British wine duties[48] are not relevant to the case at hand, because the Norwegian health authorities, in accepting whey cheese but not corn flakes as a suitable vehicle for iron fortification, are not seeking to promote whey cheese to the detriment of corn flakes. Furthermore, whey cheese and corn flakes are not substitute products.

104. The Government of Norway strongly objects to the allegation that the rejection of Kellogg's application had a discriminatory purpose. Reference is made to the EFTA Court's judgment in the *Wilhelmsen* case.[49]

105. In the application, the EFTA Surveillance Authority based its argument with respect to iron fortification on the presumption that there exists an iron deficiency in the Norwegian population. The Government of Norway contests the validity of this presumption. In any case, the EFTA Surveillance Authority fails to address the issue of iron overload in the Norwegian population.

106. The main scientific support for the EFTA Surveillance Authority's allegations in the application relating to iron is the 1993 report from the Scientific Committee for Food.[50] The section of that document dealing with iron discusses only very briefly the health hazards related to iron overload, other than from acute iron intoxication. Haemochromatosis is mentioned, but not addressed. This can most likely be attributed to the date of the report, which precedes the

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182-191; and Natvig H, Vellar OD., *Hemoglobin, hematocrit and MCHC values among adult men and women*, Acta Med Scand 1967:182, pages 193-205.

45 Enclosure 3 to Annex 7 to the application, page 8.

46 *Ibid.* page 8-9.

47 Case 178/84 *Commission* v *Germany* [1987] ECR 1227.

48 Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417.

49 Case E-6/96 *Tore Wilhelmsen AS* v *Oslo Kommune* [1997] EFTA Court Report 53.

50 Annex 3 to the application.

significant publications on this issue. The finding of the hereditary haemochromatosis gene was published in 1996.

107. Reference is made to the studies of Professor Borch-Iohnsen of the University of Oslo, who has described the negative health effects that may result from excess iron in the human body, and has identified the population groups at risk of iron overload.[51] Furthermore, a Dutch report on iron deficiency and overload in relation to nutrition has recently been presented.[52] The report concludes that 'fortification of iron in functional foods should be avoided and discouraged until the risks of iron overload has been more clearly determined', because of the low prevalence of iron deficiency and the association between iron intake and several chronic diseases.

108. In the discussion of the risks of excess iron in the context of fortification, the margin of safety between RDI and tolerable upper intake level (UL) is of major importance. It is an established fact that this margin is relatively narrow for iron, compared to the safety margin for most other vitamins and minerals.[53] The EFTA Surveillance Authority does not contest this fact, but merely points out that Norway 'allows for fortification of products with other vitamins for which the safety margin is lower than the one for iron'.[54] In the opinion of the Government of Norway, a comparison cannot be made between fortification with iron and vitamin D, although the safety margin of both is at least narrow, because there are no indications of too high vitamin D status in the Norwegian population.[55] The health risk related to fortification with vitamin D in Norway is, therefore, theoretical.

109. The reliability of the assessment of the safety margin for iron is contingent upon the reliability of the RDI and UL values presently accepted by the scientific community. The Government of Norway questions the reliability of existing upper safe level values for iron, on the basis of recent research. It should also be borne in mind that the upper intake levels employed must be reduced if children constitute a significant proportion of the relevant consumers, as is the case for corn flakes.

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51 Enclosure 8 to Annex 5, and as further elaborated in Enclosure 3 to Annex 7 to the application.

52 Jansen and Spanjersberg, RIVM report 650250 004, *Iron deficiency and overload in relation to nutrition*, August 2000.

53 *Van den Berg*, Responding to consumer needs: Risk-benefit analysis of fortification (1999), Annex 3 to the application, page 114S.

54 Application, at paragraph 39 *in fine*.

55 Calculations show that if vitamin D had not been added to margarine, butter and milk, the average intake of vitamin D from foods would have been only approximately half of the recommended intake among adult Norwegians, and only one-third of the recommended intake among those over 60 years of age.

110. Iron metabolism in the human body is complex and not yet fully understood.[56] However, one major problem is that iron is a 'one-way nutrient'.[57] The body has a large capacity to re-utilise iron, and very little iron is lost from the body. Once the body has accumulated a surplus of iron, it is very difficult to get rid of it, except by systematic bleeding. The body tries to maintain its iron balance by controlling the absorption of dietary iron, but this control mechanism is not perfect.

111. The 1993 report from the Scientific Committee for Food makes contradictory statements regarding this important issue. It first states: 'The body tries to maintain iron balance not by regulating the losses of iron but by controlling the absorption of dietary iron. This control is not perfect but still of great importance for the prevention of iron deficiency and excess.'[58] However, further on, it is claimed that '[t]he very effective regulation of iron absorption prevents overload of the tissues by iron from a normal diet, except in individuals with genetic defects as in idiopathic haemochromatosis'.[59]

112. It should be noted that the terms 'dietary iron' and 'normal diet' are used. If a healthy person, in addition to the usual diet, takes supplements or eats foods fortified with iron, the iron intake may be so high that the body cannot prevent excessive iron absorption and accumulation of iron in the body. For people suffering from haemochromatosis, any extra iron is a problem.

113. Since the method of genotyping became available in 1996, there has been increasing awareness of the large size of the iron-sensitive subpopulation suffering from homo- or heterozygote primary haemochromatosis. In subjects with haemochromatosis, iron absorption is two to three times more efficient than in normal subjects, and they must avoid extra iron intake.

114. The theory according to which excess iron stores may have serious adverse health effects has gained support during recent years.

115. The iron status of the population in Norway is improving. Similar trends are found in other countries, such as Denmark and the United States. Data from the Third National Health and Nutrition Examination Survey demonstrate that the prevalence of iron deficiency anaemia in the United States is now very low.

116. In the opinion of the Government of Norway, attention should be drawn to an article by Lynch and Baynes.[60] In their conclusion it is stated: 'Nonetheless, because there is no known benefit of high iron storage status, it seems prudent to

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56 Scientific Committee for Food, 1993 report, Annex 3 to the application, pages 177, 182-183.

57 Borch-Iohnsen, in Enclosure 3 to Annex 7 to the application, page 2.

58 Annex 3 to the application, page 177.

59 *Ibid*, page 179.

60 Lynch SR, Baynes RD, *Deliberations and evaluations of the approaches, endpoints and paradigms for iron dietary recommendations*. J Nutr 1996 Sep;126 (9 Suppl.): 2404-2409.

avoid further increases in and possibly to reduce the dietary iron intake of men and postmenopausal women […] The complexity of the Western diet and an incomplete understanding of all of the factors affecting serum ferritin concentrations make it very difficult to specify a safe upper range for daily iron intake at the present time'.

117. The Government of Norway emphasises that it must be accepted that it is difficult to set a definite upper safe level for iron intake, because of insufficient data. Based on this, there is reason to conclude that the safety margin for iron is, at best, narrow, and possibly non-existent.

118. As mentioned, the human body has a very limited ability to get rid of excess iron. Animal experiments and *in vitro* studies have shown that iron catalyses the formation of toxic oxygen radicals which may cause cell damage. This will happen in the event of iron overload when 'free iron' is released. Many diseases also produce toxic oxygen radicals with iron as a catalyst. Such pathological conditions include artherosclerosis, rheumatoid arthritis, and colon cancer. There is growing epidemiological indication of the association between iron and lipid peroxidation in cardiovascular disease, and recent studies have shown that excessive iron, i.e. unabsorbed iron, produces free radicals in the colon and may increase the risk of colorectal cancer.[61]

119. Excess iron may contribute to the development of serious diseases that affect a large number of people in western populations. The EFTA Surveillance Authority notes that there are no reports of excessive intake of iron from countries where fortification of flour – which affects the population to a greater extent than fortification of breakfast cereals – is permitted.[62] However, given that the end point of iron overload might be illnesses such as cardiovascular disease, colon cancer and arthritis, which take a long time to develop and may have multiple causes, the Government of Norway cannot accept that any present absence of reports should be considered evidence of lack of connection to disease.

120. Chronic iron overload is divided into primary and secondary iron overload or haemochromatosis. Primary haemochromatosis is a hereditary condition characterised by over-absorption of iron, which leads to iron overload. In addition to the potential diseases, primary haemochromatosis leads to several other ailments and diseases and may lead to premature death. Secondary haemochromatosis has many causes, e.g. long-term abuse of iron supplements and increased iron stores with age.

121. An extensive Norwegian health study in 1997 revealed that primary haemochromatosis occurs much more frequently than previously believed. The

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61 For further details and references, see Professor Borch-Iohnsen's expert witness statement, Enclosure 3 to Annex 7 to the application, particularly pages 4-5.

62 Application at paragraph 40, *in fine*.

prevalence in Norway, based on this study, is estimated to be 0.5%, or 20 000, homozygous, and close to 15%, or 500 000 – 600 000, heterozygous individuals in the Norwegian population of 4.2 million. Prevalence varies from one country to another, and Norway is one of those where it is highest. In addition to the fact that it affects a substantial proportion of the Norwegian population, primary haemochromatosis is a problem because the condition is considerably under-diagnosed, both in Norway and elsewhere. In the 1997 health study, only 3.3% of the homozygotes were aware of their diagnosis.

122. In homozygous individuals, iron absorption is two to three times higher than in normal individuals. A person who absorbs 1 to 3 mg of iron from the diet in excess of their needs may accumulate 20-40 g of iron in the body over a period of 40 to 50 years, whereas the normal range is 2 g to 6 g of iron. Accumulation occurs especially in the liver and may, if undetected and untreated, cause severe injuries and premature death. In heterozygous individuals, a normal diet without extra iron will not or only to a moderate degree lead to pathological iron overload in the liver. However, recent studies have revealed biochemical and possibly clinical abnormalities and increased risk of cardiovascular disease in heterozygotes.

123. It must, therefore, be concluded that a diet rich in iron is likely to increase iron accumulation and associated diseases in individuals with undiagnosed primary haemochromatosis. This group constitutes a substantial proportion of the Norwegian population, and general preventive measures are needed to protect them, as their condition is not reliably detected by the health system. Dietary fortification with iron would increase the risk of disease.

124. It is not a legal condition for applying restrictive measures pursuant to Article 13 EEA, according either to the *Sandoz* judgment or to other case-law of the Court of Justice of the European Communities, that such measures are justified only where the majority of the population is exposed to health risks due to fortification.

125. As has been demonstrated, approximately 15% of Norwegians have a hereditary disorder involving increased iron absorption that makes them vulnerable to extra iron in their diets. The overwhelming majority of these individuals are unaware of their disorder and are, therefore, not able to protect themselves by avoiding foodstuffs rich in iron, either naturally-occurring iron or iron from fortification. This group is, therefore, particularly exposed to the serious diseases that may result from excess iron in the body.

126. On the other hand, the Government of Norway cannot reasonably deny that there are individuals in the Norwegian population who may benefit from iron fortification of corn flakes, namely, those who suffer from iron deficiency anaemia. However, only small groups of the population suffer from iron deficiency anaemia in Norway today. It cannot reasonably be claimed, on the basis of known dietary habits, that iron fortified corn flakes are a suitable vehicle

for satisfying the needs of these sub-groups. For individuals with specific iron requirements, special measures must be taken to satisfy their needs, such as iron supplements for sub-groups of pregnant women and women with heavy menstrual bleeding, and iron fortification of infant formula and cereal-based baby food.[63]

127. In addition to the fact that the segment of the population at risk of iron overload is much larger than the segment of the population at risk of iron deficiency, it should also be pointed out that iron deficiency is not a condition with a lethal outcome, in contrast to progressive hereditary and secondary haemochromatosis, and some diseases that may be associated with iron catalysed oxygen radical damage.

128. If the application by Kellogg's is granted, other applications for fortification of foodstuffs with B vitamins and iron will have to be granted as well. This follows not only from Norwegian national law, but also from the EC law principle of non-discrimination, the case-law of the Court of Justice of the European Communities,[64] and the Commission Communication on free movement of foodstuffs within the Community.[65] It is, therefore, a reasonable factual and legal presupposition in fortification risk assessment that other brands of breakfast cereals will be similarly fortified, and perhaps also other breakfast products such as bread. In the assessment of the extent to which the marketing of Kellogg's fortified corn flakes creates a risk for the health of Norwegians, the frame of reference is what is otherwise consumed through the Norwegian diet. Referring to the judgment of the Court of Justice of the European Communities in *Sandoz*, the Government of Norway states that iron consumption through the intake of foodstuffs other than Kellogg's corn flakes cannot be disregarded in risk assessment.[66] The risk assessment was made in a proper and acceptable way and reflects the variation in dietary habits within the population.[67] In summary, the calculations show that if 7.5 mg and 10 mg of iron per 100 g of product were added to breakfast products, bread and brown whey cheese, respectively, the average intake of iron among Norwegian men would increase from 12 to 23 mg/d. Among the one-tenth of the men with the highest intake of breakfast products, the same amounts of added iron would increase the average iron in this group of men from 16 to 32 mg/d.

129. Among men with average intakes of these foods, the addition of iron thus would result in intakes that are twice as high as the recommended daily intakes (10 mg/d). Among the one-tenth of men with high intakes of breakfast products,

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63 Borch-Iohnsen, Enclosure 3 to Annex 7 to the application, page 9.

64 Case 176/84 *Commission* v *Greece* ECR [1987] 1213; and Case 178/84 *Commission* v *Germany* [1987] 1227.

65 OJ No. C 271, 24 October 1989, p. 3, paragraphs 36 and 37.

66 At paragraph 17 of the judgment.

67 Annex 1 to Enclosure 3 to Annex 7 to the Application.

iron enrichment at these levels would result in intakes that are over three times higher than the recommended level, or, above the upper daily intake level of 30 mg/d as mentioned by the EFTA Surveillance Authority in its application of 7 April 2000.

130. Article 13 EEA leaves considerable discretion to the Member States in the non-harmonised area of food fortification as regards striking a balance between conflicting health needs and health risks in the population. The Government of Norway has carefully considered and weighed the benefits and disadvantages of Kellogg's proposed fortification in relation to health needs and health risks for various population groups. Given the number of people affected, the severity of adverse health effects, and, not least, the current uncertainties in scientific knowledge, the Government of Norway has decided that such fortification should not be allowed. The fact that the existing practice of fortifying brown whey cheese with iron is being re-evaluated demonstrates the Government of Norway's concern about the serious health risk posed by excess iron in the Norwegian diet.

131. In conclusion, the fortification in question may constitute a health risk to large population groups, in particular with respect to fortification with iron. Thus, even if the Court should find that the prohibition based on lack of nutritional need because of the potential health risks inherent in any consumption of vitamins and minerals beyond nutritional need is not justified under Article 13 EEA, the prohibition of the fortification in question is, in any event, justified under that Article.

132. Concerning alternative measures, such as labelling requirements and/or maximum limits, the Government of Norway states that it follows from Article 13 EEA and the case-law of the European Court of Justice that the least restrictive measure necessary to protect public health should be chosen.

133. In the opinion of the Government of Norway and the Government of Denmark, labelling requirements[68] would not be sufficient, as the labelling itself could mislead the consumer to believe that the product is beneficial to health. Vitamins and minerals are both necessary and potentially dangerous, and the needs of different sexes and age groups differ. It would be almost impossible to label fortified products in a way which takes account of these differing and, in some cases, contradictory needs, without at the same time confusing the customer. As regards iron, labelling requirements are of no use to persons with haemochromatosis, as the majority of them have no knowledge of their condition.

134. Reference is made to a recent judgment of the Court of Justice of the European Communities,[69] in which that Court held that the numerical labelling

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68 All food labelling requirements laid down in regulations presently in force in Norway are based on EC directives on labelling, including nutritional labelling.

69 Case C-217/99 *Commission* v *Belgium*, judgment of 16 November 2000, not yet reported.

requirement at issue '(…) is not capable of enabling them to decide whether or not they should consume the product, if they do consume it, in what quantities (...)'. Following this conclusion, labelling will not be sufficient to protect health, because the information provided thereby cannot enable consumers to decide whether or not they should eat fortified corn flakes and, if so, in what quantities.

135. In considering whether labelling requirements would be adequate, the Government of Norway refers to Annex 2 to the application of the EFTA Surveillance Authority, which contains two articles concerning studies of the awareness and attitudes to food fortification of European/Nordic consumers.[70] According to those studies, a large majority of European/Nordic consumers (77%/74%) believe that their habitual diet provides them with the vitamins and minerals they need. Despite this, between 23% and 50 % take vitamin pills or vitamin or mineral supplements, and 68 % of the European consumers agree that 'a little extra vitamins and minerals cannot do any harm'. In addition, 13 % of the European and 15%-26 % of the Nordic consumers 'don't know' whether or not they consume fortified foods. Up to one-third of the consumers are indifferent about the contents of added nutrients.

136. Accordingly, it must be concluded that labelling requirements are not sufficient to protect public health against the potential harmful effects of vitamins and minerals.

137. The possibility of introducing upper limits for fortification with vitamin B and iron is not mentioned in the application of the EFTA Surveillance Authority. It was, however, claimed in the *Sandoz* judgment, as with labelling without success, that maximum limits for fortification with vitamins could effectively meet public health concerns raised.

138. As the Court of Justice of the European Communities held in *Sandoz*, it is not possible to foresee or monitor the quantities of vitamins or minerals consumed as part of general nutrition. It would be impossible for the authorities to set upper levels which would exclude excessive intake in the different groups of the population with different needs, as mentioned above.

139. With respect to the fact that iron supplements can be obtained without prescription in Norway, the Government of Norway emphasises that there are important distinctions between vitamin or mineral supplements and fortified food. Fortified food is intended for everyday diet, and adequate consumer consciousness of the need to regulate intake of regular foods due to high levels of vitamins or minerals cannot be expected. Supplements are taken in addition to ordinary foods, and reflect a specific choice made by the consumer.

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70 *Fortification and the European consumer: Consumer awareness and attitudes to food fortification*, by Anne-Laure Gassin of Kellogg's Europe, and *Nordic legislative practices and consumer attitudes towards the addition of nutrients to foods*, by *Mette Peetz-Schou* of Nordisk Kellogg's AS.

140. It follows from what has been said that the position of the Government of Norway is that Norway has not failed to fulfil its obligations under Article 11 EEA by applying its legislation so as to prohibit the import and marketing in Norway of corn flakes fortified per 100 g with 1 mg of thiamine, 1 mg of riboflavin, 10 mg of niacin and 7 mg of iron, since the prohibition is justified under Article 13 EEA.

The Government of France

141. The Government of France refers to the partial and incomplete Community regulation in the field of nutrients added to foodstuffs and to a proposed directive. With respect to food products which are not designed for a particular nutritional use, there is thus far no Community legislation.

142. With respect to public health, the Government of France refers to the recitals and provisions in Council Directive 89/398/EEC,[71] which, together with the White Paper on Food Safety and further plans in this field of law, show that this objective is at stake.

143. Furthermore, the Government of France points out that there is no discrimination between cereals of the corn flakes type imported by Kellogg's and locally manufactured cereals.

144. Reference is made to the food habits and food needs which vary from one area to another, taking into account other criteria, such as the climate of a given country, and the activities and traditions of its population. In a field of law which is not harmonised, it is enough that a government justifies its data with the work of national experts, provided that the work is not totally inconsistent with findings made by experts in other Member States, or that it is not in contradiction with international standards, such as the ones issued by the Codex Alimentarius. The Court of Justice of the European Communities has confirmed this approach.[72]

145. The Government of France is of the opinion that the mere fact that Norway refers to data supplied by national experts in the area of fortification of breakfast cereals does not, by itself, make its national measures disproportionate, taking particularly into account the fact that the manufacturing and marketing rules of these products have not to date been harmonised.

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71 Council Directive 89/398/EEC of 3 May 1989 on the approximation of the laws of Member States relating to foodstuffs intended for particular nutritional uses, OJ No L 186, 30.6.1989, p. 27.

72 Case C-400/96 *Jean Harpegnies* [1998] I-5121; and Case C-100/96 *The Queen* v *Ministry of Agriculture, Fisheries and Food*, ex parte: *British Agrochemicals Association Ltd.* [1999] ECR I-1499.

The Government of the Netherlands

146. The Government of the Netherlands refers to a White Paper on Food Safety, in which the Commission of the European Communities indicates that it will present a proposal for a directive concerning fortified foodstuffs. Furthermore, reference is made to the *Sandoz* case, and to a judgment in which the Court of Justice of the European Communities ruled that, in so far as there are uncertainties at the present state of scientific research, it is for the Member States, in the absence of harmonisation, to decide what degree of protection of the health and life of humans they intend to ensure.[73]

147. In its interpretation of the *Sandoz* judgment, the Government of the Netherlands points to the following criteria which should be applied to the case at hand: (1) with regard to the present state of science, vitamins must be considered as potentially harmful substances; (2) the question of whether the addition as such is safe has to be answered on a case-by-case assessment, taking into account the total foodstuff-package and the eating habits in the State concerned; (3) the third point concerns the question of whether the addition meets a real nutritional need. The EFTA Surveillance Authority did not answer this question.

148. An assessment of the real nutritional need has to take account exclusively of the situation in the State of consumption.

149. Furthermore, the Government of the Netherlands observes that nothing in the application leads to the conclusion that fortified products are systematically banned in Norway.

150. The facts of the case concerning German beer have to be distinguished from the ones in the case at hand, because the micro-nutrients are not allowed in general in other categories of products in Norway and the protection of human health is not put forward as a general justification. The Government of Norway is only concerned about the protection against overly high intakes of the micro-nutrients in question.

151. Regarding alternative production methods, the Government of the Netherlands refers to the case-law of the Court of Justice of the European Communities. Following this, the line of reasoning regarding alternative production methods is linked to the concept of additives with a technological need (preservation), not to additions as micro-nutrients. It follows from the application that the Government of Norway refers only to requirements as to the composition of the product, and not to production methods.

152. Reference is made to the Communication from the Commission on the precautionary principle, in which guidelines are given. Following this, a careful risk assessment is an important element in applying the principle, but the

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[73] Case 272/80 *Frans-Nederlandse Maatschappij voor Biologische Producten BV* [1981] ECR 3277.

Commission recognises that the decision to act or not to act is of 'an eminently political nature'.

153. With respect to the findings of the Scientific Committee for Food, it must be observed that the report does not make any observations on the safety levels of intake of micro-nutrients. Therefore, the Government of the Netherlands questions the reference of the EFTA Surveillance Authority to the upper intake level as 'a measure which indicates the maximum safe intake'. The only conclusion that can be drawn from the amounts quoted in the application is that the addition of thiamine and riboflavin causes less harm to human health than niacin and iron. It is not possible to consider the amounts quoted in the application as safe levels of intake.

154. Although, in a certain case, a product category, which is domestically produced in Norway, is taken into account, the EFTA Surveillance Authority has not indicated or proven that the Government of Norway aims to exclude the import of products in these categories from the Norwegian market.

155. The Government of the Netherlands observes that a recent report from the Dutch Health Council on the early tracing of hereditary iron overload indicates that 0.5% of the Dutch population suffers from this disease, and that 10% of the Dutch population carries the gene. As was indicated by the Government of Norway, only a small number of people of this group are aware of that fact.

156. The Government of the Netherlands submits that the question of whether the addition of vitamins and minerals is safe must be answered according to the most recent state of science, followed by a risk assessment. The national authorities have the responsibility to judge the safety of fortified foodstuffs. It is in line with the case-law of the Court of Justice of the European Communities and with the Communication from the Commission on the precautionary principle, that the national authorities have a reasonable margin of appreciation in deciding on the measures necessary to protect the health and life of citizens.

157. The Government of the Netherlands concludes that the Government of Norway was entitled to prohibit the import of fortified cornflakes and that the referral to Article 13 EEA is correct. Therefore, the application of the EFTA Surveillance Authority should be dismissed.

The Commission of the European Communities

158. The Commission of the European Communities refers to the judgment of the Court of Justice of the European Communities in *Sandoz*, other decisions relied upon,[74] and Annex II to Directive 89/107/EEC.[75] With regard to legislation

[74] Case C-227/82 *Van Bennekom* [1983] ECR 3883, Case 247/84 *Motte* [1985] ECR 3887; Case 304/84 *Müller and Others* [1986] ECR 1511; Case 178/84 *Commission* v *Germany* [1987] ECR 1227.

concerning the addition of nutrients to foods in general, reference is made to the Commission's White Paper on Food Safety of 12 January 2000, and to the announced intention to make a proposal for a directive concerning fortified foods in the near future.

159. In the *Sandoz* case, the Court of Justice of the European Communities was faced with a difficult technical issue – namely, the toxicity of various vitamins – on which it put questions to the parties, but to which it received different answers. This could be the reason why the Court referred to uncertainties inherent in the scientific assessment and the potentially harmful effect. Because of these facts, that Court decided that a prior authorisation procedure would, in principle, be justified under Article 30 EC. Therefore, it is understandable that the Court of Justice of the European Communities chose to approach the question from the perspective of the proportionality of the authorisation procedure taken as a whole.

160. From a proper reading of the *Sandoz* judgment, it follows that it would be disproportionate to prohibit the marketing of a food, where the addition of the nutrient meets a nutritional need. In such a case, it can be presumed that there is no danger to health, but a health benefit.

161. However, it does not necessarily follow that where there is no nutritional need for the addition of nutrients, there is a danger to public health. Moreover, the Commission of the European Communities considers it not being appropriate elevating the concept of nutritional need from its proper role in assessing the proportionality of a measure taken to protect the public from potentially toxic products to that of a self-standing imperative requirement. Such an approach would crystallise existing consumer habits and place in question the marketing of numerous products having no nutritional interest whatsoever. Reference is made to the opinion of Advocate General Mancini in the *Sandoz* case.

162. The Commission of the European Communities concludes this argument by stating that it would not be justified under Article 13 EEA to base a rejection of an application for authorisation of a fortified food solely on the absence of any nutritional need for the addition in question. Where the concept of nutritional need is relevant is in cases where product safety is at issue. When a nutritional need is established for the addition of the nutrients, a rejection of the product cannot be justified on the grounds of food safety as a proportionate measure.

163. The Commission of the European Communities agrees with the approach of the Norwegian authorities, *viz.*, to take into account the total diet of the population when evaluating the health hazard. Furthermore, it is accepted that the health authorities have a large measure of discretion in their assessment of whether the addition of nutrients to foodstuffs constitutes an acceptable risk to

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[75] OJ No L 40, 11.2.1989, p. 27.

public health or not.[76] However, the discretion should not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties, and the national authorities should demonstrate that it has a sound scientific basis.[77] The mere reference to potential health risks is not sufficient.[78]

164. In the case at hand, it seems to the Commission of the European Communities that Norway does not rely on the Codex General Principles for the Addition of Nutrients as constituting a specific scientific basis for the rejection of the application. Throughout the procedure, Norway has referred to scientific research in support of its position.

165. However, it does not appear that this demonstration of a scientific basis to the refusal issued by the Control Authority was available to the applicant at the time the refusal was made. Following the case-law,[79] it is for the national authorities to demonstrate to an applicant in each case that their rules are necessary to give effective protection to the interests referred to in Article 13 EEA.

166. Concerning the risk assessment made by the Norwegian authorities, the Commission of the European Communities states that it is relevant to take into account all possible food sources of the nutrients from all products presently on the market. It is not appropriate to take into account future hypothetical eventualities, which presume a commercial decision on the part of other producers to fortify their products. In this limited respect, the scientific basis of the Norwegian authorities is questioned.

167. Furthermore, the fact that iron may be added to a typically Norwegian product but not to a breakfast cereal imported from other EEA States, without any objectively apparent reason for distinguishing between the products, suggests that the refusal to authorise the Kellogg's product could be considered as arbitrary discrimination or a disguised restriction on trade.

Carl Baudenbacher
Judge-Rapporteur

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76 Case C-227/82 *Van Bennekom* [1983] ECR 3883; *Sandoz*.

77 Case 178/84 *Commission* v *Germany* [1987] ECR 1227.

78 Case C-17/93 *Van der Veldt* [1994] ECR I-3537.

79 Case 304/84 *Müller and Others* [1986] ECR 1511.

Case E-4/00

Dr Johann Brändle

(Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein))

(Right of establishment – Single practice rule – Justification by overriding reasons of general interest)

Summary of the Judgment

When one is interpreting the EEA Agreement, it is necessary always to take into account that the objective of the Contracting Parties was to create a dynamic and homogeneous European Economic Area. This point of departure has particular weight with regard to fundamental principles, such as the freedom of establishment set out in Article 31 EEA. The Court has, at the same time, recognised that there are differences in the scope and purpose of the EEA Agreement as compared to the EC Treaty, and has stated that these differences might, under specific circumstances, lead to differences in interpretation. In the present case, the Court has not been presented with any specific circumstance which would compel it to disregard the case law of the Court of Justice of the European Communities in respect of Article 43 EC.

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, or through the exercise of administrative discretion with regard to exceptions and dispensations, would in practice lead to the same result.

The practical effect of the single practice rule appears to be that it prevents physicians who are already in practice outside the territory of Liechtenstein from establishing a secondary practice in Liechtenstein. Having to give up an established practice renders it less attractive for foreign physicians to establish

Rechtssache E-4/00

Dr Johann Brändle

(Antrag der Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein auf Erlass einer Vorlageentscheidung)

(Niederlassungsfreiheit – "Single practice rule" – Rechtfertigung aus zwingenden Gründen des Allgemeinwohls)

Zusammenfassung des Urteils

Bei der Auslegung des EWR-Abkommens ist stets zu beachten, dass die Zielsetzung der Vertragsparteien darin bestand, einen dynamischen und homogenen Europäischen Wirtschaftsraum zu schaffen. Dieser Ausgangspunkt ist von besonderer Bedeutung im Hinblick auf elementare Grundsätze wie die in Artikel 31 EWRA normierte Niederlassungsfreiheit. Zugleich hat der Gerichtshof anerkannt, dass es zwischen dem EWR-Abkommen und dem EG-Vertrag Unterschiede hinsichtlich des Anwendungsbereichs und der Ziele gibt, und hat entschieden, dass diese Unterschiede unter spezifischen Umständen zu Unterschieden in der Auslegung führen können. Im vorliegenden Fall sind dem Gerichtshof keine spezifischen Umstände vorgetragen worden, die ihn zwingen würden, die Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften zu Artikel 43 EGV unberücksichtigt zu lassen.

Nach ständiger Rechtsprechung verbietet der Grundsatz der Gleichbehandlung 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.

Es zeigt sich, dass die praktische Wirkung der *"Single practice rule"* darin besteht, dass sie Ärzte, die bereits ausserhalb des Hoheitsgebiets des

themselves in Liechtenstein, and directly affects physicians' access to the market in that country. The negative consequences of the rule would be more likely to materialise for physicians established in another EEA State than for physicians already in practice in Liechtenstein.

It appears that a primary objective of the contested single practice rule is to limit the total number of physicians active in the country. This must mean that the rule is assumed to be an effective mechanism for restraining the inclination of non-national physicians to establish themselves in Liechtenstein, and that the rule is intended to function as a restriction on the general right to establishment for a large number of physicians from other EEA States.

The fact that the contested national rule is not contrary to the provisions of the EEA Agreement relating to the freedom to provide services does not affect the compatibility of that national rule with the provisions of the EEA Agreement on the freedom of establishment.

The single practice rule may potentially dissuade physicians from other EEA States from establishing themselves in Liechtenstein. This is sufficient to establish a breach of Article 31 EEA. There is no requirement that an appreciable effect on cross-border establishment be demonstrated.

Non-discriminatory national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement, such as the single practice rule at issue in the present case, can be justified only if they fulfil the following conditions: they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective.

The contested single practice rule is not justified by overriding reasons based on the general interest.

A national provision of a Contracting Party to the EEA Agreement which provides that a physician may not operate more than one practice, regardless of location, is incompatible with Article 31 EEA.

Fürstentums Liechtenstein eine Praxis haben, an der Gründung einer Zweitpraxis in Liechtenstein hindert. Der Zwang zur Aufgabe einer bestehenden Praxis macht es für ausländische Ärzte weniger attraktiv, sich in Liechtenstein niederzulassen und beeinträchtigt unmittelbar den Zugang von Ärzten zum Markt dieses Landes. Die negativen Folgen der *"Single practice rule"* werden eher für Ärzte aus einem anderen EWR-Staat eintreten als für solche, die bereits in Liechtenstein niedergelassen sind.

Es scheint, dass ein Hauptzweck der beanstandeten *"Single practice rule"* darin besteht, die Gesamtzahl der im Land praktizierenden Ärzte zu begrenzen. Dies kann nur bedeuten, dass die *"Single practice rule"* als ein wirksamer Mechanismus angesehen wird, die Neigung ausländischer Ärzte, sich in Liechtenstein niederzulassen, einzuschränken, und dass sie als eine Beschränkung des allgemeinen Niederlassungsrechts für eine grosse Zahl von Ärzten aus anderen EWR-Staaten wirken soll.

Dass die beanstandete nationale Regelung nicht den Bestimmungen des EWR-Abkommens über die Dienstleistungsfreiheit zuwiderläuft, berührt nicht die Frage ihrer Vereinbarkeit mit den Bestimmungen des EWR-Abkommens über die Niederlassungsfreiheit.

Die *"Single practice rule"* kann Ärzte aus anderen EWR-Staaten von einer Niederlassung in Liechtenstein abschrecken. Dies genügt für die Feststellung eines Verstosses gegen Artikel 31 EWRA. Des Nachweises einer spürbaren Auswirkung auf die grenzüberschreitende Niederlassung bedarf es nicht.

Nichtdiskriminierende nationale Massnahmen, welche die Ausübung von durch das EWR-Abkommen gewährleisteten Grundfreiheiten behindern oder weniger attraktiv machen können, wie es bei der im Ausgangsverfahren in Rede stehenden *"Single practice rule"* der Fall ist, können nur dann gerechtfertigt sein, wenn sie die folgenden Voraussetzungen erfüllen: Sie müssen zwingenden Gründen des Allgemeininteresses entsprechen, sie müssen zur Erreichung des verfolgten Ziels geeignet sein, und sie dürfen nicht über das hinausgehen, was zur Erreichung dieses Ziels erforderlich ist.

Die beanstandete *"Single practice rule"* ist nicht durch zwingende Gründe des Allgemeininteresses gerechtfertigt.

Eine nationale Bestimmung einer Vertragspartei des EWR-Abkommens, nach der ein Arzt nicht mehr als eine Praxis, gleichviel an welchem Ort, führen darf, ist nicht mit Artikel 31 EWRA vereinbar.

JUDGMENT OF THE COURT

14 June 2001*

(Right of establishment – Single practice rule – Justification by overriding reasons of general interest)

In Case E-4/00

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 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 Johann Brändle

on the interpretation of Article 31 of the EEA Agreement.

THE COURT,

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

Registrar: Gunnar Selvik

after considering the written observations submitted on behalf of:

– Dr Johann Brändle, represented by Toni Jäger;

– the Government of Liechtenstein, represented by Christoph Büchel, Director, EEA Coordination Unit, and Frank Montag, Rechtsanwalt;

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

URTEIL DES GERICHTSHOFS

14. Juni 2001[*]

(Niederlassungsrecht – "Single practice rule" –
Rechtfertigung durch zwingende Gründe des Allgemeininteresses)

In der Rechtssache E-4/00

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 in der gegen die Entscheidung der Regierung des Fürstentums Liechtenstein gerichteten Beschwerde von

Dr. Johann Brändle

über die Auslegung von Artikel 31 des EWR-Abkommens erlässt

DER GERICHTSHOF,

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

Kanzler: Gunnar Selvik

Beteiligte, die schriftliche Erklärungen abgegeben haben:

– Dr. Johann Brändle, vertreten durch Toni Jäger;

– Liechtensteinische Regierung, vertreten durch Christoph Büchel, Direktor, EWR-Koordinierungsstelle, und Rechtsanwalt Dr. Frank Montag;

[*] Sprache des Antrags auf Erlass eines Gutachtens: Deutsch.

– the Government of Iceland, represented by Högni S. Kristjánsson, 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 Anne-Lise H. Rolland, Officer, Legal & Executive Affairs, acting as Agent;

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

having regard to the Report for the Hearing,

after hearing the oral observations of the Government of Liechtenstein, the EFTA Surveillance Authority, represented by Michael Sanchez Rydelski, and the Commission of the European Communities at the hearing on 6 March 2001,

gives the following

Judgment

Facts and procedure

1 Dr Johann Brändle (hereinafter the "Complainant") is an Austrian national with an established medical practice in Rankweil, Austria. By an application dated 17 November 1997, the Complainant filed a request with the Liechtenstein Sanitätskommission (Board of Public Health) for the grant of a licence to set up and operate a medical practice in Liechtenstein.

2 The Sanitätskommission, by a decision dated 11 November 1999, refused to grant the licence applied for by the Complainant. The reason given for that decision was, essentially, that according to Article 9(1) of the *Verordnung vom 17 Dezember 1996 betreffend die Abänderung der Verordnung über die medizinischen Berufe* (Regulation on medical professions), a physician seeking a licence to practise in Liechtenstein may not operate more than one practice, regardless of location (hereinafter the "single practice rule"), and that a licence could not be granted until the Complainant had given up his practice in Austria and provided written confirmation to that effect from the Vorarlberger Ärztekammer (Vorarlberg Medical Association).

– Isländische Regierung, vertreten durch Högni S. Kristjánsson, Rechtsabteilung, Aussenministerium, als Beauftragten;

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

– EFTA-Überwachungsbehörde, vertreten durch Anne-Lise H. Rolland, Rechtliche & Exekutive Angelegenheiten, als Beauftragte;

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

aufgrund des Sitzungsberichts,

nach Anhörung der mündlichen Stellungnahmen der liechtensteinischen Regierung, der EFTA-Überwachungsbehörde, vertreten durch Michael Sanchez Rydelski, und der Kommission der Europäischen Gemeinschaften in der Sitzung vom 6. März 2001,

folgendes

Urteil

Sachverhalt und Verfahren

1 Dr. Johann Brändle (nachstehend: Beschwerdeführer) ist ein österreichischer Staatsangehöriger, der in Rankweil (Österreich) eine Arztpraxis eingerichtet hat. Mit Gesuch vom 17. November 1997 an die Sanitätskommission des Fürstentums Liechtenstein beantragte er eine Konzession zur Eröffnung und Führung einer Arztpraxis in Liechtenstein.

2 Die Sanitätskommission lehnte die Erteilung der vom Beschwerdeführer beantragten Konzession mit Verfügung vom 11. November 1999 ab. Diese Entscheidung wurde im Wesentlichen damit begründet, dass gemäss Artikel 9 Absatz 1 der Verordnung vom 17. Dezember 1996 betreffend die Abänderung der Verordnung über die medizinischen Berufe ein Arzt, der um eine Praxiskonzession in Liechtenstein nachsuche, nicht mehr als eine Praxis, gleichviel an welchem Ort, führen dürfe (nachstehend: *single practice rule*) und dass eine Konzession nicht erteilt werden könne, solange der Beschwerdeführer seine Praxis in Österreich nicht aufgegeben und hierüber eine schriftliche Bestätigung der Ärztekammer für Vorarlberg beigebracht habe.

3 On 24 January 2000, the Complainant submitted to the Government of Liechtenstein a complaint against the decision of the Sanitätskommission, asking for the contested decision to be rescinded and for the licence to be granted. The Government of Liechtenstein did not deal with that complaint within three months. On 8 May 2000, the Complainant submitted, by way of appeal, a further complaint to the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein. In the proceedings before the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein, the Complainant has raised issues concerning the compatibility of the single practice rule with the EEA Agreement.

4 The Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein decided to stay the proceedings and submit a Request for an Advisory Opinion to the EFTA Court on the following question:

> *Is the single practice rule applying without exception to all doctors under Liechtenstein national law, and in particular Article 9(1) of the Regulation of 8 November 1988 on the medical professions which provides: "A doctor may pursue his profession in a self-employed capacity, as a sole practitioner or jointly with others, only if he holds a licence authorising him to do so and only if he himself works on his own behalf in the practice concerned. A doctor may not operate more than one practice, whether as a sole practitioner or jointly with others" compatible with the EEA and/or with the Agreement on the European Economic Area (EEA Agreement) of 2 May 1992?*

5 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.

Findings of the Court

6 Before addressing directly the question formulated by the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein, the Court finds it appropriate to consider a more general argument submitted by the Government of Liechtenstein. In the Government of Liechtenstein's contention, the case-law of the Court of Justice of the European Communities relating to the freedom of establishment under Article 43 EC is not directly relevant for the interpretation of the corresponding provision in Article 31 EEA. That contention is based on, *inter alia*, the argument that there are fundamental differences in the scope and purposes of the Community legal order and the EEA legal order.

3 Gegen diese Verfügung der Sanitätskommission erhob der Beschwerdeführer am 24. Januar 2000 Beschwerde an die liechtensteinische Regierung und beantragte, die angefochtene Verfügung aufzuheben und ihm die Konzession zu erteilen. Die liechtensteinische Regierung behandelte diese Beschwerde nicht innert drei Monaten. Am 8. Mai 2000 erhob der Beschwerdeführer hiergegen eine weitere Beschwerde (Säumnisbeschwerde) an die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein. Im Verfahren vor der Verwaltungsbeschwerdeinstanz machte der Beschwerdeführer geltend, die *single practice rule* sei nicht mit dem EWR-Abkommen vereinbar.

4 Die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein hat beschlossen, das Verfahren auszusetzen und den EFTA-Gerichtshof um Erlass einer Vorlageentscheidung über folgende Frage zu ersuchen:

> *Ist die im nationalen liechtensteinischen Recht absolut geltende Bestimmung der "single practice rule" für Ärzte, insbesondere Artikel 9 Absatz 1 der Verordnung vom 8. November 1988 über die medizinischen Berufe, nämlich: "Der Arzt darf nur in einer Einzel- oder Gemeinschaftspraxis selbständig tätig sein, wenn er die Konzession dazu besitzt und selbst im eigenen Namen in der Praxis arbeitet. Der Arzt darf nicht mehr als eine Einzel- oder Gemeinschaftspraxis führen", EWR-konform bzw. mit dem Abkommen über den Europäischen Wirtschaftsraum vom 2. Mai 1992 (EWRA) vereinbar?*

5 Wegen weiterer Einzelheiten des Sachverhalts des Ausgangsverfahrens, der anwendbaren Regelungen sowie 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.

Entscheidung des Gerichtshofs

6 Bevor der Gerichtshof direkt auf die von der Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein vorgelegte Frage eingeht, hält er es für angezeigt, sich mit einem allgemeineren Argument der liechtensteinischen Regierung zu befassen. Nach Ansicht der liechtensteinischen Regierung ist die Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften zur Niederlassungsfreiheit nach Artikel 43 EGV nicht unmittelbar übertragbar auf die Auslegung der entsprechenden Bestimmung in Artikel 31 EWRA. Sie stützt diese Ansicht u.a. auf grundlegende Unterschiede zwischen der Rechtsordnung der Gemeinschaft und der des EWR-Abkommens hinsichtlich ihres jeweiligen Anwendungsbereichs und ihrer Ziele.

7 The Court has consistently held that, when one is interpreting the EEA Agreement, it is necessary always to take into account that the objective of the Contracting Parties was to create a dynamic and homogeneous European Economic Area (see, *inter alia*, Case E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205, at paragraph 17). This point of departure has particular weight with regard to fundamental principles, such as the freedom of establishment set out in Article 31 EEA. The Court has, at the same time, recognised that there are differences in the scope and purpose of the EEA Agreement as compared to the EC Treaty, and has stated that these differences might, under specific circumstances, lead to differences in interpretation (see Case E-2/97 *Mag Instruments* v *California Trading Company Norway* [1997] EFTA Court Report 127, at paragraph 25 *et seq.*). In the present case, the Court has not been presented with any specific circumstance which would compel it to disregard the case-law of the Court of Justice of the European Communities in respect of Article 43 EC (see Case E-3/98 *Rainford-Towning*, cited above, at paragraph 21). Therefore, the Court cannot accept the contention of the Government of Liechtenstein to the effect that the case-law of the Court of Justice of the European Communities is not relevant to the consideration of the EEA provisions raised in the present case.

8 In this case, the national court is essentially asking whether a national provision stating that a physician seeking a licence to practise in Liechtenstein may not operate more than one practice, regardless of location, is compatible with the provisions of the EEA Agreement.

9 The pursuit of an economic activity by an EEA national in an EEA State other than his State of nationality may, under the EEA Agreement, be governed by the chapter on the free movement of workers, or the chapter on the right of establishment, or the chapter on services, these being mutually exclusive (see Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, at paragraph 20).

10 In the present case, the Complainant, resident in and a national of Austria, seeks to take up and pursue, on a stable and continuous basis, activities as a self-employed physician in Liechtenstein, maintaining permanent premises there. This follows clearly from the Complainant's own pleadings. Therefore, the case must be dealt with under the rules on the freedom of establishment (see Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, cited above, at paragraphs 23 to 25).

11 Freedom of establishment is one of the fundamental principles of the EEA Agreement. Chapter 2 of Part III of the EEA Agreement contains the principal treaty provisions relating to the freedom of establishment within the EEA. Article 31 EEA provides as follows:

7 Nach ständiger Rechtsprechung des Gerichtshofes ist bei der Auslegung des EWR-Abkommens stets zu beachten, dass die Zielsetzung der Vertragsparteien darin bestand, einen dynamischen und homogenen Europäischen Wirtschaftsraum zu schaffen (vgl. u.a. Rechtssache E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205, Randnr. 17). Dieser Ausgangspunkt ist von besonderer Bedeutung im Hinblick auf elementare Grundsätze wie die in Artikel 31 EWRA normierte Niederlassungsfreiheit. Zugleich hat der Gerichtshof anerkannt, dass es zwischen dem EWR-Abkommen und dem EG-Vertrag Unterschiede hinsichtlich des Anwendungsbereichs und der Ziele gibt, und hat entschieden, dass diese Unterschiede unter spezifischen Umständen zu Unterschieden in der Auslegung führen können (vgl. Rechtssache E-2/97 *Mag Instruments ./. California Trading Company Norway* [1997] EFTA Court Report 127, Randnnr. 25 ff.). Im vorliegenden Fall sind dem Gerichtshof keine spezifischen Umstände vorgetragen worden, die ihn zwingen würden, die Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften zu Artikel 43 EGV unberücksichtigt zu lassen (vgl. die oben erwähnte Rechtssache E-3/98 *Rainford Towning*, Randnr. 21). Daher kann der Gerichtshof dem Vorbringen der liechtensteinischen Regierung nicht folgen, wonach die Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften für die Prüfung der im vorliegenden Fall einschlägigen Bestimmungen des EWR-Abkommens nicht relevant sei.

8 Im vorliegenden Fall fragt das nationale Gericht im Wesentlichen, ob eine nationale Bestimmung, wonach ein Arzt, der eine Konzession zur Führung einer Praxis in Liechtenstein beantragt, nicht mehr als eine Praxis, gleichviel an welchem Ort, betreiben darf, mit den Bestimmungen des EWR-Abkommens vereinbar ist.

9 Die Ausübung einer wirtschaftlichen Tätigkeit durch einen Angehörigen eines EWR-Staates in einem anderen EWR-Staat kann nach dem EWR-Abkommen unter das Kapitel über die Freizügigkeit der Arbeitnehmer, unter das Kapitel über das Niederlassungsrecht oder unter das Kapitel über Dienstleistungen fallen, wobei diese Kapitel einander ausschliessen (EuGH C-55/94 *Gebhard ./. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Slg. 1995, I-4165, Randnr. 20).

10 Im vorliegenden Fall strebt der Beschwerdeführer, ein in Österreich wohnender Österreicher, die Aufnahme und ständige, kontinuierliche Ausübung von Tätigkeiten eines selbständigen Arztes in Liechtenstein im Rahmen einer ständigen Praxis an. Dies ergibt sich eindeutig aus dem Vortrag des Beschwerdeführers selbst. Der Fall ist daher nach den Bestimmungen über die Niederlassungsfreiheit zu beurteilen (EuGH C-55/94 *Gebhard ./. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, a.a.O., Randnrn. 23 bis 25).

11 Die Niederlassungsfreiheit ist einer der elementaren Grundsätze des EWR-Abkommens. Kapitel 2 des Teils III des EWR-Abkommens enthält die wesentlichen Abkommensbestimmungen über die Niederlassungsfreiheit im EWR. Artikel 31 EWRA lautet:

> "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."

12 This provision is specific and far-reaching. It refers explicitly to self-employed persons, and to the setting up of agencies, branches or subsidiaries. This indicates that the right to secondary establishments is equated with the right to establish a principal seat of activity. Article 31 EEA requires national treatment for nationals of other EEA States (see *inter alia* Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, cited above, at paragraph 33), and abolishes all restrictions on establishment between the Contracting Parties to the EEA Agreement.

13 Therefore, it is necessary for the Court to consider whether a single practice rule such as that at issue in the main proceedings constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

14 The Court of Justice of the European Communities has consistently held that the right of establishment entails the freedom to set up and maintain, subject to observance of the professional rules of conduct, more than one place of work within the Community (see, *inter alia*, Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351, at paragraph 20, and Case C-351/90 *Commission* v *Luxembourg* [1992] ECR I-3945, at paragraph 11).

15 The contested single practice rule does not distinguish between Liechtenstein physicians and physicians of other EEA States. It applies equally to all physicians seeking to operate a medical practice in Liechtenstein, regardless of whether they have their primary establishment in Liechtenstein or in any other EEA State, and regardless of their nationality and place of residence. There is no overt discrimination in this respect.

16 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, or through the exercise of administrative discretion with regard to exceptions and dispensations, would in practice lead to the same result (see, *inter alia*, Case E-3/98 *Rainford-Towning*, cited above, at paragraph 27).

> "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 ."

12 Diese Bestimmung ist spezifisch und weitreichend. Sie bezieht sich ausdrücklich auf Selbständige und auf die Gründung von Agenturen, Zweigniederlassungen oder Tochtergesellschaften. Dies deutet darauf hin, dass das Recht auf eine Zweitniederlassung dem Recht auf die Begründung eines Haupttätigkeitssitzes gleichgestellt ist. Artikel 31 EWRA schreibt die Inländerbehandlung für Angehörige anderer EWR-Staaten vor (vgl. u.a. EuGH C-55/94 *Gebhard ./. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, a.a.O., Randnr. 33) und beseitigt alle Niederlassungsbeschränkungen zwischen den Vertragsparteien des EWR-Abkommens.

13 Daher muss der Gerichtshof prüfen, ob eine *single practice rule* wie die im Ausgangsverfahren in Rede stehende eine Beschränkung der Niederlassungsfreiheit im Sinne von Artikel 31 EWRA darstellt.

14 Nach ständiger Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften umfasst das Niederlassungsrecht die Möglichkeit, unter Beachtung der jeweiligen Berufsregelungen im Gebiet der Gemeinschaft mehr als eine Stätte für die Ausübung einer Tätigkeit einzurichten und beizubehalten (vgl. u.a. EuGH C-106/91 *Ramrath ./. Ministre de la Justice,* Slg. 1992, I-3351, Randnr. 20, und C-351/90 *Kommission ./. Luxemburg*, Slg. 1992, I-3945, Randnr. 11).

15 Die beanstandete *single practice rule* unterscheidet nicht zwischen liechtensteinischen Ärzten und Ärzten aus anderen EWR-Staaten. Sie gilt gleichermassen für alle Ärzte, die in Liechtenstein eine ärztliche Praxis betreiben wollen, unabhängig davon, ob sie ihre Hauptniederlassung in Liechtenstein oder in irgendeinem anderen EWR-Staat haben, und ungeachtet ihrer Staatsangehörigkeit und ihres Wohnsitzes. Eine offene Diskriminierung liegt insoweit nicht vor.

16 Nach ständiger Rechtsprechung verbietet der Grundsatz der Gleichbehandlung 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,* a.a.O., Randnr. 27).

17 The Court observes that, for physicians who have previously not conducted a practice, the contested single practice rule does not entail negative effects with regard to their establishment in Liechtenstein.

18 Nor does it provide a barrier to the establishment of a practice within the territory of Liechtenstein by those physicians who have already established a practice outside that country when, in their evaluation, the relative professional career prospects are such that they would be induced to give up the practice they already have established, or for those who, for reasons unconnected with their professional calculations, would discontinue their previous practice.

19 The practical effect of the single practice rule appears to be that it prevents physicians who are already in practice outside the territory of Liechtenstein from establishing a secondary practice in Liechtenstein. Having to give up an established practice renders it less attractive for foreign physicians to establish themselves in Liechtenstein, and directly affects physicians' access to the market in that country. The negative consequences of the rule would be more likely to materialise for physicians established in another EEA State than for physicians already in practice in Liechtenstein.

20 From the submissions of the Government of Liechtenstein, it appears that a primary objective of the contested single practice rule is to limit the total number of physicians active in the country. This must mean that the rule is assumed to be an effective mechanism for restraining the inclination of non-national physicians to establish themselves in Liechtenstein, and that the rule is intended to function as a restriction on the general right to establishment for a large number of physicians from other EEA States.

21 The Government of Liechtenstein has submitted that the single practice rule at issue does not prevent physicians established in other EEA States from providing services to patients in Liechtenstein from their established practices abroad.

22 The Court finds that this circumstance does not remove the restrictive effect of the national rule with regard to secondary establishments. The fact that the contested national rule is not contrary to the provisions of the EEA Agreement relating to the freedom to provide services does not affect the compatibility of that national rule with the provisions of the EEA Agreement on the freedom of establishment.

23 The Government of Liechtenstein has also submitted that the high proportion of physicians from other EEA States practising in Liechtenstein implies that the single practice rule, in practice, has not had the effect of rendering it more onerous for nationals from other EEA States to establish themselves in Liechtenstein.

17 Der Gerichtshof weist darauf hin, dass die beanstandete *single practice rule* keine negativen Auswirkungen auf die Niederlassung von Ärzten, die zuvor noch keine Praxis geführt haben, in Liechtenstein hat.

18 Sie errichtet auch keine Schranke für die Einrichtung einer Praxis im Hoheitsgebiet des Fürstentums Liechtenstein durch Ärzte, die bereits eine Praxis ausserhalb dieses Landes eingerichtet haben, wenn diese Ärzte die entsprechenden Aussichten für ihre berufliche Karriere als so günstig einschätzen, dass sie sich zur Aufgabe ihrer bereits bestehenden Praxis veranlasst sehen würden, oder durch Ärzte, die aus anderen als beruflichen Erwägungen ihre bisherige Praxis nicht fortführen würden.

19 Es zeigt sich, dass die praktische Wirkung der *single practice rule* darin besteht, dass sie Ärzte, die bereits ausserhalb des Hoheitsgebiets des Fürstentums Liechtenstein eine Praxis haben, an der Gründung einer Zweitpraxis in Liechtenstein hindert. Der Zwang zur Aufgabe einer bestehenden Praxis macht es für ausländische Ärzte weniger attraktiv, sich in Liechtenstein niederzulassen, und beeinträchtigt unmittelbar den Zugang von Ärzten zum Markt dieses Landes. Die negativen Folgen der *single practice rule* werden eher für Ärzte aus einem anderen EWR-Staat eintreten als für solche, die bereits in Liechtenstein niedergelassen sind.

20 Dem Vortrag des Fürstentums Liechtenstein zufolge besteht ein Hauptzweck der beanstandeten *single practice rule* darin, die Gesamtzahl der im Land praktizierenden Ärzte zu begrenzen. Dies kann nur bedeuten, dass die *single practice rule* als ein wirksamer Mechanismus angesehen wird, die Neigung ausländischer Ärzte, sich in Liechtenstein niederzulassen, einzuschränken, und dass sie als eine Beschränkung des allgemeinen Niederlassungsrechts für eine grosse Zahl von Ärzten aus anderen EWR-Staaten wirken soll.

21 Die liechtensteinische Regierung hat vorgetragen, dass die in Rede stehende *single practice rule* in anderen EWR-Staaten niedergelassene Ärzte nicht daran hindere, Dienstleistungen für Patienten in Liechtenstein von ihren Praxen im Ausland aus zu erbringen.

22 Der Gerichtshof stellt fest, dass dieser Umstand die beschränkende Wirkung der nationalen Regelung für Zweitniederlassungen nicht beseitigt. Dass die beanstandete nationale Regelung nicht den Bestimmungen des EWR-Abkommens über die Dienstleistungsfreiheit zuwiderläuft, berührt nicht die Frage ihrer Vereinbarkeit mit den Bestimmungen des EWR-Abkommens über die Niederlassungsfreiheit.

23 Die liechtensteinische Regierung hat auch vorgetragen, die hohe Zahl von in Liechtenstein praktizierenden Ärzten aus anderen EWR-Staaten belege, dass die *single practice rule* nicht den Effekt gehabt habe, Staatsangehörige anderer EWR-Staaten bei ihrer Niederlassung in Liechtenstein über Gebühr zu belasten.

24 That argument cannot be accepted. The single practice rule may potentially dissuade physicians from other EEA States from establishing themselves in Liechtenstein. This is sufficient to establish a breach of Article 31 EEA. There is no requirement that an appreciable effect on cross-border establishment be demonstrated.

25 The Court concludes from the foregoing that a single practice rule such as that at issue in the main proceedings constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

26 The Court must now examine whether this restriction can be objectively justified so as to permit the continued application of such a single practice rule.

27 Non-discriminatory national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement, such as the single practice rule at issue in the present case, can be justified only if they fulfil the following conditions: they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective (see, to this effect, Case C-424/97 *Haim* [2000] ECR I-5123, at paragraph 57, and, most recently, Case C-108/96 *Mac Quen and Others* v *Grandvision Belgium*, judgment of 1 February 2001, not yet reported, at paragraph 26).

28 The Government of Liechtenstein has submitted that the underlying main objective of the single practice rule is the maintenance of the financial equilibrium of the Liechtenstein social security system. Protecting this equilibrium must be held to be an overriding reason based on the general interest, justifying a restriction on the freedom of establishment in this case. It is argued that if the single practice rule were disallowed, Liechtenstein would experience a significant increase in the number of medical practitioners. Such an increase in the supply of medical services in the country would simultaneously cause an artificial increase in the demand for such services. This would again lead to a corresponding rise in the expenditure relating to medical treatment in the Liechtenstein social security system. The Government of Liechtenstein has submitted that such increases in expenditure might threaten the sustainability of a health care system accessible to all.

29 Moreover, the Government of Liechtenstein has submitted that reasons connected with the maintenance of the high quality of medical services provided in Liechtenstein must also be taken into account. The single practice rule ensures the availability and continuity of presence of the practitioner. Medical practitioners who establish a second practice would not be able to provide the necessary continuous and permanent medical care for their patients as practitioners who exclusively operate one practice in the country.

24 Dem ist nicht zu folgen. Die *single practice rule* kann Ärzte aus anderen EWR-Staaten von einer Niederlassung in Liechtenstein abschrecken. Dies genügt für die Feststellung eines Verstosses gegen Artikel 31 EWRA. Des Nachweises einer spürbaren Auswirkung auf die grenzüberschreitende Niederlassung bedarf es nicht.

25 Der Gerichtshof folgert aus dem Vorstehenden, dass eine *single practice rule*, wie sie im Ausgangsverfahren in Rede steht, eine Beschränkung der Niederlassungsfreiheit im Sinne von Artikel 31 EWRA darstellt.

26 Der Gerichtshof hat nun zu prüfen, ob diese Beschränkung objektiv gerechtfertigt werden kann, so dass die weitere Anwendung einer solchen *single practice rule* zulässig wäre.

27 Nichtdiskriminierende nationale Massnahmen, welche die Ausübung von durch das EWR-Abkommen gewährleisteten Grundfreiheiten behindern oder weniger attraktiv machen können, wie es bei der im Ausgangsverfahren in Rede stehenden *single practice rule* der Fall ist, können nur dann gerechtfertigt sein, wenn sie die folgenden Voraussetzungen erfüllen: Sie müssen zwingenden Gründen des Allgemeininteresses entsprechen, sie müssen zur Erreichung des verfolgten Ziels geeignet sein, und sie dürfen nicht über das hinausgehen, was zur Erreichung dieses Ziels erforderlich ist (vgl. in diesem Sinne EuGH C-424/97 *Haim,* Slg. 2000, I-5123, Randnr. 57, und jüngst Urteil vom 1. Februar 2001, C-108/96 *Mac Quen u.a. ./. Grandvision Belgium*, noch nicht veröffentlicht, Randnr. 26).

28 Die liechtensteinische Regierung hat vorgetragen, Hauptziel der *single practice rule* sei die Aufrechterhaltung des finanziellen Gleichgewichts des liechtensteinischen Systems der sozialen Sicherheit. Der Schutz dieses Gleichgewichts sei als zwingender Grund des öffentlichen Interesses anzusehen, der eine Beschränkung der Niederlassungsfreiheit in diesem Fall rechtfertige. Würde die *single practice rule* für unzulässig erklärt, so käme es in Liechtenstein zu einer deutlichen Zunahme der Zahl der praktizierenden Ärzte. Eine solche Zunahme des Angebots an ärztlichen Leistungen würde zugleich zu einem künstlichen Anstieg der Nachfrage nach solchen Leistungen führen. Dies wiederum würde zu einem entsprechenden Anstieg der Ausgaben für medizinische Behandlungen im liechtensteinischen System der sozialen Sicherheit führen. Nach Ansicht der liechtensteinischen Regierung könnte dieser Kostenanstieg die Nachhaltigkeit eines allen Menschen zugänglichen Gesundheitssystems gefährden.

29 Darüber hinaus hat die liechtensteinische Regierung vorgetragen, dass auch Gründe der Aufrechterhaltung der hohen Qualität der in Liechtenstein angebotenen medizinischen Leistungen zu berücksichtigen seien. Die *single practice rule* sichere die Verfügbarkeit und kontinuierliche Anwesenheit des Arztes. Ärzten mit einer Zweitniederlassung wäre es im Gegensatz zu solchen mit nur einer Praxis im Land nicht möglich, die notwendige kontinuierliche und permanente Betreuung ihrer Patienten sicherzustellen.

30 The Court recalls that EEA law does not detract from the powers of the EEA States to organise their social security systems. In the absence of harmonisation at the EEA level, it is for each EEA State to determine whether and to what extent expenses for medical treatment are to be borne by the social security system.

31 The Court notes from the information presented to it that, under the Liechtenstein health system, a considerable share of the costs for medical treatment is covered by the social security system. Consequently, an increase in the demand for medical services may result in a corresponding increase in the expenditure of the social security system. That being so, it is necessary to consider whether the single practice rule is necessary and proportionate in order to limit opportunities for physicians to create artificial demand for their services.

32 It cannot be ruled out that, in certain circumstances, an increase in the supply of medical services in the country may lead to an increase in the demand for such services which does not reflect a real need among patients. However, there seem to be other, less restrictive means to deal with artificial and excessive supply induced demand than by restricting the freedom of establishment by way of a single practice rule.

33 The application of suitable control measures may be one way of preventing medical practitioners from exercising their profession in such a manner as to create artificial demand. All medical practitioners established in an EEA State must observe the national rules governing professional practice (see, *inter alia*, Case C-351/90 *Commission* v *Luxembourg*, cited above, at paragraph 11), and such rules may be used to limit the alleged risk of medical practitioners creating demand among their patients for unnecessary medical services. The observance of those rules may be encouraged by supervisory professional bodies or administrative agencies.

34 Economic considerations alone cannot justify a barrier to one of the fundamental freedoms provided for in the EEA Agreement (see Case C-158/96 *Kohll* v *Union des Caisses de Maladie* [1998] ECR I-1931, at paragraph 41). In the present case, even a considerable difference in the expenditure expected over a range of years from increases in the consumption of medical services generated by the establishment of secondary medical practices would not by itself serve to justify the maintenance of the single practice rule.

30 Der Gerichtshof erinnert daran, dass das EWR-Recht die Befugnisse der EWR-Staaten zur Gestaltung ihrer Systeme der sozialen Sicherheit unberührt lässt. Mangels einer Harmonisierung auf EWR-Ebene ist es Sache jedes EWR-Staates, festzulegen, ob und in welchem Umfang Kosten medizinischer Behandlung vom System der sozialen Sicherheit zu tragen sind.

31 Der Gerichtshof entnimmt den ihm vorgelegten Informationen, dass im liechtensteinischen Gesundheitssystem ein beträchtlicher Teil der Kosten medizinischer Behandlung vom System der sozialen Sicherheit getragen wird. Folglich kann ein Anstieg der Nachfrage nach medizinischen Leistungen zu einem entsprechenden Anstieg der Ausgaben des Systems der sozialen Sicherheit führen. Daher ist zu prüfen, ob die *single practice rule* erforderlich und angemessen ist, um die Möglichkeit für Ärzte zu begrenzen, eine künstliche Nachfrage nach ihren Leistungen zu schaffen.

32 Es kann nicht ausgeschlossen werden, dass unter bestimmten Umständen eine Zunahme des Angebots an medizinischen Leistungen im Land zu einem Anstieg der Nachfrage nach solchen Leistungen führen kann, der kein echtes Bedürfnis auf Seiten der Patienten widerspiegelt. Gleichwohl scheint es aber andere, weniger restriktive Mittel zu geben, um einer künstlichen, angebotsinduzierten Nachfrage zu begegnen, als die Beschränkung der Niederlassungsfreiheit durch eine *single practice rule*.

33 Die Anwendung geeigneter Kontrollmassnahmen kann ein Weg sein, um Ärzte daran zu hindern, ihren Beruf so auszuüben, dass eine künstliche Nachfrage geschaffen wird. Jeder in einem EWR-Staat niedergelassene Arzt muss die nationalen Berufsregelungen beachten (vgl. u.a. EuGH C-351/90 *Kommission./. Luxemburg*, a.a.O., Randnr. 11), und von solchen Regelungen kann Gebrauch gemacht werden, um die Gefahr zu begrenzen, dass Ärzte bei ihren Patienten eine Nachfrage nach unnötigen medizinischen Leistungen erzeugen. Zur Beachtung solcher Regelungen kann durch berufsständische Aufsichtsgremien oder Einrichtungen der Verwaltung angehalten werden.

34 Rein wirtschaftliche Gründe können eine Beschränkung einer der im EWR-Abkommen vorgesehenen Grundfreiheiten nicht rechtfertigen (vgl. EuGH C-158/96 *Kohll ./. Union des Caisses de Maladie*, Slg. 1998, I-1931, Randnr. 41). Im vorliegenden Fall könnte auch ein erheblicher Unterschied bei den Kosten, die über eine Reihe von Jahren wegen des Anstiegs der Inanspruchnahme medizinischer Leistungen infolge der Gründung ärztlicher Zweitniederlassungen erwartet werden, allein die Beibehaltung der *single practice rule* nicht rechtfertigen.

35 It cannot be excluded that the risk of seriously undermining the financial balance of the social security system, and of jeopardising the sustainability of a health care system accessible to all, might nevertheless constitute an overriding reason in the general interest capable of justifying a barrier of that kind (see, *inter alia*, Case C-158/96 *Kohll* v *Union des Caisses de Maladie*, cited above, at paragraphs 41 and 50). The evidence presented in the case at hand does not, however, allow the Court to evaluate whether this risk will materialise.

36 As regards the submission concerning the maintenance of the high quality of medical services, the Court observes that it is not, under contemporary conditions, necessary for a physician to be close to the patient on a continuous basis after the treatment has been given. Modern transport and communications have obviated the need to require medical practitioners to work in one place only.

37 In this respect, the Court notes that the single practice rule does not require that physicians reside in Liechtenstein or be continuously available locally. Therefore, the general rule prohibiting medical practitioners from establishing a secondary establishment in Liechtenstein seems to be neither suitable nor necessary in order to attain the objective of maintaining the high quality of medical services.

38 It is recalled that in Case C-351/90 *Commission* v *Luxembourg*, cited above, at paragraph 14, the Court of Justice of the European Communities held that measures such as that in question here are compatible with EC law if "the restrictions which they entail are actually justified in view of the general obligations inherent in the proper practice of the professions in question" and do not discriminate on grounds of nationality. The circumstances in which the consideration adduced by the Court of Justice of the European Communities might be invoked at some time in the future cannot be established theoretically.

39 In the context of indicating which circumstances could provide a basis for a finding that the application of a single practice rule would be "actually justified" for reasons which relate to the "general obligations inherent in the proper practice" of a profession, the Court refers to the geographical, demographic and sociological situation of Liechtenstein. The Court recalls that it has taken note of the express recognition by the EEA Council, in its Declaration on free movement of persons (OJ 1995 L 86/80), that "Liechtenstein has a very small inhabitable area of a rural character with an unusually high percentage of non-national residents and employees" and "acknowledge[d] the vital interest of Liechtenstein to maintain its own national identity" (see Case E-3/98 *Rainford-Towning*, cited above, at paragraph 40).

35 Es kann nicht ausgeschlossen werden, dass die Gefahr einer ernsten Störung des finanziellen Gleichgewichts des Systems der sozialen Sicherheit und die Gefährdung der Nachhaltigkeit eines allen Menschen zugänglichen Gesundheitssystems dennoch einen zwingenden Grund des Allgemeininteresses darstellen kann, der eine derartige Beschränkung zu rechtfertigen vermag (vgl. EuGH C-158/96 *Kohll ./. Union des Caisses de Maladie*, a.a.O., Randnrn. 41 und 50). Anhand der im hier zu entscheidenden Fall vorgelegten Beweise kann der Gerichtshof jedoch nicht beurteilen, ob diese Gefahr eintreten wird.

36 Was das Vorbringen betreffend die Aufrechterhaltung der hohen Qualität der medizinischen Leistungen angeht, bemerkt der Gerichtshof, dass unter heutigen Umständen ein Arzt nach der Behandlung eines Patienten nicht mehr ständig in dessen Nähe zu sein braucht. Moderne Verkehrs- und Kommunikationsmittel haben die Notwendigkeit beseitigt, von einem Arzt zu verlangen, dass er nur an einem Ort arbeitet.

37 In dieser Hinsicht hält der Gerichtshof fest, dass die *single practice rule* einem Arzt nicht vorschreibt, in Liechtenstein zu wohnen oder dort ständig verfügbar zu sein. Daher erscheint das allgemeine Verbot für Ärzte, eine Zweitniederlassung in Liechtenstein zu begründen, weder geeignet noch erforderlich, um das Ziel der Aufrechterhaltung einer hohen Qualität der medizinischen Leistungen zu erreichen.

38 In dem erwähnten Urteil C-351/90 *Kommission./. Luxemburg*, a.a.O., Randnr. 14, hat der Gerichtshof der Europäischen Gemeinschaften ausgeführt, dass Massnahmen wie die hier in Rede stehende mit dem Gemeinschaftsrecht vereinbar sind, "wenn die in ihnen enthaltenen Beschränkungen wirklich in Anbetracht allgemeiner Verpflichtungen gerechtfertigt sind, von deren Erfüllung die ordnungsgemässe Ausübung der fraglichen Berufe abhängt", und wenn sie keine Diskriminierung aus Gründen der Staatsangehörigkeit darstellen. Die Umstände, unter denen in einem künftigen Fall eine Berufung auf diese Erwägung des Gerichtshofs der Europäischen Gemeinschaften zulässig sein kann, lassen sich nicht theoretisch bestimmen.

39 Zu der Frage, welche Umstände eine Grundlage für eine Entscheidung bieten könnten, dass die Anwendung einer *single practice rule* "wirklich gerechtfertigt" ist aus Gründen im Zusammenhang mit "allgemeine[n] Verpflichtungen [...], von deren Erfüllung die ordnungsgemässe Ausübung [eines Berufs] abhängt", verweist der Gerichtshof auf die geographische, demographische und soziologische Lage Liechtensteins. Der Gerichtshof erinnert daran, dass er zur Kenntnis genommen hat, dass der EWR-Rat in seiner Erklärung über die Freizügigkeit (ABl. 1995 Nr. L 86, S.80) ausdrücklich anerkannt hat, dass "Liechtenstein ein sehr kleines bewohnbares Gebiet ländlichen Charakters mit einem ungewöhnlich hohen Prozentsatz an ausländischen Gebietsansässigen und Beschäftigten hat", und "das vitale Interesse Liechtensteins an der Wahrung seiner nationalen Identität [anerkannt]" hat (vgl. die oben erwähnte Rechtssache E-3/98 *Rainford-Towning*, Randnr. 40).

40 On the reasoning set out in the foregoing, and on the basis of what has been submitted to the Court, and without entering into any examination of questions of fact and their appreciation, this Court must hold that the contested single practice rule is not justified by overriding reasons based on the general interest.

41 In those circumstances, the answer to the national court must be that a national provision of a Contracting Party to the EEA Agreement which provides that a physician may not operate more than one practice, regardless of location, is incompatible with Article 31 EEA.

Costs

42 The costs incurred by 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 question referred to it by Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein by an order of 13 June 2000, hereby gives the following Advisory Opinion:

A national provision of a Contracting Party to the EEA Agreement which provides that a physician may not operate more than one practice, regardless of location, is incompatible with Article 31 EEA.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

40 Aus den vorstehend dargelegten Gründen und auf der Grundlage der ihm unterbreiteten Vorbringen muss der Gerichtshof, ohne in eine Prüfung von Tatsachenfragen und Fragen der Tatsachenwürdigung einzutreten, entscheiden, dass die beanstandete *single practice rule* nicht durch zwingende Gründe des Allgemeininteresses gerechtfertigt ist.

41 Unter diesen Umständen ist dem vorlegenden Gericht zu antworten, dass eine nationale Bestimmung einer Vertragspartei des EWR-Abkommens, nach der ein Arzt nicht mehr als eine Praxis, gleichviel an welchem Ort, führen darf, nicht mit Artikel 31 EWRA vereinbar ist.

Kosten

42 Die Auslagen der isländischen Regierung, der norwegischen Regierung, der EFTA-Überwachungskommission 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 erlässt

DER GERICHTSHOF

in Beantwortung der Frage, die ihm die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein mit Beschluss vom 13. Juni 2000 vorgelegt hat, folgendes Gutachten:

Eine nationale Bestimmung einer Vertragspartei des EWR-Abkommens, nach der ein Arzt nicht mehr als eine Praxis, gleichviel an welchem Ort, führen darf, ist nicht mit Artikel 31 EWR-Abkommen vereinbar.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 14 June 2001.

Gunnar Selvik
Registrar

Thór Vilhjálmsson
President

Verkündet in öffentlicher Sitzung in Luxemburg am 14. Juni 2001.

Gunnar Selvik
Kanzler

Thór Vilhjálmsson
Präsident

REPORT FOR THE HEARING

in Case E-4/00

– 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 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 Johann Brändle

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

I. Introduction

1. By an order dated 13 June 2000, registered at the Court on 21 June 2000, 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 Johann Brändle (hereinafter the "Complainant").

2. The dispute before the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein concerns the compatibility with the EEA Agreement of a Liechtenstein provision requiring that a medical practitioner seeking a licence to practise in Liechtenstein may not operate more than one practice, regardless of location.

II. Legal background

* Amendments to paragraphs 41, 42, and 44.

SITZUNGSBERICHT
in der Rechtssache E-4/00
– berichtigte Fassung* –

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 über die Auslegung des EWR-Abkommens in der Beschwerde von

Dr. Johann Brändle

gegen die Entscheidung der Regierung des Fürstentums Liechtenstein über die Auslegung von Artikel 4, 31 und 33 des Abkommens über den Europäischen Wirtschaftsraum (EWR-Abkommen).

I. Einleitung

1. Mit Beschluss vom 13. Juni 2000, der am 21. Juni 2000 beim Gerichtshof eingegangen ist, ersuchte die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein um Erlass einer Vorlageentscheidung über die Auslegung des EWR-Abkommens in der Beschwerde von Dr. Johann Brändle (der „Beschwerdeführer“) gegen die Entscheidung der Regierung des Fürstentums Liechtenstein.

2. Im Rechtsstreit vor der Verwaltungsbeschwerdeinstanz geht es um die Frage, ob eine Bestimmung des liechtensteinischen Rechts, nach der ein praktischer Arzt, der in Liechtenstein eine Konzession für Allgemeinmedizin sowie als Arbeitsmediziner beantragt - unabhängig vom Ort - nicht mehr als eine Praxis unterhalten darf, mit dem EWR-Abkommen vereinbar sind.

II. Rechtlicher Hintergrund

* Die Änderungen betreffen die Randnummern 41, 42 und 44.

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:

> *"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 des Fürstentums Liechtenstein is the *Verordnung vom 17 Dezember 1996 betreffend die Abänderung der Verordnung über die medizinischen Berufe* (Regulation of 17 December 1996 amending the rules governing the medical professions, hereinafter the "Regulation on medical professions").

8. Article 9 of the Regulation on medical professions reads as follows:

> *"A doctor may pursue his profession in a self-employed capacity, as a sole practitioner or jointly with others, only if he holds a licence authorising him to*

EWR-Recht

3. Die Fragen des nationalen Gerichts betreffen die Auslegung der Artikel 4, 31 und 33 des EWR-Abkommens.

4. Artikel 4 EWRA lautet:

> *„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-Staats, 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."*

Liechtensteinisches Recht

7. Bei dem streitigen Gesetz handelt es sich um die Verordnung vom 17. Dezember 1996 betreffend die Abänderung der Verordnung über die medizinischen Berufe (die „Verordnung für die medizinischen Berufe").

8. Artikel 9 Absatz 1 der Verordnung für die medizinischen Berufe lautet:

> *„Der Arzt darf nur in einer Einzel- oder Gemeinschaftspraxis selbständig tätig sein, wenn er die Konzession dazu besitzt und selbst in eigenem Namen in der*

do so and only if he himself works on his own behalf in the practice concerned. A doctor may not operate more than one practice, whether as a sole practitioner or jointly with others."

III. Facts and procedure

9. The Complainant, Dr. Johann Brändle, is an Austrian national with an established medical practice in Rankweil, Austria. It appears from the Request for an Advisory Opinion from the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein that the Complainant had sought to establish himself as a specialist in internal medicine in Liechtenstein.

10. By an application dated 17 November 1997/4 June 1998, the Complainant filed a request with the Liechtenstein Sanitätskommission (Board of Public Health) for the grant of a licence to set up and operate a medical practice in Liechtenstein.

11. The Sanitätskommission, by a decision dated 11 November/21 December 1999, refused to grant the licence applied for by the Complainant. The reason given for that decision was, essentially, that, according to Article 9(1) of the Regulation on medical professions, a medical practitioner may not operate more than one practice (hereinafter the "single practice rule"), and that a licence could not be granted until the Complainant had given up his practice in Austria and provided written confirmation to that effect from the Vorarlberger Ärztekammer (Vorarlberg Medical Association).

12. On 24 January 2000, the Complainant submitted to the Government of Liechtenstein a complaint against the decision of the Sanitätskommission, asking for the contested decision to be rescinded and for the licence to be granted. The Government of Liechtenstein did not deal with that complaint within three months. On 8 May 2000, the Complainant submitted, by way of appeal, a further complaint to the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein. In the proceedings before the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein, the Complainant has raised issues concerning the compatibility of the single practice rule with the EEA Agreement.

13. The Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein decided to stay the proceedings and submit a Request for an Advisory Opinion to the EFTA Court.

IV. Question

14. The following question was referred to the EFTA Court:

Praxis arbeitet. Der Arzt darf nicht mehr als eine Einzel- oder Gemeinschaftspraxis führen."

III. Sachverhalt und Verfahren

9. Der Beschwerdeführer, Dr. Johann Brändle, ist ein österreichischer Staatsbürger, der in Rankweil, Österreich, eine Arztpraxis eingerichtet hat. Dem Vorlageersuchen der Verwaltungsbeschwerdeinstanz ist zu entnehmen, dass sich der Beschwerdeführer als Facharzt für Innere Medizin in Liechtenstein niederlassen wollte.

10. Mit einem Gesuch vom 17. November 1997/4. Juni 1998 beantragte der Beschwerdeführer bei der Liechtensteinischen Sanitätskommission die Erteilung einer Konzession um eine Arztpraxis in Liechtenstein führen zu können.

11. Mit Verfügung vom 11. November/21. Dezember 1999 lehnte die Sanitätskommission das Gesuch des Beschwerdeführers im wesentlichen mit der Begründung ab, Artikel 9 Absatz 1 der Verordnung über die medizinischen Berufe erlaube es einem praktischen Arzt nicht, mehr als eine Praxis zu unterhalten (*single practice rule*). Eine Konzession könne nicht erteilt werden, bevor der Beschwerdeführer seine Praxis in Österreich aufgegeben und einen entsprechenden Nachweis durch schriftliche Bestätigung der Vorarlberger Ärztekammer erbracht habe.

12. Am 24. Januar 2000 reichte der Beschwerdeführer gegen die Verfügung der Sanitätskommission eine Beschwerde an die liechtensteinische Regierung ein und verlangte die Aufhebung der angefochtenen Entscheidung und und die Erteilung der beantragten Konzession. Die Regierung trat auf die Beschwerde innerhalb von drei Monaten nicht ein. Am 8. Mai 2000 erhob der Beschwerdeführer eine weitere Beschwerde an die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein. Im Verfahren vor der Verwaltungsbeschwerdeinstanz machte er Ausführungen zur Vereinbarkeit der *single practice rule* mit dem EWR-Abkommen.

13. Die Verwaltungsbeschwereinstanz des Fürstentums Liechtenstein entschied, das Verfahren auszusetzen und dem EFTA-Gerichtshof einen Antrag auf Vorlageentscheidung zu übermitteln.

IV. Frage

14. Die folgende Frage wurden dem EFTA-Gerichtshof vorgelegt:

Is the single practice rule applying without exception to all doctors under Liechtenstein national law, and in particular Article 9(1) of the Regulation of 8 November 1988 on the medical professions which provides: "A doctor may pursue his profession in a self-employed capacity, as a sole practitioner or jointly with others, only if he holds a licence authorising him to do so and only if he himself works on his own behalf in the practice concerned. A doctor may not operate more than one practice, whether as a sole practitioner or jointly with others" compatible with the EEA and/or with the Agreement on the European Economic Area (EEA Agreement) of 2 May 1992?

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 Johann Brändle, represented by Toni Jäger;

– the Government of Liechtenstein, represented by Christoph Büchel, Director, EEA Coordination Unit, and Frank Montag, Rechtsanwalt;

– the Government of Iceland, represented by Högni S. Kristjánsson, 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 Anne-Lise H. Rolland, Officer, Legal & Executive Affairs, acting as Agent;

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

Dr Johann Brändle

16. In his written observations, the Complainant, Dr Johann Brändle, refers to the facts and arguments already set out in the Request for an Advisory Opinion, with accompanying enclosures, submitted by the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein.

Ist die im nationalen liechtensteinischen Recht absolut geltende Bestimmung des „single practice rule“ für Zahnärzte, insbesondere Artikel 9 Absatz 1 der Verordnung vom 8. November 1998 über die medizinischen Berufe, nämlich:“ Der Arzt darf nur in einer Einzel- oder Gemeinschaftspraxis selbständig tätig sein, wenn er die Konzession dazu besitzt und selbst in eigenem Namen in der Praxis arbeitet. Der Arzt darf nicht mehr als eine Einzel- oder Gemeinschaftspraxis führen“ EWR-konform bzw. mit dem Abkommen über den Europäischen Wirtschaftsraum vom 2. Mai 1992 (EWRA) vereinbar ?

V. Schriftliche Erklärungen

15. Schriftliche Erklärungen gemäss Artikel 20 der Satzung des EFTA-Gerichtshofs und Artikel 97 der Verfahrensordnung sind eingegangen von:

– Dr. Johann Brändle, vertreten durch Toni Jäger;

– der Regierung des Fürstentums Liechtenstein, vertreten durch lic.iur. Christoph Büchel, Direktor der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein, als Bevollmächtigter, und Rechtsanwalt Dr. Frank Montag;

– der isländischen Regierung, vertreten durch Högni S. Kristjánsson, Beamter im Aussenministerium, als Bevollmächtigter;

– der norwegischen Regierung, vertreten durch Helge Seland, Stellvertretende Generaldirektorin im Aussenministerium, als Bevollmächtigte;

– der EFTA-Überwachungsbehörde, vertreten durch Anne-Lise H. Rolland, Mitglied der Abteilung Rechtliche & Exekutive Angelegenheiten, als Bevollmächtigte;

– der Kommission der Europäischen Gemeinschaften, vertreten durch Maria Patakia und John Forman, Mitglieder des Rechtsdienstes, als Bevollmächtigte.

Dr. Johann Brändle

16. Der Beschwerdeführer bezieht sich in einer schriftlichen Stellungnahme auf die Tatsachen und Vorbringen, die bereits im Antrag auf eine Vorlageentscheidung bzw. in den Beilagen der Verwaltungsbeschwerdeinstanz enthalten sind.

17. The Complainant submits that the contested single practice rule is contrary to EEA law. It follows from Article 6 EEA that provisions of the EEA Agreement, in so far as they are identical in substance to corresponding rules of the EC Treaty, are to be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities. The Complainant refers to the judgments in *Commission* v *France*[1] and *Commission* v *Luxembourg*,[2] in which the Court of Justice of the European Communities held similar single practice rules to be contrary to Community law.

18. The Complainant also draws attention to the *EFTA Surveillance Authority Annual Report 1998*, from which it follows that the EFTA Surveillance Authority has initiated formal proceedings against the Government of Liechtenstein for failure to comply with Article 31 EEA by reason of the contested single practice rule. The single practice rule prevents physicians with a medical practice in another EEA State from establishing themselves in Liechtenstein.

19. The Complainant proposes the following answer to the question:

> *"The 'single practice rule' applying to doctors under the national law of Liechtenstein, and in particular Article 9(1) of the Regulation of 8 November 1988 on the medical professions, is not in conformity with the EEA, and/or not compatible with the Agreement on the European Economic Area (EEA Agreement) of 2 May 1992."*

The Government of Liechtenstein

The existence of overt or covert discrimination

20. The Government of Liechtenstein submits that the single practice rule at issue in the main proceedings is compatible with Article 31 EEA.

21. The Government of Liechtenstein argues that the contested single practice rule does not constitute either overt or covert discrimination prohibited by Article 31 EEA.

22. The single practice rule at issue applies equally to Liechtenstein nationals and to nationals of other EEA States. Neither a Liechtenstein national nor a national of another EEA State, who already operates a practice anywhere in the EEA, will be granted a licence to establish a practice in Liechtenstein. No exceptions to the single practice rule have ever been made. The single practice rule treats nationals of all EEA States in the same way. Therefore, it does not

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1 Case 96/85 *Commission* v *France* [1986] ECR 1475.

2 Case C-351/90 *Commission* v *Luxembourg* [1992] ECR I-3945.

17. Der Beschwerdeführer macht geltend, die umstrittene *single practice rule* verstosse gegen das EWR-Abkommen. Aus Artikel 6 EWR-Abkommen folge, dass Bestimmungen des EWR-Abkommens, soweit sie inhaltlich gleichlautend mit Bestimmungen des EG-Vertrags sind, in Übereinstimmung mit den einschlägigen Urteilen des EuGH ausgelegt werden müssen. Der Beschwerdeführer verweist auf die Urteile *Kommission./.Frankreich*[1] und *Kommission./.Luxemburg*[2]. In diesen Urteilen habe der EuGH eine ähnliche single practice rule als gemeinschaftsrechtswidrig verworfen.

18. Der Beschwerdeführe macht auch auf den Jahresbericht 1998 der EFTA-Überwachungsbehörde aufmerksam. Aus diesem Bericht ergibt sich, dass die EFTA-Überwachungsbehörde ein förmliche Verfahren gegen Liechtenstein wegen Verletzung des Artikels 31 EWRA durch die streitige single practice rule eingeleitet hat. Die *single practice rule* verhindert, dass sich Zahnärzte aus anderen EWR-Staaten in Liechtenstein niederlassen können.

19. Der Beschwerdeführer schlägt die folgende Antwort auf die Frage vor:

> *„Die auf Ärzte nach dem liechtensteinischen Rech, insbesondere Artikel 9 Absatz 1 der Verordnung vom 8. November über die medizinischen Berufe, anwendbare single practice rule ist mit dem EWR-Abkommen vom 2. Mai 1992 nicht vereinbar“.*

Die Regierung des Fürstentums Liechtenstein

Vorliegen einer offenen oder versteckten Diskriminierung

20. Die liechtensteinische Regierung macht geltend, die in Rede stehende single practice rule sei mit Artikel 31 EWR-Abkommen vereinbar.

21. Die Regierung Liechtenstein's argumentiert, die streitige *single practice rule* stelle weder eine offene noch eine versteckte Diskriminierung dar, die nach Artikel 31 EWR-Abkommen unzulässig wäre.

22. Die in Frage stehende *single practice rule* gelte sowohl für liechtensteinische Staatsangehörige als auch für Angehörige anderer EWR-Staaten. Weder liechtensteinische Staatsangehörige noch Angehörige anderer EWR-Staaten, die bereits eine Praxis im EWR unterhalten, erhalten eine Konzession zur Führung einer Arztpraxis in Liechtenstein. Von dieser Regel wurde noch nie eine Ausnahme gemacht. Nach der single practice rule werden

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1 EuGH 96/85 *Kommission./.Frankreich*, Slg. 1986, 1475.

2 EuGH C-351/90 *Kommission./.Luxemburg*, Slg. 1992, I-3945.

discriminate on grounds of nationality and, consequently, does not constitute overt discrimination prohibited by Article 31 EEA.

23. The Government of Liechtenstein acknowledges that, according to the case-law[3] of the Court of Justice of the European Communities, the principle of equal treatment prohibits not only overt discrimination on grounds of nationality, but also all covert forms of discrimination which, by application of other criteria of differentiation, lead in fact to the same result.

24. The Government of Liechtenstein notes that the Court of Justice of the European Communities rejected single practice rules in *Commission* v *Luxembourg*[4] and *Commission* v *France*.[5] However, the Government of Liechtenstein submits that those cases differ on essential points from the present case, in terms of their wording, effect, and context. Moreover, the Court of Justice of the European Communities did not consider single practice rules inadmissible in principle, but merely deemed the justifications invoked in those cases to be insufficient. It was the specific circumstances in both judgments which led the Court to the conclusion that the single practice rules were applied in a discriminatory way.

25. By contrast, the single practice rule at issue in the present case applies without distinction to nationals and non-nationals of Liechtenstein and is, in practice, not applied more strictly to physicians practising in other EEA States than those practising in Liechtenstein. There is no available derogation to the single practice rule, and no exception has ever been made to it, either for physicians established in Liechtenstein, or for physicians established in other EEA States. Thus, there is nothing which can substantiate the assertion that the persons disadvantaged by the single practice rule are exclusively or mainly foreign nationals. Referring to case-law[6] of the Court of Justice of the European Communities, the Government of Liechtenstein argues that the contested single practice rule cannot be viewed as giving rise to indirect discrimination on grounds of nationality.

26. The Government of Liechtenstein adds that the present case also differs substantially from the situations in the judgments in *Ciola* v *Land Vorarlberg*[7] and *Rainford-Towning*,[8] in which extremely strict standards were applied to the

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3 Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153; Case 3/88 *Commission* v *Italy* [1989] ECR 4035; Case C-266/95 *Merino García* v *Bundesanstalt für Arbeit* [1997] ECR I-3279.

4 See footnote 2.

5 See footnote 1.

6 Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877; Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897.

7 Case C-224/97 *Ciola* v *Land Vorarlberg* [1999] ECR I-2517.

8 Case E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205.

Staatsangehörige aus allen EWR-Staaten gleich behandelt, weshalb keine Diskriminierung aufgrund der Staatsangehörigkeit und damit auch keine offene Diskriminierung vorliegt, die nach Art. 31 EWRA verboten wäre.

23. Die liechtensteinische Regierung räumt ein, dass nach der Rechtsprechung des EuGH[3] das Prinzip der Gleichbehandlung nicht nur offene Diskriminierungen aufgrund der Staatsangehörigkeit verbietet, sondern auch alle Formen der versteckten Diskriminierungen, die durch die Anwendung anderer Unterscheidungskriterien zum gleichen Ergebnis führen.

24. Die Regierung nimmt zur Kenntnis, dass der EuGH in den Urteilen *Kommission./.Luxemburg*[4] und *Kommission./.Frankreich*[5] eine single practice rule verworfen hat. Allerdings unterscheiden sich diese Fälle nach dem Wortlaut, den Auswirkungen und dem Zusammenhang vom vorliegenden Fall. Überdies hat der EuGH die *single practice rule* nicht für grundsätzlich unzulässig erachtet, sondern nur die in diesen Fällen vorgetragene Rechtfertigungsgründe für unzureichend gehalten. Die besonderen Umstände führten in beiden Urteilen dazu, dass der Gerichtshof zum Ergebnis kam, die single practice rule sei in einer diskriminierenden Weise angewendet worden.

25. Im Unterschied dazu gilt die *single practice rule* im vorliegenden Fall unterschiedslos für Staatsangehörige und Nicht-Staatsangehörige. Ausserdem wird sie in der Praxis nicht strenger gegenüber Ärzten aus anderen Mitgliedstaaten angewendet als gegenüber Ärzten aus Liechtenstein. Weder für Ärzte in Liechtenstein noch für Ärzte, die in anderen EWR-Staaten niedergelassen sind, wurde jemals eine Ausnahme gemacht. Es gibt keine Abweichungen von dieser Regel, weshalb nichts darauf hindeutet, dass es sich bei den durch die *single practice rule* Benachteiligten ausschliesslich oder hauptsächlich um fremde Staatsangehörige handelt. Unter Hinweis auf die Rechtsprechung des EuGH[6] bringt die liechtensteinische Regierung vor, die streitige Bestimmung könne nicht als indirekte Diskriminierung aufgrund der Staatsangehörigkeit angesehen werden.

26. Zusätzlich führt die Regierung aus, der vorliegende Fall unterscheide sich wesentlich von den Sachverhalten, die den Urteilen *Ciola./.Land Vorarlberg*[7] und *Rainford-Towning*[8] - in denen sehr strenge Massstäbe in der Frage der Nichtdiskriminierung angewendet wurden - zugrundegelegen haben. Die in

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3 EuGH 152/73 *Sotgiu./.Deutsche Bundespost*, Slg. 1974, 153; Case 3/88 *Kommission./.Italien*, Slg. 1989, 4035; Case C-266/95 *Merino Garcia./.Bundesanstalt für Arbeit*, Slg. 1997, I-3279.

4 Vgl. FN 2.

5 Vgl. FN 1.

6 EuGH 143/87 *Stanton./.Inasti*, Slg. 1988, 3877; Verbundene Rechtssachen 154/87 und 155/87 *RSVZ./.Wolf u.a.*, Slg. 1988, 3897.

7 EuGH C-224/97 *Ciola./.Land Vorarlberg*, Slg. 1999, I-2517.

8 EFTA-Gerichtshof E-3/*98 Rainford-Towning*, EFTACt.-Report 1998, 205.

question of non-discrimination. The provisions under scrutiny in those cases used as a distinguishing criterion not the nationality of the persons concerned, but their place of residence. The single practice rule at issue in the present case is in no way linked to any residence requirement in Liechtenstein. The single practice rule applies to all physicians already operating a practice in the EEA, be it in Liechtenstein or in any other EEA State, regardless of their nationality or their place of residence.

27. The Government of Liechtenstein submits that the extremely high proportion of medical specialists from other EEA States practising in Liechtenstein implies that the single practice rule has not had the effect of rendering it more onerous for nationals from other EEA States to establish themselves in Liechtenstein.

The existence of a restriction on the freedom of establishment

28. The Government of Liechtenstein acknowledges that the Court of Justice of the European Communities, in its judgments in *Commission* v *France*,[9] *Commission* v *Luxembourg*[10] and *Ordre des Avocats au Barreau de Paris* v *Klopp*,[11] found an infringement of the fundamental freedom of establishment, independently of the existence of any overt or covert discrimination. It follows that, even under the principle of equal treatment, of which Article 43 EC embodies a specific instance, a national measure which is applied without distinction to nationals and non-nationals of a Member State may still be considered incompatible, if it has the effect of restricting the right of establishment. The Court of Justice of the European Communities has followed this approach in several other cases.[12]

29. The Government of Liechtenstein considers that this progressive interpretation of Article 43 EC, which the Court of Justice of the European Communities has applied in its case-law on the single practice rule, is not directly relevant to the interpretation of Article 31 EEA.

30. Referring to the Advisory Opinion of the EFTA Court in *Rainford-Towning*,[13] the Government of Liechtenstein argues that, although the wording of

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9 See footnote 1.

10 See footnote 2.

11 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971.

12 Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897; Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877; Case C-53/95 *Inasti* v *Kemmler* [1996] ECR I-703; Case 292/86 *Gullung* v *Conseils de l'ordre des avocats du barreau de Colmar et de Saverne* [1988] ECR 111; Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

13 See footnote 8.

diesen Fällen überprüften Vorschriften unterschieden nicht nach der Nationalität der betroffenen Personen, sondern nach dem Wohnsitz. Die vorliegend in Rede stehende *single practice rule* ist in keiner Weise mit einem Wohnsitzerfordernis in Liechtenstein verbunden. Die Regel gilt für alle Ärzte, die bereits eine Praxis im EWR unterhalten, sei es in Liechtenstein oder in einem anderen EWR-Staat, unabhängig von ihrer Staatsangehörigkeit oder ihrem Wohnsitz.

27. Die Regierung Liechtenstein's macht geltend, die ausserordentlich hohe Anzahl von Fachärzten aus anderen EWR-Staaten in Liechtenstein belegt, dass die *single praxis rule* nicht den Effekt hatte, Staatsangehörige aus anderen EWR-Staaten bei ihrer Niederlassung in Liechtenstein über Gebühr zu belasten.

Vorliegen einer Beschränkung der Niederlassungsfreiheit

28. Die liechtensteinische Regierung räumt ein, dass der EuGH in den Urteilen *Kommission./.Frankreich*[9]*, Kommission./Luxemburg*[10] und *Ordre des Advocats au Barreau de Paris./.Klopp*[11] unabhängig vom Vorliegen einer offenen oder versteckten Diskriminierung eine Verletzung der Niederlassungsfreiheit angenommen hat. Aus dem Gleichbehandlungsgebot, das in Artikel 43 EG seinen besonderen Ausdruck findet, folgt, dass eine nationale Massnahme, die nicht zwischen Staatsangehörigen und Nichtstaatsangehörigen unterscheidet, trotzdem unzulässig sein kann, wenn sie eine Beschränkung der Niederlassungsfreiheit bewirkt. Der EuGH hat diesen Ansatz in mehreren anderen Fällen vertreten[12].

29. Die Regierung von Liechtenstein hält diese extensive Auslegung von Artikel 43 EG, die der Rechtsprechung des EuGH zur *single practice rule* zugrundeliegt, nicht für unmittelbar auf die Auslegung von Artikel 31 EWR-Abkommen übertragbar.

30. Unter Hinweis auf das Urteil des EFTA-Gerichtshofs in der Rechtssache *Rainford-Towning*[13] führt die liechtensteinische Regierung aus, die besonderen

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9 Vgl. FN 1.

10 Vgl. FN 2.

11 EuGH C-107/83 *Ordre des Avocats au Barreau de Paris./.Klopp*, Slg. 1984, 2971.

12 Verbundene Rechtssachen EuGH 154/87 und 155/87 *RSVZ./.Wolf u.a*, Slg. 1988, 3897; EuGH 143/87 *Stanton./.Inasti*, Slg. 1988, 3877; EuGH C-53/95 *Inast./.Kemmler*, Slg. 1996, I-703; EuGH 292/86 *Gullung./.Conseils de l`ordre des avocats du barreau de Colmar et de Saverne*, Slg. 1988, 111; EuGH C-55/94 *Gebhard ./.Consiglio dell`Ordine degli Avvocati e Procuratori di Milano*, Slg. 1995, I-4165.

13 Vgl. FN 8.

Article 31 EEA is identical to that of Article 43 EC, the specific circumstances of the present case necessitate a different interpretation. This reasoning is based both on the fundamental differences in the scope and the purposes of the Community legal order and the EEA, and on the progressive development of the case-law of the Court of Justice of the European Communities on the freedom of establishment.

31. The Government of Liechtenstein submits that, through the progressive interpretation adopted by the Court of Justice of the European Communities, Community law reaches far into sensitive areas of national policy. Applying the same interpretation to the scope of the freedom of establishment under the EEA Agreement would affect Liechtenstein's autonomy to regulate its social policy. This interpretation is compatible with the objectives of Community law, but is not justifiable under the less ambitious intentions of the EEA Agreement.

32. The Government of Liechtenstein refers to *Opinion 1/91*[14] of the Court of Justice of the European Communities, in which the differences between the Community legal order and the EEA Agreement are discussed. The Government of Liechtenstein notes that the Contracting Parties to the EEA Agreement transferred no sovereign rights to the institutions which they set up. Therefore, they retain greater autonomy than the Member States of the European Communities, especially in the field of national legislative powers.

33. With the expansion of the EC Treaty in the field of social policy by the Treaty on the European Union and the Treaty of Amsterdam, the competence of the Community in the field of social policy was significantly increased. The EC Member States have, in the field of social policy, transferred sovereign rights to the Community institutions which go beyond the promotion of economic relations.

34. However, no such transfer of sovereign rights in the field of social policy has taken place under the EEA Agreement. If the EEA Agreement were to be extended to cover areas of national policy, the national ratification procedure and therefore the consent of the EEA States would be required.

35. The Government of Liechtenstein points out that the EEA Agreement is concerned solely with the promotion of trade and economic relations between the parties, whereas, within the EC Treaty, these objectives are not an end in themselves, but are instrumental in achieving economic and social progress "through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency".[15] The EEA Agreement contains no explicit reference to economic and monetary union.

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14 *Opinion 1/91* [1991] ECR I-6079

15 Article 2 EU.

Umstände im vorliegenden Fall machten eine unterschiedliche Interpretation notwendig, obwohl Artikel 31 EWR-Abkommen und Artikel 43 EG den gleichen Wortlaut haben. Diese Auffassung gründet sich auf die Ziel- und Kontextverschiedenheit der Rechtsordnungen des EWR und der Gemeinschaftsrechtsordnung. Dazu komme eine immer weiter reichende Rechtsprechung des EuGH zur Niederlassungsfreiheit.

31. Nach Meinung der liechtensteinischen Regierung reicht das Gemeinschaftsrecht - bedingt durch die extensive Interpretation des EuGH - weit in sensible nationale Politikbereiche hinein. Würde man im Blick auf die Niederlassungsfreiheit im EWR den gleichen Massstab anlegen, dann wäre die Autonomie Liechtenstein's bei der Ausgestaltung seiner Sozialpolitik eingeschränkt. Eine solche Interpretation ist mit den Zwecken des Gemeinschaftsrechts vereinbar, aber angesichts der weniger weit reichenden Ziele ist sie im EWR nicht zu rechtfertigen.

32. Die liechtensteinische Regierung verweist auf das *Gutachten 1/91*[14] des EuGH, in dem die Unterschiede zwischen der Gemeinschaftsrechtsordnung und dem EWR-Abkommen dargelegt werden und stellt fest, dass die Parteien des EWR-Abkommens keine Souveränitätsrechte auf die von ihnen geschaffenen Institutionen übertragen haben. Deshalb behalten sie eine grössere Autonomie als die Mitgliedstaaten der Gemeinschaft. Das gilt insbesonders, wenn es um die nationale Gesetzgebungshoheit geht.

33. Die Ausdehnung des EG-Vertrags in den Bereich der Sozialpolitik durch den Unionsvertrag und den Vertrag von Amsterdam hat zu einem signifikanten Kompetenzzuwachs der Gemeinschaft in der Sozialpolitik geführt. Die Mitgliedstaaten haben im Bereich der Sozialpolitik Souveränitätsrechte auf die Institutionen der Gemeinschaft übertragen, die über eine Förderung der wirtschaftlichen Beziehungen hinausgehen.

34. Nach dem EWR-Abkommen hat jedoch keine solche Übertragung von Souveränitätsrechten in der Sozialpolitik stattgefunden. Wenn man das EWR-Abkommen auf diese nationalen Politikbereiche ausdehnen wollte, dann wäre dazu ein Ratifizierungsverfahren und damit die Zustimmung der EWR-Staaten notwendig.

35. Nach Meinung der liechtensteinischen Regierung betrifft das EWR-Abkommen ausschliesslich die Förderung der Handels- und Wirtschaftsbeziehungen zwischen den Abkommensparteien. Demgegenüber sind diese Ziele im EG-Vertrag kein Selbstzweck, sondern nur ein Mittel, um wirtschaftlichen und sozialen Fortschritt - durch „Schaffung eines Raumes ohne Binnengrenzen, durch Stärkung des wirtschaftlichen und sozialen Zusammenhalts und durch Errichtung einer Wirtschafts- und Währungsunion, die

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[14] EuGH *Gutachten 1/91*, Slg. 1991, I-6079.

There is furthermore no equivalent commitment to establish an internal market as set out in Article 14 EC. The EEA is not intended to be an area without internal frontiers.

36. In the view of the Government of Liechtenstein, an interpretation of Article 31 EEA within the meaning of the judgments in *Commission* v *France*[16] and *Commission* v *Luxembourg*[17] would depart from the actual wording of that provision, which embodies a specific instance of the principle of equal treatment laid down in Article 4 EEA. This results in a severe restriction of the EEA States' sovereign rights. Such an interpretation cannot find a valid basis in the EEA Agreement, which is a traditional international agreement. An interpretation of the EEA Agreement may not go beyond what is necessary for the furtherance of trade and economic relations.

37. The Government of Liechtenstein takes the view that, under Article 31 EEA, the freedom of establishment of physicians in Liechtenstein is guaranteed to the extent required in the EEA Agreement. Any further requirement or modifications of the relevant provisions in this field, in particular the elimination of the single practice rule, would go beyond the aim of strengthening trade between the EEA States. Therefore, even if the EFTA Court were to take the view that the single practice rule restricted the freedom of establishment, such a restriction would still be within the objectives of the EEA Agreement.

Assessment under the case-law of the Court of Justice of the European Communities

38. In the alternative, if the EFTA Court were to conclude that Article 31 EEA must be construed and applied in the same way as the corresponding Article 43 EC, the Government of Liechtenstein submits that the restrictions entailed by the single practice rule are nonetheless compatible with Article 31 EEA.

39. The Government of Liechtenstein argues that the Court of Justice of the European Communities, in *Commission* v *Belgium*,[18] accepted Belgian legislation which was substantially similar to the single practice rule at issue in the present case, in that it hindered the possibility of secondary establishment. The Court held that the national rule was non-discriminatory, and upheld it, without assessing its proportionality in relation to its restrictive effect on the freedom of

16 See footnote 1.

17 See footnote 2.

18 Case 221/85 *Commission* v *Belgium* [1987] ECR 719.

auf längere Sicht auch eine einheitliche Währung.... umfasst“[15] - zu erreichen. Das EWR-Abkommen enthält keinen ausdrückliche Verweis auf eine Wirtschafts- und Währungsunion. Es besteht auch keine Verpflichtung, einen Binnenmarkt zu errichten wie nach Art. 14 EG. Der EWR ist nicht darauf gerichtet, ein Raum ohne interne Grenzen zu sein.

36. Die liechtensteinische Regierung vertritt die Meinung, eine Auslegung von Artikel 31 des EWR-Abkommens im Lichte der Urteile *Kommission./.Frankreich*[16] und *Kommission./.Luxemburg*[17] würde eine Abkehr vom Wortlaut der Bestimmung bedeuten, die nur ein besonderer Ausdruck des in Artikel 4 EWR-Abkommens enthaltenen Gleichbehandlungsgebotes ist. Eine solche Interpretation führte zu einer ernsten Beschränkung der Souveränitätsrechte der EWR-Staaten. Sie finde auch keine genügende Grundlage im EWR-Abkommen, das einen klassischen internationalen Vertrag darstellt. Eine Auslegung des EWR-Abkommens könne nicht über das hinausgehen, was notwendig ist, um den Handel und die wirtschaftlichen Beziehungen zu fördern.

37. Nach Auffassung der liechtensteinischen Regierung garantiert Artikel 31 EWR-Abkommen die Niederlassungsfreiheit von Ärzten in Liechtenstein in dem Umfang, wie es das EWR-Abkommen verlangt. Jede weitere Voraussetzung oder Änderung der einschlägigen Bestimmungen auf diesem Gebiet, insbesondere eine Abschaffung der *single practice rule*, ginge über den Zweck, den Handel zwischen den EWR-Staaten zu stärken, hinaus. Selbst wenn der EFTA-Gerichtshof zur Auffassung gelangen sollte, dass die *single practice rule* die Niederlassungsfreiheit einschränkt, so läge eine solche Einschränkung immer noch innerhalb der Ziele des EWR-Abkommens.

Beurteilung im Lichte der Rechtsprechung des EuGH

38. Für den Fall, dass der EFTA-Gerichtshof zum Ergebnis kommen sollte, Artikel 31 EWR-Abkommen müsse in der gleichen Weise wie Artikel 43 EG ausgelegt werden, macht die liechtensteinische Regierung geltend, die durch die *single practice rule* hervorgerufenen Beschränkungen seien trotzdem mit Art. 31 EWR-Abkommen vereinbar.

39. Die liechtensteinische Regierung bringt vor, der EuGH habe eine belgische Regelung[18], die inhaltlich der *single practice rule* im vorliegenden Fall ähnlich war, indem sie die Möglichkeit der Errichtung von Zweitniederlassungen behinderte, unbeanstandet gelassen. Der EuGH habe festgestellt, die nationale

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15 Artikel 2 EU.

16 Vgl. FN 1.

17 Vgl. FN 2.

18 EuGH 221/85 *Kommission./.Belgien*, Slg. 1987, 719.

establishment. The Government of Liechtenstein also refers to *Fearon* v *Irish Land Commission*,[19] on similar reasoning.

40. The Government of Liechtenstein argues, in essence, that it is difficult to see how the Court of Justice of the European Communities arrived at different results in *Commission* v *Belgium*,[20] on the one hand, and in *Ordre des Avocats au Barreau de Paris* v *Klopp*,[21] *Commission* v *France*[22] and *Commission* v *Luxembourg*,[23] on the other hand. The Government of Liechtenstein contends that the latter judgments do not give a complete picture of the Court's case-law on secondary establishment. These differing results render it difficult to determine when the absence of discrimination on grounds of nationality alone is to be considered sufficient to show that the right of establishment has not been restricted.

41. In addition, there are substantial differences between the judgments in *Ordre des Avocats au Barreau de Paris* v *Klopp*,[24] *Commission* v *France*,[25] and *Commission* v *Luxembourg*,[26] and the situation in the present dispute. In the opinion of the Government of Liechtenstein, the economic and socio-political contexts of the cases are entirely different. In particular, there is one phenomenon which characterises and influences the health market at issue in the present case, but may not be found with respect to the activities of lawyers at issue in the *Klopp* case: the phenomenon of supply-induced demand. Referring to the *Liechtenstein Health Report*,[27] the Government of Liechtenstein submits that the increase in the supply on the health market, such as the increase in the number of practices, results in an increase in the demand for medical services and, ultimately, in an increase in health expenditure. This phenomenon is principally based on the incapability of the potential customers (the patients) to decide upon objective and rational considerations on their state of health and whether to avail themselves of the medical services offered or not. Therefore, establishment of further practices may have the effect of (artificially) increasing demand for medical services.

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19 Case 182/83 *Fearon* v *Irish Land Commission* [1984] ECR 3677.

20 See footnote 18.

21 See footnote 11.

22 See footnote 1.

23 See footnote 2.

24 See footnote 11.

25 See footnote 1.

26 See footnote 2.

27 Professor Friedrich Schneider, *Aktuelle Entwicklungen im Gesundheitssystem von Liechtenstein unter dem besonderen Aspekt der Single Practice Rule* (Current Developments of the Health System in Liechtenstein with a Particular View to the single practice rule), 24 October 2000 (Annex I to the written observations of the Government of Liechtenstein).

Regelung sei nicht diskriminierend und sie akzeptiert, ohne ihre Verhältnismässigkeit bezüglich der beschränkenden Wirkungen auf die Niederlassungsfreiheit zu prüfen. Die liechtensteinische Regierung verweist mit einer ähnlichen Argumentation auf das Urteil *Fearon./.Irish Land Commission*[19].

40. Die liechtensteinische Regierung trägt i.w. vor, es sei schwierig zu erklären, warum der EuGH im Urteil *Belgien./. Kommission*[20] zu einem anderen Ergebnis gelangt sei als in den Urteilen *Ordre des Avocats au Barreau de Paris./.Klopp*[21], *Kommission./.Frankreich*[22] und *Kommission./.Luxemburg*[23]. Für die liechtensteinische Regierung geben die letzteren Urteile kein vollständiges Bild der EuGH-Rechtsprechung zur Frage der Zweitniederlassung. Die unterschiedlichen Ergebnisse machten es schwierig, zu bestimmen, wann das Fehlen einer Diskriminierung aufgrund der Staatsangehörigkeit allein ausreichend anzusehen ist, um darzutun, dass die Niederlassungsfreiheit nicht beeinträchtigt ist.

41. Zusätzlich bestehen nach Auffassung der liechtensteinischen Regierung zwischen den Urteilen *Ordre des Avocats au Barreau de Paris./.Klopp*[24], *Kommission./.Frankreich*[25] und *Kommission./.Luxemburg*[26] und der Situation im vorliegenden Fall substantielle Unterschiede. Der wirtschafts- und sozialpolitische Zusammenhang der Fälle sei völlig unterschiedlich. Insbesondere gehe es im vorliegenden Fall um ein Phänomen, das den Gesundheitsmarkt prägt und beeinflusst und das in den Fällen von anwaltlicher Tätigkeit - wie im *Klopp*-Fall - nicht zur Diskussion stand: das Phänomen der angebotsinduzierten Nachfrage. Unter Bezugnahme auf den *Liechtenstein Health Report*[27] verweist die liechtensteinische Regierung darauf, dass es durch die Zunahme von Arztpraxen zu einer Erhöhung der Nachfrage nach medizinischen Leistungen und schliesslich zu einer Erhöhung der Gesundheitskosten kommt. Das Phänomen gründet sich auf die Unfähigkeit potentieller Kunden (Patienten), in objektiver und rationaler Weise über ihren Gesundheitszustand zu entscheiden und darüber zu entscheiden, ob sie medizinische Dienstleistungen in Anspruch nehmen oder nicht. Deshalb kann die Niederlassung zusätzlicher Ärzte zu einer (künstlichen) Zunahme der Nachfrage nach medizinischen Leistungen führen.

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19 EuGH 182-83 *Fearon./.Irish land Commission*, Slg. 1984, 3677.

20 Vgl. FN 18.

21 Vgl. FN 11.

22 Vgl. FN 1.

23 Vgl. FN 2.

24 Vgl. FN 11.

25 Vgl. FN 1.

26 Vgl. FN 2.

27 Professor Friedrich Schneider, Aktuelle Entwicklungen im Gesundheitssystem von Liechtenstein unter dem besonderen Aspekt der Single Practice Rule, 24. Oktober 2000 (Anhang I zur schriftlichen Stellungnahme der Regierung von Liechtenstein).

42. The Government of Liechtenstein asserts that, due to the phenomenon of supply-induced demand, the implications of the establishment of secondary practices in the present case differs substantially from the situation in the *Klopp* case. In the case of physicians, the setting-up of secondary practices induces higher demand and therefore imposes higher, and often unbearable, costs on the health system of the host State. The single practice rules in these cases protect entirely different interests and, therefore, cannot be considered from the same point of view.

43. The Government of Liechtenstein adds that, in contrast to the situations in the cases *Commission* v *France*[28] and *Commission* v *Luxembourg*,[29] the single practice rule at issue here does not, in practice, prevent access to the medical profession. Neither physicians nor patients are hindered in any way from providing/demanding cross-border medical services. Patients who avail themselves of the medical services offered by physicians in the neighbouring countries receive a complete refund by the Liechtenstein health insurances of the costs which arise. In addition, there is no other EEA State where so many representatives of the medical professions from other EEA States offer their services, invoking the freedom of establishment, as in Liechtenstein.

44. According to the Government of Liechtenstein, the single practice rule constitutes a measure aimed at regulating the increasing health expenditure and ensuring the high quality of the medical services provided, and is, therefore, part of the national legislation which regulates the health system in the country. Neither at Community level, nor in the framework of the EEA Agreement, has harmonisation of health systems taken place. Referring to *Decker* v *Caisse de Maladie des Employés Privés*,[30] the Government of Liechtenstein submits that it must be for the national legislation of each Member State to determine the conditions of the exercise of the medical profession and to regulate the way in which the health expenditures of the country are controlled. The Government of Liechtenstein asserts that there is no common definition of the exercise of the medical profession throughout the EEA. To ensure the high quality of the medical services provided in Liechtenstein, the professional rules of Liechtenstein's association of the medical professions require that a practitioner must be capable of operating a practice full-time. The Government of Liechtenstein submits that such provisions form part of the national legislation determining the ethics of the medical profession in the country. It is within the competence of the EEA States to adopt national rules aimed at ensuring the high quality of medical services in the country.

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28 See footnote 1.

29 See footnote 2.

30 Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831.

42. Die Regierung Liechtenstein's behauptet, dass sich aufgrund des Phänomens der angebotsinduzierten Nachfrage die Auswirkungen von Zweitpraxen im vorliegenden Fall wesentlich von der Situation im *Klopp*-Fall unterscheidet. Eine Zweitpraxis eines Arztes bedingt eine höhere Nachfrage und damit höhere und oft untragbare Kosten für das Gesundheitssystem des Aufnahmestaates. Eine *single practice rule* in solchen Fällen schützt andere Interessen und kann deshalb nicht vom gleichen Standpunkt aus betrachtet werden wie in anderen Fällen.

43. Im Unterschied zu den Fällen *Kommission./.Frankreich*[28] und *Kommission./.Luxemburg*[29] hindert die *single practice rule* im vorliegenden Fall - bei einer praktischen Sicht der Dinge - nicht den Zugang zum ärztlichen Beruf. Weder Ärzte noch Patienten sind daran gehindert, grenzüberschreitende ärztliche Dienstleistungen zu erbringen bzw. nachzufragen. Patienten, die sich zu einer ärztlichen Behandlung zu einem Arzt in einem Nachbarstaat begeben, erhalten in Liechtenstein vollständigen Kostenersatz durch die Krankenversicherung. Zusätzlich gibt es keinen anderen EWR-Staat, in dem so viele Ärzte aus anderen EWR-Staaten in Ausübung der Niederlassungsfreiheit ihre Dienste anbieten als in Liechtenstein.

44. Nach Auffassung der liechtensteinischen Regierung ist die *single practice rule* eine Massnahme zur Regulierung der ansteigenden Gesundheitskosten und soll gleichzeitig die hohe Qualität der ärztlichen Dienste sichern, weshalb sie Teil der nationalen Gesundheitsgesetzgebung ist. Weder auf Gemeinschaftsebene noch im Rahmen des EWR-Abkommens ist es zu einer Harmonisierung der Gesundheitssysteme gekommen. Unter Hinweis auf das Urteil *Decker./.Caisse de Maladie des Employés Privés*[30] trägt die liechtensteinische Regierung vor, es müsse Sache der nationalen Gesetzgebung jedes Mitgliedstaates sein, die Bedingungen für die Ausübung des Arztberufs und die Art der Kontrolle der Gesundheitskosten des Landes festzulegen. Die liechensteinische Regierung behauptet, dass es keine einheitliche Umschreibung der Berufsausübungsregeln für ärztliche Berufe im EWR gibt. Um die hohe Qualität der medizinischen Leistungen in Liechtenstein sicherzustellen, verlangen die Berufsausübungsvorschriften der liechtensteinischen Ärztevereinigung, dass ein Mediziner fähig sein muss, seine Praxis vollzeitlich zu führen. Die liechtensteinische Regierung trägt vor, eine solche Bestimmung sei Bestandteil der nationalen Gesetzgebung, welche die Ethik der medizischen Berufe im Land festlegt. Es liege in der Kompetenz der EWR-Staaten solche Regeln, welche die hohe Qualität der ärztlichen Leistungen sichern wollen, aufzustellen.

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28 Vgl. FN 1.

29 Vgl. FN 2.

30 EuGH C-120/95 *Decker./. Caisse de Maladie des Employés Privés,* Slg. 1998, I-1831.

The justification of the single practice rule

45. In the alternative, if the EFTA Court takes the view that the single practice rule is a restriction on the freedom of establishment within the meaning of Article 31 EEA, the Government of Liechtenstein submits that the single practice rule must be considered as justified by imperative reasons relating to the public interest.

46. The Government of Liechtenstein states that, in accordance with the case-law of the Court of Justice of the European Communities, non-discriminatory national measures liable to restrict the freedom of establishment may be justified by imperative requirements relating to general interest if they fulfil three conditions: first, they must be suitable for securing the attainment of the objective which they pursue; second, they must not go beyond what is necessary in order to attain the objective; third, the restriction of the freedom of establishment must be proportionate to the general interest of the objective pursued.

Imperative reasons relating to the general interest

47. The Government of Liechtenstein submits that the single practice rule at issue is adequately justified by imperative reasons relating to the general interest. The public interest at stake is the maintenance of the financial equilibrium of Liechtenstein's social security system in view of the significant increase in the number of practitioners which would otherwise occur, the sustainability of a health care system accessible to all, and the maintenance of the high quality of medical services provided in Liechtenstein.

48. According to the *Liechtenstein Health Report*,[31] the abolition of the single practice rule would have a serious effect on the financial equilibrium of the social security system and therefore endanger the sustainability of the current health system and the high quality of the medical services provided.

49. In relation to the abovementioned public interests, the Government of Liechtenstein refers to *Duphar and Others* v *Netherlands*,[32] from which it follows that Community law does not detract from the powers of Member States to organise their social security system. Member States may adopt provisions which not only promote financial stability but also eliminate the deficit of their health care system. Moreover, it follows from *Kohll* v *Union des Caisses de*

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31 See footnote 27.

32 Case 238/82 *Duphar BV and Others* v *Netherlands* [1984] ECR 523.

Die Rechtfertigung der single practice rule

45. Für den Fall, dass der EFTA-Gerichtshof zur Auffassung gelangen sollte, die single practice rule sei eine Beschränkung der Niederlassungsfreiheit im Sinne von Artikel 31 EWR-Abkommen, trägt die liechtensteinische Regierung vor, dass die single practice rule aus zwingenden Gründen des öffentlichen Interesses gerechtfertigt sei.

46. Die liechtensteinische Regierung bringt vor, nach der Rechtsprechung des EuGH seien nicht diskriminierende Regelungen, welche die Niederlassungsfreiheit beeinträchtigen dann aus zwingenden Gründen des öffentlichen Interesses gerechtfertigt, wenn sie drei Voraussetzungen erfüllten: (1) Sie müssen zur Erreichung des verfolgten Ziels geeignet sein; (2) sie dürfen nicht über das hinausgehen, was zur Erreichung des Ziels erforderlich ist; (3) die Beschränkung der Niederlassungsfreiheit muss verhältnismässig zum öffentlichen Interesse am angestrebten Ziel sein.

Zwingende Gründe des öffentlichen Interesses

47. Die liechtensteinische Regierung ist der Auffassung, die *single practice rule* sei im vorliegenden Fall hinreichend durch zwingende Gründe des allgemeinen Interesses gerechtfertigt. Das öffentliche Interesse in diesem Fall bezieht sich auf die Erhaltung des finanziellen Gleichgewichts des liechtensteinischen Systems der Sozialen Sicherheit im Blick auf die deutliche Zunahme der Zahl der Ärzte, die ohne diese Regelung entstehen würde. Ausserdem geht es um die Nachhaltigkeit eines allen Menschen zugänglichen Gesundheitssystems und um die Aufrechterhaltung der hohen Qualität der in Liechtenstein angebotenen medizinischen Leistungen.

48. Nach dem *Liechtenstein Health Rep*ort[31] würde die Abschaffung der single practice rule ernste Auswirkungen auf das finanzielle Gleichgewicht des Systems der Sozialen Sicherheit haben und deshalb die Nachhaltigkeit und die Qualität der medizinischen Leistungen gefährden.

49. Zum erwähnten öffentlichen Interesse verweist die liechtensteinische Regierung auf das Urteil *Duphar u.a./.Niederlande*[32]. Aus diesem Urteil folge, dass die Gemeinschaft den Mitgliedstaaten die Kompetenz zur Regelung ihrer Systeme der Sozialen Sicherheit nicht entzogen hat. Die Mitgliedstaaten sind frei, nicht nur Bestimmungen zu erlassen, welche die finanzielle Stabilität fördern, sondern auch das Defizit des Gesundheitssystems eliminieren. Darüber hinaus folge aus dem Urteil *Kohll./.Union des Caisses de Maladie*[33], dass Massnahmen

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31 Vgl. FN 27.

32 EuGH 238/82 *Duphar BV u.a./.Niederlande*, Slg. 1984, 523.

33 EuGH C-158/96 *Kohll./.Union des Caisses de Maladie, Slg. 1998, I-1931.*

Maladie[33] that measures connected with the control of health expenditures may be justified.

The specific nature of the health market

50. The Government of Liechtenstein asserts that the specific nature of the health system and the health market justifies the way in which the health system is funded and can remain beneficial and efficient. The Government of Liechtenstein finds support for this view in *Webb*.[34]

51. The Government of Liechtenstein submits that the health market and the health service in Liechtenstein are of an extraordinarily high standard and quality.

52. The Government of Liechtenstein furthermore submits that the Liechtenstein health market is distinguished by being extremely liberal. Neither physicians nor patients are limited with regard to supply or demand of cross-border medical services. Physicians practising in Liechtenstein obtain a complete refund of the services covered by the health insurance. Patients enjoy a high degree of freedom in the choice of providers of medical services. They may consult physicians in other EEA States and receive a complete refund of their costs from the health insurance system.

53. In addition, the Government of Liechtenstein points out that, due to the small size of the country, there exists a strong interdependence between the health market in Liechtenstein and the development of the respective health regimes in Liechtenstein's neighbouring countries.

54. Referring to the *Liechtenstein Health Report*,[35] the Government of Liechtenstein also submits that the financial stability of the health system in Liechtenstein is exposed to growing pressure, due to increasing demand and continually rising health costs. Health insurers and insured patients have suffered from major increases in expenditure and premiums. One of the most important reasons for the cost increases in the health service is the rapid increase in the number of established physicians.

55. Based on collected statistical material,[36] the Government of Liechtenstein contends that the number of practitioners offering medical services in

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33 Case C-158/96 *Kohll* v *Union des Caisses de Maladie* [1998] ECR I-1931.

34 Case 279/80 *Webb* [1981] ECR 3305.

35 See footnote 27.

36 Statistics on the number of physicians per inhabitants in Austria and Liechtenstein based on data provided by the Ärztekammer Wien and the Government of Liechtenstein, Department of Public Health and Social Affairs, October 2000 (Annex II to the written observations of the Government of Liechtenstein).

in Verbindung mit der Kontrolle der Gesundheitskosten gerechtfertigt sein können.

Die besondere Natur des Gesundheitsmarktes

50. Die Regierung Liechtenstein's bringt vor, die besondere Natur des Gesundheitssystems und des Gesundheitsmarktes rechtfertige die Art, wie das Gesundheitssystem finanziert wird und damit nützlich und effizient bleiben kann. Diese Auffassung werde durch das Urteil *Webb*[34] unterstützt.

51. Die liechtensteinische Regierung macht geltend, der Gesundheitsmarkt und das Gesundheitssystem in Liechtenstein wiesen einen ausserordentlich hohen Standard und eine ausserordentlich hohe Qualität auf.

52. Die liechtensteinische Regierung weist ausserdem darauf hin, dass sich der liechtensteinische Gesundheitsmarkt insbesondere durch seine extreme Liberalität auszeichnet. Weder Ärzte noch Patienten sind im Blick auf das Angebot von oder die Nachfrage nach grenzüberschreitenden medizinischen Leistungen eingeschränkt. In Liechtenstein praktizierende Ärzte erhalten von der Krankenversicherung einen vollständigen Kostenersatz für ihre Leistungen. Die Patienten verfügen über einen grossen Freiraum bei der Arztwahl. Sie können Ärzte in anderen EWR-Staaten aufsuchen und erhalten einen vollständigen Ersatz ihrer Kosten von der Krankenversicherung.

53. Zusätzlich hebt die liechtensteinische Regierung hervor, aufgrund der geographischen Grösse des Landes bestehe ein enger Zusammenhang zwischen dem liechtensteinischen Gesundheitsmarkt und der Entwicklung der Gesundheitssysteme in den Nachbarstaaten.

54. Unter Hinweis auf den *Liechtenstein Health Report*[35] macht die Regierung auch geltend, das finanzielle Gleichgewicht des Gesundheitssystems sei wegen der steigenden Nachfrage und den ständig steigenden Gesundheitskosten erheblichem Druck ausgesetzt. Versicherer und versicherte Patienten hätten unter erheblichen Prämienerhöhungen bzw. steigenden Gesundheitskosten zu leiden. Einer der wichtigsten Gründe für die Kostenerhöhung im Gesundheitswesen sei die stark steigende Anzahl von niedergelassenen Ärzten.

55. Gestützt auf statistisches Material[36] hebt die Regierung hervor, dass die Anzahl der Ärzte verglichen mit den Nachbarländern in Liechtenstein höher ist. Die finanzielle Stabilität des Gesundheitssystems in Liechtenstein sei erhöhtem

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34 EuGH 279/80 *Webb*, Slg. 1981, 3305.

35 Vgl. FN 27.

36 Statistik über die Anzahl der Ärzte pro Einwohner in Österreich und in Liechtenstein. Die Daten stützen sich auf Angaben der Ärztekammer Wien und der Regierung von Liechtenstein (Abteilung für öffentliche Gesundheit und soziale Angelegenheiten, Oktober 2000). Annex II der schriftlichen Stellungnahme der liechtensteinischen Regierung.

Liechtenstein is proportionally higher than in neighbouring countries. The financial stability of the health system in Liechtenstein is exposed to growing pressure due to an increasing demand and continually increasing health costs. Referring to the *Liechtenstein Health Report*,[37] the Government of Liechtenstein submits that the health expenditure *per capita* in Liechtenstein is already higher than in countries that traditionally have been assumed to spend most on their health service, such as Switzerland.

56. Referring to the *Liechtenstein Health Report*[38] and the Commission's *Report on Social Protection in Europe 1999*,[39] the Government of Liechtenstein points out that there is a strong correlation between the supply of medical services and the expenditure on the health system, namely, the phenomenon of supply-induced demand. Supply-induced demand is, in particular, made possible in health systems with a high level of insurance coverage for treatment costs. On this basis, the Government of Liechtenstein states that the total health expenditure in Liechtenstein can be expected to rise significantly if the number of physicians offering medical services in Liechtenstein becomes even higher.

57. The Government of Liechtenstein observes that, since the health market in Liechtenstein was made accessible to physicians from other EEA States in 1997, there has been a sharp increase in the number of physicians operating in Liechtenstein. Based on the *Liechtenstein Health Report*,[40] the Government of Liechtenstein points out that the rise in medical expenses in Liechtenstein during the same period gives cause for concern.

58. The Government of Liechtenstein states that Liechtenstein needs to find ways to monitor its escalating health expenditure. One way consists of preventing an uncontrollable increase in the number of practising physicians, as implemented through the single practice rule.

The suitability of the single practice rule

59. The Government of Liechtenstein contends that the necessity of the single practice rule and its suitability for the maintenance of the financial stability and high quality of the Liechtenstein health system must be considered with reference to the specific nature of Liechtenstein's health market. The single practice rule must also be seen in conjunction with certain other measures which have been introduced during the health reform in Liechtenstein, in particular the

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37 See footnote 27.

38 Ibid.

39 Commission of the European Communities: *Report on Social Protection in Europe 1999*, COM/2000/0163 final.

40 See footnote 27.

Druck ausgesetzt, der sich aus der steigenden Nachfrage und den kontinuierlich steigenden Gesundheitskosten ergebe. Unter Hinweis auf den *Liechtenstein Health Report*[37] bringt die liechtensteinische Regierung vor, die Gesundheitsausgaben per capita seien in Liechtenstein bereits höher als in Ländern , die traditionell hohe Ausgaben im Gesundheitswesen tätigen, wie z.B. der Schweiz..

56. Unter Hinweis auf den *Liechtenstein Health Report*[38] und den *Report on Social Protection in Europe 1999* der Kommission[39] hebt die liechtensteinische Regierung hervor, dass zwischen dem Angebot von medizinischen Leistungen und den Gesundheitsausgaben ein enger Zusammenhang besteht. Dabei handelt es sich um das Phänomen der angebotsinduzierten Nachfrage. Diese tritt insbesondere in Gesundheitssystemen mit einem hohen Niveau an Versicherungsschutz für Behandlungskosten auf. Gestützt darauf muss die liechtensteinische Regierung davon ausgehen, dass die Gesundheitskosten in erheblichem Umfang steigen werden, wenn sich die Anzahl der niedergelassenen Ärzte weiter erhöht.

57. Die liechtensteinische Regierung hat eine starke Zunahme der Anzahl der in Liechtenstein tätigen Ärzte festgestellt, seit der Gesundheitsmarkt im Jahr 1997 für Ärzte aus anderen EWR-Staaten geöffnet wurde. Der *Liechtenstein Health Report*[40] gibt der liechtensteinische Regierung Anlass zur Sorge, weil die Gesundheitskosten in Liechtenstein während dieses Zeitraums erheblich angestiegen sind.

58. Für Liechtenstein besteht nach Auffassung der Regierung die Notwendigkeit, Mittel und Wege zu finden, um die steigenden Gesundheitskosten in den Griff zu bekommen. Ein Mittel dazu ist die *single practice rule*, mit der eine unkontrollierte Zunahme der Arztdichte verhindert wird.

Eignung der single practice rule

59. Die Eignung und Notwendigkeit der *single practice rule* zur Beibehaltung des finanziellen Gleichgewichts und der Qualität des liechtensteinischen Gesundheitssystems muss nach Meinung der liechtensteinischen Regierung vor dem Hintergrund der besonderen Gegebenheiten des liechtensteinischen Gesundheitsmarkts gesehen werden. Die single practice rule muss auch in Zusammenhang mit anderen Massnahmen gesehen werden, die durch die

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37 Vgl. FN 27.

38 Vgl. FN 27.

39 Kommission der Europäischen Gemeinschaften: Bericht über den sozialen Schutz in Europa 1999, COM/2000/0163final.

40 Vgl. FN 27.

Hausarztsystem (Family Doctor System), as described in the *Liechtenstein Health Report*.[41]

60. The single practice rule has for years been applied consistently in order to prevent further, unaffordable increases in the number of physicians and the ensuing rise in health costs, without at the same time preventing the establishment of practitioners from other EEA States.

61. It was in the light of these considerations that, during the reform of the health system in Liechtenstein, the Government of Liechtenstein opted for the maintenance of the single practice rule, rather than introducing a system requiring a licence from the national health insurance agencies, and allowing only a certain number of practitioners to provide services covered by health insurance in Liechtenstein.

62. The attractive economic conditions for operating a practice in Liechtenstein, the virtually complete refund of all medical expenses for services provided in the country, and the strong temptation for physicians to create supply-induced demand, all bring about a strong incentive for physicians to operate a practice, and particularly a second practice, in Liechtenstein. Moreover, health insurers in Liechtenstein pay considerably more for medical services than a physician would receive for the same services in another EEA State.

63. Referring to the *Liechtenstein Health Report*,[42] the Government of Liechtenstein contends that, if the single practice rule is abolished, health expenditure in Liechtenstein is likely to rise by between 26% and 34.8%, based on hypothetical calculations.

64. The Government of Liechtenstein points out that it is primarily Austrian physicians who are keen to establish secondary practices in Liechtenstein. Due to the adjacency of the two countries, those physicians can reap the benefits of having two practices close together.

65. The Government of Liechtenstein contends that nationals of EEA States who have not yet established a practice enjoy an advantage under the system of the single practice rule. They will generally be authorised to operate a practice in Liechtenstein. The single practice rule is only applicable to those who already operate a practice. It prevents exploitation by physicians of the economic advantages offered by Liechtenstein and its liberal health system through the establishment of secondary practices.

66. The Government of Liechtenstein contends that, under the influence of supply-induced demand, the rules of the market economy do not apply. The

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41 Ibid.

42 Ibid.

Gesundheitsreform eingeführt wurden. Dazu zählt v.a. das Hausarztsystem, das im *Liechtenstein Health Report*[41] beschrieben ist.

60. Die *single practice rule* wird seit Jahren konsistent angewendet, um einen weiteren, unbezahlbaren Anstieg der Anzahl von Ärzten und den damit verbundenen Anstieg der Kosten zu vermeiden, ohne dabei die Niederlassung von Ärzten aus anderen EWR-Staaten zu verhindern.

61. Im Lichte dieser Überlegungen hat sich die liechtensteinische Regierung bei der Reform des Gesundheitssystems für die Beibehaltung der *single practice rule* entschieden und auf die Einführung eines Kassenarztsystems, in dem die Ärzte eine Zulassung durch die nationalen Krankenversicherer benötigen, verzichtet. In einem Kassenarztsystem kann nur eine bestimmte Anzahl von Ärzten ihre Leistungen mit Versicherungsdeckung anbieten.

62. Die attraktiven wirtschaftlichen Bedingungen zum Führen einer Praxis, der vollständige Kostenersatz für alle medizinischen Leistungen und der Hang von Ärzten, eine angebotsinduzierte Nachfrage zu erzeugen, sind starke Anreize, in Liechtenstein eine Arztpraxis - insbesondere eine Zweitpraxis - zu unterhalten. Darüber hinaus ist der Kostenersatz der Versicherer an die Ärzte bedeutend höher als in anderen EWR-Staaten.

63. Unter Hinweis auf den *Liechtenstein Health Report*[42] nimmt die liechtensteinische Regierung an, dass für den Fall, dass die single practice rule abgeschafft wird, die Gesundheitskosten vermutlich um 26 bis 34,8% steigen werden.

64. Die liechtensteinische Regierung weist darauf hin, dass es insbesondere österreichische Ärzte sind, die eine Zweitpraxis in Liechtenstein eröffnen wollen. Aufgrund der geographischen Nähe zwischen den beiden Ländern können diese Ärzte die Vorteile nützen, welche sich aus dem Betrieb zweier nah beieinanderliegender Arztpraxen ergeben.

65. Die liechtensteinische Regierung sieht sogar einen Vorteil der single practice rule für Ärzte, die in anderen EWR-Staaten noch keine Praxis eröffnet haben. Solche Ärzte werden im allgemeinen eine Genehmigung in Liechtenstein erhalten. Die *single practice rule* gilt nur für Ärzte, die bereits eine andere Praxis unterhalten. Dadurch wird verhindert, dass Ärzte durch die Eröffnung einer Zweitpraxis die wirtschaftlichen Vorteile des liberalen liechtensteinischen Gesundheitssystems ausnützen.

66. Nach Auffassung der liechtensteinischen Regierung können die Regeln der Marktwirtschaft unter dem Einfluss der angebotsinduzierten Nachfrage keine Anwendung finden. Die *single practice rule* reduziert die Möglichkeit, dass eine

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41 Vgl. FN 27.

42 Vgl. FN 27.

single practice rule reduces the possibility of creating artificial demand and increasing health expenditure. This ultimately benefits the consumers, as their contributions would otherwise be raised either by an increase in health insurance premiums or by an increase in costs.

67. The aim of the adopted Hausarztsystem is to intensify the relationship between patients and their physician in order to prevent supply-induced demand and thereby reduce costs. The Government of Liechtenstein submits that physicians who establish a second practice would not be able to provide the necessary continuous and permanent medical care for their patients as physicians who exclusively operate one practice in a country.

68. The Government of Liechtenstein submits, therefore, that the single practice rule is a suitable measure to secure the financial stability of the social security system, the sustainability of its health system, and the high quality of medical services provided in the country.

The necessity of the single practice rule

69. The Government of Liechtenstein argues that the single practice rule does not go beyond what is necessary in order to maintain the objectives pursued. During the preparation of the health reform in Liechtenstein, other systems were considered in order to assess whether they constituted a less restrictive way to prevent excessive cost increases. The Government of Liechtenstein asserts that the single practice rule constitutes the least restrictive means of attaining the abovementioned objectives.

70. An increase in the number of physicians on a national health market results at the same time in an increase of the total health expenditure in that country. Several other EEA States have experienced this. Some of these EEA States, for example, Austria and Germany, have reacted to the increasing costs by introducing a licence system limiting the number of practitioners under the health insurance system. According to the Government of Liechtenstein, the Commission of the European Communities has deemed such a system of limiting the number of practitioners to be compatible with Community law, as long as practitioners from all Member States are guaranteed equal access to obtain a licence, under the same conditions, and in the same manner as nationals from the host Member State.

71. The Government of Liechtenstein contends that such systems may also employ conditions for admission under the health insurance scheme which might result in a considerably stronger restriction on the freedom of establishment. Liechtenstein operates a system with comparably limited restrictions and prerequisites.

künstliche Nachfrage geschaffen wird und Kostensteigerungen entstehen. Das kommt letztlich den Konsumenten zugute, die ansonsten mit höheren Prämien oder Kosten rechnen müssten.

67. Der Zweck des Hausarztsystems ist es, das Verhältnis zwischen Arzt und Patient zu vertiefen, um eine angebotsinduzierte Nachfrage zu vermeiden und dadurch die Kosten zu reduzieren. Die liechtensteinische Regierung geht davon aus, dass es einem Arzt mit einer Zweitniederlassung im Gegensatz zu einem Arzt mit nur einer Praxis nicht möglich wäre, die notwendige kontinuierliche und permanente medizinische Betreuung seiner Patienten sicherzustellen.

68. Aus diesen Gründen betrachtet die liechtensteinische Regierung die *single practice rule* als geeignete Massnahme zur Sicherstellung der finanziellen Stabilität des Systems der Sozialen Sicherheit, der Nachhaltigkeit des Gesundheitssystems und der hohen Qualität der medizinischen Dienste, die im Land erbracht werden.

Notwendigkeit der single practice rule

69. Die liechtensteinische Regierung ist der Auffassung, die *single practice rule* gehe nicht über das hinaus, was zur Erreichung des beabsichtigten Ziels notwendig ist. Im Zuge der Vorbereitung der Gesundheitsreform wurden auch andere Möglichkeiten geprüft, um festzustellen, ob mit weniger einschneidenden Mitteln Kostensteigerungen verhindert werden können. Die liechtensteinische Regierung ist überzeugt, dass die *single practice rule* die am wenigsten einschneidende Massnahme ist, um die angegebenen Ziele zu erreichen.

70. Eine Zunahme der Anzahl der Ärzte in einem nationalen Gesundheitsmarkt führt zu einer Erhöhung der totalen Gesundheitskosten in diesem Land. Zahlreiche andere EWR-Staaten haben diese Erfahrung gemacht. Einige dieser Staaten, z.B. Österreich und Deutschland, haben auf den Kostenanstieg mit einem Konzessionssystem, das die Anzahl der Kassenärzte limitiert, reagiert. Die Kommission erachtet ein solches System als gemeinschaftskonform, solange Ärzten aus allen Mitgliedstaaten der gleiche Zugang zur Konzession offensteht wie Ärzten aus dem Aufnahmestaat.

71. Nach Auffassung der liechtensteinischen Regierung kann ein solches System auch Bedingungen für die Zulassung zur Krankenversicherung enthalten, die zu einer bedeutend stärkeren Einschränkung der Niederlassungsfreiheit führen. Demgegenüber kommt Liechtenstein mit vergleichbar geringfügigen Einschränkungen und Anforderungen aus.

72. Other public health regimes apply systems which limit the admission of practitioners as soon as there is a disproportionate number of practitioners in a certain area. However, such a reaction to an excessive number of physicians in the country may, in fact, result in a complete restriction of admissions for a certain period of time. Liechtenstein has chosen an approach which, in its result, is less restrictive, as it constantly allows practitioners of the EEA States to establish themselves in Liechtenstein. This approach was kept even though the representation of physicians in Liechtenstein (one for every 642 inhabitants in 2000) is generally higher than in other countries and the increase in the density of physicians in Liechtenstein gives cause for concern.

73. The Government of Liechtenstein claims that it must be the effect of a provision, and not merely the wording of a provision, which determines its compatibility or incompatibility with the EEA Agreement. The proportion in Liechtenstein of medical specialists from other EEA States (20% in 1999) is higher than in many other EEA States.

74. The Government of Liechtenstein emphasises that the role of the single practice rule is to reduce the attractiveness for all those who intend to exploit the economically advantageous conditions of a secondary practice in Liechtenstein. The measure simply prevents an increase in the number of suppliers and, therefore, an increase in health expenditure which does not at the same time contribute to the quality of the health system for the benefit of the patients.

75. According to the Government of Liechtenstein, it must be concluded that none of the systems which has been considered as an alternative to the single practice rule and the related Hausarztsystem offers a less restrictive means for the attainment of the financial equilibrium of the social security system. On the contrary, the single practice rule constitutes an extremely moderate restriction on access to the profession as a practitioner in Liechtenstein and achieves freedom of establishment in Liechtenstein to the greatest possible extent.

The proportionality of the single practice rule

76. The Government of Liechtenstein submits that the single practice rule is proportionate to the general interest of the objectives pursued.

77. The Government of Liechtenstein finds support for this submission in *Ramrath* v *Ministre de la Justice*.[43] In that case, the Court of Justice of the European Communities held that, in view of the special nature of certain professional activities, the imposition of specific requirements pursuant to the rules governing such activities cannot be considered incompatible with the EC Treaty. The aims pursued in that case are, to a certain extent, comparable to the objectives pursued by the Liechtenstein rule in the present case, namely, to

[43] Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351.

72. Andere öffentliche Gesundheitssysteme wenden Mittel an, die den Zugang von Ärzten begrenzen, sobald eine unverhältnismässig hohe Zahl in einem bestimmten Gebiet praktiziert. Eine solche Reaktion auf eine übermässige Zunahme der Arztdichte in einem Land kann tatsächlich zu einer totalen Zugangsbeschränkung für einen bestimmten Zeitraum führen. Liechtenstein hat sich demgegenüber für einen weniger einschränkenden Ansatz entschieden. Ärzte können sich ständig in Liechtenstein niederlassen. Diesem Ansatz ist man treu geblieben, obwohl die Anzahl der Ärzte in Liechtenstein generell höher ist als in anderen Staaten und der Anstieg der Arztdichte Anlass zur Sorge gibt (ein Arzt pro 624 Einwohner im Jahr 2000).

73. Für die liechtensteinische Regierung kommt es bei der Frage, ob eine Regelung mit dem EWR-Abkommen vereinbar ist oder nicht, auf die Auswirkung und nicht auf den Wortlaut an. Der Anteil ausländischer Fachärzte aus anderen EWR-Staaten ist in Liechtenstein höher als in vielen anderen EWR-Ländern (20% im Jahr 1999).

74. Die liechtensteinische Regierung betont, Aufgabe der *single practice rule* sei es, die Attraktivität für all die, welche von den wirtschaftlich vorteilhaften Bedingungen einer Zweitpraxis in Liechtenstein profitieren wollen, zu reduzieren. Die Massnahme verhindere einen Anstieg der Anbieter und damit einen Anstieg der Gesundheitskosten. Ein solcher trage nicht zur Qualität des Gesundheitssystems bei und liege auch nicht im Interesse der Patienten.

75. Nach der liechtensteinischen Regierung muss man zum Ergebnis kommen, dass keines der Systeme, die als Alternative zur single practice rule und zum Hausarztsystem in Erwägung gezogen wurden, weniger einschneidende Massnahmen zur Sicherung des finanziellen Gleichgewichts des Systems der Sozialen Sicherheit mit sich bringt. Die *single practice rule* sei im Gegenteil eine äusserst moderate Einschränkung des Zugangs zur Arzttätigkeit in Liechtenstein und verwirkliche die Niederlassungsfreiheit in Liechtenstein im grösstmöglichen Umfang.

Verhältnismässigkeit der single practice rule

76. Die liechtensteinische Regierung trägt vor, die *single practice rule* sei im Hinblick auf das öffentliche Interesse an den verfolgten Zielen auch verhältnismässig.

77. Die Regierung macht geltend, diese Auffassung finde Rückhalt im Urteil *Ramrath./.Ministre de la Justice*[43]. In diesem Fall habe der EuGH vor dem Hintergrund der besonderen Natur bestimmter beruflicher Tätigkeiten geurteilt, dass die Einführung spezieller Voraussetzungen, die diese Tätigkeiten betreffen, mit dem Gemeinschaftsrecht vereinbar sind. Der in diesem Fall zu erreichende

[43] EuGH C-106/91 *Ramrath* v *Ministre de la Justice*, Slg. 1992 I-3351.

ensure the medical availability and continuity of presence of the physician. Yet, the objectives pursued by the Liechtenstein rule in the present case go further, since it also concerns the financial stability of the health care system and the high quality of medical services rendered in the country.

78. The Government of Liechtenstein submits that the judgments in *Kohll* v *Union des Caisses de Maladie*[44] and *Decker* v *Caisse de Maladie des Employés Privés*[45] are also of importance in this connection, since, in those cases, the Court of Justice of the European Communities explicitly acknowledged that national measures may be justified if they attempt to protect the financial balance of the social security system. The two cases show the Court's awareness of the tremendous importance of the affordability and sustainability of the health systems of the Member States.

79. The Government of Liechtenstein states that, in the light of the considerable public interest element at stake, the single practice rule constitutes a tolerable restriction on the freedom of establishment.

80. Many other countries in Europe are challenged with comparable difficulties in securing the financial balance of their social security systems and the maintenance of affordable health regimes. However, it must be considered that, in the special case of Liechtenstein, due to the limited size of the country and its strong inter-dependence with the neighbouring countries, the public interest at stake takes on an even stronger significance.

81. The Government of Liechtenstein observes that, if it were to adopt a licence system regulating the admission of practitioners in the country, the number of practitioners from other EEA States would be considerably lower than it is under the current regime.

82. The Government of Liechtenstein concludes that the single practice rule is justified by imperative reasons relating to the general interest. It constitutes a non-discriminatory and suitable measure which is necessary to attain the intended objective and is proportionate to the general interest of the objective pursued.

Justification for the single practice rule under Article 33 EEA

83. If the EFTA Court were to conclude that the contested single practice rule constitutes a discriminatory measure, the Government of Liechtenstein submits

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44 See footnote 33.

45 See footnote 30.

Zweck sei mit dem Ziel im vorliegenden Fall, die Verfügbarkeit medizinischer Leistungen und die ständige Anwesenheit des Arztes sicherzustellen, vergleichbar. Indes gingen die Ziele, die durch die liechtensteinische Regelung angestrebt werden, weiter. Sie umfassten auch die finanzielle Stabilität des Gesundheitssystems und die Sicherung der Qualität der im Land erbrachten medizinischen Leistungen.

78. Die liechtensteinische Regierung trägt vor, dass den Urteilen *Kohll./.Union des Caisses de Maladie*[44] und *Decker./.Caisse de Maladie des Employés Privés*[45] in diesem Zusammenhang ebenfalls Bedeutung zukommt, weil der EuGH in diesen Fällen ausdrücklich anerkannt habe, dass nationale Massnahmen gerechfertigt sein können, wenn sie das finanzielle Gleichgewicht der Systeme der Sozialen Sicherheit schützen wollen. Die beiden Urteile zeigten, dass sich der EuGH der überragenden Bedeutung der Nachhaltigkeit und der Bezahlbarkeit der Gesundheitssysteme in den Mitgliedstaaten bewusst ist.

79. Die liechtensteinische Regierung stellt fest, im Lichte des bedeutenden öffentlichen Interesses, um das es in diesem Fall geht, sei die *single practice rule* eine hinzunehmende Beschränkung der Niederlassungsfreiheit.

80. Viele andere Staaten in Europa stehen bei ihren Bemühungen, das finanzielle Gleichgewicht der Systeme der Sozialen Sicherheit zu sichern und bezahlbare Gesundheitssysteme aufrechtzuerhalten, vor vergleichbaren Schwierigkeiten. Indes wiegt das in Frage stehende öffentliche Interesse für Liechtenstein aufgrund der geographischen Kleinheit des Landes und der starken Interdependenz mit den Nachbarstaaten noch schwerer.

81. Im Fall der Einführung eines Konzessionssystems, das die Zulassung von Ärzten regelt, wäre der Anteil von Ärzten aus anderen EWR-Staaten nach der Auffassung der Regierung erheblich geringer.

82. Die liechtensteinische Regierung erachtet die single practice rule als aus zwingenden Gründen des öffentlichen Interesses gerechtfertigt. Es handelt sich um eine nicht diskriminierende und geeignete Massnahme, die notwendig ist, um das angestrebte Ziel zu erreichen. Überdies ist die Massnahme auch verhältnismässig in Beziehung zum öffentlichen Interesse an den verfolgten Zielen.

Rechtfertigung der single practice rule nach Artikel 33 EWR

83. Sollte der EFTA-Gerichtshof zum Ergebnis gelangen, dass die streitige *single practice rule* eine diskriminierende Massnahme darstellt, so erachtet die

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44 Vgl. FN 33.

45 Vgl. FN 30.

that the rule may also be justified on grounds of public health under Article 33 EEA.

84. The Government of Liechtenstein states that the single practice rule prevents an increase in the number of suppliers who operate a practice in Liechtenstein merely as a sideline and thereby diminish the quality of the health system. The Government of Liechtenstein, while acknowledging the reasoning in *Commission* v *France*[46] and *Commission* v *Luxembourg*,[47] submits that, under the particular health system of Liechtenstein, the availability of the practitioner is indispensable to ensure the protection of the patients' health. Under the established Hausarztsystem, the general practitioner is the key person in the treatment of patients and the referral of patients to specialists and hospitals, and the presence of the practitioner is required to a much higher degree than in other health systems.

85. Moreover, the aforementioned arguments concerning the significance of the single practice rule in order to ensure a balanced medical service accessible to all, the financing of the social security system, the sustainability of the health system, and the high quality of the medical services provided, will also be valid in the assessment under Article 33 EEA.

86. Based on the arguments set out above, the Government of Liechtenstein proposes the following answer to the question:

> *"Article 31 of the Agreement on the European Economic Area (EEA Agreement) of 2 May 1992 does not preclude a Member State from providing that a doctor may not operate more than one practice whether as a sole practitioner or jointly with others throughout the territory of the European Economic Area."*

The Government of Iceland

87. The Government of Iceland begins by stating that, as regards Article 31 EEA, the contested single practice rule is incompatible with the principle of freedom of establishment laid down in that provision.

88. The Government of Iceland does not dispute that the national provision at issue in the main proceedings applies equally to Liechtenstein nationals and nationals of other EEA States. However, the Government of Iceland asserts that a national provision of that kind can lead to indirect discrimination. The Government of Iceland contends, in essence, that the single practice rule will, by its very nature, be more onerous for physicians of other EEA States than for

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46 See footnote 1.

47 See footnote 2.

liechtensteinische Regierung die Regelung als aus den Gründen des öffentlichen Gesundheitsschutzes nach Artikel 33 EWR-Abkommen gerechtfertigt.

84. Die liechtensteinische Regierung trägt vor, die *single practice rule* verhindere eine Zunahme der Zahl von Anbietern, die nur nebenbei in Liechtenstein tätig werden wollen und damit der Qualität des Gesundheitssystems schaden. Die Regierung anerkennt die Begründung in den Urteilen *Kommission./.Frankreich*[46] und *Kommission./.Luxemburg*[47]. Allerdings sei im besonderen liechtensteinischen Gesundheitssystem die Erreichbarkeit des Arztes für den Schutz der Gesundheit des Patienten unverzichtbar. Im bestehenden Hausarztsystem sei der praktische Arzt die Schlüsselperson bei der Behandlung des Patienten und bei der Überweisung an Fachärzte bzw. bei der Einweisung in Spitäler. Die Anwesenheit des Arztes sei deshalb in sehr viel höherem Masse erforderlich als in anderen Gesundheitssystemen.

85. Darüber hinaus sind die bereits vorgetragenen Argumente betreffend die Bedeutung der single practice rule bei der Beurteilung einer Rechtfertigung nach Artikel 33 EWR-Abkommen von Bedeutung. Dabei geht es um die Sicherstellung einer ausgewogenen medizinischen Versorgung, die für alle zugänglich ist, die Finanzierung des Systems der Sozialen Sicherheit, die Nachhaltigkeit des Gesundheitssystems und die hohe Qualität der erbrachten medizinischen Leistungen.

86. Gestützt auf diese Argumente schlägt die Regierung von Liechtenstein dem EFTA-Gerichtshof vor, die Fragen wie folgt zu beantworten:

> *„Artikel 31 des EWR-Abkommens vom 2. Mai 1992 verbietet es einem Abkommensstaat nicht, eine Regelung vorzusehen, nach der ein Arzt nicht mehr als eine Praxis als Einzelpraxis oder als Gemeinschaftspraxis mit anderen im Gebiet des EWR unterhalten darf.“*

Die Regierung von Island

87. Die isländische Regierung führt aus, die streitige *single practice rule* sei eine Verletzung der Niederlassungsfreiheit und deshalb mit Artikel 31 EWR unvereinbar.

88. Die isländische Regierung bestreitet nicht, dass die nationale Regelung im Anlassfall für Liechtensteiner und EWR-Ausländer gleichermassen gilt. Allerdings könne eine solche Bestimmung zu einer indirekten Diskriminierung führen. Die Massnahme sei von ihrer Natur her geeignet, sich nachteiliger auf Ärzte aus anderen EWR-Staaten als auf liechtensteinische Ärzte auszuwirken,

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46 Vgl. FN 1.

47 Vgl. FN 2.

physicians of Liechtenstein, since the former have to give up their practice in that other EEA State in order to establish a practice in Liechtenstein.

89. The Government of Iceland argues that it is settled case-law of the Court of Justice of the European Communities, *inter alia, Ordre des Avocats au Barreau de Paris* v *Klopp*,[48] and *Gullung* v *Conseils de l'ordre des avocats du barreau de Colmar et de Saverne*,[49] that, even if national provisions apply equally to all parties, irrespective of their nationality, they may still be contrary to Article 31 EEA.

90. The Government of Iceland adds that it is also contrary to the EEA Agreement for an EEA State to impose a single practice rule on its own nationals when they seek to establish themselves in another EEA State and thereby restrict their possibilities to pursue their profession in that other EEA State.

91. Referring to the judgment in *Commission* v *France*,[50] the Government of Iceland contends that a single practice rule in general is unnecessarily restrictive and that it, as such, is too far-reaching.

92. In the opinion of the Government of Iceland, the case-law[51] of the Court of Justice of the European Communities supports the view that it is contrary to the fundamental principles of Articles 31 and 34 EEA for an EEA State to require members of a profession who seek to establish themselves in that EEA State to give up their practice in another EEA State.

93. The Government of Iceland does not agree with the Government of Liechtenstein that the reasoning in *Commission* v *France*[52] is not applicable in the present case, since, in that case, the French physicians were allowed to open a second practice whereas that possibility was not available to practitioners from other Member States. According to the Government of Iceland, this fact was not decisive for the ruling, as the Court also found the rule to be unduly restrictive on its own, irrespective of any discriminatory effect.

94. As regards possible grounds of justification for the single practice rule at issue, the Government of Iceland states that the relevant legal basis to be considered is Article 33 EEA and the public health derogation set out in that

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48 See footnote 11.

49 Case 292/86 *Gullung* v *Conseils de l'ordre des avocats du barreau de Colmar et de Saverne* [1988] ECR 111.

50 See footnote 1.

51 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971; Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877; Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897; Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351; Case 96/85 *Commission* v *France* [1986] ECR 1475.

52 See footnote 1.

weil die ersteren ihre Praxis im Heimatstaat aufgeben müssten, um eine Praxis in Liechtenstein einrichten zu können.

89. Die isländische Regierung bringt vor, nach der gesicherten Rechtsprechung des EuGH u.a in den Fällen *Ordre des Advocats au Barreau de Paris./.Klopp*[48] und *Gullung./.Conseils de l'ordre des avocats du barreau de Colmar et de Saverne*[49] sei klar, dass auch unterschiedslos, d.h. unabhängig von der Staatsangehörigkeit anwendbare, nationale Bestimmungen Artikel 31 EWR verletzen können.

90. Für die isländische Regierung verstösst es auch gegen das EWR-Abkommen, wenn ein EWR-Staat seinen eigenen Staatsangehörigen eine *single practice rule* auferlegt, wenn sich diese in einem anderen EWR-Staat niederlassen wollen. Damit beschränkt der Staat die Möglichkeiten der Berufsausübung in diesem anderen EWR-Staat.

91. Unter Hinweis auf das Urteil *Kommission./Frankreich*[50] bringt die isländische Regierung vor, eine *single practice rule* sei im allgemeinen eine unnötige Beschränkung, die als solche zu weit gehe.

92. Nach Auffassung der isländischen Regierung unterstützt die Rechtsprechung des EuGH[51] die Annahme, dass es gegen die fundamentalen Grundsätze von Artikel 31 und 34 EWR-Abkommen verstösst, wenn ein EWR-Staat Mitglieder einer Berufsgruppe, die sich in diesem EWR-Staat niederlassen wollen, dazu zwingt, ihre Praxis in einem anderen EWR-Staat aufzugeben.

93. Die isländische Regierung widerspricht der Auffassung der liechtensteinischen Regierung, nach der die Begründung des Urteils *Kommission./.Frankreich*[52] im vorliegenden Fall nicht anwendbar sei, weil es französischen Ärzten in diesem Fall erlaubt war, eine Zweitpraxis zu unterhalten, nicht aber Ärzten aus anderen Mitgliedstaaten. Für die isländische Regierung war dieses Kriterium nicht entscheidend für das Urteil, weil der Gerichtshof die Regelung an sich - unabhängig von einem diskriminierenden Effekt - als unzulässige Beschränkung angesehen hat.

94. Im Blick auf mögliche Rechtfertigungen für die in Frage stehende single practice rule ist für die isländische Regierung der Gesundheitsschutz in Artikel

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48 Vgl. FN 11.

49 EuGH C-292/86 *Gullung./. Conseils de l'ordre des avocats du barreau de Colmar et de Saverne*, Slg. 1988, 111.

50 Vgl. FN 1.

51 EuGH C-107/83 *Ordre des Avocats au Barreau de Paris./.Klopp*, Slg. 1984, 2971; C-143/87 *Stanton ./. Inasti*, Slg. 1988, 3877; verbundene Rechtssachen EuGH C-154/87 und 155/87 *RSVZ./.Wolf u.a*, Slg. 1988, 3897; EuGH C-106/91 *Ramrath./.Ministre de la Justice*, Slg. 1992, I-3351; EuGH C 96/85 *Kommission./.Frankreich*, Slg. 1986, 1475.

52 Vgl. FN 1.

provision. The Government of Iceland observes that it is settled case-law of the Court of Justice of the European Communities that this provision is to be interpreted narrowly.

95. The Government of Iceland refers to the judgment in *Commission* v *France*,[53] in which the Court of Justice of the European Communities held a similar single practice rule to be too far-reaching to be justified on grounds of public health.

96. The Government of Iceland argues that the Government of Liechtenstein has not shown that the single practice rule is necessary to maintain the financial equilibrium of the social security system and that the objective cannot be reached through less restrictive means.

97. The Government of Iceland states that an EEA State may, without infringing Article 31 EEA, adopt and apply national rules aimed at guaranteeing a certain level and quality of service to patients. It furthermore states that it is for the EEA State concerned to regulate its social security system. This discretion of the Member States is confirmed by the case-law[54] of the Court of Justice of the European Communities. However, such a power has to be practised in accordance with the fundamental principles of the EEA Agreement.

98. The Government of Iceland proposes the following answer to the question:

> *"The Single practice rule applying without exception to all doctors under Liechtenstein national law, and in particular Article 9(1) of the Regulation of 8 November on the medical professions, is incompatible with the EEA Agreement."*

The Government of Norway

99. The Government of Norway states that the wording of Article 31 EEA suggests that what is required is the equal treatment of nationals and non-nationals, including a prohibition against direct discrimination. The Government of Norway observes, however, that the scope of the right of establishment has been given a wider interpretation in recent case-law from the Court of Justice of the European Communities and the EFTA Court. Referring to *Clean Car Autoservice* v *Landeshauptmann von Wien*,[55] *Merino García* v *Bundesanstalt für*

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53 Ibid.

54 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971; Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351; Case 96/85 *Commission* v *France* [1986] ECR 1475; Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831.

55 Case C-350/96 *Clean Car Autoservice* v *Landeshauptmann von Wien* [1998] ECR I-2521.

33 EWR-Abkommen die einschlägige Bestimmung. Nach ständiger Rechtsprechung des EuGH sei diese Bestimmung aber eng auszulegen.

95. Die isländische Regierung verweist auf das Urteil *Kommission./.Frankreich*[53]. In diesem Urteil hatte der EuGH eine ähnliche single practice rule als zu weitreichend angesehen, als dass sie aus Gründen des öffentlichen Gesundheitsschutzes zu rechtfertigen gewesen wäre.

96. Die isländische Regierung bringt vor, die liechtensteinische Regierung habe nicht nachgewiesen, dass diese Regelung notwendig sei, um das finanzielle Gleichgewicht des Systems der Sozialen Sicherheit aufrechtzuerhalten und dass dieses Ziel nicht auch mit weniger einschneidenden Mitteln erreicht werden könnte.

97. Um ein bestimmtes Niveau und eine bestimmte Qualität der Dienstleistungen für die Patienten aufrechtzuerhalten, kann ein EWR-Staat nach der Auffassung der isländischen Regierung Regelungen erlassen und anwenden, die helfen, dieses Ziel zu erreichen, ohne dabei gegen Artikel 31 EWR-Abkommen zu verstossen. Ausserdem obliegt die Regelung der Sozialversicherungssysteme den Mitgliedstaaten. Dieser Handlungsspielraum wurde vom EuGH bestätigt[54]. Von dieser Möglichkeit darf aber nur in Übereinstimmung mit den fundamentalen Grundsätzen des EWR-Abkommens Gebrauch gemacht werden.

98. Die Regierung von Island schlägt die folgenden Antworten auf die Fragen vor:

> *„Die ausnahmslos auf alle Ärzte anwendbare single practice rule des liechtensteinischen Rechts, und insbesondere Artikel 9 Abs. 1 der Verordnung vom 8. November über medizinische Berufe, ist mit dem EWR-Abkommen unvereinbar.“*

Die Regierung von Norwegen

99. Die norwegische Regierung führt aus, der Wortlaut von Artikel 31 EWR-Abkommen lege nahe, dass die Vorschrift die Inländergleichbehandlung einschliesslich des Verbots der indirekten Diskriminierung sicherstellen wolle. Allerdings sei der Anwendungsbereich der Niederlassungsfreiheit in der jüngeren Rechtsprechung des EuGH und des EFTA-Gerichtshofs weit interpretiert worden. Unter Hinweis auf die Urteile *Clean Car*

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53 Vgl. FN 1.

54 EuGH C-107/83 *Ordre des Avocats au Barreau de Paris./.Klopp*, Slg. 1984, 2971; EuGH C-106/91 *Ramrath./.Ministre de la Justice*, Slg. 1992, I-3351; EuGH C-96/85 *Kommission./.Frankreich*, Slg. 1986, 1475 ; EuGH C-120/95 *Decker./. Caisse de Maladie des Employés Privés,* Slg. 1998, I-1831.

Arbeit[56] and *Rainford-Towning*,[57] the Government of Norway contends 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, lead to the same result in practice.

100. The Government of Norway submits, furthermore, that it is settled case-law[58] of the Court of Justice of the European Communities that a person may be established in more than one Member State, in particular through the setting-up of agencies, branches or subsidiaries, or by establishing a second professional base.

101. The Government of Norway states that it follows from the case-law[59] of the Court of Justice of the European Communities that any restriction on the freedom to set up a secondary establishment by requiring that a person give up his establishment elsewhere before he can establish himself in the host country needs justification. Such restrictions are considered to be national measures that are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement. Article 31(1) EEA would be deprived of its meaning if it did not include the right to maintain the business in the EEA State of origin.

102. The Government of Norway asserts that, if national rules of an EEA State have the effect of placing nationals of other EEA States in a less favourable position than their own nationals, and thus are liable to hinder or make less attractive the exercise of the right of establishment, such rules must, according to *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*,[60] fulfil four conditions: first, they must be applied in a non-discriminatory manner; second, they must be justified by imperative requirements in the general interest; third, they must be suitable for securing the attainment of the objective which they pursue; fourth, they must not go beyond what is necessary in order to attain it.

103. The Government of Norway submits that the contested single practice rule is a restriction within the meaning of Article 31 EEA, one which requires

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56 Case C-266/95 *Merino García* v *Bundesanstalt für Arbeit* [1997] ECR I-3279.

57 See footnote 8.

58 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971; Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351.

59 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971; Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; Case 96/85 *Commission* v *France* [1986] ECR 1475; Case C-351/90 *Commission* v *Luxembourg* [1992] ECR I-3945.

60 Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

Autoservice./.Landeshauptmann von Wien[55], *Merino García./.Bundesanstalt für Arbeit*[56] *und Rainford-Towning*[57] macht die norwegische Regierung geltend, dass das Gleichbehandlungsgebot nicht nur die offene Diskriminierung verbietet, sondern auch alle Formen der versteckten Diskriminierung, die durch die Anwendung anderer Kriterien zum gleichen Ergebnis führen.

100. Aus der ständigen Rechtsprechung des EuGH[58] folgt für die norwegische Regierung, dass es einer Person erlaubt sein muss, sich in mehr als einem Mitgliedstaat durch die Gründung von Agenturen, Zweigniederlassungen oder Tochtergesellschaften oder durch die Einrichtung einer zweiten beruflichen Basis niederzulassen.

101. Aus der Rechtsprechung des EuGH[59] folgt, dass jede Beschränkung des Rechts auf eine Zweitniederlassung, die eine solche von der Aufgabe einer anderen Praxis abhängig macht, gerechtfertigt werden muss. Solche Einschränkungen werden als staatliche Massnnahmen angesehen, welche die durch den EWR-Vertrag eingeräumten Grundfreiheiten behindern oder weniger attraktiv machen. Artikel 31 Absatz 1 EWR-Abkommen wäre seines Sinns entleert, wenn er das Recht, die Geschäftstätigkeit im Herkunftstaat aufrechtzuerhalten, nicht einschlösse.

102. Gemäss dem Urteil *Gebhard ./.Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[60] müssen - nach Auffassung der norwegischen Regierung - nationale Regelungen, die im Ergebnis Staatsangehörige aus anderen EWR-Staaten gegenüber den eigenen Staatsangehörigen benachteiligen, indem sie die Ausübung der Niederlassungsfreiheit behindern oder weniger attraktiv machen, vier Bedingungen erfüllen, um gerechtfertigt zu sein: (1) sie müssen in einer nicht diskriminierenden Art und Weise angewendet werden; (2) sie müssen aus zwingenden Gründen des Allgemeininteresses gerechtfertigt sein; (3) sie müssen zur Erreichung des beabsichtigten Ziels geeignet sein; (4) sie dürfen nicht über das hinausgehen, was notwenig ist, um dieses Ziel zu erreichen.

103. Für die norwegische Regierung ist die streitige *single practice rule* eine Einschränkung i.S.v. Artikel 31 EWR-Abkommen, die gerechtfertigt werden

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55 EuGH C-350/96 *Clean Car Autoservice./.Landeshauptmann von Wien, Slg. 1998,I-2521.*

56 EuGH C-266/95 *Merino García./.Bundesanstalt für Arbeit,* Slg. 1997, I-3279.

57 Vgl. FN 8.

58 EuGH C-107/83 *Ordre des Avocats au Barreau de Paris./.Klopp*, Slg. 1984, 2971; EuGH C-55/94 *Gebhard ./.Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Slg. 1995, I-4165; EuGH C-106/91 *Ramrath./.Ministre de la Justice*, Slg. 1992, I-3351.

59 EuGH C-107/83 *Ordre des Avocats au Barreau de Paris./.Klopp*, Slg. 1984, 2971; EuGH C-55/94 *Gebhard ./.Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Slg. 1995, I-4165; EuGH C 96/85 *Kommission./.Frankreich*, Slg. 1986, 1475; EuGH C-351/90 *Kommission./.Luxemburg*, Slg. 1992, I-3945.

60 EuGH C-55/94 *Gebhard./.Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Slg. 1995, I-4165.

justification. The Government of Norway finds support for this view in *Commission* v *Luxembourg*.[61]

104. The Government of Norway acknowledges that the single practice rule at issue in the main proceedings applies equally to Liechtenstein nationals and to nationals of other EEA States. There are no specific rules that apply only to non-nationals, as was the case in *Commission* v *France*,[62] nor are there exceptions that only apply to nationals, as was the case in *Commission* v *Luxembourg*.[63] However, it can be inferred that the purpose of the single practice rule is to discriminate against professionals from other EEA States.

105. In response to the Government of Liechtenstein's submissions on justification, as set out in the Request for an Advisory Opinion, the Government of Norway submits that restricting the growth in the number of physicians from other EEA States is not *per se* an "imperative requirement in the general interest".

106. The Government of Norway agrees that keeping health costs under control, maintaining the financial equilibrium of the social security system and maintenance of a medical and hospital security system are purposes that may constitute "imperative requirements in the general interest". The Government of Norway questions, however, whether the single practice rule is suitable for securing the attainment of such objectives, and argues that it goes beyond what is necessary in order to attain such objectives. More physicians would normally lead to lower costs per consultation, due to more competition. Cost control could be achieved by other means. The performance of medical services should also normally improve when there are more physicians, not the contrary. With modern transport and communication, there is no need to require physicians to work in one place only. Furthermore, the Government of Norway notes that it does not seem to be a requirement that physicians live in Liechtenstein to ensure that they are available locally 24 hours a day, but only that they have their sole place of work there.

107. The Government of Norway points out that arguments relating to keeping health costs under control, maintaining the financial equilibrium of the social security system and maintaining a sufficient supply of medical services were advanced by France and Luxembourg in *Commission* v *France*[64] and *Commission* v *Luxembourg*,[65] respectively, but the Court of Justice of the European Communities held in those cases that a single practice rule was "unduly restrictive".

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61 See footnote 2.

62 See footnote 1.

63 See footnote 2.

64 See footnote 1.

65 See footnote 2.

muss. Diese Rechtsansicht werde durch das Urteil Kommission./.Luxemburg[61] bestätigt.

104. Die norwegische Regierung anerkennt, dass die single practice rule unabhängig von der Staatsangehörigkeit angewendet wird. Es gibt auch keine speziellen Regelungen, die nur für fremde Staatsangehörige gelten, wie im Fall *Kommission ./.Frankreich*[62] noch gibt es Ausnahmen, die nur für eigene Staatsangehörige gelten, wie im Fall *Kommission./.Luxemburg*[63.] Indes ist anzunehmen, dass die single practice rule die Diskriminierung von Berufsangehörigen aus anderen EWR-Staaten bezweckt.

105. Im Blick auf die von der liechtensteinischen Regierung vorgetragenen Rechtfertigungsgründe, wie sie im Vorlageersuchen enthalten sind, trägt die norwegische Regierung vor, dass die Beschränkung der Zunahme der Anzahl von Ärzten aus anderen EWR-Staaten nicht per se ein zwingender, im Allgemeininteresse gelegener, Grund ist.

106. Für die norwegische Regierung sind die Kontrolle der Gesundheitskosten, die Erhaltung des finanziellen Gleichgewichts der Systeme der Sozialen Sicherheit und die Aufrechterhaltung eines Systems der Sicherheit bezüglich medizinischer und spitalmässiger Versorgung durchaus Ziele, die zwingende im Allgemeininteresse gelegene Gründe darstellen können. Fraglich sei aber, ob die *single practice rule* geeignet ist, diese Ziele zu erreichen. Die Regel gehe über das hinaus, was notwendig ist, um die Ziele zu erreichen. Eine grössere Anzahl von Ärzten führe aufgrund des grösseren Wettbewerbs zu niedrigeren Kosten pro Behandlung. Eine Kostenkontrolle könne auch mit anderen Mitteln erreicht werden. Normalerweise sollten mehr Ärzte auch helfen, die medizinischen Dienstleistungen zu verbessern und nicht umgekehrt. Aufgrund der modernen Transport- und Kommunikationsmöglichkeiten ergibt sich auch kein Bedarf, den Ärzten vorzuschreiben, nur an einem Ort zu arbeiten. Überdies sei offenbar der 24-Stunden-Dienst für Ärzte nicht vorgeschrieben. Es bestehe nur der Zwang für die Ärzte, ihren einzigen Arbeitsplatz in Liechtenstein zu unterhalten.

107. Die norwegische Regierung weist darauf hin, dass die Argumente betreffend Kontrolle der Gesundheitskosten, Aufrechterhaltung des finanziellen Gleichgewichts des Systems der Sozialen Sicherheit und Aufrechterhaltung einer ausreichenden medizinischen Versorgung in den Fällen *Kommission./.Frankreich*[64] und *Kommission./.Luxemburg*[65] von Frankreich und Luxemburg geltend gemacht wurden. Der EuGH habe die *single practice rule* aber trotzdem als unzulässige Beschränkung beurteilt.

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61 Vgl. FN 2.

62 Vgl. FN 1.

63 Vgl. FN 2.

64 Vgl. FN 1.

65 Vgl. FN 2.

108. The Government of Norway adds that the grounds of justification can be considered to be within the concept of "public health" as set out in Article 33 EEA, but, having concluded that the single practice rule is unduly restrictive, it is clear that it cannot be justified under Article 33 EEA.

109. The Government of Norway proposes the following answer to the question:

> *"National legislation applying a single practice rule without exception to all doctors and dentists is in breach of Article 31 of the Agreement on the European Economic Area."*

The EFTA Surveillance Authority

110. The EFTA Surveillance Authority begins by observing that the single practice rules were the object of the rulings of the Court of Justice of the European Communities in *Ordre des Avocats au Barreau de Paris* v *Klopp*,[66] *Commission* v *France*[67] and *Commission* v *Luxembourg*.[68]

111. The EFTA Surveillance Authority states that, for the professions in question, the single practice rule dilutes the right of establishment enshrined in Article 31 EEA. Being a restriction of this fundamental freedom, the rule may only be compatible with the EEA Agreement if it can be justified by imperative requirements.

112. As regards possible grounds for justification of the single practice rule, the EFTA Surveillance Authority states that the main reason for the contested single practice rule appears to be that, in the absence of such a rule, the financial balance of the Liechtenstein social security system would be destroyed. In considering whether this can serve as a justification for the single practice rule, the EFTA Surveillance Authority refers to *Kohll* v *Union des Caisses de Maladie*[69] and *Decker* v *Caisse de Maladie des Employés Privés*,[70] in which the Court of Justice of the European Communities held that the risk of seriously undermining the financial balance of a social security system may constitute an overriding reason in the general interest capable of justifying a barrier to one of the fundamental freedoms.

113. The EFTA Surveillance Authority states that it has no knowledge of any convincing proof to the effect that the financial balance of the Liechtenstein

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66 See footnote 11.

67 See footnote 1.

68 See footnote 2.

69 See footnote 33.

70 See footnote 30.

108. Die angeführten Rechtfertigungsgründe liegen zwar im Schutzbereich des öffentlichen Gesundheitsschutzes, wie er in Artikel 33 EWR-Abkommen festgelegt ist. Weil die *single practice rule* aber eine unzulässige Beschränkung darstellt, kann sie nicht nach Artike 33 EWR-Abkommen gerechtfertigt werden.

109. Die norwegische Regierung schlägt die folgende Antwort auf die Fragen vor:

> *„Nationales Recht, das ausnahmslos für alle Ärzte und Zahnärzte eine single practice rule statuiert, verstösst gegen Artikel 31 des EWR-Abkommens“.*

Die EFTA-Überwachungsbehörde

110. Die EFTA-Überwachungsbehörde beginnt ihre Ausführungen mit einem Hinweis darauf, dass es in den Urteilen des EuGH in den Fällen *Ordre des Avocats au Barreau de Paris./.Klopp*[66], *Kommission./.Frankreich*[67] und *Kommission./.Luxemburg*[68] um eine *single practice rule* gegangen ist.

111. Für die betroffene Berufsgruppe führt die single practice rule zu einer Verwässerung der in Artikel 31 EWR-Abkommen verbrieften Niederlassungsfreiheit. Als Beschränkung dieser Grundfreiheit ist eine solche Regelung nur dann EWR-konform, wenn sie aus zwingenden Gründen gerechtfertigt werden kann.

112. Im Blick auf mögliche Rechtfertigungsgründe führt die EFTA-Überwachungsbehörde aus, der Hauptgrund für die single practice rule sei die Sorge, das finanzielle Gleichgewicht des Systems der Sozialen Sicherheit würde ohne eine solche Regelung zusammenbrechen. Zur Beurteilung dieses Rechtfertigungsgrundes verweist die EFTA-Überwachungsbehörde auf die Fälle Kohll./.Union des Caisses de Maladie[69] und *Decker./. Caisse de Maladie des Employés Privés*[70]. In diesen Urteilen hat der EuGH geurteilt, dass die Gefahr der schwerwiegenden Störung des finanziellen Gleichgewichts der Systeme der Sozialen Sicherheit einen überwiegenden Grund des öffentlichen Interesses darstellen und somit eine Einschränkung der Grundfreiheiten rechtfertigen kann.

113. Die EFTA-Überwachungsbehörde stellt fest, ihr seien keine überzeugenden Beweise dafür bekannt, dass das liechtensteinische Gesundheitssystem ohne die *single practice rule* ernsthaft gefährdet würde.

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66 Vgl. FN 11.

67 Vgl. FN 1.

68 Vgl. FN 2.

69 Vgl. FN 33.

70 Vgl. FN 30.

health insurance system would be seriously undermined by the absence of the single practice rule.

114. The EFTA Surveillance Authority adds that, even if sufficient proof had been provided, it would still have to be established that more suitable and less restrictive means could not be applied in order to achieve the same aim. It doubts whether that would be possible. In the view of the EFTA Surveillance Authority, it is not clear why one cannot apply cost reduction measures that do not restrict the fundamental freedoms. Furthermore, it is not clear how requiring physicians to give up their practice in other EEA States would preserve the financial balance of the social security system.

115. The EFTA Surveillance Authority notes that there are not, at present, any rulings by the Court of Justice of the European Communities in which an absolute and general restriction to the freedom of establishment has been justified by the need to preserve the financial balance of a social security system.

116. The EFTA Surveillance Authority proposes the following answer to the question:

> *"Article 31 of the EEA Agreement must be interpreted as precluding Liechtenstein from maintaining a provision of national law according to which doctors are required to give up any other establishment simultaneously held in other Member States in order to operate a practice in Liechtenstein."*

The Commission of the European Communities

117. The Commission of the European Communities refers to the arguments put forward in its written observations in Case E-6/00 *Dr Jürgen Tschannett*. In that case, the Commission begins by referring to the judgment of the EFTA Court in *State Dept Management Agency* v *Íslandsbanki-FBA hf*,[71] and observes that, since the principle of non-discrimination has been given effect in the field of the right of establishment by Article 31 EEA, Article 4 EEA does not require further consideration.

118. Referring to the very broad understanding of the concept of establishment adopted by the Court of Justice of the European Communities in its judgments in *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[72] and *Reyners* v *Belgium*,[73] the Commission does not object to the single practice rule at issue in this case being assessed in the context of Article 31 EEA.

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71 Case E-1/00 *State Debt Management Agency* v *Íslandsbanki-FBA hf*, judgment of 14 July 2000 (not yet reported).

72 See footnote 60.

73 Case 2/74 *Reyners* v *Belgium* [1974] ECR 631.

114. Selbst wenn es ausreichende Beweise dafür gäbe, müsste immer noch nachgewiesen werden, dass besser geeignete und weniger einschneidende Mittel nicht zum gleichen Ergebnis führen könnten. Die EFTA-Überwachungsbehörde zweifelt daran, dass das möglich ist. Es sei unklar, warum man keine Kostenreduzierungsmassnahmen ergreifen kann, ohne die Grundfreiheiten zu verletzen. Ausserdem sei unklar, warum das Erfordernis, dass Ärzte ihre Praxis im Heimatstaat aufzugeben haben, das finanzielle Gleichgewicht des Sozialsystems stützen sollte.

115. Die EFTA-Überwachungsbehörde stellt fest, dass der EuGH bislang in keinem einzigen Fall eine absolute und generelle Einschränkung der Niederlassungsfreiheit mit der Notwendigkeit, das finanzielle Gleichgewicht eines Systems der Sozialen Sicherheit aufrechtzuerhalten, gerechtfertigt hat.

116. Die EFTA-Überwachungsbehörde schlägt vor, die Fragen wie folgt zu beantworten:

> *„Artikel 31 des EWR-Abkommens muss dahingehend ausgelegt werden, dass die Bestimmung es Liechtenstein verbietet, eine Regelung im nationalen Recht beizubehalten, nach der ein Arzt jede andere Praxis, die er in einem anderen Mitgliedstaat gleichzeitig unterhält, aufgeben muss, wenn er in Liechtenstein eine Praxis betreiben will“.*

Die Kommission der Europäischen Gemeinschaften

117. Die Kommission der Europäischen Gemeinschaften bezieht sich auf die Argumente. die sie in ihrer schriftlichen Stellungnahme in der Rechtssache E-6/00 *Dr. Jürgen Tschanett* vorgetragen hat. In diesem Fall beginnt die Kommission ihre Ausführungen mit einem Hinweis auf das Urteil des EFTA-Gerichtshofs im Fall *State Dept Management Agency./.ÍslandsbankiFBA hf*[71] und stellt fest, dass Artikel 4 des EWR-Abkommens nicht einschlägig sei, weil der Grundsatz der Nichtdiskriminierung seinen besonderen Ausdruck in Artikel 31 EWR-Abkommen gefunden habe.

118. Unter Hinweis auf die weite Auslegung des Begriffs der Niederlassung durch den EuGH in den Rechtssachen *Gebhard ./.Consiglio dell`Ordine degli Avvocati e Procuratori di Milano*[72] und *Reyners./.Belgien*[73] widerspricht die Kommission einer Beurteilung der *single practice* im Kontext des Artikels 31 EWR-Abkommen nicht.

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71 EFTA-Gerichtshof E-1/00 *State Dept Management Agency./.ÍslandsbankiFBA hf* , Urteil vom 14. Juli 2000 (noch nicht veröffentlicht)

72 Vgl. FN 60.

73 EuGH 2/74 *Reyners./.Belgien*, Slg. 1974, 631.

119. The Commission of the European Communities contends that Article 33 EEA is not applicable in this case, since the contested national provision constitutes a non-discriminatory measure which is applied without distinction.

120. As regards Article 31 EEA, the Commission of the European Communities contends that the single practice rule in question restricts the right of establishment. The Court of Justice of the European Communities held in *Ordre des Avocats au Barreau de Paris* v *Klopp*,[74] *Stanton* v *Inasti*,[75] and *Inasti* v *Kemmler*[76] that the right of establishment includes the freedom to set up and maintain more than one place of work in the Community. The single practice rule runs counter to this, by preventing physicians of other EEA States from taking up and pursuing their activities in Liechtenstein, if they want to carry on working in their home State.

121. In support of the view that the single practice rule constitutes a restriction on the freedom of establishment, the Commission of the European Communities relies on *Commission* v *France*,[77] in which the Court of Justice of the European Communities held *inter alia* that requiring physicians established in another Member State to cancel their enrolment or registration in that other Member State in order to be able to practise their profession in the State in question, as a principal in a practice, was against the EC Treaty. The basis of the reasoning in that case was that the discrimination against practitioners established in other Member States, who were excluded from opening a further practice in the State in question, represented a restriction not similarly applicable to nationals of that State. In addition, the Court considered that such a general rule was unduly restrictive.

122. As regards possible justification for the single practice rule, the Commission of the European Communities begins by referring to *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*.[78] According to that ruling, national measures liable to hinder or make less attractive the exercise of fundamental freedoms must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.

123. The Commission of the European Communities does not agree with the Government of Liechtenstein that the single practice rule can be justified on the grounds that it constitutes a means of keeping health costs under control and of

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74 See footnote 11.

75 Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877.

76 Case C-53/95 *Inasti* v *Kemmler* [1996] ECR I-703.

77 See footnote 1.

78 See footnote 60.

119. Die Kommission ist der Auffassung, Artikel 33 EWR-Abkommen sei im vorliegenden Fall nicht anwendbar, weil es sich bei der streitigen nationalen Vorschrift um eine nichtdiskriminierende Massnahme handele, die unterschiedslos angewendet werde.

120. Was Artikel 31 EWR-Abkommen anlangt, so macht die Kommission eine Beschränkung der Niederlassungsfreiheit durch die *single practice rule* geltend. In den Urteilen *Ordre des Avocats au Barreau de Paris./.Klopp*[74], *Stanton./.Inasti*[75] und *Inast./.Kemmler*[76] habe der EuGH festgestellt, dass die Niederlassungsfreiheit das Recht umfasst, mehr als einen Tätigkeitsort in der Gemeinschaft zu eröffnen und zu unterhalten. Die *single practice rule* laufe dem zuwider, indem sie Ärzten aus anderen Mitgliedstaaten verbietet, eine Praxis in Liechtenstein zu eröffnen und zu unterhalten, wenn sie ihre Tätigkeit auch im Heimatstaat weiter ausüben wollen.

121. Um darzutun, dass eine single practice rule eine Beschränkung der Niederlassungsfreiheit darstellt, beruft sich die Kommission auf das Urteil *Kommission./.Frankreich*[77]. In diesem Fall habe der EuGH u.a. entschieden, dass es dem EG-Vertrag widerspricht, wenn Ärzten aus anderen Mitgliedstaaten vorgeschrieben wird, ihre Eintragung in diesem Staat löschen zu lassen, damit sie im fraglichen Staat als Chef in einer Praxis tätig werden dürfen. Die Basis für die Begründung in diesem Fall war, dass die Ungleichbehandlung von Ärzten aus anderen Mitgliedstaaten, die daran gehindert waren, eine Zweitpraxis zu eröffnen, als Beschränkung angesehen wurde, die auf eigene Staatsangehörige nicht in vergleichbarer Weise angewendet wurde. Zusätzlich hielt der EuGH eine so allgemeine Regelung für übermässig beschränkend.

122. Im Blick auf eine mögliche Rechtfertigung der *single practice rule* beginnt die Kommission ihre Ausführungen mit einem Hinweis auf das Urteil *Gebhard ./.Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[78]. Nach diesem Urteil müssen nationale Regelungen, die geeignet sind, die Ausübung der Grundfreiheiten zu behindern oder weniger attraktiv zu machen, vier Bedingungen erfüllen: (1) Sie müssen in einer nicht diskriminierenden Art und Weise angewendet werden; (2) sie müssen aus zwingenden Gründen des Allgemeininteresses gerechtfertigt sein; (3) sie müssen zur Erreichung des beabsichtigten Ziels geeignet sein; (4) sie dürfen nicht über das hinausgehen, was notwenig ist, um dieses Ziel zu erreichen.

123. Die Kommission stimmt nicht mit der Auffassung der liechtensteinischen Regierung überein, die *single practice rule* könne damit gerechtfertigt werden,

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74 Vgl. FN 11.

75 EuGH C-143/87 *Stanton ./. Inasti*, Slg. 1988, 3877.

76 EuGH C-53/95 *Inasti ./. Kemmler*, Slg. 1996, I-703.

77 Vgl. FN 1.

78 Vgl. FN 60.

maintaining the financial equilibrium of the social security system. In setting out its view, the Commission refers to *Kohll* v *Union des Caisses de Maladie*,[79] in which the Court of Justice of the European Communities held that it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute a ground of justification. However, the Commission of the European Communities contends that, in the absence of any further evidence, the situation in Liechtenstein does not fall within the parameters set out in that judgment. The Commission's reasoning for that is threefold: first, cross-border provision of services by physicians operating a practice outside Liechtenstein is not covered by the national provision at issue, even though this could also have an effect on the social security system; second, the contested national provision would not necessarily lead to a quantitative limitation of physicians which might have an impact on the health budget, since physicians may set up a practice in Liechtenstein if they give up their practice in their country of origin; third, the national provision at hand could apply without there necessarily being any link between the physician in question and the social security system.

124. The Commission of the European Communities adds that, in its view, national provisions may not determine to what extent physicians are obliged to be present in their respective practices, save as in exceptional circumstances. To insist that physicians should work exclusively in one practice would have entirely the same result as the single practice rule. The Commission refers to *Commission* v *Luxembourg*.[80]

125. The Commission of the European Communities proposes the following answer to the question:

> *"Article 31 of the EEA Agreement on the right of establishment precludes a national law which provides that doctors may only operate in a single practice. Such a measure is justifiable neither as a means of keeping health costs under control nor of maintaining the financial equilibrium of the social security system of an EFTA State except where it could be demonstrated that this was required by overriding reasons in the general interest. Nor is a national law compatible with Article 31 EEA to the extent that it obliges a doctor to have a certain presence in a particular practice except where it could be shown that this was required – and then only to the extent necessary – to ensure the well-being of patients. The legitimacy, or otherwise, of any such exceptional provision would be for the national courts to determine."*

Per Tresselt
Judge-Rapporteur

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79 See footnote 33.

80 See footnote 2.

dass sie ein Mittel zur Kontrolle der Gesundheitskosten und zur Aufrechterhaltung des finanziellen Gleichgewichts des Systems der Sozialen Sicherheit darstellt. Sie verweist auf das Urteil des EuGH in der Rechtssache *Kohll./.Union des Caisses de Maladie*[79]. In diesem Urteil habe der EuGH festgestellt, es könne nicht ausgeschlossen werden, dass die Gefahr der schwerwiegenden Störung des finanziellen Gleichgewichts der Systeme der Sozialen Sicherheit eine Einschränkung der Grundfreiheiten rechtfertigen kann. Wenn es keine weiteren Beweise gibt, so falle die Situation in Liechtenstein aber nicht unter die in diesem Urteil genannten Parameter. Die Kommission geht dabei von dreierlei Überlegungen aus: (1) Die nationale Regelung erfasst die Dienstleistungserbringung von Ärzten aus anderen Mitgliedstaaten nicht, obwohl diese ebenfalls Auswirkungen auf das nationale System der Sozialen Sicherheit haben könnten. (2) Die streitige nationale Bestimmung führt nicht notwendigerweise zu einer zahlenmässigen Begrenzung der Ärzte, was Auswirkungen auf das Gesundheitsbudget hätte, weil Ärzte ja eine Praxis in Liechtenstein eröffnen können, wenn sie ihre Praxis im Herkunftsstaat aufgeben. (3) Die in Rede stehende nationale Bestimmung ist auch in Fällen anwendbar, in denen kein Zusammenhang zwischen dem Arzt und dem Sozialversicherungssystem besteht.

124. Ausser unter ganz besonderen Umständen dürfen nationale Bestimmungen nicht festlegen, in welchem Umfang Ärzte in ihrer jeweiligen Praxis tätig sind. Vorzuschreiben, dass Ärzte ausschliesslich in einer Praxis arbeiten dürfen, würde zum gleichen Ergebnis führen wie eine single practice rule. Die Kommission verweist dazu auf das Urteil *Kommission./.Luxemburg*[80].

125. Die Kommission der Europäischen Gemeinschaften schlägt folgende Antwort auf die Fragen vor:

> *„Artikel 31 des EWR-Abkommens über das Niederlassungsrecht steht einer nationalen Vorschrift, die Ärzten das Führen nur einer Praxis erlaubt, entgegen. Eine solche Massnahme kann weder als Massnahme zur Kontrolle der Gesundheitskosten, noch zur Aufrechterhaltung des finanziellen Gleichgewichts des Systems der Sozialen Sicherheit eines EFTA-Staates gerechtfertigt werden, es sei denn, dass allgemeine Gründe des öffentlichen Interesses nachgewiesen werden. Auch das Erfordernis, den Ärzten eine bestimmte Anwesenheitsdauer in einer bestimmten Praxis vorzuschreiben, widerspricht Artikel 31 EWR-Abkommen. Ein solches Erfordernis ist nur zulässig, wenn nachgewiesen werden kann, dass es notwendig ist, um das Wohlergehen der Patienten sicherzustellen. Die Rechtmässigkeit jeder dieser Ausnahmebestimmungen müsste das nationale Gericht beurteilen.“*

Per Tresselt
Berichterstatter

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79 Vgl. FN 33.

80 Vgl. FN 5.

Case E-5/00

Dr Josef Mangold

(Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein))

(Right of establishment – Single practice rule – Justification by overriding reasons of general interest)

Summary of the Judgment

When one is interpreting the EEA Agreement, it is necessary always to take into account that the objective of the Contracting Parties was to create a dynamic and homogeneous European Economic Area. This point of departure has particular weight with regard to fundamental principles, such as the freedom of establishment set out in Article 31 EEA. The Court has, at the same time, recognised that there are differences in the scope and purpose of the EEA Agreement as compared to the EC Treaty, and has stated that these differences might, under specific circumstances, lead to differences in interpretation. In the present case, the Court has not been presented with any specific circumstance which would compel it to disregard the caselaw of the Court of Justice of the European Communities in respect of Article 43 EC.

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, or through the exercise of administrative discretion with regard to exceptions and dispensations, would in practice lead to the same result.

Rechtssache E-5/00

Dr Josef Mangold

(Antrag der Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein auf Erlass einer Vorlageentscheidung)

(Niederlassungsfreiheit – "Single practice rule" – Rechtfertigung aus zwingenden Gründen des Allgemeinwohls)

Zusammenfassung des Urteils

Bei der Auslegung des EWR-Abkommens ist stets zu beachten, dass die Zielsetzung der Vertragsparteien darin bestand, einen dynamischen und homogenen Europäischen Wirtschaftsraum zu schaffen. Dieser Ausgangspunkt ist von besonderer Bedeutung im Hinblick auf elementare Grundsätze wie die in Artikel 31 EWRA normierte Niederlassungsfreiheit. Zugleich hat der Gerichtshof anerkannt, dass es zwischen dem EWR-Abkommen und dem EG-Vertrag Unterschiede hinsichtlich des Anwendungsbereichs und der Ziele gibt, und hat entschieden, dass diese Unterschiede unter spezifischen Umständen zu Unterschieden in der Auslegung führen können. Im vorliegenden Fall sind dem Gerichtshof keine spezifischen Umstände vorgetragen worden, die ihn zwingen würden, die Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften zu Artikel 43 EGV unberücksichtigt zu lassen.

Nach ständiger Rechtsprechung verbietet der Grundsatz der Gleichbehandlung 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.

The practical effect of the single practice rule appears to be that it prevents dentists who are already in practice outside the territory of Liechtenstein from establishing a secondary practice in Liechtenstein. Having to give up an established practice renders it less attractive for foreign dentists to establish themselves in Liechtenstein, and directly affects dentists' access to the market in that country. The negative consequences of the rule would be more likely to materialise for dentists established in another EEA State than for dentists already in practice in Liechtenstein.

It appears that a primary objective of the contested single practice rule is to limit the total number of dentists active in the country. This must mean that the rule is assumed to be an effective mechanism for restraining the inclination of non-national dentists to establish themselves in Liechtenstein, and that the rule is intended to function as a restriction on the general right to establishment for a large number of dentists from other EEA States.

The fact that the contested national rule is not contrary to the provisions of the EEA Agreement relating to the freedom to provide services does not affect the compatibility of that national rule with the provisions of the EEA Agreement on the freedom of establishment.

Non-discriminatory national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement, such as the single practice rule at issue in the present case, can be justified only if they fulfil the following conditions: they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective.

The contested single practice rule is not justified by overriding reasons based on the general interest.

A national provision of a Contracting Party to the EEA Agreement which provides that a dentist may not operate more than one practice, regardless of location, is incompatible with Article 31 EEA.

Es zeigt sich, dass die praktische Wirkung der „S*ingle practice rule*“ darin besteht, dass sie Zahnärzte, die bereits ausserhalb des Hoheitsgebiets des Fürstentums Liechtenstein eine Praxis haben, an der Gründung einer Zweitpraxis in Liechtenstein hindert. Der Zwang zur Aufgabe einer bestehenden Praxis macht es für ausländische Zahnärzte weniger attraktiv, sich in Liechtenstein niederzulassen und beeinträchtigt unmittelbar den Zugang von Zahnärzten zum Markt dieses Landes. Die negativen Folgen der „*Single practice rule“* werden eher für Zahnärzte aus einem anderen EWR-Staat eintreten als für solche, die bereits in Liechtenstein niedergelassen sind.

Es scheint, dass ein Hauptzweck der beanstandeten „*Single practice rule*“ darin besteht, die Gesamtzahl der im Land praktizierenden Zahnärzte zu begrenzen. Dies kann nur bedeuten, dass die „*Single practice rule“* als ein wirksamer Mechanismus angesehen wird, die Neigung ausländischer Zahnärzte, sich in Liechtenstein niederzulassen, einzuschränken, und dass sie als eine Beschränkung des allgemeinen Niederlassungsrechts für eine große Zahl von Zahnärzten aus anderen EWR-Staaten wirken soll.

Dass die beanstandete nationale Regelung nicht den Bestimmungen des EWR-Abkommens über die Dienstleistungsfreiheit zuwiderläuft, berührt nicht die Frage ihrer Vereinbarkeit mit den Bestimmungen des EWR-Abkommens über die Niederlassungsfreiheit.

Nichtdiskriminierende nationale Massnahmen, welche die Ausübung von durch das EWR-Abkommen gewährleisteten Grundfreiheiten behindern oder weniger attraktiv machen können, wie es bei der im Ausgangsverfahren in Rede stehenden *“Single practice rule”* der Fall ist, können nur dann gerechtfertigt sein, wenn sie die folgenden Voraussetzungen erfüllen: Sie müssen zwingenden Gründen des Allgemeininteresses entsprechen, sie müssen zur Erreichung des verfolgten Ziels geeignet sein, und sie dürfen nicht über das hinausgehen, was zur Erreichung dieses Ziels erforderlich ist.

Die beanstandete *“Single practice rule”* ist nicht durch zwingende Gründe des Allgemeininteresses gerechtfertigt.

Eine nationale Bestimmung einer Vertragspartei des EWR-Abkommens, nach der ein Zahnarzt nicht mehr als eine Praxis, gleichviel an welchem Ort, führen darf, ist nicht mit Artikel 31 EWRA vereinbar.

JUDGMENT OF THE COURT

14 June 2001*

(Right of establishment – Single practice rule – Justification by overriding reasons of general interest)

In Case E-5/00

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 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 Josef Mangold

on the interpretation of Article 31 of the EEA Agreement.

THE COURT,

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

Registrar: Gunnar Selvik

after considering the written observations submitted on behalf of:

– Dr Josef Mangold, represented by Toni Jäger;

– the Government of Liechtenstein, represented by Christoph Büchel, Director, EEA Coordination Unit, and Frank Montag, Rechtsanwalt;

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

URTEIL DES GERICHTSHOFS

14. Juni 2001*

(Niederlassungsrecht – "Single practice rule" – Rechtfertigung durch zwingende Gründe des Allgemeininteresses)

In der Rechtssache E-5/00

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 in der gegen die Entscheidung der Regierung des Fürstentums Liechtenstein gerichteten Beschwerde von

Dr. Josef Mangold

über die Auslegung von Artikel 31 des EWR-Abkommens erlässt

DER GERICHTSHOF,

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

Kanzler: Gunnar Selvik

Beteiligte, die schriftliche Erklärungen abgegeben haben:

– Dr. Josef Mangold, vertreten durch Toni Jäger;

– Liechtensteinische Regierung, vertreten durch Cristoph Büchel, Direktor, EWR-Koordinierungsstelle, und Rechtsanwalt Dr. Frank Montag;

– Isländische Regierung, vertreten durch Högni S. Kristjánsson,

* Sprache des Antrags auf Erlass eines Gutachtens: Deutsch.

– the Government of Iceland, represented by Högni S. Kristjánsson, 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 Anne-Lise H. Rolland, Officer, Legal & Executive Affairs, acting as Agent;

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

having regard to the Report for the Hearing,

after hearing the oral observations of the Government of Liechtenstein, the EFTA Surveillance Authority, represented by Michael Sanchez Rydelski, and the Commission of the European Communities at the hearing on 6 March 2001,

gives the following

Judgment

Facts and procedure

1 Dr. Josef Mangold (hereinafter the "Complainant") is an Austrian national with an established orthodontic practice in Bregenz, Austria. By an application dated 9 September 1997, the Complainant filed a request with the Liechtenstein Sanitätskommission (Board of Public Health) for the grant of a licence to set up and operate an orthodontic practice in Liechtenstein.

2 The Sanitätskommission, by a decision dated 11 November 1999, refused to grant the licence applied for by the Complainant. The reason given for that decision was, essentially, that according to Article 23(1) of the *Verordnung vom 17 Dezember 1996 betreffend die Abänderung der Verordnung über die medizinischen Berufe* (Regulation on medical professions), a dentist seeking a licence to practise in Liechtenstein may not operate more than one practice, regardless of location (hereinafter the "single practice rule"), and that a licence could not be granted until the Complainant had given up his practice in Austria and provided written confirmation to that effect from the Austrian authorities.

Rechtsabteilung, Aussenministerium, als Beauftragten;

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

– EFTA-Überwachungsbehörde, vertreten durch Anne-Lise H. Rolland, Rechtliche & Exekutive Angelegenheiten, als Beauftragte;

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

aufgrund des Sitzungsberichts,

nach Anhörung der mündlichen Stellungnahmen der liechtensteinischen Regierung, der EFTA-Überwachungsbehörde, vertreten durch Michael Sanchez Rydelski, und der Kommission der Europäischen Gemeinschaften in der Sitzung vom 6. März 2001,

folgendes

Urteil

Sachverhalt und Verfahren

1 Dr. Josef Mangold (nachstehend: Beschwerdeführer) ist ein österreichischer Staatsangehöriger, der in Bregenz (Österreich) eine Zahnarztpraxis eingerichtet hat. Mit Gesuch vom 9. September 1997 an die Sanitätskommission des Fürstentums Liechtenstein beantragte er eine Konzession zur Eröffnung und Führung einer Zahnarztpraxis in Liechtenstein.

2 Die Sanitätskommission lehnte die Erteilung der vom Beschwerdeführer beantragten Konzession mit Verfügung vom 11. November 1999 ab. Diese Entscheidung wurde im Wesentlichen damit begründet, dass gemäss Artikel 23 Absatz 1 der Verordnung vom 17. Dezember 1996 betreffend die Abänderung der Verordnung über die medizinischen Berufe ein Zahnarzt, der um eine Praxiskonzession in Liechtenstein nachsuche, nicht mehr als eine Praxis, gleichviel an welchem Ort, führen dürfe (nachstehend: *single practice rule*) und dass eine Konzession nicht erteilt werden könne, solange der Beschwerdeführer seine Praxis in Österreich nicht aufgegeben und hierüber eine schriftliche Bestätigung der österreichischen Behörden beigebracht habe.

3 On 24 January 2000, the Complainant submitted to the Government of Liechtenstein a complaint against the decision of the Sanitätskommission, asking for the contested decision to be rescinded and for the licence to be granted. The Government of Liechtenstein did not deal with that complaint within three months. On 8 May 2000, the Complainant submitted, by way of appeal, a further complaint to the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein. In the proceedings before the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein, the Complainant has raised issues concerning the compatibility of the single practice rule with the EEA Agreement.

4 The Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein decided to stay the proceedings and submit a Request for an Advisory Opinion to the EFTA Court on the following question:

> *Is the single practice rule applying without exception to all dentists under Liechtenstein national law, and in particular Article 23(1) of the Regulation of 8 November 1988 on the medical professions which provides: "A dentist may pursue his profession in a self-employed capacity, as a sole practitioner or jointly with others, only if he holds a licence authorising him to carry on his profession on a self-employed basis and only if he himself works in the practice concerned. A dentist may not operate more than one practice, whether as a sole practitioner or jointly with others" compatible with the EEA and/or with the Agreement on the European Economic Area (EEA Agreement) of 2 May 1992?*

5 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.

Findings of the Court

6 Before addressing directly the question formulated by the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein, the Court finds it appropriate to consider a more general argument submitted by the Government of Liechtenstein. In the Government of Liechtenstein's contention, the case-law of the Court of Justice of the European Communities relating to the freedom of establishment under Article 43 EC is not directly relevant for the interpretation of the corresponding provision in Article 31 EEA. That contention is based on, *inter alia*, the argument that there are fundamental differences in the scope and purposes of the Community legal order and the EEA legal order.

3 Gegen diese Verfügung der Sanitätskommission erhob der Beschwerdeführer am 24. Januar 2000 Beschwerde an die liechtensteinische Regierung und beantragte, die angefochtene Verfügung aufzuheben und ihm die Konzession zu erteilen. Die liechtensteinische Regierung behandelte diese Beschwerde nicht innert drei Monaten. Am 8. Mai 2000 erhob der Beschwerdeführer hiergegen eine weitere Beschwerde (Säumnisbeschwerde) an die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein. Im Verfahren vor der Verwaltungsbeschwerdeinstanz machte der Beschwerdeführer geltend, die *single practice rule* sei nicht mit dem EWR-Abkommen vereinbar.

4 Die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein hat beschlossen, das Verfahren auszusetzen und den EFTA-Gerichtshof um Erlass einer Vorlageentscheidung über folgende Frage zu ersuchen:

> *Ist die im nationalen liechtensteinischen Recht absolut geltende Bestimmung der "single practice rule" für Zahnärzte, insbesondere Artikel 23 Absatz 1 der Verordnung vom 8. November 1988 über die medizinischen Berufe, nämlich: "Der Zahnarzt darf nur in einer Einzel- oder Gemeinschaftspraxis selbstständig tätig sein, wenn er die Konzession zur selbstständigen Berufsausübung besitzt und selbst in der Praxis arbeitet. Der Zahnarzt darf nicht mehr als eine Einzel- oder Gemeinschaftspraxis führen", EWR-konform bzw. mit dem Abkommen über den Europäischen Wirtschaftsraum vom 2. Mai 1992 (EWRA) vereinbar?*

5 Wegen weiterer Einzelheiten des Sachverhalts des Ausgangsverfahrens, der anwendbaren Regelungen sowie 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.

Entscheidung des Gerichtshofs

6 Bevor der Gerichtshof direkt auf die von der Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein vorgelegte Frage eingeht, hält er es für angezeigt, sich mit einem allgemeineren Argument der liechtensteinischen Regierung zu befassen. Nach Ansicht der liechtensteinischen Regierung ist die Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften zur Niederlassungsfreiheit nach Artikel 43 EGV nicht unmittelbar übertragbar auf die Auslegung der entsprechenden Bestimmung in Artikel 31 EWRA. Sie stützt diese Ansicht u.a. auf grundlegende Unterschiede zwischen der Rechtsordnung der Gemeinschaft und der des EWR-Abkommens hinsichtlich ihres jeweiligen Anwendungsbereichs und ihrer Ziele.

7 The Court has consistently held that, when one is interpreting the EEA Agreement, it is necessary always to take into account that the objective of the Contracting Parties was to create a dynamic and homogeneous European Economic Area (see, *inter alia*, Case E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205, at paragraph 17). This point of departure has particular weight with regard to fundamental principles, such as the freedom of establishment set out in Article 31 EEA. The Court has, at the same time, recognised that there are differences in the scope and purpose of the EEA Agreement as compared to the EC Treaty, and has stated that these differences might, under specific circumstances, lead to differences in interpretation (see Case E-2/97 *Mag Instruments* v *California Trading Company Norway* [1997] EFTA Court Report 127, at paragraph 25 *et seq.*). In the present case, the Court has not been presented with any specific circumstance which would compel it to disregard the case-law of the Court of Justice of the European Communities in respect of Article 43 EC (see Case E-3/98 *Rainford-Towning*, cited above, at paragraph 21). Therefore, the Court cannot accept the contention of the Government of Liechtenstein to the effect that the case-law of the Court of Justice of the European Communities is not relevant to the consideration of the EEA provisions raised in the present case.

8 In this case, the national court is essentially asking whether a national provision stating that a dentist seeking a licence to practise in Liechtenstein may not operate more than one practice, regardless of location, is compatible with the provisions of the EEA Agreement.

9 The pursuit of an economic activity by an EEA national in an EEA State other than his State of nationality may, under the EEA Agreement, be governed by the chapter on the free movement of workers, or the chapter on the right of establishment, or the chapter on services, these being mutually exclusive (see Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, at paragraph 20).

10 In the present case, the Complainant, resident in and a national of Austria, seeks to take up and pursue, on a stable and continuous basis, activities as a self-employed dentist in Liechtenstein, maintaining permanent premises there. This follows from the Complainant's own pleadings. Therefore, the case must be dealt with under the rules on the freedom of establishment (see Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, cited above, at paragraphs 23 to 25).

11 Freedom of establishment is one of the fundamental principles of the EEA Agreement. Chapter 2 of Part III of the EEA Agreement contains the principal treaty provisions relating to the freedom of establishment within the EEA. Article 31 EEA provides as follows:

7 Nach ständiger Rechtsprechung des Gerichtshofs ist bei der Auslegung des EWR-Abkommens stets zu beachten, dass die Zielsetzung der Vertragsparteien darin bestand, einen dynamischen und homogenen Europäischen Wirtschaftsraum zu schaffen (vgl. u.a. Rechtssache E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205, Paragraph 17). Dieser Ausgangspunkt ist von besonderer Bedeutung im Hinblick auf elementare Grundsätze wie die in Artikel 31 EWRA normierte Niederlassungsfreiheit. Zugleich hat der Gerichtshof anerkannt, dass es zwischen dem EWR-Abkommen und dem EG-Vertrag Unterschiede hinsichtlich des Anwendungsbereichs und der Ziele gibt, und hat entschieden, dass diese Unterschiede unter spezifischen Umständen zu Unterschieden in der Auslegung führen können (vgl. Rechtssache E-2/97 *Mag Instruments ./. California Trading Company Norway* [1997] EFTA Court Report 127, Paragraphen 25 ff.). Im vorliegenden Fall sind dem Gerichtshof keine spezifischen Umstände vorgetragen worden, die ihn zwingen würden, die Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften zu Artikel 43 EGV unberücksichtigt zu lassen (vgl. die oben erwähnte Rechtssache E-3/98 *Rainford Towning*, Paragraph 21). Daher kann der Gerichtshof dem Vorbringen der liechtensteinischen Regierung nicht folgen, wonach die Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften für die Prüfung der im vorliegenden Fall einschlägigen Bestimmungen des EWR-Abkommens nicht relevant sei.

8 Im vorliegenden Fall fragt das nationale Gericht im Wesentlichen, ob eine nationale Bestimmung, wonach ein Zahnarzt, der eine Konzession zur Führung einer Praxis in Liechtenstein beantragt, nicht mehr als eine Praxis, gleichviel an welchem Ort, betreiben darf, mit den Bestimmungen des EWR-Abkommens vereinbar ist.

9 Die Ausübung einer wirtschaftlichen Tätigkeit durch einen Angehörigen eines EWR-Staates in einem anderen EWR-Staat kann nach dem EWR-Abkommen unter das Kapitel über die Freizügigkeit der Arbeitnehmer, unter das Kapitel über das Niederlassungsrecht oder unter das Kapitel über Dienstleistungen fallen, wobei diese Kapitel einander ausschliessen (EuGH C-55/94 *Gebhard ./. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Slg. 1995, I-4165, Randnr. 20).

10 Im vorliegenden Fall strebt der Beschwerdeführer, ein in Österreich wohnender Österreicher, die Aufnahme und ständige, kontinuierliche Ausübung von Tätigkeiten eines selbständigen Zahnarztes in Liechtenstein im Rahmen einer ständigen Praxis an. Dies ergibt sich aus dem Vortrag des Beschwerdeführers selbst. Der Fall ist daher nach den Bestimmungen über die Niederlassungsfreiheit zu beurteilen (EuGH C-55/94 *Gebhard ./. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, a.a.O., Randnrn. 23 bis 25).

11 Die Niederlassungsfreiheit ist einer der elementaren Grundsätze des EWR-Abkommens. Kapitel 2 des Teils III des EWR-Abkommens enthält die wesentlichen Abkommensbestimmungen über die Niederlassungsfreiheit im EWR. Artikel 31 EWRA lautet:

> "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."

12 This provision is specific and far-reaching. It refers explicitly to self-employed persons, and to the setting up of agencies, branches or subsidiaries. This indicates that the right to secondary establishments is equated with the right to establish a principal seat of activity. Article 31 EEA requires national treatment for nationals of other EEA States (see *inter alia* Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, cited above, at paragraph 33), and abolishes all restrictions on establishment between the Contracting Parties to the EEA Agreement.

13 Therefore, it is necessary for the Court to consider whether a single practice rule such as that at issue in the main proceedings constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

14 The Court of Justice of the European Communities has consistently held that the right of establishment entails the freedom to set up and maintain, subject to observance of the professional rules of conduct, more than one place of work within the Community (see, *inter alia*, Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351, at paragraph 20, and Case C-351/90 *Commission* v *Luxembourg* [1992] ECR I-3945, at paragraph 11).

15 The contested single practice rule does not distinguish between Liechtenstein dentists and dentists of other EEA States. It applies equally to all dentists seeking to operate a dental practice in Liechtenstein, regardless of whether they have their primary establishment in Liechtenstein or in any other EEA State, and regardless of their nationality and place of residence. There is no overt discrimination in this respect

> "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 ."

12 Diese Bestimmung ist spezifisch und weitreichend. Sie bezieht sich ausdrücklich auf Selbständige und auf die Gründung von Agenturen, Zweigniederlassungen oder Tochtergesellschaften. Dies deutet darauf hin, dass das Recht auf eine Zweitniederlassung dem Recht auf die Begründung eines Haupttätigkeitssitzes gleichgestellt ist. Artikel 31 EWRA schreibt die Inländerbehandlung für Angehörige anderer EWR-Staaten vor (vgl. u.a. EuGH C-55/94 *Gebhard ./. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, a.a.O., Randnr. 33) und beseitigt alle Niederlassungsbeschränkungen zwischen den Vertragsparteien des EWR-Abkommens.

13 Daher muss der Gerichtshof prüfen, ob eine *single practice rule* wie die im Ausgangsverfahren in Rede stehende eine Beschränkung der Niederlassungsfreiheit im Sinne von Artikel 31 EWRA darstellt.

14 Nach ständiger Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften umfasst das Niederlassungsrecht die Möglichkeit, unter Beachtung der jeweiligen Berufsregelungen im Gebiet der Gemeinschaft mehr als eine Stätte für die Ausübung einer Tätigkeit einzurichten und beizubehalten (vgl. u.a. EuGH C-106/91 *Ramrath ./. Ministre de la Justice,* Slg. 1992, I-3351, Randnr. 20, und C-351/90 *Kommission ./. Luxemburg*, Slg. 1992, I-3945, Randnr. 11).

15 Die beanstandete *single practice rule* unterscheidet nicht zwischen liechtensteinischen Zahnärzten und Zahnärzten aus anderen EWR-Staaten. Sie gilt gleichermassen für alle Zahnärzte, die in Liechtenstein eine zahnärztliche Praxis betreiben wollen, unabhängig davon, ob sie ihre Hauptniederlassung in Liechtenstein oder in irgendeinem anderen EWR-Staat haben, und ungeachtet ihrer Staatsangehörigkeit und ihres Wohnsitzes. Eine offene Diskriminierung liegt insoweit nicht vor.

16 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, or through the exercise of administrative discretion with regard to exceptions and dispensations, would in practice lead to the same result (see, *inter alia*, Case E-3/98 *Rainford-Towning*, cited above, at paragraph 27).

17 The Court observes that, for dentists who have previously not conducted a practice, the contested single practice rule does not entail negative effects with regard to their establishment in Liechtenstein.

18 Nor does it provide a barrier to the establishment of a practice within the territory of Liechtenstein by those dentists who have already established a practice outside that country when, in their evaluation, the relative professional career prospects are such that they would be induced to give up the practice they already have established, or for those who, for reasons unconnected with their professional calculations, would discontinue their previous practice.

19 The practical effect of the single practice rule appears to be that it prevents dentists who are already in practice outside the territory of Liechtenstein from establishing a secondary practice in Liechtenstein. Having to give up an established practice renders it less attractive for foreign dentists to establish themselves in Liechtenstein, and directly affects dentists' access to the market in that country. The negative consequences of the rule would be more likely to materialise for dentists established in another EEA State than for dentists already in practice in Liechtenstein.

20 From the submissions of the Government of Liechtenstein, it appears that a primary objective of the contested single practice rule is to limit the total number of dentists active in the country. This must mean that the rule is assumed to be an effective mechanism for restraining the inclination of non-national dentists to establish themselves in Liechtenstein, and that the rule is intended to function as a restriction on the general right to establishment for a large number of dentists from other EEA States.

21 The Government of Liechtenstein has submitted that the single practice rule at issue does not prevent dentists established in other EEA States from providing services to patients in Liechtenstein from their established practices abroad.

22 The Court finds that this circumstance does not remove the restrictive effect of the national rule with regard to secondary establishments.

16 Nach ständiger Rechtsprechung verbietet der Grundsatz der Gleichbehandlung 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,* a.a.O. Randnr. 27).

17 Der Gerichtshof weist darauf hin, dass die beanstandete *single practice rule* keine negativen Auswirkungen auf die Niederlassung von Zahnärzten, die zuvor noch keine Praxis geführt haben, in Liechtenstein hat.

18 Sie errichtet auch keine Schranke für die Einrichtung einer Praxis im Hoheitsgebiet des Fürstentums Liechtenstein durch Zahnärzte, die bereits eine Praxis ausserhalb dieses Landes eingerichtet haben, wenn diese Zahnärzte die entsprechenden Aussichten für ihre berufliche Karriere als so günstig einschätzen, dass sie sich zur Aufgabe ihrer bereits bestehenden Praxis veranlasst sehen würden, oder durch Zahnärzte, die aus anderen als beruflichen Erwägungen ihre bisherige Praxis nicht fortführen würden.

19 Es zeigt sich, dass die praktische Wirkung der *single practice rule* darin besteht, dass sie Zahnärzte, die bereits ausserhalb des Hoheitsgebiets des Fürstentums Liechtenstein eine Praxis haben, an der Gründung einer Zweitpraxis in Liechtenstein hindert. Der Zwang zur Aufgabe einer bestehenden Praxis macht es für ausländische Zahnärzte weniger attraktiv, sich in Liechtenstein niederzulassen, und beeinträchtigt unmittelbar den Zugang von Zahnärzten zum Markt dieses Landes. Die negativen Folgen der *single practice rule* werden eher für Zahnärzte aus einem anderen EWR-Staat eintreten als für solche, die bereits in Liechtenstein niedergelassen sind.

20 Dem Vortrag des Fürstentums Liechtenstein zufolge besteht ein Hauptzweck der beanstandeten *single practice rule* darin, die Gesamtzahl der im Land praktizierenden Zahnärzte zu begrenzen. Dies kann nur bedeuten, dass die *single practice rule* als ein wirksamer Mechanismus angesehen wird, die Neigung ausländischer Zahnärzte, sich in Liechtenstein niederzulassen, einzuschränken, und dass sie als eine Beschränkung des allgemeinen Niederlassungsrechts für eine große Zahl von Zahnärzten aus anderen EWR-Staaten wirken soll.

21 Die liechtensteinische Regierung hat vorgetragen, dass die in Rede stehende *single practice rule* in anderen EWR-Staaten niedergelassene Zahnärzte nicht daran hindere, Dienstleistungen für Patienten in Liechtenstein von ihren Praxen im Ausland aus zu erbringen.

22 Der Gerichtshof stellt fest, dass dieser Umstand die beschränkende Wirkung der nationalen Regelung für Zweitniederlassungen nicht beseitigt.

The fact that the contested national rule is not contrary to the provisions of the EEA Agreement relating to the freedom to provide services does not affect the compatibility of that national rule with the provisions of the EEA Agreement on the freedom of establishment.

23 The Court concludes from the foregoing that a single practice rule such as that at issue in the main proceedings constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

24 The Court must now examine whether this restriction can be objectively justified so as to permit the continued application of such a single practice rule.

25 Non-discriminatory national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement, such as the single practice rule at issue in the present case, can be justified only if they fulfil the following conditions: they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective (see, to this effect, Case C-424/97 *Haim* [2000] ECR I-5123, at paragraph 57, and, most recently, Case C-108/96 *Mac Quen and Others* v *Grandvision Belgium*, judgment of 1 February 2001, not yet reported, at paragraph 26).

26 The Government of Liechtenstein has submitted that the underlying main objective of the single practice rule is the maintenance of the financial equilibrium of the Liechtenstein social security system. Protecting this equilibrium must be held to be an overriding reason based on the general interest, justifying a restriction on the freedom of establishment in this case. It is argued that if the single practice rule were disallowed, Liechtenstein would experience a significant increase in the number of medical and dental practitioners. Such an increase in the supply of medical and dental services in the country would simultaneously cause an artificial increase in the demand for such services. This would again lead to a corresponding rise in the expenditure relating to medical and dental treatment in the Liechtenstein social security system. The Government of Liechtenstein has submitted that such increases in expenditure might threaten the sustainability of a health care system accessible to all.

27 Moreover, the Government of Liechtenstein has submitted that reasons connected with the maintenance of the high quality of medical and dental services provided in Liechtenstein must also be taken into account. The single practice rule ensures the availability and continuity of presence of the practitioner.

Dass die beanstandete nationale Regelung nicht den Bestimmungen des EWR-Abkommens über die Dienstleistungsfreiheit zuwiderläuft, berührt nicht die Frage ihrer Vereinbarkeit mit den Bestimmungen des EWR-Abkommens über die Niederlassungsfreiheit.

23 Der Gerichtshof folgert aus dem Vorstehenden, dass eine *single practice rule*, wie sie im Ausgangsverfahren in Rede steht, eine Beschränkung der Niederlassungsfreiheit im Sinne von Artikel 31 EWRA darstellt.

24 Der Gerichtshof hat nun zu prüfen, ob diese Beschränkung objektiv gerechtfertigt werden kann, so dass die weitere Anwendung einer solchen *single practice rule* zulässig wäre.

25 Nichtdiskriminierende nationale Massnahmen, die die Ausübung von durch das EWR-Abkommen gewährleisteten Grundfreiheiten behindern oder weniger attraktiv machen können, wie es bei der im Ausgangsverfahren in Rede stehenden *single practice rule* der Fall ist, können nur dann gerechtfertigt sein, wenn sie die folgenden Voraussetzungen erfüllen: Sie müssen zwingenden Gründen des Allgemeininteresses entsprechen, sie müssen zur Erreichung des verfolgten Ziels geeignet sein, und sie dürfen nicht über das hinausgehen, was zur Erreichung dieses Ziels erforderlich ist (vgl. in diesem Sinne EuGH C-424/97 *Haim,* Slg. 2000, I-5123, Randnr. 57, und jüngst Urteil vom 1. Februar 2001, C-108/96 *Mac Quen u.a. ./. Grandvision Belgium*, noch nicht veröffentlicht, Randnr. 26).

26 Die liechtensteinische Regierung hat vorgetragen, Hauptziel der *single practice rule* sei die Aufrechterhaltung des finanziellen Gleichgewichts des liechtensteinischen Systems der sozialen Sicherheit. Der Schutz dieses Gleichgewichts sei als zwingender Grund des öffentlichen Interesses anzusehen, der eine Beschränkung der Niederlassungsfreiheit in diesem Fall rechtfertige. Würde die *single practice rule* für unzulässig erklärt, so käme es in Liechtenstein zu einer deutlichen Zunahme der Zahl der praktizierenden Ärzte und Zahnärzte. Eine solche Zunahme des Angebots an ärztlichen und zahnärztlichen Leistungen würde zugleich zu einem künstlichen Anstieg der Nachfrage nach solchen Leistungen führen. Dies wiederum würde zu einem entsprechenden Anstieg der Ausgaben für medizinische und zahnmedizinische Behandlungen im liechtensteinischen System der sozialen Sicherheit führen. Nach Ansicht der liechtensteinischen Regierung könnte dieser Kostenanstieg die Nachhaltigkeit eines allen Menschen zugänglichen Gesundheitssystems gefährden.

27 Darüber hinaus hat die liechtensteinische Regierung vorgetragen, dass auch Gründe der Aufrechterhaltung der hohen Qualität der in Liechtenstein angebotenen medizinischen und zahnmedizinischen Leistungen zu berücksichtigen seien. Die *single practice rule* sichere die Verfügbarkeit und kontinuierliche Anwesenheit des

Medical and dental practitioners who establish a second practice would not be able to provide the necessary continuous and permanent medical and dental care for their patients as practitioners who exclusively operate one practice in the country.

28 The Court recalls that EEA law does not detract from the powers of the EEA States to organise their social security systems. In the absence of harmonisation at the EEA level, it is for each EEA State to determine whether and to what extent expenses for medical and dental treatment are to be borne by the social security system.

29 Economic considerations alone cannot justify a barrier to one of the fundamental freedoms provided for in the EEA Agreement (see Case C-158/96 *Kohll* v *Union des Caisses de Maladie* [1998] ECR I-1931, at paragraph 41). However, it cannot be excluded that the risk of seriously undermining the financial balance of the social security system, and of jeopardising the sustainability of a health care system accessible to all, might nevertheless constitute an overriding reason in the general interest capable of justifying a barrier of that kind (see, *inter alia*, Case C-158/96 *Kohll* v *Union des Caisses de Maladie*, cited above, at paragraphs 41 and 50).

30 The Court notes from the information presented to it that, under the Liechtenstein health system, most of the costs for dental treatment will in fact be borne by the patients themselves. Only certain types of dental treatment appear to be covered by the social security system. Therefore, an increase in the demand for dental services would not have any appreciable effect on the expenditure of the social security system. Accordingly, with regard to dentists, the single practice rule does not seem to be a suitable measure for securing the attainment of financial balance in the social security system.

31 The Court adds that none of the other arguments put forward by the Government of Liechtenstein can be accepted as capable of justifying the contested single practice rule. It is sufficient in this respect to refer to the Court's judgment in Case E-4/00 *Brändle*, judgment of 14 June 2001, not yet reported. In that case, the Court held that a single practice rule is not necessary and proportionate in order to limit opportunities for physicians to create artificial demand for their services. Moreover, the Court held that a single practice rule is neither suitable nor necessary in order to attain the objective of maintaining the high quality of medical services. The reasoning of the findings of the Court in that case is equally valid with regard to dentists and dental services in the present case.

Arztes bzw. Zahnarztes. Ärzten und Zahnärzten mit einer Zweitniederlassung wäre es im Gegensatz zu solchen mit nur einer Praxis im Land nicht möglich, die notwendige kontinuierliche und permanente Betreuung ihrer Patienten sicherzustellen.

28 Der Gerichtshof erinnert daran, dass das EWR-Recht die Befugnisse der EWR-Staaten zur Gestaltung ihrer Systeme der sozialen Sicherheit unberührt lässt. Mangels einer Harmonisierung auf EWR-Ebene ist es Sache jedes EWR-Staates, festzulegen, ob und in welchem Umfang Kosten medizinischer und zahnmedizinischer Behandlung vom System der sozialen Sicherheit zu tragen sind.

29 Rein wirtschaftliche Gründe können eine Beschränkung einer der im EWR-Abkommen vorgesehenen Grundfreiheiten nicht rechtfertigen (vgl. EuGH C-158/96 *Kohll ./. Union des Caisses de Maladie*, Slg. 1998, I-1931, Randnr. 41). Es kann jedoch nicht ausgeschlossen werden, dass die Gefahr einer ernsten Störung des finanziellen Gleichgewichts des Systems der sozialen Sicherheit und die Gefährdung der Nachhaltigkeit eines allen Menschen zugänglichen Gesundheitssystems dennoch einen zwingenden Grund des Allgemeininteresses darstellen kann, der eine derartige Beschränkung zu rechtfertigen vermag (vgl. EuGH C-158/96 *Kohll ./. Union des Caisses de Maladie*, a.a.O., Randnrn. 41 und 50).

30 Der Gerichtshof entnimmt den ihm vorgelegten Informationen, dass im liechtensteinischen Gesundheitssystem der Grossteil der Kosten zahnmedizinischer Behandlung tatsächlich von den Patienten selbst getragen wird. Nur für bestimmte Arten zahnmedizinischer Behandlung gibt es eine Kostenerstattung durch das System der sozialen Sicherheit. Daher hätte eine Zunahme der Nachfrage nach zahnmedizinischen Leistungen keine spürbare Auswirkung auf die Ausgaben des Systems der sozialen Sicherheit. Demgemäss stellt sich die *single practice rule* in Bezug auf Zahnärzte nicht als eine geeignete Massnahme dar, um die Erreichung des Ziels des finanziellen Gleichgewichts des Systems der sozialen Sicherheit zu gewährleisten.

31 Der Gerichtshof fügt hinzu, dass keines der übrigen von der liechtensteinischen Regierung vorgetragenen Argumente die beanstandete *single practice rule* zu rechtfertigen vermag. Insoweit genügt der Hinweis auf das Urteil des Gerichtshofs vom 14. Juni 2001 in der Rechtssache E-4/00 *Brändle*, noch nicht veröffentlicht. In dieser Rechtssache hat der Gerichtshof entschieden, dass eine *single practice rule* weder erforderlich noch angemessen ist, um die Möglichkeit für Ärzte zu begrenzen, eine künstliche Nachfrage nach ihren Leistungen zu schaffen. Darüber hinaus hat der Gerichtshof entschieden, dass eine *single practice rule* zur Aufrechterhaltung einer hohen Qualität der medizinischen Leistungen weder geeignet noch erforderlich ist. Die vom Gerichtshof gegebene Begründung für diese Entscheidung gilt gleichermassen in Bezug auf Zahnärzte und zahnmedizinische Leistungen im vorliegenden Fall.

32 On the reasoning set out in the foregoing, and on the basis of what has been submitted to the Court, and without entering into any examination of questions of fact and their appreciation, this Court must hold that the contested single practice rule is not justified by overriding reasons based on the general interest.

33 In those circumstances, the answer to the national court must be that a national provision of a Contracting Party to the EEA Agreement which provides that a dentist may not operate more than one practice, regardless of location, is incompatible with Article 31 EEA.

Costs

34 The costs incurred by 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 question referred to it by Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein by an order of 13 June 2000, hereby gives the following Advisory Opinion:

A national provision of a Contracting Party to the EEA Agreement which provides that a dentist may not operate more than one practice, regardless of location, is incompatible with Article 31 EEA.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

32 Aus den vorstehend dargelegten Gründen und auf der Grundlage der ihm unterbreiteten Vorbringen muss der Gerichtshof, ohne in eine Prüfung von Tatsachenfragen und Fragen der Tatsachenwürdigung einzutreten, entscheiden, dass die beanstandete *single practice rule* nicht durch zwingende Gründe des Allgemeininteresses gerechtfertigt ist.

33 Unter diesen Umständen ist dem vorlegenden Gericht zu antworten, dass eine nationale Bestimmung einer Vertragspartei des EWR-Abkommens, nach der ein Zahnarzt nicht mehr als eine Praxis, gleichviel an welchem Ort, führen darf, nicht mit Artikel 31 EWRA vereinbar ist.

Kosten

34 Die Auslagen der isländischen Regierung, der norwegischen Regierung, der EFTA-Überwachungskommission 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 erlässt

DER GERICHTSHOF

in Beantwortung der Frage, die ihm die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein mit Beschluss vom 13. Juni 2000 vorgelegt hat, folgendes Gutachten:

Eine nationale Bestimmung einer Vertragspartei des EWR-Abkommens, nach der ein Zahnarzt nicht mehr als eine Praxis, gleichviel an welchem Ort, führen darf, ist nicht mit Artikel 31 EWR-Abkommen vereinbar.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 14 June 2001.

Gunnar Selvik
Registrar

Thór Vilhjálmsson
President

Verkündet in öffentlicher Sitzung in Luxemburg am 14. Juni 2001.

Gunnar Selvik
Kanzler

Thór Vilhjálmsson
Präsident

REPORT FOR THE HEARING

in Case E-5/00
– 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 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 Josef Mangold

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

I. Introduction

1. By an order dated 13 June 2000, registered at the Court on 21 June 2000, 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 Josef Mangold (hereinafter the "Complainant").

2. The dispute before the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein concerns the compatibility with the EEA Agreement of a Liechtenstein provision requiring that a dentist seeking a licence to practise in Liechtenstein may not operate more than one practice, regardless of location.

II. Legal background

* Amendments to paragraphs 41, 42, and 44.

SITZUNGSBERICHT
in der Rechtssache E-5/00
– berichtigte Fassung* –

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 über die Auslegung des EWR-Abkommens in der Beschwerde von

Dr. Josef Mangold

gegen die Entscheidung der Regierung des Fürstentums Liechtenstein über die Auslegung von Artikel 4, 31 und 33 des Abkommens über den Europäischen Wirtschaftsraum (EWR-Abkommen).

I. Einleitung

1. Mit Beschluss vom 13. Juni 2000, der am 21. Juni 2000 beim Gerichtshof eingegangen ist, ersuchte die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein um Erlass einer Vorlageentscheidung über die Auslegung des EWR-Abkommens in der Beschwerde von Dr. Josef Mangold (der „Beschwerdeführer“) gegen die Entscheidung der Regierung des Fürstentums Liechtenstein.

2. Im Rechtsstreit vor der Verwaltungsbeschwerdeinstanz geht es um die Frage, ob eine Bestimmung des liechtensteinischen Rechts, nach der ein Zahnarzt, der in Liechtenstein eine Konzession beantragt - unabhängig vom Ort - nicht mehr als eine Praxis unterhalten darf, mit dem EWR-Abkommen vereinbar ist.

II. Rechtlicher Hintergrund

* Die Änderungen betreffen die Randnummern 41, 42 und 44.

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:

> *"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 des Fürstentums Liechtenstein is the *Verordnung vom 17 Dezember 1996 betreffend die Abänderung der Verordnung über die medizinischen Berufe* (Regulation of 17 December 1996 amending the rules governing the medical professions, hereinafter the "Regulation on medical professions").

8. Article 23(1) of the Regulation on medical professions reads as follows:

> *"A dentist may pursue his profession in a self-employed capacity, as a sole practitioner or jointly with others, only if he holds a licence authorising him to*

EWR-Recht

3. Die Fragen des nationalen Gerichts betreffen die Auslegung der Artikel 4, 31 und 33 des EWR-Abkommens.

4. Artikel 4 EWRA lautet:

> *„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-Staats, 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."*

Liechtensteinisches Recht

7. Bei dem streitigen Gesetz handelt es sich um die Verordnung vom 17. Dezember 1996 betreffend die Abänderung der Verordnung über die medizinischen Berufe (die „Verordnung für die medizinischen Berufe").

8. Artikel 23(1) der Verordnung für die medizinischen Berufe lautet:

> *„Der Zahnarzt darf nur in einer Einzel- oder Gemeinschaftspraxis selbständig tätig sein, wenn er die Konzession zur selbständigen Berufsausübung besitzt und*

*to carry on his profession on a self-employed basis and only if himself works in the practice concerned. A dentist may not operate more than o***ne practice, whether as a sole practitioner or jointly with others."*

III. Facts and procedure

9. The Complainant, Dr. Josef Mangold, is an Austrian national with an established orthodontic practice in Bregenz, Austria. It appears from the Request for an Advisory Opinion from the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein that the Complainant had sought to establish himself as a dentist in Liechtenstein.

10. By an application dated 9 September 1997/4 June 1998, the Complainant filed a request with the Liechtenstein Sanitätskommission (Board of Public Health) for the grant of a licence to set up and operate an orthodontic practice in Liechtenstein.

11. The Sanitätskommission, by a decision dated 11 November/21 December 1999, refused to grant the licence applied for by the Complainant. The reason given for that decision was, essentially, that, according to Article 23(1) of the Regulation on medical professions, a dentist may not operate more than one practice (hereinafter the "single practice rule"), and that a licence could not be granted until the Complainant had given up his practice in Austria and provided written confirmation to that effect from the Austrian authorities.

12. On 24 January 2000, the Complainant submitted to the Government of Liechtenstein a complaint against the decision of the Sanitätskommission, asking for the contested decision to be rescinded and for the licence to be granted. The Government of Liechtenstein did not deal with that complaint within three months. On 8 May 2000, the Complainant submitted, by way of appeal, a further complaint to the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein. In the proceedings before the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein, the Complainant has raised issues concerning the compatibility of the single practice rule with the EEA Agreement.

13. The Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein decided to stay the proceedings and submit a Request for an Advisory Opinion to the EFTA Court.

IV. Question

14. The following question was referred to the EFTA Court:

selbst in der Praxis arbeitet. Der Zahnarzt darf nicht mehr als eine Einzel- oder Gemeinschaftspraxis führen."

III. Sachverhalt und Verfahren

9. Der Beschwerdeführer, Dr. Josef Mangold, ist ein Österreicher, der in Bregenz in Vorarlberg (Österreich) eine Zahnarztpraxis eingerichtet hat. Dem Vorlageersuchen der Verwaltungsbeschwerdeinstanz ist zu entnehmen, dass sich der Beschwerdeführer als Zahnarzt in Liechtenstein niederlassen wollte.

10. Mit einem Gesuch vom 9. September 1997 und 4. Juni 1998 beantragte der Beschwerdeführer bei der Liechtensteinischen Sanitätskommission die Erteilung einer Konzession für die Errichtung einer Zahnarztpraxis in Liechtenstein.

11. Mit Verfügung vom 11. November bzw. 21. Dezember 1999 lehnte die Sanitätskommission das Gesuch des Beschwerdeführers im wesentlichen mit der Begründung ab, Artikel 23 Absatz 1 der Verordnung über die medizinischen Berufe erlaube es einem Zahnarzt nicht, mehr als eine Praxis zu unterhalten (*single practice rule*). Der Beschwerdeführer müsse deshalb seine Praxis in Österreich aufgeben, um in Liechtenstein eine Konzession zu erhalten. Die Aufgabe der Praxis in Österreich habe der Beschwerdeführer durch schriftliche Bestätigung der österreichischen Behörden nachzuweisen.

12. Am 24. Januar 2000 erhob der Beschwerdeführer eine Beschwerde gegen die Entscheidung der Sanitätskommission bei der Regierung und beantragte die Abänderung dieser Entscheidung dahingehend, dass ihm die Konzession zum Betrieb einer Zahnarztpraxis erteilt werde. Die Regierung trat auf die Beschwerde innerhalb von drei Monaten nicht ein, weshalb der Beschwerdeführer am 8. Mai 2000 Beschwerde an die Verwaltungsbeschwerdeinstanz erhob. Im Verfahren vor der Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein machte der Beschwerdeführe Ausführungen zur Vereinbarkeit der *single practice rule* mit dem EWR-Abkommen.

13. Die Verwaltungsbeschwerdeinstanz entschied, das Verfahren auszusetzen und dem EFTA-Gerichtshof einen Antrag auf Vorlageentscheidung zu übermitteln.

IV. Fragen

14. Die folgende Frage wurde dem EFTA-Gerichtshof vorgelegt:

Ist die im nationalen liechtensteinischen Recht absolut geltende Bestimmung des „single practice rule" für Zahnärzte, insbesondere Artikel 23 Absatz 1 der Verordnung vom 8. November 1998 über die

Is the single practice rule applying without exception to all dentists under Liechtenstein national law, and in particular Article 23(1) of the Regulation of 8 November 1988 on the medical professions which provides: "A dentist may pursue his profession in a self-employed capacity, as a sole practitioner or jointly with others, only if he holds a licence authorising him to carry on his profession on a self-employed basis and only if he himself works in the practice concerned. A dentist may not operate more than one practice, whether as a sole practitioner or jointly with others" compatible with the EEA and/or with the Agreement on the European Economic Area (EEA Agreement) of 2 May 1992?

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 Josef Mangold, represented by Toni Jäger;

– the Government of Liechtenstein, represented by Christoph Büchel, Director, EEA Coordination Unit, and Frank Montag, Rechtsanwalt;

– the Government of Iceland, represented by Högni S. Kristjánsson, 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 Anne-Lise H. Rolland, Officer, Legal & Executive Affairs, acting as Agent;

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

Dr Josef Mangold

16. In his written observations, the Complainant, Dr Josef Mangold, refers to the facts and arguments already set out in the Request for an Advisory Opinion, with accompanying enclosures, submitted by the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein.

medizinischen Berufe, nämlich:“ Der Zahnarzt darf nur in einer Einzel- oder Gemeinschaftspraxis selbständig tätig sein, wenn er die Konzession zur selbständigen Berufsausübung besitzt und selbst in der Praxis arbeitet. Der Zahnarzt darf nicht mehr als eine Einzel- oder Gemeinschaftspraxis führen“ EWR-konform bzw. mit dem Abkommen über den Europäischen Wirtschaftsraum vom 2. Mai 1992 (EWRA) vereinbar ?

V. Schriftliche Erklärungen

15. Schriftliche Erklärungen gemäss Artikel 20 der Satzungen des EFTA-Gerichtshofs und Artikel 97 der Verfahrensordnung sind eingegangen von:

– Dr. Josef Mangold, vertreten durch Toni Jäger;

– der Regierung des Fürstentums Liechtenstein, vertreten durch lic.iur. Christoph Büchel, Direktor der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein, als Bevollmächtigter, und Rechtsanwalt Dr. Frank Montag;

– der isländischen Regierung, vertreten durch Högni S. Kristjánsson, Beamter im Aussenministerium, als Bevollmächtigter;

– der norwegischen Regierung, vertreten durch Helge Seland, Stellvertretende Generaldirektorin im Aussenministerium, als Bevollmächtigte;

– der EFTA-Überwachungsbehörde, vertreten durch Anne-Lise H. Rolland, Mitglied der Abteilung Rechtliche & Exekutive Angelegenheiten, als Bevollmächtigte;

– der Kommission der Europäischen Gemeinschaften, vertreten durch Maria Patakia und John Forman, Mitglieder des Rechtsdienstes, als Bevollmächtigte.

Dr. Josef Mangold

16. Der Beschwerdeführer, Dr. Josef Mangold, verweist in seiner schriftlichen Stellungnahme auf Tatsachen und Vorbringen, die bereits im Antrag der liechtensteinischen Verwaltungsbeschwerdeinstanz auf eine Vorlageentscheidung bzw. in den Beilagen enthalten sind.

17. Der Beschwerdeführer macht geltend, die umstrittene single practice rule verstosse gegen das EWR-Abkommen. Aus Artikel 6 EWR-Abkommen folge, dass Bestimmungen des EWR-Abkommens, soweit sie inhaltlich gleichlautend mit Bestimmungen des EG-Vertrags sind, in Übereinstimmung mit den

17. The Complainant submits that the contested single practice rule is contrary to EEA law. It follows from Article 6 EEA that provisions of the EEA Agreement, in so far as they are identical in substance to corresponding rules of the EC Treaty, are to be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities. The Complainant refers to the judgments in *Commission* v *France*[1] and *Commission* v *Luxembourg*,[2] in which the Court of Justice of the European Communities held similar single practice rules to be contrary to Community law.

18. The Complainant also draws attention to the *EFTA Surveillance Authority Annual Report 1998*, from which it follows that the EFTA Surveillance Authority has initiated formal proceedings against the Government of Liechtenstein for failure to comply with Article 31 EEA by reason of the contested single practice rule. The single practice rule prevents dentists with an orthodontic practice in another EEA State from establishing themselves in Liechtenstein.

19. The Complainant proposes the following answer to the question:

> *"The 'single practice rule' applying to dentists under the national law of Liechtenstein, and in particular Article 23(1) of the Regulation of 8 November 1988 on the medical professions, is not in conformity with the EEA, and/or not compatible with the Agreement on the European Economic Area (EEA Agreement) of 2 May 1992."*

The Government of Liechtenstein

The existence of overt or covert discrimination

20. The Government of Liechtenstein submits that the single practice rule at issue in the main proceedings is compatible with Article 31 EEA.

21. The Government of Liechtenstein argues that the contested single practice rule does not constitute either overt or covert discrimination prohibited by Article 31 EEA.

22. The single practice rule at issue applies equally to Liechtenstein nationals and to nationals of other EEA States. Neither a Liechtenstein national nor a national of another EEA State, who already operates a practice anywhere in the EEA, will be granted a licence to establish a practice in Liechtenstein. No exceptions to the single practice rule have ever been made. The single practice rule treats nationals of all EEA States in the same way. Therefore, it does not

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1 Case 96/85 *Commission* v *France* [1986] ECR 1475.

2 Case C-351/90 *Commission* v *Luxembourg* [1992] ECR I-3945.

einschlägigen Urteilen des EuGH ausgelegt werden müssen. Der Beschwerdeführer verweist auf die Urteile *Kommission./.Frankreich*[1] und *Kommission./.Luxemburg*[2]. In diesen Urteilen habe der EuGH eine ähnliche single practice rule als gemeinschaftsrechtswidrig verworfen.

18. Der Beschwerdeführe macht auch auf den Jahresbericht 1998 der EFTA-Überwachungsbehörde aufmerksam. Aus diesem Bericht ergibt sich, dass die EFTA-Überwachungsbehörde ein förmliche Verfahren gegen Liechtenstein wegen Verletzung der Niederlassungsfreiheit durch die streitige single practice rule eingeleitet hat. Die *single practice rule* verhindert, dass sich Zahnärzte aus anderen EWR-Staaten in Liechtenstein niederlassen können.

19. Der Beschwerdeführer schlägt daher die folgende Antwort auf die Fragen vor:

> *„Die auf Zahnärzte nach dem liechtensteinsichen Recht- insbesondere Artikel 23 Absatz 1 der Verordnung vom 8. November über die medizinischen Berufe - anwendbare single practice rule verstösst gegen das EWR-Abkommen vom 2. Mai 1992“.*

Die Regierung des Fürstentums Liechtenstein

Vorliegen einer offenen oder versteckten Diskriminierung

20. Die liechtensteinische Regierung macht geltend, die in Rede stehende *single practice rule* sei mit Artikel 31 EWR-Abkommen vereinbar.

21. Die Regierung Liechtenstein's argumentiert, die streitige *single practice rule* stelle weder eine offene noch eine versteckte Diskriminierung dar, die nach Artikel 31 EWR-Abkommen unzulässig wäre.

22. Die in Frage stehende *single practice rule* gelte sowohl für liechtensteinische Staatsangehörige als auch für Angehörige anderer EWR-Staaten. Weder liechtensteinische Staatsangehörige noch Angehörige anderer EWR-Staaten, die bereits eine Praxis im EWR unterhalten, erhalten eine Konzession zur Führung einer Arztpraxis in Liechtenstein. Von dieser Regel wurde noch nie eine Ausnahme gemacht. Nach der *single practice rule* werden Staatsangehörige aus allen EWR-Staaten gleich behandelt, weshalb keine Diskriminierung aufgrund der Staatsangehörigkeit und damit auch keine offene Diskriminierung vorliegt, die nach Art. 31 EWRA verboten wäre.

23. Die liechtensteinische Regierung räumt ein, dass nach der Rechtsprechung des EuGH[3] das Prinzip der Gleichbehandlung nicht nur offene

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1 EuGH 96/85 *Kommission./.Frankreich*, Slg. 1986, 1475.

2 EuGH C-351/90 *Kommission./.Luxemburg*, Slg. 1992, I-3945.

3 EuGH 152/73 *Sotgiu./.Deutsche Bundespost*, Slg. 1974, 153; Case 3/88 *Kommission./.Italien*, Slg. 1989, 4035; Case C-266/95 *Merino Garcia./.Bundesanstalt für Arbeit*, Slg. 1997, I-3279.

discriminate on grounds of nationality and, consequently, does not constitute overt discrimination prohibited by Article 31 EEA.

23. The Government of Liechtenstein acknowledges that, according to the case-law[3] of the Court of Justice of the European Communities, the principle of equal treatment prohibits not only overt discrimination on grounds of nationality, but also all covert forms of discrimination which, by application of other criteria of differentiation, lead in fact to the same result.

24. The Government of Liechtenstein notes that the Court of Justice of the European Communities rejected single practice rules in *Commission* v *Luxembourg*[4] and *Commission* v *France*.[5] However, the Government of Liechtenstein submits that those cases differ on essential points from the present case, in terms of their wording, effect, and context. Moreover, the Court of Justice of the European Communities did not consider single practice rules inadmissible in principle, but merely deemed the justifications invoked in those cases to be insufficient. It was the specific circumstances in both judgments which led the Court to the conclusion that the single practice rules were applied in a discriminatory way.

25. By contrast, the single practice rule at issue in the present case applies without distinction to nationals and non-nationals of Liechtenstein and is, in practice, not applied more strictly to physicians and dentists practising in other EEA States than those practising in Liechtenstein. There is no available derogation to the single practice rule, and no exception has ever been made to it, either for dentists established in Liechtenstein, or for dentists established in other EEA States. Thus, there is nothing which can substantiate the assertion that the persons disadvantaged by the single practice rule are exclusively or mainly foreign nationals. Referring to case-law[6] of the Court of Justice of the European Communities, the Government of Liechtenstein argues that the contested single practice rule cannot be viewed as giving rise to indirect discrimination on grounds of nationality.

26. The Government of Liechtenstein adds that the present case also differs substantially from the situations in the judgments in *Ciola* v *Land Vorarlberg*[7] and *Rainford-Towning*,[8] in which extremely strict standards were applied to the

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3 Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153; Case 3/88 *Commission* v *Italy* [1989] ECR 4035; Case C-266/95 *Merino García* v *Bundesanstalt für Arbeit* [1997] ECR I-3279.

4 See footnote 2.

5 See footnote 1.

6 Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877; Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897.

7 Case C-224/97 *Ciola* v *Land Vorarlberg* [1999] ECR I-2517.

8 Case E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205.

Diskriminierungen aufgrund der Staatsangehörigkeit verbietet, sondern auch alle Formen der versteckten Diskriminierungen, die durch die Anwendung anderer Unterscheidungskriterien zum gleichen Ergebnis führen.

24. Die Regierung nimmt zur Kenntnis, dass der EuGH in den Urteilen *Kommission./.Luxemburg*[4] und *Kommission./.Frankreich*[5] eine *single practice rule* verworfen hat. Allerdings unterscheiden sich diese Fälle nach dem Wortlaut, den Auswirkungen und dem Zusammenhang vom vorliegenden Fall. Überdies hat der EuGH die *single practice rule* nicht für grundsätzlich unzulässig erachtet, sondern nur die in diesen Fällen vorgetragenen Rechtfertigungsgründe für unzureichend gehalten. Die besonderen Umstände führten in beiden Urteilen dazu, dass der Gerichtshof zum Ergebnis kam, die *single practice rule* sei in einer diskriminierenden Weise angewendet worden.

25. Im Unterschied dazu gilt die *single practice rule* im vorliegenden Fall unterschiedslos für Staatsangehörige und Nicht-Staatsangehörige. Ausserdem wird sie in der Praxis nicht strenger gegenüber Ärzten und Zahnärzten aus anderen Mitgliedstaaten angewendet als gegenüber Medizinern aus Liechtenstein. Weder für Zahnärzte in Liechtenstein noch für Zahnärzte, die in anderen EWR-Staaten niedergelassen sind, wurde jemals eine Ausnahme gemacht. Es gibt keine Abweichungen von dieser Regel, weshalb nichts darauf hindeutet, dass es sich bei den durch die *single practice rule* Benachteiligten ausschliesslich oder hauptsächlich um fremde Staatsangehörige handelt. Unter Hinweis auf die Rechtsprechung des EuGH[6] bringt die liechtensteinische Regierung vor, die streitige Bestimmung könne nicht als indirekte Diskriminierung aufgrund der Staatsangehörigkeit angesehen werden.

26. Zusätzlich führt die Regierung aus, der vorliegende Fall unterscheide sich wesentlich von den Sachverhalten, die den Urteilen *Ciola./.Land Vorarlberg*[7] und *Rainford-Towning*[8] - in denen sehr strenge Massstäbe in der Frage der

4 Vgl. FN 2.

5 Vgl. FN 1.

6 EuGH 143/87 *Stanton./.Inasti*, Slg. 1988, 3877; Verbundene Rechtssachen 154/87 und 155/87 *RSVZ./.Wolf u.a.*, Slg. 1988, 3897.

7 EuGH C-224/97 *Ciola./.Land Vorarlberg*, Slg. 1999, I-2517.

8 EFTA-Gerichtshof E-3/98 *Rainford-Towning*, EFTA Ct.-Report 1998, 205.

question of non-discrimination. The provisions under scrutiny in those cases used as a distinguishing criterion not the nationality of the persons concerned, but their place of residence. The single practice rule at issue in the present case is in no way linked to any residence requirement in Liechtenstein. The single practice rule applies to all dentists already operating a practice in the EEA, be it in Liechtenstein or in any other EEA State, regardless of their nationality or their place of residence.

27. The Government of Liechtenstein submits that the extremely high proportion of dentists from other EEA States practising in Liechtenstein (25% in 1999) implies that the single practice rule has not had the effect of rendering it more onerous for nationals from other EEA States to establish themselves in Liechtenstein.

The existence of a restriction on the freedom of establishment

28. The Government of Liechtenstein acknowledges that the Court of Justice of the European Communities, in its judgments in *Commission* v *France*,[9] *Commission* v *Luxembourg*[10] and *Ordre des Avocats au Barreau de Paris* v *Klopp*,[11] found an infringement of the fundamental freedom of establishment, independently of the existence of any overt or covert discrimination. It follows that, even under the principle of equal treatment, of which Article 43 EC embodies a specific instance, a national measure which is applied without distinction to nationals and non-nationals of a Member State may still be considered incompatible, if it has the effect of restricting the right of establishment. The Court of Justice of the European Communities has followed this approach in several other cases.[12]

29. The Government of Liechtenstein considers that this progressive interpretation of Article 43 EC, which the Court of Justice of the European Communities has applied in its case-law on the single practice rule, is not directly relevant to the interpretation of Article 31 EEA.

30. Referring to the Advisory Opinion of the EFTA Court in *Rainford-Towning*,[13] the Government of Liechtenstein argues that, although the wording of

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9 See footnote 1.

10 See footnote 2.

11 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971.

12 Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897; Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877; Case C-53/95 *Inasti* v *Kemmler* [1996] ECR I-703; Case 292/86 *Gullung* v *Conseils de l'ordre des avocats du barreau de Colmar et de Saverne* [1988] ECR 111; Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

13 See footnote 8.

Nichtdiskriminierung angewendet wurden - zugrundegelegen haben. Die in diesen Fällen überprüften Vorschriften unterschieden nicht nach der Nationalität der betroffenen Personen, sondern nach dem Wohnsitz. Die vorliegend in Rede stehende *single practice rule* ist in keiner Weise mit einem Wohnsitzerfordernis in Liechtenstein verbunden. Die Regel gilt für alle Zahnärzte, die bereits eine Praxis im EWR unterhalten, sei es in Liechtenstein oder in einem anderen EWR-Staat, unabhängig von ihrer Staatsangehörigkeit oder ihrem Wohnsitz.

27. Die Regierung Liechtenstein's führt aus, der ausserordentlich hohe Anteil von Zahnärzten aus anderen EWR-Staaten in Liechtenstein (25% im Jahr 1999) belege, dass die single praxis rule nicht den Effekt hatte, Staatsangehörige aus anderen EWR-Staaten bei ihrer Niederlassung in Liechtenstein über Gebühr zu belasten.

Vorliegen einer Beschränkung der Niederlassungsfreiheit

28. Die liechtensteinische Regierung räumt ein, dass der EuGH in den Urteilen *Kommission./.Frankreich*[9], *Kommission./Luxemburg*[10] und *Ordre des Advocats au Barreau de Paris./.Klopp*[11] unabhängig vom Vorliegen einer offenen oder versteckten Diskriminierung eine Verletzung der Niederlassungsfreiheit angenommen hat. Aus dem Gleichbehandlungsgebot, das in Artikel 43 EG seinen besonderen Ausdruck findet, folgt, dass eine nationale Massnahme, die nicht zwischen Staatsangehörigen und Nichtstaatsangehörigen unterscheidet, trotzdem unzulässig sein kann, wenn sie eine Beschränkung der Niederlassungsfreiheit bewirkt. Der EuGH hat diesen Ansatz in mehreren anderen Fällen vertreten[12].

29. Die Regierung von Liechtenstein hält diese extensive Auslegung von Artikel 43 EG, die der Rechtsprechung des EuGH zur single practice rule zugrundeliegt, nicht für unmittelbar auf die Auslegung von Artikel 31 EWR-Abkommen übertragbar.

30. Unter Hinweis auf das Urteil des EFTA-Gerichtshofs in der Rechtssache *Rainford-Towning*[13] führt die liechtensteinische Regierung aus, die besonderen Umstände im vorliegenden Fall machten eine unterschiedliche Interpretation notwendig, obwohl Artikel 31 EWR-Abkommen und Artikel 43 EG den gleichen

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9 Vgl. FN 1.

10 Vgl. FN 2.

11 EuGH C-107/83 *Ordre des Avocats au Barreau de Paris./.Klopp*, Slg. 1984, 2971.

12 Verbundene Rechtssachen EuGH C-154/87 und C-155/87 *RSVZ./.Wolf u.a*, Slg. 1988, 3897; EuGH C-143/87 *Stanton./.Inasti*, Slg. 1988, 3877; EuGH C-53/95 *Inast./.Kemmler*, Slg. 1996, I-703; EuGH C-292/86 *Gullung./.Conseils de l'ordre des avocats du barreau de Colmar et de Saverne*, Slg. 1988, 111;EuGH C-55/94 *Gebhard ./.Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Slg. 1995, I-4165.

13 Vgl. FN 8.

Article 31 EEA is identical to that of Article 43 EC, the specific circumstances of the present case necessitate a different interpretation. This reasoning is based both on the fundamental differences in the scope and the purposes of the Community legal order and the EEA, and on the progressive development of the case-law of the Court of Justice of the European Communities on the freedom of establishment.

31. The Government of Liechtenstein submits that, through the progressive interpretation adopted by the Court of Justice of the European Communities, Community law reaches far into sensitive areas of national policy. Applying the same interpretation to the scope of the freedom of establishment under the EEA Agreement would affect Liechtenstein's autonomy to regulate its social policy. This interpretation is compatible with the objectives of Community law, but is not justifiable under the less ambitious intentions of the EEA Agreement.

32. The Government of Liechtenstein refers to *Opinion 1/91*[14] of the Court of Justice of the European Communities, in which the differences between the Community legal order and the EEA Agreement are discussed. The Government of Liechtenstein notes that the Contracting Parties to the EEA Agreement transferred no sovereign rights to the institutions which they set up. Therefore, they retain greater autonomy than the Member States of the European Communities, especially in the field of national legislative powers.

33. With the expansion of the EC Treaty in the field of social policy by the Treaty on the European Union and the Treaty of Amsterdam, the competence of the Community in the field of social policy was significantly increased. The EC Member States have, in the field of social policy, transferred sovereign rights to the Community institutions which go beyond the promotion of economic relations.

34. However, no such transfer of sovereign rights in the field of social policy has taken place under the EEA Agreement. If the EEA Agreement were to be extended to cover areas of national policy, the national ratification procedure and therefore the consent of the EEA States would be required.

35. The Government of Liechtenstein points out that the EEA Agreement is concerned solely with the promotion of trade and economic relations between the parties, whereas, within the EC Treaty, these objectives are not an end in themselves, but are instrumental in achieving economic and social progress "through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency".[15] The EEA Agreement contains no explicit reference to economic and monetary union.

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14 *Opinion 1/91* [1991] ECR I-6079

15 Article 2 EU.

Wortlaut haben. Diese Auffassung gründet sich auf die Ziel- und Kontextverschiedenheit der Rechtsordnung des EWR und der Gemeinschaftsrechtsordnung. Dazu komme eine immer weiter reichende Rechtsprechung des EuGH zur Niederlassungsfreiheit.

31. Nach Meinung der liechtensteinischen Regierung reicht das Gemeinschaftsrecht - bedingt durch die extensive Interpretation des EuGH - weit in sensible nationale Politikbereiche hinein. Würde man im Blick auf die Niederlassungsfreiheit im EWR den gleichen Massstab anlegen, dann wäre die Autonomie Liechtenstein's bei der Ausgestaltung seiner Sozialpolitik eingeschränkt. Eine solche Interpretation ist mit den Zwecken des Gemeinschaftsrechts vereinbar, aber angesichts der weniger weit reichenden Ziele ist sie im EWR nicht zu rechtfertigen.

32. Die liechtensteinische Regierung verweist auf das *Gutachten 1/91*[14] des EuGH, in dem die Unterschiede zwischen der Gemeinschaftsrechtsordnung und dem EWR-Abkommen dargelegt werden und stellt fest, dass die Parteien des EWR-Abkommens keine Souveränitätsrechte auf die von ihnen geschaffenen Institutionen übertragen haben. Deshalb behalten sie eine grössere Autonomie als die Mitgliedstaaten der Gemeinschaft. Das gilt insbesondere, wenn es um die nationale Gesetzgebungshoheit geht.

33. Die Ausdehnung des EG-Vertrags in den Bereich der Sozialpolitik durch den Unionsvertrag und den Vertrag von Amsterdam hat zu einem signifikanten Kompetenzzuwachs der Gemeinschaft in der Sozialpolitik geführt. Die Mitgliedstaaten haben im Bereich der Sozialpolitik Souveränitätsrechte auf die Institutionen der Gemeinschaft übertragen, die über eine Förderung der wirtschaftlichen Beziehungen hinausgehen.

34. Nach dem EWR-Abkommen hat jedoch keine solche Übertragung von Souveränitätsrechten in der Sozialpolitik stattgefunden. Wenn man das EWR-Abkommen auf diese nationalen Politikbereiche ausdehnen wollte, dann wäre dazu ein Ratifizierungsverfahren und damit die Zustimmung der EWR-Staaten notwendig.

35. Nach Meinung der liechtensteinischen Regierung betrifft das EWR-Abkommen ausschliesslich die Förderung der Handels- und Wirtschaftsbeziehungen zwischen den Abkommensparteien. Demgegenüber sind diese Ziele im EG-Vertrag kein Selbstzweck, sondern nur ein Mittel, um wirtschaftlichen und sozialen Fortschritt - durch „Schaffung eines Raumes ohne Binnengrenzen, durch Stärkung des wirtschaftlichen und sozialen Zusammenhalts und durch Errichtung einer Wirtschafts- und Währungsunion, die auf längere Sicht auch eine einheitliche Währung.... umfasst“[15] - zu erreichen. Das EWR-Abkommen enthält keinen ausdrückliche Verweis auf eine

14 EuGH *Gutachten 1/91*, Slg. 1991, I-6079.

15 Artikel 2 EU.

There is furthermore no equivalent commitment to establish an internal market as set out in Article 14 EC. The EEA is not intended to be an area without internal frontiers.

36. In the view of the Government of Liechtenstein, an interpretation of Article 31 EEA within the meaning of the judgments in *Commission* v *France*[16] and *Commission* v *Luxembourg*[17] would depart from the actual wording of that provision, which embodies a specific instance of the principle of equal treatment laid down in Article 4 EEA. This results in a severe restriction of the EEA States' sovereign rights. Such an interpretation cannot find a valid basis in the EEA Agreement, which is a traditional international agreement. An interpretation of the EEA Agreement may not go beyond what is necessary for the furtherance of trade and economic relations.

37. The Government of Liechtenstein takes the view that, under Article 31 EEA, the freedom of establishment of physicians and dentists in Liechtenstein is guaranteed to the extent required in the EEA Agreement. Any further requirement or modifications of the relevant provisions in this field, in particular the elimination of the single practice rule, would go beyond the aim of strengthening trade between the EEA States. Therefore, even if the EFTA Court were to take the view that the single practice rule restricted the freedom of establishment, such a restriction would still be within the objectives of the EEA Agreement.

Assessment under the case-law of the Court of Justice of the European Communities

38. In the alternative, if the EFTA Court were to conclude that Article 31 EEA must be construed and applied in the same way as the corresponding Article 43 EC, the Government of Liechtenstein submits that the restrictions entailed by the single practice rule are nonetheless compatible with Article 31 EEA.

39. The Government of Liechtenstein argues that the Court of Justice of the European Communities, in *Commission* v *Belgium*,[18] accepted Belgian legislation which was substantially similar to the single practice rule at issue in the present case, in that it hindered the possibility of secondary establishment. The Court held that the national rule was non-discriminatory, and upheld it, without assessing its proportionality in relation to its restrictive effect on the freedom of

16 See footnote 1.

17 See footnote 2.

18 Case 221/85 *Commission* v *Belgium* [1987] ECR 719.

Wirtschafts- und Währungsunion. Es besteht auch keine Verpflichtung, einen Binnenmarkt zu errichten wie nach Art. 14 EG. Der EWR ist nicht darauf gerichtet, ein Raum ohne interne Grenzen zu sein.

36. Die liechtensteinische Regierung vertritt die Meinung, eine Auslegung von Artikel 31 des EWR-Abkommens im Lichte der Urteile *Kommission./.Frankreich*[16] und *Kommission./.Luxemburg*[17] würde eine Abkehr vom Wortlaut der Bestimmung bedeuten, die nur ein besonderer Ausdruck des in Artikel 4 EWR-Abkommens enthaltenen Gleichbehandlungsgebotes ist. Eine solche Interpretation führte zu einer ernsten Beschränkung der Souveränitätsrechte der EWR-Staaten. Sie finde auch keine genügende Grundlage im EWR-Abkommen, das einen klassischen internationalen Vertrag darstelle. Eine Auslegung des EWR-Abkommens könne nicht über das hinausgehen, was notwendig ist, um den Handel und die wirtschaftlichen Beziehungen zu fördern.

37. Nach Auffassung der liechtensteinischen Regierung garantiert Artikel 31 EWR-Abkommen die Niederlassungsfreiheit von Ärzten und Zahnärzten in Liechtenstein in dem Umfang, wie es das EWR-Abkommen verlangt. Jede weitere Voraussetzung oder Änderung der einschlägigen Bestimmungen auf diesem Gebiet, insbesondere eine Abschaffung der *single practice rule*, ginge über den Zweck, den Handel zwischen den EWR-Staaten zu stärken, hinaus. Selbst wenn der EFTA-Gerichtshof zur Auffassung gelangen sollte, dass die *single practice rule* die Niederlassungsfreiheit einschränkt, so läge eine solche Einschränkung immer noch innerhalb der Ziele des EWR-Abkommens.

Beurteilung im Lichte der Rechtsprechung des EuGH

38. Für den Fall, dass der EFTA-Gerichtshof zum Ergebnis kommen sollte, Artikel 31 EWR-Abkommen müsse in der gleichen Weise wie Artikel 43 EG ausgelegt werden, macht die liechtensteinische Regierung geltend, die durch die single practice rule hervorgerufenen Beschränkungen seien trotzdem mit Art. 31 EWR-Abkommen vereinbar.

39. Die liechtensteinische Regierung bringt vor, der EuGH habe eine belgische Regelung[18], die inhaltlich der *single practice rule* im vorliegenden Fall ähnlich war, indem sie die Möglichkeit der Errichtung von Zweitniederlassungen behinderte, unbeanstandet gelassen. Der EuGH habe festgestellt, die nationale Regelung sei nicht diskriminierend und habe sie akzeptiert, ohne ihre Verhältnismässigkeit bezüglich der beschränkenden Wirkungen auf die

16 Vgl. FN 1.

17 Vgl. FN 2.

18 EuGH 221/85 *Kommission./.Belgien*, Slg. 1987, 719.

establishment. The Government of Liechtenstein also refers to *Fearon* v *Irish Land Commission*,[19] on similar reasoning.

40. The Government of Liechtenstein argues, in essence, that it is difficult to see how the Court of Justice of the European Communities arrived at different results in *Commission* v *Belgium*,[20] on the one hand, and in *Ordre des Avocats au Barreau de Paris* v *Klopp*,[21] *Commission* v *France*[22] and *Commission* v *Luxembourg*,[23] on the other hand. The Government of Liechtenstein contends that the latter judgments do not give a complete picture of the Court's case-law on secondary establishment. These differing results render it difficult to determine when the absence of discrimination on grounds of nationality alone is to be considered sufficient to show that the right of establishment has not been restricted.

41. In addition, there are substantial differences between the judgments in *Ordre des Avocats au Barreau de Paris* v *Klopp*,[24] *Commission* v *France*,[25] and *Commission* v *Luxembourg*,[26] and the situation in the present dispute. In the opinion of the Government of Liechtenstein, the economic and socio-political contexts of the cases are entirely different. In particular, there is one phenomenon which characterises and influences the health market at issue in the present case, but may not be found with respect to the activities of lawyers at issue in the *Klopp* case: the phenomenon of supply-induced demand. Referring to the *Liechtenstein Health Report*,[27] the Government of Liechtenstein submits that the increase in the supply on the health market, such as the increase in the number of practices, results in an increase in the demand for medical services and, ultimately, in an increase in health expenditure. This phenomenon is principally based on the incapability of the potential customers (the patients) to decide upon objective and rational considerations on their state of health and whether to avail themselves of the medical services offered or not. Therefore, establishment of further practices may have the effect of (artificially) increasing demand for medical services. The Government of Liechtenstein appears to assert that the phenomenon of supply-induced demand will apply equally in the case of dental services.

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19 Case 182/83 *Fearon* v *Irish Land Commission* [1984] ECR 3677.

20 See footnote 18.

21 See footnote 11.

22 See footnote 1.

23 See footnote 2.

24 See footnote 11.

25 See footnote 1.

26 See footnote 2.

27 Professor Friedrich Schneider, *Aktuelle Entwicklungen im Gesundheitssystem von Liechtenstein unter dem besonderen Aspekt der Single Practice Rule* (Current Developments of the Health System in Liechtenstein with a Particular View to the single practice rule), 24 October 2000 (Annex I to the written observations of the Government of Liechtenstein).

Niederlassungsfreiheit zu prüfen. Die liechtensteinische Regierung verweist mit einer ähnlichen Argumentation auf das Urteil *Fearon./.Irish Land Commission*[19].

40. Die liechtensteinische Regierung trägt i.w. vor, es sei schwierig zu erklären, warum der EuGH im Urteil *Belgien./. Kommission*[20] zu einem anderen Ergebnis gelangt sei als in den Urteilen *Ordre des Avocats au Barreau de Paris./.Klopp*[21], *Kommission./.Frankreich*[22] und *Kommission./.Luxemburg*[23]. Für die liechtensteinische Regierung geben die letzteren Urteile kein vollständiges Bild der EuGH-Rechtsprechung zur Frage der Zweitniederlassung. Die unterschiedlichen Ergebnisse machten es schwierig, zu bestimmen, wann das Fehlen einer Diskriminierung aufgrund der Staatsangehörigkeit allein als ausreichend anzusehen ist, um darzutun, dass die Niederlassungsfreiheit nicht beeinträchtigt ist.

41. Zusätzlich bestehen nach Auffassung der liechtensteinischen Regierung zwischen den Urteilen *Ordre des Avocats au Barreau de Paris./.Klopp*[24], *Kommission./.Frankreich*[25] und *Kommission./.Luxemburg*[26] und der Situation im vorliegenden Fall substantielle Unterschiede. Der wirtschafts- und sozialpolitische Zusammenhang der Fälle sei völlig unterschiedlich. Insbesondere gehe es im vorliegenden Fall um ein Phänomen, das den Gesundheitsmarkt prägt und beeinflusst und das in den Fällen von anwltlicher Tätigkeit - wie im *Klopp*-Fall - nicht zur Diskussion stand: das Phänomen der angebotsinduzierten Nachfrage. Unter Bezugnahme auf den *Liechtenstein Health Report*[27] verweist die liechtensteinische Regierung darauf, dass es durch die Zunahme von Arztpraxen zu einer Erhöhung der Nachfrage nach medizinischen Leistungen und schliesslich zu einer Erhöhung der Gesundheitskosten kommt. Das Phänomen gründet sich auf die Unfähigkeit potentieller Kunden (Patienten), in objektiver und rationaler Weise über ihren Gesundheitszustand zu entscheiden und darüber zu entscheiden, ob sie medizinische Dienstleistungen in Anspruch nehmen oder nicht. Deshalb kann die Niederlassung zusätzlicher Ärzte zu einer (künstlichen) Zunahme der Nachfrage nach medizinischen Leistungen führen. Die liechtensteinische Regierung nimmt offenbar an, dass das Phänomen der angebotsinduzierten Nachfrage auch im Fall von zahnmedizinischen Leistungen relevant ist.

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19 EuGH 182-83 *Fearon./.Irish land Commission*, Slg. 1984, 3677.

20 Vgl. FN 18.

21 Vgl. FN 11.

22 Vgl. FN 1.

23 Vgl. FN 2.

24 Vgl. FN 11.

25 Vgl. FN 1.

26 Vgl. FN 2.

27 Professor Friedrich Schneider, Aktuelle Entwicklungen im Gesundheitssystem von Liechtenstein unter dem besonderen Aspekt der Single Practice Rule, 24. Oktober 2000 (Anhang I zur schriftlichen Stellungnahme der Regierung von Liechtenstein).

42. The Government of Liechtenstein asserts that, due to the phenomenon of supply-induced demand, the implications of the establishment of secondary practices in the present case differs substantially from the situation in the *Klopp* case. In the case of physicians and dentists, the setting-up of secondary practices induces higher demand and therefore imposes higher, and often unbearable, costs on the health system of the host State. The single practice rules in these cases protect entirely different interests and, therefore, cannot be considered from the same point of view.

43. The Government of Liechtenstein adds that, in contrast to the situations in the cases *Commission* v *France*[28] and *Commission* v *Luxembourg*,[29] the single practice rule at issue here does not, in practice, prevent access to the medical and dental professions. Physicians and dentists, and their patients, are not in any way hindered from providing or demanding cross-border medical and dental services. There is no other EEA State where so many representatives of these professions from other EEA States offer their services, invoking the freedom of establishment, as in Liechtenstein.

44. According to the Government of Liechtenstein, the single practice rule constitutes a measure aimed at regulating the increasing health expenditure and ensuring the high quality of the medical and dental services provided, and is, therefore, part of the national legislation which regulates the health system in the country. Neither at Community level, nor in the framework of the EEA Agreement, has harmonisation of health systems taken place. Referring to *Decker* v *Caisse de Maladie des Employés Privés*,[30] the Government of Liechtenstein submits that it must be for the national legislation of each Member State to determine the conditions of the exercise of the medical and dental professions, and to regulate the way in which the health expenditures of the country are controlled. The Government of Liechtenstein asserts that there is no common definition of the exercise of the medical profession throughout the EEA. To ensure the high quality of the medical services provided in Liechtenstein, the professional rules of Liechtenstein's association of the medical professions and association of dentists require that a practitioner/dentist must be capable of operating a practice full-time. The Government of Liechtenstein submits that such provisions form part of the national legislation determining the ethics of the medical profession in the country. It is within the competence of the EEA States to adopt national rules aimed at ensuring the high quality of medical services in the country.

The justification of the single practice rule

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28 See footnote 1.

29 See footnote 2.

30 Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831.

42. Die Regierung Liechtenstein's behauptet, dass sich aufgrund des Phänomens der angebotsinduzierten Nachfrage die Auswirkungen von Zweitpraxen im vorliegenden Fall wesentlich von der Situation im *Klopp*-Fall unterscheiden. Eine Zweitpraxis eines Arztes oder eines Zahnarztes bedingt eine höhere Nachfrage und damit höhere und oft untragbare Kosten für das Gesundheitssystem des Aufnahmestaates. Eine single practice rule in solchen Fällen schützt andere Interessen und kann deshalb nicht vom gleichen Standpunkt aus betrachtet werden wie in anderen Fällen.

43. Im Unterschied zu den Fällen *Kommission./.Frankreich*[28] und *Kommission./.Luxemburg*[29] hindert die *single practice rule* im vorliegenden Fall in der Praxis nicht den Zugang zum ärztlichen und zum zahnärztlichen Beruf. Ärzte und Zahnärzte und deren Patienten sind in keiner Weise daran gehindert, grenzüberschreitende ärztliche und zahnärztliche Dienstleistungen zu erbringen bzw. nachzufragen. Es gibt keinen anderen EWR-Staat, in dem so viele Angehörige der in Frage stehenden medizinischen Berufe aus anderen EWR-Staaten in Ausübung der Niederlassungsfreiheit ihre Dienste anbieten wie in Liechtenstein.

44. Nach Auffassung der liechtensteinischen Regierung ist die single practice rule eine Massnahme zur Regulierung der ansteigenden Gesundheitskosten und soll gleichzeitig die hohe Qualität der ärztlichen und zahnärztlichen Dienste sichern, weshalb sie Teil der nationalen Gesundheitsgesetzgebung ist. Weder auf Gemeinschaftsebene noch im Rahmen des EWR-Abkommens ist es zu einer Harmonisierung der Gesundheitssysteme gekommen. Unter Hinweis auf das Urteil *Decker./.Caisse de Maladie des Employés Privés*[30] trägt die liechtensteinische Regierung vor, es müsse Sache der nationalen Gesetzgebung jedes Mitgliedstaates sein, die Bedingungen für die Ausübung des Arztberufs und des Zahnarztberufs und die Art der Kontrolle der Gesundheitskosten des Landes festzulegen. Die liechensteinische Regierung behauptet, dass es keine einheitliche Umschreibung der Berufsausübungsregeln für ärztliche Berufe im EWR gibt. Um die hohe Qualität der medizinischen Leistungen in Liechtenstein sicherzustellen, verlangen die Berufsausübungsvorschriften der liechtensteinischen Ärztevereinigung, dass ein Mediziner fähig sein muss, seine Praxis vollzeitlich zu führen. Die liechtensteinische Regierung trägt vor, eine solche Bestimmung sei Bestandteil der nationalen Gesetzgebung, welche die Ethik der medizischen Berufe im Land festlegt. Es liege in der Kompetenz der EWR-Staaten solche Regeln, welche die hohe Qualität der ärztlichen Leistungen sichern wollen, aufzustellen.

Die Rechtfertigung der single practice rule

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28 Vgl. FN 1.

29 Vgl. FN 2.

30 EuGH C-120/95 *Decker./. Caisse de Maladie des Employés Privés,* Slg. 1998, I-1831.

45. In the alternative, if the EFTA Court takes the view that the single practice rule is a restriction on the freedom of establishment within the meaning of Article 31 EEA, the Government of Liechtenstein submits that the single practice rule must be considered as justified by imperative reasons relating to the public interest.

46. The Government of Liechtenstein states that, in accordance with the case-law of the Court of Justice of the European Communities, non-discriminatory national measures liable to restrict the freedom of establishment may be justified by imperative requirements relating to general interest if they fulfil three conditions: first, they must be suitable for securing the attainment of the objective which they pursue; second, they must not go beyond what is necessary in order to attain the objective; third, the restriction of the freedom of establishment must be proportionate to the general interest of the objective pursued.

Imperative reasons relating to the general interest

47. The Government of Liechtenstein submits that the single practice rule at issue is adequately justified by imperative reasons relating to the general interest. The public interest at stake is the maintenance of the financial equilibrium of Liechtenstein's social security system in view of the significant increase in the number of practitioners which would otherwise occur, the sustainability of a health care system accessible to all, and the maintenance of the high quality of medical and dental services provided in Liechtenstein.

48. According to the *Liechtenstein Health Report*,[31] the abolition of the single practice rule would have a serious effect on the financial equilibrium of the social security system and therefore endanger the sustainability of the current health system and the high quality of the medical and dental services provided.

49. In relation to the abovementioned public interests, the Government of Liechtenstein refers to *Duphar and Others* v *Netherlands*,[32] from which it follows that Community law does not detract from the powers of Member States to organise their social security system. Member States may adopt provisions which not only promote financial stability but also eliminate the deficit of their health care system. Moreover, it follows from *Kohll* v *Union des Caisses de Maladie*[33] that measures connected with the control of health expenditures may be justified.

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31 See footnote 27.

32 Case 238/82 *Duphar BV and Others* v *Netherlands* [1984] ECR 523.

33 Case C-158/96 *Kohll* v *Union des Caisses de Maladie* [1998] ECR I-1931.

45. Für den Fall, dass der EFTA-Gerichtshof zur Auffassung gelangen sollte, die *single practice rule* sei eine Beschränkung der Niederlassungsfreiheit im Sinne von Artikel 31 EWR-Abkommen, trägt die liechtensteinische Regierung vor, dass die *single practice rule* aus zwingenden Gründen des öffentlichen Interesses gerechtfertigt sei.

46. Die liechtensteinische Regierung bringt vor, nach der Rechtsprechung des EuGH seien nicht diskriminierende Regelungen, welche die Niederlassungsfreiheit beeinträchtigen dann aus zwingenden Gründen des öffentlichen Interesses gerechtfertigt, wenn sie drei Voraussetzungen erfüllen: (1) Sie müssen zur Erreichung des verfolgten Ziels geeignet sein; (2) sie dürfen nicht über das hinausgehen, was zur Erreichung des Ziels erforderlich ist; (3) die Beschränkung der Niederlassungsfreiheit muss verhältnismässig zum öffentlichen Interesse am angestrebten Ziel sein.

Zwingende Gründe des öffentlichen Interesses

47. Die liechtensteinische Regierung ist der Auffassung, die *single practice rule* sei im vorliegenden Fall hinreichend durch zwingende Gründe des allgemeinen Interesses gerechtfertigt. Das öffentliche Interesse in diesem Fall bezieht sich auf die Erhaltung des finanziellen Gleichgewichts des liechtensteinischen Systems der Sozialen Sicherheit im Blick auf die deutliche Zunahme der Zahl der Mediziner, die ohne diese Regelung eintreten würde. Ausserdem geht es um die Nachhaltigkeit eines allen Menschen zugänglichen Gesundheitssystems und um die Aufrechterhaltung der hohen Qualität der in Liechtenstein angebotenen medizinischen und zahnmedizinischen Leistungen.

48. Nach dem *Liechtenstein Health Report*[31] würde die Abschaffung der single practice rule ernste Auswirkungen auf das finanzielle Gleichgewicht des Systems der Sozialen Sicherheit haben und deshalb die Nachhaltigkeit und die Qualität der medizinischen Leistungen gefährden.

49. Zum erwähnten öffentlichen Interesse verweist die liechtensteinische Regierung auf das Urteil *Duphar u.a./.Niederlande*[32]. Aus diesem Urteil folge, dass die Gemeinschaft den Mitgliedstaaten die Kompetenz zur Regelung ihrer Systeme der Sozialen Sicherheit nicht entzogen hat. Die Mitgliedstaaten sind frei, nicht nur Bestimmungen zu erlassen, welche die finanzielle Stabilität fördern, sondern auch das Defizit des Gesundheitssystems eliminieren. Darüber hinaus folge aus dem Urteil *Kohll./.Union des Caisses de Maladie*[33], dass Massnahmen in Verbindung mit der Kontrolle der Gesundheitskosten gerechtfertigt sein können.

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31 Vgl. FN 27.

32 EuGH 238/82 *Duphar BV u.a./.Niederlande*, Slg. 1984, 523.

33 EuGH C-158/96 *Kohll./.Union des Caisses de Maladie, Slg. 1998, I-1931.*

The specific nature of the health market

50. The Government of Liechtenstein asserts that the specific nature of the health system and the health market justifies the way in which the health system is funded and can remain beneficial and efficient. The Government of Liechtenstein finds support for this view in *Webb*.[34]

51. The Government of Liechtenstein submits that the health market and the health service in Liechtenstein are of an extraordinarily high standard and quality.

52. The Government of Liechtenstein furthermore submits that the Liechtenstein health market is distinguished by being extremely liberal. Physicians and dentists, and their patients, are not limited with regard to supply or demand of cross-border medical and dental services. Patients enjoy a high degree of freedom in the choice of providers of medical and dental services.

53. In addition, the Government of Liechtenstein points out that, due to the small size of the country, there exists a strong interdependence between the health market in Liechtenstein and the development of the respective health regimes in Liechtenstein's neighbouring countries.

54. Referring to the *Liechtenstein Health Report*,[35] the Government of Liechtenstein also submits that the financial stability of the health system in Liechtenstein is exposed to growing pressure, due to increasing demand and continually rising health costs. Health insurers and insured patients have suffered from major increases in expenditure and premiums.

55. Based on collected statistical material,[36] the Government of Liechtenstein contends that the number of physicians and dentists in Liechtenstein is proportionally higher than in neighbouring countries. The financial stability of the health system in Liechtenstein is exposed to growing pressure due to an increasing demand and continually increasing health costs. Referring to the *Liechtenstein Health Report*,[37] the Government of Liechtenstein submits that the health expenditure *per capita* in Liechtenstein is already higher than in countries that traditionally have been assumed to spend most on their health service, such as Switzerland.

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34 Case 279/80 *Webb* [1981] ECR 3305.

35 See footnote 27.

36 Statistics on the number of physicians per inhabitants in Austria and Liechtenstein based on data provided by the Ärztekammer Wien and the Government of Liechtenstein, Department of Public Health and Social Affairs, October 2000 (Annex II to the written observations of the Government of Liechtenstein).

37 See footnote 27.

Die besondere Natur des Gesundheitsmarktes

50. Die Regierung Liechtenstein's bringt vor, die besondere Natur des Gesundheitssystems und des Gesundheitsmarktes rechtfertige die Art, wie das Gesundheitssystem finanziert wird und damit nützlich und effizient bleiben kann. Diese Auffassung werde durch das Urteil *Webb*[34] unterstützt.

51. Die liechtensteinische Regierung macht geltend, der Gesundheitsmarkt und das Gesundheitssystem in Liechtenstein wiesen einen ausserordentlich hohen Standard und eine ausserordentlich hohe Qualität auf.

52. Die liechtensteinische Regierung weist ausserdem darauf hin, dass sich der liechtensteinische Gesundheitsmarkt insbesondere durch seine extreme Liberalität auszeichnet. Ärzte, Zahnärzte und deren Patienten sind im Blick auf das Angebot von oder die Nachfrage nach grenzüberschreitenden medizinischen und zahnmedizinischen Leistungen nicht eingeschränkt. Die Patienten verfügen über einen grossen Freiraum bei der Arzt- und Zahnarztwahl.

53. Zuätzlich hebt die liechtensteinische Regierung hervor, aufgrund der geographischen Grösse des Landes bestehe ein enger Zusammenhang zwischen dem liechtensteinischen Gesundheitsmarkt und der Entwicklung der Gesundheitssysteme in den Nachbarstaaten.

54. Unter Hinweis auf den *Liechtenstein Health Report*[35] macht die Regierung auch geltend, das finanzielle Gleichgewicht des Gesundheitssystems sei wegen der steigenden Nachfrage und den ständig steigenden Gesundheitskosten erheblichem Druck ausgesetzt. Versicherer und versicherte Patienten hätten unter erheblichen Prämienerhöhungen bzw. steigenden Gesundheitskosten zu leiden.

55. Gestützt auf statistisches Material[36] hebt die Regierung hervor, dass die Anzahl der Ärzte und Zahnärzte verglichen mit den Nachbarländern in Liechtenstein höher ist. Die finanzielle Stabilität des Gesundheitssystems in Liechtenstein sei erhöhtem Druck ausgesetzt, der sich aus der steigenden Nachfrage und den kontinuierlich steigenden Gesundheitskosten ergebe. Unter Hinweis auf den *Liechtenstein Health Report*[37] bringt die liechtensteinische Regierung vor, die Gesundheitsausgaben *per capita* seien in Liechtenstein bereits höher als in Ländern, die traditionell hohe Ausgaben im Gesundheitswesen tätigen, wie z.B. der Schweiz.

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34 EuGH 279/80 *Webb*, Slg. 1981, 3305.

35 Vgl. FN 27.

36 Statistik über die Anzahl der Ärzte pro Einwohner in Österreich und in Liechtenstein. Die Daten stützen sich auf Angaben der Ärztekammer Wien und der Regierung von Liechtenstein (Abteilung für öffentliche Gesundheit und soziale Angelegenheiten, Oktober 2000). Annex II der schriftlichen Stellungnahme der liechtensteinischen Regierung.

37 Vgl. FN 27.

56. Referring to the *Liechtenstein Health Report*[38] and the Commission's *Report on Social Protection in Europe 1999*,[39] the Government of Liechtenstein points out that there is a strong correlation between the supply of medical services and the expenditure on the health system, namely, the phenomenon of supply-induced demand. Supply-induced demand is, in particular, made possible in health systems with a high level of insurance coverage for treatment costs. On this basis, the Government of Liechtenstein states that the total health expenditure in Liechtenstein can be expected to rise significantly if the number of practitioners offering services in Liechtenstein becomes even higher.

57. The Government of Liechtenstein observes that, since the health market in Liechtenstein was made accessible to physicians and dentists from other EEA States in 1997, there has been a sharp increase in the number of medical and dental practitioners operating in Liechtenstein. Based on the *Liechtenstein Health Report*,[40] the Government of Liechtenstein points out that the rise in medical expenses in Liechtenstein during the same period gives cause for concern.

58. The Government of Liechtenstein states that Liechtenstein needs to find ways to monitor its escalating health expenditure. One way consists of preventing an uncontrollable increase in the number of practitioners, as implemented through the single practice rule.

59. It follows from the written submissions that, under the Liechtenstein health system, part of the costs for dental treatment is to be borne by the patients themselves. The submission may be read as implying that the validity of the arguments set out above is not thereby diminished, and that the incentive for dentists to establish themselves in Liechtenstein is not reduced. Moreover, the Government of Liechtenstein argues that the fact that patients must bear a part of their dental treatment costs does not eliminate the phenomenon of supply-induced demand. Dentists profit from their medical knowledge and may strongly influence the decision of their patients and their concern for their state of health. According to the Government of Liechtenstein, patients fear the consequences of dental problems even more than other medical problems, and place an even higher degree of confidence in the dentist. Therefore, the phenomenon of supply-induced demand is present and leads to a rapid increase in the number of dentists establishing themselves in Liechtenstein.

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38 Ibid.

39 Commission of the European Communities: *Report on Social Protection in Europe 1999*, COM/2000/0163 final.

40 See footnote 27.

56. Unter Hinweis auf den *Liechtenstein Health Report*[38] und den Report on Social Protection in Europe 1999 der Kommission[39] hebt die liechtensteinische Regierung hervor, dass zwischen dem Angebot von medizinischen Leistungen und den Gesundheitsausgaben ein enger Zusammenhang besteht. Dabei handelt es sich um das Phänomen der angebotsinduzierten Nachfrage. Diese tritt insbesondere in Gesundheitssystemen mit einem hohen Niveau an Versicherungsschutz für Behandlungskosten auf. Gestützt darauf muss die liechtensteinische Regierung davon ausgehen, dass die Gesundheitskosten in erheblichem Umfang steigen werden, wenn sich die Anzahl der niedergelassenen Mediziner weiter erhöht.

57. Die liechtensteinische Regierung hat eine starke Zunahme der Anzahl der in Liechtenstein tätigen Ärzte festgestellt, seit der Gesundheitsmarkt im Jahr 1997 für Ärzte und Zahnärzte aus anderen EWR-Staaten geöffnet wurde. Der *Liechtenstein Health Report*[40] gibt der liechtensteinische Regierung Anlass zur Sorge, weil die Gesundheitskosten in Liechtenstein während dieses Zeitraums erheblich angestiegen sind.

58. Für Liechtenstein besteht nach Auffassung der Regierung die Notwendigkeit, Mittel und Wege zu finden, um die steigenden Gesundheitskosten in den Griff zu bekommen. Ein Mittel dazu ist die *single practice rule*, mit der eine unkontrollierte Zunahme der Anzahl von Medizinern verhindert wird.

59. Aus den schriftlichen Ausführungen geht hervor, dass ein Teil der Kosten für zahnmedizinische Behandlung von den Patienten selbst getragen werden muss. Die Ausführungen kann man dahin verstehen, dass die Gültigkeit der oben erwähnten Argumente dadurch nicht gemindert wird und dass der Anreiz für Zahnärzte, sich in Liechtenstein niederzulassen, nicht vermindert wird. Die liechtensteinische Regierung argumentiert überdies, dass die Tatsache, dass die Patienten einen Teil der Kosten selber zu tragen haben, das Phänomen der angebotsinduzierten Nachfrage nicht eliminiert. Zahnärzte profitieren von ihrem medizinischen Wissen und können die Entscheidungen ihrer Patienten sowie deren Sorge um die Gesundheit stark beeinflussen. Gemäss der liechtensteinischen Regierung fürchten die Patienten die Konsequenzen von Zahnproblemen noch mehr als andere medizinische Probleme und haben entsprechend mehr Vertrauen in den Zahnarzt. Das Phänomen der angebotsinduzierten Nachfrage ist daher gegeben, und es führt zu einem raschen Anstieg der Anzahl von Zahnärzten, die sich in Liechtenstein niederlassen.

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38 Vgl. FN 27.

39 Kommission der Europäischen Gemeinschaften: Bericht über den sozialen Schutz in Europa 1999, COM/2000/0163final.

40 Vgl. FN 27.

The suitability of the single practice rule

60. The Government of Liechtenstein contends that the necessity of the single practice rule and its suitability for the maintenance of the financial stability and high quality of the Liechtenstein health system must be considered with reference to the specific nature of Liechtenstein's health market.

61. The single practice rule has for years been applied consistently in order to prevent further, unaffordable increases in the number of medical practitioners and the ensuing rise in health costs, without at the same time preventing the establishment of practitioners from other EEA States.

62. It was in the light of these considerations that, during the reform of the health system in Liechtenstein, the Government of Liechtenstein opted for the maintenance of the single practice rule, rather than introducing a system requiring a licence from the national health insurance agencies, and allowing only a certain number of practitioners to provide services covered by health insurance in Liechtenstein.

63. The attractive economic conditions for operating a practice in Liechtenstein, combined with the strong temptation for physicians and dentists to create supply-induced demand, bring about a strong incentive for physicians and dentists to operate a practice, and particularly a second practice, in Liechtenstein.

64. Referring to the *Liechtenstein Health Report*,[41] the Government of Liechtenstein contends that, if the single practice rule is abolished, health expenditure in Liechtenstein is likely to rise by between 26% and 34.8%, based on hypothetical calculations.

65. As patients have to bear part of the costs for dental treatment themselves, the Government of Liechtenstein accepts that the effect on health expenditure due to the increase in the number of dental practices may not be as strong as for physicians. However, it states that this does not alter the fact that, with an increase in the number of physicians in the country, health expenditure will rise, and the premiums and costs for medical treatment will increase. This will ultimately affect the prosperity of the population.

66. The Government of Liechtenstein points out that it is primarily Austrian medical and dental practitioners who are keen to establish secondary practices in Liechtenstein. Due to the adjacency of the two countries, those practitioners can reap the benefits of having two practices close together.

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41 Ibid.

Eignung der single practice rule

60. Die Eignung und Notwendigkeit der *single practice rule* zur Beibehaltung des finanziellen Gleichgewichts und der Qualität des liechtensteinischen Gesundheitssystems muss nach Meinung der liechtensteinischen Regierung vor dem Hintergrund der besonderen Gegebenheiten des liechtensteinischen Gesundheitsmarkts gesehen werden.

61. Die *single practice rule* wird seit Jahren konsistent angewendet, um einen weiteren, unbezahlbaren Anstieg der Anzahl von Medizinern und den damit verbundenen Anstieg der Kosten zu vermeiden, ohne dabei die Niederlassung von Ärzten aus anderen EWR-Staaten zu verhindern.

62. Im Lichte dieser Überlegungen hat sich die liechtensteinische Regierung bei der Reform des Gesundheitssystems für die Beibehaltung der *single practice rule* entschieden und auf die Einführung eines Kassenarztsystems, in dem die Ärzte eine Zulassung durch die nationalen Krankenversicherer benötigen, verzichtet. In einem Kassenarztsystem kann nur eine bestimmte Anzahl von Ärzten ihre Leistungen mit Versicherungsdeckung anbieten.

63. Die attraktiven wirtschaftlichen Bedingungen zum Führen einer Praxis in Liechtenstein kombiniert mit dem Hang von Ärzten und Zahnärzten, eine angebotsinduzierte Nachfrage zu erzeugen, sind starke Anreize, in Liechtenstein eine Arztpraxis oder eine Zahnarztpraxis - insbesondere eine Zweitpraxis - zu unterhalten.

64. Unter Hinweis auf den *Liechtenstein Health Report*[41] nimmt die liechtensteinische Regierung an, dass für den Fall, dass die single practice rule abgeschafft wird, die Gesundheitskosten vermutlich um 26 bis 34,8% steigen werden.

65. Da die Patienten einen Teil der Kosten für zahnmedizinische Behandlung selbst tragen müssen, räumt die liechtensteinische Regierung ein, dass ein Anstieg der Anzahl der Zahnarztpraxen nicht denselben Effekt auf die Gesundheitskosten hätte wie ein Anstieg der Anzahl der Arztpraxen. Die Regierung stellt aber fest, dass das nichts an der Tatsache ändert, dass mit einem Anstieg der Anzahl der Ärzte die Gesundheitskosten steigen und die Prämien und Kosten für medizinische Behandlung steigen werden. Das werde sich letztlich auf die Prosperität der Bevölkerung auswirken.

66. Die liechtensteinische Regierung weist darauf hin, dass es insbesondere österreichische Ärzte und Zahnärzte sind, die eine Zweitpraxis in Liechtenstein eröffnen wollen. Aufgrund der geographischen Nähe zwischen den beiden

41 Vgl. FN 27.

67. The Government of Liechtenstein contends that nationals of EEA States who have not yet established a practice enjoy an advantage under the system of the single practice rule. They will generally be authorised to operate a practice in Liechtenstein. The single practice rule is only applicable to those who already operate a practice. It prevents exploitation by physicians and dentists of the economic advantages offered by Liechtenstein and its liberal health system through the establishment of secondary practices.

68. The Government of Liechtenstein contends that, under the influence of supply-induced demand, the rules of the market economy do not apply. The single practice rule reduces the possibility of creating artificial demand and increasing health expenditure. This ultimately benefits the consumers, as their contributions would otherwise be raised either by an increase in health insurance premiums or by an increase in costs.

69. The Government of Liechtenstein submits that medical and dental practitioners who establish a second practice would not be able to provide the necessary continuous and permanent medical and dental care for their patients as practitioners who exclusively operate one practice in a country.

70. The Government of Liechtenstein submits, therefore, that the single practice rule is a suitable measure to secure the financial stability of the social security system, the sustainability of its health system, and the high quality of medical services provided in the country.

The necessity of the single practice rule

71. The Government of Liechtenstein argues that the single practice rule does not go beyond what is necessary in order to maintain the objectives pursued. During the preparation of the health reform in Liechtenstein, other systems were considered in order to assess whether they constituted a less restrictive way to prevent excessive cost increases. The Government of Liechtenstein asserts that the single practice rule constitutes the least restrictive means of attaining the abovementioned objectives.

72. An increase in the number of practitioners on a national health market results at the same time in an increase of the total health expenditure in that country. Several other EEA States have experienced this. Some of these EEA States, for example, Austria and Germany, have reacted to the increasing costs by introducing a licence system limiting the number of practitioners under the health insurance system. According to the Government of Liechtenstein, the Commission of the European Communities has deemed such a system of limiting the number of practitioners to be compatible with Community law, as long as practitioners from all Member States are guaranteed equal access to obtain a licence, under the same conditions, and in the same manner as nationals from the host Member State.

Ländern können diese Mediziner die Vorteile nützen, welche sich aus dem Betrieb zweier nah beieinanderliegender Arztpraxen ergeben.

67. Die liechtensteinische Regierung sieht sogar einen Vorteil der *single practice rule* für Ärzte, die in anderen EWR-Staaten noch keine Praxis eröffnet haben. Solche Ärzte werden im allgemeinen eine Genehmigung in Liechtenstein erhalten. Die *single practice rule* gilt nur für Ärzte, die bereits eine andere Praxis unterhalten. Dadurch wird verhindert, dass Ärzte durch die Eröffnung einer Zweitpraxis die wirtschaftlichen Vorteile des liberalen liechtensteinischen Gesundheitssystems ausnützen.

68. Nach Auffassung der liechtensteinischen Regierung können die Regeln der Marktwirtschaft unter dem Einfluss der angebotsinduzierten Nachfrage keine Anwendung finden. Die *single practice rule* reduziert die Möglichkeit, dass eine künstliche Nachfrage geschaffen wird und Kostensteigerungen entstehen. Das kommt letztlich den Konsumenten zugute, die ansonsten mit höheren Prämien oder Kosten rechnen müssten.

69. Die liechtensteinische Regierung geht davon aus, dass es einem Arzt oder einem Zahnarzt mit einer Zweitniederlassung im Gegensatz zu einem Arzt oder Zahnarzt mit nur einer Praxis nicht möglich wäre, die notwendige kontinuierliche und permanente medizinische Betreuung seiner Patienten sicherzustellen.

70. Aus diesen Gründen betrachtet die liechtensteinische Regierung die *single practice rule* als geeignete Massnahme zur Sicherstellung der finanziellen Stabilität des Systems der Sozialen Sicherheit, der Nachhaltigkeit des Gesundheitssystems und der hohen Qualität der medizinischen Dienste, die im Land erbracht werden.

Notwendigkeit der single practice rule

71. Die liechtensteinische Regierung ist der Auffassung, die *single practice rule* gehe nicht über das hinaus, was zur Erreichung des beabsichtigten Ziels notwendig ist. Im Zuge der Vorbereitung der Gesundheitsreform wurden auch andere Möglichkeiten geprüft, um festzustellen, ob mit weniger einschneidenden Mitteln Kostensteigerungen verhindert werden können. Die liechtensteinische Regierung ist überzeugt, dass die *single practice rule* die am wenigsten einschneidende Massnahme ist, um die angegebenen Ziele zu erreichen.

72. Eine Zunahme der Anzahl von Ärzten und Zahnärzten in einem nationalen Gesundheitsmarkt führt zu einer Erhöhung der totalen Gesundheitskosten in diesem Land. Zahlreiche andere EWR-Staaten haben diese Erfahrung gemacht. Einige dieser Staaten, z.B. Österreich und Deutschland, haben auf den Kostenanstieg mit einem Konzessionssystem, das die Anzahl der Kassenärzte limitiert, reagiert. Die Kommission erachtet ein solches System als gemeinschaftskonform, solange Ärzten aus allen Mitgliedstaaten der gleiche Zugang zur Konzession offensteht wie Ärzten aus dem Aufnahmestaat.

73. The Government of Liechtenstein contends that such systems may also employ conditions for admission under the health insurance scheme which might result in a considerably stronger restriction on the freedom of establishment. Liechtenstein operates a system with comparably limited restrictions and prerequisites.

74. Other public health regimes apply systems which limit the admission of practitioners as soon as there is a disproportionate number of practitioners in a certain area. However, such a reaction to an excessive number of practitioners in the country may, in fact, result in a complete restriction of admissions for a certain period of time. Liechtenstein has chosen an approach which, in its result, is less restrictive, as it constantly allows practitioners of the EEA States to establish themselves in Liechtenstein. This approach was kept even though the representation of physicians and dentists in Liechtenstein (one physician for every 642 inhabitants and one dentist for every 1670 inhabitants in 2000) is generally higher than in other countries and the increase in the density of physicians and dentists in Liechtenstein gives cause for concern.

75. The Government of Liechtenstein claims that it must be the effect of a provision, and not merely the wording of a provision, which determines its compatibility or incompatibility with the EEA Agreement. The proportion in Liechtenstein of dentists from other EEA States (25% in 1999) is higher than in many other EEA States.

76. The Government of Liechtenstein emphasises that the role of the single practice rule is to reduce the attractiveness for all those who intend to exploit the economically advantageous conditions of a secondary practice in Liechtenstein. The measure simply prevents an increase in the number of suppliers and, therefore, an increase in health expenditure which does not at the same time contribute to the quality of the health system for the benefit of the patients.

77. According to the Government of Liechtenstein, it must be concluded that none of the systems which has been considered as an alternative to the single practice rule offers a less restrictive means for the attainment of the financial equilibrium of the social security system. On the contrary, the single practice rule constitutes an extremely moderate restriction on access to the profession as a practitioner in Liechtenstein and achieves freedom of establishment in Liechtenstein to the greatest possible extent.

The proportionality of the single practice rule

78. The Government of Liechtenstein submits that the single practice rule is proportionate to the general interest of the objectives pursued.

73. Nach Auffassung der liechtensteinischen Regierung kann ein solches System auch Bedingungen für die Zulassung zur Krankenversicherung enthalten, die zu einer bedeutend stärkeren Einschränkung der Niederlassungsfreiheit führen. Demgegenüber kommt Liechtenstein mit vergleichbar geringfügigen Einschränkungen und Anforderungen aus.

74. Andere öffentliche Gesundheitssysteme wenden Mittel an, die den Zugang von Medizinern begrenzen, sobald eine unverhältnismässig hohe Zahl in einem bestimmten Gebiet praktiziert. Eine solche Reaktion auf eine übermässige Zunahme der Dichte an Ärzten und Zahnärzten in einem Land kann tatsächlich zu einer totalen Zugangsbeschränkung für einen bestimmten Zeitraum führen. Liechtenstein hat sich demgegenüber für einen weniger einschränkenden Ansatz entschieden. Ärzte und Zahnärzte können sich ständig in Liechtenstein niederlassen. Diesem Ansatz ist man treu geblieben, obwohl die Anzahl der Ärzte und Zahnärzte in Liechtenstein generell höher ist als in anderen Staaten und der Anstieg der Arzt- und Zahnarztdichte Anlass zur Sorge gibt (ein Arzt pro 624 Einwohner und ein Zahnarzt pro 1670 Einwohner im Jahr 2000).

75. Für die liechtensteinische Regierung kommt es bei der Frage, ob eine Regelung mit dem EWR-Abkommen vereinbar ist oder nicht, auf die Auswirkung und nicht auf den Wortlaut an. Der Anteil ausländischer Zahnärzte aus anderen EWR-Staaten ist in Liechtenstein höher als in vielen anderen EWR-Ländern (25% im Jahr 1999).

76. Die liechtensteinische Regierung betont, Aufgabe der *single practice rule* sei es, die Attraktivität für all die, welche von den wirtschaftlich vorteilhaften Bedingungen einer Zweitpraxis in Liechtenstein profitieren wollen, zu reduzieren. Die Massnahme verhindere einen Anstieg der Anbieter und damit einen Anstieg der Gesundheitskosten. Ein solcher trage nicht zur Qualität des Gesundheitssystems bei und liege auch nicht im Interesse der Patienten.

77. Nach der liechtensteinischen Regierung muss man zum Ergebnis kommen, dass keines der Systeme, die als Alternative zur *single practice rule* in Erwägung gezogen wurden, weniger einschneidende Massnahmen zur Sicherung des finanziellen Gleichgewichts des Systems der Sozialen Sicherheit mit sich bringt. Die *single practice rule* sei im Gegenteil eine äusserst moderate Einschränkung des Zugangs zur Arzttätigkeit in Liechtenstein und verwirkliche die Niederlassungsfreiheit in Liechtenstein im grösstmöglichen Umfang.

Verhältnismässigkeit der single practice rule

78. Die liechtensteinische Regierung trägt vor, die *single practice rule* sei im Hinblick auf das öffentliche Interesse an den verfolgten Zielen auch verhältnismässig.

79. The Government of Liechtenstein finds support for this submission in *Ramrath* v *Ministre de la Justice*.[42] In that case, the Court of Justice of the European Communities held that, in view of the special nature of certain professional activities, the imposition of specific requirements pursuant to the rules governing such activities cannot be considered incompatible with the EC Treaty. The aims pursued in that case are, to a certain extent, comparable to the objectives pursued by the Liechtenstein rule in the present case, namely, to ensure the availability and continuity of presence of the physician and dentist. Yet, the objectives pursued by the Liechtenstein rule in the present case go further, since it also concerns the financial stability of the health care system and the high quality of medical services rendered in the country.

80. The Government of Liechtenstein submits that the judgments in *Kohll* v *Union des Caisses de Maladie*[43] and *Decker* v *Caisse de Maladie des Employés Privés*[44] are also of importance in this connection, since, in those cases, the Court of Justice of the European Communities explicitly acknowledged that national measures may be justified if they attempt to protect the financial balance of the social security system. The two cases show the Court's awareness of the tremendous importance of the affordability and sustainability of the health systems of the Member States.

81. The Government of Liechtenstein states that, in the light of the considerable public interest element at stake, the single practice rule constitutes a tolerable restriction on the freedom of establishment.

82. Many other countries in Europe are challenged with comparable difficulties in securing the financial balance of their social security systems and the maintenance of affordable health regimes. However, it must be considered that, in the special case of Liechtenstein, due to the limited size of the country and its strong inter-dependence with the neighbouring countries, the public interest at stake takes on an even stronger significance.

83. The Government of Liechtenstein observes that, if it were to adopt a licence system regulating the admission of practitioners in the country, the number of practitioners from other EEA States would be considerably lower than it is under the current regime.

84. The Government of Liechtenstein concludes that the single practice rule is justified by imperative reasons relating to the general interest. It constitutes a non-discriminatory and suitable measure which is necessary to attain the intended objective and is proportionate to the general interest of the objective pursued.

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42 Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351.

43 See footnote 33.

44 See footnote 30.

79. Die Regierung macht geltend, diese Auffassung finde Rückhalt im Urteil *Ramrath./.Ministre de la Justice*[42]. In diesem Fall habe der EuGH vor dem Hintergrund der besonderen Natur bestimmter beruflicher Tätigkeiten geurteilt, dass die Einführung spezieller Voraussetzungen, die diese Tätigkeiten betreffen, mit dem Gemeinschaftsrecht vereinbar sind. Der in diesem Fall zu erreichende Zweck sei mit dem Ziel im vorliegenden Fall, die Verfügbarkeit medizinischer Leistungen und die ständige Anwesenheit des Arztes und Zahnarztes sicherzustellen, vergleichbar. Indes gingen die Ziele, die durch die liechtensteinische Regelung angestrebt werden, weiter. Sie umfassten auch die finanzielle Stabilität des Gesundheitssystems und die Sicherung der Qualität der im Land erbrachten medizinischen Leistungen.

80. Die liechtensteinische Regierung trägt vor, dass den Urteilen *Kohll./.Union des Caisses de Maladie*43 und *Decker./.Caisse de Maladie des Employés Privés*[44] in diesem Zusammenhang ebenfalls Bedeutung zukommt, weil der EuGH in diesen Fällen ausdrücklich anerkannt habe, dass nationale Massnahmen gerechfertigt sein können, wenn sie das finanzielle Gleichgewicht der Systeme der Sozialen Sicherheit schützen wollen. Die beiden Urteile zeigten, dass sich der EuGH der überragenden Bedeutung der Nachhaltigkeit und der Bezahlbarkeit der Gesundheitssysteme in den Mitgliedstaaten bewusst ist.

81. Die liechtensteinische Regierung stellt fest, im Lichte des bedeutenden öffentlichen Interesses, um das es in diesem Fall geht, sei die *single practice rule* eine hinzunehmende Beschränkung der Niederlassungsfreiheit.

82. Viele andere Staaten in Europa stehen bei ihren Bemühungen, das finanzielle Gleichgewicht der Systeme der Sozialen Sicherheit zu sichern und bezahlbare Gesundheitssysteme aufrechtzuerhalten, vor vergleichbaren Schwierigkeiten. Indes wiegt das in Frage stehende öffentliche Interesse für Liechtenstein aufgrund der geographischen Kleinheit des Landes und der starken Interdependenz mit den Nachbarstaaten noch schwerer.

83. Im Fall der Einführung eines Konzessionssystems, das die Zulassung von Ärzten regelt, wäre der Anteil von Ärzten aus anderen EWR-Staaten nach der Auffassung der Regierung erheblich geringer.

84. Die liechtensteinische Regierung erachtet die *single practice rule* als aus zwingenden Gründen des öffentlichen Interesses gerechtfertigt. Es handelt sich um eine nicht diskriminierende und geeignete Massnahme, die notwendig ist, um das angestrebte Ziel zu erreichen. Überdies ist die Massnahme auch verhältnismässig in Beziehung zum öffentlichen Interesse an den verfolgten Zielen.

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42 EuGH C-106/91 *Ramrath ./. Ministre de la Justice*, Slg. 1992, I-3351.

43 Vgl. FN 33.

44 Vgl. FN 30.

Justification for the single practice rule under Article 33 EEA

85. If the EFTA Court were to conclude that the contested single practice rule constitutes a discriminatory measure, the Government of Liechtenstein submits that the rule may also be justified on grounds of public health under Article 33 EEA.

86. The Government of Liechtenstein states that the single practice rule prevents an increase in the number of suppliers who operate a practice in Liechtenstein merely as a sideline and thereby diminish the quality of the health system. The Government of Liechtenstein, while acknowledging the reasoning in *Commission* v *France*[45] and *Commission* v *Luxembourg*,[46] submits that, under the particular health system of Liechtenstein, the availability of the practitioner is indispensable to ensure the protection of the patients' health. The professional rules of dentists in Liechtenstein require dentists to operate and practise full-time to be able to meet the high quality standards for dentists in Liechtenstein. It is doubtful whether dentists who spend about 80% of their working time in another practice will be able to fulfil these ambitious requirements.

87. Moreover, the aforementioned arguments concerning the significance of the single practice rule in order to ensure a balanced medical service accessible to all, the financing of the social security system, the sustainability of the health system, and the high quality of the medical services provided, will also be valid in the assessment under Article 33 EEA.

88. Based on the arguments set out above, the Government of Liechtenstein proposes the following answer to the question:

> *"Article 31 of the Agreement on the European Economic Area (EEA Agreement) of 2 May 1992 does not preclude a Member State from providing that a dentist may not operate more than one practice whether as a sole practitioner or jointly with others throughout the territory of the European Economic Area."*

The Government of Iceland

89. The Government of Iceland begins by stating that, as regards Article 31 EEA, the contested single practice rule is incompatible with the principle of freedom of establishment laid down in that provision.

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45 See footnote 1.

46 See footnote 2.

Rechtfertigung der single practice rule nach Artikel 33 EWR

85. Sollte der EFTA-Gerichtshof zum Ergebnis gelangen, dass die streitige *single practice rule* eine diskriminierende Massnahme darstellt, so erachtet die liechtensteinische Regierung die Regelung als aus den Gründen des öffentlichen Gesundheitsschutzes nach Artikel 33 EWR-Abkommen gerechtfertigt.

86. Die liechtensteinische Regierung trägt vor, die *single practice rule* verhindere eine Zunahme der Zahl von Anbietern, die nur nebenbei in Liechtenstein tätig werden wollen und damit der Qualität des Gesundheitssystems schaden. Die Regierung anerkennt die Begründung in den Urteilen *Kommission./.Frankreich*[45] und *Kommission./.Luxemburg*[46]. Allerdings sei im besonderen liechtensteinischen Gesundheitssystem die Erreichbarkeit des Arztes für den Schutz der Gesundheit des Patienten unverzichtbar. Die in Liechtenstein für die Ausübung des Zahnarztberufs geltenden Vorschriften verlangen, dass Zahnärzte ganztägig praktizieren, um die bestehenden hohen Qualitätsanforderungen zu erfüllen. Es ist zweifelhaft, ob Zahnärzte, welche rund 80 % ihrer Arbeitszeit in einer anderen Praxis verbringen, in der Lage sein werden, diesen hohen Anforderungen gerecht zu werden.

87. Darüber hinaus sind die bereits vorgetragenen Argumente betreffend die Bedeutung der *single practice rule* bei der Beurteilung einer Rechtfertigung nach Artikel 33 EWR-Abkommen von Bedeutung. Dabei geht es um die Sicherstellung einer ausgewogenen medizinischen Versorgung, die für alle zugänglich ist, die Finanzierung des Systems der Sozialen Sicherheit, die Nachhaltigkeit des Gesundheitssystems und die hohe Qualität der erbrachten medizinischen Leistungen.

88. Gestützt auf diese Argumente schlägt die Regierung von Liechtenstein dem EFTA-Gerichtshof vor, die Fragen wie folgt zu beantworten:

> *„Artikel 31 des EWR-Abkommens vom 2. Mai 1992 verbietet es einem Abkommensstaat nicht, eine Regelung vorzusehen, nach der ein Zahnarzt nicht mehr als eine Praxis, ob als Einzelpraxis oder als Gemeinschaftspraxis mit anderen, im Gebiet des EWR führen darf.“*

Die Regierung von Island

89. Die isländische Regierung führt aus, die streitige *single practice rule* sei eine Verletzung der Niederlassungsfreiheit und deshalb mit Artikel 31 EWR unvereinbar.

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45 Vgl. FN 1.

46 Vgl. FN 2.

90. The Government of Iceland does not dispute that the national provision at issue in the main proceedings applies equally to Liechtenstein nationals and nationals of other EEA States. However, the Government of Iceland asserts that a national provision of that kind can lead to indirect discrimination. The Government of Iceland contends, in essence, that the single practice rule will, by its very nature, be more onerous for dentists of other EEA States than for dentists of Liechtenstein, since the former have to give up their practice in that other EEA State in order to establish a practice in Liechtenstein.

91. The Government of Iceland argues that it is settled case-law of the Court of Justice of the European Communities, *inter alia, Ordre des Avocats au Barreau de Paris* v *Klopp*,[47] and *Gullung* v *Conseils de l'ordre des avocats du barreau de Colmar et de Saverne*,[48] that, even if national provisions apply equally to all parties, irrespective of their nationality, they may still be contrary to Article 31 EEA.

92. The Government of Iceland adds that it is also contrary to the EEA Agreement for an EEA State to impose a single practice rule on its own nationals when they seek to establish themselves in another EEA State and thereby restrict their possibilities to pursue their profession in that other EEA State.

93. Referring to the judgment in *Commission* v *France*,[49] the Government of Iceland contends that a single practice rule in general is unnecessarily restrictive and that it, as such, is too far-reaching.

94. In the opinion of the Government of Iceland, the case-law[50] of the Court of Justice of the European Communities supports the view that it is contrary to the fundamental principles of Articles 31 and 34 EEA for an EEA State to require members of a profession who seek to establish themselves in that EEA State to give up their practice in another EEA State.

95. The Government of Iceland does not agree with the Government of Liechtenstein that the reasoning in *Commission* v *France*[51] is not applicable in the present case, since, in that case, the French physicians were allowed to open a second practice whereas that possibility was not available to practitioners from other Member States. According to the Government of Iceland, this fact was not

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47 See footnote 11.

48 Case 292/86 *Gullung* v *Conseils de l'ordre des avocats du barreau de Colmar et de Saverne* [1988] ECR 111.

49 See footnote 1.

50 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971; Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877; Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897; Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351; Case 96/85 *Commission* v *France* [1986] ECR 1475.

51 See footnote 1.

90. Die isländische Regierung bestreitet nicht, dass die nationale Regelung im Anlassfall für Liechtensteiner und EWR-Ausländer gleichermassen gilt. Allerdings könne eine solche Bestimmung zu einer indirekten Diskriminierung führen. Die Massnahme sei von ihrer Natur her geeignet, sich nachteiliger auf Zahnärzte aus anderen EWR-Staaten als auf liechtensteinische Zahnärzte auszuwirken, weil die ersteren ihre Praxis im Heimatstaat aufgeben müssten, um eine Praxis in Liechtenstein einrichten zu können.

91. Die isländische Regierung bringt vor, nach der gesicherten Rechtsprechung des EuGH u.a in den Fällen *Ordre des Advocats au Barreau de Paris./.Klopp*[47] und *Gullung./.Conseils de l'ordre des avocats du barreau de Colmar et de Saverne*[48] sei klar, dass auch unterschiedslos, d.h. unabhängig von der Staatsangehörigkeit anwendbare, nationale Bestimmungen Artikel 31 EWR verletzen können.

92. Für die isländische Regierung verstösst es auch gegen das EWR-Abkommen, wenn ein EWR-Staat seinen eigenen Staatsangehörigen eine *single practice rule* auferlegt, wenn sich diese in einem anderen EWR-Staat niederlassen wollen. Damit beschränkt der Staat die Möglichkeiten der Berufsausübung in diesem anderen EWR-Staat.

93. Unter Hinweis auf das Urteil *Kommission./Frankreich*[49] bringt die isländische Regierung vor, eine *single practice rule* sei im allgemeinen eine unnötige Beschränkung, die als solche zu weit gehe.

94. Nach Auffassung der isländischen Regierung unterstützt die Rechtsprechung des EuGH[50] die Annahme, dass es gegen die fundamentalen Grundsätze von Artikel 31 und 34 EWR-Abkommen verstösst, wenn ein EWR-Staat Mitglieder einer Berufsgruppe, die sich in diesem EWR-Staat niederlassen wollen, dazu zwingt, ihre Praxis in einem anderen EWR-Staat aufzugeben.

95. Die isländische Regierung widerspricht der Auffassung der liechtensteinischen Regierung, nach der die Begründung des Urteils *Kommission./.Frankreich*[51] im vorliegenden Fall nicht anwendbar sei, weil es französischen Ärzten in diesem Fall erlaubt war, eine Zweitpraxis zu unterhalten, nicht aber Ärzten aus anderen Mitgliedstaaten. Für die isländische Regierung war dieses Kriterium nicht entscheidend für das Urteil, weil der Gerichtshof die

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47 Vgl. FN 11.

48 EuGH C-292/86 *Gullung ./. Conseils de l'ordre des avocats du barreau de Colmar et de Saverne*, Slg. 1988, 111.

49 Vgl. FN 1.

50 EuGH C-107/83 *Ordre des Avocats au Barreau de Paris./.Klopp*, Slg. 1984, 2971; EuGH C-143/87 *Stanton ./. Inasti*, Slg. 1988, 3877;verbundene Rechtssachen EuGH C-154/87 und C-155/87 *RSVZ./.Wolf u.a*, Slg. 1988, 3897; EuGH C-106/91 *Ramrath./.Ministre de la Justice*, Slg. 1992, I-3351; EuGH C 96/85 *Kommission./.Frankreich*, Slg. 1986, 1475.

51 Vgl. FN 1.

decisive for the ruling, as the Court also found the rule to be unduly restrictive on its own, irrespective of any discriminatory effect.

96. As regards possible grounds of justification for the single practice rule at issue, the Government of Iceland states that the relevant legal basis to be considered is Article 33 EEA and the public health derogation set out in that provision. The Government of Iceland observes that it is settled case-law of the Court of Justice of the European Communities that this provision is to be interpreted narrowly.

97. The Government of Iceland refers to the judgment in *Commission* v *France*,[52] in which the Court of Justice of the European Communities held a similar single practice rule to be too far-reaching to be justified on grounds of public health.

98. The Government of Iceland argues that the Government of Liechtenstein has not shown that the single practice rule is necessary to maintain the financial equilibrium of the social security system and that the objective cannot be reached through less restrictive means.

99. The Government of Iceland states that an EEA State may, without infringing Article 31 EEA, adopt and apply national rules aimed at guaranteeing a certain level and quality of service to patients. It furthermore states that it is for the EEA State concerned to regulate its social security system. This discretion of the Member States is confirmed by the case-law[53] of the Court of Justice of the European Communities. However, such a power has to be practised in accordance with the fundamental principles of the EEA Agreement.

100. The Government of Iceland proposes the following answer to the question:

> *"The Single practice rule applying without exception to all dentists under Liechtenstein national law, and in particular Article 23(1) of the Regulation of 8 November on the medical professions, is incompatible with the EEA Agreement."*

The Government of Norway

101. The Government of Norway states that the wording of Article 31 EEA suggests that what is required is the equal treatment of nationals and non-nationals, including a prohibition against direct discrimination. The Government

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52 Ibid.

53 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971; Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351; Case 96/85 *Commission* v *France* [1986] ECR 1475; Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831.

Regelung an sich - unabhängig von einem diskriminierenden Effekt - als unzulässige Beschränkung angesehen hat.

96. Im Blick auf mögliche Rechtfertigungen für die in Frage stehende single practice rule ist für die isländische Regierung der Gesundheitsschutz in Artikel 33 EWR-Abkommen die einschlägige Bestimmung. Nach ständiger Rechtsprechung des EuGH sei diese Bestimmung aber eng auszulegen.

97. Die isländische Regierung verweist auf das Urteil *Kommission./.Frankreich*[52]. In diesem Urteil hatte der EuGH eine ähnliche *single practice rule* als zu weitreichend angesehen, als dass sie aus Gründen des öffentlichen Gesundheitsschutzes zu rechtfertigen gewesen wäre.

98. Die isländische Regierung bringt vor, die liechtensteinische Regierung habe nicht nachgewiesen, dass diese Regelung notwendig sei, um das finanzielle Gleichgewicht des Systems der Sozialen Sicherheit aufrechtzuerhalten und dass dieses Ziel nicht auch mit weniger einschneidenden Mitteln erreicht werden könnte.

99. Um ein bestimmtes Niveau und eine bestimmte Qualität der Dienstleistungen für die Patienten aufrechtzuerhalten, kann ein EWR-Staat nach der Auffassung der isländischen Regierung Regelungen erlassen und anwenden, die helfen, dieses Ziel zu erreichen, ohne dabei gegen Artikel 31 EWR-Abkommen zu verstossen. Ausserdem obliegt die Regelung der Sozialversicherungssysteme den Mitgliedstaaten. Dieser Handlungsspielraum wurde vom EuGH bestätigt[53]. Von dieser Möglichkeit darf aber nur in Übereinstimmung mit den fundamentalen Grundsätzen des EWR-Abkommens Gebrauch gemacht werden.

100. Die Regierung von Island schlägt die folgenden Antworten auf die Fragen vor:

> *„Die für Zahnärzte ausnahmslos anwendbare single practice rule im liechtensteinischen Recht, die insbesondere in Artikel 23 Abs. 1 der Verordnung vom 8. November über medizinische Berufe enthalten ist, ist mit dem EWR-Abkommen unvereinbar."*

Die Regierung von Norwegen

101. Die norwegische Regierung führt aus, der Wortlaut von Artikel 31 EWR-Abkommen lege nahe, dass die Vorschrift die Inländergleichbehandlung einschliesslich des Verbots der indirekten Diskriminierung sicherstellen wolle.

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52 Vgl. FN 1.

53 EuGH C-107/83 *Ordre des Avocats au Barreau de Paris./.Klopp*, Slg. 1984, 2971; EuGH C-106/91 *Ramrath./.Ministre de la Justice*, Slg. 1992, I-3351; EuGH C-96/85 *Kommission./.Frankreich*, Slg. 1986, 1475 ; EuGH C-120/95 *Decker./. Caisse de Maladie des Employés Privés,* Slg. 1998, I-1831.

of Norway observes, however, that the scope of the right of establishment has been given a wider interpretation in recent case-law from the Court of Justice of the European Communities and the EFTA Court. Referring to *Clean Car Autoservice* v *Landeshauptmann von Wien*,[54] *Merino García* v *Bundesanstalt für Arbeit*[55] and *Rainford-Towning*,[56] the Government of Norway contends 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, lead to the same result in practice.

102. The Government of Norway submits, furthermore, that it is settled case-law[57] of the Court of Justice of the European Communities that a person may be established in more than one Member State, in particular through the setting-up of agencies, branches or subsidiaries, or by establishing a second professional base.

103. The Government of Norway states that it follows from the case-law[58] of the Court of Justice of the European Communities that any restriction on the freedom to set up a secondary establishment by requiring that a person give up his establishment elsewhere before he can establish himself in the host country needs justification. Such restrictions are considered to be national measures that are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement. Article 31(1) EEA would be deprived of its meaning if it did not include the right to maintain the business in the EEA State of origin.

104. The Government of Norway asserts that, if national rules of an EEA State have the effect of placing nationals of other EEA States in a less favourable position than their own nationals, and thus are liable to hinder or make less attractive the exercise of the right of establishment, such rules must, according to *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*,[59] fulfil four conditions: first, they must be applied in a non-discriminatory manner; second, they must be justified by imperative requirements in the general interest; third, they must be suitable for securing the attainment of the objective which

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54 Case C-350/96 *Clean Car Autoservice* v *Landeshauptmann von Wien* [1998] ECR I-2521.

55 Case C-266/95 *Merino García* v *Bundesanstalt für Arbeit* [1997] ECR I-3279.

56 See footnote 8.

57 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971; Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351.

58 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971; Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; Case 96/85 *Commission* v *France* [1986] ECR 1475; Case C-351/90 *Commission* v *Luxembourg* [1992] ECR I-3945.

59 Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

Allerdings sei der Anwendungsbereich der Niederlassungsfreiheit in der jüngeren Rechtsprechung des EuGH und des EFTA-Gerichtshofs weit interpretiert worden. Unter Hinweis auf die Urteile *Clean Car Autoservice./.Landeshauptmann von Wien*[54]*, Merino García./.Bundesanstalt für Arbeit*[55] und *Rainford-Towning*[56] macht die norwegische Regierung geltend, dass das Gleichbehandlungsgebot nicht nur die offene Diskriminierung verbietet, sondern auch alle Formen der versteckten Diskriminierung, die durch die Anwendung anderer Kriterien zum gleichen Ergebnis führen.

102. Aus der ständigen Rechtsprechung des EuGH[57] folgt für die norwegische Regierung, dass es einer Person erlaubt sein muss, sich in mehr als einem Mitgliedstaat durch die Gründung von Agenturen, Zweigniederlassungen oder Tochtergesellschaften oder durch die Einrichtung einer zweiten beruflichen Basis niederzulassen.

103. Aus der Rechtsprechung des EuGH[58] folgt, dass jede Beschränkung des Rechts auf eine Zweitniederlassung, die eine solche von der Aufgabe einer anderen Praxis abhängig macht, gerechtfertigt werden muss. Solche Einschränkungen werden als staatliche Massnahmen angesehen, welche die durch den EWR-Vertrag eingeräumten Grundfreiheiten behindern oder weniger attraktiv machen. Artikel 31 Absatz 1 EWR-Abkommen wäre seines Sinns entleert, wenn er das Recht, die Geschäftstätigkeit im Herkunftstaat aufrechtzuerhalten, nicht einschlösse.

104. Gemäss dem Urteil *Gebhard ./.Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[59] müssen - nach Auffassung der norwegischen Regierung - nationale Regelungen, die im Ergebnis Staatsangehörige aus anderen EWR-Staaten gegenüber den eigenen Staatsangehörigen benachteiligen, indem sie die Ausübung der Niederlassungsfreiheit behindern oder weniger attraktiv machen, vier Bedingungen erfüllen, um gerechtfertigt zu sein: (1) sie müssen in einer nicht diskriminierenden Art und Weise angewendet werden; (2) sie müssen aus zwingenden Gründen des Allgemeininteresses gerechtfertigt sein; (3) sie müssen zur Erreichung des beabsichtigten Ziels geeignet sein; (4) sie dürfen nicht über das hinausgehen, was notwenig ist, um dieses Ziel zu erreichen.

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54 EuGH C-350/96 *Clean Car Autoservice./.Landeshauptmann von Wien,* Slg. 1998*, I-2521*.

55 EuGH C-266/95 *Merino García./.Bundesanstalt für Arbeit,* Slg. 1997, I-3279.

56 Vgl. FN 8.

57 EuGH C-107/83 *Ordre des Avocats au Barreau de Paris./.Klopp*, Slg. 1984, 2971; EuGH C-55/94 *Gebhard ./.Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Slg. 1995, I-4165 ; EuGH C-106/91 *Ramrath./.Ministre de la Justice*, Slg. 1992, I-3351 ;

58 EuGH C-107/83 *Ordre des Avocats au Barreau de Paris./.Klopp*, Slg. 1984, 2971 ; EuGH C-55/94 *Gebhard ./.Consiglio del``Ordine degli Avvocati e Procuratori di Milano*, Slg. 1995, I-4165 ; EuGH C 96/85 *Kommission./.Frankreich*, Slg. 1986, 1475; EuGH C-351/90 *Kommission./.Luxemburg*, Slg. 1992, I-3945.

59 EuGH C-55/94 *Gebhard./.Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Slg. 1995, I-4165.

they pursue; fourth, they must not go beyond what is necessary in order to attain it.

105. The Government of Norway submits that the contested single practice rule is a restriction within the meaning of Article 31 EEA, one which requires justification. The Government of Norway finds support for this view in *Commission* v *Luxembourg*.[60]

106. The Government of Norway acknowledges that the single practice rule at issue in the main proceedings applies equally to Liechtenstein nationals and to nationals of other EEA States. There are no specific rules that apply only to non-nationals, as was the case in *Commission* v *France*,[61] nor are there exceptions that only apply to nationals, as was the case in *Commission* v *Luxembourg*.[62] However, it can be inferred that the purpose of the single practice rule is to discriminate against professionals from other EEA States.

107. In response to the Government of Liechtenstein's submissions on justification, as set out in the Request for an Advisory Opinion, the Government of Norway submits that restricting the growth in the number of physicians and dentists from other EEA States is not *per se* an "imperative requirement in the general interest".

108. The Government of Norway agrees that keeping health costs under control, maintaining the financial equilibrium of the social security system and maintenance of a medical and hospital security system are purposes that may constitute "imperative requirements in the general interest". The Government of Norway questions, however, whether the single practice rule is suitable for securing the attainment of such objectives, and argues that it goes beyond what is necessary in order to attain such objectives. More physicians and dentists would normally lead to lower costs per consultation, due to more competition. Cost control could be achieved by other means. The performance of medical and dental services should also normally improve when there are more physicians and dentists, not the contrary. With modern transport and communication, there is no need to require physicians and dentists to work in one place only. Furthermore, the Government of Norway notes that it does not seem to be a requirement that physicians and dentists live in Liechtenstein to ensure that they are available locally 24 hours a day, but only that they have their sole place of work there.

109. The Government of Norway points out that arguments relating to keeping health costs under control, maintaining the financial equilibrium of the social security system and maintaining a sufficient supply of medical services were

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60 See footnote 2.

61 See footnote 1.

62 See footnote 2.

105. Für die norwegische Regierung ist die streitige *single practice rule* eine Einschränkung i.S.v. Artikel 31 EWR-Abkommen, die gerechtfertigt werden muss. Diese Rechtsansicht werde durch das Urteil *Kommission./.Luxemburg*[60] bestätigt.

106. Die norwegische Regierung anerkennt, dass die *single practice rule* unabhängig von der Staatsangehörigkeit angewendet wird. Es gibt auch keine speziellen Regelungen, die nur für fremde Staatsangehörige gelten, wie im Fall *Kommission ./.Frankreich*[61] noch gibt es Ausnahmen, die nur für eigene Staatsangehörige gelten, wie im Fall *Kommission./.Luxemburg*[62]. Indes ist anzunehmen, dass die *single practice rule* die Diskriminierung von Berufsangehörigen aus anderen EWR-Staaten bezweckt.

107. Im Blick auf die von der liechtensteinischen Regierung vorgetragenen Rechtfertigungsgründe, wie sie im Vorlageersuchen enthalten sind, trägt die norwegische Regierung vor, dass die Beschränkung der Zunahme der Anzahl von Ärzten und Zahnärzten aus anderen EWR-Staaten nicht *per se* ein zwingender, im Allgemeininteresse gelegener, Grund ist.

108. Für die norwegische Regierung sind die Kontrolle der Gesundheitskosten, die Erhaltung des finanziellen Gleichgewichts der Systeme der Sozialen Sicherheit und die Aufrechterhaltung eines Systems der Sicherheit bezüglich medizinischer und spitalmässiger Versorgung durchaus Ziele, die zwingende im Allgemeininteresse gelegene Gründe darstellen können. Fraglich sei aber, ob die *single practice rule* geeignet ist, diese Ziele zu erreichen. Die Regel gehe über das hinaus, was notwendig ist, um die Ziele zu erreichen. Eine grössere Anzahl von Ärzten und Zahnärzten führe aufgrund des grösseren Wettbewerbs zu niedrigeren Kosten pro Behandlung. Eine Kostenkontrolle könne auch mit anderen Mitteln erreicht werden. Normalerweise sollten mehr Ärzte und Zahnärzte auch helfen, die medizinischen Dienstleistungen zu verbessern und nicht umgekehrt. Aufgrund der modernen Transport- und Kommunikationsmöglichkeiten ergibt sich auch kein Bedarf, den Ärzten und Zahnärzten vorzuschreiben, nur an einem Ort zu arbeiten. Überdies sei offenbar der 24-Stunden-Dienst für Ärzte und Zahnärzte nicht vorgeschrieben. Es bestehe nur der Zwang für die Ärzte, ihren einzigen Arbeitsplatz in Liechtenstein zu unterhalten.

109. Die norwegische Regierung weist darauf hin, dass die Argumente betreffend Kontrolle der Gesundheitskosten, Aufrechterhaltung des finanziellen Gleichgewichts des Systems der Sozialen Sicherheit und Aufrechterhaltung einer ausreichenden medizinischen Versorgung in den Fällen *Kommission./.Frankreich*[63] und *Kommission./.Luxemburg*[64] von Frankreich und

60 Vgl. FN 2.

61 Vgl. FN 1.

62 Vgl. FN 2.

63 Vgl. FN 1.

advanced by France and Luxembourg in *Commission* v *France*[63] and *Commission* v *Luxembourg*,[64] respectively, but the Court of Justice of the European Communities held in those cases that a single practice rule was "unduly restrictive".

110. The Government of Norway adds that the grounds of justification can be considered to be within the concept of "public health" as set out in Article 33 EEA, but, having concluded that the single practice rule is unduly restrictive, it is clear that it cannot be justified under Article 33 EEA.

111. The Government of Norway proposes the following answer to the question:

> *"National legislation applying a single practice rule without exception to all doctors and dentists is in breach of Article 31 of the Agreement on the European Economic Area."*

The EFTA Surveillance Authority

112. The EFTA Surveillance Authority begins by observing that the single practice rules were the object of the rulings of the Court of Justice of the European Communities in *Ordre des Avocats au Barreau de Paris* v *Klopp*,[65] *Commission* v *France*[66] and *Commission* v *Luxembourg*.[67]

113. The EFTA Surveillance Authority states that, for the professions in question, the single practice rule dilutes the right of establishment enshrined in Article 31 EEA. Being a restriction of this fundamental freedom, the rule may only be compatible with the EEA Agreement if it can be justified by imperative requirements.

114. As regards possible grounds for justification of the single practice rule, the EFTA Surveillance Authority states that the main reason for the contested single practice rule appears to be that, in the absence of such a rule, the financial balance of the Liechtenstein social security system would be destroyed. In considering whether this can serve as a justification for the single practice rule, the EFTA Surveillance Authority refers to *Kohll* v *Union des Caisses de Maladie*[68] and *Decker* v *Caisse de Maladie des Employés Privés*,[69] in which the

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63 See footnote 1.

64 See footnote 2.

65 See footnote 11.

66 See footnote 1.

67 See footnote 2.

68 See footnote 33.

69 See footnote 30.

Luxemburg geltend gemacht wurden. Der EuGH habe die *single practice rule* aber trotzdem als unzulässige Beschränkung beurteilt.

110. Die angeführten Rechtfertigungsgründe liegen zwar im Schutzbereich des öffentlichen Gesundheitsschutzes, wie er in Artikel 33 EWR-Abkommen festgelegt ist. Weil die *single practice rule* aber eine unzulässige Beschränkung darstellt, kann sie nicht nach Artike 33 EWR-Abkommen gerechtfertigt werden.

111. Die norwegische Regierung schlägt die folgende Antwort auf die Fragen vor:

> *„Nationales Recht, das ausnahmslos für alle Ärzte und Zahnärzte eine single practice rule statuiert, verstösst gegen Artikel 31 des EWR-Abkommens“.*

Die EFTA-Überwachungsbehörde

112. Die EFTA-Überwachungsbehörde beginnt ihre Ausführungen mit einem Hinweis darauf, dass es in den Urteilen des EuGH in den Fällen *Ordre des Avocats au Barreau de Paris./.Klopp*[65]*, Kommission./.Frankreich*[66] und *Kommission./.Luxemburg*[67] um eine *single practice rule* gegangen ist.

113. Für die betroffene Berufsgruppe führt die *single practice rule* zu einer Verwässerung der in Artikel 31 EWR-Abkommen verbrieften Niederlassungsfreiheit. Als Beschränkung dieser Grundfreiheit ist eine solche Regelung nur dann EWR-konform, wenn sie aus zwingenden Gründen gerechtfertigt werden kann.

114. Im Blick auf mögliche Rechtfertigungsgründe führt die EFTA-Überwachungsbehörde aus, der Hauptgrund für die *single practice rule* sei die Sorge, das finanzielle Gleichgewicht des Systems der Sozialen Sicherheit würde ohne eine solche Regelung zusammenbrechen. Zur Beurteilung dieses Rechtfertigungsgrundes verweist die EFTA-Überwachungsbehörde auf die Fälle *Kohll./.Union des Caisses de Maladie*[68] und *Decker./. Caisse de Maladie des Employés Privés*[69]. In diesen Urteilen hat der EuGH geurteilt, dass die Gefahr der schwerwiegenden Störung des finanziellen Gleichgewichts der Systeme der Sozialen Sicherheit einen überwiegenden Grund des öffentlichen Interesses darstellen und somit eine Einschränkung der Grundfreiheiten rechtfertigen kann.

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64 Vgl. FN 2.

65 Vgl. FN 11.

66 Vgl. FN 1.

67 Vgl. FN 2.

68 Vgl. FN 33.

69 Vgl. FN 30.

Court of Justice of the European Communities held that the risk of seriously undermining the financial balance of a social security system may constitute an overriding reason in the general interest capable of justifying a barrier to one of the fundamental freedoms.

115. The EFTA Surveillance Authority states that it has no knowledge of any convincing proof to the effect that the financial balance of the Liechtenstein health insurance system would be seriously undermined by the absence of the single practice rule.

116. The EFTA Surveillance Authority adds that, even if sufficient proof had been provided, it would still have to be established that more suitable and less restrictive means could not be applied in order to achieve the same aim. It doubts whether that would be possible. In the view of the EFTA Surveillance Authority, it is not clear why one cannot apply cost reduction measures that do not restrict the fundamental freedoms. Furthermore, it is not clear how requiring physicians and dentists to give up their practice in other EEA States would preserve the financial balance of the social security system.

117. The EFTA Surveillance Authority notes that there are not, at present, any rulings by the Court of Justice of the European Communities in which an absolute and general restriction to the freedom of establishment has been justified by the need to preserve the financial balance of a social security system.

118. The EFTA Surveillance Authority proposes the following answer to the question:

> *"Article 31 of the EEA Agreement must be interpreted as precluding Liechtenstein from maintaining a provision of national law according to which dentists are required to give up any other establishment simultaneously held in other Member States in order to operate a practice in Liechtenstein."*

The Commission of the European Communities

119. The Commission of the European Communities refers to the arguments put forward in its written observations in Case E-6/00 *Dr Jürgen Tschannett*. In that case, the Commission begins by referring to the judgment of the EFTA Court in *State Dept Management Agency* v *Íslandsbanki-FBA hf*,[70] and observes that, since the principle of non-discrimination has been given effect in the field of the right of establishment by Article 31 EEA, Article 4 EEA does not require further consideration.

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[70] Case E-1/00 *State Debt Management Agency* v *Íslandsbanki-FBA hf*, judgment of 14 July 2000 (not yet reported).

115. Die EFTA-Überwachungsbehörde stellt fest, ihr seien keine überzeugenden Beweise dafür bekannt, dass das liechtensteinische Gesundheitssystem ohne die *single practice rule* ernsthaft gefährdet würde.

116. Selbst wenn es ausreichende Beweise dafür gäbe, müsste immer noch nachgewiesen werden, dass besser geeignete und weniger einschneidende Mittel nicht zum gleichen Ergebnis führen könnten. Die EFTA-Überwachungsbehörde zweifelt daran, dass das möglich ist. Es sei unklar, warum man keine Kostenreduzierungsmassnahmen ergreifen kann, ohne die Grundfreiheiten zu verletzen. Ausserdem sei unklar, warum das Erfordernis, dass Ärzte und Zahnärzte ihre Praxis im Heimatstaat aufzugeben haben, das finanzielle Gleichgewicht des Sozialsystems stützen sollte.

117. Die EFTA-Überwachungsbehörde stellt fest, dass der EuGH bislang in keinem einzigen Fall eine absolute und generelle Einschränkung der Niederlassungsfreiheit mit der Notwendigkeit, das finanzielle Gleichgewicht eines Systems der Sozialen Sicherheit aufrechtzuerhalten, gerechtfertigt hat.

118. Die EFTA-Überwachungsbehörde schlägt vor, die Fragen wie folgt zu beantworten:

> *„Artikel 31 des EWR-Abkommens muss dahingehend ausgelegt werden, dass die Bestimmung es Liechtenstein verbiete,t eine Regelung im nationalen Recht beizubehalten, nach der ein Zahnarzt jede andere Praxis, die er in einem anderen Mitgliedstaat gleichzeitig unterhält, aufgeben muss, wenn er in Liechtenstein eine Praxis betreiben will.“*

Die Kommission der Europäischen Gemeinschaften

119. Die Kommission der Europäischen Gemeinschaften bezieht sich auf die Argumente in ihrer schriftlichen Stellungnahme in der Rechtssache E-6/00 Dr. Jürgen Tschanett. In diesem Fall beginnt die Kommission ihre Ausführungen mit einem Hinweis auf das Urteil des EFTA-Gerichtshofs im Fall *State Dept Management Agency./.ÍslandsbankiFBA hf*[70] und stellt fest, dass Artikel 4 des EWR-Abkommens nicht einschlägig sei, weil der Grundsatz der Nichtdiskriminierung seinen besonderen Ausdruck in Artikel 31 EWR-Abkommen gefunden habe.

70 EFTA-Gerichtshof E-1/00 *State Dept Management Agency./.ÍslandsbankiFBA hf* , Urteil vom 14. Juli 2000 (noch nicht veröffentlicht)

120. Referring to the very broad understanding of the concept of establishment adopted by the Court of Justice of the European Communities in its judgments in *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[71] and *Reyners* v *Belgium*,[72] the Commission does not object to the single practice rule at issue in this case being assessed in the context of Article 31 EEA.

121. The Commission of the European Communities contends that Article 33 EEA is not applicable in this case, since the contested national provision constitutes a non-discriminatory measure which is applied without distinction.

122. As regards Article 31 EEA, the Commission of the European Communities contends that the single practice rule in question restricts the right of establishment. The Court of Justice of the European Communities held in *Ordre des Avocats au Barreau de Paris* v *Klopp*,[73] *Stanton* v *Inasti*,[74] and *Inasti* v *Kemmler*[75] that the right of establishment includes the freedom to set up and maintain more than one place of work in the Community. The single practice rule runs counter to this, by preventing physicians and dentists of other EEA States from taking up and pursuing their activities in Liechtenstein, if they want to carry on working in their home State.

123. In support of the view that the single practice rule constitutes a restriction on the freedom of establishment, the Commission of the European Communities relies on *Commission* v *France*,[76] in which the Court of Justice of the European Communities held *inter alia* that requiring physicians and dental practitioners established in another Member State to cancel their enrolment or registration in that other Member State in order to be able to practise their profession in the State in question, as a principal in a practice, was against the EC Treaty. The basis of the reasoning in that case was that the discrimination against practitioners established in other Member States, who were excluded from opening a further practice in the State in question, represented a restriction not similarly applicable to nationals of that State. In addition, the Court considered that such a general rule was unduly restrictive.

124. As regards possible justification for the single practice rule, the Commission of the European Communities begins by referring to *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*.[77] According to that ruling, national measures liable to hinder or make less attractive the exercise

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71 See footnote 59.

72 Case 2/74 *Reyners* v *Belgium* [1974] ECR 631.

73 See footnote 11.

74 Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877.

75 Case C-53/95 *Inasti* v *Kemmler* [1996] ECR I-703.

76 See footnote 1.

77 See footnote 59.

120. Unter Hinweis auf die weite Auslegung des Begriffs der Niederlassung durch den EuGH in den Rechtssachen *Gebhard ./.Consiglio dell`Ordine degli Avvocati e Procuratori di Milano*[71] und *Reyners./.Belgien*[72] widerspricht die Kommission einer Beurteilung der *single practice* im Kontext des Artikels 31 EWR-Abkommen nicht.

121. Die Kommission ist der Auffassung, Artikel 33 EWR-Abkommen sei im vorliegenden Fall nicht anwendbar, weil es sich bei der streitigen nationalen Vorschrift um eine nichtdiskriminierende Massnahme handele, die unterschiedslos angewendet werde.

122. Was Artikel 31 EWR-Abkommen anlangt, so macht die Kommission eine Beschränkung der Niederlassungsfreiheit durch die *single practice rule* geltend. In den Urteilen *Ordre des Avocats au Barreau de Paris./.Klopp*[73], *Stanton./.Inasti*[74] und *Inast./.Kemmler*[75] habe der EuGH festgestellt, dass die Niederlassungsfreiheit das Recht umfasst, mehr als einen Tätigkeitsort in der Gemeinschaft zu eröffnen und zu unterhalten. Die *single practice rule* laufe dem zuwider, indem sie Ärzten und Zahnärzten aus anderen Mitgliedstaaten verbietet, eine Praxis in Liechtenstein zu eröffnen und zu unterhalten, wenn sie ihre Tätigkeit auch im Heimatstaat weiter ausüben wollen.

123. Um darzutun, dass eine *single practice rule* eine Beschränkung der Niederlassungsfreiheit darstellt, beruft sich die Kommission auf das Urteil *Kommission./.Frankreich*[76]. In diesem Fall habe der EuGH u.a. entschieden, dass es dem EG-Vertrag widerspricht, wenn Ärzten aus anderen Mitgliedstaaten vorgeschrieben wird, ihre Eintragung in diesem Staat löschen zu lassen, damit sie im fraglichen Staat als Chef in einer Praxis tätig werden dürfen. Die Basis für die Begründung in diesem Fall war, dass die Ungleichbehandlung von Ärzten aus anderen Mitgliedstaaten, die daran gehindert waren, eine Zweitpraxis zu eröffnen, als Beschränkung angesehen wurde, die auf eigene Staatsangehörige nicht in vergleichbarer Weise angewendet wurde. Zusätzlich hielt der EuGH eine so allgemeine Regelung für übermässig beschränkend.

124. Im Blick auf eine mögliche Rechtfertigung der *single practice rule* beginnt die Kommission ihre Ausführungen mit einem Hinweis auf das Urteil *Gebhard ./.Consiglio dell``Ordine degli Avvocati e Procuratori di Milano*[77]. Nach diesem Urteil müssen nationale Regelungen, die geeignet sind, die Ausübung der Grundfreiheiten zu behindern oder weniger attraktiv zu machen,

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71 Vgl. FN 59.

72 EuGH 2/74 *Reyners./.Belgien*, Slg. 1974, 631.

73 FN. 11.

74 EuGH C-143/87 *Stanton ./. Inasti*, Slg. 1988, 3877.

75 EuGH C-53/95 *Inasti ./. Kemmler*, Slg. 1996. I-703.

76 Vgl. FN 1.

77 Vgl. FN 59.

of fundamental freedoms must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.

125. The Commission of the European Communities does not agree with the Government of Liechtenstein that the single practice rule can be justified on the grounds that it constitutes a means of keeping health costs under control and of maintaining the financial equilibrium of the social security system. In setting out its view, the Commission refers to *Kohll* v *Union des Caisses de Maladie*,[78] in which the Court of Justice of the European Communities held that it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute a ground of justification. However, the Commission of the European Communities contends that, in the absence of any further evidence, the situation in Liechtenstein does not fall within the parameters set out in that judgment. The Commission's reasoning for that is threefold: first, cross-border provision of services by physicians and dentists operating a practice outside Liechtenstein is not covered by the national provision at issue, even though this could also have an effect on the social security system; second, the contested national provision would not necessarily lead to a quantitative limitation of physicians and dentists which might have an impact on the health budget, since physicians and dentists may set up a practice in Liechtenstein if they give up their practice in their country of origin; third, the national provision at hand could apply without there necessarily being any link between the physician and dentist in question and the social security system.

126. The Commission of the European Communities adds that, in its view, national provisions may not determine to what extent physicians and dentists are obliged to be present in their respective practices, save as in exceptional circumstances. To insist that physicians and dentists should work exclusively in one practice would have entirely the same result as the single practice rule. The Commission refers to *Commission* v *Luxembourg*.[79]

127. The Commission of the European Communities proposes the following answer to the question:

> *"Article 31 of the EEA Agreement on the right of establishment precludes a national law which provides that dentists may only operate in a single practice. Such a measure is justifiable neither as a means of keeping health costs under control nor of maintaining the financial equilibrium of the social security system of an EFTA State except where it could be demonstrated that this was required by overriding reasons in the general interest. Nor is a national law compatible with Article 31 EEA to the extent that it obliges a dentist to have a certain*

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78 See footnote 33.

79 See footnote 2.

vier Bedingungen erfüllen: (1) Sie müssen in einer nicht diskriminierenden Art und Weise angewendet werden; (2) sie müssen aus zwingenden Gründen des Allgemeininteresses gerechtfertigt sein; (3) sie müssen zur Erreichung des beabsichtigten Ziels geeignet sein; (4) sie dürfen nicht über das hinausgehen, was notwenig ist, um dieses Ziel zu erreichen.

125. Die Kommission stimmt nicht mit der Auffassung der liechtensteinischen Regierung überein, die *single practice rule* könne damit gerechtfertigt werden, dass sie ein Mittel zur Kontrolle der Gesundheitskosten und zur Aufrechterhaltung des finanziellen Gleichgewichts des Systems der Sozialen Sicherheit darstellt. Sie verweist auf das Urteil des EuGH in der Rechtssache *Kohll./.Union des Caisses de Maladie*[78]. In diesem Urteil habe der EuGH festgestellt, es könne nicht ausgeschlossen werden, dass die Gefahr der schwerwiegenden Störung des finanziellen Gleichgewichts der Systeme der Sozialen Sicherheit eine Einschränkung der Grundfreiheiten rechtfertigen kann. Wenn es keine weiteren Beweise gibt, so falle die Situation in Liechtenstein aber nicht unter die in diesem Urteil genannten Parameter. Die Kommission geht dabei von dreierlei Überlegungen aus: (1) Die nationale Regelung erfasst die Dienstleistungserbringung von Ärzten und Zahnärzten aus anderen Mitgliedstaaten nicht, obwohl diese ebenfalls Auswirkungen auf das nationale System der Sozialen Sicherheit haben könnten. (2) Die streitige nationale Bestimmung führt nicht notwendigerweise zu einer zahlenmässigen Begrenzung der Ärzte, was Auswirkungen auf das Gesundheitsbudget hätte, weil Ärzte und Zahnärzte ja eine Praxis in Liechtenstein eröffnen können, wenn sie ihre Praxis im Herkunftsstaat aufgeben. (3) Die in Rede stehende nationale Bestimmung ist auch in Fällen anwendbar, in denen kein Zusammenhang zwischen dem Arzt bzw. dem Zahnarzt und dem Sozialversicherungssystem besteht.

126. Ausser unter ganz besonderen Umständen dürfen nationale Bestimmungen nicht festlegen, in welchem Umfang Ärzte und Zahnärzte in ihrer jeweiligen Praxis tätig sind. Vorzuschreiben, dass Ärzte und Zahnärzte ausschliesslich in einer Praxis arbeiten dürfen, würde zum gleichen Ergebnis führen wie eine *single practice rule*. Die Kommission verweist dazu auf das Urteil *Kommission./.Luxemburg*[79].

127. Die Kommission der Europäischen Gemeinschaften schlägt folgende Antwort auf die Fragen vor:

> *„Artikel 31 des EWR-Abkommens über das Niederlassungsrecht steht einer nationalen Vorschrift, die Zahnärzten das Führen nur einer Praxis erlaubt, entgegen. Eine solche Massnahme kann weder als Massnahme zur Kontrolle der Gesundheitskosten, noch zur Aufrechterhaltung des finanziellen Gleichgewichts des Systems der Sozialen Sicherheit eines EFTA-Staates gerechtfertigt werden, es sei denn, dass allgemeine Gründe des öffentlichen Interesses nachgewiesen*

78 Vgl. FN 33.

79 Vgl. FN 2.

presence in a particular practice except where it could be shown that this was required – and then only to the extent necessary – to ensure the well-being of patients. The legitimacy, or otherwise, of any such exceptional provision would be for the national courts to determine."

Per Tresselt
Judge-Rapporteur

werden. Auch das Erfordernis, den Zahnärzten eine bestimmte Anwesenheitsdauer in einer bestimmten Praxis vorzuschreiben, widerspricht Artikel 31 EWR-Abkommen. Ein solches Erfordernis ist nur zulässig, wenn nachgewiesen werden kann, dass es notwendig ist, um das Wohlergehen der Patienten sicherzustellen. Die Rechtmässigkeit jeder dieser Ausnahmebestimmungen müsste das nationale Gericht beurteilen.“

Per Tresselt
Berichterstatter

Case E-6/00

Dr Jürgen Tschannett

(Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein))

(Right of establishment – Single practice rule – Justification by overriding reasons of general interest)

Summary of the Judgment

When one is interpreting the EEA Agreement, it is necessary always to take into account that the objective of the Contracting Parties was to create a dynamic and homogeneous European Economic Area. This point of departure has particular weight with regard to fundamental principles, such as the freedom of establishment set out in Article 31 EEA. The Court has, at the same time, recognised that there are differences in the scope and purpose of the EEA Agreement as compared to the EC Treaty, and has stated that these differences might, under specific circumstances, lead to differences in interpretation. In the present case, the Court has not been presented with any specific circumstance which would compel it to disregard the case law of the Court of Justice of the European Communities in respect of Article 43 EC.

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, or through the exercise of administrative discretion with regard to exceptions and dispensations, would in practice lead to the same result.

Rechtssache E-6/00

Dr Jürgen Tschannett

(Antrag der Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein auf Erlass einer Vorlageentscheidung)

(Niederlassungsfreiheit – „Single practice rule" – Rechtfertigung aus zwingenden Gründen des Allgemeinwohls)

Zusammenfassung des Urteils

Bei der Auslegung des EWR-Abkommens ist stets zu beachten, dass die Zielsetzung der Vertragsparteien darin bestand, einen dynamischen und homogenen Europäischen Wirtschaftsraum zu schaffen. Dieser Ausgangspunkt ist von besonderer Bedeutung im Hinblick auf elementare Grundsätze wie die in Artikel 31 EWRA normierte Niederlassungsfreiheit. Zugleich hat der Gerichtshof anerkannt, dass es zwischen dem EWR-Abkommen und dem EG-Vertrag Unterschiede hinsichtlich des Anwendungsbereichs und der Ziele gibt, und hat entschieden, dass diese Unterschiede unter spezifischen Umständen zu Unterschieden in der Auslegung führen können. Im vorliegenden Fall sind dem Gerichtshof keine spezifischen Umstände vorgetragen worden, die ihn zwingen würden, die Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften zu Artikel 43 EGV unberücksichtigt zu lassen.

Nach ständiger Rechtsprechung verbietet der Grundsatz der Gleichbehandlung 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.

The practical effect of the single practice rule appears to be that it prevents physicians who are already in practice outside the territory of Liechtenstein from establishing a secondary practice in Liechtenstein. Having to give up an established practice renders it less attractive for foreign physicians to establish themselves in Liechtenstein, and directly affects physicians' access to the market in that country. The negative consequences of the rule would be more likely to materialise for physicians established in another EEA State than for physicians already in practice in Liechtenstein.

It appears that a primary objective of the contested single practice rule is to limit the total number of physicians active in the country. This must mean that the rule is assumed to be an effective mechanism for restraining the inclination of non-national physicians to establish themselves in Liechtenstein, and that the rule is intended to function as a restriction on the general right to establishment for a large number of physicians from other EEA States.

The fact that the contested national rule is not contrary to the provisions of the EEA Agreement relating to the freedom to provide services does not affect the compatibility of that national rule with the provisions of the EEA Agreement on the freedom of establishment.

The single practice rule may potentially dissuade physicians from other EEA States from establishing themselves in Liechtenstein. This is sufficient to establish a breach of Article 31 EEA. There is no requirement that an appreciable effect on cross-border establishment be demonstrated.

Non-discriminatory national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement, such as the single practice rule at issue in the present case, can be justified only if they fulfil the following conditions: they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective.

The contested single practice rule is not justified by overriding reasons based on the general interest.

A national provision of a Contracting Party to the EEA Agreement which provides that a physician may not operate more than one practice, regardless of location, is incompatible with Article 31 EEA.

Es zeigt sich, dass die praktische Wirkung der „*Single practice rule*“ darin besteht, dass sie Ärzte, die bereits ausserhalb des Hoheitsgebiets des Fürstentums Liechtenstein eine Praxis haben, an der Gründung einer Zweitpraxis in Liechtenstein hindert. Der Zwang zur Aufgabe einer bestehenden Praxis macht es für ausländische Ärzte weniger attraktiv, sich in Liechtenstein niederzulassen, und beeinträchtigt unmittelbar den Zugang von Ärzten zum Markt dieses Landes. Die negativen Folgen der „*Single practice rule*“ werden eher für Ärzte aus einem anderen EWR-Staat eintreten als für solche, die bereits in Liechtenstein niedergelassen sind.

Es scheint, dass ein Hauptzweck der beanstandeten „*Single practice rule*““ darin besteht, die Gesamtzahl der im Land praktizierenden Ärzte zu begrenzen. Dies kann nur bedeuten, dass die „*Single practice rule*“ als ein wirksamer Mechanismus angesehen wird, die Neigung ausländischer Ärzte, sich in Liechtenstein niederzulassen, einzuschränken, und dass sie als eine Beschränkung des allgemeinen Niederlassungsrechts für eine grosse Zahl von Ärzten aus anderen EWR-Staaten wirken soll.

Dass die beanstandete nationale Regelung nicht den Bestimmungen des EWR-Abkommens über die Dienstleistungsfreiheit zuwiderläuft, berührt nicht die Frage ihrer Vereinbarkeit mit den Bestimmungen des EWR-Abkommens über die Niederlassungsfreiheit.

Die „*Single practice rule*“ kann Ärzte aus anderen EWR-Staaten von einer Niederlassung in Liechtenstein abschrecken. Dies genügt für die Feststellung eines Verstosses gegen Artikel 31 EWRA. Des Nachweises einer spürbaren Auswirkung auf die grenzüberschreitende Niederlassung bedarf es nicht.

Nichtdiskriminierende nationale Massnahmen, welche die Ausübung von durch das EWR-Abkommen gewährleisteten Grundfreiheiten behindern oder weniger attraktiv machen können, wie es bei der im Ausgangsverfahren in Rede stehenden „*Single practice rule*“ der Fall ist, können nur dann gerechtfertigt sein, wenn sie die folgenden Voraussetzungen erfüllen: Sie müssen zwingenden Gründen des Allgemeininteresses entsprechen, sie müssen zur Erreichung des verfolgten Ziels geeignet sein, und sie dürfen nicht über das hinausgehen, was zur Erreichung dieses Ziels erforderlich ist.

Die beanstandete „*Single practice rule*“ ist nicht durch zwingende Gründe des Allgemeininteresses gerechtfertigt.

Eine nationale Bestimmung einer Vertragspartei des EWR-Abkommens, nach der ein Arzt nicht mehr als eine Praxis, gleichviel an welchem Ort, führen darf, ist nicht mit Artikel 31 EWRA vereinbar.

JUDGMENT OF THE COURT

14 June 2001*

(Right of establishment – Single practice rule – Justification by overriding reasons of general interest)

In Case E-6/00

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 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 Jürgen Tschannett

on the interpretation of Article 31 of the EEA Agreement.

THE COURT,

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

Registrar: Gunnar Selvik

after considering the written observations submitted on behalf of:

– Dr Jürgen Tschannett, represented by Harry Gstöhl, Rechtsanwalt;

– the Government of Liechtenstein, represented by Christoph Büchel, Director, EEA Coordination Unit, and Frank Montag, Rechtsanwalt;

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

URTEIL DES GERICHTSHOFS

14. Juni 2001*

(Niederlassungsrecht – "Single practice rule" – Rechtfertigung durch zwingende Gründe des Allgemeininteresses)

In der Rechtssache E-6/00

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 in der gegen die Entscheidung der Regierung des Fürstentums Liechtenstein gerichteten Beschwerde von

Dr. Jürgen Tschannett

über die Auslegung von Artikel 31 des EWR-Abkommens erlässt

DER GERICHTSHOF,

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

Kanzler: Gunnar Selvik

Beteiligte, die schriftliche Erklärungen abgegeben haben:

– Dr. Jürgen Tschannett, vertreten durch Rechtsanwalt Harry Gstöhl;

– Liechtensteinische Regierung, vertreten durch Cristoph Büchel, Direktor, EWR-Koordinierungsstelle, und Rechtsanwalt Dr. Frank Montag;

– Isländische Regierung, vertreten durch Högni S. Kristjánsson,

* Sprache des Antrags auf Erlass eines Gutachtens: Deutsch.

– the Government of Iceland, represented by Högni S. Kristjánsson, 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 Anne-Lise H. Rolland, Officer, Legal & Executive Affairs, acting as Agent;

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

having regard to the Report for the Hearing,

after hearing the oral observations of Dr Jürgen Tschannett, represented by Gunilla Kranz, the Government of Liechtenstein, the EFTA Surveillance Authority, represented by Michael Sanchez Rydelski, and the Commission of the European Communities at the hearing on 6 March 2001,

gives the following

Judgment

Facts and procedure

1 Dr Jürgen Tschannett (hereinafter the "Complainant") is an Austrian national living in Nendeln, Liechtenstein, with an established medical practice in Sulz, Vorarlberg, Austria. By an application dated 27 August 1996, the Complainant filed a request with the Liechtenstein Sanitätskommission (Board of Public Health) for the grant of a licence to practise in Liechtenstein as a general medical practitioner with the additional title "Facharzt für Arbeitsmedizin" (Specialist in occupational medicine).

2 The Sanitätskommission, by a decision dated 25 June 1999, refused to grant the licence applied for by the Complainant. The reason given for that decision was, essentially, that according to Article 9(1) of the *Verordnung vom 17 Dezember 1996 betreffend die Abänderung der Verordnung über die medizinischen Berufe* (Regulation on medical professions), a physician seeking a licence to practise in Liechtenstein may not operate more than one practice, regardless of location (hereinafter the "single practice rule"), and that a licence could not be granted until the Complainant had given up his practice in Austria and provided written confirmation to that effect from the Vorarlberger Ärztekammer (Vorarlberg Medical Association).

Rechtsabteilung, Aussenministerium, als Beauftragten;

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

– EFTA-Überwachungsbehörde, vertreten durch Anne-Lise H. Rolland, Rechtliche & Exekutive Angelegenheiten, als Beauftragte;

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

aufgrund des Sitzungsberichts,

nach Anhörung der mündlichen Stellungnahmen von Dr. Jürgen Tschannett, vertreten durch Gunilla Kranz, der liechtensteinischen Regierung, der EFTA-Überwachungsbehörde, vertreten durch Michael Sanchez Rydelski, und der Kommission der Europäischen Gemeinschaften in der Sitzung vom 6. März 2001,

folgendes

Urteil

Sachverhalt und Verfahren

1 Dr. Jürgen Tschannett (nachstehend: Beschwerdeführer) ist ein in Nendeln in Liechtenstein lebender österreichischer Staatsangehöriger, der in Sulz in Vorarlberg (Österreich) eine Arztpraxis eingerichtet hat. Mit Gesuch vom 27. August 1996 an die Sanitätskommission des Fürstentums Liechtenstein beantragte er die Erteilung einer Konzession als Arzt für Allgemeinmedizin mit dem zusätzlichen Titel “Facharzt für Arbeitsmedizin” in Liechtenstein.

2 Die Sanitätskommission lehnte die Erteilung der vom Beschwerdeführer beantragten Konzession mit Verfügung vom 25. Juni 1999 ab. Diese Entscheidung wurde im Wesentlichen damit begründet, dass gemäss Artikel 9 Absatz 1 der Verordnung vom 17. Dezember 1996 betreffend die Abänderung der Verordnung über die medizinischen Berufe ein Arzt, der um eine Praxiskonzession in Liechtenstein nachsuche, nicht mehr als eine Praxis, gleichviel an welchem Ort, führen dürfe (nachstehend: *single practice rule*) und dass eine Konzession nicht erteilt werden könne, solange der Beschwerdeführer seine Praxis in Österreich nicht aufgegeben und hierüber eine schriftliche Bestätigung der Ärztekammer für Vorarlberg beigebracht habe.

3 The Complainant submitted to the Government of Liechtenstein a complaint against the decision of the Sanitätskommission, asking for the contested decision to be rescinded and for the licence to be granted. By a decision dated 16 November 1999, the Government of Liechtenstein rejected the complaint and upheld the decision made by the Sanitätskommission. On 6 December 1999, the Complainant submitted, by way of appeal, a further complaint to the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein. In the proceedings before the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein, the Complainant has raised issues concerning the compatibility of the single practice rule with the EEA Agreement.

4 The Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein decided to stay the proceedings and submit a Request for an Advisory Opinion to the EFTA Court on the following questions:

> *1 Is the single practice rule applying without exception to all doctors under Liechtenstein national law, and in particular Article 9(1) of the Regulation of 8 November 1988 on the medical professions which provides:*
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> *"A doctor may pursue his profession in a self-employed capacity, as a sole practitioner or jointly with others, only if he holds a licence authorising him to do so and only if he himself works on his own behalf in the practice concerned. A doctor may not operate more than one practice, whether as a sole practitioner or jointly with others"*
>
> *compatible with the EEA and/or with the Agreement on the European Economic Area (EEA Agreement) of 2 May 1992?*
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> *2 If the answer to the first question is that the Liechtenstein single practice rule, as laid down in Article 9(1) of the Regulation of 8 November 1988 on the medical professions, is basically compatible with the EEA, does that none the less mean that, in an individual case, regard must be had to the specialist medical activities carried on by an "occupational physician", so that the necessary exceptions should be made for such specific activities, which do not require a "medical practice" within the generally accepted meaning of the term?*

5 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.

3 Der Beschwerdeführer erhob gegen diese Verfügung der Sanitätskommission Beschwerde an die liechtensteinische Regierung und beantragte, die angefochtene Verfügung aufzuheben und ihm die Konzession zu erteilen. Mit Entscheidung vom 16. November 1999 wie die liechtensteinische Regierung die Beschwerde zurück und bestätigte die Verfügung der Sanitätskommission. Am 6. Dezember 1999 erhob der Beschwerdeführer hiergegen Beschwerde an die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein. Im Verfahren vor der Verwaltungsbeschwerdeinstanz machte der Beschwerdeführer geltend, die *single practice rule* sei nicht mit dem EWR-Abkommen vereinbar.

4 Die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein hat beschlossen, das Verfahren auszusetzen und den EFTA-Gerichtshof um Erlass einer Vorlageentscheidung über folgende Fragen zu ersuchen:

> *1 Ist die im nationalen liechtensteinischen Recht absolut geltende Bestimmung der "single practice rule" für Ärzte, insbesondere Artikel 9 Absatz 1 der Verordnung vom 8. November 1988 über die medizinischen Berufe, nämlich:*
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> *"Der Arzt darf nur in einer Einzel- oder Gemeinschaftspraxis selbständig tätig sein, wenn er die Konzession dazu besitzt und selbst im eigenen Namen in der Praxis arbeitet. Der Arzt darf nicht mehr als eine Einzel- oder Gemeinschaftspraxis führen",*
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> *EWR-konform bzw. mit dem Abkommen über den Europäischen Wirtschaftsraum vom 2. Mai 1992 (EWRA) vereinbar?*
>
> *2 Im Falle der Beantwortung der ersten Frage dahin gehend, dass die liechtensteinische "single practice rule" gemäss Artikel 9 Absatz 1 der Verordnung vom 8. November 1988 über die medizinischen Berufe grundsätzlich EWR-konform ist, ob dann dennoch im Einzelfall auf die fachärztliche Bestätigung als "Arbeitsmediziner" Rücksicht genommen werden müsste, indem für solch spezifische Tätigkeiten, die keine "Arztpraxis" im landläufigen Sinne benötigen, die nötigen Ausnahmen gewährt werden müssten.*

5 Wegen weiterer Einzelheiten des Sachverhalts des Ausgangsverfahrens, der anwendbaren Regelungen sowie 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.

Findings of the Court

6 Before addressing directly the question formulated by the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein, the Court finds it appropriate to consider a more general argument submitted by the Government of Liechtenstein. In the Government of Liechtenstein's contention, the case-law of the Court of Justice of the European Communities relating to the freedom of establishment under Article 43 EC is not directly relevant for the interpretation of the corresponding provision in Article 31 EEA. That contention is based on, *inter alia*, the argument that there are fundamental differences in the scope and purposes of the Community legal order and the EEA legal order.

7 The Court has consistently held that when one is interpreting the EEA Agreement, it is necessary always to take into account that the objective of the Contracting Parties was to create a dynamic and homogeneous European Economic Area (see, *inter alia*, Case E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205, at paragraph 17). This point of departure has particular weight with regard to fundamental principles, such as the freedom of establishment set out in Article 31 EEA. The Court has, at the same time, recognised that there are differences in the scope and purpose of the EEA Agreement as compared to the EC Treaty, and has stated that these differences might, under specific circumstances, lead to differences in interpretation (see Case E-2/97 *Mag Instruments* v *California Trading Company Norway* [1997] EFTA Court Report 127, at paragraph 25 *et seq.*). In the present case, the Court has not been presented with any specific circumstance which would compel it to disregard the case-law of the Court of Justice of the European Communities in respect of Article 43 EC (see Case E-3/98 *Rainford-Towning*, cited above, at paragraph 21). Therefore, the Court cannot accept the contention of the Government of Liechtenstein to the effect that the case-law of the Court of Justice of the European Communities is not relevant to the consideration of the EEA provisions raised in the present case.

8 By its first question, the national court is essentially asking whether a national provision stating that a physician seeking a licence to practise in Liechtenstein may not operate more than one practice, regardless of location, is compatible with the provisions of the EEA Agreement

9 The Court notes that the Complainant and the Government of Liechtenstein are in disagreement with regard to whether national law in fact requires the Complainant to obtain a licence to operate a practice as a general medical practitioner, in order to carry out the functions of an occupational physician in Liechtenstein. It is for the national court to interpret national law, and to assess whether a licence is required in the present case.

Entscheidung des Gerichtshofs

6 Bevor der Gerichtshof direkt auf die von der Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein vorgelegten Fragen eingeht, hält er es für angezeigt, sich mit einem allgemeineren Argument der liechtensteinischen Regierung zu befassen. Nach Ansicht der liechtensteinischen Regierung ist die Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften zur Niederlassungsfreiheit nach Artikel 43 EGV nicht unmittelbar übertragbar auf die Auslegung der entsprechenden Bestimmung in Artikel 31 EWRA. Sie stützt diese Ansicht u.a. auf grundlegende Unterschiede zwischen der Rechtsordnung der Gemeinschaft und der des EWR-Abkommens hinsichtlich ihres jeweiligen Anwendungsbereichs und ihrer Ziele.

7 Nach ständiger Rechtsprechung des Gerichtshofs ist bei der Auslegung des EWR-Abkommens stets zu beachten, dass die Zielsetzung der Vertragsparteien darin bestand, einen dynamischen und homogenen Europäischen Wirtschaftsraum zu schaffen (vgl. u.a. Rechtssache E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205, Paragraph 17). Dieser Ausgangspunkt ist von besonderer Bedeutung im Hinblick auf elementare Grundsätze wie die in Artikel 31 EWRA normierte Niederlassungsfreiheit. Zugleich hat der Gerichtshof anerkannt, dass es zwischen dem EWR-Abkommen und dem EG-Vertrag Unterschiede hinsichtlich des Anwendungsbereichs und der Ziele gibt, und hat entschieden, dass diese Unterschiede unter spezifischen Umständen zu Unterschieden in der Auslegung führen können (vgl. Rechtssache E-2/97 *Mag Instruments ./. California Trading Company Norway* [1997] EFTA Court Report 127, Paragraphen 25 ff.). Im vorliegenden Fall sind dem Gerichtshof keine spezifischen Umstände vorgetragen worden, die ihn zwingen würden, die Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften zu Artikel 43 EGV unberücksichtigt zu lassen (vgl. die oben erwähnte Rechtssache E-3/98 *Rainford Towning*, Paragraph 21). Daher kann der Gerichtshof dem Vorbringen der liechtensteinischen Regierung nicht folgen, wonach die Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften für die Prüfung der im vorliegenden Fall einschlägigen Bestimmungen des EWR-Abkommens nicht relevant sei.

8 Mit seiner ersten Frage möchte das nationale Gericht im Wesentlichen wissen, ob eine nationale Bestimmung, wonach ein Arzt, der eine Konzession zur Führung einer Praxis in Liechtenstein beantragt, nicht mehr als eine Praxis, gleichviel an welchem Ort, betreiben darf, mit den Bestimmungen des EWR-Abkommens vereinbar ist.

9 Der Gerichtshof hält fest, dass der Beschwerdeführer und die liechtensteinische Regierung darüber streiten, ob der Beschwerdeführer nach nationalem Recht tatsächlich einer Konzession zur Führung einer Praxis als Arzt für Allgemeinmedizin bedarf, um in Liechtenstein die Tätigkeit eines Arbeitsmediziners ausüben zu können. Es ist Sache des nationalen Gerichts, das nationale Recht auszulegen und festzustellen, ob im vorliegenden Fall eine Konzession erforderlich ist.

The Court notes further that the questions referred by the national court are based on the assumption that there is such a licence requirement, and will deal with the case on that basis.

10 The pursuit of an economic activity by an EEA national in an EEA State other than his State of nationality may, under the EEA Agreement, be governed by the chapter on the free movement of workers, or the chapter on the right of establishment, or the chapter on services, these being mutually exclusive (see Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, at paragraph 20).

11 In the present case, the Complainant, a national of Austria, seeks to take up and pursue, on a stable and continuous basis, activities as a self-employed occupational physician in Liechtenstein. This follows from the Complainant's own pleadings. Therefore, the case must be dealt with under the rules on the freedom of establishment (see Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, cited above, at paragraphs 23 to 25).

12 Freedom of establishment is one of the fundamental principles of the EEA Agreement. Chapter 2 of Part III of the EEA Agreement contains the principal treaty provisions relating to the freedom of establishment within the EEA. Article 31 EEA provides 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."

13 This provision is specific and far-reaching. It refers explicitly to self-employed persons, and to the setting up of agencies, branches or subsidiaries. This indicates that the right to secondary establishments is equated with the right to establish a principal seat of activity. Article 31 EEA requires national treatment for nationals of other EEA States (see *inter alia* Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, cited above, at paragraph 33), and abolishes all restrictions on establishment between the Contracting Parties to the EEA Agreement.

Der Gerichtshof hält ferner fest, dass das vorlegende Gericht in seinen Vorlagefragen davon ausgeht, dass eine solche Konzession erforderlich ist, und er wird die Fragen auf dieser Grundlage behandeln.

10 Die Ausübung einer wirtschaftlichen Tätigkeit durch einen Angehörigen eines EWR-Staates in einem anderen EWR-Staat kann nach dem EWR-Abkommen unter das Kapitel über die Freizügigkeit der Arbeitnehmer, unter das Kapitel über das Niederlassungsrecht oder unter das Kapitel über Dienstleistungen fallen, wobei diese Kapitel einander ausschliessen (EuGH C-55/94 *Gebhard ./. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Slg. 1995, I-4165, Randnr. 20).

11 Im vorliegenden Fall strebt der Beschwerdeführer, ein Österreicher, die Aufnahme und ständige, kontinuierliche Ausübung von Tätigkeiten eines selbständigen Arztes für Arbeitsmedizin in Liechtenstein an. Dies ergibt sich aus dem Vortrag des Beschwerdeführers selbst. Der Fall ist daher nach den Bestimmungen über die Niederlassungsfreiheit zu beurteilen (EuGH C-55/94 *Gebhard ./. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, a.a.O., Randnrn. 23 bis 25).

12 Die Niederlassungsfreiheit ist einer der elementaren Grundsätze des EWR-Abkommens. Kapitel 2 des Teils III des EWR-Abkommens enthält die wesentlichen Abkommensbestimmungen über die Niederlassungsfreiheit im EWR. 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 ."

13 Diese Bestimmung ist spezifisch und weitreichend. Sie bezieht sich ausdrücklich auf Selbständige und auf die Gründung von Agenturen, Zweigniederlassungen oder Tochtergesellschaften. Dies deutet darauf hin, dass das Recht auf eine Zweitniederlassung dem Recht auf die Begründung eines Haupttätigkeitssitzes gleichgestellt ist. Artikel 31 EWRA schreibt die Inländerbehandlung für Angehörige anderer EWR-Staaten vor (vgl. u.a. EuGH C-55/94 *Gebhard ./. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, a.a.O., Randnr. 33) und beseitigt alle Niederlassungsbeschränkungen zwischen den Vertragsparteien des EWR-Abkommens.

14 Therefore, it is necessary for the Court to consider whether a single practice rule such as that at issue in the main proceedings constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

15 The Court of Justice of the European Communities has consistently held that the right of establishment entails the freedom to set up and maintain, subject to observance of the professional rules of conduct, more than one place of work within the Community (see, *inter alia*, Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351, at paragraph 20, and Case C-351/90 *Commission* v *Luxembourg* [1992] ECR I-3945, at paragraph 11).

16 The contested single practice rule does not distinguish between Liechtenstein physicians and physicians of other EEA States. It applies equally to all physicians seeking to operate a medical practice in Liechtenstein, regardless of whether they have their primary establishment in Liechtenstein or in any other EEA State, and regardless of their nationality and place of residence. There is no overt discrimination in this respect.

17 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, or through the exercise of administrative discretion with regard to exceptions and dispensations, would in practice lead to the same result (see, *inter alia*, Case E-3/98 *Rainford-Towning*, cited above, at paragraph 27).

18 The Court observes that, for physicians who have previously not conducted a practice, the contested single practice rule does not entail negative effects with regard to their establishment in Liechtenstein.

19 Nor does it provide a barrier to the establishment of a practice within the territory of Liechtenstein by those physicians who have already established a practice outside that country when, in their evaluation, the relative professional career prospects are such that they would be induced to give up the practice they already have established, or for those who, for reasons unconnected with their professional calculations, would discontinue their previous practice.

20 The practical effect of the single practice rule appears to be that it prevents physicians who are already in practice outside the territory of Liechtenstein from establishing a secondary practice in Liechtenstein. Having to give up an established practice renders it less attractive for foreign physicians to establish themselves in Liechtenstein, and directly affects physicians' access to the market in that country. The negative consequences of the rule would be more likely to materialise for physicians established in another EEA State than for physicians already in practice in Liechtenstein.

14 Daher muss der Gerichtshof prüfen, ob eine *single practice rule* wie die im Ausgangsverfahren in Rede stehende eine Beschränkung der Niederlassungsfreiheit im Sinne von Artikel 31 EWRA darstellt.

15 Nach ständiger Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften umfasst das Niederlassungsrecht die Möglichkeit, unter Beachtung der jeweiligen Berufsregelungen im Gebiet der Gemeinschaft mehr als eine Stätte für die Ausübung einer Tätigkeit einzurichten und beizubehalten (vgl. u.a. EuGH C-106/91 *Ramrath ./. Ministre de la Justice,* Slg. 1992, I-3351, Randnr. 20, und C-351/90 *Kommission ./. Luxemburg*, Slg. 1992, I-3945, Randnr. 11).

16 Die beanstandete *single practice rule* unterscheidet nicht zwischen liechtensteinischen Ärzten und Ärzten aus anderen EWR-Staaten. Sie gilt gleichermassen für alle Ärzte, die in Liechtenstein eine ärztliche Praxis betreiben wollen, unabhängig davon, ob sie ihre Hauptniederlassung in Liechtenstein oder in irgendeinem anderen EWR-Staat haben, und ungeachtet ihrer Staatsangehörigkeit und ihres Wohnsitzes. Eine offene Diskriminierung liegt insoweit nicht vor.

17 Nach ständiger Rechtsprechung verbietet der Grundsatz der Gleichbehandlung 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,* a.a.O., Randnr. 27).

18 Der Gerichtshof weist darauf hin, dass die beanstandete *single practice rule* keine negativen Auswirkungen auf die Niederlassung von Ärzten, die zuvor noch keine Praxis geführt haben, in Liechtenstein hat.

19 Sie errichtet auch keine Schranke für die Einrichtung einer Praxis im Hoheitsgebiet des Fürstentums Liechtenstein durch Ärzte, die bereits eine Praxis ausserhalb dieses Landes eingerichtet haben, wenn diese Ärzte die entsprechenden Aussichten für ihre berufliche Karriere als so günstig einschätzen, dass sie sich zur Aufgabe ihrer bereits bestehenden Praxis veranlasst sehen würden, oder durch Ärzte, die aus anderen als beruflichen Erwägungen ihre bisherige Praxis nicht fortführen würden.

20 Es zeigt sich, dass die praktische Wirkung der *single practice rule* darin besteht, dass sie Ärzte, die bereits ausserhalb des Hoheitsgebiets des Fürstentums Liechtenstein eine Praxis haben, an der Gründung einer Zweitpraxis in Liechtenstein hindert. Der Zwang zur Aufgabe einer bestehenden Praxis macht es für ausländische Ärzte weniger attraktiv, sich in Liechtenstein niederzulassen, und beeinträchtigt unmittelbar den Zugang von Ärzten zum Markt dieses Landes. Die negativen Folgen der *single practice rule* werden eher für Ärzte aus einem anderen EWR-Staat eintreten als für solche, die bereits in Liechtenstein niedergelassen sind.

21 From the submissions of the Government of Liechtenstein, it appears that a primary objective of the contested single practice rule is to limit the total number of physicians active in the country. This must mean that the rule is assumed to be an effective mechanism for restraining the inclination of non-national physicians to establish themselves in Liechtenstein, and that the rule is intended to function as a restriction on the general right to establishment for a large number of physicians from other EEA States.

22 The Government of Liechtenstein has submitted that the single practice rule at issue does not prevent physicians established in other EEA States from providing services to patients in Liechtenstein from their established practices abroad.

23 The Court finds that this circumstance does not remove the restrictive effect of the national rule with regard to secondary establishments. The fact that the contested national rule is not contrary to the provisions of the EEA Agreement relating to the freedom to provide services does not affect the compatibility of that national rule with the provisions of the EEA Agreement on the freedom of establishment.

24 The Government of Liechtenstein has also submitted that the high proportion of physicians from other EEA States practising in Liechtenstein implies that the single practice rule, in practice, has not had the effect of rendering it more onerous for nationals from other EEA States to establish themselves in Liechtenstein.

25 That argument cannot be accepted. The single practice rule may potentially dissuade physicians from other EEA States from establishing themselves in Liechtenstein. This is sufficient to establish a breach of Article 31 EEA. There is no requirement that an appreciable effect on cross-border establishment be demonstrated.

26 The Court concludes from the foregoing that a single practice rule such as that at issue in the main proceedings constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

27 The Court must now examine whether this restriction can be objectively justified so as to permit the continued application of such a single practice rule.

28 Non-discriminatory national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement, such as the single practice rule at issue in the present case, can be justified only if they fulfil the following conditions: they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective

21 Dem Vortrag des Fürstentums Liechtenstein zufolge besteht ein Hauptzweck der beanstandeten *single practice rule* darin, die Gesamtzahl der im Land praktizierenden Ärzte zu begrenzen. Dies kann nur bedeuten, dass die *single practice rule* als ein wirksamer Mechanismus angesehen wird, die Neigung ausländischer Ärzte, sich in Liechtenstein niederzulassen, einzuschränken, und dass sie als eine Beschränkung des allgemeinen Niederlassungsrechts für eine grosse Zahl von Ärzten aus anderen EWR-Staaten wirken soll.

22 Die liechtensteinische Regierung hat vorgetragen, dass die in Rede stehende *single practice rule* in anderen EWR-Staaten niedergelassene Ärzte nicht daran hindere, Dienstleistungen für Patienten in Liechtenstein von ihren Praxen im Ausland aus zu erbringen.

23 Der Gerichtshof stellt fest, dass dieser Umstand die beschränkende Wirkung der nationalen Regelung für Zweitniederlassungen nicht beseitigt. Dass die beanstandete nationale Regelung nicht den Bestimmungen des EWR-Abkommens über die Dienstleistungsfreiheit zuwiderläuft, berührt nicht die Frage ihrer Vereinbarkeit mit den Bestimmungen des EWR-Abkommens über die Niederlassungsfreiheit.

24 Die liechtensteinische Regierung hat auch vorgetragen, die hohe Zahl von in Liechtenstein praktizierenden Ärzten aus anderen EWR-Staaten belege, dass die *single practice rule* nicht den Effekt gehabt habe, Staatsangehörige anderer EWR-Staaten bei ihrer Niederlassung in Liechtenstein über Gebühr zu belasten.

25 Dem ist nicht zu folgen. Die *single practice rule* kann Ärzte aus anderen EWR-Staaten von einer Niederlassung in Liechtenstein abschrecken. Dies genügt für die Feststellung eines Verstosses gegen Artikel 31 EWRA. Des Nachweises einer spürbaren Auswirkung auf die grenzüberschreitende Niederlassung bedarf es nicht.

26 Der Gerichtshof folgert aus dem Vorstehenden, dass eine *single practice rule*, wie sie im Ausgangsverfahren in Rede steht, eine Beschränkung der Niederlassungsfreiheit im Sinne von Artikel 31 EWRA darstellt.

27 Der Gerichtshof hat nun zu prüfen, ob diese Beschränkung objektiv gerechtfertigt werden kann, so dass die weitere Anwendung einer solchen *single practice rule* zulässig wäre.

28 Nichtdiskriminierende nationale Massnahmen, die die Ausübung von durch das EWR-Abkommen gewährleisteten Grundfreiheiten behindern oder weniger attraktiv machen können, wie es bei der im Ausgangsverfahren in Rede stehenden *single practice rule* der Fall ist, können nur dann gerechtfertigt sein, wenn sie die folgenden Voraussetzungen erfüllen: Sie müssen zwingenden Gründen des Allgemeininteresses entsprechen, sie müssen zur Erreichung des verfolgten Ziels geeignet sein, und sie dürfen nicht über das hinausgehen, was zur Erreichung dieses Ziels erforderlich ist

(see, to this effect, Case C-424/97 *Haim* [2000] ECR I-5123, at paragraph 57, and, most recently, Case C-108/96 *Mac Quen and Others* v *Grandvision Belgium*, judgment of 1 February 2001, not yet reported, at paragraph 26).

29 The Government of Liechtenstein has submitted that the underlying main objective of the single practice rule is the maintenance of the financial equilibrium of the Liechtenstein social security system. Protecting this equilibrium must be held to be an overriding reason based on the general interest, justifying a restriction on the freedom of establishment in this case. It is argued that if the single practice rule were disallowed, Liechtenstein would experience a significant increase in the number of medical practitioners. Such an increase in the supply of medical services in the country would simultaneously cause an artificial increase in the demand for such services. This would again lead to a corresponding rise in the expenditure relating to medical treatment in the Liechtenstein social security system. The Government of Liechtenstein has submitted that such increases in expenditure might threaten the sustainability of a health care system accessible to all.

30 Moreover, the Government of Liechtenstein has submitted that reasons connected with the maintenance of the high quality of medical services provided in Liechtenstein must also be taken into account. The single practice rule ensures the availability and continuity of presence of the practitioner. Medical practitioners who establish a second practice would not be able to provide the necessary continuous and permanent medical care for their patients as practitioners who exclusively operate one practice in the country.

31 The Court recalls that EEA law does not detract from the powers of the EEA States to organise their social security systems. In the absence of harmonisation at the EEA level, it is for each EEA State to determine whether and to what extent expenses for medical treatment are to be borne by the social security system.

32 Economic considerations alone cannot justify a barrier to one of the fundamental freedoms provided for in the EEA Agreement (see Case C-158/96 *Kohll* v *Union des Caisses de Maladie* [1998] ECR I-1931, at paragraph 41). However, it cannot be excluded that the risk of seriously undermining the financial balance of the social security system, and of jeopardising the sustainability of a health care system accessible to all, might nevertheless constitute an overriding reason in the general interest capable of justifying a barrier of that kind (see, *inter alia*, Case C-158/96 *Kohll* v *Union des Caisses de Maladie*, cited above, at paragraphs 41 and 50).

33 The Court notes from the information presented to it that, under the Liechtenstein health system, the services of an occupational physician within the field of occupational medicine would appear not to be covered by the social security system.

(vgl. in diesem Sinne EuGH C-424/97 *Haim,* Slg. 2000, I-5123, Randnr. 57, und jüngst Urteil vom 1. Februar 2001, C-108/96 *Mac Quen u.a. ./. Grandvision Belgium*, noch nicht veröffentlicht, Randnr. 26).

29 Die liechtensteinische Regierung hat vorgetragen, Hauptziel der *single practice rule* sei die Aufrechterhaltung des finanziellen Gleichgewichts des liechtensteinischen Systems der sozialen Sicherheit. Der Schutz dieses Gleichgewichts sei als zwingender Grund des öffentlichen Interesses anzusehen, der eine Beschränkung der Niederlassungsfreiheit in diesem Fall rechtfertige. Würde die *single practice rule* für unzulässig erklärt, so käme es in Liechtenstein zu einer deutlichen Zunahme der Zahl der praktizierenden Ärzte. Eine solche Zunahme des Angebots an ärztlichen Leistungen würde zugleich zu einem künstlichen Anstieg der Nachfrage nach solchen Leistungen führen. Dies wiederum würde zu einem entsprechenden Anstieg der Ausgaben für medizinische Behandlungen im liechtensteinischen System der sozialen Sicherheit führen. Nach Ansicht der liechtensteinischen Regierung könnte dieser Kostenanstieg die Nachhaltigkeit eines allen Menschen zugänglichen Gesundheitssystems gefährden.

30 Darüber hinaus hat die liechtensteinische Regierung vorgetragen, dass auch Gründe der Aufrechterhaltung der hohen Qualität der in Liechtenstein angebotenen medizinischen Leistungen zu berücksichtigen seien. Die *single practice rule* sichere die Verfügbarkeit und kontinuierliche Anwesenheit des Arztes. Ärzten mit einer Zweitniederlassung wäre es im Gegensatz zu solchen mit nur einer Praxis im Land nicht möglich, die notwendige kontinuierliche und permanente Betreuung ihrer Patienten sicherzustellen.

31 Der Gerichtshof erinnert daran, dass das EWR-Recht die Befugnisse der EWR-Staaten zur Gestaltung ihrer Systeme der sozialen Sicherheit unberührt lässt. Mangels einer Harmonisierung auf EWR-Ebene ist es Sache jedes EWR-Staates, festzulegen, ob und in welchem Umfang Kosten medizinischer Behandlung vom System der sozialen Sicherheit zu tragen sind.

32 Rein wirtschaftliche Gründe können eine Beschränkung einer der im EWR-Abkommen vorgesehenen Grundfreiheiten nicht rechtfertigen (vgl. EuGH C-158/96 *Kohll ./. Union des Caisses de Maladie*, Slg. 1998, I-1931, Randnr. 41). Es kann jedoch nicht ausgeschlossen werden, dass die Gefahr einer ernsten Störung des finanziellen Gleichgewichts des Systems der sozialen Sicherheit und die Gefährdung der Nachhaltigkeit eines allen Menschen zugänglichen Gesundheitssystems dennoch einen zwingenden Grund des Allgemeininteresses darstellen kann, der eine derartige Beschränkung zu rechtfertigen vermag (vgl. EuGH C-158/96 *Kohll ./. Union des Caisses de Maladie*, a.a.O., Randnrn. 41 und 50).

33 Der Gerichtshof entnimmt den ihm vorgelegten Informationen, dass im liechtensteinischen Gesundheitssystem die Kosten arbeitsmedizinischer Leistungen eines Arztes für Arbeitsmedizin nicht vom System der sozialen Sicherheit getragen zu werden scheinen.

Therefore, an increase in the demand for such services would not have any effect on the expenditure of the social security system, and no threat would arise against the financial balance of the social security system.

34 It is not clear from the information presented to the Court whether an occupational physician holding a licence for general practice may, under national law, also perform such medical services as are in fact covered by the social security system. If that is the case, an increase in the demand for such services may result in a corresponding increase in the expenditure of the social security system. It cannot be ruled out that, in certain circumstances, an increase in the supply of medical services in the country may lead to an increase in the demand for such services which does not reflect a real need among patients. However, as the Court has already held in Case E-4/00 *Brändle*, judgment of 14 June 2001, not yet reported, a single practice rule is not necessary and proportionate in order to limit opportunities for physicians to create artificial demand for their services. There seem to be other, less restrictive means to deal with artificial and excessive supply-induced demand than by restricting the freedom of establishment by way of a single practice rule.

35 As regards the submission concerning the maintenance of the high quality of medical services, the Court observes that it is not, under contemporary conditions, necessary for a physician to be close to the patient on a continuous basis after the treatment has been given. Modern transport and communications have obviated the need to require medical practitioners to work in one place only.

36 In this respect, the Court notes that the single practice rule does not require that physicians reside in Liechtenstein or be continuously available locally. Therefore, the general rule prohibiting medical practitioners from establishing a secondary establishment in Liechtenstein seems to be neither suitable nor necessary in order to attain the objective of maintaining the high quality of medical services.

37 On the reasoning set out in the foregoing, and on the basis of what has been submitted to the Court, and without entering into any examination of questions of fact and their appreciation, this Court must hold that the contested single practice rule is not justified by overriding reasons based on the general interest.

38 In those circumstances, the answer to the first question must be that a national provision of a Contracting Party to the EEA Agreement which provides that a physician may not operate more than one practice, regardless of location, is incompatible with Article 31 EEA.

Daher hätte eine Zunahme der Nachfrage nach solchen Leistungen keinerlei Auswirkung auf die Ausgaben des Systems der sozialen Sicherheit, und das finanzielle Gleichgewicht des Systems der sozialen Sicherheit wäre nicht gefährdet.

34 Aus den dem Gerichtshof vorgelegten Informationen geht nicht hervor, ob ein Arbeitsmediziner, der über eine Konzession als Arzt für Allgemeinmedizin verfügt, nach nationalem Recht auch solche ärztliche Leistungen erbringen darf, deren Kosten tatsächlich vom System der sozialen Sicherheit getragen werden. Ist dies der Fall, so kann ein Anstieg der Nachfrage nach solchen Leistungen zu einem entsprechenden Anstieg der Ausgaben des Systems der sozialen Sicherheit führen. Es kann nicht ausgeschlossen werden, dass unter bestimmten Umständen eine Zunahme des Angebots an medizinischen Leistungen im Land zu einem Anstieg der Nachfrage nach solchen Leistungen führen kann, der kein echtes Bedürfnis auf Seiten der Patienten widerspiegelt. Wie der Gerichtshof jedoch bereits in der Rechtssache E-4/00 *Brändle*, Urteil vom 14. Juni 2001, noch nicht veröffentlicht, entschieden hat, ist eine *single practice rule* weder erforderlich noch angemessen, um die Möglichkeit für Ärzte zu begrenzen, eine künstliche Nachfrage nach ihren Leistungen zu schaffen. Um einer künstlichen, angebotsinduzierten Nachfrage zu begegnen, scheint es andere, weniger restriktive Mittel zu geben als die Beschränkung der Niederlassungsfreiheit durch eine *single practice rule.*

35 Was das Vorbringen betreffend die Aufrechterhaltung der hohen Qualität der medizinischen Leistungen angeht, bemerkt der Gerichtshof, dass unter heutigen Umständen ein Arzt nach der Behandlung eines Patienten nicht mehr ständig in dessen Nähe zu sein braucht. Moderne Verkehrs- und Kommunikationsmittel haben die Notwendigkeit beseitigt, von einem Arzt zu verlangen, dass er nur an einem Ort arbeitet.

36 In dieser Hinsicht hält der Gerichtshof fest, dass die *single practice rule* einem Arzt nicht vorschreibt, in Liechtenstein zu wohnen oder dort ständig verfügbar zu sein. Daher erscheint das allgemeine Verbot für Ärzte, eine Zweitniederlassung in Liechtenstein zu begründen, weder geeignet noch erforderlich, um das Ziel der Aufrechterhaltung einer hohen Qualität der medizinischen Leistungen zu erreichen.

37 Aus den vorstehend dargelegten Gründen und auf der Grundlage der ihm unterbreiteten Vorbringen muss der Gerichtshof, ohne in eine Prüfung von Tatsachenfragen und Fragen der Tatsachenwürdigung einzutreten, entscheiden, dass die beanstandete *single practice rule* nicht durch zwingende Gründe des Allgemeininteresses gerechtfertigt ist.

38 Unter diesen Umständen ist dem vorlegenden Gericht zu antworten, dass eine nationale Bestimmung einer Vertragspartei des EWR-Abkommens, nach der ein Arzt nicht mehr als eine Praxis, gleichviel an welchem Ort, führen darf, nicht mit Artikel 31 EWRA vereinbar ist.

39 In light of the discussion and conclusion with regard to the first question, it is not necessary to answer the second question, as that question is based on the premise that the single practice rule at issue is compatible with the EEA Agreement.

Costs

40 The costs incurred by 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 15 June 2000, hereby gives the following Advisory Opinion:

A national provision of a Contracting Party to the EEA Agreement which provides that a physician may not operate more than one practice, regardless of location, is incompatible with Article 31 EEA.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 14 June 2001.

Gunnar Selvik
Registrar

Thór Vilhjálmsson
President

39 Angesichts der Behandlung der ersten Frage und ihres Ergebnisses braucht die zweite Frage nicht beantwortet zu werden, da diese nur für den Fall gestellt ist, dass die in Rede stehende *single practice rule* nicht mit dem EWR- Abkommen vereinbar sein sollte.

Kosten

40 Die Auslagen der isländischen Regierung, der norwegischen Regierung, der EFTA-Überwachungskommission 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 erlässt

DER GERICHTSHOF

in Beantwortung der Fragen, die ihm die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein mit Beschluss vom 15. Juni 2000 vorgelegt hat, folgendes Gutachten:

Eine nationale Bestimmung einer Vertragspartei des EWR-Abkommens, nach der ein Arzt nicht mehr als eine Praxis, gleichviel an welchem Ort, führen darf, ist nicht mit Artikel 31 EWR-Abkommen vereinbar.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Verkündet in öffentlicher Sitzung in Luxemburg am 14. Juni 2001.

Gunnar Selvik
Kanzler

Thór Vilhjálmsson
Präsident

REPORT FOR THE HEARING

in Case E-6/00
– 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 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 Jürgen Tschannett

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

I. Introduction

1. By an order dated 15 June 2000, registered at the Court on 21 June 2000, 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 Jürgen Tschannett (hereinafter the "Complainant").

2. The dispute before the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein concerns the compatibility with the EEA Agreement of a Liechtenstein provision requiring that a medical practitioner seeking a licence to practise in Liechtenstein may not operate more than one practice, regardless of location.

II. Legal background

* Amendments to paragraphs 58, 59, and 61.

SITZUNGSBERICHT
in der Rechtssache E-6/00
– berichtigte Fassung* –

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 über die Auslegung des EWR-Abkommens in der Beschwerde von

Dr. Jürgen Tschannett

gegen die Entscheidung der Regierung des Fürstentums Liechtenstein über die Auslegung von Artikel 4, 31 und 33 des Abkommens über den Europäischen Wirtschaftsraum (EWR-Abkommen).

I. Einleitung

1. Mit Beschluss vom 15. Juni 2000, der am 21. Juni 2000 beim Gerichtshof eingegangen ist, ersuchte die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein um Erlass einer Vorlageentscheidung über die Auslegung des EWR-Abkommens in der Beschwerde von Dr. Jürgen Tschannett (der „Beschwerdeführer“) gegen die Entscheidung der Regierung des Fürstentums Liechtenstein.

2. Im Rechtsstreit vor der Verwaltungsbeschwerdeinstanz geht es um die Frage, ob eine Bestimmung des liechtensteinischen Rechts, nach der ein praktischer Arzt, der in Liechtenstein eine Konzession für Allgemeinmedizin sowie als Arbeitsmediziner beantragt - unabhängig vom Ort - nicht mehr als eine Praxis unterhalten darf, mit dem EWR-Abkommen vereinbar sind.

II. Rechtlicher Hintergrund

* Die Änderungen betreffen die Randnummern 58, 59 und 61.

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:

> *"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 des Fürstentums Liechtenstein is the *Verordnung vom 17 Dezember 1996 betreffend die Abänderung der Verordnung über die medizinischen Berufe* (Regulation of 17 December 1996 amending the rules governing the medical professions, hereinafter the "Regulation on medical professions").

8. Article 9 of the Regulation on medical professions reads as follows:

EWR-Recht

3. Die Fragen des nationalen Gerichts betreffen die Auslegung der Artikel 4, 31 und 33 des EWR-Abkommens.

4. Artikel 4 EWRA lautet:

> *„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-Staats, 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."*

Liechtensteinisches Recht

7. Bei dem streitigen Gesetz handelt es sich um die Verordnung vom 17. Dezember 1996 betreffend die Abänderung der Verordnung über die medizinischen Berufe (die „Verordnung für die medizinischen Berufe").

8. Artikel 9 Absatz 1 der Verordnung für die medizinischen Berufe lautet wie folgt:

> *„Der Arzt darf nur in einer Einzel- oder Gemeinschaftspraxis selbständig tätig sein, wenn er die Konzession dazu besitzt und selbst in eigenem Namen in der*

"A doctor may pursue his profession in a self-employed capacity, as a sole practitioner or jointly with others, only if he holds a licence authorising him to do so and only if he himself works on his own behalf in the practice concerned. A doctor may not operate more than one practice, whether as a sole practitioner or jointly with others."

III. Facts and procedure

9. The Complainant, Dr. Jürgen Tschannet, is an Austrian national living in Nendeln, Liechtenstein. The Complainant has an established medical practice in Sulz, Vorarlberg, Austria. It appears from the Request for an Advisory Opinion from the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein that the Complainant had sought to establish himself as an occupational physician in Liechtenstein to provide services to undertakings there.

10. By an application dated 27 August 1996/12 November 1996, the Complainant filed a request with the Liechtenstein Sanitätskommission (Board of Public Health) for the grant of a licence to practise in Liechtenstein as a general medical practitioner with the additional title "Facharzt für Arbeitsmedizin" (Specialist in occupational medicine).

11. The Sanitätskommission, by a decision dated 25 June 1999, refused to grant the licence applied for by the Complainant. The reason given for that decision was, essentially, that, according to Article 9(1) of the Regulation on medical professions, a medical practitioner may not operate more than one practice (hereinafter the "single practice rule"), and that a licence could not be granted until the Complainant had given up his practice in Austria and provided written confirmation to that effect from the Vorarlberger Ärztekammer (Vorarlberg Medical Association).

12. The Complainant appealed the decision by the Sanitätskommission to the Government of Liechtenstein. By a decision dated 16 November 1999, the Government of Liechtenstein rejected the complaint and upheld the decision made by the Sanitätskommission. In its decision, the Government of Liechtenstein stated *inter alia* that the single practice rule applies to all doctors wishing to establish themselves permanently in Liechtenstein, regardless of their nationality and that there are no exceptions available to that rule.

13. On 6 December 1999, the Complainant brought an appeal before the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein (hereinafter the "Appeal"). In the proceedings before the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein, the Complainant has raised issues concerning the compatibility of the single practice rule with the EEA Agreement, in particular Articles 4, 31 and 33 EEA.

Praxis arbeitet. Der Arzt darf nicht mehr als eine Einzel- oder Gemeinschaftspraxis führen."

III. Sachverhalt und Verfahren

9. Der Beschwerdeführer, Dr. Jürgen Tschannett, ist ein in Nendeln in Liechtenstein lebender Österreicher, der in Sulz in Vorarlberg (Österreich) eine Arztpraxis eingerichtet hat. Dem Vorlageersuchen der Verwaltungsbeschwerdeinstanz ist zu entnehmen, dass sich der Beschwerdeführer als Arbeitsmediziner in Liechtenstein niederlassen wollte, um seine Leistungen dort für Unternehmen zu erbringen.

10. Mit einem Gesuch vom 27. August 1996 und vom 12. November 1996 beantragte der Beschwerdeführer bei der Liechtensteinischen Sanitätskommission die Erteilung einer Konzession als Arzt für Allgemeinmedizin mit dem zusätzlichen Titel „Facharzt für Arbeitsmedizin" im Fürstentum Liechtenstein.

11. Mit Verfügung vom 25. Juni 1999 lehnte die Sanitätskommission das Gesuch des Beschwerdeführers im wesentlichen mit der Begründung ab, Artikel 9 Absatz 1 der Verordnung über die medizinischen Berufe erlaube es einem praktischen Arzt nicht, mehr als eine Praxis zu unterhalten (*single practice rule*). Eine Konzession könne nicht erteilt werden, bevor der Beschwerdeführer seine Praxis in Österreich aufgegeben und einen entsprechenden Nachweis durch schriftliche Bestätigung der Vorarlberger Ärztekammer erbracht habe.

12. Der Beschwerdeführer erhob gegen die Verfügung der Sanitätskommission Beschwerde an die liechtensteinische Regierung. Mit Entscheidung vom 16. November 1999 wies die Regierung die Beschwerde zurück und bestätigte die Verfügung der Sanitätskommission. Die Regierung begründete ihre Entscheidung u.a. damit, dass die *single practice rule* ausnahmslos für alle niederlassungswilligen Ärzte gilt, und zwar unabhängig von der Staatsangehörigkeit.

13. Am 6. Dezember erhob der Beschwerdeführer Beschwerde an die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein. Im Verfahren vor der Verwaltungsbeschwerdeinstanz machte er Ausführungen zur Vereinbarkeit der *single practice rule* mit dem EWR-Abkommen. Insbesondere ging es dabei um die Artikel 4, 31 und 33 des EWR-Abkommens.

14. The Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein decided to stay the proceedings and submit a Request for an Advisory Opinion to the EFTA Court.

IV. Questions

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

1 Is the single practice rule applying without exception to all doctors under Liechtenstein national law, and in particular Article 9(1) of the Regulation of 8 November 1988 on the medical professions which provides:

"A doctor may pursue his profession in a self-employed capacity, as a sole practitioner or jointly with others, only if he holds a licence authorising him to do so and only if he himself works on his own behalf in the practice concerned. A doctor may not operate more than one practice, whether as a sole practitioner or jointly with others"

compatible with the EEA and/or with the Agreement on the European Economic Area (EEA Agreement) of 2 May 1992?

2 If the answer to the first question is that the Liechtenstein single practice rule, as laid down in Article 9(1) of the Regulation of 8 November 1988 on the medical professions, is basically compatible with the EEA, does that none the less mean that, in an individual case, regard must be had to the specialist medical activities carried on by an "occupational physician", so that the necessary exceptions should be made for such specific activities, which do not require a "medical practice" within the generally accepted meaning of the term?

V. Written Observations

16. 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 Jürgen Tschannett, represented by Harry Gstöhl, Rechtsanwalt;

– the Government of Liechtenstein, represented by Christoph Büchel, Director, EEA Coordination Unit, and Frank Montag, Rechtsanwalt;

– the Government of Iceland, represented by Högni S. Kristjánsson, Legal Officer, Ministry of Foreign Affairs, acting as Agent;

14. Die Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein entschied, das Verfahren auszusetzen und dem EFTA-Gerichtshof einen Antrag auf Vorlageentscheidung zu übermitteln.

IV. Fragen

15. Die folgenden Fragen wurden dem EFTA-Gerichtshof vorgelegt:

1 Ist die im nationalen liechtensteinischen Recht absolut geltende Bestimmung des „single practice rule" für Ärzte, insbesondere Artikel 9 Absatz 1 der Verordnung vom 8. November 1988 über die medizinischen Berufe, nämlich:

„Der Arzt darf in einer Einzel- oder Gemeinschaftspraxis selbständig tätig sein, wenn er die Konzession dazu besitzt und selbst in eigenem Namen in der Praxis arbeitet. Der Arzt darf nicht mehr als eine Einzel- oder Gemeinschaftspraxis führen"

EWR-konform bzw. mit dem Abkommen über den Europäischen Wirtschaftsraum vom 2. Mai 1992 (EWRA) vereinbar ?

2 Im Falle der Beantwortung der ersten Frage dahingehend, dass die liechtensteinische „single practice rule" gemäss Artikel 9 Absatz 1 der Verordnung vom 8. November 1988 über die medizinischen Berufe grundsätzlich EWR-konform ist, ob dann dennoch im Einzelfall auf die fachärztliche Betätigung als „Arbeitsmediziner" Rücksicht genommen werden müsste, indem für solch spezifische Tätigkeiten, die keine „Arztpraxis" im landläufigen Sinne benötigen, die nötigen Ausnahmen gewährt werden müssten.

V. Schriftliche Erklärungen

16. Schriftliche Erklärungen gemäss Artikel 20 der Satzung des EFTA-Gerichtshofs und Artikel 97 der Verfahrensordnung sind eingegangen von:

– Dr. Jürgen Tschannett, vertreten durch Rechtsanwalt Harry Gstöhl;

– der Regierung des Fürstentums Liechtenstein, vertreten durch lic.iur. Christoph Büchel, Direktor der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein, als Bevollmächtigter, und Rechtsanwalt Dr. Frank Montag;

– der isländischen Regierung, vertreten durch Högni S. Kristjánsson, Beamter im Aussenministerium, als Bevollmächtigter;

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

– the EFTA Surveillance Authority, represented by Anne-Lise H. Rolland, Officer, Legal & Executive Affairs, acting as Agent;

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

Dr Jürgen Tschannett

17. In his written observations, the Complainant, Dr Jürgen Tschannett, limits himself to making reference to the facts and arguments already set out in the Request for an Advisory Opinion with accompanying enclosures, including the Appeal, by the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein.

18. The Complainant submits, in essence, that a further explanation of the concept of occupational medicine is required in order to make a proper assessment of the present case. In the Appeal, the Complainant states that the object of occupational medicine is to harmonise the relationship between individuals and their work. By adopting preventive and hygienic measures in the workplace and the work environment, harm to the life and health of workers can be prevented. In order to achieve that goal, the task of an occupational physician is threefold: first, to take steps to prevent the health of workers from being damaged as a result of their working conditions; second, to assign individual employees work which corresponds to their physiological and psychological aptitudes; and third, to promote and maintain the physical, mental and social well-being of workers. Thus, the activities of an occupational physician are wholly preventive and do not, in principle, involve the therapeutic treatment of patients.

19. The Complainant also points out that the services provided by an occupational physician are based on a contract for work and services (*Werkvertrag*) concluded between the physician and the business undertaking under his care. An occupational physician does not need to run a medical practice within the generally accepted meaning of the term, to which patients come for treatment, since his activities are basically not of a therapeutic nature and his services are provided within the business undertaking.

20. In the Appeal, the Complainant refers to Article 10 of Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal

– der norwegischen Regierung, vertreten durch Helge Seland, Stellvertretende Generaldirektorin im Aussenministerium, als Bevollmächtigte;

– der EFTA-Überwachungsbehörde, vertreten durch Anne-Lise H. Rolland, Mitglied der Abteilung Rechtliche & Exekutive Angelegenheiten, als Bevollmächtigte;

– der Kommission der Europäischen Gemeinschaften, vertreten durch Maria Patakia und John Forman, Mitglieder des Rechtsdienstes, als Bevollmächtigte.

Dr. Jürgen Tschannett

17. Der Beschwerdeführer beschränkt sich in einer schriftlichen Stellungnahme darauf, auf Tatsachen und Vorbringen zu verweisen, die bereits im Antrag auf eine Vorlageentscheidung bzw. in den Beilagen - einschliesslich der Beschwerde an die Verwaltungsbeschwerdeinstanz - enthalten sind.

18. Der Beschwerdeführer macht im wesentlichen geltend, es sei eine genauere Erläuterung des Konzepts der Arbeitsmedizin erforderlich, um den vorliegenden Fall beurteilen zu können. Der Beschwerdeführer brachte in seiner Beschwerde vor, das Ziel der Arbeitsmedizin sei es, das Verhältnis zwischen Mensch und Arbeit zu harmonisieren. Durch präventive und hygienische Massnahmen am Arbeitsplatz sowie an der Arbeitsumgebung sind Schäden an Leben und Gesundheit der Arbeitnehmer zu verhüten. Zur Erreichung dieses Ziels hat der Arbeitsmediziner eine dreifache Aufgabe: (1) Zu verhindern, dass die Arbeitnehmer infolge ihrer Arbeitsbedingungen in irgendeiner Weise an der Gesundheit Schaden nehmen; (2) den einzelnen Arbeitnehmer einer Beschäftigung zuzuführen, die seiner physiologischen und psychologischen Eignung entspricht und ihm diese Beschäftigung zu erhalten; (3) das körperliche, geistige und soziale Wohlbefinden der Arbeitnehmer in allen Berufen im grösstmöglichen Ausmass zu fördern und aufrecht zu erhalten. Somit wird der Arbeitsmediziner ausschliesslich präventiv tätig und seine Tätigkeit umfasst grundsätzlich keine Heilbehandlung von Patienten.

19. Der Beschwerdeführer führt aus, Grundlage der Leistungen eines Arbeitsmediziners sei ein Werkvertrag zwischen ihm und dem betreuten Unternehmen. Ein Arbeitsmediziner benötige auch keine Arztpraxis im landläufigen Sinn, zu der die Patienten kommen, weil er grundsätzlich nicht therapeutisch tätig ist und die Leistungen in den betreuten Unternehmen vor Ort erbracht werden.

20. In der Beschwerde verweist der Beschwerdeführer auf Artikel 10 der Richtlinie 93/16/EWG zur Erleichterung der Freizügigkeit der Ärzte und zur Anerkennung ihrer Diplome, Prüfungszeugnisse und sonstigen Befähigungsnachweise. Nach diesem Rechtsakt sei ihm das Führen des Titels eines „Facharzt für Arbeitsmedizin“ zu bewilligen.

qualifications, and contends that he should be authorised to use the title “Facharzt für Arbeitsmedizin”.

21. As regards Article 31 EEA, it appears from the Request for an Advisory Opinion and the Appeal that the Complainant is of the opinion that the single practice rule is a restriction on the freedom of establishment, and that there is no possible justification for this rule.

22. The Complainant states that Article 31 EEA prohibits all forms of overt and covert discrimination. Referring to the case-law of the Court of Justice of the European Communities, the Complainant adds that Article 31 EEA has developed into a general prohibition on restrictions on establishment. Such restrictions are permissible only when they are applied in a non-discriminatory manner, are justified by imperative reasons relating to the public interest, are suitable for attaining the objective pursued and do not go beyond what is necessary in order to attain that objective on the freedom of establishment.

23. The Complainant claims that the single practice rule constitutes a covertly discriminatory measure, since it is more onerous for physicians established in other EEA States than for physicians established in Liechtenstein. Physicians who operate a medical practice in another EEA State are precluded from establishing a practice in Liechtenstein, unless they discontinue their medical practice in that other State, whereas physicians established in Liechtenstein are subject to no such constraint. If the Complainant were to be treated in a non-discriminatory manner, this could only mean his being limited to operating just one medical practice in Liechtenstein; it could not mean his being permitted to have only one practice within the entire EEA.

24. The Complainant submits that there are no possible grounds for justification of the single practice rule. The Government of Liechtenstein has failed to present any sound, verifiable reasons in support of its contention that the grant of a licence to operate a second practice in Liechtenstein would be detrimental to imperative public-interest considerations.

25. With regard to the grounds of justification invoked by the Government of Liechtenstein, in particular the need to maintain the financial equilibrium of the social security system, the Complainant observes that payment for the services provided by an occupational physician is made directly to the occupational physician by the undertaking, and that the occupational physician has no claim against any health insurance fund. Consequently, no financial burden is placed on the social security system.

26. The Complainant does not agree with the Government of Liechtenstein that allowing physicians from other EEA States to operate a second practice in Liechtenstein would significantly increase health care costs. The Complainant states that this view is based on the unacceptable suggestion that many physicians

21. Im Blick auf Artikel 31 EWR-Abkommen ergibt sich aus dem Vorlagegesuch und aus der Beschwerde, dass der Beschwerdeführer der Meinung ist, die *single practice rule* sei eine nicht zu rechtfertigende Beschränkung der Niederlassungsfreiheit.

22. Der Beschwerdeführer bringt vor, Artikel 31 EWR-Abkommen verbiete alle Formen der offenen oder versteckten Diskriminierung. Aus der Rechtsprechung des EuGH ergibt sich für den Beschwerdeführer, dass sich Artikel 31 EWR-Abkommen zu einem allgemeinen Verbot von Beschränkungen der Niederlassungsfreiheit entwickelt habe. Solche Beschränkungen sind nur mehr erlaubt, wenn sie in einer nichtdiskriminierenden Weise angewendet werden. Ausserdem müssen sie zwingenden Gründen des Allgemeininteresses entsprechen, zur Erreichung des verfolgten Ziels erforderlich sein und dürfen auch nicht über das hinausgehen, was zur Erreichung des Ziels erforderlich ist.

23. Der Beschwerdeführer sieht in der *single practice rule* eine versteckt diskriminierende Massnahme, weil sie den im EWR-Ausland eine Praxis führenden Arzt gegenüber dem in Liechtenstein zugelassenen Arzt schlechter stellt. Ärzte, die in einem anderen EWR-Staat eine Praxis unterhalten, sind daran gehindert, eine Praxis in Liechtenstein einzurichten, ausser sie geben ihre Praxis im anderen Staat auf. Umgekehrt gilt diese Einschränkung für in Liechtenstein niedergelassene Ärzte nicht. Eine nicht diskriminierende Behandlung des Beschwerdeführers kann nur bedeuten, dass er in Liechtenstein nur eine Arztpraxis führen, nicht aber, dass er im gesamten EWR ausschliesslich eine einzige Arztpraxis führen darf.

24. Der Beschwerdeführer kann keine Gründe für eine Rechtfertigung der *single practice rule* erkennen. Die liechtensteinische Regierung habe keine nachvollziehbaren Gründe dafür angeben können, warum eine Konzession zur Führung einer Zweitpraxis in Liechtenstein dem zwingenden öffentlichen Interesse widersprechen sollte.

25. Im Blick auf die von der liechtensteinischen Regierung angeführten Rechtfertigungsgründe - insbesondere das Bedürfnis, das finanzielle Gleichgewicht des Systems der Sozialen Sicherheit aufrechtzuerhalten - verweist der Beschwerdeführer darauf, dass der Arbeitsmediziner direkt vom Unternehmen bezahlt wird. Der Arbeitsmediziner hat keinen Anspruch gegenüber den Krankenkassen, weshalb es auch zu keiner Belastung des Systems der Sozialen Sicherheit kommt.

26. Der Beschwerdeführer widerspricht der Auffassung der liechtensteinischen Regierung, die Zulassung einer Zweitpraxis für Ärzte aus anderen EWR-Staaten würde die Kosten des Gesundheitssystems in erheblichem Umfang erhöhen. Diese Auffassung stütze sich auf die nicht akzeptable Unterstellung, Ärzte aus anderen EWR-Staaten wollten eine Zweitpraxis in Liechtenstein nur deshalb eröffnen, um hier vom sozialen System zu profitieren. Damit werde auch unterstellt, die Menschen in Liechtenstein seien häufiger krank und die Ärzte aus an-

established in other EEA States are simply waiting to open a second practice in Liechtenstein in order to exploit the social security system there. It also implies either that people in Liechtenstein would suffer more illness or that these physicians from other EEA States would prescribe unnecessary medications and therapeutic treatment.

27. Based on the foregoing, the Complainant submits that the single practice rule is neither an appropriate nor a proportionate means of attaining the objectives invoked by the Government of Liechtenstein.

28. In addition, the Complainant contends that the findings expressed in *Commission* v *France*[1] are perfectly applicable to the case at hand. In that case, the Court of Justice of the European Communities held a similar single practice rule to be disproportionate.

29. As regards Article 4 EEA, the Complainant submits, in essence, that if an infringement of the right to freedom of establishment as set out in Article 31 EEA has been established, the national rule must be inapplicable on that ground alone, and there is no need to examine whether there has been an infringement of the general prohibition on discrimination set out in Article 4 EEA.

The Government of Liechtenstein

The application of the single practice rule to activities carried out by an occupational physician

30. The Government of Liechtenstein begins by stating that, based on the factual and legal circumstances of the case, an Advisory Opinion from the EFTA Court on the questions referred can be of no use in resolving the dispute in the main proceedings.

31. The Government of Liechtenstein argues that it is not entirely clear from the Complainant's submissions which professional "status" he is claiming to have within the medical profession. Moreover, it is not clear whether he intends to set up and operate a practice in Liechtenstein or merely wants to provide services to, or take up employment in, an undertaking established within Liechtenstein territory.

32. The Government of Liechtenstein states that it is necessary to make an accurate assessment of the kind of activity the Complainant intends to pursue in Liechtenstein. The Government of Liechtenstein refers in this connection to the

[1] Case 96/85 *Commission* v *France* [1986] ECR 1475.

deren EWR-Staaten würden ihnen unnötige Medikamente und Heilbehandlungen verschreiben.

27. Gestützt auf diese Argumente hält der Beschwerdeführer die *single practice rule* weder für eine geeignete noch für eine verhältnismässige Massnahme, um die von der liechtensteinischen Regierung angeführten Ziele zu erreichen.

28. Zusätzlich hält der Beschwerdeführer die Ausführungen des EuGH in der Rechtssache *Kommission./.Frankreich*[1] für auf den vorliegenden Fall anwendbar. In diesem Fall hatte der EuGH eine ähnliche *single practice rule* für unverhältnismässig erklärt.

29. Im Blick auf Artikel 4 des EWR-Abkommens macht der Beschwerdeführer i.w. geltend, dass in Fällen, in denen ein Verstoss gegen die Niederlassungsfreiheit von Artikels 31 EWR-Abkommen festgestellt ist, die nationale Bestimmung alleine aus diesem Grund unanwendbar ist. Es bestehe kein Bedürfnis, noch weiter zu untersuchen, ob auch ein Verstoss gegen das allgemeine Diskriminierungsverbot des Artikels 4 EWR-Abkommen vorliegt.

Die Regierung des Fürstentums Liechtenstein

Anwendung der „single practice rule" auf Tätigkeiten eines Arbeitsmediziners

30. Die liechtensteinische Regierung weist darauf hin, dass - aufgrund der Sach- und Rechtslage - eine Vorlageentscheidung des EFTA-Gerichtshofs nicht nötig sei, um den Streit im Ausgangsverfahren zu entscheiden.

31. Für die liechtensteinische Regierung ist unklar, welchen beruflichen Status innerhalb des Spektrums der medizinischen Berufe der Beschwerdeführer für sich in Anspruch nehmen will. Überdies sei nicht klar, ob er eine Praxis in Liechtenstein eröffnen und unterhalten oder lediglich Dienstleistungen erbringen oder ob er für ein in Liechtenstein ansässiges Unternehmen arbeiten will.

32. Für die liechtensteinische Regierung ist es notwendig, eine zutreffende Beurteilung der Art von Tätigkeit vorzunehmen, die der Beschwerdeführer in Liechtenstein ausüben will. Dazu verweist die liechtensteinische Regierung auf

1 EuGH 96/85 *Kommission./.Frankreich*, Slg. 1986, 1475.

judgment of the Court of Justice of the European Communities in *Factortame and Others*.[2] That assessment will determine which provisions of the EEA Agreement are relevant: the ones relating to the free movement of workers, the freedom to provide services, or the freedom of establishment.

33. Referring to Article 57a of *Gesetz vom 18. Dezember 1985 über das Gesundheitswesens – Sanitätsgesetz* (the Health Act of 18 December 1985), the Government of Liechtenstein points out that, if the Complainant intends to provide medical services without being established in Liechtenstein, he is free to do so, and will not need a concession granted by the Liechtenstein authorities. The situation will be the same if the Complainant intends to work as an employee within the structure of an undertaking in Liechtenstein.

34. The Government of Liechtenstein states that if the facts of the case are assessed under the freedom to provide services or the free movement of workers, the single practice rule is not at issue, as it only comes into play in relation to the freedom of establishment.

35. The Government of Liechtenstein further argues that the grounds referred to in the Request for an Advisory Opinion are insufficient to classify the activity in question, and the first question of the Verwaltungsbeschwerdeinstanz should not even have been brought before the EFTA Court. The Government of Liechtenstein refers to *Ramrath* v *Ministre de la Justice*,[3] in which the Court of Justice of the European Communities held that it is for the national court to decide on the status of the complainant as employee, self-employed or provider of services.

36. The Government of Liechtenstein asserts that there are a number of outstanding factual issues underlying the questions in the case at hand, and that the answers to those questions are dependent on how those issues are resolved. However, the division of jurisdictions between the EFTA Court and national courts requires that those outstanding facts be assessed by the Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein, in accordance with the laws of the Principality of Liechtenstein.

The existence of overt or covert discrimination

37. In the alternative, if the EFTA Court deems that the facts underlying the present dispute are sufficient for this case to be assessed under the provisions on the freedom of establishment, the Government of Liechtenstein submits that the single practice rule at issue in the main proceedings is compatible with Article 31 EEA.

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2 Case C-221/89 *Factortame and Others* [1991] ECR I-3905.

3 Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351.

das Urteil des EuGH in der Rechtssache *Factortame*[2]. Das Ergebnis dieser Beurteilung werde darüber entscheiden, welche Bestimmungen des EWR-Abkommens einschlägig sind, diejenigen betreffend Arbeitnehmerfreizügigkeit, Dienstleistungsfreiheit oder Niederlassungsfreiheit.

33. Unter Hinweis auf Artikel 57a des *Gesetzes vom 18. Dezember 1985 über das Gesundheitswesen - Sanitätsgesetz* hebt die liechtensteinische Regierung hervor, dass der Beschwerdeführer ohne behördliche Konzession medizinische Leistungen erbringen kann, auch wenn er in Liechtenstein nicht niedergelassen ist. Das gleiche gilt, wenn der Beschwerdeführer als Arbeitnehmer in einem in Liechtenstein ansässigen Unternehmen tätig werden will.

34. Nach Meinung der liechtensteinischen Regierung kommt der *single practice rule* keine Bedeutung zu, wenn der Sachverhalt nach den Bestimmungen über die Dienstleistungsfreiheit oder die Arbeitnehmerfreizügigkeit zu beurteilen ist. Die *single practice rule* spiele nur vor dem Hintergrund der Niederlassungsfreiheit eine Rolle.

35. Die Angaben im Vorlagegesuch erlauben nach Auffassung der liechtensteinischen Regierung eine Einordnung der fraglichen Tätigkeit nicht, weshalb die erste Frage der Verwaltungsbeschwerdeinstanz dem EFTA-Gerichtshof nicht hätte vorgelegt werden sollen. Die Regierung verweist auf das Urteil *Ramrath./.Ministre de la Justice*[3], aus dem folge, dass es dem nationalen Gericht obliegt, zu beurteilen, ob der Beschwerdeführer als Arbeitnehmer, Selbständiger oder als Dienstleistungserbringer anzusehen ist.

36. Die liechtensteinische Regierung behauptet, einige faktische Fragen, welche den Vorlagefragen zugrundeliegen, seien im vorliegenden Fall nicht geklärt, wobei die Antwort auf jene Fragen davon abhänge, wie jene Probleme gelöst würden. Die Aufteilung der Kompetenzen zwischen dem EFTA-Gerichtshof und den nationalen Gerichten setze voraus, dass jene offenen Fragen von der Verwaltungsbeschwerdeinstanz beurteilt würden, und zwar nach liechtensteinischem Recht.

Vorliegen einer offenen oder versteckten Diskriminierung

37. Sollte der EFTA-Gerichtshof zum Ergebnis gelangen, die dem Rechtsstreit zugrundeliegenden Fakten seien ausreichend, um den Fall unter die Bestimmungen der Niederlassungsfreiheit zu subsumieren, so hält die liechtensteinische Regierung die in Rede stehende *single practice rule* für mit Artikel 31 EWR-Abkommen vereinbar.

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2 EuGH C-221/89 *Factortame u.a.*, Slg. 1991, I-3905.

3 EuGH C-106/91 *Ramrath./.Ministre de la Justice*, Slg. 1992, I-3351.

38. The Government of Liechtenstein argues that the contested single practice rule does not constitute either overt or covert discrimination prohibited by Article 31 EEA.

39. The single practice rule at issue applies equally to Liechtenstein nationals and to nationals of other EEA States. Neither a Liechtenstein national nor a national of another EEA State, who already operates a practice anywhere in the EEA, will be granted a licence to establish a practice in Liechtenstein. No exceptions to the single practice rule have ever been made. The single practice rule treats nationals of all EEA States in the same way. Therefore, it does not discriminate on grounds of nationality and, consequently, does not constitute overt discrimination prohibited by Article 31 EEA.

40. The Government of Liechtenstein acknowledges that, according to the case-law[4] of the Court of Justice of the European Communities, the principle of equal treatment prohibits not only overt discrimination on grounds of nationality, but also all covert forms of discrimination which, by application of other criteria of differentiation, lead in fact to the same result.

41. The Government of Liechtenstein notes that the Court of Justice of the European Communities rejected single practice rules in *Commission* v *Luxembourg*[5] and *Commission* v *France*.[6] However, the Government of Liechtenstein submits that those cases differ on essential points from the present case, in terms of their wording, effect, and context. Moreover, the Court of Justice of the European Communities did not consider single practice rules inadmissible in principle, but merely deemed the justifications invoked in those cases to be insufficient. It was the specific circumstances in both judgments which led the Court to the conclusion that the single practice rules were applied in a discriminatory way.

42. By contrast, the single practice rule at issue in the present case applies without distinction to nationals and non-nationals of Liechtenstein and is, in practice, not applied more strictly to physicians practising in other EEA States than those practising in Liechtenstein. There is no available derogation to the single practice rule, and no exception has ever been made to it, either for physicians established in Liechtenstein, or for physicians established in other EEA States. Thus, there is nothing which can substantiate the assertion that the persons disadvantaged by the single practice rule are exclusively or mainly foreign nationals. Referring to case-law[7] of the Court of Justice of the European

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4 Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153; Case 3/88 *Commission* v *Italy* [1989] ECR 4035; Case C-266/95 *Merino García* v *Bundesanstalt für Arbeit* [1997] ECR I-3279.

5 Case C-351/90 *Commission* v *Luxembourg* [1992] ECR I-3945.

6 See footnote 1.

7 Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877; Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897.

38. Die Regierung Liechtenstein's argumentiert, die streitige *single practice rule* stelle weder eine offene noch eine versteckte Diskriminierung dar, die nach Artikel 31 EWR-Abkommen unzulässig wäre.

39. Die in Frage stehende *single practice rule* gelte sowohl für liechtensteinische Staatsangehörige als auch für Angehörige anderer EWR-Staaten. Weder liechtensteinische Staatsangehörige noch Angehörige anderer EWR-Staaten, die bereits eine Praxis im EWR unterhalten, erhalten eine Konzession zur Führung einer Arztpraxis in Liechtenstein. Von dieser Regel wurde noch nie eine Ausnahme gemacht. Nach der *single practice rule* werden Staatsangehörige aus allen EWR-Staaten gleich behandelt, weshalb keine Diskriminierung aufgrund der Staatsangehörigkeit und damit auch keine offene Diskriminierung vorliegt, die nach Art. 31 EWRA verboten wäre.

40. Die liechtensteinische Regierung räumt ein, dass nach der Rechtsprechung des EuGH[4] das Prinzip der Gleichbehandlung nicht nur offene Diskriminierungen aufgrund der Staatsangehörigkeit verbietet, sondern auch alle Formen der versteckten Diskriminierungen, die durch die Anwendung anderer Unterscheidungskriterien zum gleichen Ergebnis führen.

41. Die Regierung nimmt zur Kenntnis, dass der EuGH in den Urteilen *Kommission./.Luxemburg*[5] und *Kommission./.Frankreich*[6] eine *single practice rule* verworfen hat. Allerdings unterscheiden sich diese Fälle nach dem Wortlaut, den Auswirkungen und dem Zusammenhang vom vorliegenden Fall. Überdies hat der EuGH die *single practice rule* nicht für grundsätzlich unzulässig erachtet, sondern nur die in diesen Fällen vorgetragenen Rechtfertigungsgründe für unzureichend gehalten. Die besonderen Umstände führten in beiden Urteilen dazu, dass der Gerichtshof zum Ergebnis kam, die *single practice rule* sei in einer diskriminierenden Weise angewendet worden.

42. Im Unterschied dazu gilt die *single practice rule* im vorliegenden Fall unterschiedslos für Staatsangehörige und Nicht-Staatsangehörige. Ausserdem wird sie in der Praxis nicht strenger gegenüber Ärzten aus anderen Mitgliedstaaten angewendet als gegenüber Ärzten aus Liechtenstein. Weder für Ärzte in Liechtenstein noch für Ärzte, die in anderen EWR-Staaten niedergelassen sind, wurde jemals eine Ausnahme gemacht. Es gibt keine Abweichungen von dieser Regel, weshalb nichts darauf hindeutet, dass es sich bei den durch die *single practice rule* Benachteiligten ausschliesslich oder hauptsächlich um fremde Staatsangehörige handelt. Unter Hinweis auf die Rechtsprechung des EuGH[7] bringt die liech-

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4 EuGH 152/73 *Sotgiu./.Deutsche Bundespost*, Slg. 1974, 153; Case 3/88 *Kommission./.Italien*, Slg. 1989, 4035; Case C-266/95 *Merino Garcia./.Bundesanstalt für Arbeit*, Slg. 1997, I-3279.

5 EuGH C-351/90 *Kommission./.Luxemburg*, Slg. 1992, I-3945.

6 Vgl. FN 1.

7 EuGH 143/87 *Stanton./.Inasti*, Slg. 1988, 3877; Verbundene Rechtssachen 154/87 und 155/87 *RSVZ./.Wolf u.a.*, Slg. 1988, 3897.

Communities, the Government of Liechtenstein argues that the contested single practice rule cannot be viewed as giving rise to indirect discrimination on grounds of nationality.

43. The Government of Liechtenstein adds that the present case also differs substantially from the situations in the judgments in *Ciola* v *Land Vorarlberg*[8] and *Rainford-Towning*,[9] in which extremely strict standards were applied to the question of non-discrimination. The provisions under scrutiny in those cases used as a distinguishing criterion not the nationality of the persons concerned, but their place of residence. The single practice rule at issue in the present case is in no way linked to any residence requirement in Liechtenstein. The single practice rule applies to all physicians already operating a practice in the EEA, be it in Liechtenstein or in any other EEA State, regardless of their nationality or their place of residence.

44. The Government of Liechtenstein objects to the Complainant's argument that the single practice rule imposes restrictions which are de facto more onerous for nationals from other EEA States than for Liechtenstein nationals. The extremely high proportion of medical specialists from other EEA States practising in Liechtenstein implies that the single practice rule has not had the effect of rendering it more onerous for nationals from other EEA States to establish themselves in Liechtenstein.

The existence of a restriction on the freedom of establishment

45. The Government of Liechtenstein acknowledges that the Court of Justice of the European Communities, in its judgments in *Commission* v *France*,[10] *Commission* v *Luxembourg*,[11] and *Ordre des Avocats au Barreau de Paris* v *Klopp*,[12] found an infringement of the fundamental freedom of establishment, independently of the existence of any overt or covert discrimination. It follows that, even under the principle of equal treatment, of which Article 43 EC embodies a specific instance, a national measure which is applied without distinction to nationals and non-nationals of a Member State may still be considered incompatible, if it has the effect of restricting the right of establishment. The Court of Justice of the European Communities has followed this approach in several other cases.[13]

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8 Case C-224/97 *Ciola* v *Land Vorarlberg* [1999] ECR I-2517.

9 Case E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205.

10 See footnote 1.

11 See footnote 5.

12 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971.

13 Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897; Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877; Case C-53/95 *Inasti* v *Kemmler* [1996] ECR I-703; Case 292/86 *Gullung* v *Conseils de l'ordre des avocats du barreau de Colmar et de Saverne* [1988]

tensteinische Regierung vor, die streitige Bestimmung könne nicht als indirekte Diskriminierung aufgrund der Staatsangehörigkeit angesehen werden.

43. Zusätzlich führt die Regierung aus, der vorliegende Fall unterscheide sich wesentlich von den Sachverhalten, die den Urteilen *Ciola./.Land Vorarlberg*[8] und *Rainford-Towning*[9] - in denen sehr strenge Massstäbe in der Frage der Nichtdiskriminierung angewendet wurden - zugrundegelegen haben. Die in diesen Fällen überprüften Vorschriften unterschieden nicht nach der Nationalität der betroffenen Personen, sondern nach dem Wohnsitz. Die vorliegend in Rede stehende *single practice rule* ist in keiner Weise mit einem Wohnsitzerfordernis in Liechtenstein verbunden. Die Regel gilt für alle Ärzte, die bereits eine Praxis im EWR unterhalten, sei es in Liechtenstein oder in einem anderen EWR-Staat, unabhängig von ihrer Staatsangehörigkeit oder ihrem Wohnsitz.

44. Die Regierung Liechtenstein's wendet sich gegen das Argument des Beschwerdeführers, die *single practice rule* lege Staatsangehörigen aus anderen EWR-Staaten schwerere Beschränkungen auf als liechtensteinischen Staatsangehörigen. Die ausserordentlich hohe Anzahl von Fachärzten aus anderen EWR-Staaten in Liechtenstein belegt, dass die *single praxis rule* nicht den Effekt hatte, Staatsangehörige aus anderen EWR-Staaten bei ihrer Niederlassung in Liechtenstein über Gebühr zu belasten.

Vorliegen einer Beschränkung der Niederlassungsfreiheit

45. Die liechtensteinische Regierung räumt ein, dass der EuGH in den Urteilen *Kommission./.Frankreich*[10]*, Kommission./Luxemburg*[11] und *Ordre des Advocats au Barreau de Paris./.Klopp*[12] unabhängig vom Vorliegen einer offenen oder versteckten Diskriminierung eine Verletzung der Niederlassungsfreiheit angenommen hat. Aus dem Gleichbehandlungsgebot, das in Artikel 43 EG seinen besonderen Ausdruck findet, folgt, dass eine nationale Massnahme, die nicht zwischen Staatsangehörigen und Nichtstaatsangehörigen unterscheidet, trotzdem unzulässig sein kann, wenn sie eine Beschränkung der Niederlassungsfreiheit bewirkt. Der EuGH hat diesen Ansatz in mehreren anderen Fällen vertreten[13].

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8 EuGH C-224/97 *Ciola./.Land Vorarlberg*, Slg. 1999, I-2517.

9 EFTA-Gerichtshof E-3/98 *Rainford-Towning*, EFTACt.-Report 1998, 205.

10 Vgl. FN 1.

11 Vgl. FN 5.

12 EuGH C-107/83 *Ordre des Avocats au Barreau de Paris./.Klopp*, Slg. 1984, 2971.

13 Verbundene Rechtssachen EuGH 154/87 und 155/87 *RSVZ./.Wolf u.a*, Slg. 1988, 3897; EuGH 143/87 *Stanton./.Inasti*, Slg. 1988, 3877; EuGH C-53/95 *Inast./.Kemmler*, Slg. 1996, I-703; EuGH 292/86 *Gullung./.Conseils de l`ordre des avocats du barreau de Colmar et de Saverne*, Slg. 1988, 111; EuGH C-55/94 *Gebhard ./.Consiglio dell`Ordine degli Avvocati e Procuratori di Milano*, Slg. 1995, I-4165.

46. The Government of Liechtenstein considers that this progressive interpretation of Article 43 EC, which the Court of Justice of the European Communities has applied in its case-law on the single practice rule, is not directly relevant to the interpretation of Article 31 EEA.

47. Referring to the Advisory Opinion of the EFTA Court in *Rainford-Towning*,[14] the Government of Liechtenstein argues that, although the wording of Article 31 EEA is identical to that of Article 43 EC, the specific circumstances of the present case necessitate a different interpretation. This reasoning is based both on the fundamental differences in the scope and the purposes of the Community legal order and the EEA, and on the progressive development of the case-law of the Court of Justice of the European Communities on the freedom of establishment.

48. The Government of Liechtenstein submits that, through the progressive interpretation adopted by the Court of Justice of the European Communities, Community law reaches far into sensitive areas of national policy. Applying the same interpretation to the scope of the freedom of establishment under the EEA Agreement would affect Liechtenstein's autonomy to regulate its social policy. This interpretation is compatible with the objectives of Community law, but is not justifiable under the less ambitious intentions of the EEA Agreement.

49. The Government of Liechtenstein refers to *Opinion 1/91*[15] of the Court of Justice of the European Communities, in which the differences between the Community legal order and the EEA Agreement are discussed. The Government of Liechtenstein notes that the Contracting Parties to the EEA Agreement transferred no sovereign rights to the institutions which they set up. Therefore, they retain greater autonomy than the Member States of the European Communities, especially in the field of national legislative powers.

50. With the expansion of the EC Treaty in the field of social policy by the Treaty on the European Union and the Treaty of Amsterdam, the competence of the Community in the field of social policy was significantly increased. The EC Member States have, in the field of social policy, transferred sovereign rights to the Community institutions which go beyond the promotion of economic relations.

51. However, no such transfer of sovereign rights in the field of social policy has taken place under the EEA Agreement. If the EEA Agreement were to be extended to cover areas of national policy, the national ratification procedure and therefore the consent of the EEA States would be required.

ECR 111; Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

14 See footnote 9.

15 *Opinion 1/91* [1991] ECR I-6079

46. Die Regierung von Liechtenstein hält diese extensive Auslegung von Artikel 43 EG, die der Rechtsprechung des EuGH zur *single practice rule* zugrundeliegt, nicht für unmittelbar auf die Auslegung von Artikel 31 EWR-Abkommen übertragbar.

47. Unter Hinweis auf das Urteil des EFTA-Gerichtshofs in der Rechtssache *Rainford-Towning*[14] führt die liechtensteinische Regierung aus, die besonderen Umstände im vorliegenden Fall machten eine unterschiedliche Interpretation notwendig, obwohl Artikel 31 EWR-Abkommen und Artikel 43 EG den gleichen Wortlaut haben. Diese Auffassung gründet sich auf die Ziel- und Kontextverschiedenheit der Rechtsordnungen des EWR und der Gemeinschaftsrechtsordnung. Dazu komme eine immer weiter reichende Rechtsprechung des EuGH zur Niederlassungsfreiheit.

48. Nach Meinung der liechtensteinischen Regierung reicht das Gemeinschaftsrecht - bedingt durch die extensive Interpretation des EuGH - weit in sensible nationale Politikbereiche hinein. Würde man im Blick auf die Niederlassungsfreiheit im EWR den gleichen Massstab anlegen, dann wäre die Autonomie Liechtenstein's bei der Ausgestaltung seiner Sozialpolitik eingeschränkt. Eine solche Interpretation ist mit den Zwecken des Gemeinschaftsrechts vereinbar, aber angesichts der weniger weit reichenden Ziele ist sie im EWR nicht zu rechtfertigen.

49. Die liechtensteinische Regierung verweist auf das *Gutachten 1/91*[15] des EuGH, in dem die Unterschiede zwischen der Gemeinschaftsrechtsordnung und dem EWR-Abkommen dargelegt werden und stellt fest, dass die Parteien des EWR-Abkommens keine Souveränitätsrechte auf die von ihnen geschaffenen Institutionen übertragen haben. Deshalb behalten sie eine grössere Autonomie als die Mitgliedstaaten der Gemeinschaft. Das gilt insbesondere, wenn es um die nationale Gesetzgebungshoheit geht.

50. Die Ausdehnung des EG-Vertrags in den Bereich der Sozialpolitik durch den Unionsvertrag und den Vertrag von Amsterdam hat zu einem signifikanten Kompetenzzuwachs der Gemeinschaft in der Sozialpolitik geführt. Die Mitgliedstaaten haben im Bereich der Sozialpolitik Souveränitätsrechte auf die Institutionen der Gemeinschaft übertragen, die über eine Förderung der wirtschaftlichen Beziehungen hinausgehen.

51. Nach dem EWR-Abkommen hat jedoch keine solche Übertragung von Souveränitätsrechten in der Sozialpolitik stattgefunden. Wenn man das EWR-Abkommen auf diese nationalen Politikbereiche ausdehnen wollte, dann wäre dazu ein Ratifizierungsverfahren und damit die Zustimmung der EWR-Staaten notwendig.

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14 Vgl. FN 9.

15 EuGH *Gutachten 1/91*, Slg. 1991, I-6079.

52. The Government of Liechtenstein points out that the EEA Agreement is concerned solely with the promotion of trade and economic relations between the parties, whereas, within the EC Treaty, these objectives are not an end in themselves, but are instrumental in achieving economic and social progress "through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency".[16] The EEA Agreement contains no explicit reference to economic and monetary union. There is furthermore no equivalent commitment to establish an internal market as set out in Article 14 EC. The EEA is not intended to be an area without internal frontiers.

53. In the view of the Government of Liechtenstein, an interpretation of Article 31 EEA within the meaning of the judgments in *Commission* v *France*[17] and *Commission* v *Luxembourg*[18] would depart from the actual wording of that provision, which embodies a specific instance of the principle of equal treatment laid down in Article 4 EEA. This results in a severe restriction of the EEA States' sovereign rights. Such an interpretation cannot find a valid basis in the EEA Agreement, which is a traditional international agreement. An interpretation of the EEA Agreement may not go beyond what is necessary for the furtherance of trade and economic relations.

54. The Government of Liechtenstein takes the view that, under Article 31 EEA, the freedom of establishment of physicians in Liechtenstein is guaranteed to the extent required in the EEA Agreement. Any further requirement or modifications of the relevant provisions in this field, in particular the elimination of the single practice rule, would go beyond the aim of strengthening trade between the EEA States. Therefore, even if the EFTA Court were to take the view that the single practice rule restricted the freedom of establishment, such a restriction would still be within the objectives of the EEA Agreement.

Assessment under the case-law of the Court of Justice of the European Communities

55. In the alternative, if the EFTA Court were to conclude that Article 31 EEA must be construed and applied in the same way as the corresponding Article 43 EC, the Government of Liechtenstein submits that the restrictions entailed by the single practice rule are nonetheless compatible with Article 31 EEA.

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16 Article 2 EU.

17 See footnote 1.

18 See footnote 5.

52. Nach Meinung der liechtensteinischen Regierung betrifft das EWR-Abkommen ausschliesslich die Förderung der Handels- und Wirtschaftsbeziehungen zwischen den Abkommensparteien. Demgegenüber sind diese Ziele im EG-Vertrag kein Selbstzweck, sondern nur ein Mittel, um wirtschaftlichen und sozialen Fortschritt - durch „Schaffung eines Raumes ohne Binnengrenzen, durch Stärkung des wirtschaftlichen und sozialen Zusammenhalts und durch Errichtung einer Wirtschafts- und Währungsunion, die auf längere Sicht auch eine einheitliche Währung.... umfasst“[16] - zu erreichen. Das EWR-Abkommen enthält keinen ausdrückliche Verweis auf eine Wirtschafts- und Währungsunion. Es besteht auch keine Verpflichtung, einen Binnenmarkt zu errichten wie nach Art. 14 EG. Der EWR ist nicht darauf gerichtet, ein Raum ohne interne Grenzen zu sein.

53. Die liechtensteinische Regierung vertritt die Meinung, eine Auslegung von Artikel 31 des EWR-Abkommens im Lichte der Urteile *Kommission./.Frankreich*[17] und *Kommission./.Luxemburg*[18] würde eine Abkehr vom Wortlaut der Bestimmung bedeuten, die nur ein besonderer Ausdruck des in Artikel 4 EWR-Abkommens enthaltenen Gleichbehandlungsgebotes ist. Eine solche Interpretation führte zu einer ernsten Beschränkung der Souveränitätsrechte der EWR-Staaten. Sie finde auch keine genügende Grundlage im EWR-Abkommen, das einen klassischen internationalen Vertrag darstellt. Eine Auslegung des EWR-Abkommens könne nicht über das hinausgehen, was notwendig ist, um den Handel und die wirtschaftlichen Beziehungen zu fördern.

54. Nach Auffassung der liechtensteinischen Regierung garantiert Artikel 31 EWR-Abkommen die Niederlassungsfreiheit von Ärzten in Liechtenstein in dem Umfang, wie es das EWR-Abkommen verlangt. Jede weitere Voraussetzung oder Änderung der einschlägigen Bestimmungen auf diesem Gebiet, insbesondere eine Abschaffung der *single practice rule*, ginge über den Zweck, den Handel zwischen den EWR-Staaten zu stärken, hinaus. Selbst wenn der EFTA-Gerichtshof zur Auffassung gelangen sollte, dass die *single practice rule* die Niederlassungsfreiheit einschränkt, so läge eine solche Einschränkung immer noch innerhalb der Ziele des EWR-Abkommens.

Beurteilung im Lichte der Rechtsprechung des EuGH

55. Für den Fall, dass der EFTA-Gerichtshof zum Ergebnis kommen sollte, Artikel 31 EWR-Abkommen müsse in der gleichen Weise wie Artikel 43 EG ausgelegt werden, macht die liechtensteinische Regierung geltend, die durch die *single practice rule* hervorgerufenen Beschränkungen seien trotzdem mit Art. 31 EWR-Abkommen vereinbar.

16 Artikel 2 EU.

17 Vgl. FN 1.

18 Vgl. FN 5.

56. The Government of Liechtenstein argues that the Court of Justice of the European Communities, in *Commission* v *Belgium*,[19] accepted Belgian legislation which was substantially similar to the single practice rule at issue in the present case, in that it hindered the possibility of secondary establishment. The Court held that the national rule was non-discriminatory, and upheld it, without assessing its proportionality in relation to its restrictive effect on the freedom of establishment. The Government of Liechtenstein also refers to *Fearon* v *Irish Land Commission*,[20] on similar reasoning.

57. The Government of Liechtenstein argues, in essence, that it is difficult to see how the Court of Justice of the European Communities arrived at different results in *Commission* v *Belgium*,[21] on the one hand, and in *Ordre des Avocats au Barreau de Paris* v *Klopp*,[22] *Commission* v *France*[23] and *Commission* v *Luxembourg*,[24] on the other hand. The Government of Liechtenstein contends that the latter judgments do not give a complete picture of the Court's case-law on secondary establishment. These differing results render it difficult to determine when the absence of discrimination on grounds of nationality alone is to be considered sufficient to show that the right of establishment has not been restricted.

58. In addition, there are substantial differences between the judgments in *Ordre des Avocats au Barreau de Paris* v *Klopp*,[25] *Commission* v *France*,[26] and *Commission* v *Luxembourg*,[27] and the situation in the present dispute. In the opinion of the Government of Liechtenstein, the economic and socio-political contexts of the cases are entirely different. In particular, there is one phenomenon which characterises and influences the health market at issue in the present case, but may not be found with respect to the activities of lawyers at issue in the *Klopp* case: the phenomenon of supply-induced demand. Referring to the *Liechtenstein Health Report*,[28] the Government of Liechtenstein submits that the increase in the supply on the health market, such as the increase in the number of practices, results in an increase in the demand for medical services and,

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19 Case 221/85 *Commission* v *Belgium* [1987] ECR 719.

20 Case 182/83 *Fearon* v *Irish Land Commission* [1984] ECR 3677.

21 See footnote 19.

22 See footnote 12.

23 See footnote 1.

24 See footnote 5.

25 See footnote 12.

26 See footnote 1.

27 See footnote 5.

28 Professor Friedrich Schneider, *Aktuelle Entwicklungen im Gesundheitssystem von Liechtenstein unter dem besonderen Aspekt der Single Practice Rule* (Current Developments of the Health System in Liechtenstein with a Particular View to the single practice rule), 24 October 2000 (Annex I to the written observations of the Government of Liechtenstein).

56. Die liechtensteinische Regierung bringt vor, der EuGH habe eine belgische Regelung[19], die inhaltlich der *single practice rule* im vorliegenden Fall ähnlich war, indem sie die Möglichkeit der Errichtung von Zweitniederlassungen behinderte, unbeanstandet gelassen. Der EuGH habe festgestellt, die nationale Regelung sei nicht diskriminierend und habe sie akzeptiert, ohne ihre Verhältnismässigkeit bezüglich der beschränkenden Wirkungen auf die Niederlassungsfreiheit zu prüfen. Die liechtensteinische Regierung verweist mit einer ähnlichen Argumentation auf das Urteil *Fearon./.Irish Land Commission*[20].

57. Die liechtensteinische Regierung trägt i.w. vor, es sei schwierig zu erklären, warum der EuGH im Urteil *Belgien./. Kommission*[21] zu einem anderen Ergebnis gelangt sei als in den Urteilen *Ordre des Avocats au Barreau de Paris./.Klopp*[22], *Kommission./.Frankreich*[23] und *Kommission./.Luxemburg*[24]. Für die liechtensteinische Regierung geben die letzteren Urteile kein vollständiges Bild der EuGH-Rechtsprechung zur Frage der Zweitniederlassung. Die unterschiedlichen Ergebnisse machten es schwierig, zu bestimmen, wann das Fehlen einer Diskriminierung aufgrund der Staatsangehörigkeit allein als ausreichend anzusehen ist, um darzutun, dass die Niederlassungsfreiheit nicht beeinträchtigt ist.

58. Zusätzlich bestehen nach Auffassung der liechtensteinischen Regierung zwischen den Urteilen *Ordre des Avocats au Barreau de Paris./.Klopp*[25], *Kommission./.Frankreich*[26] und *Kommission./.Luxemburg*[27] und der Situation im vorliegenden Fall substantielle Unterschiede. Der wirtschafts- und sozialpolitische Zusammenhang der Fälle sei völlig unterschiedlich. Insbesondere gehe es im vorliegenden Fall um ein Phänomen, das den Gesundheitsmarkt prägt und beeinflusst und das in den Fällen von anwaltlicher Tätigkeit - wie im *Klopp*-Fall - nicht zur Diskussion stand: das Phänomen der angebotsinduzierten Nachfrage. Unter Bezugnahme auf den *Liechtenstein Health Report*[28] verweist die liechtensteinische Regierung darauf, dass es durch die Zunahme von Arztpraxen zu einer Erhöhung der Nachfrage nach medizinischen Leistungen und schliesslich zu einer Erhöhung der Gesundheitskosten kommt. Das Phänomen gründet sich auf die Unfähigkeit potentieller Kunden (Patienten), in objektiver und rationaler Weise

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19 EuGH 221/85 *Kommission./.Belgien*, Slg. 1987, 719.

20 EuGH 182-83 *Fearon./.Irish land Commission*, Slg. 1984, 3677.

21 Vgl. FN 19.

22 Vgl. FN 12.

23 Vgl. FN 1.

24 Vgl. FN 5.

25 Vgl. FN 12.

26 Vgl. FN 1.

27 Vgl. FN 5.

28 Professor Friedrich Schneider, Aktuelle Entwicklungen im Gesundheitssystem von Liechtenstein unter dem besonderen Aspekt der Single Practice Rule, 24. Oktober 2000 (Anhang I zur schriftlichen Stellungnahme der Regierung von Liechtenstein).

ultimately, in an increase in health expenditure. This phenomenon is principally based on the incapability of the potential customers (the patients) to decide upon objective and rational considerations on their state of health and whether to avail themselves of the medical services offered or not. Therefore, establishment of further practices may have the effect of (artificially) increasing demand for medical services.

59. The Government of Liechtenstein asserts that, due to the phenomenon of supply-induced demand, the implications of the establishment of secondary practices in the present case differs substantially from the situation in the *Klopp* case. In the case of physicians, the setting-up of secondary practices induces higher demand and therefore imposes higher, and often unbearable, costs on the health system of the host State. The single practice rules in these cases protect entirely different interests and, therefore, cannot be considered from the same point of view.

60. The Government of Liechtenstein adds that, in contrast to the situations in the cases *Commission* v *France*[29] and *Commission* v *Luxembourg*,[30] the single practice rule at issue here does not, in practice, prevent access to the medical profession. Neither physicians nor patients are hindered in any way from providing/demanding cross-border medical services. Patients who avail themselves of the medical services offered by physicians in the neighbouring countries receive a complete refund by the Liechtenstein health insurances of the costs which arise. In addition, there is no other EEA State where so many representatives of the medical professions from other EEA States offer their services, invoking the freedom of establishment, as in Liechtenstein.

61. According to the Government of Liechtenstein, the single practice rule constitutes a measure aimed at regulating the increasing health expenditure and ensuring the high quality of the medical services provided, and is, therefore, part of the national legislation which regulates the health system in the country. Neither at Community level, nor in the framework of the EEA Agreement, has harmonisation of health systems taken place. Referring to *Decker* v *Caisse de Maladie des Employés Privés*,[31] the Government of Liechtenstein submits that it must be for the national legislation of each Member State to determine the conditions of the exercise of the medical profession and to regulate the way in which the health expenditures of the country are controlled. The Government of Liechtenstein asserts that there is no common definition of the exercise of the medical profession throughout the EEA. To ensure the high quality of the medical services provided in Liechtenstein, the professional rules of Liechtenstein's association of the medical professions require that a practitioner must be capable of operating a practice full-time. The Government of

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29 See footnote 1.

30 See footnote 5.

31 Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831.

über ihren Gesundheitszustand zu entscheiden und darüber zu entscheiden, ob sie medizinische Dienstleistungen in Anspruch nehmen oder nicht. Deshalb kann die Niederlassung zusätzlicher Ärzte zu einer (künstlichen) Zunahme der Nachfrage nach medizinischen Leistungen führen.

59. Die Regierung Liechtenstein's behauptet, dass sich aufgrund des Phänomens der angebotsinduzierten Nachfrage die Auswirkungen von Zweitpraxen im vorliegenden Fall wesentlich von der Situation im *Klopp*-Fall unterscheiden. Eine Zweitpraxis eines Arztes bedingt eine höhere Nachfrage und damit höhere und oft untragbare Kosten für das Gesundheitssystem des Aufnahmestaates. Eine *single practice rule* in solchen Fällen schützt andere Interessen und kann deshalb nicht vom gleichen Standpunkt aus betrachtet werden wie in anderen Fällen.

60. Im Unterschied zu den Fällen *Kommission./.Frankreich*[29] und *Kommission./.Luxemburg*[30] hindert die *single practice rule* im vorliegenden Fall in der Praxis nicht den Zugang zum ärztlichen Beruf. Weder Ärzte noch Patienten sind daran gehindert, grenzüberschreitende ärztliche Dienstleistungen zu erbringen bzw. nachzufragen. Patienten, die sich zu einer ärztlichen Behandlung zu einem Arzt in einem Nachbarstaat begeben, erhalten in Liechtenstein vollständigen Kostenersatz durch die Krankenversicherung. Zusätzlich gibt es keinen anderen EWR-Staat, in dem so viele Ärzte aus anderen EWR-Staaten in Ausübung der Niederlassungsfreiheit ihre Dienste anbieten wie in Liechtenstein.

61. Nach Auffassung der liechtensteinischen Regierung ist die *single practice rule* eine Massnahme zur Regulierung der ansteigenden Gesundheitskosten und soll gleichzeitig die hohe Qualität der ärztlichen Dienste sichern, weshalb sie Teil der nationalen Gesundheitsgesetzgebung ist. Weder auf Gemeinschaftsebene noch im Rahmen des EWR-Abkommens ist es zu einer Harmonisierung der Gesundheitssysteme gekommen. Unter Hinweis auf das Urteil *Decker./.Caisse de Maladie des* Employés Privés[31] trägt die liechtensteinische Regierung vor, es müsse Sache der nationalen Gesetzgebung jedes Mitgliedstaates sein, die Bedingungen für die Ausübung des Arztberufs und die Art der Kontrolle der Gesundheitskosten des Landes festzulegen. Die liechensteinische Regierung behauptet, dass es keine einheitliche Umschreibung der Berufsausübungsregeln für ärztliche Berufe im EWR gibt. Um die hohe Qualität der medizinischen Leistungen in Liechtenstein sicherzustellen, verlangen die Berufsausübungsvorschriften der liechtensteinischen Ärztevereinigung, dass ein Mediziner fähig sein muss, seine Praxis vollzeitlich zu führen. Die liechtensteinische Regierung trägt vor, eine solche Bestimmung sei Bestandteil der nationalen Gesetzgebung, welche die Ethik der medizischen Berufe im Land festlegt. Es liege in der Kompetenz der EWR-Staaten solche Regeln, welche die hohe Qualität der ärztlichen Leistungen sichern wollen, aufzustellen.

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29 Vgl. FN 1.

30 Vgl. FN 5.

31 EuGH C-120/95 *Decker./. Caisse de Maladie des Employés Privés,* Slg. 1998, I-1831.

Liechtenstein submits that such provisions form part of the national legislation determining the ethics of the medical profession in the country. It is within the competence of the EEA States to adopt national rules aimed at ensuring the high quality of medical services in the country.

The justification of the single practice rule

62. In the alternative, if the EFTA Court takes the view that the single practice rule is a restriction on the freedom of establishment within the meaning of Article 31 EEA, the Government of Liechtenstein submits that the single practice rule must be considered as justified by imperative reasons relating to the public interest.

63. The Government of Liechtenstein states that, in accordance with the case-law of the Court of Justice of the European Communities, non-discriminatory national measures liable to restrict the freedom of establishment may be justified by imperative requirements relating to general interest if they fulfil three conditions: first, they must be suitable for securing the attainment of the objective which they pursue; second, they must not go beyond what is necessary in order to attain the objective; third, the restriction of the freedom of establishment must be proportionate to the general interest of the objective pursued.

Imperative reasons relating to the general interest

64. The Government of Liechtenstein submits that the single practice rule at issue is adequately justified by imperative reasons relating to the general interest. The public interest at stake is the maintenance of the financial equilibrium of Liechtenstein's social security system in view of the significant increase in the number of practitioners which would otherwise occur, the sustainability of a health care system accessible to all and the maintenance of the high quality of medical services provided in Liechtenstein.

65. According to the *Liechtenstein Health Report*,[32] the abolition of the single practice rule would have a serious effect on the financial equilibrium of the social security system and therefore endanger the sustainability of the current health system and the high quality of the medical services provided.

66. In relation to the abovementioned public interests, the Government of Liechtenstein refers to *Duphar and Others* v *Netherlands*,[33] from which it follows that Community law does not detract from the powers of Member States to organise their social security system. Member States may adopt provisions

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[32] See footnote 28.

[33] Case 238/82 *Duphar BV and Others* v *Netherlands* [1984] ECR 523.

Die Rechtfertigung der single practice rule

62. Für den Fall, dass der EFTA-Gerichtshof zur Auffassung gelangen sollte, die *single practice rule* sei eine Beschränkung der Niederlassungsfreiheit im Sinne von Artikel 31 EWR-Abkommen, trägt die liechtensteinische Regierung vor, dass die *single practice rule* aus zwingenden Gründen des öffentlichen Interesses gerechtfertigt sei.

63. Die liechtensteinische Regierung bringt vor, nach der Rechtsprechung des EuGH seien nicht diskriminierende Regelungen, welche die Niederlassungsfreiheit beeinträchtigen dann aus zwingenden Gründen des öffentlichen Interesses gerechtfertigt, wenn sie drei Voraussetzungen erfüllen: (1) Sie müssen zur Erreichung des verfolgten Ziels geeignet sein; (2) sie dürfen nicht über das hinausgehen, was zur Erreichung des Ziels erforderlich ist; (3) die Beschränkung der Niederlassungsfreiheit muss verhältnismässig zum öffentlichen Interesse am angestrebten Ziel sein.

Zwingende Gründe des öffentlichen Interesses

64. Die liechtensteinische Regierung ist der Auffassung, die *single practice rule* sei im vorliegenden Fall hinreichend durch zwingende Gründe des allgemeinen Interesses gerechtfertigt. Das öffentliche Interesse in diesem Fall bezieht sich auf die Erhaltung des finanziellen Gleichgewichts des liechtensteinischen Systems der Sozialen Sicherheit im Blick auf die deutliche Zunahme der Zahl der Ärzte, die ohne diese Regelung eintreten würde. Ausserdem geht es um die Nachhaltigkeit eines allen Menschen zugänglichen Gesundheitssystems und um die Aufrechterhaltung der hohen Qualität der in Liechtenstein angebotenen medizinischen Leistungen.

65. Nach dem *Liechtenstein Health Report*[32] würde die Abschaffung der *single practice rule* ernste Auswirkungen auf das finanzielle Gleichgewicht des Systems der Sozialen Sicherheit haben und deshalb die Nachhaltigkeit und die Qualität der medizinischen Leistungen gefährden.

66. Zum erwähnten öffentlichen Interesse verweist die liechtensteinische Regierung auf das Urteil *Duphar u.a./.Niederlande*[33]. Aus diesem Urteil folge, dass die Gemeinschaft den Mitgliedstaaten die Kompetenz zur Regelung ihrer Systeme der Sozialen Sicherheit nicht entzogen hat. Die Mitgliedstaaten sind frei, nicht nur Bestimmungen zu erlassen, welche die finanzielle Stabilität fördern, sondern auch das Defizit des Gesundheitssystems eliminieren. Darüber hinaus folge aus dem Urteil *Kohll./.Union des Caisses de Maladie*[34], dass Massnahmen

32 Vgl. FN 28.

33 EuGH 238/82 *Duphar BV u.a./.Niederlande*, Slg. 1984, 523.

34 EuGH C-158/96 *Kohll./.Union des Caisses de Maladie,* Slg. 1998*, I-1931.*

which not only promote financial stability but also eliminate the deficit of their health care system. Moreover, it follows from *Kohll* v *Union des Caisses de Maladie*[34] that measures connected with the control of health expenditures may be justified.

The specific nature of the health market

67. The Government of Liechtenstein asserts that the specific nature of the health system and the health market justifies the way in which the health system is funded and can remain beneficial and efficient. The Government of Liechtenstein finds support for this view in *Webb*.[35]

68. The Government of Liechtenstein submits that the health market and the health service in Liechtenstein are of an extraordinarily high standard and quality.

69. The Government of Liechtenstein furthermore submits that the Liechtenstein health market is distinguished by being extremely liberal. Neither physicians nor patients are limited with regard to supply or demand of cross-border medical services. Physicians practising in Liechtenstein obtain a complete refund of the services covered by the health insurance. Patients enjoy a high degree of freedom in the choice of providers of medical services. They may consult physicians in other EEA States and receive a complete refund of their costs from the health insurance system.

70. In addition, the Government of Liechtenstein points out that, due to the small size of the country, there exists a strong interdependence between the health market in Liechtenstein and the development of the respective health regimes in Liechtenstein's neighbouring countries.

71. Referring to the *Liechtenstein Health Report*,[36] the Government of Liechtenstein also submits that the financial stability of the health system in Liechtenstein is exposed to growing pressure, due to increasing demand and continually rising health costs. Health insurers and insured patients have suffered from major increases in expenditure and premiums. One of the most important reasons for the cost increases in the health service is the rapid increase in the number of established physicians.

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34 Case C-158/96 *Kohll* v *Union des Caisses de Maladie* [1998] ECR I-1931.

35 Case 279/80 *Webb* [1981] ECR 3305.

36 See footnote 28.

in Verbindung mit der Kontrolle der Gesundheitskosten gerechtfertigt sein können.

Die besondere Natur des Gesundheitsmarktes

67. Die Regierung Liechtenstein's bringt vor, die besondere Natur des Gesundheitssystems und des Gesundheitsmarktes rechtfertige die Art, wie das Gesundheitssystem finanziert wird und damit nützlich und effizient bleiben kann. Diese Auffassung werde durch das Urteil *Webb*[35] unterstützt.

68. Die liechtensteinische Regierung macht geltend, der Gesundheitsmarkt und das Gesundheitssystem in Liechtenstein wiesen einen ausserordentlich hohen Standard und eine ausserordentlich hohe Qualität auf.

69. Die liechtensteinische Regierung weist ausserdem darauf hin, dass sich der liechtensteinische Gesundheitsmarkt insbesondere durch seine extreme Liberalität auszeichnet. Weder Ärzte noch Patienten sind im Blick auf das Angebot von oder die Nachfrage nach grenzüberschreitenden medizinischen Leistungen eingeschränkt. In Liechtenstein praktizierende Ärzte erhalten von der Krankenversicherung einen vollständigen Kostenersatz für ihre Leistungen. Die Patienten verfügen über einen grossen Freiraum bei der Arztwahl. Sie können Ärzte in anderen EWR-Staaten aufsuchen und erhalten einen vollständigen Ersatz ihrer Kosten von der Krankenversicherung.

70. Zusätzlich hebt die liechtensteinische Regierung hervor, aufgrund der geographischen Grösse des Landes bestehe ein enger Zusammenhang zwischen dem liechtensteinischen Gesundheitsmarkt und der Entwicklung der Gesundheitssysteme in den Nachbarstaaten.

71. Unter Hinweis auf den *Liechtenstein Health Report*[36] macht die Regierung auch geltend, das finanzielle Gleichgewicht des Gesundheitssystems sei wegen der steigenden Nachfrage und den ständig steigenden Gesundheitskosten erheblichem Druck ausgesetzt. Versicherer und versicherte Patienten hätten unter erheblichen Prämienerhöhungen bzw. steigenden Gesundheitskosten zu leiden. Einer der wichtigsten Gründe für die Kostenerhöhung im Gesundheitswesen sei die stark steigende Anzahl von niedergelassenen Ärzten.

72. Gestützt auf statistisches Material[37] hebt die Regierung hervor, dass die Anzahl der Ärzte verglichen mit den Nachbarländern in Liechtenstein höher ist. Die finanzielle Stabilität des Gesundheitssystems in Liechtenstein sei erhöhtem

35 EuGH 279/80 *Webb*, Slg. 1981, 3305.

36 Vgl. FN 28.

37 Statistik über die Anzahl der Ärzte pro Einwohner in Österreich und in Liechtenstein. Die Daten stützen sich auf Angaben der Ärztekammer Wien und der Regierung von Liechtenstein (Abteilung für öffentliche Gesundheit und soziale Angelegenheiten, Oktober 2000). Annex II der schriftlichen Stellungnahme der liechtensteinischen Regierung.

72. Based on collected statistical material,[37] the Government of Liechtenstein contends that the number of practitioners offering medical services in Liechtenstein is proportionally higher than in neighbouring countries. The financial stability of the health system in Liechtenstein is exposed to growing pressure due to an increasing demand and continually increasing health costs. Referring to the *Liechtenstein Health Report*,[38] the Government of Liechtenstein submits that the health expenditure *per capita* in Liechtenstein is already higher than in countries that traditionally have been assumed to spend most on their health service, such as Switzerland.

73. Referring to the *Liechtenstein Health Report*[39] and the Commission's *Report on Social Protection in Europe 1999*,[40] the Government of Liechtenstein points out that there is a strong correlation between the supply of medical services and the expenditure on the health system, namely, the phenomenon of supply-induced demand. Supply-induced demand is, in particular, made possible in health systems with a high level of insurance coverage for treatment costs. On this basis, the Government of Liechtenstein states that the total health expenditure in Liechtenstein can be expected to rise significantly if the number of physicians offering medical services in Liechtenstein becomes even higher.

74. The Government of Liechtenstein observes that, since the health market in Liechtenstein was made accessible to physicians from other EEA States in 1997, there has been a sharp increase in the number of physicians operating in Liechtenstein. Based on the *Liechtenstein Health Report*,[41] the Government of Liechtenstein points out that the rise in medical expenses in Liechtenstein during the same period gives cause for concern.

75. The Government of Liechtenstein states that Liechtenstein needs to find ways to monitor its escalating health expenditure. One way consists of preventing an uncontrollable increase in the number of practising physicians, as implemented through the single practice rule.

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37 Statistics on the number of physicians per inhabitants in Austria and Liechtenstein based on data provided by the Ärztekammer Wien and the Government of Liechtenstein, Department of Public Health and Social Affairs, October 2000 (Annex II to the written observations of the Government of Liechtenstein).

38 See footnote 28.

39 Ibid.

40 Commission of the European Communities: *Report on Social Protection in Europe 1999*, COM/2000/0163 final.

41 See footnote 28.

Druck ausgesetzt, der sich aus der steigenden Nachfrage und den kontinuierlich steigenden Gesundheitskosten ergebe. Unter Hinweis auf den *Liechtenstein Health Report*[38] bringt die liechtensteinische Regierung vor, die Gesundheitsausgaben *per capita* seien in Liechtenstein bereits höher als in Ländern, die traditionell hohe Ausgaben im Gesundheitswesen tätigen, wie z.B. der Schweiz.

73. Unter Hinweis auf den *Liechtenstein Health Report*[39] und den *Report on Social Protection in Europe* 1999 der Kommission[40] hebt die liechtensteinische Regierung hervor, dass zwischen dem Angebot von medizinischen Leistungen und den Gesundheitsausgaben ein enger Zusammenhang besteht. Dabei handelt es sich um das Phänomen der angebotsinduzierten Nachfrage. Diese tritt insbesondere in Gesundheitssystemen mit einem hohen Niveau an Versicherungsschutz für Behandlungskosten auf. Gestützt darauf muss die liechtensteinische Regierung davon ausgehen, dass die Gesundheitskosten in erheblichem Umfang steigen werden, wenn sich die Anzahl der niedergelassenen Ärzte weiter erhöht.

74. Die liechtensteinische Regierung hat eine starke Zunahme der Anzahl der in Liechtenstein tätigen Ärzte festgestellt, seit der Gesundheitsmarkt im Jahr 1997 für Ärzte aus anderen EWR-Staaten geöffnet wurde. Der *Liechtenstein Health Report*[41] gibt der liechtensteinische Regierung Anlass zur Sorge, weil die Gesundheitskosten in Liechtenstein während dieses Zeitraums erheblich angestiegen sind.

75. Für Liechtenstein besteht nach Auffassung der Regierung die Notwendigkeit, Mittel und Wege zu finden, um die steigenden Gesundheitskosten in den Griff zu bekommen. Ein Mittel dazu ist die *single practice rule*, mit der eine unkontrollierte Zunahme der Arztdichte verhindert wird.

38 Vgl. FN 28.

39 Vgl. FN 28.

40 Kommission der Europäischen Gemeinschaften: Bericht über den sozialen Schutz in Europa 1999, COM/2000/0163final.

41 Vgl. FN 28.

The suitability of the single practice rule

76. The Government of Liechtenstein contends that the necessity of the single practice rule and its suitability for the maintenance of the financial stability and high quality of the Liechtenstein health system must be considered with reference to the specific nature of Liechtenstein's health market. The single practice rule must also be seen in conjunction with certain other measures which have been introduced during the health reform in Liechtenstein, in particular the *Hausarztsystem* (Family Doctor System), as described in the *Liechtenstein Health Report*.[42]

77. The single practice rule has for years been applied consistently in order to prevent further, unaffordable increases in the number of physicians and the ensuing rise in health costs, without at the same time preventing the establishment of practitioners from other EEA States.

78. It was in the light of these considerations that, during the reform of the health system in Liechtenstein, the Government of Liechtenstein opted for the maintenance of the single practice rule, rather than introducing a system requiring a licence from the national health insurance agencies, and allowing only a certain number of practitioners to provide services covered by health insurance in Liechtenstein.

79. The attractive economic conditions for operating a practice in Liechtenstein, the virtually complete refund of all medical expenses for services provided in the country, and the strong temptation for physicians to create supply-induced demand, all bring about a strong incentive for physicians to operate a practice, and particularly a second practice, in Liechtenstein. Moreover, health insurers in Liechtenstein pay considerably more for medical services than a physician would receive for the same services in another EEA State.

80. Referring to the *Liechtenstein Health Report*,[43] the Government of Liechtenstein contends that, if the single practice rule is abolished, health expenditure in Liechtenstein is likely to rise by between 26% and 34.8%, based on hypothetical calculations.

81. The Government of Liechtenstein points out that it is primarily Austrian physicians who are keen to establish secondary practices in Liechtenstein. Due to the adjacency of the two countries, those physicians can reap the benefits of having two practices close together.

82. The Government of Liechtenstein contends that nationals of EEA States who have not yet established a practice enjoy an advantage under the system of

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42 Ibid.

43 Ibid.

Eignung der single practice rule

76. Die Eignung und Notwendigkeit der *single practice rule* zur Beibehaltung des finanziellen Gleichgewichts und der Qualität des liechtensteinischen Gesundheitssystems muss nach Meinung der liechtensteinischen Regierung vor dem Hintergrund der besonderen Gegebenheiten des liechtensteinischen Gesundheitsmarkts gesehen werden. Die *single practice rule* muss auch in Zusammenhang mit anderen Massnahmen gesehen werden, die durch die Gesundheitsreform eingeführt wurden. Dazu zählt v.a. das Hausarztsystem, das im *Liechtenstein Health Report*[42] beschrieben ist.

77. Die *single practice rule* wird seit Jahren konsistent angewendet, um einen weiteren, unbezahlbaren Anstieg der Anzahl von Ärzten und den damit verbundenen Anstieg der Kosten zu vermeiden, ohne dabei die Niederlassung von Ärzten aus anderen EWR-Staaten zu verhindern.

78. Im Lichte dieser Überlegungen hat sich die liechtensteinische Regierung bei der Reform des Gesundheitssystems für die Beibehaltung der *single practice rule* entschieden und auf die Einführung eines Kassenarztsystems, in dem die Ärzte eine Zulassung durch die nationalen Krankenversicherer benötigen, verzichtet. In einem Kassenarztsystem kann nur eine bestimmte Anzahl von Ärzten ihre Leistungen mit Versicherungsdeckung anbieten.

79. Die attraktiven wirtschaftlichen Bedingungen zum Führen einer Praxis, der vollständige Kostenersatz für alle medizinischen Leistungen und der Hang von Ärzten, eine angebotsinduzierte Nachfrage zu erzeugen, sind starke Anreize, in Liechtenstein eine Arztpraxis - insbesondere eine Zweitpraxis - zu unterhalten. Darüber hinaus ist der Kostenersatz der Versicherer an die Ärzte bedeutend höher als in anderen EWR-Staaten.

80. Unter Hinweis auf den *Liechtenstein Health Report*[43] nimmt die liechtensteinische Regierung an, dass für den Fall, dass die *single practice rule* abgeschafft wird, die Gesundheitskosten vermutlich um 26 bis 34,8% steigen werden.

81. Die liechtensteinische Regierung weist darauf hin, dass es insbesondere österreichische Ärzte sind, die eine Zweitpraxis in Liechtenstein eröffnen wollen. Aufgrund der geographischen Nähe zwischen den beiden Ländern können diese Ärzte die Vorteile nützen, welche sich aus dem Betrieb zweier nah beieinanderliegender Arztpraxen ergeben.

82. Die liechtensteinische Regierung sieht sogar einen Vorteil der *single practice rule* für Ärzte, die in anderen EWR-Staaten noch keine Praxis eröffnet haben. Solche Ärzte werden im allgemeinen eine Genehmigung in Liechtenstein

42 Vgl. FN 28.

43 Vgl. FN 28.

the single practice rule. They will generally be authorised to operate a practice in Liechtenstein. The single practice rule is only applicable to those who already operate a practice. It prevents exploitation by physicians of the economic advantages offered by Liechtenstein and its liberal health system through the establishment of secondary practices.

83. The Government of Liechtenstein contends that, under the influence of supply-induced demand, the rules of the market economy do not apply. The single practice rule reduces the possibility of creating artificial demand and increasing health expenditure. This ultimately benefits the consumers, as their contributions would otherwise be raised either by an increase in health insurance premiums or by an increase in costs.

84. The aim of the adopted Hausarztsystem is to intensify the relationship between patients and their physician in order to prevent supply-induced demand and thereby reduce costs. The Government of Liechtenstein submits that physicians who establish a second practice would not be able to provide the necessary continuous and permanent medical care for their patients as physicians who exclusively operate one practice in a country.

85. The Government of Liechtenstein submits, therefore, that the single practice rule is a suitable measure to secure the financial stability of the social security system, the sustainability of its health system, and the high quality of medical services provided in the country.

The necessity of the single practice rule

86. The Government of Liechtenstein argues that the single practice rule does not go beyond what is necessary in order to maintain the objectives pursued. During the preparation of the health reform in Liechtenstein, other systems were considered in order to assess whether they constituted a less restrictive way to prevent excessive cost increases. The Government of Liechtenstein asserts that the single practice rule constitutes the least restrictive means of attaining the abovementioned objectives.

87. An increase in the number of physicians on a national health market results at the same time in an increase of the total health expenditure in that country. Several other EEA States have experienced this. Some of these EEA States, for example, Austria and Germany, have reacted to the increasing costs by introducing a licence system limiting the number of practitioners under the health insurance system. According to the Government of Liechtenstein, the Commission of the European Communities has deemed such a system of limiting the number of practitioners to be compatible with Community law, as long as practitioners from all Member States are guaranteed equal access to obtain a licence, under the same conditions, and in the same manner as nationals from the host Member State.

erhalten. Die *single practice rule* gilt nur für Ärzte, die bereits eine andere Praxis unterhalten. Dadurch wird verhindert, dass Ärzte durch die Eröffnung einer Zweitpraxis die wirtschaftlichen Vorteile des liberalen liechtensteinischen Gesundheitssystems ausnützen.

83. Nach Auffassung der liechtensteinischen Regierung können die Regeln der Marktwirtschaft unter dem Einfluss der angebotsinduzierten Nachfrage keine Anwendung finden. Die *single practice ru*le reduziert die Möglichkeit, dass eine künstliche Nachfrage geschaffen wird und Kostensteigerungen entstehen. Das kommt letztlich den Konsumenten zugute, die ansonsten mit höheren Prämien oder Kosten rechnen müssten.

84. Der Zweck des Hausarztsystems ist es, das Verhältnis zwischen Arzt und Patient zu vertiefen, um eine angebotsinduzierte Nachfrage zu vermeiden und dadurch die Kosten zu reduzieren. Die liechtensteinische Regierung geht davon aus, dass es einem Arzt mit einer Zweitniederlassung im Gegensatz zu einem Arzt mit nur einer Praxis nicht möglich wäre, die notwendige kontinuierliche und permanente medizinische Betreuung seiner Patienten sicherzustellen.

85. Aus diesen Gründen betrachtet die liechtensteinische Regierung die *single practice rule* als geeignete Massnahme zur Sicherstellung der finanziellen Stabilität des Systems der Sozialen Sicherheit, der Nachhaltigkeit des Gesundheitssystems und der hohen Qualität der medizinischen Dienste, die im Land erbracht werden.

Notwendigkeit der single practice rule

86. Die liechtensteinische Regierung ist der Auffassung, die *single practice rule* gehe nicht über das hinaus, was zur Erreichung des beabsichtigten Ziels notwendig ist. Im Zuge der Vorbereitung der Gesundheitsreform wurden auch andere Möglichkeiten geprüft, um festzustellen, ob mit weniger einschneidenden Mitteln Kostensteigerungen verhindert werden können. Die liechtensteinische Regierung ist überzeugt, dass die *single practice rul*e die am wenigsten einschneidende Massnahme ist, um die angegebenen Ziele zu erreichen.

87. Eine Zunahme der Anzahl der Ärzte in einem nationalen Gesundheitsmarkt führt zu einer Erhöhung der totalen Gesundheitskosten in diesem Land. Zahlreiche anderen EWR-Staaten haben diese Erfahrung gemacht. Einige dieser Staaten, z.B. Österreich und Deutschland, haben auf den Kostenanstieg mit einem Konzessionssystem, das die Anzahl der Kassenärzte limitiert, reagiert. Die Kommission erachtet ein solches System als gemeinschaftskonform, solange Ärzten aus allen Mitgliedstaaten der gleiche Zugang zur Konzession offensteht wie Ärzten aus dem Aufnahmestaat.

88. The Government of Liechtenstein contends that such systems may also employ conditions for admission under the health insurance scheme which might result in a considerably stronger restriction on the freedom of establishment. Liechtenstein operates a system with comparably limited restrictions and prerequisites.

89. Other public health regimes apply systems which limit the admission of practitioners as soon as there is a disproportionate number of practitioners in a certain area. However, such a reaction to an excessive number of physicians in the country may, in fact, result in a complete restriction of admissions for a certain period of time. Liechtenstein has chosen an approach which, in its result, is less restrictive, as it constantly allows practitioners of the EEA States to establish themselves in Liechtenstein. This approach was kept even though the representation of physicians in Liechtenstein (one for every 642 inhabitants in 2000) is generally higher than in other countries and the increase in the density of physicians in Liechtenstein gives cause for concern.

90. The Government of Liechtenstein claims that it must be the effect of a provision, and not merely the wording of a provision, which determines its compatibility or incompatibility with the EEA Agreement. The proportion in Liechtenstein of medical specialists from other EEA States (20% in 1999) is higher than in many other EEA States.

91. The Government of Liechtenstein emphasises that the role of the single practice rule is to reduce the attractiveness for all those who intend to exploit the economically advantageous conditions of a secondary practice in Liechtenstein. The measure simply prevents an increase in the number of suppliers and, therefore, an increase in health expenditure which does not at the same time contribute to the quality of the health system for the benefit of the patients.

92. According to the Government of Liechtenstein, it must be concluded that none of the systems which has been considered as an alternative to the single practice rule and the related Hausarztsystem offers a less restrictive means for the attainment of the financial equilibrium of the social security system. On the contrary, the single practice rule constitutes an extremely moderate restriction on access to the profession as a practitioner in Liechtenstein and achieves freedom of establishment in Liechtenstein to the greatest possible extent.

The proportionality of the single practice rule

93. The Government of Liechtenstein submits that the single practice rule is proportionate to the general interest of the objectives pursued.

88. Nach Auffassung der liechtensteinischen Regierung kann ein solches System auch Bedingungen für die Zulassung zur Krankenversicherung enthalten, die zu einer bedeutend stärkeren Einschränkung der Niederlassungsfreiheit führen. Demgegenüber kommt Liechtenstein mit vergleichbar geringfügigen Einschränkungen und Anforderungen aus.

89. Andere öffentliche Gesundheitssysteme wenden Mittel an, die den Zugang von Ärzten begrenzen, sobald eine unverhältnismässig hohe Zahl in einem bestimmten Gebiet praktiziert. Eine solche Reaktion auf eine übermässige Zunahme der Arztdichte in einem Land kann tatsächlich zu einer totalen Zugangsbeschränkung für einen bestimmten Zeitraum führen. Liechtenstein hat sich demgegenüber für einen weniger einschränkenden Ansatz entschieden. Ärzte können sich ständig in Liechtenstein niederlassen. Diesem Ansatz ist man treu geblieben, obwohl die Anzahl der Ärzte in Liechtenstein generell höher ist als in anderen Staaten und der Anstieg der Arztdichte Anlass zur Sorge gibt (ein Arzt pro 624 Einwohner im Jahr 2000).

90. Für die liechtensteinische Regierung kommt es bei der Frage, ob eine Regelung mit dem EWR-Abkommen vereinbar ist oder nicht, auf die Auswirkung und nicht auf den Wortlaut an. Der Anteil ausländischer Fachärzte aus anderen EWR-Staaten ist in Liechtenstein höher als in vielen anderen EWR-Ländern (20% im Jahr 1999).

91. Die liechtensteinische Regierung betont, Aufgabe der *single practice rule* sei es, die Attraktivität für all die, welche von den wirtschaftlich vorteilhaften Bedingungen einer Zweitpraxis in Liechtenstein profitieren wollen, zu reduzieren. Die Massnahme verhindere einen Anstieg der Anbieter und damit einen Anstieg der Gesundheitskosten. Ein solcher trage nicht zur Qualität des Gesundheitssystems bei und liege auch nicht im Interesse der Patienten.

92. Nach der liechtensteinischen Regierung muss man zum Ergebnis kommen, dass keines der Systeme, die als Alternative zur *single practice rule* und zum Hausarztsystem in Erwägung gezogen wurden, weniger einschneidende Massnahmen zur Sicherung des finanziellen Gleichgewichts des Systems der Sozialen Sicherheit mit sich bringt. Die *single practice rule* sei im Gegenteil eine äusserst moderate Einschränkung des Zugangs zur Arzttätigkeit in Liechtenstein und verwirkliche die Niederlassungsfreiheit in Liechtenstein im grösstmöglichen Umfang.

Verhältnismässigkeit der single practice rule

93. Die liechtensteinische Regierung trägt vor, die *single practice rule* sei im Hinblick auf das öffentliche Interesse an den verfolgten Zielen auch verhältnismässig.

94. The Government of Liechtenstein finds support for this submission in *Ramrath* v *Ministre de la Justice*.[44] In that case, the Court of Justice of the European Communities held that, in view of the special nature of certain professional activities, the imposition of specific requirements pursuant to the rules governing such activities cannot be considered incompatible with the EC Treaty. The aims pursued in that case are, to a certain extent, comparable to the objectives pursued by the Liechtenstein rule in the present case, namely, to ensure the medical availability and continuity of presence of the physician. Yet, the objectives pursued by the Liechtenstein rule in the present case go further, since it also concerns the financial stability of the health care system and the high quality of medical services rendered in the country.

95. The Government of Liechtenstein submits that the judgments in *Kohll* v *Union des Caisses de Maladie*[45] and *Decker* v *Caisse de Maladie des Employés Privés*[46] are also of importance in this connection, since, in those cases, the Court of Justice of the European Communities explicitly acknowledged that national measures may be justified if they attempt to protect the financial balance of the social security system. The two cases show the Court's awareness of the tremendous importance of the affordability and sustainability of the health systems of the Member States.

96. The Government of Liechtenstein states that, in the light of the considerable public interest element at stake, the single practice rule constitutes a tolerable restriction on the freedom of establishment.

97. Many other countries in Europe are challenged with comparable difficulties in securing the financial balance of their social security systems and the maintenance of affordable health regimes. However, it must be considered that, in the special case of Liechtenstein, due to the limited size of the country and its strong inter-dependence with the neighbouring countries, the public interest at stake takes on an even stronger significance.

98. The Government of Liechtenstein observes that, if it were to adopt a licence system regulating the admission of practitioners in the country, the number of practitioners from other EEA States would be considerably lower than it is under the current regime.

99. The Government of Liechtenstein concludes that the single practice rule is justified by imperative reasons relating to the general interest. It constitutes a non-discriminatory and suitable measure which is necessary to attain the intended objective and is proportionate to the general interest of the objective pursued.

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44 See footnote 3.

45 See footnote 34.

46 See footnote 31.

94. Die Regierung macht geltend, diese Auffassung finde Rückhalt im Urteil *Ramrath./.Ministre de la Justice*[44]. In diesem Fall habe der EuGH vor dem Hintergrund der besonderen Natur bestimmter beruflicher Tätigkeiten geurteilt, dass die Einführung spezieller Voraussetzungen, die diese Tätigkeiten betreffen, mit dem Gemeinschaftsrecht vereinbar sind. Der in diesem Fall zu erreichende Zweck sei mit dem Ziel im vorliegenden Fall, die Verfügbarkeit medizinischer Leistungen und die ständige Anwesenheit des Arztes sicherzustellen, vergleichbar. Indes gingen die Ziele, die durch die liechtensteinische Regelung angestrebt werden, weiter. Sie umfassten auch die finanzielle Stabilität des Gesundheitssystems und die Sicherung der Qualität der im Land erbrachten medizinischen Leistungen.

95. Die liechtensteinische Regierung trägt vor, dass den Urteilen *Kohll./.Union des Caisses de Maladie*[45] und *Decker./.Caisse de Maladie des Employés Privés*[46] in diesem Zusammenhang ebenfalls Bedeutung zukommt, weil der EuGH in diesen Fällen ausdrücklich anerkannt habe, dass nationale Massnahmen gerechfertigt sein können, wenn sie das finanzielle Gleichgewicht der Systeme der Sozialen Sicherheit schützen wollen. Die beiden Urteile zeigten, dass sich der EuGH der überragenden Bedeutung der Nachhaltigkeit und der Bezahlbarkeit der Gesundheitssysteme in den Mitgliedstaaten bewusst ist.

96. Die liechtensteinische Regierung stellt fest, im Lichte des bedeutenden öffentlichen Interesses, um das es in diesem Fall geht, sei die *single practice rule* eine hinzunehmende Beschränkung der Niederlassungsfreiheit.

97. Viele andere Staaten in Europa stehen bei ihren Bemühungen, das finanzielle Gleichgewicht der Systeme der Sozialen Sicherheit zu sichern und bezahlbare Gesundheitssysteme aufrechtzuerhalten, vor vergleichbaren Schwierigkeiten. Indes wiegt das in Frage stehende öffentliche Interesse für Liechtenstein aufgrund der geographischen Kleinheit des Landes und der starken Interdependenz mit den Nachbarstaaten noch schwerer.

98. Im Fall der Einführung eines Konzessionssystems, das die Zulassung von Ärzten regelt, wäre der Anteil von Ärzten aus anderen EWR-Staaten nach der Auffassung der Regierung erheblich geringer.

99. Die liechtensteinische Regierung erachtet die *single practice rule* als aus zwingenden Gründen des öffentlichen Interesses gerechtfertigt. Es handelt sich um eine nicht diskriminierende und geeignete Massnahme, die notwendig ist, um das angestrebte Ziel zu erreichen. Überdies ist die Massnahme auch verhältnismässig in Beziehung zum öffentlichen Interesse an den verfolgten Zielen.

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44 Vgl. FN 3.

45 Vgl. FN 34.

46 Vgl. FN 31.

Justification for the single practice rule under Article 33 EEA

100. If the EFTA Court were to conclude that the contested single practice rule constitutes a discriminatory measure, the Government of Liechtenstein submits that the rule may also be justified on grounds of public health under Article 33 EEA.

101. The Government of Liechtenstein states that the single practice rule prevents an increase in the number of suppliers who operate a practice in Liechtenstein merely as a sideline and thereby diminish the quality of the health system. The Government of Liechtenstein, while acknowledging the reasoning in *Commission* v *France*[47] and *Commission* v *Luxembourg*,[48] submits that, under the particular health system of Liechtenstein, the availability of the practitioner is indispensable to ensure the protection of the patients' health. Under the established Hausarztsystem, the general practitioner is the key person in the treatment of patients and the referral of patients to specialists and hospitals, and the presence of the practitioner is required to a much higher degree than in other health systems.

102. Moreover, the aforementioned arguments concerning the significance of the single practice rule in order to ensure a balanced medical service accessible to all, the financing of the social security system, the sustainability of the health system, and the high quality of the medical services provided, will also be valid in the assessment under Article 33 EEA.

103. Based on the arguments set out above, the Government of Liechtenstein proposes the following answers to the questions:

> *"Question 2.*
>
> *The questions in the present request for an advisory opinion do not raise an issue of EEA law, but depend on the assessment of factual circumstances underlying the present dispute. According to the division of jurisdiction between the Court and the national court, these outstanding facts must be examined under the law of the Principality of Liechtenstein. The Court therefore refers this question for a proper assessment of the relevant facts to the competent Liechtenstein Court.*

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47 See footnote 1.

48 See footnote 5.

Rechtfertigung der single practice rule nach Artikel 33 EWR

100. Sollte der EFTA-Gerichtshof zum Ergebnis gelangen, dass die streitige *single practice rule* eine diskriminierende Massnahme darstellt, so erachtet die liechtensteinische Regierung die Regelung als aus den Gründen des öffentlichen Gesundheitsschutzes nach Artikel 33 EWR-Abkommen gerechtfertigt.

101. Die liechtensteinische Regierung trägt vor, die *single practice rule* verhindere eine Zunahme der Zahl von Anbietern, die nur nebenbei in Liechtenstein tätig werden wollen und damit der Qualität des Gesundheitssystems schaden. Die Regierung anerkennt die Begründung in den Urteilen *Kommission./.Frankreich*[47] und *Kommission./.Luxemburg*[48]. Allerdings sei im besonderen liechtensteinischen Gesundheitssystem die Erreichbarkeit des Arztes für den Schutz der Gesundheit des Patienten unverzichtbar. Im bestehenden Hausarztsystem sei der praktische Arzt die Schlüsselperson bei der Behandlung des Patienten und bei der Überweisung an Fachärzte bzw. bei der Einweisung in Spitäler. Die Anwesenheit des Arztes sei deshalb in sehr viel höherem Masse erforderlich als in anderen Gesundheitssystemen.

102. Darüber hinaus sind die bereits vorgetragenen Argumente betreffend die Bedeutung der *single practice rule* bei der Beurteilung einer Rechtfertigung nach Artikel 33 EWR-Abkommen von Bedeutung. Dabei geht es um die Sicherstellung einer ausgewogenen medizinischen Versorgung, die für alle zugänglich ist, die Finanzierung des Systems der Sozialen Sicherheit, die Nachhaltigkeit des Gesundheitssystems und die hohe Qualität der erbrachten medizinischen Leistungen.

103. Gestützt auf diese Argumente schlägt die Regierung von Liechtenstein dem EFTA-Gerichtshof vor, die Fragen wie folgt zu beantworten:

> *„Frage 2:*
>
> *Die Fragen im vorliegenden Antrag auf Vorabentscheidung werfen keine Fragen des EWR-Rechts auf, sondern sind von der Beurteilung der dem vorliegenden Rechtsstreit zugrundeliegenden tatsächlichen Umstände abhängig. Entsprechend der Aufteilung der Zuständigkeit zwischen dem Gerichtshof und dem nationalen Gericht müssen diese ausstehenden Tatsachen nach liechtensteinischem Recht beurteilt werden. Der EFTA-Gerichtshof verweist deshalb die Frage zur Beurteilung der relevanten Fakten an das nationale Gericht.*

47 Vgl. FN 1.

48 Vgl. FN 5.

Question 1.

Article 31 of the Agreement on the European Economic Area (EEA Agreement) of 2 May 1992 does not preclude a Member State from providing that a doctor may not operate more than one practice whether as a sole practitioner or jointly with others throughout the territory of the European Economic Area."

The Government of Iceland

104. The Government of Iceland begins by stating that, as regards Article 31 EEA, the contested single practice rule is incompatible with the principle of freedom of establishment laid down in that provision.

105. The Government of Iceland does not dispute that the national provision at issue in the main proceedings applies equally to Liechtenstein nationals and nationals of other EEA States. However, the Government of Iceland asserts that a national provision of that kind can lead to indirect discrimination. The Government of Iceland contends, in essence, that the single practice rule will, by its very nature, be more onerous for physicians of other EEA States than for physicians of Liechtenstein, since the former have to give up their practice in that other EEA State in order to establish a practice in Liechtenstein.

106. The Government of Iceland argues that it is settled case-law of the Court of Justice of the European Communities, *inter alia, Ordre des Avocats au Barreau de Paris* v *Klopp*,[49] and *Gullung* v *Conseils de l'ordre des avocats du barreau de Colmar et de Saverne*,[50] that, even if national provisions apply equally to all parties, irrespective of their nationality, they may still be contrary to Article 31 EEA.

107. The Government of Iceland adds that it is also contrary to the EEA Agreement for an EEA State to impose a single practice rule on its own nationals when they seek to establish themselves in another EEA State and thereby restrict their possibilities to pursue their profession in that other EEA State.

108. Referring to the judgment in *Commission* v *France*,[51] the Government of Iceland contends that a single practice rule in general is unnecessarily restrictive and that it, as such, is too far-reaching.

109. In the opinion of the Government of Iceland, the case-law[52] of the Court of Justice of the European Communities supports the view that it is contrary to

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49 See footnote 12.

50 Case 292/86 *Gullung* v *Conseils de l'ordre des avocats du barreau de Colmar et de Saverne* [1988] ECR 111.

51 See footnote 1.

Frage 1:

Artikel 31 des EWR-Abkommens vom 2. Mai 1992 verbietet es einem Abkommensstaat nicht, eine Regelung vorzusehen, nach der ein Arzt nicht mehr als eine Praxis als Einzelpraxis oder als Gemeinschaftspraxis mit anderen im Gebiet des EWR unterhalten darf."

Die Regierung von Island

104. Die isländische Regierung führt aus, die streitige *single practice rule* sei eine Verletzung der Niederlassungsfreiheit und deshalb mit Artikel 31 EWR unvereinbar.

105. Die isländische Regierung bestreitet nicht, dass die nationale Regelung im Anlassfall für Liechtensteiner und EWR-Ausländer gleichermassen gilt. Allerdings könne eine solche Bestimmung zu einer indirekten Diskriminierung führen. Die Massnahme sei von ihrer Natur her geeignet, sich nachteiliger auf Ärzte aus anderen EWR-Staaten als auf liechtensteinische Ärzte auszuwirken, weil die ersteren ihre Praxis im Heimatstaat aufgeben müssten, um eine Praxis in Liechtenstein einrichten zu können.

106. Die isländische Regierung bringt vor, nach der gesicherten Rechtsprechung des EuGH u.a in den Fällen *Ordre des Advocats au Barreau de Paris./.Klopp*[49] und *Gullung./.Conseils de l'ordre des avocats du barreau de Colmar et de Saverne*[50] sei klar, dass auch unterschiedslos, d.h. unabhängig von der Staatsangehörigkeit anwendbare, nationale Bestimmungen Artikel 31 EWR verletzen können.

107. Für die isländische Regierung verstösst es auch gegen das EWR-Abkommen, wenn ein EWR-Staat seinen eigenen Staatsangehörigen eine *single practice rule* auferlegt, wenn sich diese in einem anderen EWR-Staat niederlassen wollen. Damit beschränkt der Staat die Möglichkeiten der Berufsausübung in diesem anderen EWR-Staat.

108. Unter Hinweis auf das Urteil *Kommission./Frankreich*[51] bringt die isländische Regierung vor, eine *single practice rule* sei im allgemeinen eine unnötige Beschränkung, die als solche zu weit gehe.

109. Nach Auffassung der isländischen Regierung unterstützt die Rechtsprechung des EuGH[52] die Annahme, dass es gegen die fundamentalen Grundsätze

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49 Vgl. FN 12.

50 EuGH C-292/86 *Gullung ./. Conseils de l'ordre des avocats du barreau de Colmar et de Saverne*, Slg. 1988, 111.

51 Vgl. FN 1.

52 EuGH C-107/83 *Ordre des Avocats au Barreau de Paris./.Klopp*, Slg. 1984, 2971; EuGH C-143/87 *Stanton ./. Inasti*, Slg. 1988, 3877; verbundene Rechtssachen EuGH 154/87 und 155/87

the fundamental principles of Articles 31 and 34 EEA for an EEA State to require members of a profession who seek to establish themselves in that EEA State to give up their practice in another EEA State.

110. The Government of Iceland does not agree with the Government of Liechtenstein that the reasoning in *Commission* v *France*[53] is not applicable in the present case, since, in that case, the French physicians were allowed to open a second practice whereas that possibility was not available to practitioners from other Member States. According to the Government of Iceland, this fact was not decisive for the ruling, as the Court also found the rule to be unduly restrictive on its own, irrespective of any discriminatory effect.

111. As regards possible grounds of justification for the single practice rule at issue, the Government of Iceland states that the relevant legal basis to be considered is Article 33 EEA and the public health derogation set out in that provision. The Government of Iceland observes that it is settled case-law of the Court of Justice of the European Communities that this provision is to be interpreted narrowly.

112. The Government of Iceland refers to the judgment in *Commission* v *France*,[54] in which the Court of Justice of the European Communities held a similar single practice rule to be too far-reaching to be justified on grounds of public health.

113. The Government of Iceland argues that the Government of Liechtenstein has not shown that the single practice rule is necessary to maintain the financial equilibrium of the social security system and that the objective cannot be reached through less restrictive means.

114. The Government of Iceland states that an EEA State may, without infringing Article 31 EEA, adopt and apply national rules aimed at guaranteeing a certain level and quality of service to patients. It furthermore states that it is for the EEA State concerned to regulate its social security system. This discretion of the Member States is confirmed by the case-law[55] of the Court of Justice of the European Communities. However, such a power has to be practised in accordance with the fundamental principles of the EEA Agreement.

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52 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971; Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877; Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897; Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351; Case 96/85 *Commission* v *France* [1986] ECR 1475.

53 See footnote 1.

54 Ibid.

55 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971; Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351; Case 96/85 *Commission* v *France* [1986] ECR 1475; Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831.

von Artikel 31 und 34 EWR-Abkommen verstösst, wenn ein EWR-Staat Mitglieder einer Berufsgruppe, die sich in diesem EWR-Staat niederlassen wollen, dazu zwingt, ihre Praxis in einem anderen EWR-Staat aufzugeben.

110. Die isländische Regierung widerspricht der Auffassung der liechtensteinischen Regierung, nach der die Begründung des Urteils *Kommission./.Frankreich*[53] im vorliegenden Fall nicht anwendbar sei, weil es französischen Ärzten in diesem Fall erlaubt war, eine Zweitpraxis zu unterhalten, nicht aber Ärzten aus anderen Mitgliedstaaten. Für die isländische Regierung war dieses Kriterium nicht entscheidend für das Urteil, weil der Gerichtshof die Regelung an sich - unabhängig von einem diskriminierenden Effekt - als unzulässige Beschränkung angesehen hat.

111. Im Blick auf mögliche Rechtfertigungen für die in Frage stehende *single practice rule* ist für die isländische Regierung der Gesundheitsschutz in Artikel 33 EWR-Abkommen die einschlägige Bestimmung. Nach ständiger Rechtsprechung des EuGH sei diese Bestimmung aber eng auszulegen.

112. Die isländische Regierung verweist auf das Urteil *Kommission./.Frankreich*[54]. In diesem Urteil hatte der EuGH eine ähnliche *single practice rule* als zu weitreichend angesehen, als dass sie aus Gründen des öffentlichen Gesundheitsschutzes zu rechtfertigen gewesen wäre.

113. Die isländische Regierung bringt vor, die liechtensteinische Regierung habe nicht nachgewiesen, dass diese Regelung notwendig sei, um das finanzielle Gleichgewicht des Systems der Sozialen Sicherheit aufrechtzuerhalten und dass dieses Ziel nicht auch mit weniger einschneidenden Mitteln erreicht werden könnte.

114. Um ein bestimmtes Niveau und eine bestimmte Qualität der Dienstleistungen für die Patienten aufrechtzuerhalten, kann ein EWR-Staat nach der Auffassung der isländischen Regierung Regelungen erlassen und anwenden, die helfen, dieses Ziel zu erreichen, ohne dabei gegen Artikel 31 EWR-Abkommen zu verstossen. Ausserdem obliegt die Regelung der Sozialversicherungssysteme den Mitgliedstaaten. Dieser Handlungsspielraum wurde vom EuGH bestätigt[55]. Von dieser Möglichkeit darf aber nur in Übereinstimmung mit den fundamentalen Grundsätzen des EWR-Abkommens Gebrauch gemacht werden.

RSVZ./.Wolf u.a, Slg. 1988, 3897; EuGH C-106/91 *Ramrath./.Ministre de la Justice*, Slg. 1992, I-3351; EuGH C 96/85 *Kommission./.Frankreich*, Slg. 1986, 1475.

53 Vgl. FN 1.

54 Vgl. FN 1.

55 EuGH C-107/83 *Ordre des Avocats au Barreau de Paris./.Klopp*, Slg. 1984, 2971 ; EuGH C-106/91 *Ramrath./.Ministre de la Justice*, Slg. 1992, I-3351; EuGH C 96/85 *Kommission./.Frankreich*, Slg. 1986, 1475 ; EuGH C-120/95 *Decker./. Caisse de Maladie des Employés Privés,* Slg. 1998, I-1831.

115. The Government of Iceland proposes the following answer to the questions:

> *"1. The Single practice rule applying without exception to all doctors under Liechtenstein national law, and in particular Article 9(1) of the Regulation of 8 November on the medical professions, is incompatible with the EEA Agreement.*
>
> *2. Referring to the answer to the first question the second question need not be answered."*

The Government of Norway

116. The Government of Norway states that the wording of Article 31 EEA suggests that what is required is the equal treatment of nationals and non-nationals, including a prohibition against direct discrimination. The Government of Norway observes, however, that the scope of the right of establishment has been given a wider interpretation in recent case-law from the Court of Justice of the European Communities and the EFTA Court. Referring to *Clean Car Autoservice* v *Landeshauptmann von Wien*,[56] *Merino García* v *Bundesanstalt für Arbeit*[57] and *Rainford-Towning*,[58] the Government of Norway contends 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, lead to the same result in practice.

117. The Government of Norway submits, furthermore, that it is settled case-law[59] of the Court of Justice of the European Communities that a person may be established in more than one Member State, in particular through the setting-up of agencies, branches or subsidiaries, or by establishing a second professional base.

118. The Government of Norway states that it follows from the case-law[60] of the Court of Justice of the European Communities that any restriction on the freedom to set up a secondary establishment by requiring that a person give up his establishment elsewhere before he can establish himself in the host country needs justification. Such restrictions are considered to be national measures that

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56 Case C-350/96 *Clean Car Autoservice* v *Landeshauptmann von Wien* [1998] ECR I-2521.

57 Case C-266/95 *Merino García* v *Bundesanstalt für Arbeit* [1997] ECR I-3279.

58 See footnote 9.

59 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971; Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351.

60 Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971; Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; Case 96/85 *Commission* v *France* [1986] ECR 1475; Case C-351/90 *Commission* v *Luxembourg* [1992] ECR I-3945.

115. Die Regierung von Island schlägt die folgenden Antworten auf die Fragen vor:

> *„1. Die ausnahmslos auf alle Ärzte anwendbare single practice rule des liechtensteinischen Rechts, und insbesondere Artikel 9 Abs. 1 der Verordnung vom 8. November über medizinische Berufe ist mit dem EWR-Abkommen unvereinbar.*
>
> *2. Im Blick auf die Antwort auf die erste Frage braucht die zweite Frage nicht beantwortet zu werden".*

Die Regierung von Norwegen

116. Die norwegische Regierung führt aus, der Wortlaut von Artikel 31 EWR-Abkommen lege nahe, dass die Vorschrift die Inländergleichbehandlung einschliesslich des Verbots der indirekten Diskriminierung sicherstellen wolle. Allerdings sei der Anwendungsbereich der Niederlassungsfreiheit in der jüngeren Rechtsprechung des EuGH und des EFTA-Gerichtshofs weit interpretiert worden. Unter Hinweis auf die Urteile *Clean Car Autoservice./.Landeshauptmann von Wien*[56]*, Merino García./.Bundesanstalt für Arbeit*[57] und *Rainford-Towning*[58] macht die norwegische Regierung geltend, dass das Gleichbehandlungsgebot nicht nur die offene Diskriminierung verbietet, sondern auch alle Formen der versteckten Diskriminierung, die durch die Anwendung anderer Kriterien zum gleichen Ergebnis führen.

117. Aus der ständigen Rechtsprechung des EuGH59 folgt für die norwegische Regierung, dass es einer Person erlaubt sein muss, sich in mehr als einem Mitgliedstaat durch die Gründung von Agenturen, Zweigniederlassungen oder Tochtergesellschaften oder durch die Einrichtung einer zweiten beruflichen Basis niederzulassen.

118. Aus der Rechtsprechung des EuGH[60] folgt, dass jede Beschränkung des Rechts auf eine Zweitniederlassung, die eine solche von der Aufgabe einer anderen Praxis abhängig macht, gerechtfertigt werden muss. Solche Einschränkungen werden als staatliche Massnahmen angesehen, welche die durch den EWR-Vertrag eingeräumten Grundfreiheiten behindern oder weniger attraktiv machen.

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56 EuGH C-350/96 *Clean Car Autoservice./.Landeshauptmann von Wien, Slg. 1998,I-2521.*

57 EuGH C-266/95 *Merino García./.Bundesanstalt für Arbeit,* Slg. 1997, I-3279.

58 Vgl. FN 9.

59 EuGH C-107/83 *Ordre des Avocats au Barreau de Paris./.Klopp*, Slg. 1984, 2971; EuGH C-55/94 *Gebhard ./.Consiglio del''Ordine degli Avvocati e Procuratori di Milano*, Slg. 1995, I-4165 ; EuGH C-106/91 *Ramrath./.Ministre de la Justice*, Slg. 1992, I-3351 ;

60 EuGH C-107/83 *Ordre des Avocats au Barreau de Paris./.Klopp*, Slg. 1984, 2971 ; EuGH C-55/94 *Gebhard ./.Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Slg. 1995, I-4165 ; EuGH C 96/85 *Kommission./.Frankreich*, Slg. 1986, 1475 ; EuGH C-351/90 *Kommission./.Luxemburg*, Slg. 1992, I-3945.

are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement. Article 31(1) EEA would be deprived of its meaning if it did not include the right to maintain the business in the EEA State of origin.

119. The Government of Norway asserts that, if national rules of an EEA State have the effect of placing nationals of other EEA States in a less favourable position than their own nationals, and thus are liable to hinder or make less attractive the exercise of the right of establishment, such rules must, according to *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*,[61] fulfil four conditions: first, they must be applied in a non-discriminatory manner; second, they must be justified by imperative requirements in the general interest; third, they must be suitable for securing the attainment of the objective which they pursue; fourth, they must not go beyond what is necessary in order to attain it.

120. The Government of Norway submits that the contested single practice rule is a restriction within the meaning of Article 31 EEA, one which requires justification. The Government of Norway finds support for this view in *Commission* v *Luxembourg*.[62]

121. The Government of Norway acknowledges that the single practice rule at issue in the main proceedings applies equally to Liechtenstein nationals and to nationals of other EEA States. There are no specific rules that apply only to non-nationals, as was the case in *Commission* v *France*,[63] nor are there exceptions that only apply to nationals, as was the case in *Commission* v *Luxembourg*.[64] However, it can be inferred that the purpose of the single practice rule is to discriminate against professionals from other EEA States.

122. In response to the Government of Liechtenstein's submissions on justification, as set out in the Request for an Advisory Opinion, the Government of Norway submits that restricting the growth in the number of physicians from other EEA States is not *per se* an "imperative requirement in the general interest".

123. The Government of Norway agrees that keeping health costs under control, maintaining the financial equilibrium of the social security system and maintenance of a medical and hospital security system are purposes that may constitute "imperative requirements in the general interest". The Government of Norway questions, however, whether the single practice rule is suitable for

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61 Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

62 See footnote 5.

63 See footnote 1.

64 See footnote 5.

Artikel 31 Absatz 1 EWR-Abkommen wäre seines Sinns entleert, wenn er das Recht, die Geschäftstätigkeit im Herkunftstaat aufrechtzuerhalten, nicht einschlösse.

119. Gemäss dem Urteil *Gebhard ./.Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[61] müssen - nach Auffassung der norwegischen Regierung - nationale Regelungen, die im Ergebnis Staatsangehörige aus anderen EWR-Staaten gegenüber den eigenen Staatsangehörigen benachteiligen, indem sie die Ausübung der Niederlassungsfreiheit behindern oder weniger attraktiv machen, vier Bedingungen erfüllen, um gerechtfertigt zu sein: (1) sie müssen in einer nicht diskriminierenden Art und Weise angewendet werden; (2) sie müssen aus zwingenden Gründen des Allgemeininteresses gerechtfertigt sein; (3) sie müssen zur Erreichung des beabsichtigten Ziels geeignet sein; (4) sie dürfen nicht über das hinausgehen, was notwenig ist, um dieses Ziel zu erreichen.

120. Für die norwegische Regierung ist die streitige *single practice rule* eine Einschränkung i.S.v. Artikel 31 EWR-Abkommen, die gerechtfertigt werden muss. Diese Rechtsansicht werde durch das Urteil *Kommission./.Luxemburg*[62] bestätigt.

121. Die norwegische Regierung anerkennt, dass die *single practice rule* unabhängig von der Staatsangehörigkeit angewendet wird. Es gibt auch keine speziellen Regelungen, die nur für fremde Staatsangehörige gelten, wie im Fall *Kommission ./.Frankreich*[63] noch gibt es Ausnahmen, die nur für eigene Staatsangehörige gelten, wie im Fall *Kommission./.Luxemburg*[64]. Indes ist anzunehmen, dass die *single practice rule* die Diskriminierung von Berufsangehörigen aus anderen EWR-Staaten bezweckt.

122. Im Blick auf die von der liechtensteinischen Regierung vorgetragenen Rechtfertigungsgründe, wie sie im Vorlageersuchen enthalten sind, trägt die norwegische Regierung vor, dass die Beschränkung der Zunahme der Anzahl von Ärzten aus anderen EWR-Staaten nicht *per se* ein zwingender, im Allgemeininteresse gelegener, Grund ist.

123. Für die norwegische Regierung sind die Kontrolle der Gesundheitskosten, die Erhaltung des finanziellen Gleichgewichts der Systeme der Sozialen Sicherheit und die Aufrechterhaltung eines Systems der Sicherheit bezüglich medizinischer und spitalmässiger Versorgung durchaus Ziele, die zwingende im Allgemeininteresse gelegene Gründe darstellen können. Fraglich sei aber, ob die

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61 EuGH C-55/94 *Gebhard./.Consiglio del``Ordine degli Avvocati e Procuratori di Milano*, Slg. 1995, I-4165.

62 Vgl. FN 5.

63 Vgl. FN 1.

64 Vgl. FN 5.

securing the attainment of such objectives, and argues that it goes beyond what is necessary in order to attain such objectives. More physicians would normally lead to lower costs per consultation, due to more competition. Cost control could be achieved by other means. The performance of medical services should also normally improve when there are more physicians, not the contrary. With modern transport and communication, there is no need to require physicians to work in one place only. Furthermore, the Government of Norway notes that it does not seem to be a requirement that physicians live in Liechtenstein to ensure that they are available locally 24 hours a day, but only that they have their sole place of work there.

124. The Government of Norway points out that arguments relating to keeping health costs under control, maintaining the financial equilibrium of the social security system and maintaining a sufficient supply of medical services were advanced by France and Luxembourg in *Commission* v *France*[65] and *Commission* v *Luxembourg*,[66] respectively, but the Court of Justice of the European Communities held in those cases that a single practice rule was "unduly restrictive".

125. The Government of Norway adds that the grounds of justification can be considered to be within the concept of "public health" as set out in Article 33 EEA, but, having concluded that the single practice rule is unduly restrictive, it is clear that it cannot be justified under Article 33 EEA.

126. The Government of Norway proposes the following answer to the question:

> *"National legislation applying a single practice rule without exception to all doctors and dentists is in breach of Article 31 of the Agreement on the European Economic Area."*

The EFTA Surveillance Authority

127. The EFTA Surveillance Authority begins by observing that the single practice rules were the object of the rulings of the Court of Justice of the European Communities in *Ordre des Avocats au Barreau de Paris* v *Klopp*,[67] *Commission* v *France*[68] and *Commission* v *Luxembourg*.[69]

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65 See footnote 1.

66 See footnote 5.

67 See footnote 12.

68 See footnote 1.

69 See footnote 5.

single practice rule geeignet ist, diese Ziele zu erreichen. Die Regel gehe über das hinaus, was notwendig ist, um die Ziele zu erreichen. Eine grössere Anzahl von Ärzten führe aufgrund des grösseren Wettbewerbs zu niedrigeren Kosten pro Behandlung. Eine Kostenkontrolle könne auch mit anderen Mitteln erreicht werden. Normalerweise sollten mehr Ärzte auch helfen, die medizinischen Dienstleistungen zu verbessern und nicht umgekehrt. Aufgrund der modernen Transport- und Kommunikationsmöglichkeiten ergibt sich auch kein Bedarf, den Ärzten vorzuschreiben, nur an einem Ort zu arbeiten. Überdies sei offenbar der 24-Stunden-Dienst für Ärzte nicht vorgeschrieben. Es bestehe nur der Zwang für die Ärzte, ihren einzigen Arbeitsplatz in Liechtenstein zu unterhalten.

124. Die norwegische Regierung weist darauf hin, dass die Argumente betreffend Kontrolle der Gesundheitskosten, Aufrechterhaltung des finanziellen Gleichgewichts des Systems der Sozialen Sicherheit und Aufrechterhaltung einer ausreichenden medizinischen Versorgung in den Fällen *Kommission./.Frankreich*[65] und *Kommission./.Luxemburg*[66] von Frankreich und Luxemburg geltend gemacht wurden. Der EuGH habe die *single practice rule* aber trotzdem als unzulässige Beschränkung beurteilt.

125. Die angeführten Rechtfertigungsgründe liegen zwar im Schutzbereich des öffentlichen Gesundheitsschutzes, wie er in Artikel 33 EWR-Abkommen festgelegt ist. Weil die *single practice rule* aber eine unzulässige Beschränkung darstellt, kann sie nicht nach Artike 33 EWR-Abkommen gerechtfertigt werden.

126. Die norwegische Regierung schlägt die folgende Antwort auf die Fragen vor:

> *„Nationales Recht, das ausnahmslos für alle Ärzte und Zahnärzte eine single practice rule statuiert, verstösst gegen Artikel 31 des EWR-Abkommens“.*

Die EFTA-Überwachungsbehörde

127. Die EFTA-Überwachungsbehörde beginnt ihre Ausführungen mit einem Hinweis darauf, dass es in den Urteilen des EuGH in den Fällen *Ordre des Avocats au Barreau de Paris./.Klopp*[67]*, Kommission./.Frankreich*[68] und *Kommission./.Luxemburg*[69] um eine *single practice rule* gegangen ist.

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65 Vgl. FN 1.

66 Vgl. FN 5.

67 Vgl. FN 12.

68 Vgl. FN 1.

69 Vgl. FN 5.

128. The EFTA Surveillance Authority states that, for the professions in question, the single practice rule dilutes the right of establishment enshrined in Article 31 EEA. Being a restriction of this fundamental freedom, the rule may only be compatible with the EEA Agreement if it can be justified by imperative requirements.

129. As regards possible grounds for justification of the single practice rule, the EFTA Surveillance Authority states that the main reason for the contested single practice rule appears to be that, in the absence of such a rule, the financial balance of the Liechtenstein social security system would be destroyed. In considering whether this can serve as a justification for the single practice rule, the EFTA Surveillance Authority refers to *Kohll* v *Union des Caisses de Maladie*[70] and *Decker* v *Caisse de Maladie des Employés Privés*,[71] in which the Court of Justice of the European Communities held that the risk of seriously undermining the financial balance of a social security system may constitute an overriding reason in the general interest capable of justifying a barrier to one of the fundamental freedoms.

130. The EFTA Surveillance Authority observes that it is for the national court to make the necessary factual findings in order to ascertain whether the services of the Complainant will in any way burden the Liechtenstein social security system and thus whether the ground of justification invoked by the Government of Liechtenstein is at all relevant in the present case.

131. The EFTA Surveillance Authority states that it has no knowledge of any convincing proof to the effect that the financial balance of the Liechtenstein health insurance system would be seriously undermined by the absence of the single practice rule.

132. The EFTA Surveillance Authority adds that, even if sufficient proof had been provided, it would still have to be established that more suitable and less restrictive means could not be applied in order to achieve the same aim. It doubts whether that would be possible. In the view of the EFTA Surveillance Authority, it is not clear why one cannot apply cost reduction measures that do not restrict the fundamental freedoms. Furthermore, it is not clear how requiring physicians to give up their practice in other EEA States would preserve the financial balance of the social security system.

133. The EFTA Surveillance Authority notes that there are not, at present, any rulings by the Court of Justice of the European Communities in which an absolute and general restriction to the freedom of establishment has been justified by the need to preserve the financial balance of a social security system.

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[70] See footnote 34.

[71] See footnote 31.

128. Für die betroffene Berufsgruppe führt die *single practice rule* zu einer Verwässerung der in Artikel 31 EWR-Abkommen verbrieften Niederlassungsfreiheit. Als Beschränkung dieser Grundfreiheit ist eine solche Regelung nur dann EWR-konform, wenn sie aus zwingenden Gründen gerechtfertigt werden kann.

129. Im Blick auf mögliche Rechtfertigungsgründe führt die EFTA-Überwachungsbehörde aus, der Hauptgrund für die *single practice rule* sei die Sorge, das finanzielle Gleichgewicht des Systems der Sozialen Sicherheit würde ohne eine solche Regelung zusammenbrechen. Zur Beurteilung dieses Rechtfertigungsgrundes verweist die EFTA-Überwachungsbehörde auf die Fälle *Kohll./.Union des Caisses de Maladie*[70] und *Decker./. Caisse de Maladie des Employés Privés*[71]. In diesen Urteilen hat der EuGH geurteilt, dass die Gefahr der schwerwiegenden Störung des finanziellen Gleichgewichts der Systeme der Sozialen Sicherheit einen überwiegenden Grund des öffentlichen Interesses darstellen und somit eine Einschränkung der Grundfreiheiten rechtfertigen kann.

130. Nach Auffassung der EFTA-Überwachungsbehörde ist es Aufgabe des nationalen Gerichts, festzustellen, ob die vom Beschwerdeführer erbrachten Leistungen das nationale System der Sozialen Sicherheit belasten und ob die von der liechtensteinischen Regierung vorgetragenen Rechtfertigungsgründe vorliegend überhaupt relevant sind.

131. Die EFTA-Überwachungsbehörde stellt fest, ihr seien keine überzeugenden Beweise dafür bekannt, dass das liechtensteinische Gesundheitssystem ohne die *single practice rule* ernsthaft gefährdet würde.

132. Selbst wenn es ausreichende Beweise dafür gäbe, müsste immer noch nachgewiesen werden, dass besser geeignete und weniger einschneidende Mittel nicht zum gleichen Ergebnis führen könnten. Die EFTA-Überwachungsbehörde zweifelt daran, dass das möglich ist. Es sei unklar, warum man keine Kostenreduzierungsmassnahmen ergreifen kann, ohne die Grundfreiheiten zu verletzen. Ausserdem sei unklar, warum das Erfordernis, dass Ärzte ihre Praxis im Heimatstaat aufzugeben haben, das finanzielle Gleichgewicht des Sozialsystems stützen sollte.

133. Die EFTA-Überwachungsbehörde stellt fest, dass der EuGH bislang in keinem einzigen Fall eine absolute und generelle Einschränkung der Niederlassungsfreiheit mit der Notwendigkeit, das finanzielle Gleichgewicht eines Systems der Sozialen Sicherheit aufrechtzuerhalten, gerechtfertigt hat.

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70 Vgl. FN 34.

71 Vgl. FN 31.

134. The EFTA Surveillance Authority proposes the following answer to the questions:

> *"Article 31 of the EEA Agreement must be interpreted as precluding Liechtenstein from maintaining a provision of national law according to which doctors are required to give up any other establishment simultaneously held in other Member States in order to operate a practice in Liechtenstein."*

The Commission of the European Communities

135. The Commission of the European Communities begins by referring to the judgment of the EFTA Court in *State Dept Management Agency* v *Íslandsbanki-FBA hf*,[72] and observes that, since the principle of non-discrimination has been given effect in the field of the right of establishment by Article 31 EEA, Article 4 EEA does not require further consideration.

136. Referring to the very broad understanding of the concept of establishment adopted by the Court of Justice of the European Communities in its judgments in *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[73] and *Reyners* v *Belgium*,[74] the Commission does not object to the single practice rule at issue in this case being assessed in the context of Article 31 EEA.

137. The Commission of the European Communities contends that Article 33 EEA is not applicable in this case, since the contested national provision constitutes a non-discriminatory measure which is applied without distinction.

138. As regards Article 31 EEA, the Commission of the European Communities contends that the single practice rule in question restricts the right of establishment. The Court of Justice of the European Communities held in *Ordre des Avocats au Barreau de Paris* v *Klopp*,[75] *Stanton* v *Inasti*,[76] and *Inasti* v *Kemmler*[77] that the right of establishment includes the freedom to set up and maintain more than one place of work in the Community. The single practice rule runs counter to this, by preventing physicians of other EEA States from taking up and pursuing their activities in Liechtenstein, if they want to carry on working in their home State.

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72 Case E-1/00 *State Debt Management Agency* v *Íslandsbanki-FBA hf*, judgment of 14 July 2000 (not yet reported).

73 See footnote 61.

74 Case 2/74 *Reyners* v *Belgium* [1974] ECR 631.

75 See footnote 12.

76 Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877.

77 Case C-53/95 *Inasti* v *Kemmler* [1996] ECR I-703.

134. Die EFTA-Überwachungsbehörde schlägt vor, die Fragen wie folgt zu beantworten:

> *„Artikel 31 des EWR-Abkommens muss dahingehend ausgelegt werden, dass die Bestimmung es Liechtenstein verbietet eine Regelung im nationalen Recht beizubehalten, nach der ein Arzt jede andere Praxis, die er in einem anderen Mitgliedstaat gleichzeitig unterhält, aufgeben muss, wenn er in Liechtenstein eine Praxis betreiben will".*

Die Kommission der Europäischen Gemeinschaften

135. Die Kommission der Europäischen Gemeinschaften beginnt ihre Ausführungen mit einem Hinweis auf das Urteil des EFTA-Gerichtshofs im Fall *State Dept Management Agency./.ÍslandsbankiFBA hf*[72] und stellt fest, dass Artikel 4 des EWR-Abkommens nicht einschlägig sei, weil der Grundsatz der Nichtdiskriminierung seinen besonderen Ausdruck in Artikel 31 EWR-Abkommen gefunden habe.

136. Unter Hinweis auf die weite Auslegung des Begriffs der Niederlassung durch den EuGH in den Rechtssachen *Gebhard ./.Consiglio dell`Ordine degli Avvocati e Procuratori di Milano*[73] und *Reyners./.Belgien*[74] widerspricht die Kommission einer Beurteilung der *single practice* im Kontext des Artikels 31 EWR-Abkommen nicht.

137. Die Kommission ist der Auffassung, Artikel 33 EWR-Abkommen sei im vorliegenden Fall nicht anwendbar, weil es sich bei der streitigen nationalen Vorschrift um eine nichtdiskriminierende Massnahme handele, die unterschiedslos angewendet werde.

138. Was Artikel 31 EWR-Abkommen anlangt, so macht die Kommission eine Beschränkung der Niederlassungsfreiheit durch die *single practice rule* geltend. In den Urteilen *Ordre des Avocats au Barreau de Paris./.Klopp*[75], *Stanton./.Inasti*[76] und *Inast./.Kemmler*[77] habe der EuGH festgestellt, dass die Niederlassungsfreiheit das Recht umfasst, mehr als einen Tätigkeitsort in der Gemeinschaft zu eröffnen und zu unterhalten. Die *single practice rule* laufe dem zuwider, indem sie Ärzten aus anderen Mitgliedstaaten verbietet, eine Praxis in Liechtenstein zu eröffnen und zu unterhalten, wenn sie ihre Tätigkeit auch im Heimatstaat weiter ausüben wollen.

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72 EFTA-Gerichtshof E-1/00 *State Dept Management Agency./.ÍslandsbankiFBA hf* , Urteil vom 14. Juli 2000 (noch nicht veröffentlicht)

73 Vgl. FN 61.

74 EuGH C-2/74 *Reyners./.Belgien*, Slg. 1974, 631.

75 Vgl. FN 12.

76 EuGH C-143/87 *Stanton ./. Inasti*, Slg. 1988, 3877.

77 EuGH C-53/95 *Inasti ./. Kemmler*, Slg. 1996, I-703.

139. In support of the view that the single practice rule constitutes a restriction on the freedom of establishment, the Commission of the European Communities relies on *Commission* v *France*,[78] in which the Court of Justice of the European Communities held *inter alia* that requiring physicians established in another Member State to cancel their enrolment or registration in that other Member State in order to be able to practise their profession in the State in question, as a principal in a practice, was against the EC Treaty. The basis of the reasoning in that case was that the discrimination against practitioners established in other Member States, who were excluded from opening a further practice in the State in question, represented a restriction not similarly applicable to nationals of that State. In addition, the Court considered that such a general rule was unduly restrictive.

140. As regards possible justification for the single practice rule, the Commission of the European Communities begins by referring to *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*.[79] According to that ruling, national measures liable to hinder or make less attractive the exercise of fundamental freedoms must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.

141. The Commission of the European Communities does not agree with the Government of Liechtenstein that the single practice rule can be justified on the grounds that it constitutes a means of keeping health costs under control and of maintaining the financial equilibrium of the social security system. In setting out its view, the Commission refers to *Kohll* v *Union des Caisses de Maladie*,[80] in which the Court of Justice of the European Communities held that it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute a ground of justification. However, the Commission of the European Communities contends that, in the absence of any further evidence, the situation in Liechtenstein does not fall within the parameters set out in that judgment. The Commission's reasoning for that is threefold: first, cross-border provision of services by physicians operating a practice outside Liechtenstein is not covered by the national provision at issue, even though this could also have an effect on the social security system; second, the contested national provision would not necessarily lead to a quantitative limitation of physicians which might have an impact on the health budget, since physicians may set up a practice in Liechtenstein if they give up their practice in their country of origin; third, the national provision at hand could apply without there

78 See footnote 1.

79 See footnote 61.

80 See footnote 34.

139. Um darzutun, dass eine *single practice rule* eine Beschränkung der Niederlassungsfreiheit darstellt, beruft sich die Kommission auf das Urteil *Kommission./.Frankreich*[78]. In diesem Fall habe der EuGH u.a. entschieden, dass es dem EG-Vertrag widerspricht, wenn Ärzten aus anderen Mitgliedstaaten vorgeschrieben wird, ihre Eintragung in diesem Staat löschen zu lassen, damit sie im fraglichen Staat als Chef in einer Praxis tätig werden dürfen. Die Basis für die Begründung in diesem Fall war, dass die Ungleichbehandlung von Ärzten aus anderen Mitgliedstaaten, die daran gehindert waren, eine Zweitpraxis zu eröffnen, als Beschränkung angesehen wurde, die auf eigene Staatsangehörige nicht in vergleichbarer Weise angewendet wurde. Zusätzlich hielt der EuGH eine so allgemeine Regelung für übermässig beschränkend.

140. Im Blick auf eine mögliche Rechtfertigung der *single practice rule* beginnt die Kommission ihre Ausführungen mit einem Hinweis auf das Urteil *Gebhard ./.Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[79]. Nach diesem Urteil müssen nationale Regelungen, die geeignet sind, die Ausübung der Grundfreiheiten zu behindern oder weniger attraktiv zu machen, vier Bedingungen erfüllen: (1) Sie müssen in einer nicht diskriminierenden Art und Weise angewendet werden; (2) sie müssen aus zwingenden Gründen des Allgemeininteresses gerechtfertigt sein; (3) sie müssen zur Erreichung des beabsichtigten Ziels geeignet sein; (4) sie dürfen nicht über das hinausgehen, was notwenig ist, um dieses Ziel zu erreichen.

141. Die Kommission stimmt nicht mit der Auffassung der liechtensteinischen Regierung überein, die *single practice rule* könne damit gerechtfertigt werden, dass sie ein Mittel zur Kontrolle der Gesundheitskosten und zur Aufrechterhaltung des finanziellen Gleichgewichts des Systems der Sozialen Sicherheit darstellt. Sie verweist auf das Urteil des EuGH in der Rechtssache *Kohll./.Union des Caisses de Maladie*[80]. In diesem Urteil habe der EuGH festgestellt, es könne nicht ausgeschlossen werden, dass die Gefahr der schwerwiegenden Störung des finanziellen Gleichgewichts der Systeme der Sozialen Sicherheit eine Einschränkung der Grundfreiheiten rechtfertigen kann. Wenn es keine weiteren Beweise gibt, so falle die Situation in Liechtenstein aber nicht unter die in diesem Urteil genannten Parameter. Die Kommission geht dabei von dreierlei Überlegungen aus: (1) Die nationale Regelung erfasst die Dienstleistungserbringung von Ärzten aus anderen Mitgliedstaaten nicht, obwohl diese ebenfalls Auswirkungen auf das nationale System der Sozialen Sicherheit haben könnten. (2) Die streitige nationale Bestimmung führt nicht notwendigerweise zu einer zahlenmässigen Begrenzung der Ärzte, was Auswirkungen auf das Gesundheitsbudget hätte, weil Ärzte ja eine Praxis in Liechtenstein eröffnen können, wenn sie ihre Praxis im Herkunftsstaat aufgeben. (3) Die in Rede stehende nationale Bestimmung ist auch in Fällen anwendbar, in denen kein Zusammenhang zwischen dem Arzt und dem

78 Vgl. FN 1.

79 Vgl. FN 61.

80 Vgl. FN 34.

necessarily being any link between the physician in question and the social security system, as, for example, in the present case, where the Complainant is paid directly by the undertaking for which he works, so that no financial burden is placed on the social security system.

142. The Commission of the European Communities adds that, in its view, national provisions may not determine to what extent physicians are obliged to be present in their respective practices, save as in exceptional circumstances. To insist that physicians should work exclusively in one practice would have entirely the same result as the single practice rule. The Commission refers to *Commission* v *Luxembourg*.[81]

143. The Commission of the European Communities proposes the following answer to the questions:

> *"Article 31 of the EEA Agreement on the right of establishment precludes a national law which provides that doctors may only operate in a single practice. Such a measure is justifiable neither as a means of keeping health costs under control nor of maintaining the financial equilibrium of the social security system of an EFTA State except where it could be demonstrated that this was required by overriding reasons in the general interest. Nor is a national law compatible with Article 31 EEA to the extent that it obliges a doctor to have a certain presence in a particular practice except where it could be shown that this was required – and then only to the extent necessary – to ensure the well-being of patients. The legitimacy, or otherwise, of any such exceptional provision would be for the national courts to determine."*

Per Tresselt
Judge-Rapporteur

[81] See footnote 5.

Sozialversicherungssystem besteht - wie zum Beispiel im vorliegenden Fall - weil der Beschwerdeführer direkt von den Unternehmen bezahlt wird, für die er arbeitet, so dass sich auch keine zusätzliche Belastung für das Sozialversicherungssystem ergibt.

142. Ausser unter ganz besonderen Umständen dürfen nationale Bestimmungen nicht festlegen, in welchem Umfang Ärzte in ihrer jeweiligen Praxis tätig sind. Vorzuschreiben, dass Ärzte ausschliesslich in einer Praxis arbeiten dürfen, würde zum gleichen Ergebnis führen wie eine *single practice rule*. Die Kommission verweist dazu auf das Urteil *Kommission./.Luxemburg*[81].

143. Die Kommission der Europäischen Gemeinschaften schlägt folgende Antwort auf die Fragen vor:

> *„Artikel 31 des EWR-Abkommens über das Niederlassungsrecht steht einer nationalen Vorschrift, die Ärzten das Führen nur einer Praxis erlaubt, entgegen. Eine solche Massnahme kann weder als Massnahme zur Kontrolle der Gesundheitskosten, noch zur Aufrechterhaltung des finanziellen Gleichgewichts des Systems der Sozialen Sicherheit eines EFTA-Staates gerechtfertigt werden, es sei denn, dass allgemeine Gründe des öffentlichen Interesses nachgewiesen werden. Auch das Erfordernis, den Ärzten eine bestimmte Anwesenheitsdauer in einer bestimmten Praxis vorzuschreiben, widerspricht Artikel 31 EWR-Abkommen. Ein solches Erfordernis ist nur zulässig, wenn nachgeweisen werden kann, dass es notwendig ist, um das Wohlergehen der Patienten sicherzustellen. Die Rechtmässigkeit jeder dieser Ausnahmebestimmungen müsste das nationale Gericht beurteilen.“*

Per Tresselt
Berichterstatter

81 Vgl. FN 5.

Case E-7/00

Halla Helgadóttir
v
Daníel Hjaltason and Iceland Insurance Company Ltd.

(Motor Vehicle Insurance Directives – Standardised compensation system – Compensation for victims)

Summary of the Judgment

1. The Motor Vehicle Insurance Directives have established the principle of compulsory third-party insurance in return for a single premium throughout the European Economic Area. In view of the aim of ensuring protection, which is stated repeatedly in the Motor Vehicle Insurance Directives, Article 3(1) of the First Motor Vehicle Insurance Directive, as developed and amended by the Second and Third Motor Vehicle Insurance Directives, must be interpreted as meaning that compulsory motor vehicle insurance must enable third-party victims of accidents caused by motor vehicles to be compensated for all actual loss incurred, up to the amounts fixed in Article 1(2) of the Second Motor Vehicle Insurance Directive.

The basic aim of the three Directives is to harmonise insurance coverage. The rules of the EEA Contracting Parties on liability for road accidents are, however, given the present state of Community and EEA law, not subject to harmonisation and the Motor Vehicle Insurance Directives do not aim at such harmonisation within the European Economic Area.

Although the basic aim of the three Directives is to harmonise the insurance coverage in case of motor vehicle accidents, the Directives, taken as a whole, may have some effect on the liability regimes of the Contracting Parties. From this it follows that it cannot be excluded that certain liability

Mál E-7/00

Halla Helgadóttir

gegn

Daníel Hjaltasyni og Vátryggingafélagi Íslands hf.

(Tilskipanir um ökutækjatryggingar –staðlaðar bótareglur – bætur til tjónþola)

Samantekt

1. Í tilskipununum um ökutækjatryggingar felst reglan um skyldubundna ábyrðartryggingu bifreiða gegn föstu iðgjaldi á öllu Evrópska efnahagssvæðinu. Í ljósi þess markmiðs að tryggja vernd, sem endurtekið kemur fram í tilskipununum um ökutækjatryggingar, verður að skýra 1. mgr. 3. gr. fyrstu tilskipunarinnar eins og hún hefur verið þróuð og henni breytt með annarri og þriðju tilskipuninni, þannig að skyldubundin ábyrgðartrygging verði að gera þriðja aðila, sem verður fyrir tjóni af völdum vélknúins ökutækis, kleift að heimta bætur fyrir allt raunverulegt tjón sem hann hefur orðið fyrir, allt að þeim fjárhæðum sem nefndar eru í 2. mgr. 1. gr. annarrar tilskipunarinnar.

Meginmarkmið tilskipananna þriggja er að samræma tryggingavernd. Reglur samningsaðila EES-samningsins um skaðabótaábyrgð vegna umferðarslysa eru á hinn bóginn, eins og rétturinn í Evrópusambandinu og á Evrópska efnahagssvæðinu er nú, ekki samræmdar og tilskipanirnar um ökutækjatryggingar miða ekki að slíkri samræmingu á Evrópska efnahagssvæðinu.

Þótt meginmarkmið tilskipananna þriggja sé að samræma reglur um tryggingavernd vegna slysa af völdum vélknúinna ökutækja, geta tilskipanirnar, þegar þær eru lesnar í heild, haft viss áhrif á reglur aðildarríkjanna um skaðabótaábyrgð. Af þessu leiðir að ekki er unnt að útiloka

rules could be seen as conflicting with the aims of the Directives to harmonise the rules relating to insurance coverage, and to guarantee comparable treatment of victims of road accidents in the EEA States. This has been held to be the case when national provisions on liability exclude certain situations from insurance coverage altogether. The same might be true if national liability rules were to operate to exclude victims from protection in a manner that would depart significantly from what may be considered as the general standards of the law of civil liability within the EEA in similar situations.

However, in light of the basic aim of the Directives, and having regard to the nexus between considerations of comparable treatment and the rules and practices concerning insurance coverage, the possible effect of the Directives upon the liability regimes will be exceptional and limited, and the Contracting Parties have a wide margin of appreciation.

It is compatible with EEA law, in particular the Motor Vehicle Insurance Directives, to determine compensation payable to victims under the third-party liability insurance of a motor vehicle in accordance with national tort liability statutes providing for standardised compensation based on a tier of non-pecuniary loss (medical disability tier), regardless of a tier of permanent disability (occupational disability tier), in cases of victims who, on the date of an accident, make use of their earning capacity in a manner providing them with little or no earnings from employment.

2. The Motor Vehicle Insurance Directives do not contain any specific requirement for a minimum compensation for a victim in such a situation.

3. It is for the Contracting Parties to determine whether, and to what extent, the compensation covered by compulsory third-party insurance under the Directives should be adjusted by reference to any entitlement of a victim to compensation from other sources.

að litið verði svo á að einstaka bótareglur geti verið ósamrýmanlegar því markmiði tilskipananna, að samræma reglur um tryggingavernd, og tryggja að þeir sem bíða tjón í slysum sem vélknúin ökutæki valda á Evrópska efnahagssvæðinu sitji við sama borð. Þetta hefur verið talið eiga við þegar bótareglur landsréttar útiloka með öllu tryggingarvernd við tilteknar aðstæður. Hið sama getur átt við ef bótareglur landsréttar leiða til þess að vernd tjónaþola víkur í verulegum atriðum frá því sem telja má að séu almennt viðurkenndar bótareglur á hinu Evrópska efnahagssvæði við sambærilegar aðstæður.

Í ljósi meginmarkmiða tilskipananna, og að teknu tilliti til samspils sjónarmiða um sambærilega meðferð og reglna og venja um tryggingavernd heyra áhrif tilskipananna á reglur um skaðabótaábyrgð til undantekninga og verða takmörkuð. Hafa samningsríkin rúmar heimildir til mats í þessu efni.

Það samrýmist ákvæðum samningsins um Evrópska efnahagssvæðið, einkum tilskipununum um ökutækjatryggingar, að bætur til tjónþola úr ábyrgðartryggingu vélknúins ökutækis séu ákvarðaðar samkvæmt ákvæðum í skaðabótalögum landsréttar, sem mæla fyrir um staðlaðar bætur á grundvelli miskastigs (læknisfræðilega metins örorkustigs), en óháð varanlegu örorkustigi (fjárhagslega metnu örorkustigi), þegar um er að ræða tjónþola, sem á slysdegi nýta vinnugetu sína að verulegu leyti þannig, að þeir hafa litlar eða engar vinnutekjur.

2. Fyrrnefndar tilskipanir um ökutækjatryggingar hafa ekki að geyma fyrirmæli um lágmarksbætur til tjónþola við þær aðstæður sem lýst er í fyrstu spurningunni.

3. Það er á valdi samningsríkjanna að ákvarða hvort og að hvaða marki bætur sem greiðast af öðrum skuli hafa áhrif á skaðabætur sem greiða á vegna ábyrgðartryggingar á grundvelli tilskipananna.

JUDGMENT OF THE COURT

14 June 2001*

(Motor Vehicle Insurance Directives – Standardised compensation system – Compensation for victims)

In Case E-7/00

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 Héraðsdómur Reykjavíkur (Reykjavík District Court) for an Advisory Opinion in the case pending before it between

Halla Helgadóttir

and

Daníel Hjaltason and Iceland Insurance Company Ltd.

on the interpretation of the EEA Agreement, with particular reference to the following Acts referred to in Annex IX:

– the Act referred to in point 8 of Annex IX (Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, hereinafter the "First Motor Vehicle Insurance Directive");

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

DÓMUR EFTA-DÓMSTÓLSINS

14. júní 2001*

(Tilskipanir um ökutækjatryggingar –staðlaðar bótareglur – bætur til tjónþola)

Mál E-7/00

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

Halla Helgadóttir

gegn

Daníel Hjaltasyni og Vátryggingafélagi Íslands hf.

varðandi túlkun á samningnum um Evrópska efnahagssvæðið (hér eftir EES-samningurinn), sérstaklega eftirtöldum gerðum, sem vísað er til í viðauka IX við EES-samninginn:

– gerð sem vísað er til í 8. tl. í viðauka IX. (Tilskipun ráðsins 72/166/EBE frá 24. apríl 1972 um samræmingu á lögum aðildarríkja um ábyrgðartryggingu vegna notkunar vélknúinna ökutækja, og til að kveða á um skyldu til að viðhalda vátryggingu gagnvart slíkri ábyrgð, hér eftir ”fyrsta tilskipunin um ökutækjatryggingar”);

* Beiðni um ráðgefandi álit er á íslensku.

– the Act referred to in point 9 of Annex IX (Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, hereinafter the "Second Motor Vehicle Insurance Directive");

– the Act referred to in point 10 of Annex IX (Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, hereinafter the "Third Motor Vehicle Insurance Directive");

(hereinafter collectively the "Directives" or the "Motor Vehicle Insurance Directives").

THE COURT,

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

Registrar: Gunnar Selvik

after considering the written observations submitted on behalf of:

– Halla Helgadóttir, represented by Jón Steinar Gunnlaugsson, hæstaréttarlögmaður (Supreme Court Advocate), Reykjavík;

– Daníel Hjaltason and Iceland Insurance Company Ltd., represented by Óttar Pálsson, héraðsdómslögmaður (District Court Advocate), Reykjavík;

– the Government of Iceland, represented by Högni S. Kristjánsson, Legal Officer in the Ministry for Foreign Affairs of Iceland, External Trade Department, acting as Agent, assisted by Björn Friðfinnsson, Permanent Secretary, Ministry of Justice and Ecclesiastical Affairs;

– the Government of Norway, represented by Morten Goller, Advocate, and Thomas Nordby, Assistant Advocate, Office of the Attorney General (Civil Affairs);

– the EFTA Surveillance Authority, represented by Jan Magne Langseth, Officer, Legal and Executive Affairs, acting as Agent;

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

– gerð sem vísað er til í 9. tl. í viðauka IX (Önnur tilskipun ráðsins 84/5/EBE frá 30. desember 1983 um samræmingu á lögum aðildarríkjanna um ábyrgðartryggingu vegna notkunar á vélknúnum ökutækjum, hér eftir ”önnur tilskipunin um ökutækjatryggingar”);

– gerð sem vísað er til í 10. tl. í viðauka IX (Þriðja tilskipun ráðsins 90/232/EBE frá 14. maí 1990 um samræmingu á lögum aðildarríkjanna um ábyrgðartryggingu vegna notkunar á vélknúnum ökutækjum, hér eftir ”þriðja tilskipunin um ökutækjatryggingar”);

(hér er vísað til allra tilskipananna sem ”tilskipana um ökutækjatryggingar”).

DÓMSTÓLLINN,

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

dómritari: Gunnar Selvik,

hefur með tilliti til skriflegra greinargerða frá:

– Höllu Helgadóttur. Í fyrirsvari er Jón Steinar Gunnlaugsson, hæstaréttarlögmaður, Reykjavík;

– Daníel Hjaltasyni og Vátryggingafélagi Íslands hf. Í fyrirsvari er Óttar Pálsson, héraðsdómslögmaður, Reykjavík;

– Ríkisstjórn Íslands. Í fyrirsvari sem umboðsmaður er Högni S. Kristjánsson, lögfræðingur á viðskiptaskrifstofu utanríkisráðuneytisins. Honum til aðstoðar er Björn Friðfinnsson, ráðuneytisstjóri í dóms- og kirkjumálaráðuneytinu;

– Ríkisstjórn Noregs. Í fyrirsvari sem umboðsmenn eru Morten Goller, lögmaður, og Thomas Nordby, aðstoðarlögmaður, skrifstofu ríkislögmanns;

– Eftirlitsstofnun EFTA. Í fyrirsvari sem umboðsmaður er Jan Magne Langseth, fulltrúi á lögfræði- og framkvæmdasviði;

– Framkvæmdastjórn Evrópubandalaganna. Í fyrirsvari sem umboðsmenn eru Christina Tufvesson og John Forman, lögfræðilegir ráðgjafar hjá lagadeild.

having regard to the Report for the Hearing,

after hearing the oral observations of Halla Helgadóttir, represented by Reimar Pétursson, Daníel Hjaltason and Iceland Insurance Company Ltd., the Government of Iceland, the Government of Norway, the EFTA Surveillance Authority, represented by Bjarnveig Eiríksdóttir, acting as Agent, and the Commission of the European Communities at the hearing on 22 February 2001,

gives the following

Judgment

Facts and procedure

1. By a reference dated 6 July 2000, registered at the Court on 10 July 2000, Héraðsdómur Reykjavíkur made a Request for an Advisory Opinion in a case brought before it by Halla Helgadóttir against Daníel Hjaltason and the Iceland Insurance Company Ltd. On 1 July 1994, Halla Helgadóttir, then 17 years of age, was hit by Daníel Hjaltason's car while she was riding her bicycle. She suffered head injuries. Her permanent non-pecuniary loss has been assessed at 7%, and her permanent disability also at 7%. The parties are in agreement that Daníel Hjaltason and Iceland Insurance Company Ltd. are jointly liable to Halla Helgadóttir for compensation on account of this accident.

2. Having completed primary school, Halla Helgadóttir studied in junior secondary school, from which she graduated four years later. She was engaged in a summer job at the time of the accident. Iceland Insurance Company Ltd. paid ISK 141 238 by way of compensation for her temporary loss of income from employment. In the year preceding the accident, her earnings from employment amounted to ISK 369 915, and in the year of the accident ISK 196 274. At the time of the present proceedings, Halla Helgadóttir is 23 years of age and a psychology student at university.

3. The dispute in this case relates to the question of whether the compensation to be paid to her on account of her permanent disability is to be paid under sections 5 to 7 of the Icelandic Tort Damages Act No. 50/1993 (hereinafter the "Tort Damages Act") or under section 8 of that Act. Halla Helgadóttir's claim on account of her permanent disability amounts to ISK 1 467 234 plus interest, but Iceland Insurance Company Ltd. has only paid her compensation in the amount of ISK 375 854 plus interest.

4. The Tort Damages Act was enacted in Iceland on 1 July 1993. Sections 5 to 7 of that Act contain provisions on disability compensation payable to a victim who has previously earned income. The compensation is to equal the victim's annual

með tilliti til skýrslu framsögumanns og munnlegs málflutnings Reimars Péturssonar fyrir Höllu Helgadóttur, Óttars Pálssonar fyrir Vátryggingafélag Íslands hf., ríkisstjórnar Íslands, ríkisstjórnar Noregs, Bjarnveigar Eiríksdóttur fyrir Eftirlitsstofnun EFTA og framkvæmdastjórnar Evrópubandalaganna þann 22. febrúar 2001,

kveðið upp svohljóðandi

dóm

Málsatvik og meðferð máls

1 Með beiðni dagsettri 6. júlí 2000, sem skráð var í málaskrá dómstólsins 10. júlí 2000, óskaði Héraðsdómur Reykjavíkur eftir ráðgefandi áliti í máli sem rekið er fyrir dómstólnum milli Höllu Helgadóttur annars vegar og Daníels Hjaltasonar og Vátryggingafélags Íslands hf. hins vegar. Hinn 1. júlí 1994 varð Halla Helgadóttir, sem þá var 17 ára gömul, fyrir bifreið Daníels Hjaltasonar, er hún ók reiðhjóli sínu. Við þetta slasaðist hún á höfði. Hefur varanlegur miski hennar verið metinn 7% og varanleg örorka sömuleiðis 7%. Ágreiningslaust er með aðilum að Daníel Hjaltason og Vátryggingafélag Íslands hf. beri sameiginlega skaðabótaábyrgð gagnvart stefnanda vegna slyssins.

2 Að loknu grunnskólaprófi stundaði Halla Helgadóttir nám í menntaskóla og útskrifaðist þaðan fjórum árum síðar. Hún var í sumarstarfi þegar slysið varð. Hefur Vátryggingafélag Íslands hf. þegar bætt henni tímabundið atvinnutjón með greiðslu á kr. 141.238. Síðasta árið fyrir slysið námu atvinnutekjur hennar kr. 369.915 og á árinu sem slysið varð námu þær 196.274. Halla Helgadóttir er nú 23 ára gömul og stundar háskólanám í sálarfræði.

3 Ágreiningurinn í málinu snýst um það hvort bætur til Höllu Helgadóttur vegna varanlegrar örorku hennar eigi að greiðast eftir 5. – 7. gr. skaðabótalaga nr. 50/1993 eða eftir 8. gr. sömu laga (hér eftir skaðabótalögin). Krafa Höllu vegna varanlegrar örorku er kr. 1.467.234, auk vaxta, en Vátryggingafélag Íslands hf. hefur aðeins greitt henni bætur að fjárhæð kr. 375.854, auk vaxta.

4 Skaðabótalögin tóku gildi á Íslandi 1. júlí 1993. Í 5. – 7. gr. laganna er kveðið á um örorkubætur til tjónþola sem aflað hafði tekna fyrir slys. Bótafjárhæð er miðuð við 7,5 föld árslaun tjónþola, árið fyrir slysdag, og sú upphæð margfölduð

income from employment in the year preceding the accident, multiplied by 7.5, and the resulting amount is to be multiplied by the victim's permanent disability percentage. However, at the time of the accident, Section 8 contained provisions on compensation to be paid to a victim who earned little or no income from employment. This concerned mainly children, students and persons working on an unpaid basis in the home. Compensation to persons coming under section 8 was not based on an assessment of occupational disability, as was the case with persons with previous earnings, but instead derived from an assessment of medical disability. The assessed financial loss was compensated for by reference to a tier system provided for in section 4 of the Act. According to the Act, no compensation for financial loss was to be paid to persons coming under section 8 if their non-pecuniary loss was assessed at under 15% but, following an amendment in 1996 (Act No. 42/1996), this minimum was reduced to 10%. The Supreme Court of Iceland held, in a judgment rendered 4 June 1998 (Case No. 317/1997), that this division of victims into two categories was based on objective criteria, but that it was incompatible with principles of equality and the provisions of the Icelandic Constitution giving protection to property to deny compensation to persons whose non-pecuniary loss was assessed at under a particular minimum compensation that corresponded to their probable loss. Section 8 of the Tort Damages Act was again amended by Act No. 37/1999 to provide that compensation to persons coming under section 8 was to be determined on the basis of the disability percentage as provided for in section 5, and that the amount thereof was to be determined as provided for in sections 5 to 7 of the Act.

5. Héraðsdómur Reykjavíkur decided to submit a Request for an Advisory Opinion to the EFTA Court on the following questions:

> *1 Is it compatible with the provisions of the Agreement on the European Economic Area, in particular European Economic Community Council Directives on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, Nos. 72/166/EEC of 24 April 1972, 84/5/EEC of 30 December 1983, and 90/232/EEC of 14 May 1990, as amended, to determine the compensation payable to victims under the third-party liability insurance of a motor vehicle in accordance with national tort statutes providing for standardised compensation based on a tier of non-pecuniary loss (medical disability tier), regardless of a tier of permanent disability (occupational disability tier), in cases of victims who, on the date of an accident, make use of their earning capacity in a manner providing them with little or no earnings from employment?*
>
> *2 If the first question is answered in the affirmative, do the Directives provide for minimum compensation for a victim in that situation?*
>
> *3 If the second question is answered in the affirmative, by what reference is the minimum compensation payable to a victim in that*

með varanlegu örorkustigi. Í 8. gr. laganna var hins vegar, þegar slysið varð, mælt fyrir um bætur til tjónþola sem höfðu haft óverulegar eða engar vinnutekjur. Þessar reglur vörðuðu fyrst og fremst börn, unga námsmenn og heimavinnandi húsmæður. Voru bætur til þeirra, sem féllu undir 8. gr., ekki byggðar á mati á fjárhagslegri örorku, eins og til tjónþola með tekjureynslu, heldur leiddar af mati á læknisfræðilegri örorku. Var áætlað tjón bætt á grundvelli miskastigs samkvæmt 4. gr. laganna. Samkvæmt lögunum greiddust engar bætur vegna fjárhagslegs tjóns til þeirra sem féllu undir 8. gr. ef miski var metinn lægri 15%, en eftir lagabreytingu árið 1996 (lög nr. 42/1996) var lágmarkið fært í 10%. Hæstiréttur Íslands komst að þeirri niðurstöðu í máli, sem dæmt var 4. júní 1998 (mál nr. 317/1997) að þessi aðgreining tjónþola í tvo hópa væri byggð á málefnalegum sjónarmiðum, en hins vegar væri það andstætt jafnræðisreglu og eignaréttarákvæði stjórnarskrárinnar, að þeir sem fái metinn miska undir tilteknu lágmarki, fái ekki bætur í samræmi við líklegt fjártjón. Ákvæði 8. gr. skaðabótalaganna var aftur breytt á árinu 1999 (lög nr. 37/1999) á þann veg, að bætur til þeirra, sem undir greinina falla, skuli ákvarða á grundvelli örorkustigs eins og segir í 5. gr. og skuli bætur þeirra ákveðnar eftir reglum 5. – 7. gr. laganna.

5 Héraðsdómur Reykjavíkur ákvað að senda EFTA-dómstólnum beiðni um ráðgefandi álit varðandi eftirfarandi spurningar:

> *1 Samrýmist það ákvæðum samningsins um evrópska efnahagssvæðið, einkum tilskipunum ráðs EB um samræmingu á lögum aðildarríkja um ábyrgðartryggingu vegna notkunar vélknúinna ökutækja nr. 72/166/EBE 24. apríl 1972, nr. 84/5/EBE 30. desember 1983 og nr. 90/232/EBE 14. maí 1990, ásamt síðari breytingum, að bætur til tjónþola úr ábyrgðartryggingu vélknúins ökutækis séu ákvarðaðar samkvæmt ákvæðum í skaðabótalögum landsréttar, sem mæla fyrir um staðlaðar bætur á grundvelli miskastigs (læknisfræðilega metið örorkustig), en óháð varanlegu örorkustigi (fjárhagslega metið örorkustig), þegar um er að ræða tjónþola, sem á slysdegi nýta vinnugetu sína að verulegu leyti þannig, að þeir hafa engar eða takmarkaðar vinnutekjur?*
>
> *2 Sé svar við fyrstu spurningu jákvætt, er spurt, hvort tilskipanirnar mæli fyrir um lágmarksbætur til tjónþola, sem þannig er ástatt um.*
>
> *3 Sé svar við annarri spurningunni jákvætt, er spurt, hvaða mælikvarða skuli leggja til grundvallar við mat á lágmarksbótum til*

situation to be determined and, in particular, what significance is to be given in this context to actuarial calculations, based on different premises as regards discounting and income?

4 Does it matter in this context whether a victim is entitled to compensation from other sources?

6. 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.

Legal background

EEA law

7. The questions referred by Héraðsdómur Reykjavíkur concern the interpretation of various articles of the First, Second and Third Motor Vehicle Insurance Directives.

8. Article 3(1) and 3(2) of the First Motor Vehicle Insurance Directive read as follows:

> "1. Each Member State shall, subject to Article 4, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures.
>
> 2. Each Member State shall take all appropriate measures to ensure that the contract of insurance also covers:
> – according to the law in force in other Member States, any loss or injury which is caused in the territory of those States (...)."

9. Article 1(1) and 1(2) of the Second Motor Vehicle Insurance Directive read as follows:

> "1. The insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover compulsorily both damage to property and personal injuries.
>
> 2. Without prejudice to any higher guarantees which Member States may lay down, each Member State shall require that the amounts for which such insurance is compulsory are at least:

tjónþola, sem þannig hagar til um, og þá sérstaklega, hvaða þýðingu útreikningur tryggingafræðings á fjártjóni, með mismunandi afvöxtunar- og tekjuforsendum, hafi í því samhengi.

4 Skiptir máli í þessu sambandi, hvort tjónþoli eigi rétt til bóta annars staðar frá?

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

Löggjöf

EES – réttur

7 Spurningarnar sem Héraðsdómstóll Reykjavíkur óskar svara við lúta að skýringu á ýmsum ákvæðum fyrstu, annarrar og þriðju tilskipunarinnar um ökutækjatryggingar.

8 Ákvæði 1. og 2. mgr. 3. gr. fyrstu tilskipunarinnar um ökutækjatryggingar eru svohljóðandi:

> "1. Sérhvert aðildarríki skal gera allar nauðsynlegar ráðstafanir, samanber þó 4. gr., til þess að sá, sem ábyrgð ber á ökutæki og notkun þess og að öllu jöfnu er staðsett á yfirráðasvæði þess ríkis, hafi gilda vátryggingu. Á grundvelli þessara ráðstafana ákvarðast hvaða tjón það eru sem vátryggingin tekur til sem og skilmálar hennar og skilyrði.
>
> 2. Aðildarríki skulu gera viðeigandi ráðstafanir til að vátryggingarsamningurinn taki einnig til:
>
> – tjóns sem verður í öðrum aðildarríkjum og gildi lög þess ríkis (...)."

9 Ákvæði 1. og 2. mgr. 1. gr. annarrar tilskipunarinnar um ökutækjatryggingar eru svohljóðandi:

> "1. Skylt er að vátrygging samkvæmt 1. mgr. 3. gr. tilskipunar nr. 72/166/EBE nái bæði til líkamstjóns og munatjóns.
>
> 2. Aðildarríki skulu sjá til þess að vátryggingafjárhæðir samkvæmt 1. mgr., sem skylt er að vátryggja fyrir, nemi að lágmarki eftirtöldum fjárhæðum svo framarlega sem aðildarríki kveða ekki á um hærri fjárhæðir sem þá halda gildi sínu:

– *in the case of personal injury, 350 000 ECU where there is only one victim (…).”*

National law

10. The national law at issue is the Icelandic Tort Damages Act, in particular sections 5 to 7, and section 8.

11. According to section 5(2) of the Tort Damages Act, loss resulting from disability is to be assessed in the light of the victim’s prospects for earning income from any work in which he or she may reasonably be expected to be engaged. On the date of the accident in question here, disability compensation under the Tort Damages Act was to be calculated as 7.5 times the victim’s annual wages, multiplied by the disability percentage, see section 6 of the Act. According to section 7, the victim’s annual wages were to be deemed to correspond to his or her total earnings from employment in the year preceding the year of the accident. However, annual wages were to be assessed separately in extraordinary circumstances, for example, if changes had occurred in income or conditions of employment (section 7(2)).

12. On the date of the accident, section 8(1) of the Tort Damages Act read as follows:

> “Compensation to children and to victims who, to a large extent, make use of their earning capacity in a manner providing them with little or no income from employment shall be determined by reference to their tier of non-pecuniary loss as provided for in section 4. Compensation shall be determined as a percentage of the compensation for permanent non-pecuniary loss in accordance with the first four sentences of section 4(1).”

Arguments of the parties

13. Halla Helgadóttir argues that the Motor Vehicle Insurance Directives aim to secure individual victims of motor vehicle accidents satisfactory compensation for the personal injury caused to them by such accidents. If Halla Helgadóttir were awarded damages under the rigid and standardised section 8 of the Tort Damages Act, she would not be compensated for all the damage to her person and/or the actual loss caused by the accident. Therefore, section 8 is, in the view of Halla Helgadóttir, incompatible with the Directives.

14. According to Halla Helgadóttir, the aim of the Directives and their wording support the conclusion that they contain minimum requirements of how the amount of compensation is to be determined and how the amount is to relate to the actual damage.

– 350 000 evrópskar mynteiningar (ECU) þegar um er að ræða einn slasaðan einstakling (…).”

Landsréttur

10 Vísað er til íslensku skaðabótalaganna, einkum 5. – 7. gr. og 8. gr.

11 Samkvæmt 2. mgr. 5. gr. skal, þegar tjón vegna örorku er metið, líta til þeirra kosta sem tjónþoli á til að afla sér tekna með vinnu sem sanngjarnt er að ætlast til að hann starfi við. Þegar slys það sem hér um ræðir átti sér stað, bar að reikna tjón vegna örorku þannig að margfalda skyldi árstekjur tjónþola með 7,5 og margfalda síðan þá upphæð með örorkustiginu, sbr. 6. gr. Samkvæmt 7. gr. skyldu árslaun tjónþola teljast jafngilda heildarvinnutekjum hans á næstliðnu ári fyrir það ár, er tjón varð. Árslaun skyldu þó metin sérstaklega við óvenjulegar aðstæður, t.d. breytingar á tekjum eða atvinnuhögum, sbr. 2. mgr. 7. gr.

12 Á slysdegi var 1. mgr. 8. gr. skaðabótalaga svohljóðandi:

”Bætur til barna og tjónþola, sem að verulegu leyti nýta vinnugetu sína þannig að þeir hafa engar eða takmarkaðar vinnutekjur, skal ákvarða á grundvelli miskastigs skv. 4. gr. Bætur skulu ákveðnar sem hundraðshluti af bótum fyrir varnanlegan miska eftir reglum 1. – 4. málsl. 1. mgr. 4. gr.”

Röksemdir aðila

13 Halla Helgadóttir heldur því fram að tilskipanirnar hafi það að markmiði að tryggja fórnarlömbum bifreiðaslysa viðunandi bætur vegna líkamstjóns sem þau verða fyrir af völdum slíkra slysa. Ef Höllu Helgadóttur yrðu ákvarðaðar bætur á grundvelli hinna ströngu og stöðluðu reglna í 8. gr. skaðabótalaganna, yrðu þær ekki nægar til að bæta fyrir allt líkamstjón og/eða það raunverulega tjón sem hún hefur orðið fyrir vegna slyssins. Af þessum sökum telur Halla Helgadóttir að 8. gr. skaðabótalaganna sé ósamrýmanleg tilskipununum.

14 Halla Helgadóttir telur að markmið tilskipananna og orðalag þeirra styðji þá niðurstöðu að í þeim felist lágmarkskröfur um það hvernig fjárhæð skaðabóta skuli ákvörðuð og hvernig skuli háttað samhengi milli þeirra og hins raunverulega tjóns.

15. Daníel Hjaltason and Iceland Insurance Company Ltd. refer to the aim and the wording of the Motor Vehicle Insurance Directives. The aim of the Directives is, firstly, to ensure the free movement of vehicles normally based on Community territory and of persons travelling in those vehicles, and, secondly, to guarantee that victims of accidents caused by those vehicles receive comparable treatment regardless of where in the EEA the accident has occurred.

16. The Directives do not contain any provisions on minimum compensation for persons suffering losses due to motor vehicle accidents, or set any standards as to what can be regarded as reasonable compensation for same.

17. Furthermore, Daníel Hjaltason and Iceland Insurance Company Ltd. argue that the Directives were not intended to amend or approximate the tort laws of individual EEA States, or to affect national rules on the assessment of compensation. This view is said to be further confirmed by Case C-129/94 *Ruiz Bernáldez* [1996] ECR I-1829, and Case C-348/98 *Mendes Ferreira and Delgado Correia Ferreira* [2000] ECR I-6711, of the Court of Justice of the European Communities.

18. Daníel Hjaltason and Iceland Insurance Company Ltd. submit that, even if the Directives were to be interpreted so that domestic laws on tort which lay down rules unfavourable to victims on the calculation of compensation are regarded as jeopardising the aims of the Directives, there is nothing to support the view that this is the case in the matter at hand. Section 8 of the Tort Damages Act is only applicable when a reasonable assessment of loss cannot be determined with regard to prior earned income from employment.

19. The Government of Iceland argues that the case deals only with the question of whether section 8(1) of the Icelandic Tort Damages Act of 1993 is incompatible with the Directives. It contends that the primary objective ever since the enactment of the First Motor Vehicle Insurance Directive has been to facilitate the free movement of goods and persons. In the Second Motor Vehicle Insurance Directive, these main objectives were reiterated and a specific minimum amount to be covered by compulsory insurance was introduced. Lastly, in the Third Motor Vehicle Insurance Directive, further amendments were introduced to facilitate the crossing of internal Community frontiers and the establishment and functioning of the internal market.

20. The Government of Iceland submits that the Directives do not contain any provisions or obligations for how each EEA State is to assess disability or how that disability should be compensated for in monetary terms.

21. The Government of Norway supports the view of Daníel Hjaltason and Iceland Insurance Company Ltd., and refers as well to the main purpose of the Motor Vehicle Insurance Directives, that is, to remove barriers to the free movement of motor vehicles and persons within the European Economic Area resulting from disparities between national provisions on liability insurance for motor vehicles.

15 Daníel Hjaltason og Vátryggingafélag Íslands hf. vísa til markmiða og orðalags tilskipananna um ökutækjatryggingar. Þeir telja að markmið tilskipananna séu, í fyrsta lagi, að tryggja frjálsa för ökutækja, sem að öllu jöfnu eru staðsett á landsvæði Evrópusambandsins og fólks sem ferðast með þessum ökutækjum, og í öðru lagi, að tryggja þeim sem orðið hafa fyrir tjóni vegna slysa af völdum þeirra sambærilega réttarstöðu, óháð því hvar á Evrópska efnahagssvæðinu slys á sér stað.

16 Tilskipanirnar hafi ekki að geyma nein ákvæði um lágmarksbætur til þeirra sem verða fyrir tjóni vegna slysa af völdum ökutækja, eða fyrirmæli um mat á því hvað teljast hæfilegar bætur vegna þeirra.

17 Daníel Hjaltason og Vátryggingafélag Íslands hf. halda því jafnframt fram að það sé ekki markmið með tilskipununum að breyta eða samræma skaðabótalöggjöf EES-ríkjanna, eða þeim sé ætlað að hafa áhrif á reglur landsréttar um ákvörðun skaðabóta. Þetta sjónarmið sé staðfest í dómum dómstóls EB í máli C-129/94 *Ruiz Bernáldez* [1996] ECR I-1829, og mál nr. C-348/98 *Mendes Ferreira og Delgado Correira Ferreira* [2000] ECR I-6711.

18 Ennfremur halda Daníel Hjaltason og Vátryggingafélag Íslands hf. því fram að þótt tilskipanirnar yrðu skýrðar þannig, að ákvæði landsréttar, sem mæla fyrir um reglur um ákvörðun bóta sem væru óhagstæðar tjónþolum, væru taldar andstæðar markmiðum tilskipananna, sé ekkert sem styðji það sjónarmið, að um slíkt sé að ræða í þessu máli. Ákvæði 8. gr. skaðabótalaganna verði aðeins beitt þegar skynsamlegt mat á tjóni getur ekki byggst á fyrri vinnutekjum.

19 Ríkisstjórn Íslands telur að málið snúist aðeins um það hvort 1. mgr. 8. gr. íslensku skaðabótalaganna frá 1993 sé ósamrýmanleg tilskipununum. Hún telur að meginmarkmiðið, allt frá því að fyrsta tilskipunin um ökutækjatryggingar var sett, hafi verið að stuðla að frjálsu flæði vara og fólks. Í annarri tilskipuninni um ökutækjatryggingar hafa þessi meginmarkmið verið ítrekuð og regla sett um lágmarksbætur sem lögbundin ábyrgðartrygging á að tryggja. Að lokum voru með þriðju tilskipuninni gerðar breytingar sem auðvelda eiga för yfir landamæri aðildarríkjanna og stofnun og starfsemi innri markaðarins.

20 Ríkisstjórn Íslands er á þeirri skoðun að tilskipanirnar hafi ekki að geyma nein ákvæði eða fyrirmæli um það hvernig aðildarríki EES skuli ákvarða örorku og hvernig ákvarða skuli bætur vegna slíkrar örorku.

21 Ríkisstjórn Noregs tekur undir sjónarmið Daníels Hjaltasonar og Vátryggingafélags Íslands, og vísar jafnframt til þeirra meginmarkmiða tilskipananna að afnema hindranir á frjálsri för ökutækja og fólks á Evrópska efnahagssvæðinu, sem leiða af ólíkum reglum einstakra landa um ábyrgðartryggingar vélknúinna ökutækja. Þótt tilskipanirnar hafi ekki að geyma nein ákvæði sem beinlínis svara spurningunum sem leitað er svara við í máli

Although the Directives do not contain any provisions which directly answer the question in the case at hand, the Directives cannot be interpreted as prohibiting standardised compensation of the kind described in the first question.

22. The Government of Norway points out that the Directives do not contain any specific provisions relating to minimum compensation to be paid to individuals out of third-party liability insurance.

23. The EFTA Surveillance Authority argues that insurance cover for liability in the event of motor vehicle accidents must be secured for all groups of the population, including groups with no or little income. Even though the Motor Vehicle Insurance Directives do not regulate the principles for calculating economic loss sustained by the victim, the amounts in respect of which insurance is compulsory must in any event guarantee victims "adequate compensation", irrespective of the EEA State in which the accident occurs. This does not mean that a standardised system for compensation will necessarily be contrary to the Directives. It will only be contrary to the Directives if the effect is that adequate compensation and insurance coverage are rendered impossible within the framework of that system.

24. The EFTA Surveillance Authority argues that "adequate compensation" within the meaning of the Second Motor Vehicle Insurance Directive is a legal standard linked to the amounts for which insurance must be compulsory, but cannot, at the current level of harmonisation, be interpreted as a quantitative, EEA-wide "standard" for minimum compensation to be paid by the insurer in each individual case.

25. The Commission of the European Communities points out that the purpose of the Directives, *viz.*, to ensure the free movement of vehicles and passengers and to guarantee that victims of accidents caused by those vehicles receive comparable treatment in the whole of the European Economic Area, is crucial. Therefore, a standardised system of compensation might be contrary to the Directives if it is construed in a way that very large parts of the population are, in fact, excluded from ever obtaining compensation up to the level of minimum insurance coverage laid down in the Directives, even in cases of serious disabilities.

Findings of the Court

26. By the first question, the national court wishes to know whether a standardised compensation system such as the one provided for in Section 8(1) of the Icelandic Tort Damages Act, as it stood until it was amended by Act No. 37/1999, is contrary to the Motor Vehicle Insurance Directives. The Court understands that the standardised system referred to in Section 8(1) encompasses only the calculation of compensation for loss of future income for motor vehicle accident victims having little or no income.

þessu, telur ríkisstjórn Noregs að ekki sé unnt að skýra tilskipanirnar þannig að þær banni staðlaðar bætur af því tagi sem fyrsta spurningin lýtur að.

22 Ríkisstjórn Noregs bendir á að tilskipanirnar hafi ekki að geyma nein ákvæði sem varða lágmarksbætur sem skuli greiddar til einstaklinga á grundvelli ábyrgðartryggingar.

23 Eftirlitsstofnun EFTA heldur því fram að vátrygging vegna slysa af völdum vélknúinna ökutækja verði að vernda alla þjóðfélagshópa, einnig þá sem hafa litlar eða engar tekjur. Þótt tilskipanirnar um ökutækjatryggingar hafi ekki að geyma reglur um útreikning á fjárhagslegu tjóni verði bætur til tjónþola, vegna lögbundinna trygginga, í öllu falli að vera "hæfilegar", óháð því í hvaða EES-ríki slys hefur orðið. Í þessu felist ekki nauðsynlega að staðlaðar reglur um útreikning bóta séu ósamrýmanlegar tilskipununum. Það væru þær aðeins ef reglurnar hefðu þau áhrif að hæfilegar bætur og tryggingavernd væri útilokuð á grundvelli þeirra.

24 Það er skoðun Eftirlitsstofnunar EFTA að reglan "hæfilegar bætur" í skilningi annarrar tilskipunarinnar um ökutækjatryggingar sé vísiregla sem tengist fjárhæð skyldutryggingar, en reglan verði ekki, eins og samræming sé nú á vegi stödd, skýrð svo að hún geymi fyrirmæli um fjárhæðir, þ.e. staðal sem gildi á Evrópska efnahagssvæðinu um lágmarksbætur frá vátryggjanda í einstökum málum.

25 Framkvæmdastjórnin telur að þau markmið tilskipananna, að stuðla að frjálsri för ökutækja og farþega og að tryggja þeim, sem verða fyrir tjóni af völdum ökutækja á Evrópska efnahagssvæðinu, sambærilega stöðu, skipti höfuðmáli. Af því leiði, að staðlaðar reglur um bætur geti verið andstæðar tilskipununum ef þær eru þess eðlis að stór hluti þjóðfélagsþegna er í reynd útilokaður frá því að fá bætur upp að þeim mörkum sem tilgreind eru í tilskipununum, jafnvel þegar alvarlega fötlun leiðir af slysi.

Álit dómstólsins.

26 Í fyrstu spurningunni er spurt hvort staðlaðar bótareglur eins og þær sem mælt er fyrir um í 1. mgr. 8. gr. íslensku skaðabótalaganna, eins og hún var áður en henni var breytt með lögum nr. 37/1999, sé andstæð tilskipununum um ökutækjatryggingar. Dómurinn skilur það svo að reglurnar sem er að finna í 1. mgr. 8. gr. eigi aðeins við um útreikning bóta vegna tekjutaps í framtíðinni til þeirra tjónþola sem hafa haft litlar eða engar tekjur.

27 Dómstóllinn bendir á að meginröksemd Daníels Hjaltasonar og Vátryggingafélags Íslands hf., ríkisstjórnar Íslands og norsku ríkisstjórnarinnar sé

27. The Court notes that the main argument of Daníel Hjaltason and Iceland Insurance Company Ltd., the Government of Iceland and the Government of Norway is that the Motor Vehicle Insurance Directives do not deal with rules relating to personal liability, but only with insurance. Therefore, the national legislatures should be free to establish the liability rules they deem to be adequate. Furthermore, the EFTA Surveillance Authority and the Commission of the European Communities have observed that the harmonisation of the rules on insurance coverage may have certain repercussions on the liability regimes of the Contracting Parties, a point which was acknowledged by the Government of Norway at the oral hearing.

28. The overall purpose of the Motor Vehicle Insurance Directives is to facilitate the free movement of goods and persons and to safeguard the interests of persons who may be the victims of accidents caused by motor vehicles (see the first and second recitals of the preamble to the First Motor Vehicle Insurance Directive; Case C-129/94 *Ruiz Bernáldez*, cited above; and Case E-1/99 *Storebrand Skadeforsikring* v *Finanger* [1999] EFTA Court Report 119). In particular, the goal of the Directives is to ensure the free movement of motor vehicles and of persons travelling in those vehicles (third recital of the preamble to the First Motor Vehicle Insurance Directive). To that end, the Motor Vehicle Insurance Directives aim at ensuring that "the national law of each Member State should (…) provide for the compulsory insurance of vehicles against civil liability, the insurance to be valid throughout Community territory" (eighth recital of the preamble to the First Motor Vehicle Insurance Directive). The purpose of the Second Motor Vehicle Insurance Directive is to further reduce disparities between the laws of the EEA States in the field of motor vehicle insurance since, as is stated in the third recital of the Second Motor Vehicle Insurance Directive: "these disparities have a direct effect upon the establishment and the operation of the common market". Consequently, the Second Motor Vehicle Insurance Directive establishes, as already stated, *inter alia* minimum amounts for which insurance is compulsory (Article 1 of the Second Motor Vehicle Insurance Directive). The fifth recital of the preamble to the Second Motor Vehicle Insurance Directive emphasises that these amounts must "guarantee victims adequate compensation irrespective of the Member State in which the accident occurred". Lastly, the Third Motor Vehicle Insurance Directive aims at eliminating "any uncertainty concerning the application of the first indent of Article 3(2) of Directive 72/166/EEC" (sixth recital of the preamble to the Third Motor Vehicle Insurance Directive), under which Member States are to take all appropriate measures to ensure that the contract of insurance also covers any loss or injury caused in the territory of those States. Thus, "a high level of consumer protection should be taken as a basis" (thirteenth recital of the preamble to the Third Motor Vehicle Insurance Directive) and liability is to be covered "for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle" (Article 1 of the Third Motor Vehicle Insurance Directive).

29. The Court concludes from the foregoing that the Motor Vehicle Insurance Directives have established the principle of compulsory third-party insurance in

sú að tilskipanirnar um ökutækjatryggingar taki ekki til reglna um skaðabætur fyrir líkamstjón, heldur aðeins til vátrygginga. Af því leiði að löggjafinn í einstökum samningsríkjum hafi heimild til að setja þær reglur sem þeir telja eðlilegar og nægilegar. Ennfremur hafa Eftirlitsstofnun EFTA og Framkvæmdastjórn Evrópusambandsins bent á að samræming reglna um tryggingarvernd geti haft viss áhrif á reglur samningsríkjanna um skaðabótaábyrgð. Norska ríkisstjórnin hefur einnig fallist á þetta sjónarmið í munnlegum málflutningi.

28 Almennt markmið tilskipananna um ökutækjatryggingar er að stuðla að frjálsu flæði vara og fólks og tryggja hagsmuni þeirra sem verða fórnarlömb slysa af völdum vélknúinna ökutækja (sjá fyrstu og aðra málsgrein inngangsorða fyrstu tilskipunarinnar; mál C-129/94 *Ruiz Bernáldez*, sem vísað er til að framan; og mál E-1/99 *Storebrand Skadeforsikring v Finanger* [1999] EFTA Court Report 119. Einkum er tilgangur tilskipananna að stuðla að frjálsri för vélknúinna ökutækja og þeirra sem ferðast um í þeim (þriðja málsgrein inngangsorða fyrstu tilskipunarinnar). Í þessu skyni miða tilskipanirnar að því að tryggja, að "í löggjöf aðildarríkjanna" sé gert ráð "fyrir lögboðinni ábyrgðartryggingu ökutækja sem gildi alls staðar í bandalaginu" (áttunda málsgrein inngangsorða fyrstu tilskipunarinnar). Markmið annarrar tilskipunarinnar er að draga enn frekar úr mismun á löggjöf ríkja Evrópska efnahagssvæðisins um ökutækjatryggingar, þar sem, eins og segir í þriðju málsgrein inngangsorða annarrar tilskipunarinnar "ósamræmið hefur bein áhrif á stofnun og starfsemi hins sameiginlega markaðar." Í samræmi við það mælir önnur tilskipunin, eins og fyrr segir, m.a. fyrir um lágmarksfjárhæðir sem skylt er að tryggja fyrir (1. gr. annarrar tilskipunarinnar). Í fimmta lið inngangsorða annarrar tilskipunarinnar er lögð áhersla á að "lögboðnar vátryggingarfjárhæðir skulu í öllum tilvikum tryggja hæfilegar bætur óháð því í hvaða aðildarríki slys verður." Að síðustu miðar þriðja tilskipunin að því að eyða "allri óvissu um beitingu fyrsta undirliðar 2. mgr. 3. gr. tilskipunar 72/166/EBE (sjötta málsgrein inngangsorða þriðju tilskipunarinnar), en samkvæmt henni eiga aðildarríkin að gera allar viðeigandi ráðstafanir til að tryggja að vátryggingasamningar taki til alls tjóns á mönnum og munum sem verður á landsvæði þessara ríkja. Þannig ber "að ganga út frá öflugri neytendavernd" (þrettánda málsgrein inngangsorða þriðju tilskipunarinnar) og að vátryggingin skuli ná til "allra farþega, að ökumanni undanskildum, þegar líkamstjón hlýst af notkun ökutækis" (1. gr. þriðju tilskipunarinnar).

29 Af framansögðu dregur dómstóllinn þá ályktun að í tilskipununum um ökutækjatryggingar felist reglan um skyldubundna ábyrðartryggingu bifreiða gegn föstu iðgjaldi á öllu Evrópska efnahagssvæðinu. Í ljósi þess markmiðs að tryggja vernd, sem endurtekið kemur fram í tilskipununum um

return for a single premium throughout the European Economic Area. In view of the aim of ensuring protection, which is stated repeatedly in the Motor Vehicle Insurance Directives, Article 3(1) of the First Motor Vehicle Insurance Directive, as developed and amended by the Second and Third Motor Vehicle Insurance Directives, must be interpreted as meaning that compulsory motor vehicle insurance must enable third-party victims of accidents caused by motor vehicles to be compensated for all actual loss incurred, up to the amounts fixed in Article 1(2) of the Second Motor Vehicle Insurance Directive.

30. The basic aim of the three Directives is to harmonise insurance coverage (see Case E-1/99 *Storebrand Skadeforsikring* v *Finanger*, cited above). The rules of the EEA Contracting Parties on liability for road accidents are, however, at the present state of Community and EEA law, not subject to harmonisation and the Motor Vehicle Insurance Directives do not aim at such harmonisation within the European Economic Area (Case C-348/98 *Mendes Ferreira and Delgado Correia Ferreira*, cited above, at paragraph 23).

31. Although the basic aim of the three Directives is to harmonise the insurance coverage in case of motor vehicle accidents, the Directives, taken as a whole, may have some effect on the liability regimes of the Contracting Parties. From this it follows that it cannot be excluded that certain liability rules could be seen as conflicting with the aims of the Directives to harmonise the rules relating to insurance coverage, and to guarantee comparable treatment of victims of road accidents in the EEA States. This has been held to be the case when national provisions on liability exclude certain situations from insurance coverage altogether (see Case E-1/99 *Storebrand Skadeforsikring* v *Finanger*, cited above). The same might be true if national liability rules were to operate to exclude victims from protection in a manner that would depart significantly from what may be considered as the general standards of the law of civil liability within the EEA in similar situations. However, in the light of the basic aim of the Directives, and having regard to the nexus between considerations of comparable treatment and the rules and practices concerning insurance coverage, the possible effect of the Directives upon the liability regimes will be exceptional and limited, and the Contracting Parties have a wide margin of appreciation.

32. Section 8 of the Icelandic Tort Damages Act sets out a standardised system for calculating compensation for loss of future income from employment for victims with low income, or no income at all. The provision is not intended to exclude, nor does it have the effect of excluding, any group of victims from compensation from insurance cover. Nor does it preclude a victim from seeking reparations for any specific type of loss, or under any specific head of claim. The aim of that provision is to respond to the difficulties that arise in assessing the scope of loss of future income, and determining the compensation for that loss in the absence of adequate indicators regarding the earning possibilities in an uncertain future for victims for whom there is no previous record of income from employment, or where such income is lower than would result from full-time employment. It follows from the reasoning of the Court, as set out in the foregoing, that it falls

ökutækjatryggingar, verður að skýra 1. mgr. 3. gr. fyrstu tilskipunarinnar eins og hún hefur verið þróuð og henni breytt með annarri og þriðju tilskipuninni, þannig að skyldubundin ábyrgðartrygging verði að gera þriðja aðila, sem verður fyrir tjóni af völdum vélknúins ökutækis, kleift að heimta bætur fyrir allt raunverulegt tjón sem hann hefur orðið fyrir, allt að þeim fjárhæðum sem nefndar eru í 2. mgr. 1. gr. annarrar tilskipunarinnar.

30 Meginmarkmið tilskipananna þriggja er að samræma tryggingavernd (sjá mál E-1/99 *Storebrand Skadeforsikring v Finanger,* sem áður er vísað til). Reglur samningsaðila EES-samningsins um skaðabótaábyrgð vegna umferðarslysa eru á hinn bóginn, eins og rétturinn í Evrópusambandinu og á Evrópska efnahagssvæðinu er nú, ekki samræmdar og tilskipanirnar um ökutækjatryggingar miða ekki að slíkri samræmingu á Evrópska efnahagssvæðinu (Mál nr. C-348/98 *Mendes Ferreira og Delgado Correira Ferreira*, sem áður er vísað til, málsgrein 23).

31 Þótt meginmarkmið tilskipananna þriggja sé að samræma reglur um tryggingavernd vegna slysa af völdum vélknúinna ökutækja, geta tilskipanirnar, þegar þær eru lesnar í heild, haft viss áhrif á reglur aðildarríkjanna um skaðabótaábyrgð. Af þessu leiðir að ekki er unnt að útiloka að litið verði svo á að einstaka bótareglur geti verið ósamrýmanlegar því markmiði tilskipananna, að samræma reglur um tryggingavernd, og tryggja að þeir sem bíða tjón í slysum sem vélknúin ökutæki valda á Evrópska efnahagssvæðinu sitji við sama borð. Þetta hefur verið talið eiga við þegar bótareglur landsréttar útiloka með öllu tryggingarvernd við tilteknar aðstæður (sjá mál E-1/99 *Storebrand Skadeforsikring v Finanger,* sem áður er vísað til). Hið sama getur átt við ef bótareglur landsréttar leiða til þess að vernd tjónaþola víkur í verulegum atriðum frá því sem telja má að séu almennt viðurkenndar bótareglur á hinu Evrópska efnahagssvæði við sambærilegar aðstæður. Í ljósi meginmarkmiða tilskipananna, og að teknu tilliti til samspils sjónarmiða um sambærilega meðferð og reglna og venja um tryggingavernd heyra áhrif tilskipananna á reglur um skaðabótaábyrgð til undantekninga og verða takmörkuð. Hafa samningsríkin rúmar heimildir til mats í þessu efni.

32 Ákvæði 8. gr. íslensku skaðabótalaganna mælir fyrir um staðlaðar reglur um útreikning skaðabóta vegna taps á vinnutekjum í framtíðinni þegar um er að ræða tjónþola sem hafa haft lágar eða engar tekjur. Ákvæðið miðar ekki að því að útiloka tiltekna hópa tjónþola frá því að heimta bætur, né hefur það þau áhrif. Ekki útilokar það heldur tjónþola frá því að heimta bætur vegna sérstaks eðlis tjóns eða á grundvelli sérstakra flokka krafna. Ákvæðinu er ætlað að taka á þeim vanda sem er samfara því að áætla tekjumissi í framtíðinni, og ákvarða skaðabætur fyrir þann tekjumissi, án þess að fyrir sé að fara haldbærum mælikvarða á möguleika til öflunar tekna í óvissri framtíð vegna tjónaþola sem ekki hafa haft neinar vinnutekjur áður, eða þar sem slíkar tekjur hafa verið lægri en vænta má þegar um fullt starf er að ræða. Það leiðir af framansögðu að

within the competence of a Contracting Party to establish a standardised system for calculating such losses. Accordingly, the first question must be answered in the affirmative.

33. The answer to the first question must, therefore, be that it is compatible with EEA law, in particular the Motor Vehicle Insurance Directives, to determine compensation payable to victims under the third-party liability insurance of a motor vehicle in accordance with national tort liability statutes providing for standardised compensation based on a tier of non-pecuniary loss (medical disability tier), regardless of a tier of permanent disability (occupational disability tier), in cases of victims who, on the date of an accident, make use of their earning capacity in a manner providing them with little or no earnings from employment.

34. In considering the second and third questions, the Court refers to the discussion set out above relating to the first question. It follows that the answer to the second question must be in the negative.

35. The answer to the second question must, therefore, be that the aforementioned Motor Vehicle Insurance Directives do not contain any specific requirement for a minimum compensation for a victim in the situation referred to in the first question.

36. In the light of the answer to the second question, the third question need not be answered.

37. In answering the fourth question, the Court again refers to the discussion relating to the first question. The answer to the fourth question must, therefore, be that it is for the Contracting Parties to determine whether, and to what extent, the compensation covered by compulsory third-party insurance under the Directives should be adjusted by reference to any entitlement of a victim to compensation from other sources.

Costs

38. The costs incurred by 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

samningsríkjunum er heimilt að setja staðlaðar reglur um útreikning tjóns við þessar aðstæður. Af þessum sökum verður að svara fyrstu spurningunni játandi.

33 Svarið við fyrstu spurningunni verður því að það sé samrýmanlegt EES rétti, einkum tilskipununum um ökutækjatryggingar, að ákvarða bætur til tjónþola á grundvelli ábyrgðartryggingar vélknúinna ökutækja á grundvelli skaðabótareglu í landsrétti, sem gerir ráð fyrir stöðluðum bótum á grundvelli miskastigs (læknisfræðilegs örorkustigs), óháð varanlegu örorkustigi (fjárhagslega metnu örorkustigi), þegar um er að ræða tjónþola, sem á slysdegi nýta vinnugetu sýna að verulegu leyti þannig, að þeir hafa litlar eða engar vinnutekjur.

34 Að því er varðar aðra og þriðju spurninguna vísar dómstóllinn til þeirra forsendna sem fram koma í svari við fyrstu spurningunni. Af þeim leiðir að svara verður annarri spurningunni neitandi.

35 Svarið við annarri spurningunni verður því að fyrrnefndar tilskipanir um ökutækjatryggingar hafa ekki að geyma ákvæði sem mæla fyrir um lágmarksbætur til tjónþola við þær aðstæður sem lýst er í fyrstu spurningunni.

36 Í ljósi svarsins við annarri spurningunni, er ekki þörf á að svara þriðju spurningunni.

37 Að því er varðar fjórðu spurninguna vísar dómstóllinn aftur til forsendna sem fram koma í svari við fyrstu spurningunni. Af því leiðir að svarið við fjórðu spurningunni verður á þá leið að það sé á valdi samningsríkjanna að ákvarða hvort og að hvaða marki bætur frá öðrum skuli hafa áhrif á skaðabætur sem greiðast á grundvelli ábyrgðartryggingarinnar.

Málskostnaður

38 Ríkisstjórn Íslands, ríkisstjórn Noregs, Eftirlitsstofnun EFTA og Framkvæmdastjórn Evrópubandalaganna sem hafa skilað greinargerð til dómstólsins skulu bera sinn málskostnað. Að því er lýtur að aðilum aðalmálsins 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.

Með vísan til framangreindra forsendna lætur,

THE COURT,

in answer to the questions referred to it by Héraðsdómur Reykjavíkur by the reference of 6 July 2000, hereby gives the following Advisory Opinion:

1. **It is compatible with EEA law, in particular Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, to determine compensation payable to victims under the third-party liability insurance of a motor vehicle in accordance with national tort liability statutes providing for standardised compensation based on a tier of non-pecuniary loss (medical disability tier), regardless of a tier of permanent disability (occupational disability tier), in cases of victims who, on the date of an accident, make use of their earning capacity in a manner providing them with little or no earnings from employment.**

2. **The aforementioned Motor Vehicle Insurance Directives do not contain any specific requirement for a minimum compensation for a victim in the situation referred to in the first question.**

3. **It is for the Contracting Parties to determine whether, and to what extent, the compensation covered by compulsory third-party insurance under the Directives should be adjusted by reference to any entitlement of a victim to compensation from other sources.**

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

DÓMSTÓLLINN

uppi svohljóðandi ráðgefandi álit um spurningar þær sem Héraðsdómur Reykjavíkur beindi til dómstólsins 6. júlí 2000:

1. **Það samrýmist ákvæðum samningsins um Evrópska efnahagssvæðið, einkum tilskipun nr. 72/166/EBE 24. apríl 1972 um samræmingu á lögum aðildarríkja um ábyrgðartryggingu vegna notkunar vélknúinna ökutækja, og til að kveða á um skyldu til að viðhalda vátryggingu gagnvart slíkri ábyrgð, annarri tilskipun ráðsins nr. 84/5/EBE 30. desember 1983 um samræmingu á lögum aðildarríkjanna um ábyrgðartryggingu vegna notkunar á vélknúnum ökutækjum, og þriðju tilskipun ráðsins nr. 90/232/EBE 14. maí 1990 um samræmingu á lögum aðildarríkjanna um ábyrgðartryggingu vegna notkunar á vélknúnum ökutækjum að bætur til tjónþola úr ábyrgðartryggingu vélknúins ökutækis séu ákvarðaðar samkvæmt ákvæðum í skaðabótalögum landsréttar, sem mæla fyrir um staðlaðar bætur á grundvelli miskastigs (læknisfræðilega metins örorkustigs), en óháð varanlegu örorkustigi (fjárhagslega metnu örorkustigi), þegar um er að ræða tjónþola, sem á slysdegi nýta vinnugetu sína að verulegu leyti þannig, að þeir hafa litlar eða engar vinnutekjur.**

2. **Fyrrnefndar tilskipanir um ökutækjatryggingar hafa ekki að geyma fyrirmæli um lágmarksbætur til tjónþola við þær aðstæður sem lýst er í fyrstu spurningunni.**

3. **Það er á valdi samningsríkjanna að ákvarða hvort og að hvaða marki bætur sem greiðast af öðrum skuli hafa áhrif á skaðabætur sem greiða á vegna ábyrgðartryggingar á grundvelli tilskipananna.**

Þór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 14 June 2001.

Gunnar Selvik
Registrar

Thór Vilhjálmsson
President

Kveðið upp í heyranda hljóði í Lúxemborg 14. júní 2001.

Gunnar Selvik
dómritari

Þór Vilhjálmsson
forseti

REPORT FOR THE HEARING
in Case E-7/00

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 Héraðsdómur Reykjavíkur (Reykjavík District Court), Iceland in a case between

Halla Helgadóttir

and

Daníel Hjaltason and Iceland Insurance Company Ltd.

on the interpretation of the Agreement on the European Economic Area (hereinafter the 'EEA Agreement'), with particular reference to the following Acts referred to in Annex IX to the EEA Agreement:

- the Act referred to in point 8 of Annex IX (Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, hereinafter the 'First Motor Vehicle Insurance Directive');

- the Act referred to in point 9 of Annex IX (Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, hereinafter the 'Second Motor Vehicle Insurance Directive');

- the Act referred to in point 10 of Annex IX (Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, hereinafter the 'Third Motor Vehicle Insurance Directive');

  (hereinafter collectively the 'Directives' or the 'Motor Vehicle Insurance Directives').

SKÝRSLA FRAMSÖGUMANNS
í máli E-7/00

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

Halla Helgadóttir

gegn

Daníel Hjaltasyni og Vátryggingafélagi Íslands hf.

varðandi túlkun á samningnum um evrópska efnahagssvæðið (hér eftir EES-samningurinn), nánar tiltekið eftirtöldum gerðum, sem vísað er til í viðauka IX við EES-samninginn:

- gerð sem vísað er til í 8. tl. í viðauka IX. (Tilskipun ráðsins 72/166/EBE frá 24. apríl 1972 um samræmingu á lögum aðildarríkja um ábyrgðartryggingu vegna notkunar vélknúinna ökutækja, og til að kveða á um skyldu til að viðhalda vátryggingu gagnvart slíkri ábyrgð, hér eftir ”fyrsta tilskipunin um ökutækjatryggingar”);

- gerð sem vísað er til í 9. tl. í viðauka IX (Önnur tilskipun ráðsins 84/5/EBE frá 30. desember 1983 um samræmingu á lögum aðildarríkjanna um ábyrgðartryggingu vegna notkunar á vélknúnum ökutækjum, hér eftir ”önnur tilskipunin um ökutækjatryggingar”);

- gerð sem vísað er til í 10. tl. í viðauka IX (Þriðja tilskipun ráðsins 90/232/EBE frá 14. maí 1990 um samræmingu á lögum aðildarríkjanna um ábyrgðartryggingu vegna notkunar á vélknúnum ökutækjum, hér eftir ”þriðja tilskipunin um ökutækjatryggingar”);

  (hér er vísað til allra tilskipananna sem ”tilskipana um ökutækjatryggingar”).

I. Introduction

1. By a reference dated 6 July 2000, registered at the Court on 10 July 2000, the Reykjavík District Court made a request for an advisory opinion in a case brought before it by Halla Helgadóttir against Daníel Hjaltason and the Iceland Insurance Company Ltd.

II. Facts and procedure

2. On 1 July 1994, Ms Helgadóttir, then 17 years of age, was hit by Hjaltason's car while she was riding her bicycle. She suffered head injuries. Her permanent non-pecuniary loss has been assessed at 7%, and her permanent disability also at 7%. The parties are in agreement that Daníel Hjaltason and Iceland Insurance Company Ltd. are jointly liable to Ms Helgadóttir for compensation on account of this accident.

3. Having completed primary school, Ms Helgadóttir studied in junior secondary school, from which she graduated four years later. She was engaged in a summer job at the time of the accident. Iceland Insurance Company Ltd. paid compensation for her temporary loss of income from employment at ISK 141 238. In the year preceding the accident, her earnings from employment amounted to ISK 369 915, and in the year of the accident ISK 196 274. Ms Helgadóttir is now 23 years of age and a university psychology student.

4. The dispute in this case relates to the question of whether the compensation to be paid to her on account of her permanent disability is to be paid under sections 5 to 7 of the Tort Damages Act No. 50/1993 (hereinafter 'Tort Damages Act') or under section 8 of that Act. Ms Helgadóttir's claim on account of her permanent disability amounts to ISK 1 467 234 plus interest, but Iceland Insurance Company Ltd. has only paid her compensation in the amount of ISK 375 854 plus interest.

5. The Tort Damages Act was enacted in Iceland on 1 July 1993. Sections 5 to 7 of that Act contain provisions on disability compensation payable to a victim who has previously earned income. The compensation is to equal the victim's annual income from employment in the year preceding the accident, multiplied by 7.5, and the resulting amount is to be multiplied by the victim's permanent disability percentage. Section 8, on the other hand, previously contained provisions on compensation to be paid to a victim who earned little or no income from employment. This concerned mainly children, young students and housewives working in the home. Compensation to persons coming under section 8 was not based on an assessment of occupational disability, as was the case with persons with previous earnings, but instead derived from an assessment of medical disability. The assessed financial loss was compensated for by reference

I. Inngangur

1. Með beiðni dagsettri 6. júlí 2000, sem skráð var í málaskrá dómstólsins 10. júlí 2000, óskaði Héraðsdómur Reykjavíkur eftir ráðgefandi áliti í máli Höllu Helgadóttur gegn Daníel Hjaltasyni og Vátryggingafélagi Íslands hf. sem rekið er fyrir dómstólnum.

II. Málavextir og meðferð málsins

2. Hinn 1. júlí 1994 varð Halla Helgadóttir, sem þá var 17 ára gömul, fyrir bifreið Daníels Hjaltasonar, er hún ók reiðhjóli sínu. Við þetta slasaðist hún á höfði. Hefur varanlegur miski hennar verið metinn 7% og varanleg örorka sömuleiðis 7%. Ágreiningslaust er með aðilum að Daníel Hjaltason og Vátryggingafélag Íslands beri sameiginlega skaðabótaábyrgð gagnvart stefnanda vegna slyssins.

3. Að loknu grunnskólaprófi stundaði Halla Helgadóttir nám í menntaskóla og útskrifaðist þaðan fjórum árum síðar. Hún var í sumarstarfi þegar slysið varð. Hefur Vátryggingafélag Íslands hf. þegar bætt henni tímabundið atvinnutjón með greiðslu á kr. 141.238. Síðasta árið fyrir slysið námu atvinnutekjur hennar kr. 369.915, og á árinu sem slysið varð námu þær 196.274. Halla Helgadóttir er nú 23 ára gömul og stundar háskólanám í sálarfræði.

4. Ágreiningurinn í málinu snýst um það hvort bætur til Höllu Helgadóttur vegna varanlegrar örorku hennar eigi að greiðast eftir 5. – 7. gr. skaðabótalaga nr. 50/1993 eða eftir 8. gr. sömu laga (hér eftir skaðabótalögin). Krafa Höllu vegna varanlegrar örorku er kr. 1.467.234, auk vaxta, en Vátryggingafélag Íslands hf. hefur aðeins greitt henni bætur að fjárhæð kr. 375.854, auk vaxta.

5. Skaðabótalögin tóku gildi á Íslandi 1. júlí 1993. Í 5. – 7. gr. laganna er kveðið á um örorkubætur til tjónþola sem aflað hafði tekna fyrir slys. Bótafjárhæð er miðuð við 7,5 föld árslaun tjónþola, eins og þau voru næstliðið ár fyrir slysdag, og sú upphæð margfölduð með varanlegu örorkustigi. Í 8. gr. laganna var hins vegar áður mælt fyrir um bætur til tjónþola sem höfðu haft óverulegar eða engar vinnutekjur fyrir slys. Þessar reglur vörðuðu fyrst og fremst börn, unga námsmenn og heimavinnandi húsmæður. Voru bætur til þeirra, sem féllu undir 8. gr., ekki byggðar á mati á fjárhagslegri örorku, eins og til tjónþola með tekjureynslu, heldur leiddar af mati á læknisfræðilegri örorku. Var áætlað

to a tier system provided for in section 4 of the Act. According to the Act, no compensation for financial loss was to be paid to persons coming under section 8 if their non-pecuniary loss was assessed at under 15% but, following an amendment in 1996 (Act No. 42/1996), this minimum was reduced to 10%. The Supreme Court of Iceland held, in a judgment rendered 4 June 1998 (Case No. 317/1997), that this division of victims into two categories was based on objective criteria, but that it was incompatible with principles of equality and the provisions of the Constitution giving protection to property to deny compensation to persons whose non-pecuniary loss was assessed at under a particular minimum compensation that corresponded to their probable loss. Section 8 of the Tort Damages Act was again amended by Act No. 37/1999 to provide that compensation to persons coming under section 8 was to be determined on the basis of the disability percentage as provided for in section 5, and that the amount thereof was to be determined as provided for in sections 5 to 7 of the Act.

III. Questions

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

1. Is it compatible with the provisions of the Agreement on the European Economic Area, in particular European Economic Community Council Directives on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, Nos. 72/166/EEC of 24 April 1972, 84/5/EEC of 30 December 1983, and 90/232/EEC of 14 May 1990, as amended, to determine the compensation payable to victims under the third-party liability insurance of a motor vehicle in accordance with national tort statutes providing for standardised compensation based on a tier of non-pecuniary loss (medical disability tier), regardless of a tier of permanent disability (occupational disability tier), in cases of victims who, on the date of an accident, make use of their earning capacity in a manner providing them with little or no earnings from employment?

2. If the first question is answered in the affirmative, do the Directives provide for minimum compensation for a victim in that situation?

3. If the second question is answered in the affirmative, by what reference is the minimum compensation payable to a victim in that situation to be determined and, in particular, what significance is to be given in this context to actuarial calculations, based on different premises as regards discounting and income?

fjártjón bætt á grundvelli miskastigs samkvæmt 4. gr. laganna. Samkvæmt lögunum greiddust engar bætur vegna fjárhagslegs tjóns til þeirra sem féllu undir 8. gr. ef miski var metinn lægri 15%, en eftir lagabreytingu árið 1996 (lög nr. 42/1996) var lágmarkið fært í 10%. Hæstiréttur Íslands komst að þeirri niðurstöðu í máli, sem dæmt var 4. júní 1998 (mál nr. 317/1997) að þessi aðgreining tjónþola í tvo hópa væri byggð á málefnalegum sjónarmiðum, en hins vegar væri það andstætt jafnræðisreglu og eignaréttarákvæði stjórnarskrárinnar, að þeir sem fái metinn miska undir tilteknu lágmarki, fái ekki bætur í samræmi við líklegt fjártjón. Ákvæði 8. gr. skaðabótalaganna var aftur breytt á árinu 1999 (lög nr. 37/1999) á þann veg, að bætur til þeirra, sem undir greinina falla, skuli ákvarða á grundvelli örorkustigs eins og gert er ráð fyrir í 5. gr. og skuli bætur þeirra ákveðnar eftir reglum 5. – 7. gr. laganna.

III. Spurningar

6. Eftirfarandi spurningar voru bornar undir EFTA-dómstólinn:

1. Samrýmist það ákvæðum samningsins um evrópska efnahagssvæðið, einkum tilskipunum ráðs EB um samræmingu á lögum aðildarríkja um ábyrgðartryggingu vegna notkunar vélknúinna ökutækja nr. 72/166/EBE 24. apríl 1972, nr. 84/5/EBE 30. desember 1983 og nr. 90/232/EBE 14. maí 1990, ásamt síðari breytingum, að bætur til tjónþola úr ábyrgðartryggingu vélknúins ökutækis séu ákvarðaðar samkvæmt ákvæðum í skaðabótalögum landsréttar, sem mæla fyrir um staðlaðar bætur á grundvelli miskastigs (læknisfræðilega metið örorkustig), en óháð varanlegu örorkustigi (fjárhagslega metið örorkustig), þegar um er að ræða tjónþola, sem á slysdegi nýta vinnugetu sína að verulegu leyti þannig, að þeir hafa engar eða takmarkaðar vinnutekjur.

2. Sé svar við fyrstu spurningu jákvætt, er spurt, hvort tilskipanirnar mæli fyrir um lágmarksbætur til tjónþola, sem þannig er ástatt um.

3. Sé svar við annarri spurningunni jákvætt, er spurt, hvaða mælikvarða skuli leggja til grundvallar við mat á lágmarksbótum til tjónþola, sem þannig hagar til um, og þá sérstaklega, hvaða þýðingu útreikningur tryggingafræðings á fjártjóni, með mismunandi afvöxtunar- og tekjuforsendum, hafi í því samhengi.

4. Does it matter in this context whether a victim is entitled to compensation from other sources?

IV. Legal background

EEA law

7. The questions submitted by the national court concern various articles of the First, Second and Third Motor Vehicle Insurance Directives.

8. Articles 3(1) and 3(2) of the First Motor Vehicle Insurance Directive read as follows:

> *'1. Each Member State shall, subject to Article 4, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures.*
>
> *2. Each Member State shall take all appropriate measures to ensure that the contract of insurance also covers:*
>
> *– according to the law in force in other Member States, any loss or injury which is caused in the territory of those States (...).'*

9. Articles 1(1) and 1(2) of the Second Motor Vehicle Insurance Directive read as follows:

> *'1. The insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover compulsorily both damage to property and personal injuries.*
>
> *2. Without prejudice to any higher guarantees which Member States may lay down, each Member State shall require that the amounts for which such insurance is compulsory are at least:*
>
> *– in the case of personal injury, 350 000 ECU where there is only one victim (…).'*

National law

10. Reference is made to the Icelandic Tort Damages Act, in particular sections 5 to 7, and section 8.

11. According to section 5(2), loss resulting from disability is to be assessed in the light of the victim's prospects for earning income from any work in which

4. Skiptir máli í þessu sambandi, hvort tjónþoli eigi rétt til bóta annars staðar frá?

IV. Löggjöf

EES réttur

7. Spurningarnar sem Héraðsdómstóll Reykjavíkur óskar svara við lúta að túlkun á ýmsum ákvæðum fyrstu, annarrar og þriðju tilskipunarinnar um ökutækjatryggingar.

8. Ákvæði 1. og 2. mgr. 3. gr. fyrstu tilskipunarinnar um ökutækjatryggingar eru svohljóðandi:

> *"1. Sérhvert aðildarríki skal gera allar nauðsynlegar ráðstafanir, samanber þó 4. gr., til þess að sá, sem ábyrgð ber á ökutæki og notkun þess og að öllu jöfnu er staðsett á yfirráðasvæði þess ríkis, hafi gilda vátryggingu. Á grundvelli þessara ráðstafana ákvarðast hvaða tjón það eru sem vátryggingin tekur til sem og skilmálar hennar og skilyrði.*
>
> *2. Aðildarríki skulu gera viðeigandi ráðstafanir til að vátryggingarsamningurinn taki einnig til:*
>
> *– tjóns sem verður í öðrum aðildaríkjum og gildi lög þess ríkis (...)."*

9. Ákvæði 1. og 2. mgr. 1. gr. annarrar tilskipunarinnar um ökutækjatryggingar eru svohljóðandi:

> *"1. Skylt er að vátrygging samkvæmt 1. mgr. 3. gr. tilskipunar nr. 72/166/EBE nái bæði til líkamstjóns og munatjóns.*
>
> *2. Aðildarríki skulu sjá til þess að vátryggingafjárhæðir samkvæmt 1. mgr., sem skylt er að vátryggja fyrir, nemi að lágmarki eftirtöldum fjárhæðum svo framarlega sem aðildarríki kveða ekki á um hærri fjárhæðir sem þá halda gildi sínu:*
>
> *– 350 000 evrópskar mynteiningar (ECU) þegar um er að ræða einn slasaðan einstakling (…)."*

Landsréttur

10. Vísað er til íslensku skaðabótalaganna, einkum 5. - 7. gr. og 8. gr.

11. Samkvæmt 2. mgr. 5. gr. skal, þegar tjón vegna örorku er metið, líta til þeirra kosta sem tjónþoli á til að afla sér tekna með vinnu sem sanngjarnt er að

he or she may reasonably be expected to be engaged. On the date of the accident in question here, disability compensation was to be calculated as 7.5 times the victim's annual wages, multiplied by the disability percentage, cf. section 6. According to section 7, the victim's annual wages were to be deemed to correspond to his or her total earnings from employment in the year preceding the year of the accident. However, annual wages were to be assessed separately in extraordinary circumstances, for example, if changes had occurred in income or conditions of employment (section 7(2)).

12. On the date of the accident, section 8(1) of the Tort Damages Act read as follows:

> *'Compensation to children and to victims who, to a large extent, make use of their earning capacity in a manner providing them with little or no income from employment shall be determined by reference to their tier of non-pecuniary loss as provided for in section 4. Compensation shall be determined as a percentage of the compensation for permanent non-pecuniary loss in accordance with the first four sentences of section 4(1).'*

V. Written Observations

13. 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 Halla Helgadóttir, represented by Jón Steinar Gunnlaugsson, hæstaréttarlögmaður (Supreme Court Advocate), Reykjavík ;

– Mr Daníel Hjaltason and Iceland Insurance Company Ltd., represented by Óttar Pálsson, héraðsdómslögmaður (District Court Advocate), Reykjavík;

– the Icelandic Government, represented by Högni S. Kristjánsson, Legal Officer in the Ministry for Foreign Affairs of Iceland, External Trade Department acting as Agent, assisted by Björn Friðfinnsson, Permanent Secretary, Ministry of Justice and Ecclesiastical Affairs;

– the Norwegian Government, represented by Morten Goller, Advocate, and Thomas Nordby, Assistant Advocate, Office of the Attorney General (Civil Affairs);

– the EFTA Surveillance Authority, represented by Jan Magne Langseth, Officer, Legal and Executive Affairs, acting as Agent;

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

ætlast til að hann starfi við. Þegar slys það sem hér um ræðir átti sér stað, bar að reikna tjón vegna örorku þannig að margfalda skyldi árstekjur tjónþola með 7,5 og margfalda síðan þá upphæð með örorkustiginu, sbr. 6. gr. Samkvæmt 7. gr. skyldu árslaun tjónþola teljast jafngilda heildarvinnutekjum hans á næstliðnu ári fyrir það ár, er tjón varð. Árslaun skyldu þó metin sérstaklega við óvenjulegar aðstæður, t.d. breytingar á tekjum eða atvinnuhögum, sbr. 2. mgr. 7. gr.

12. Á slysdegi var 1. mgr. 8. gr. skaðabótalaga svohljóðandi:

> *"Bætur til barna og tjónþola, sem að verulegu leyti nýta vinnugetu sína þannig að þeir hafa engar eða takmarkaðar vinnutekjur, skal ákvarða á grundvelli miskastigs skv. 4. gr. Bætur skulu ákveðnar sem hundraðshluti af bótum fyrir varnanlegan miska eftir reglum 1. – 4. málsl. 1. mgr. 4. gr."*

V. Greinargerðir

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

– Höllu Helgadóttur. Í fyrirsvari er Jón Steinar Gunnlaugsson, hæstaréttarlögmaður, Reykjavík ;

– Daníel Hjaltasyni og Vátryggingafélagi Íslands hf. Í fyrirsvari er Óttar Pálsson, héraðsdómslögmaður, Reykjavík;

– Ríkisstjórn Íslands. Í fyrirsvari sem umboðsmaður er Högni S. Kristjánsson, lögfræðingur á viðskiptaskrifstofu utanríkisráðuneytisins. Honum til aðstoðar er Björn Friðfinnsson, ráðuneytisstjóri í dóms- og kirkjumálaráðuneytinu;

– Ríkisstjórn Noregs. Í fyrirsvari sem umboðsmenn eru Morten Goller, lögmaður, og Thomas Nordby, aðstoðarlögmaður, skrifstofu ríkislögmanns;

– Eftirlitsstofnun EFTA. Í fyrirsvari sem umboðsmaður er Jan Magne Langseth, fulltrúi á lögfræði- og framkvæmdasviði;

– Framkvæmdastjón Evrópubandalaganna. Í fyrirsvari sem umboðsmenn eru Christina Tufvesson og John Forman, lögfræðilegir ráðgjafar hjá lagadeild.

The first question

Halla Helgadóttir

14. Ms Helgadóttir argues that the Directives aim to secure individual victims of motor vehicle accidents satisfactory compensation for the physical injury caused to them by such accidents.

15. Ms Helgadóttir refers in particular to the fifth recital of the Second Motor Vehicle Insurance Directive,[1] Article 3(1) of the First Motor Vehicle Insurance Directive and Article 1 of the Second Motor Vehicle Insurance Directive. Furthermore, reference is made to the case-law of the Court of Justice of the European Communities[2] and of the EFTA Court[3] concerning the purpose and aim of the Directives.

16. As to the measures chosen to implement the Directives, Ms Helgadóttir admits that the Contracting Parties have a relatively wide margin of appreciation. However such measures must, according to the wording of the Directives and the relevant case-law, secure victims of motor vehicle accidents compensation which covers all the damage and/or loss caused by the accident. If Ms Helgadóttir were awarded damages under the rigid and standardised section 8 of the Tort Damages Act, she would not be compensated for all the damage to her person and/or the actual loss caused by the accident. Therefore, section 8 is, in the view of Ms Helgadóttir, incompatible with the Directives.

17. The standardisation in section 8 is too rigid, lacks legal justification, or is at least not proportionate to any legitimate aims because within the group of people who fall under section 8, if it is interpreted literally, are a number of people who most certainly have either suffered lesser or greater financial loss than afforded under the clause.

18. For Ms Helgadóttir, such rules must be flexible enough to take reasonable account of the circumstances of an individual who has become a victim of such an accident. Section 8 affords a great number of victims of motor vehicle accidents fixed compensation without taking into account individual circumstances or assessing what the real potential loss of an injured party is.

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1 '(…) [T]he amounts in respect of which insurance is compulsory must in any event guarantee victims adequate compensation (…).'

2 Case C-129/94 *Criminal proceedings against Rafael Ruiz Bernáldez* [1996] ECR I-1829 (hereinafter '*Bernáldez*').

3 Case E-1/99 *Storebrand Skadeforsikring AS* v *Veronika Finanger* [1999] EFTA Court Report 119 (hereinafter '*Finanger*').

Fyrsta spurningin

Halla Helgadóttir

14. Halla Helgadóttir heldur því fram, að tilskipanirnar hafi það að markmiði að tryggja fórnarlömbum bifreiðaslysa hæfilegar bætur vegna líkamstjóns sem þeir verða fyrir af völdum slíkra slysa.

15. Halla Helgadóttir vísar sérstaklega til 5. mgr. inngangsorða annarrar tilskipunarinnar um ökutækjatryggingar,[1] 1. mgr. 3. gr. fyrstu tilskipunarinnar um ökutækjatryggingar og 1. gr. annarrar tilskipunarinnar um ökutækjatryggingar. Ennfremur vísar hún til dóma dómstóls EB[2] og dóma EFTA-dómstólsins[3] varðandi markmið og tilgang tilskipananna.

16. Að því er varðar aðferðir við lögfestingu tilskipananna fellst Halla Helgadóttir á að samningsríkin hafi tiltölulega mikið svigrúm til mats í því efni. Samt sem áður leiðir það af orðalagi tilskipananna og dómaframkvæmd að löggjöfin verður að tryggja tjónþolum vegna slysa af völdum vélknúinna ökutækja bætur sem taka til alls þess tjóns sem leiðir af slysi. Ef Halla Helgadóttir fengi bætur samkvæmt hinum ströngu og stöðluðu ákvæðum 8. gr. skaðabótalaga fengi hún ekki bætur sem svöruðu til alls þess tjóns sem hún hefur orðið fyrir vegna slyssins. Því telur Halla Helgadóttir að 8. gr. sé ósamrýmanleg tilskipununum.

17. Hinar stöðluðu reglur í 8. gr. séu ekki nægilega sveigjanlegar, að baki þeim búi ekki gild lagasjónarmið, eða að þær séu a.m.k. ekki í samræmi við nein lögmæt markmið vegna þess að meðal þeirra sem 8. gr. á við, ef greinin er túlkuð eftir orðanna hljóðan, sé fjöldi einstaklinga sem með vissu hafa ýmist orðið fyrir minna eða meira fjárhagstjóni en reglurnar gera ráð fyrir að bætt verði.

18. Halla Helgadóttir telur að slíkar reglur verði að vera nægilega sveigjanlegar til þess að unnt sé að taka hæfilegt tillit til sérstakra aðstæðna einstaklinga sem orðið hafi fyrir tjóni í slíkum slysum. Ákvæði 8. gr. geri ráð fyrir stöðluðum bótum til fjölda fórnarlamba án þess að tillit sé tekið til sérstakra aðstæðna eða þess að meta líklegt tjón tjónþola.

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1 "(…) Lögboðnar vátryggingafjárhæðir skulu í öllum tilvikum tryggja tjónþolum hæfilegar bætur (…)."

2 Mál C-129/94 *Refsimál gegn Rafael Ruiz Bernáldez* [1996] ECR I-1829 (hér eftir "*Bernáldez*").

3 Mál E-1/99 *Storebrand Skadeforsikring AS* gegn *Veronika Finanger* [1999] EFTA Court Report 119 (hér eftir "*Finanger*").

19. A provision of this nature has, in the EEA area, only been enacted in Denmark and Iceland. Damages in other countries are decided on a much more individual basis.[4]

20. As a result of this provision, a large number of people who have little or no relationship with each other from the perspective of potential loss are grouped together and compensated in exactly the same way. Thus, much has been left to chance intentionally, and it is, in fact, totally arbitrary whether the loss is compensated or not.

21. To decide the amount of compensation in such a way clearly does not secure individual victims compensation for their loss caused by a motor vehicle accident.

22. Ms Helgadóttir proposes that the question be answered as follows:

> *'1. It is not compatible with the provisions of the EEA Agreement and the Directives to determine the compensation payable to victims under the third-party liability insurance of a motor vehicle in accordance with the national tort statutes providing for standardised compensation based on a tier of non-pecuniary loss (medical disability tier), regardless of a tier of permanent disability (occupational disability tier), in cases of victims who, on the date of an accident, make use of their earning capacity in a manner providing them with little or no earnings from employment.'*

Daníel Hjaltason and Iceland Insurance Company Ltd.

23. Daníel Hjaltason and Iceland Insurance Company Ltd. refer to the aim and the wording of the Motor Vehicle Insurance Directives, as well as the case-law of the Court of Justice of the European Communities[5] and the EFTA Court.[6] In their view, the aim of the Directives is, firstly, to ensure the free movement of vehicles normally based on Community territory and of persons travelling in those vehicles, and, secondly, to guarantee that victims of accidents caused by those vehicles receive comparable treatment regardless of where in the EEA the accident has occurred.

24. However, the Directives do not contain any provisions on minimum compensation for those suffering losses due to motor vehicle accidents, or set any

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4 See *Personal Injury Compensation*, edited by W. Pfenningstorf, Lloyd's of London Press Ltd., 1993, and *Personal Injury Awards in EU and EFTA Countries – An Industry Report*, prepared by David McIntosh and Marjorie Holmes, Lloyd's of London Press Ltd., 2nd Edition, 1994.

5 *Bernáldez*; Case 116/83 *Asbl Bureau Belge des Assureurs Automobiles* v *Fantozzi and SA Les Assurance Populaires* [1984] ECR 2481; Case C-348/98 *Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correira Ferreira* v *Companhia de Seguros Mundial Confiança S.A.*, Judgment of 14 September 2000, not yet reported (hereinafter '*Ferreira*').

6 *Finanger*.

19. Af þeim ríkjum sem séu aðilar EES-samningsins hafi ákvæði af þessu tagi aðeins verið lögfest í Danmörku og á Íslandi. Í öðrum ríkjum séu bætur í miklu ríkara mæli ákvarðaðar með tilliti til sérstakra aðstæðna í hverju máli.[4]

20. Vegna þessa ákvæðis eru einstaklingar, sem eiga fátt eða ekkert sameiginlegt að því er varðar það tjón sem þeir hafa orðið fyrir, flokkaðir saman og þeim reiknaðar bætur á nákvæmlega sama hátt. Með þessum reglum sé engin trygging fyrir því, og í reynd tilviljunum háð, hvort tjón fæst bætt eða ekki.

21. Ákvörðun bóta með þessum hætti tryggir tjónþolum augljóslega ekki bætur vegna þess tjóns sem þeir kunna að verða fyrir vegna slysa af völdum vélknúinna ökutækja.

22. Halla Helgadóttir leggur til að spurningunni verði svarað þannig:

> *"1. Það samrýmist ekki ákvæðum EES-samningsins og tilskipananna að ákvarða bætur til tjónþola á grundvelli ábyrgðartryggingar bifreiðar í samræmi við bótareglur í landsrétti sem mæla fyrir um staðlaðar bætur á gundvelli miskastigs (læknisfræðilega metins örorkustigs) en óháð varanlegu örokrustigi (fjárhagslega metnu örorkustigi), þegar um er að ræða tjónþola, sem á slysdegi nýta vinnugetu sína þannig, að þeir hafa litlar eða engar vinnutekjur."*

Daníel Hjaltason og Vátryggingafélag Íslands hf.

23. Daníel Hjaltason og Vátryggingafélag Íslands hf. vísa til markmiðs og orðalags tilskipananna um ökutækjatryggingar, sem og til dómaframkvæmdar dómstóls EB[5] og EFTA-dómstólsins.[6] Þeir telja að markmið tilskipananna séu, í fyrsta lagi, að tryggja frjálsa för ökutækja, sem að öllu jöfnu eru staðsett á landsvæði Evrópusambandsins og fólks sem ferðast með þessum ökutækjum, og í öðru lagi, að tryggja þeim sem orðið hafa fyrir tjóni vegna slysa af völdum þeirra sambærilega réttarstöðu, óháð því hvar á evrópska efnahagssvæðinu slys á sér stað.

24. Aftur á móti hafa tilskipanirnar ekki að geyma nein ákvæði um lágmarksbætur til þeirra sem verða fyrir tjóni vegna slysa af völdum ökutækja,

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4 Sjá *Personal Injury Compensation*, ritstýrt af W. Pfenningstorf, Lloyd's of London Press Ltd., 1993, og *Personal Injury Awards in EU and EFTA Countries – An Industry Report*, samin af David McIntosh og Marjorie Holmes, Lloyd's of London Press Ltd., 2. útgáfa, 1994.

5 *Bernáldez*; mál nr. 116/83 *Asbl Bureau Belge des Assureurs Automobiles* gegn *Fantozzi og SA Les Assurance Populaires* [1984] ECR 2481; mál nr. C-348/98 *Vitor Manuel Mendes Ferreira og Maria Clara Delgado Correira Ferreira* gegn *Companhia de Seguros Mundial Confiança S.A.*, dómur 14. september 2000, (enn óprentaður) (hér eftir "*Ferreira*").

6 Finanger-málið.

standards as to what can be regarded as reasonable compensation for same. On the contrary, the substance, nomenclature, and wording in the various Directives support the view that domestic legislation in each Member State and Contracting Party is to prevail. Reference is made *inter alia* to wording such as 'domestic law' in the seventh recital of the preamble to the First Motor Vehicle Insurance Directive; to 'the right of the Member States' in Article 1(4) of the Second Motor Vehicle Insurance Directive; and to 'each Member State shall apply its laws, regulations and administrative provisions' in the sixth paragraph of the same Article.

25. Daníel Hjaltason and Iceland Insurance Company Ltd. argue that the Directives were not intended to amend or approximate the tort laws of individual Member States, or to affect national rules on the assessment of compensation. This view is confirmed by the *Bernáldez* and *Ferreira* rulings of the Court of Justice of the European Communities. In the latter case, that Court stated that '(…) it is clear from the aim of the three directives governing insurance against civil liability in respect of the use of motor vehicles and from their wording that they do not seek to harmonise the rules of the Member States governing civil liability' (paragraph 23).

26. Daníel Hjaltason and Iceland Insurance Company Ltd. argue that generally accepted rules of interpretation do not support the Directives' having been drafted with a view to harmonising the rules of Member States governing civil liability. Furthermore, with respect, the EFTA Court has not been empowered to lay down rules on the assessment of compensation in circumstances such as those in the case at hand. Rather, decisions of that kind are political in nature.

27. Referring to the *Francovich*[7] case, Daníel Hjaltason and Iceland Insurance Company Ltd. point out that even the Court of Justice of the European Communities is of the view that, in State liability cases, 'it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused' (paragraph 42).

28. The *Finanger* ruling of the EFTA Court does not contradict the arguments of Daníel Hjaltason and Iceland Insurance Company Ltd. because the Norwegian rules in that case limited the scope of the Directives by limiting to whom they were to apply, whereas the Directives specifically set out the scope they are to have. However, the Directives do not contain any similar provisions on civil liability and the measurement of compensation.

29. Daníel Hjaltason and Iceland Insurance Company Ltd. furthermore submit that, even if the Directives were to be interpreted so that domestic laws on tort which lay down rules unfavourable to victims on the measurement of

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[7] Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 42 (hereinafter '*Francovich*').

eða fyrirmæli um mat á því hvað teljast hæfilegar bætur vegna þeirra. Þvert á móti styðja efni, hugtakanotkun og orðalag einstakra tilskipana það sjónarmið að þetta ráðist af löggjöf einstakra aðildar- og samningsríkja. Í 7. mgr. inngangsorða fyrstu tilskipunarinnar um ökutækjatryggingar sé m.a. vísað til "landsréttar" og í 4. mgr. 1. gr. annarrar tilskipunarinnar til "réttar aðildarríkis" og "laga og stjórnsýslufyrirmæla í hverju aðildarríki" í 6. málslið sömu málsgreinar.

25. Daníel Hjaltason og Vátryggingafélag Íslands hf. halda því fram að það sé ekki markmið með tilskipununum að breyta eða samræma skaðabótalöggjöf aðildarríkjanna, eða þeim sé ætlað að hafa áhrif á reglur landsréttar um ákvörðun skaðabóta. Þetta sjónarmið sé staðfest í dómum dómstóls EB í *Bernáldez* og *Ferreira*-málunum. Í síðara málinu segi dómstóll EB að það " ... sé ljóst af markmiðum tilskipananna þriggja um ábyrgðartryggingar vegna notkunar vélknúinna ökutækja og af orðalagi þeirra, að með þeim sé ekki stefnt að samræmingu reglna aðildarríkjanna um skaðabótaábyrgð" (23. grein).

26. Daníel Hjaltason og Vátryggingafélag Íslands hf. halda því fram að almennt viðurkenndar lögskýringarreglur styðji ekki það sjónarmið að tilskipununum hafi verið ætlað að samræma reglur aðildarríkjanna um skaðabótaábyrgð. Ennfremur að EFTA-dómstólnum, með fullri virðingu fyrir honum, hafi ekki verið fengið vald til að móta reglur um ákvörðun skaðabóta við aðstæður sem þær er í málinu er fjallað um. Ákvörðun um efni slíka reglna sé fremur í eðli sínu pólitísk.

27. Með vísan til *Francovich*-málsins[7] benda Daníel Hjaltason og Vátryggingafélag Íslands hf. á að dómstóll EB sé á þeirri skoðun að jafnvel í málum sem varða skaðabótaábyrgð ríkisins verði það "á grundvelli reglna landsréttar, að bæta afleiðingar tjónsins ..." (42. grein)

28. Dómur EFTA-dómstólsins í *Finanger*-málinu er ekki í andstöðu við röksemdir Daníels Hjaltasonar og Vátryggingafélags Íslands hf. vegna þess að norsku reglurnar sem fjallað var um í því máli takmörkuðu gildissvið tilskipananna með því að takmarka til hverra þær tækju, en tilskipanirnar mæla sérstaklega fyrir um það sjálfar til hverra þær eiga að taka. Tilskipanirnar hafa aftur á móti ekki að geyma hliðstæð ákvæði um skaðabótaábyrgð og útreikning bóta.

29. Daníel Hjaltason og Vátryggingafélag Íslands hf. halda því fram að ekkert bendi til að í málinu eigi við reglur um bótaákvörðun óhagstæðar tjónþolum. Gildir þetta, þó að tilskipanirnar væru túlkaðar þannig að landsréttur um bætur

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[7] Sameinuð mál nr. C-6/90 og C-9/90 *Francovich o. fl.*[1991] ECR I-5357, 42. grein (hér eftir "*Francovich*").

compensation are regarded as jeopardising the aims of the Directives, there is nothing to support the view that this is the case in the matter at hand. Section 8 of the Tort Damages Act is only applicable when a reasonable assessment of loss cannot be determined with regard to prior earned income from employment.

30. Daníel Hjaltason and Iceland Insurance Company Ltd. emphasise that the provisions of section 8 of the Tort Damages Act are objective and apply to all persons in the same or similar situation.

31. Reference is made to Danish legislation,[8] which was the model for the Icelandic Tort Damages Act, to the *travaux préparatoires* supplementing the Icelandic Act, and to a judgment of the Icelandic Supreme Court.[9]

32. Daníel Hjaltason and Iceland Insurance Company Ltd. are of the opinion that the crucial question is not whether standardised rules as such are contrary to EEA law. The decisive point is the actual amount of compensation the victim receives.

33. Daníel Hjaltason and Iceland Insurance Company Ltd. suggest answering the questions as follows:

> '*(a) It is compatible with the provisions of the Agreement on the European Economic Area, in particular European Economic Community Council Directives on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, No's. 72/166/EEC of 24 April 1972, 84/5/EEC of 30 December 1983 and 90/232/EEC of 14 May 1990, as amended, to determine the compensation payable to victims under the third-party liability insurance of a motor vehicle in accordance with national tort statutes providing for standardised compensation based on a tier of non-pecuniary loss (medical disability tier), regardless of a tier of permanent disability (occupational disability tier), in cases of victims who, on the date of an accident, make use of their earning capacity in a manner providing them with little or no earnings from employment.*
>
> *(b) The Directives do not provide for minimum compensation for a victim in that situation. Furthermore, in the absence of such EEA-legislation, it is on the basis of the rules of national law on liability that the compensation for a victim in that situation must be assessed.*
>
> *In the light of the proposed answers it seems not necessary to answer the third and fourth question.*'

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8 Danish Damages Liability Act of 1984, Danish Law No. 228 of 23 May 1984.

9 Judgments of the Supreme Court of 4 June 1998 in Case No. 317/1997 and 17 February 2000 in Case No. 380/1999.

gengi gegn markmiðum tilskipananna; en 8. gr. skaðabótalaga verður aðeins beitt, ef mat á tjóni verður ekki með skynsamlegum hætti byggt á vinnutekjum fyrir slysið.

30. Daníel Hjaltason og Vátryggingafélag Íslands hf. leggja áherslu á að ákvæði 8. gr. skaðabótalaganna feli í sér hlutlæga reglu sem eigi við um alla einstaklinga í sömu eða svipaðri aðstöðu.

31. Vísað er til danskrar löggjafar sem er fyrirmynd[8] íslensku laganna, til greinargerða sem fylgdi frumvarpi til skaðabótalaga og dóma Hæstaréttar Íslands.[9]

32. Daníel Hjaltason og Vátryggingafélag Íslands hf. halda því fram að megin spurningin snúist ekki um það hvort reglur sem gera ráð fyrir stöðluðum aðferðum við útreikning bóta séu sem slíkar andstæðar EES-rétti. Meginatriðið sé það hvaða bætur tjónþoli raunverulega fær.

33. Daníel Hjaltason og Vátryggingafélag Íslands hf. leggja til að spurningunni verði svarað þannig:

> "*(a) Það samræmist samningnum um evrópska efnahagssvæðið, sbr. einkum tilskipanir ráðsins um samræmingu á lögum aðildarríkja um ábyrgðartryggingu vegna notkunar vélknúinna ökutækja nr. 72/166/EBE frá 24. apríl 1972, nr. 84/5/EBE frá 30. desember 1983 og nr. 90/232/EBE frá 14. maí 1990, með síðari breytingum, að ákvarða bætur til tjónþola á grundvelli ábyrgðartryggingar bifreiða samkvæmt ákvæðum skaðabótalaga landsréttar sem mæla fyrir um staðlaðar bætur á grundvelli miskastigs (læknisfræðilega metins örorkustigs) en óháð varanlegu örorkustigi (fjárhagslega metnu örorkustigi), þegar um er að ræða tjónþola, sem á slysdegi nýta vinnugetu sína þannig, að þeir hafa litlar eða engar vinnutekjur.*
>
> *(b) Tilskipanirnar mæla ekki fyrir um lágmarksbætur til tjónþola í slíkri aðstöðu. Ennfremur, þar sem ekki er um nein slík ákvæði EES-réttar að ræða, ber að ákvarða bætur til tjónþola í slíkri aðstöðu á grundvelli ákvæða landsréttar um bótaskyldu.*
>
> *Í ljósi þeirra svara, sem lagt er til að veitt verði, sýnist ekki þörf á að svara þriðju og fjórðu spurningu sérstaklega.*"

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8 Lov om erstatningsansvar no. 228, 23. maj 1984.

9 Dómar Hæstaréttar Íslands frá 4. júní 1998 í máli nr. 317/1997 og 17. febrúar 2000 í máli nr. 380/1999.

The Icelandic Government

34. In the opinion of the Icelandic Government, the case deals only with the question of whether section 8(1) of the Icelandic Tort Damages Act is incompatible with the EEA Agreement and the Directives.

35. The Icelandic Government refers to Icelandic tort law generally[10] and the legislative acts implementing the Directives into Icelandic legislation (Icelandic Traffic Act and relevant regulations).

36. Reference is made to rulings of the Supreme Court of Iceland,[11] in which that Court ruled that the disputed provision is compatible with the Constitution of the Republic of Iceland regarding the division of victims into two categories: individuals with little or no income from employment and individuals with previously earned income.

37. In the opinion of the Icelandic Government, the primary objective ever since the First Motor Vehicle Insurance Directive has been to facilitate the free movement of goods and persons. This goal is reflected in the first paragraph of the preamble to the First Motor Vehicle Insurance Directive. As a consequence of that Directive, the laws of the Member States relating to compulsory insurance against civil liability in respect of the use of motor vehicles were approximated. In the Second Motor Vehicle Insurance Directive, these main objectives were reiterated and a specific minimum amount to be covered by compulsory insurance was introduced. The fifth recital of the preamble to that Directive also contains a provision aimed at guaranteeing victims adequate compensation irrespective of the Member State in which the accident occurs. Lastly, in the Third Motor Vehicle Insurance Directive, further amendments were introduced to facilitate the crossing of internal Community frontiers and the establishment and functioning of the internal market.

38. From the substance of the three Directives, combined with the aforementioned objectives, the Icelandic Government draws three conclusions. Firstly, the Directives have together established a single system ensuring that individuals in the Common Market are covered by compulsory insurance against civil liability in respect of the use of motor vehicles wherever that use takes place within the Common Market. This insurance is based on minimum amounts covered by the Directives. Secondly, Member States are under an obligation to guarantee adequate compensation to victims irrespective of the Member State in which the accident occurs. Thirdly, the Directives provide for a co-ordinated system to facilitate rapid and direct payment of compensation to victims irrespective of their nationality or location within the Common Market.

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10 Arnljótur Björnsson, A Survey of Icelandic Tort Law, Scandinavian Studies in Law, Volume 38, Stockholm Institute for Scandinavian Law 1999.

11 Judgment of the Supreme Court of 4 June 1998 in Case No. 317/1997, previously cited.

Ríkisstjórn Íslands

34. Ríkisstjórn Íslands telur að málið snúist aðeins um það hvort 1. mgr. 8. gr. íslensku skaðabótalaganna sé ósamrýmanleg EES-samningnum og tilskipununum.

35. Ríkisstjórn Íslands vísar til íslenskra skaðabótalaga almennt[10] og þeirrar löggjafar sem innleiðir tilskipanirnar í íslenskan rétt (íslensku umferðarlaganna og viðeigandi stjórnsýslufyrirmæla).

36. Vísað er til dóma Hæstaréttar Íslands,[11] þar sem dómurinn komst að þeirri niðurstöðu að hin umdeildu ákvæði væru samrýmanleg stjórnarskrá Lýðveldisins Íslands að því er varðar skiptingu tjónþola í tvo flokka, þ.e. einstaklinga með litlar eða engar atvinnutekjur og einstaklinga sem höfðu aflað atvinnutekna fyrir slys.

37. Ríkisstjórn Íslands telur að grundvallarmarkmiðið, allt frá því fyrsta tilskipunin um ökutækjatryggingar var sett, hafi verið að stuðla að frjálsu flæði vara og fólks. Þetta markmið kemur fram í 1. mgr. inngangsorða fyrstu tilskipunarinnar. Af þessu leiðir að reglur um lögbundnar ábyrgðartryggingar vegna ökutækja hafa verið samræmdar. Í annarri tilskipuninni um ökutækjatryggingar hafa þessi meginmarkmið verið staðfest og regla sett um lágmarksbætur sem lögbundin ábyrgðartrygging á að tryggja. Ákvæði 5. mgr. inngangsorða þeirrar tilskipunar hefur einnig að geyma ákvæði sem miðar að því að tryggja tjónþolum hæfilegar bætur óháð því í hvaða aðildarríki slys á sér stað. Að lokum voru með þriðju tilskipuninni gerðar breytingar sem auðvelda eiga för yfir landamæri aðildarríkjanna og tilurð og framkvæmd innri markaðarins.

38. Af efni tilskipananna þriggja og fyrrgreindum markmiðum þeirra dregur ríkisstjórn Íslands þrjár ályktanir: Í fyrsta lagi, að tilskipanirnar þrjár sameiginlega, mæla fyrir um tiltekið kerfi sem tryggir að einstaklingar á hinum sameiginlega markaði séu tryggðir á grundvelli lögbundinna ábyrgðartrygginga vegna notkunar vélknúinna ökutækja hvar sem notkunin á sér stað innan hins sameiginlega markaðar. Ábyrgðartryggingin er miðuð við lágmarksbætur sem tilskipanirnar mæla fyrir um. Í öðru lagi ber aðildarríkjunum skylda til að tryggja tjónþolum hæfilegar bætur óháð því í hvaða aðildarríki slys á sér stað. Í þriðja lagi mæla tilskipanirnar fyrir um samræmt kerfi til að tryggja hraða og greiða greiðslu bóta til tjónþola óháð ríkisfangi eða hvar tjónþoli er staddur á hinum sameiginlega markaði.

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10 Arnljótur Björnsson, A Survey of Icelandic Tort Law, Scandinavian Studies in Law, Volume 38, Stockholm Institute for Scandinavian Law 1999.

11 Dómur Hæstaréttar frá 4. júní 1998 í máli nr. 317/1997, sem áður er vísað til.

39. The Icelandic Government submits that the Directives do not contain any provision or obligation on how each Member State is to calculate disability and how that disability should be compensated for in terms of amounts.

40. The Directives would have to be more specific than they currently are if they were intended to harmonise in any way the details of the rules on how national legislation should guarantee adequate compensation to victims of road traffic accidents.

42. The situation is, in fact, quite the contrary. The Directives contain various provisions emphasising how questions relating to the calculation and assessment of compensation to be paid must be resolved, based on national rules. This conclusion can be drawn from the wording of the Directives in various places. Reference is made to the first subparagraph of Article 1(4) of the Second Motor Vehicle Insurance Directive, where it is made clear that a payment to a victim by a specific body shall be without prejudice to the right of the Member States to regard compensation by that body as subsidiary or non-subsidiary. Furthermore, the final subparagraph of Article 1(4) of the same Directive clearly states that each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by the body. This is supported by the wording of the sixth recital of the preamble to the same Directive:

> *'(...) [I]t is important, without amending the provisions applied by the Member States with regard to the subsidiary or non-subsidiary nature of the compensation paid by that body and to the rules applicable with regard to subrogation, to provide that the victim of such an accident should be able to apply directly to that body as a first point of contact (...).'*

43. The Icelandic Government submits that, in the present case, the victim has been granted the full protection contained in the Directives and has been paid adequate compensation as envisaged therein. Any further obligations cannot be construed from the EEA Agreement.

44. This interpretation is in line with the case-law, although both the Court of Justice of the European Communities and the EFTA Court have recognised that the Directives may have some impact on the decision of whether or not compensation is to be paid to a third party.

45. The Icelandic Government submits, however, that the rulings in the case-law of the two courts do not have any bearing on the present case, as they relate to very different circumstances.

46. In the EFTA-Court's *Finanger* case, the Norwegian legislation went further in excluding individuals from insurance coverage. In the present case, the damage incurred by Ms Helgadóttir comes under the Directives, liability is admitted by Daníel Hjaltason and Iceland Insurance Company Ltd., the minimum amounts fixed in the Directives and domestic legislation cover Ms Helgadóttir and compensation has been paid to Ms Helgadóttir for all her actual loss.

39. Ríkisstjórn Íslands er á þeirri skoðun að tilskipanirnar hafi ekki að geyma nein ákvæði eða fyrirmæli um það hvernig aðildarríki skuli ákvarða örorku og hvernig ákvarða skuli bætur vegna slíkrar örorku.

40. Tilskipanirnar hefðu þurft að vera nákvæmari en þær eru nú ef tilgangurinn hefði verið sá að samræma á einhvern hátt nánari reglur um það með hvaða hætti landsréttur ætti að tryggja hæfilegar bætur til þeirra sem verða fyrir tjóni vegna umferðarslysa.

42. Aðstæður eru þvert á móti aðrar. Tilskipanirnar hafa einmitt að geyma ýmis ákvæði sem mæla fyrir um að álitamál sem varða útreikning og ákvörðun bóta beri að leysa á grundvelli landsréttar. Þessa ályktun má draga af orðalagi ýmissa ákvæða tilskipananna. Vísað er til fyrstu undirmálsgreinar 4. mgr. 1. gr. annarrar tilskipunarinnar um ökutækjatryggingar þar sem skýrt kemur fram að greiðsla til tjónþola af hendi sérstaks uppgjörsaðila skuli ekki skerða rétt aðildarríkis til að meta hvort bætur greiddar af þessum aðilum skuli teljast fullnaðarbætur eða ekki. Ennfremur kveður síðasta undirmálsgrein í 4. mgr. 1. gr. sömu tilskipunar skýrt á um það að ákvæði laga og stjórnsýslufyrirmæla í hverju aðildarríki skuli gilda um greiðslu tjónabóta af hálfu uppgjörsaðila. Orðalag 6. mgr. inngangsorða sömu tilskipunar styður þetta ennfremur:

> *"(...) Mikilvægt er að sjá til þess að sá er verður fyrir slysi geti snúið sér beint til uppgjörsaðilans sem fyrsta samskiptaðila án þess að breyta ákvæðum aðildarríkja varðandi það hvort bætur, er uppgjörsaðili greiðir, teljist fullnaðarbætur eða ekki, eða reglum sem gilda um endurkröfur (...)."*

43. Ríkisstjórn Íslands telur að tjónþola, hafi í þessu máli verði tryggð að öllu leyti sú vernd sem tilskipanirnar mæla fyrir um og hafi fengið greiddar hæfilegar bætur eins og þar er gert ráð fyrir. Frekari skuldbindingar verði ekki leiddar af EES-samningnum.

44. Þessi lögskýring er í samræmi við dómaframkvæmd, þótt bæði dómstóll EB og EFTA-dómstóllinn hafi fallist á að tilskipanirnar geti haft áhrif á ákvörðun um það hvort bætur skuli greiðast til þriðja aðila.

45. Ríkisstjórn Íslands heldur því aftur á móti fram að dómar þessara tveggja dómstóla hafi ekki þýðingu í málinu, þar sem aðstæður í þeim eru mjög ólíkar þeim sem um ræðir í þessu máli.

46. Í dómi EFTA-dómstólsins í *Finanger*-málinu, gekk norsk löggjöf lengra í því að útiloka einstaklinga frá bótarétti með öllu. Í þessu máli á tjónið sem Halla Helgadóttir varð fyrir undir tilskipanirnar, skaðabótaábyrgð Daníels Hjaltasonar og Vátryggingafélags Íslands hf. er viðurkennd, lágmarkfjárhæðir sem mælt er fyrir um í tilskipununum og landsrétti tryggja Höllu Helgadóttur bætur og bætur verið greiddar til hennar vegna þess tjóns sem hún varð fyrir.

47. Furthermore, the EC-Court's ruling in the *Bernáldez* case, like *Finanger*, emphasises the objectives of the Directives, *viz*, to guarantee comparable treatment to victims of accidents, irrespective of where in the Community the accident occurs.

48. Reference is also made to the *Ferreira* ruling of the Court of Justice of the European Communities, in which it was confirmed that the intention of the Directives was not to harmonise the rules of the Member States governing civil liability.

49. The Icelandic Government submits that current legislation in Iceland fulfils this objective, since adequate compensation and compulsory insurance coverage is guaranteed.

50. Furthermore, the Icelandic legislation is proportionate, since all victims are guaranteed compensation and insurance coverage irrespective of the type of damage incurred, without prejudice to the principle of assumption of risk.

51. In addition, the Icelandic Government submits that, even in cases where the Court of Justice of the European Communities has addressed the question of compensation in the case of non-implementation or incorrect implementation of an act, that Court has not created any standardised formula to be used for calculating damages or compensation but has instead referred that matter to the national court in each case, with the only guideline being that the compensation should be along the same lines as normally applicable under the domestic legal order.[12]

52. Lastly, the Icelandic Government submits that, even if the EFTA Court were to find that, as a matter of principle, the rules applied in this particular case for calculating compensation to Ms Helgadóttir jeopardised the objectives of the Directives for receiving adequate compensation, that would not apply in the present case. The Icelandic Government submits that the compensation offered to Ms Helgadóttir is adequate.

53. It has to be borne in mind that section 8 of the Tort Damages Act is only applied in cases where there are no objective criteria, such as income, to rely on as a basis for calculation of compensation covering potential loss of future income as a consequence of the accident.

54. The rule contained in section 8 of the Tort Damages Act is an objective rule covering individuals in the specific circumstances described in the provision, children and individuals without income. A similar rule is to be found in *inter alia* Danish legislation.[13] The rule is proportionate and aimed at guaranteeing

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12 *Francovich*.

13 See footnote 8.

47. Ennfremur er í dómi dómstóls EB í *Bernáldez*-málinu, eins og í *Finanger*-málinu, lögð áhersla á markmið tilskipananna, sem eru að tryggja sambærilega meðferð tjónþola vegna slysa, óháð því hvar innan bandalagsins slys verður.

48. Vísað er til dóms dómstóls EB í *Ferreira*-málinu þar sem staðfest var að markmið tilskipananna hafi ekki verið að samræma reglur aðildarríkjanna varðandi skaðabótaábyrgð.

49. Ríkisstjórn Íslands telur að gildandi löggjöf á Íslandi sé í samræmi við þessi markmið, þar sem þar sé mælt fyrir um hæfilegar bætur og lögbundna ábyrgðartryggingu.

50. Ennfremur sé íslenska löggjöfin við hæfi, þar sem öllum tjónþolum séu tryggðar bætur og vátryggingavernd óháð því hvers konar tjón er um að ræða og taki tillit til reglunnar um eigin áhættu.

51. Að auki heldur ríkisstjórn Íslands því fram að jafnvel í málum þar sem dómstóll EB hefur fjallað um álitaefni varðandi skaðabætur vegna þess að EES-gerðir hafi ekki verið réttilega lögfestar eða það gert á ófullnægjandi hátt, hafi dómstóllinn ekki sett fram neinar reglur til leiðbeiningar um það hvernig reikna beri tjón eða bætur. Þess í stað hefur hann um þau atriði vísað til þess dómstóls aðildarríkis sem fer með málið. Einu leiðbeiningarnar eru þær að bætur skuli ákvarðaðar með sama hætti og almennt er á grundvelli landsréttar. [12]

52. Að lokum heldur ríkisstjórn Íslands því fram að í þessu máli hafi reglur um bótaákvörðun ekki gengið gegn markmiðum tilskipananna um fullnægjandi bætur, þó að EFTA-dómstóllinn kæmist að þeirri niðurstöðu að reglurnar væru að meginstefnu því marki brenndar. Ríkisstjórnin heldur því fram að bæturnar, sem Höllu Helgadóttur voru boðnar, hafi verið fullnægjandi.

53. Hafa verður í huga að 8. gr. skaðabótalaganna á aðeins við þegar ekki er við að styðjast neinar hlutlægar viðmiðanir, eins og tekjur, til að byggja á við útreikning skaðabótabóta sem taka eiga til líklegs tjóns vegna slyssins í framtíðinni.

54. Reglan í 8. gr. skaðabótalaganna er hlutlæg regla sem tekur til einstaklinga sem hinar sérstöku aðstæður, sem lýst er í ákvæðinu, eiga við um, þ.e. börn og aðra einstaklinga sem ekki hafa atvinnutekjur. Svipaða reglu er m.a að finna í

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12 *Francovich*-málið.

victims full compensation for their non-pecuniary damage as well as for damage as a result of permanent disability.

55. However, if the Court finds that the Directives should be interpreted as suggested by Ms Helgadóttir, the Icelandic Government submits that section 8 of the Tort Damages Act does fulfil the obligations contained in the Directives, since it does guarantee victims adequate compensation.

56. The Icelandic Government suggests answering the questions as follows:

> *'1. It is compatible with the provisions of the Agreement on the European Economic Area to determine the compensation payable to victims under the third-party liability insurance of a motor vehicle in accordance with national tort statutes providing for standardised compensation based on a tier of non-pecuniary loss (medical disability tier), regardless of a tier of permanent disability (occupational disability tier), in cases of victims who, on the date of an accident, make use of their earning capacity in a manner providing them with little or no earnings from employment.*
>
> *2 The Directives do not provide for minimum compensation for a victim in that situation.*
>
> *As a consequence questions 3 and 4 need not to be answered.'*

The Norwegian Government

57. In the view of the Norwegian Government, the main purpose of the Directives is to remove barriers to the free movement of motor vehicles and persons within the European Economic Area resulting from disparities between national provisions on liability insurance for motor vehicles, as evidenced by the seventh and eighth paragraphs of the preamble to the First Motor Vehicle Insurance Directive.

58. Both the placing of the Directives in Annex IX to the EEA Agreement and the purpose of the Directives indicates that they are not intended to harmonise the substantive liability for road traffic accidents throughout the Community and the EEA. The objective of the Directives is only to ensure that the civil liability arising under the Member States' domestic law is covered by insurance which complies with the Directives.

59. The Norwegian Government states that the Directives do not contain any provisions which directly answer the question in the case at hand. However, the Directives cannot be interpreted as prohibiting standardised compensation of the kind described in the first question.

danskri löggjöf.[13] Reglan er við hæfi og hefur það að markmiði að tryggja tjónþolum fullar bætur vegna miska og varanlegrar örorku.

55. Ef dómurinn á hinn bóginn telur að skýra beri tilskipanirnar eins og Halla Helgadóttir leggur til bendir ríkisstjórn Íslands á að 8. gr. skaðabótalaganna fullnægir skuldbindingunum sem felast í tilskipununum, þar sem þau tryggja tjónþolum hæfilegar bætur.

56. Ríkisstjórn Íslands leggur til að spurningunum verði svarað á eftirfarandi hátt:

> *"1. Það samræmist samningnum um evrópska efnahagssvæðið að ákvarða bætur til tjónþola samkvæmt ábyrgðartryggingu vélknúinna ökutækja á grundvelli ákvæða landsréttar sem mæla fyrir um staðlaðar bætur á grundvelli miskastigs (læknisfræðilega metins örorkustigs), en óháð varanlegu örorkustigi (fjárhagslega metnu örorkustigi), þegar um er að ræða tjónþola, sem á slysdegi nýta vinnugetu sína þannig, að þeir hafa litlar eða engar vinnutekjur.*
>
> *2 Tilskipanirnar mæla ekki fyrir um lágmarksbætur til tjónþola við þær aðstæður.*
>
> *Af framangreindu leiðir að ekki er ástæða til að svara spurningum 3 og 4."*

Ríkisstjórn Noregs

57. Að áliti ríkisstjórnar Noregs er meginmarkmið tilskipananna að afnema hindranir á frjálsi för ökutækja og fólks á evrópska efnahagssvæðinu, sem leiða af ólíkum reglum einstakra landa um ábyrgðartryggingar vélknúinna ökutækja. Þetta er ljóst af ákvæði 7. og 8. mgr. inngangsorða fyrstu tilskipunarinnar um ökutækjatryggingar.

58. Sú staðreynd að vísað er til þessara tilskipana í viðauka IX og markmið tilskipananna benda til að þeim sé ekki ætlað að samræma efnisreglur um skaðabótaábyrgð vegna umferðarslysa innan bandalagsins og á evrópska efnahagssvæðinu. Markmið tilskipananna er eingöngu að sjá til þess að skaðabótaábyrgð, sem stofnast á grundvelli ákvæða landsréttar, sé mætt með ábyrgðartryggingum sem samrýmast tilskipununum.

59. Ríkisstjórn Noregs telur að tilskipanirnar hafi ekki að geyma nein ákvæði sem beinlínis svara spurningunum sem leitað er svara við í máli þessu. Hún telur aftur á móti að ekki sé unnt að skýra tilskipanirnar þannig að þær banni staðlaðar bætur af því tagi sem fyrsta spurningin lýtur að.

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[13] Sjá neðanmálsgrein 8.

60. Reference is made to the rulings in *Ferreira* and *Finanger*, Article 3(1) of the First Motor Vehicle Insurance Directive, Articles 1 and 2 of the Second Motor Vehicle Insurance Directive, and Article 1 of the Third Motor Vehicle Insurance Directive.

61. In *Ferreira*, the Court of Justice of the European Communities held that the original version of Article 3(1) of the First Motor Vehicle Insurance Directive left it to the Member States to determine which damage was covered and the terms and conditions of compulsory insurance needed to cover civil liability. Article 3(1) of that Directive states that each Member State is to take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance, whereas the extent of the liability covered and the terms and conditions of the insurance cover are to be determined on the basis of those measures. The same wording is found again in the second recital in the preamble to the Second Motor Vehicle Insurance Directive.

62. In order to reduce the disparities which continued to exist between the laws of the Member States as regards the extent of the obligation to insure,[14] Article 1 of the Second Motor Vehicle Insurance Directive imposed amounts of mandatory cover for civil liability for damage to property and personal injuries, while Article 3 of the same Directive provided that, as regards personal injuries, members of the family of the insured person or of the driver may not be excluded from cover because of their familial relationship. Article 1 of the Third Motor Vehicle Insurance Directive extended that obligation to provide cover for personal injuries to passengers other than the driver.

63. The Second Motor Vehicle Insurance Directive still only imposes requirements as to the insurance cover of injured third persons, whereas it is left to national law to regulate their position under the law of torts.

64. The wording of the Third Motor Vehicle Insurance Directive gives further indication that it is only the insurance cover that is being governed, not the liability for compensation or the extent of such liability. Furthermore, Article 2 of the Third Motor Vehicle Insurance Directive provides that Member States shall take the necessary steps to ensure that all compulsory insurance policies against civil liability arising out of the use of vehicles: (1) cover, on the basis of a single premium, the entire territory of the Community; and (2) guarantee, on the basis of the same single premium, in each Member State, the cover required by its law or the cover required by the law of the Member State where the vehicle is normally based when that cover is higher. This clearly shows that the compulsory insurance is meant to cover the compensation the injured party is entitled to

[14] Third recital in the preamble to the Second Motor Vehicle Insurance Directive.

60. Vísað er til dómanna í *Ferreira* og *Finanger* málunum, 1. mgr. 3. gr. fyrstu tilskipunarinnar um ökutækjatryggingar, 1. og 2. gr. annarrar tilskipunarinnar um ökutækjatryggingar og 1. gr. þriðju tilskipunarinnar um ökutækjatryggingar.

61. Í *Ferreira*-málinu komst dómstóll EB að þeirri niðurstöðu að upphafleg gerð 1. mgr. 3. gr. fyrstu tilskipunarinnar um ökutækjatryggingar fæli aðildarríkjunum að ákvarða hvaða tjón skyldi bætt og skilmála og skilyrði lögbundinna ábyrgðartrygginga. Samkvæmt 1. mgr. 3. gr. þeirrar tilskipunar ber sérhverju aðildarríki að gera allar nauðsynlegar ráðstafanir til þess að sá sem ábyrgð ber á notkun ökutækis sem að öllu jöfnu er staðsett á yfirráðasvæði þess ríkis, hafi ábyrgðartryggingu, en umfang ábyrgðarinnar og skilmálar og skilorð vátryggingarinnar ákvarðast af þessum ráðstöfunum. Sama orðalag er síðan í 2. mgr. inngangsorða annarrar tilskipunarinnar um ökutækjatryggingar.

62. Í því skyni að draga úr ósamræmi sem áfram var við lýði í löggjöf einstakra aðildarríkja að því er varðar umfang skyldunnar til að ábyrgðartryggja,[14] var með 1. gr. annarrar tilskipunarinnar sett fram regla um lágmarks tryggingabætur vegna muna- og líkamstjóns. Í 3. gr. sömu tilskipunar var jafnframt mælt svo fyrir, að því er líkamstjón varðar, að ekki mætti undanskilja fjölskyldumeðlimi tryggingartaka eða ökumanns vegna fjölskyldutengslanna. Ákvæði 1. gr. þriðju tilskipunarinnar um ökutækjatryggingar mælti fyrir um frekari skyldur að því er varðar tryggingar vegna líkamstjóns á farþegum, öðrum en ökumanni.

63. Önnur tilskipunin um ökutækjatryggingar mælir, sem fyrr, aðeins fyrir um kröfur varðandi tryggingavernd þriðja manns sem verður fyrir tjóni, en eftirlætur landsrétti að mæla fyrir um réttarstöðu þeirra samkvæmt skaðabótareglum.

64. Orðalag þriðju tilskipunarinnar um ökutækjatryggingar gefur ennfremur fekari vísbendingar um að það sé aðeins tryggingaverndin sem höfð sé í huga, en ekki skaðabótaábyrgðin sem slík eða umfang hennar. Ennfremur mælir 2. gr. þriðju tilskipunarinnar um ökutækjatryggingar svo fyrir að aðildarríkin skuli gera nauðsynlegar ráðstafanir til að sjá til þess að lögboðnar ábyrgðartryggingar vegna notkunar ökutækis: (1) gildi alls staðar á yfirráðasvæði bandalagsins á grundvelli eins og sama iðgjalds; og (2) veiti, á grundvelli þessa eina og sama iðgjalds, þá vernd í hverju aðildarríki sem kveðið er á um í lögum viðkomandi ríkis, eða þá vernd sem lög kveða á um í aðildarríkinu þar sem ökutækið er að jafnaði staðsett, þegar sú vernd er víðtækari. Þetta sýnir ljóslega að hin lögboðna trygging hefur það að markmiði að tryggja greiðslu þeirra bóta til þriðja manns sem hann á rétt

[14] 3. mgr. inngangsorða annarrar tilskipunarinnar um ökutækjatryggingar.

under the relevant laws of tort, but not to govern the domestic laws of tort or the rules concerning compensation amounts.[15]

65. In the opinion of the Norwegian Government, the wording of the Directives thus shows that the way in which the Member States regulate liability for compensation is not affected by the Directives.

66. This interpretation is confirmed by the Fourth Motor Vehicle Insurance Directive,[16] in which the sixth and thirteenth recitals of the preamble refer to the fact that the green card bureau system does not solve all the problems of an injured party having to claim in another country against a party resident there and an insurance undertaking authorised there (foreign legal system, foreign language, unfamiliar settlement procedures and often unreasonably delayed settlement). However, a system of having claims representatives in the injured party's Member State of residence affects neither the substantive law to be applied in each individual case nor the matter of jurisdiction.

67. This view is also confirmed by the ECJ in *Ferreira*. It follows from the conclusions of that decision that Article 3(1) of the First Motor Vehicle Insurance Directive, as amplified and supplemented by the Second and Third Motor Vehicle Insurance Directives, requires the Member States to ensure that civil liability arising under their domestic law in respect of the use of vehicles normally based in their territory is covered by insurance and specifies *inter alia* the types of loss or injury and the third-party victims to be covered by that insurance. However, the provision does not state what type of civil liability, for risk or for fault, is to be covered, nor does it regulate the rules observed by the Member States as regards determination of compensation amounts.

68. In the view of the Norwegian Government, it is clear that the Directives impose requirements regarding insurance cover but that they do not affect the substance of national law relating to torts and compensation. The crucial point is that the insurance cover must square with the liability for compensation.

69. However, the EFTA Court in *Finanger* held that the distinction between personal liability and insurance cover is less clear-cut. In the opinion of the Norwegian Government, the suggested answer to the first question set out below is not incompatible with the Court's findings in *Finanger*. The present case does not involve excluding certain situations from insurance coverage altogether. By its first question, the national court only seeks to know whether a standardised

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15 One possible exception is the minimum amounts of cover laid down in Articles 1(2) and 5(3) of the Second Motor Vehicle Insurance Directive, cf. *Ferreira* (the second question).

16 Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC, OJ 2000 L 181, p. 65.

til samkvæmt viðeigandi skaðabótareglum, en ekki að hafa áhrif á skaðabótareglur landsréttar eða reglur sem kveða á um bótafjárhæðir.[15]

65. Það er skoðun ríkisstjórnar Noregs, að orðalag tilskipananna sýni þannig að þeim sé ekki ætlað að hafa áhrif á það hvernig reglum um skaðabótaábyrgð er háttað.

66. Þessi túlkun er staðfest í fjórðu tilskipuninni um ökutækjatryggingar,[16] þar sem 6. og 13. mgr. inngangsorða hennar vísa til þeirrar staðreyndar að skrifstofukerfi fyrir græn skírteini leysi ekki úr öllum vandkvæðum tjónþola við að heimta bætur í öðru ríki úr hendi aðila sem er búsettur þar og löggiltum vátryggjanda þar (erlent lagakerfi, erlent tungumál, annað kerfi við úrlausn máls og oft óhæfilegur dráttur á úrlausn þess). Aftur á móti hefur kerfi tryggingarfulltrúa í því aðildarríki þar sem tjónþoli er búsettur hvorki áhrif á það hvaða lögum skuli beitt né á lögsögu.

67. Þetta sjónarmið er einnig staðfest af dómstól EB í *Ferreira*-málinu. Það leiðir af niðurstöðu í því máli að 1. mgr. 3. gr. fyrstu tilskipunarinnar um ökutækjatryggingar, eins og hún hefur verið þróuð og aukin í annarri og þriðju tilskipuninni, mælir svo fyrir að aðildarríki skuli sjá til þess, að skaðabótaábyrgð, sem stofnast á grundvelli landsréttar vegna notkunar ökutækja sem að jafnaði eru staðsett á yfirráðasvæði þess, sé mætt með ábyrgðartryggingu. Þar skal tekið fram m.a. tegundir tjóns og áverka og þriðju aðila sem njóta eiga tryggingaverndar. Aftur á móti kemur ekki fram í ákvæðinu hvers konar ábyrgð, vegna áhættu eða sakar, vátrygging á að að mæta, né mælir það fyrir um hvers efnis reglur aðildarríkjanna um ákvörðun bótafjárhæðar skuli vera.

68. Það er skoðun ríkisstjórnar Noregs að það sé ljóst að tilskipanirnar mæla fyrir um kröfur varðandi tryggingavernd, en þær hafi ekki áhrif á efni landsréttar varðandi skaðabótaábyrgð og bætur. Meginatriðið er að tryggingin sé í samræmi við bótaábyrgðina.

69. EFTA-dómstóllinn hefur aftur á móti komist að þeirri niðurstöðu í *Finanger*-málinu að greinarmunurinn á persónulegri skaðabótaábyrgð og tryggingu sé ekki skýr. Það er skoðun norsku ríkisstjórnarinnar, að tillaga hennar um svar við fyrstu spurningunni, sem fram kemur hér á eftir, sé ekki í ósamræmi við niðurstöðu EFTA-dómstólsins í *Finanger*-málinu. Það mál sem hér liggur fyrir felur ekki í sér að tilteknar aðstæður séu með öllu útilokaðar frá tryggingavernd. Með fyrstu spurningunni óskar dómstóllinn aðeins eftir svari við því hvort staðlaðar reglur vegna ákvörðunar tjóns í sérstökum tilfellum séu

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15 Hugsanleg undantekning eru lágmarksvátryggingarfjárhæðir skv. 2. mgr. 1. gr. og 3. mgr. 5. gr. annarrar tilskipunarinnar um ökutækjatryggingar, sbr. *Ferreira*-málið (2. spurningu).

16 Tilskipun þingsins og ráðsins nr. 2000/26/EC frá 16 maí 2000 um samræmingu á lögum aðildarríkja um ábyrgðartryggingu vegna notkunar vélknúinna ökutækja og breytingu á tilskipunum ráðsins nr. 73/239/EBE og 88/357/EBE, OJ 2000 L 181, bls. 65.

system for calculation of damages in certain situations is compatible with EEA law. Accordingly, the distinction should be decisive in the present case.

70. The Norwegian Government proposes the following answer to the first question:

> *'It is compatible with the provisions of the Agreement on the European Economic Area, in particular Council Directives on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, Nos. 72/166/EEC of 24 April 1972, 84/5/EEC of 30 December 1983, and 90/232/EEC of 14 May 1990, as amended, to determine the compensation payable to victims under the third-party liability insurance of a motor vehicle in accordance with national tort statutes providing for standardised compensation based on a tier of non-pecuniary loss (medical disability tier), regardless of a tier of permanent disability (occupational disability tier), in cases of victims who, on the date of an accident, make use of their earning capacity in a manner providing them with little or no earnings from employment.'*

The EFTA Surveillance Authority

71. Concerning the principles of the Motor Vehicle Insurance Directives, the EFTA Surveillance Authority refers to the *Finanger* and *Ferreira* rulings. Following that case-law, the Directives do not state that national provisions may exclude certain groups of the population or certain situations from insurance cover compared to other groups. The Directives are silent in this respect. There can, therefore, be no doubt that motor vehicle insurance cover for liability must be secured for all groups of the population, including those groups with no or little income.

72. In addition to the text of the Second Motor Vehicle Insurance Directive itself, the fifth recital in the preamble, cited previously, contains a reference to the relative extent of the coverage.

73. The wording of the Directives does not provide any guidelines which make it possible to assess or further qualify or quantify the concept of 'personal injury' contained in the wording of the Second Motor Vehicle Insurance Directive. Therefore, the national legislators can also define the further content of that concept.

74. It is clear that the Directives are to provide for insurance coverage for all personal injuries sustained on the territory of the EEA State where the damage occurs. The basis for the damage assessment and the calculation cannot, however, be found in the wording of the Directives themselves, but must be found in national law. Even so, as the EFTA Court has indicated in *Finanger* and the Court of Justice of the European Communities in *Ferreira*, it must be borne

samrýmanlegar EES-rétti. Af því leiðir, að greinarmunurinn ræður úrslitum í þessu máli.

70. Ríkisstjórn Noregs leggur til að fyrstu spurningunni verði svarað á eftirfarandi hátt:

> *"Það samræmist samningnum um evrópska efnahagssvæðið, sbr. einkum tilskipanir ráðsins um samræmingu á lögum aðildarríkja um ábyrgðartryggingu vegna notkunar vélknúinna ökutækja nr. 72/166/EBE frá 24. apríl 1972,84/5/EBE frá 30. desember 1983 og 90/232/EBE frá 14. maí 1990, með síðari breytingum, að ákvarða bætur til tjónþola á grundvelli ábyrgðartryggingar bifreiða samkvæmt ákvæðum skaðabótalaga landsréttar sem mæla fyrir um staðlaðar bætur á grundvelli miskastigs (læknisfræðilega metins örorkustigs), en óháð varanlegu örorkustigi (fjárhagslega metnu örorkustigi), þegar um er að ræða tjónþola, sem á slysdegi nýta vinnugetu sína þannig, að þeir hafa litlar eða engar vinnutekjur."*

Eftirlitsstofnun EFTA

71. Að því er varðar meginreglur tilskipananna um ökutækjatryggingar, vísar Eftirlitsstofnun EFTA til dóma í *Finanger* og *Ferreira* málunum. Samkvæmt þessum dómum fela tilskipanirnar ekki í sér heimildir til þess að útiloka í landsrétti tiltekna hópa eða tilteknar aðstæður frá tryggingavernd sem aðrir hópar njóta. Tilskipanirnar sjálfar segja ekkert um þetta. Það er því enginn vafi á því að vátrygging vegna vélknúinna ökutækja verður að vernda alla þjóðfélagshópa, einnig þá sem hafa litlar eða engar tekjur.

72. Til viðbótar við meginmál annarrar tilskipunarinnar um ökutækjatryggingar, felur 5. mgr. inngangsorða hennar, sem fyrr er vitnað til, í sér tilvísun til afstæðs umfangs tryggingaverndarinnar.

73. Orðalag tilskipananna felur ekki í sér neinar leiðbeiningar sem gera það kleift að meta eða afmarka frekar eða skýra hugtakið "líkamstjón", sem er að finna í annarri tilskipuninni um ökutækjatryggingar. Af því leiðir að löggjafinn í einstökum ríkjum getur nánar afmarkað inntak þessa hugtaks.

74. Það er ljóst að tilskipununum er ætlað að mæla fyrir um tryggingavernd vegna alls líkamstjóns sem verður innan EES-ríkja. Grundvöll fyrir mati á tjóni og útreikning bóta er aftur á móti ekki að finna í orðalagi tilskipananna sjálfra, heldur er hann að finna í landsréttinum. Þrátt fyrir þetta verður að hafa í huga, eins og bent er á af EFTA-dómstólnum í *Finanger*-málinu og af dómstól EB í *Ferreira*-málinu, að lögjafinn í einstökum ríkjum er bundinn af vissum

in mind that the national legislator is bound by certain *de minimis* standards with regard to insurance coverage.

75. Even though the Motor Vehicle Insurance Directives do not regulate the principles for calculating economic loss sustained by the victim, the amounts in respect of which insurance is compulsory must in any event guarantee victims 'adequate compensation', irrespective of the EEA State in which the accident occurs.

76. This does not mean that a standardised system for compensation will necessarily run counter to the Directives. It will only be contrary to the Directives if the effect is that adequate compensation and insurance coverage is rendered impossible within the framework of that system.

77. A system based on a standard created to take due care of the victim by securing 'adequate compensation' and which generally leads to a fair result will, in principle, not be contrary to the Motor Vehicle Insurance Directives.

78. A national legal system under which a victim's future potential ability to earn income is assessed individually by the courts may, especially for younger victims, sometimes lead to widely varying results and, in some cases, maybe a more unfair result than under a standardised system.

79. Problems with a standardised system may arise where, in reality, it functions as a cut-off clause for insurance coverage for victims belonging to a certain group or groups of the population. A national provision that leads to the result that a certain group of victims of road traffic accidents may under no circumstances be awarded the compensation provided for under the minimum requirements set out in Article 1(2) of the Second Motor Vehicle Insurance Directive cannot be accepted.

80. However, section 8 of the Icelandic Tort Damages Act, as it stood at the time of the accident, does not bear the characteristics of a cut-off clause which makes it impossible for the national court to award adequate compensation up to the minimum level as prescribed by Article 1(2) of the Second Motor Vehicle Insurance Directive.

81. The EFTA Surveillance Authority thus proposes to answer the first question as follows:

> *'The Motor Insurance Directives, and in particular Article 1(2) of the Act referred to in point 9 of Annex IX to the EEA Agreement (Second Council Directive 84/5/EEC of 30 December 1983, on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles), must be interpreted so as not to preclude a national law that links the medicinal disability factor to the compensation to be paid, for pecuniary damage in the form of compensation for occupational loss, to victims with little or no income previous to the accident.'*

lágmarksreglum um tryggingavernd.

75. Þótt tilskipanirnar um ökutækjatryggingar hafi ekki að geyma reglur um útreikning á fjárhagslegu tjóni verða bætur til tjónþola, vegna lögbundinna trygginga, í öllu falli að vera ”hæfilegar”, óháð því í hvaða EES-ríki slys hefur orðið.

76. Í þessu felst ekki nauðsynlega að staðlaðar reglur um útreikning bóta séu ósamrýmanlegar tilskipununum. Það væru þær aðeins ef reglurnar hefðu þau áhrif að hæfilegar bætur og fullnægjandi tryggingavernd væri útilokuð á grundvelli þeirra.

77. Kerfi sem byggt er á því að tekið er hæfilegt tillit til hagsmuna tjónþola með því að tryggja honum ”hæfilegar bætur” og sem almennt leiðir til sanngjarnrar niðurstöðu, er að meginstefnu til, ekki andstætt tilskipununum um ökutækjatryggingar.

78. Reglur landsréttar sem hafi að geyma fyrirmæli um að mögulega skerðingu á aflahæfi tjónþola í framtíðinni eigi að meta á einstaklingsbundinn hátt af dómstólum, einkum þegar um er að ræða unga tjónþola, getur oft leitt til mjög ólíkra niðurstaðna, og jafnvel í sumum tilvikum til ósanngjarnari niðurstaða en staðlaðar reglur leiða til.

79. Vandamál varðandi staðlaðar reglur koma einkum upp, þegar þær í reynd hafa þau áhrif að tjónþolar sem tilheyra ákveðnum þjóðfélagshópum eru útilokaðir frá tryggingavernd. Ákvæði landsréttar sem leiða myndu til þeirrar niðurstöðu, að vissir hópar tjónþola í umferðarslysum gætu ekki undir nokkrum kringumstæðum fengið bætur í samræmi við þær lágmarksreglur sem koma fram í 2. mgr. 1. gr. annarrar tilskipunarinnar um ökutækjatryggingar, væru óásættanleg.

80. Ákvæði 8. gr. íslensku skaðabótalaganna, eins og hún var þegar slysið átti sér stað, ber ekki einkenni útilokunarreglu sem leiðir til þess að dómstóll aðildarríkis geti ekki kveðið á um hæfilegar bætur sem eru í samræmi við það lágmark sem kveðið er á um í 2. mgr. 1. gr. annarrar tilskipunarinnar um ökutækjatryggingar.

81. Eftirlitsstofnun EFTA leggur til að fyrstu spurningunni verði svarað á eftirfarandi hátt:

> *”Tilskipanirnar um ökutækjatryggingar, sbr, einkum 2. mgr. 1. gr. gerðar þeirrar sem vísað er til 9. tölulið IX. viðauka við EES-samninginn (Önnur tilskipunin um ökutækjatryggingar nr. 84/5/EBE frá 30. desember 1983, um samræmingu á lögum aðildarríkjanna um ábyrgðartryggingu vegna notkunar vélknúinna ökutækja), ber að skýra þannig að þær útiloki ekki að reglur landsréttar tengi læknisfræðilega örorku og bætur sem greiða skal vegna skertrar vinnugetu þeim tjónþolum, sem hafa haft litlar eða engar vinnutekjur fyrir slysið.”*

Commission of the European Communities

82. The Commission of the European Communities points out that there are a number of elements concerning both the facts of the case and the applicable national law which remain unclear. It follows that certain doubts exist as to which, precisely, are the provisions of Community/EEA law to be considered and how, then, they would be applied to the case at hand.

83. It remains unclear as to why there was agreement between the Parties as to liability to compensation in the light of the (at the time) 15% cut-off percentage for non-pecuniary damage; why there seems to be a discrepancy in the amounts of compensation paid; the relevance of the amendments to the 1993 Act and the decision of the Supreme Court; the basis on which compensation to Ms Helgadóttir has, in fact, been calculated and the method used to arrive at that compensation.

84. The Commission refers to Article 1(1) and (2) of the Second Motor Vehicle Insurance Directive and states that the motivation for this article is provided in the fifth recital of that Directive, cited previously.

85. However, the Motor Vehicle Insurance Directives do not, in the absence of harmonisation in this area of the law, lay down any rules as to how compensation to victims of traffic accidents is to be calculated. This remains for the national legislator and the national courts to decide.

86. Reference is also made to the rulings in *Bernáldez, Finanger* and *Ferreira.*

87. In *Ferreira*, the Court of Justice of the European Communities considered a case involving the death of a member of the family of the insured person. It held that:

> *'Article 3(1) of the First [Motor Insurance] Directive, as amplified and supplemented by the Second and Third [Motor Insurance] Directives, thus requires the Member States to ensure that civil liability in respect of the use of vehicles normally based on their territory is covered by insurance, and specifies,* inter alia*, the types of loss or injury and the third-party victims to be covered by that insurance. On the other hand, that provision does not state what type of civil liability, for risk or for fault, is to be covered.'* (paragraph 27)
>
> *'(...) It follows that, as Community law stands at present, the Member States are free to determine the type of civil liability applicable to road-traffic accidents. However, they must ensure that the civil liability arising under their domestic law is covered by insurance which complies with [the Motor Vehicle Insurance Directives].'* (paragraph 29)

Framkvæmdastjórn Evrópubandalaganna

82. Framkvæmdastjórn Evrópubandalaganna bendir á að mörg atriði bæði varðandi staðreyndir málsins og þau ákvæði landsréttar sem eiga við í málinu séu óljós. Af því leiðir að viss vafi er um það hvaða ákvæði bandalagsréttar eða EES-réttar það eru sem koma til skoðunar og hvernig þeim yrði þá beitt í málinu sem hér liggur fyrir.

83. Það er enn óljóst hvers vegna aðilar gerðu samning um bótagreiðslur í ljósi þess að reglan var sú á þeim tíma er slysið varð að ekki skyldu greiðast bætur vegna miska sem var undir 15%; hvers vegna það virðist vera ósamræmi í bótagreiðslum sem þegar hafa verið inntar af hendi; hver sé þýðing breytinganna sem gerðar hafa verið á lögunum frá 1993 og dóma Hæstaréttar; hver sé grundvöllinn að útreikningi á bótum sem Höllu Helgadóttur hafa verið greiddar og aðferðin sem notuð var til að finna út þá fjárhæð.

84. Framkvæmdastjórnin vísar til 1. mgr. 1. gr. og 2. gr. annarrar tilskipunarinnar um ökutækjatryggingar og bendir á að tilgangurinn með þessu ákvæði komi fram í 5. mgr. inngangsorða þeirrar tilskipunar, sbr. tilvísun til hennar hér að framan.

85. Tilskipanirnar um ökutækjatryggingar fela þó ekki í sér, þar sem ekki er gert ráð fyrir samræmingu á þessu sviði réttarins, neinar reglur um það hvernig skaðabætur til tjónþola í umferðarslysum skuli reiknaðar. Það er eftirlátið lagasetningarvaldinu og dómstólum í einstökum aðildarríkjum að kveða á um þetta.

86. Ennfremur er vísað til *Bernáldez, Finanger* og *Ferreira* málanna.

87. Í *Ferreira*-málinu, fjallaði Evrópudómstóllinn um mál sem varðaði dauða fjölskyldumeðlims hins tryggða. Í dóminum segir:

> *"Ákvæði 1. mgr. 3. gr. fyrstu tilskipunarinnar [um ökutækjatryggingar] eins og hún var útvíkkuð og aukin í annarri og þriðju tilskipununum [um ökutækjatryggingar] leggur þannig þá skyldu á herðar aðildarríkjum að sjá til þess að skaðabótaábyrgð, sem stofnast vegna notkunar vélknúins ökutækis sem að öllu jöfnu er staðsett á yfirráðasvæði þess, sé mætt með vátryggingu, og sem tilgreinir m.a. hvers konar tjón eða meiðsli og hvaða tjónþolar það eru sem tryggja skuli. Á hinn bóginn kveður þetta ákvæði ekki á um það hvers konar ábyrgð, vegna áhættu eða sakar, það er sem tryggingin skal taka til."* (27. grein)
>
> *"(...) Af þessu leiðir, að samkvæmt bandalagsrétti eins og hann er nú, er aðildarríkjunum frjálst að mæla fyrir um skaðabótaábyrgð vegna umferðarslysa. Þeim er aftur á móti skylt að sjá til þess að ábyrgð sem stofnast á grundvelli ákvæða landsréttar sé mætt með vátryggingum sem fullnægja reglum þeim sem fram koma í tiskipununum [um ökutækjatryggingar]."* (29. grein)

88. That Court went on to state:

> *'However, it is clear from paragraph 29 above that the civil liability which, under the domestic law of the Member State in question, applies to road-traffic accidents must be covered by insurance and that that insurance must adhere to the minimum amount of cover laid down in Articles 1(2) (…) of the Second [Motor Insurance] Directive (…). Consequently, in the case of accidents to which that type of civil liability attaches, the Member State's domestic law may not lay down maximum limits for compensation which are lower than the said minimum amounts.'* (paragraph 40)
>
> *'(…) Articles 1(2) and 5(3) of the Second [Motor Insurance] Directive (…) preclude domestic laws laying down maximum amounts of compensation that are lower than the minimum amounts of cover laid down by those provisions where, in the absence of fault on the part of the driver of the vehicle which caused the accident, only civil liability for materialisation of risk arises.'* (paragraph 41)

89. The Commission does not consider that, on the facts given, it is in a position to put forward a specific reply to the questions raised.

90. In its written observations, the Commission limits itself to drawing the particular attention of the EFTA Court to the *Ferreira* judgment and, in particular, to the statements in paragraphs 40 and 41 of that judgment.

The second question

Halla Helgadóttir

91. Ms Helgadóttir submits that the aim of the Directives is to secure individuals compensation if they become victims of motor vehicle accidents. Both damage to property and personal injuries are to be covered. The aim of the Directives and their wording support the conclusion that they contain minimum requirements of how the amount of compensation is to be determined and how the amount is to relate to the actual damage. Otherwise, the insurance would not compulsorily cover 'damage to property and personal injuries'.

92. This conclusion is further supported by the EFTA Court's ruling in the *Finanger* case, in which it stated that the Directives must be interpreted as meaning that compulsory motor vehicle insurance must enable third-party victims of accidents caused by motor vehicles to be compensated for all actual loss incurred up to the amounts fixed in Article 1(2) of the Second Motor Vehicle Insurance Directive. Following this reasoning, the Directives must contain some minimum requirements as to how the amount of compensation is to be determined and how it must be related to the actual loss. Otherwise, victims would not be compensated for 'all actual loss incurred'.

88. Dómstóllinn segir ennfremur:

> *"Það er á hinn bóginn ljóst af 29. grein hér að framan að skaðabótaábyrgð, sem samkvæmt landsrétti aðildarríkis þess, sem málið varðar, nær til umferðarslysa, verður að mæta með vátryggingu og sú vátrygging verður að fullnægja þeim lágmarkskröfum sem settar eru fram í 2. mgr. 1. gr. annarrar tilskipunarinnar [um ökutækjatryggingar] (…). Þegar um er að ræða slys sem skaðabótaábyrgðin tekur til, leiðir af þessu, að ríkin geta ekki sett reglur í landslögum sínum um hámarksbætur sem eru lægri en fyrrgreind lágmörk."* (40. grein)
>
> *"(…) Ákvæði 2. mgr. 1. gr. og 3. mgr. 5. gr. annarrar tilskipunarinnar [um ökutækjatryggingar] (…) útiloka reglur landsréttar sem kveða á um hámarksbætur sem eru lægri en þau lágmörk sem kveðið er á um í tilvitnuðum ákvæðum, þegar ekki er um að ræða sök af hálfu ökumanns ökutækis þess sem olli slysinu en aðeins hlutlæga bótaábyrgð."* (41. grein)

89. Framkvæmdastjórnin telur sig ekki, á grundvelli þeirra upplýsinga sem fyrir liggja, vera í aðstöðu til gera sérstaka tillögu um svör við spurningunum sem settar eru fram í beiðninni.

90. Í skriflegum athugasemdum sínum lætur framkvæmdastjórnin nægja að vekja sérstaka athygli EFTA-dómstólsins á dóminum í *Ferreira*-málinu, einkum því sem fram kemur í 40. og 41. gr. dómsins.

Önnur spurningin

Halla Helgadóttir

91. Halla Helgadóttir heldur því fram að markmið tilskipananna sé að tryggja einstaklingum sem verða fyrir tjóni vegna véknúinna ökutækja bætur. Bæði bætur vegna munatjóns og líkamstjóns. Markmið tilskipananna og orðalag þeirra styðja þá niðurstöðu að þær hafi að geyma lágmarkskröfur um það hvernig bætur skuli ákvarðaðar og hvernig fjárhæð þeirra skuli tengd hinu raunverulega tjóni. Að öðrum kosti myndi tryggingin ekki, þannig að bindandi væri að lögum, taka til "munatjóns og líkamstjóns".

92. Þessi niðurstaða er ennfremur studd við niðurstöðu EFTA-dómstólsins í *Finanger*-málinu þar sem fram kemur að tilskipanirnar verði að skýra þannig að lögbundin ábyrgðartrygging vegna vélknúinna ökutækja verði að gera þriðja aðila, sem orðið hefur fyrir tjóni í slysi af völdum vélknúins ökutækis, kleift að heimta bætur fyrir raunverulegt tjón sem samræmast þeim fjárhæðum sem fram koma í 2. mgr. 1. gr. annarrar tilskipunarinnar um ökutækjatryggingar. Af þessu leiðir að tilskipanirnar hljóta að fela í sér lágmarkskröfur um það hvernig ákveða beri fjárhæð bóta og hvernig þær verða að vera tengdar hinu raunverulega tjóni. Ella fá tjónþolar ekki bætur fyrir allt tjón sem þeir hafa í raun orðið fyrir.

93. Ms Helgadóttir also points out that the right of establishment under Articles 28 to 35 of the EEA Agreement is dependent on people enjoying sufficient liability insurance protection in case of a motor vehicle accident. If there were no minimum requirements in EEA law as to how compensation were determined, the free movement of people within the EEA could easily be adversely affected.

94. Moreover, if only insufficient amounts of compensation for motor vehicle accidents were awarded in certain countries, the insurance cost of companies in those countries would be lower than the real damage incurred in motor vehicle accidents. This could result in distortion of competition between companies in those countries and in the rest of the EEA.

95. If it were to be admitted that the Contracting Parties had unrestricted freedom in deciding the amounts of compensation to be awarded to victims of motor vehicle accidents, it would jeopardise the real protection of individual rights aimed at by the Directives. The Contracting Parties could then decide, without giving any justification, that everyone suffering injuries in a motor vehicle accident should receive, for example, ISK 1 or EUR 1 or any other arbitrary unsatisfactory amount as compensation from the liability insurance.

96. The freedom of the Contracting Parties in laying down the rules concerning the compensation to be awarded to the victims of motor vehicle accidents must never supersede the Contracting Parties' duty to secure individuals satisfactory compensation for damage to their person.

97. Therefore, the correct interpretation must be that the Contracting Parties are obliged to ensure that victims of motor vehicle accidents receive compensation in reasonable correlation to the actual financial loss incurred. If this is not so, then the Contracting Party in question will have failed to fulfil the requirements of the Directives concerning minimum amount of compensation

98. Ms Helgadóttir proposes answering the second question as follows:

> *'According to the Directives the Contracting Parties are obliged to secure individuals falling victim to motor vehicle accidents compensation, which bears reasonable correlation to the actual loss they incur in such accidents. If there is not a reasonable correlation between the actual loss and the awarded compensation a Contracting Party fails to fulfil the requirements of the Directives.'*

The Norwegian Government

99. For the *Norwegian Government,* the second question contains two elements. Firstly, there is the question of whether the Directives require a certain quantitative minimum standard for compensation. Secondly, there is the question

93. Halla Helgadóttir bendir ennfremur á að staðfesturétturinn sem mælt er fyrir um í 28. – 35. gr. EES-samningsins sé undir því kominn að einstaklingar njóti fullnægjandi tryggingaverndar vegna slysa af völdum vélknúinna ökutækja. Ef ekki fælust neinar lágmarkröfur í EES-réttinum varðandi það hvernig bætur beri að ákvarða gæti það haft neikvæð áhrif á frjálsa för fólks innan evrópska efnahagssvæðisins.

94. Ennfremur, ef aðeins ófullnægjandi bætur vegna slysa af völdum vélknúinna ökutækja eru tryggðar í einstökum löndum, yrði kostnaður tryggingafélaga vegna bótagreiðslna í þessum löndum lægri en sem næmi raunverulegu tjóni vegna vélknúinna ökutækja. Þetta gæti leitt til röskunar á samkeppni milli tryggingafélaga í þessum löndum annars vegar og tryggingafélaga í öðrum ríkjum EES hins vegar.

95. Ef fallist væri á að samningsaðilar hefðu ótakmakað frelsi til að ákvarða fjárhæð skaðabóta sem greiddar eru til tjónþola sem orðið hafa fyrir slysi af völdum vélknúinna ökutækja, myndi það stefna í hættu þeirri vernd fyrir einstaklinga sem tilskipununum er í raun ætlað að veita. Samningsaðilar gætu þannig ákveðið, án þess að réttlæta það á nokkurn hátt, að hver sá sem verður fyrir tjóni vegna umferðaslyss, skuli fá til dæmis eina íslenska krónu eða eina evru í bætur, eða einhverja aðra ófullnægjandi fjárhæð, sem ákveðin væri af handahófi á grundvelli tryggingarinnar.

96. Frelsi samningsaðila til að setja reglur um skaðabætur til fórnarlamba slysa af völdum vélknúinna ökutækja á aldrei að ganga framar skyldum samningsaðila til að sjá til þess að einstaklingar fái hæfilegar bætur vegna líkamstjóns sem þeir verða fyrir.

97. Af því leiðir að rétt skýring hlýtur að vera sú að samningsaðilar eru skuldbundnir til að sjá til þess að þeir sem verða fyrir tjóni af völdum vélknúinna ökutækja fái skaðabætur í sanngjörnu samræmi við fjárhagslegt tjón sem þeir hafa í raun orðið fyrir. Ef samningsaðili gerir þetta ekki er ljóst að hann fullnægir ekki þeim kröfum sem fram koma í tilskipununum um lágmarksbætur.

98. Halla Helgadóttir leggur til að annarri spurningunni verði svarað á eftirfarandi hátt:

> *”Samkvæmt tilskipununum eru samningsaðilar skuldbundnir til að sjá til þess að einstaklingar sem orðið hafa fyrir tjóni af völdum vélknúinna ökutækja fái bætur, sem eru í sanngjörnu samræmi við raunverulegt tjón þeirra. Ef það er ekki sanngjarnt samræmi milli raunverulegs tjóns og bóta sem eru greiddar hefur samningsaðili ekki fullnægt skuldbindingum sínum samkvæmt tilskipununum.”*

Ríkisstjórn Noregs

99. Ríkisstjórn Noregs telur að tvennt felist í annarri spurningunni. Í fyrsta lagi spurningin um það hvort tilskipanirnar fela í sé tilteknar lágmarkskröfur um fjárhæð bóta. Í öðru lagi felst í henni spurningin um það hvort það samræmist

of whether a minimum level of medical disability for compensation of future occupational loss, i.e. the level of 15% under Icelandic law at the time of the accident, is compatible with the Directives.

100. The Norwegian Government initially points out that the Directives do not contain any specific provisions relating to minimum compensation to be paid to individuals out of third-party liability insurance.

101. Referring to the *Ferreira* case, in which it was held at paragraph 23 that 'the Directives do not seek to harmonise the rules of the Member States governing civil liability', the Norwegian Government states that the Directives do not intend to improve the position of victims of road-traffic accidents as compared to victims of other kinds of accidents as far as the calculation of compensation is concerned. The Icelandic system of standardised compensation, based on a certain percentage of medical disability for children and persons with little or no earnings, covers and is applicable to all types of civil liability. Thus, Ms Helgadóttir would have been covered to the same extent regardless of whether the loss had resulted from a road-traffic accident or from another type of accident. This raises the question of liability.

102. Thus, the system as such cannot be contrary to the Directives. The Directives cannot be interpreted as setting a common EEA standard for minimum compensation, or as requiring that any level of medical disability must give rise to compensation for future occupational loss.

103. The Norwegian Government distinguishes the case at hand from the *Ferreira* case and the *Finanger* case. In the case at hand, the question is not whether the Icelandic law is contrary to Articles 1(2) and 5(3) of the Second Motor Vehicle Insurance Directive. The question is whether the Directives require minimum compensation.

104. If one reads paragraph 28 of the *Finanger* in isolation, the passage might seem to imply that the EFTA Court interprets the Directives as requiring that 'all actual loss' must be compensated in every individual case. Read as a whole, however, it is clear that the ruling in *Finanger* does not support this view. It follows from the next paragraph of the judgment that the statement is only part of an argument leading to the conclusion that the distinction between personal liability and insurance cover was not decisive in that particular case. This interpretation is confirmed by the Court's reference to the *Bernáldez* case.

105. The only reference to a relative level of compensation in the Directives can be found in the preamble to the Second Motor Vehicle Insurance Directive. The text of the Directive, however, does not in any way specify this concept. Thus, the reference to 'adequate compensation' in the preamble to the Second Motor Vehicle Insurance Directive cannot be read as harmonising a certain minimum level of compensation throughout the EEA.

tilskipununum að mæla fyrir um lágmarks læknisfræðilega örorku, þ.e 15% samkvæmt þeim lögum á Íslandi sem giltu þegar slysið átti sér stað, sem skilyrði fyrir bótum fyrir missi atvinnutekna í framtíðinni.

100. Ríkisstjórn Noregs benti í upphafi á að tilskipanirnar hafi ekki að geyma nein ákvæði sem varða lágmarksbætur sem skuli greiddar til einstaklinga á grundvelli ábyrgðartryggingar.

101. Með vísan til *Ferreira*-málsins, þar sem því er haldið fram að í 23. málsgrein að "tilskipanirnar miði ekki að því að samræma reglur aðildarríkjanna um skaðabótaábyrgð", telur ríkisstjórn Noregs að tilskipanirnar hafi það ekki að markmiði að bæta stöðu fórnarlamba umferðarslysa í samanburði við fórnarlömb annars konar slysa, að því er varðar útreikning bóta. Hið íslenska kerfi, sem gerir ráð fyrir stöðluðum bótum fyrir börn og einstaklinga sem hafa haft engar eða litlar tekjur, byggðum á læknisfræðilegu örorkustigi, á við um hvers konar skaðabótaábyrgð. Af þessu leiðir að Halla Helgadóttir nýtur sama bótaréttar óháð því hvort um er að ræða umferðarslys eða annars konar slys. Þetta vekur spurninguna um skaðabótaábyrgð.

102. Af þessu leiðir að kerfið sem slíkt getur ekki verið andstætt tilskipununum. Ekki er unnt að skýra tilskipanirnar þannig að þær mæli fyrir um sameiginlegar reglur á evrópska efnahagssvæðinu um lágmarksbætur, eða að sérhver læknisfræðileg örorka eigi að leiða til bóta fyrir missi atvinnutekna í framtíðinni.

103. Ríkisstjórn Noregs gerir greinarmun á þessu máli annars vegar og *Ferreira* og *Finanger* málunum hins vegar. Í málinu sem hér liggur fyrir snýst spurningin ekki um það hvort íslensku lögin séu andstæð 2. mgr. 1. gr. og 3. mgr. 5. gr. annarrar tilskipunarinnar. Spurningin er sú hvort tilskipanirnar mæli fyrir um lágmarksbætur.

104. Ef 28. málsgrein í *Finanger*-málinu er lesin ein og sér gæti hún virst fela í sér að EFTA-dómstóllinn skýri tilskipanirnar þannig að þær feli í sér þá kröfu að "allt raunverulegt tjón" verði að bæta í hverju einstöku máli. Ef dómurinn er aftur á móti lesinn í heild er ljóst að hann felur þetta ekki í sér. Af næstu málsgrein dómsins sést að þessi setning er aðeins hluti af röksemdum sem leiða til þeirrar niðurstöðu, að aðgreining persónulegrar ábyrgðar og tryggingarverndar réði ekki úrslitum í því tiltekna máli. Þessi túlkun er staðfest með tilvísun dómstólsins til *Bernáldez*-málsins.

105. Einu tilvísunina til afstæðs umfangs tryggingarverndarinnar í tilskipununum er að finna í inngangsorðum annarrar tilskipunarinnar um ökutækjatryggingar. Texti tilskipunarinnar sjálfrar felur þó ekki í sér nein nánari ákvæði um þetta. Tilvísun til "hæfilegra bóta" í inngangi annarrar tilskipunarinnar verður því ekki skilin svo að hún samræmi reglur um tilteknar lágmarksbætur á öllu evrópska efnahagssvæðinu.

106. Thus, it must be up to the national legislators and to the national courts to define the content of this phrase.

107. However, if the Court should come to the conclusion that the Directives, taken as a whole, require the Member States to ensure a certain minimum level of compensation, the Norwegian Government would like to emphasise that a system of standardised compensation is not contrary to the Directives. At the very least, it must be left to the national courts to assess whether the particular rule in question will *'exclude certain situations from insurance cover altogether',* as contemplated in *Finanger*, at paragraph 29.

108. The Norwegian Government suggests that the second question should be answered as follows:

> *'The Directives do not provide for minimum compensation for a victim in the situation as described in the first question.'*

The EFTA Surveillance Authority

109. In the opinion of the EFTA Surveillance Authority, 'adequate compensation' within the meaning of the Second Motor Vehicle Insurance Directive is a legal standard linked to the amounts for which insurance must be compulsory, but cannot, at the current level of harmonisation, be interpreted as a quantitative, EEA-wide 'standard' for minimum compensation to be paid by the insurer in each individual case.

110. On the contrary, the principles for calculation of the insurance compensation and the civil liability in concrete cases are matters reserved to the legislator and the national courts. The judgment of the EFTA Court in the *Finanger* case, which is in line with the *Ferreira* ruling by the Court of Justice of the European Communities, shows that there is a link between insurance cover and the provisions on liability and torts. In this respect, it is important that the victim's insurance coverage is in line with the spirit and provisions of the Motor Vehicle Insurance Directives, and that the minimum coverage provided for in Article 1(2) of the Second Motor Vehicle Insurance Directive is not rendered ineffective.

111. As the Second Motor Vehicle Insurance Directive does not distinguish between the insurance coverage that must be provided by law for different categories of victims, the insurance coverage must be the same for all 'categories' of victims.

112. This conclusion does not lead to harmonisation in the EEA States of the actual compensation to be paid by the insurer to the victim, as long as third parties to a road traffic accident receive 'adequate compensation' within the meaning of the Directives. Therefore, the national legislators may still maintain

106. Af þessu leiðir að það er hlutverk löggjafa og dómstóla einstakra aðildarríkja að skilgreina nánar inntak þessara orða.

107. Ef dómstóllinn aftur móti kemst að þeirri niðurstöðu, að tilskipanirnar í heild verði taldar fela í sér, að aðildaríkjunum beri að tryggja tilteknar lágmarksbætur, leggur ríkisstjórn Noregs áherslu á að kerfi sem gerir ráð fyrir stöðluðum bótum sé ekki andstætt tilskipununum. Að minnsta kosti verði að fela dómstólum aðildarríkjanna að meta hvort tiltekin regla "útiloki með öllu tilteknar aðstæður frá tryggingavernd", eins og fjallað er um í *Finanger*-málinu, sbr. 29. gr.

108. Ríkisstjórn Noregs telur að svara eigi annarri spurningunni þannig:

> *"Tilskipanirnar mæla ekki fyrir um lágmarksbætur til handa tjónþolum við þær aðstæður sem lýst er í fyrstu spurningunni."*

Eftirlitsstofnun EFTA

109. Það er skoðun Eftirlitsstofnunar EFTA að reglan "hæfilegar bætur" í skilningi annarrar tilskipunarinnar um ökutækjatryggingar sé vísiregla sem tengist fjárhæð skyldutryggingar en reglan verði ekki, eins og samræming er nú á vegi stödd, skýrð svo að hún geymi fyrirmæli um fjárhæðir, þ.e. stuðul sem á EES-svæðum gildi um lágmarksbætur frá vátryggjanda í einstökum málum.

110. Þvert á móti, reglurnar um útreikning tryggingabóta og skaðabótaábyrgð í einstökum tilvikum eru málefni sem eiga undir löggjafann og dómstóla í einstökum ríkjum. Dómur EFTA-dómstólsins í *Finanger*-málinu, sem er í samræmi við dóm dómstóls EB í *Ferreira*-málinu, sýnir að það er samband milli tryggingaverndar og ákvæða um skaðabótaábyrgð. Að þessu leyti er mikilvægt að tryggingavernd tjónþola sé samræmi við anda og ákvæði tilskipananna um ökutækjatryggingar, og að lágmarksverndin sem þar er gert ráð fyrir í 2. mgr. 1. gr. annarrar tilskipunarinnar sé ekki gerð að engu.

111. Þar sem önnur tilskipunin gerir ekki greinarmun á tryggingavernd sem verður að tryggja með lögum fyrir mismunandi flokka tjónþola, verður tryggingaverndin að vera sú sama fyrir alla "flokka" tjónþola.

112. Þessi niðurstaða leiðir ekki til samræmingar innan ríkjanna á evrópska efnahagssvæðinu að því er varðar þær bætur sem á að greiða til tjónþola, ef þriðji maður í umferðarslysi fær "hæfilegar bætur" í skilningi tilskipananna. Af þessu leiðir að löggjafinn í einstökum löndum getur, innan ramma tilskipananna um

different systems for assessing victims' compensation within the framework of the Motor Vehicle Insurance Directives.

113. Since the Second Motor Vehicle Insurance Directive does not provide for a lower limit for compensation in each individual case, it is not contrary to EEA law that damages below € 350 000 are awarded in individual cases. However, it is established that Article 1(2) of the Second Motor Vehicle Insurance Directive precludes domestic laws which set out maximum amounts of compensation that are lower than the minimum amounts of cover laid down by those provisions.

114. At the current level of harmonisation, it must be left to the national court to assess whether the national system in effect at the time of the accident excludes certain situations from insurance coverage or *de facto* creates a system contrary to the Motor Vehicle Insurance Directives.

115. The EFTA Surveillance Authority suggests that the second question be answered as follows:

> *'The Motor Insurance Directives, and in particular Article 1.2 of the Act referred to in point 9 of Annex IX to the EEA Agreement (Second Council Directive 84/5/EEC of 30 December 1983, on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles), must be interpreted so as to not provide for minimum compensation in individual cases as long as the national legal system does not preclude payment of adequate compensation up to the minimum level in Article 1.2 of the Directive.'*

The third question

Halla Helgadóttir

116. Ms Helgadóttir submits that two factors are most important in the determination of whether there is a reasonable correlation between the actual financial loss suffered and the amount awarded. They are: (1) the approach used to calculate the compensation; and (2) the actual amount awarded.

117. Ms Helgadóttir submits, firstly, that the more the approach adopted by a Contracting Party is standardised, and thus the less consideration is taken of individual circumstances, the greater the risk is that individuals will receive unsatisfactory compensation.

118. Secondly, if the amount of damages in one country is considerably lower than the average in the EEA, it serves as an indication that the level of protection

ökutækjatryggingar, mælt fyrir um mismunandi reglur varðandi ákvörðun á skaðabótum til tjónþola.

113. Þar sem önnur tilskipunin hefur ekki að geyma ákvæði um neðri mörk skaðabóta í einstökum tilfellum, er það ekki andstætt EES-rétti að gera ráð fyrir skaðabótum undir € 350 000 í einstaka tilfellum. Það er aftur á móti tekið fram í 2. mgr. 1. gr. annarrar tilskipunarinnar að ákvæði landsréttar, sem mæla fyrir um lægri hámarksbætur en lágmörk þau sem mælt er fyrir um í þessum ákvæðum, eru útilokuð.

114. Samræming eins og hún hefur nú orðið verður að fela dómstólum aðildarríkja að meta hvort landsréttur á þeim tíma sem slysið varð, útilokar tilteknar aðstæður frá tryggingavernd eða felur í reynd í sér kerfi sem er andstætt tilskipununum um ökutækjatryggingar.

115. Eftirlitsstofnun EFTA leggur til að annarri spurningunni verði svarað þannig:

> *"Tilskipanirnar um ökutækjatryggingar, einkum 2. mgr. 1. gr. gerðar þeirrar sem vísað er til í 9. tl. IX. viðauka við EES-samninginn (Önnur tilskipun ráðsins um samræmingu á lögum aðildarríkjanna um ábyrgðartryggingu vegna notkunar á vélknúnum ökutækjum 84/5/EEC frá 30. desember 1983), ber að skýra svo að þær mæli ekki fyrir um lágmarksbætur í einstökum tilvikum ef landsréttur útilokar ekki greiðslu hæfilegra bóta að því lágmarki sem mælt er fyrir um í 2. mgr. 1. gr. tilskipunarinnar."*

Þriðja spurningin

Halla Helgadóttir

116. Halla Helgadóttir heldur því fram að mikilvægast sé að hafa í huga tvo þætti við mat á því hvort sanngjarnt samhengi sé milli raunverulegs tjóns og bótafjárhæðar. Þeir eru: (1) aðferðin við ákvörðun bótanna; og (2) hin raunverulega fjárhæð sem greidd er.

117. Halla Helgadóttir heldur því í fyrsta lagi fram að það auki hættu á ófullnægjandi bótum til einstakra manna, ef aðildarríki miðar í auknum mæli við staðlaðar bætur, en dregur úr tilliti til aðstæðna í einstökum málum.

118. Í öðru lagi, ef bætur í einu ríki eru mun lægri en að meðaltali á evrópska efnahagssvæðinu, sé það vísbending um að tryggingaverndin sé ófullnægjandi. Í

is unsatisfactory. By way of information, damages awarded in Iceland are among the lowest in the EEA. Reference is made to Icelandic literature on the subject.[17]

119. Thirdly, calculations by actuaries serve as a prime indication of the actual loss associated with permanent disability. Rules which lead to amounts of damages being much lower than the calculated loss according to an actuary cannot be in conformity with requirements of the Directives.

120. Fourthly, the amount of compensation Ms Helgadóttir would receive under section 8 obviously does not cover the loss of future income which may be expected to result from her 7% permanent disability. It is inherent in the assessment of 7% permanent disability that she will, on average, lose 7% of her future income for the rest of her working life.

121. Fifthly, it is relevant that section 8 has been amended by Act no. 37/1999, which is applicable to all accidents taking place after 1 May 1999, with the effect that compensation to people falling under section 8 is now decided in accordance with sections 5 to 7. This amendment was introduced because there had been criticism of the considerable differences between compensation awarded to victims falling under section 8 and those coming under sections 5 to 7.[18]

122. Ms Helgadóttir suggests that the third question be answered as follows:

> *'Whether compensation bears reasonable correlation to the actual financial loss incurred is to be determined by consideration of the approach used to calculate the compensation, and the actual amount awarded. Article 8 of the Act on Damages does not meet the requirements of the Directives due to the arbitrary results following its application and the low amount of damages it provides for.'*

The Norwegian Government

123. The Norwegian Government is of the opinion that the second question should be answered in the negative. However, if the Court should answer the second question in the affirmative, the Norwegian Government would like to make the following remarks with respect to the third question.

124. The Norwegian Government is of the view that the third question is only a clarification of the second question. Thus, in order to answer the second question

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17 See *Álitsgerð til allsherjarnefndar Alþingis um skaðabótalög nr. 50/1993 ásamt fylgiskjölum og breytingartillögum*, by Gestur Jónsson and Gunnlaugur Claessen, published in *Alþingistíðindi 1995-1996 (Icelandic Parliament Reports)*, pp. 3297-3345; see specifically pp. 3300-3303 and graphs at pp. 3323-3326.

18 See comments to Article 7 of *Greinargerð með frumvarpi til laga um breytingu á skaðabótalögum, nr. 50/1993, sbr. lög nr. 42/1996*, published in *Alþingistíðindi 1998-1999 (Icelandic Parliament Reports)*, þingskjal (document no.) 199.

upplýsingaskyni skal tekið fram að bætur á Íslandi eru meðal þeirra lægstu á evrópska efnahagssvæðinu. Vísað er til íslenskra lögfræðirita um þetta efni.[17]

119. Í þriðja lagi eru útreikningar tryggingastærðfræðings megin vísbending um raunverulegt tjón sem leiða kann af varanlegri örorku. Reglur sem leiða til þess að bætur eru miklu lægri en úreiknað tjón samkvæmt útreikningum tryggingastærðfræðings geta ekki verið í samræmi við þær kröfur sem í tilskipununum felast.

120. Í fjórða lagi er fjárhæð bóta sem Halla Helgadóttir fengi samkvæmt 8. gr. augljóslega ekki nægilega há til að bæta henni tekjutap í framtíðinni sem líklegt er að leiði af 7% varanlegri örorku hennar. Í þeirri ákvörðun, að meta varanlega örorku hennar 7 % felst að hún muni að meðaltali tapa 7% af atvinnutekjum sínum á starfsferlinum í framtíðinni.

121. Í fimmta lagi skiptir það máli að 8. gr. hefur verið breytt með lögum nr. 37/1999, sem á við um öll slys sem eiga sér stað eftir 1. maí 1999, með þeim afleiðingum að bætur til einstaklinga sem falla undir 8. gr. eru nú ákvarðaðar í samræmi við 5. - 7. gr. Þessi breyting var gerð vegna gagnrýni á þann mikla mun milli skaðabóta til tjónaþola sem féllu undir 8. gr. annars vegar og þeirra sem féllu undir 5. – 7. gr. hins vegar.[18]

122. Halla Helgadóttir leggur til að þriðju spurningunni verði svarað þannig:

> *"Ákvörðun um það hvort bætur séu í sanngjörnu samhengi við raunverulegt fjárhagslegt tjón ber að ákvarða með hliðsjón af þeim aðferðum sem notaðar eru við útreikning bóta og þeirri fjárhæð sem greidd er. Ákvæði 8. gr. íslensku skaðabótalaganna fullnægir ekki þessum kröfum þar sem niðurstöður hennar eru tilviljunarkenndar og vegna þeirra lágu skaðabóta sem greinin leiðir til."*

Ríkisstjórn Noregs

123. Ríkisstjórn Noregs er á þeirri skoðun að svarið við annarri spurningunni sé neikvætt. Ef dómstóllinn, aftur á móti, svarar henni á jákvæðan hátt, gerir ríkisstjórn Noregs eftirfarandi athugsaemdir vegna þriðju spurningarinnar.

124. Norska ríkisstjórnin er á þeirri skoðun að þriðja spurningin sé aðeins nánari skýring á annarri spurningunni. Af því leiðir, að ljóst er að skýra verður

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17 Sjá *Álitsgerð til allsherjarnefndar Alþingis um skaðabótalög nr. 50/1993 ásamt fylgiskjölum og breytingartillögum*, eftir Gest Jónsson og Gunnlaug Claessen, prentuð í *Alþingistíðindum 1995-1996 (Icelandic Parliament Reports)*, pp. 3297-3345; sjá einkum bls. 3300-3303 og töflur á bls. 3323-3326.

18 Sjá athugasemdir við 7. gr. í *Greinargerð með frumvarpi til laga um breytingu á skaðabótalögum, nr. 50/1993, sbr. lög nr. 42/1996*, prentað í *Alþingistíðindum 1998-1999,* þingskjal nr. 199.

in the affirmative, one naturally has to clarify 'by what reference' a minimum compensation is payable.

125. The Directives do not contain any specific provisions relating to minimum compensation to be paid to individuals out of third-party liability insurance. As stated above, the reference to 'adequate compensation' in the preamble to the Second Motor Vehicle Insurance Directive cannot be read as harmonizing a certain minimum compensation throughout the EEA.

126. Based on the foregoing and the close connection between the second and third questions, the Norwegian Government does not suggest an answer to the third question, but repeats that the Directives do not provide for minimum compensation for a victim in the situation as described in the first question.

The EFTA Surveillance Authority

127. The EFTA Surveillance Authority examines the third and fourth questions together. It is of the view that, when assessing the compensation payable, the national court must follow the national jurisdiction's rules and law governing evidence and must, in the light of those rules, decide what is adequate compensation in each case. In so doing, the national court may use the national rules as regards discounting and income and may take into account whether a victim is entitled to compensation from other sources.

128. At the current level of harmonisation within the EEA, it is not necessary to answer questions three and four.

The fourth question

Halla Helgadóttir

129. In the view of Ms Helgadóttir, it could make a difference with respect to section 8 of the Tort Damages Act whether victims are entitled under law to damages from sources other than the insurance cover, for example, from the State Social Security Institute. In the case at hand, however, she is not entitled to any such social benefits, and will not receive any compensation for her injuries other than from Daníel Hjaltason and Iceland Insurance Company Ltd.

130. In Denmark, where a rule similar to the one in section 8 of the Tort Damages Act has been enacted, it seems that the level of social security and the amount of benefits afforded to victims of motor vehicle accidents is greater than in Iceland.

131. Ms Helgadóttir suggests that the fourth question be answered as follows:

”á hvaða grundvelli” lágmarksbætur skuli greiða, ef svara skal annarri spurningunni jákvætt.

125. Tilskipanirnar hafa ekki að geyma sérstök ákvæði um lágmarksbætur sem greiða á til einstaklinga vegna ábyrgðartryggingar bifreiða. Eins og fram hefur komið er ekki unnt að lesa orðin ”hæfilegar bætur” í inngangi annarrar tilskipunarinnar þannig að henni sé ætlað að samræma tilteknar lágmarksbætur á öllu evrópska efnahagssvæðinu.

126. Á grundvelli framanritaðs og þeirra nánu tengsla sem eru á milli annarrar og þriðju spurninganrinnar, gerir ríkisstjórn Noregs ekki tillögu að svari við þriðju spruningunni, en hnykkir á því að tilskipanirnar mæli ekki fyrir um lágmarksbætur til tjónþola við aðstæður þær sem lýst er í fyrstu spurningunni.

Eftirlitsstofnun EFTA

127. Eftirlitsstofnun EFTA skoðar þriðju og fjórðu spurninguna saman. Hún telur að við mat á bótum verði dómstóll aðildarríkis að fara að þeim lögum og reglum sem gilda innan lögsögu hans um sönnun, og verði, í ljósi þeirra reglna, að ákvarða hvað eru hæfilegar bætur í hverju einstöku tilviki. Við það mat getur dómstóllinn beitt reglum landsréttar um afvöxtun og tekjur og getur tekið tillit til þess hvort tjónþoli á rétt á bótum frá öðrum.

128. Eins og nú er komið samræmingu á evrópska efnahagssvæðinu er ekki nauðsynlegt að svara þriðju og fjórðu spurningunni.

Fjórða spurnigin

Halla Helgadóttir

129. Halla Helgadóttir telur að það gæti skipt máli að því er 8. gr. skaðabótalaga varðar hvort tjónþolar eiga lögum samkvæmt rétt til bóta frá öðrum en vátryggjanda, svo sem frá Tryggingastofnun ríkisins. Í málinu sem hér er til umfjöllunar á hún ekki rétt til neinna slíkra bóta, og mun ekki fá neinar aðrar bætur vegna tjóns síns en frá Daníel Hjaltasyni og Vátryggingafélagi Íslands hf.

130. Í Danmörku, þar sem sett hefur verið sambærileg regla og sú sem fram kemur í 8. gr. skaðabótalaganna, virðist sem almannatryggingaverndin og fríðindi sem veitt eru fórnarlömbum umferðarslysa sé ríkari en á Íslandi.

131. Halla Helgadóttir leggur til að fjórðu spurningunni sé svarað þannig:

'It may matter if a victim is entitled to compensation from other sources than from the insurance cover.'

The Norwegian Government

132. The *Norwegian Government* strongly emphasises that the Directives in no way harmonise national legislation on the issue of whether national authorities may take into account compensation from other sources to which the victim may be entitled and, if so, to what extent they may do so.

133. The answer to the fourth question will thus wholly depend on the national rules of tort. In the light of the foregoing, the Norwegian Government does not suggest an answer to the fourth question.

Carl Baudenbacher
Judge-Rapporteur

”Það getur skipt máli ef tjónþoli á rétt á bótum frá öðrum en vátryggjanda.”

Ríkisstjórn Noregs

132. Ríkisstjórn Noregs leggur ríka áherslu á að tilskipanirnar samræma á engan hátt reglur í landsrétti um það hvort yfirvöld megi taka tillit til bóta sem tjónþoli kann að eiga rétt á frá öðrum og að hvaða marki það má gera.

133. Svarið við fjóðru spurningnni veltur því alfarið á skaðabótareglum landsréttar. Í ljósi þessa gerir ríkisstjórn Noregs ekki tillögu að svari við fjórðu spurningunni.

Carl Baudenbacher
framsögumaður

Case E-5/01

EFTA Surveillance Authority
v
Principality of Liechtenstein

(Failure by a Contracting Party to fulfil its obligations - Council Directive 87/344/EEC on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance)

Summary of the Judgment

1. Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement

2. Furthermore, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee.

3. Thus by failing to adopt, within the time-limit prescribed, the national provisions necessary to comply with Articles 3(1), 4, 6 and 7, read in conjunction with Article 2, of the Act referred to in point 6 of Annex IX to the EEA Agreement, i.e. Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance, as adapted by way of Protocol 1 to the EEA Agreement, the Principality of Liechtenstein has failed to fulfil its obligations under Article 10 of the Directive and Article 7 EEA

JUDGMENT OF THE COURT

5 December 2001

(Failure by a Contracting Party to fulfil its obligations - Council Directive 87/344/EEC on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance)

In Case E-5/01,

EFTA Surveillance Authority, represented by Peter Dyrberg, Director, Legal and Executive Affairs, acting as Agent, 74 Rue de Trèves, Brussels,

applicant,

v

The Principality of Liechtenstein, represented by Christop Büchel, Director, and Beatrice Hilti, Deputy Director, EEA Coordination Unit, acting as Agents, FL-9490, Vaduz,

defendant,

APPLICATION for a declaration that, by failing to adopt, within the time-limit prescribed, the national provisions necessary to comply with Articles 3(1), 4, 6 and 7, read in conjunction with Article 2, of the Act referred to in point 6 of Annex IX to the EEA Agreement, i.e. Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance, as adapted by way of Protocol 1 to the EEA Agreement, the Principality of Liechtenstein has failed to fulfil its obligations under Article 10 of the Directive and Article 7 of the EEA Agreement.

THE COURT,

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

Registrar: Lucien Dedichen

having regard to the application and written pleadings of the parties

gives the following

Judgment

1 By application lodged at the Court Registry on 27 April 2001, the EFTA Surveillance Authority submitted, 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 (hereinafter the "ESA/Court Agreement"), an application for declaration that, by failing to adopt within the time-limit prescribed, the national provisions necessary to comply with Articles 3(1), 4, 6 and 7 of the Act referred to in point 6 of Annex IX to the EEA Agreement, i.e. Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance (1987 OJ L 185, p. 77, hereinafter the "Directive"), as adapted by way of Protocol 1 to the EEA Agreement, the Principality of Liechtenstein has failed to fulfil its obligations under Article 10 of the Directive and Article 7 EEA.

2 In its application, the EFTA Surveillance Authority refers specifically to Articles 3 (1), 4, 5 and 7 of the Directive, and submits that the Principality of Liechtenstein has failed to implement those provisions within the prescribed time-limit. It also submits that it follows from Article 10 of the Directive, as adapted, that the Principality of Liechtenstein was to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 1 May 1995, and to inform the EFTA Surveillance Authority forthwith of the measures taken to that end.

3 The EFTA Surveillance Authority argues that the failure to do so amounts to a violation of Article 10 of the Directive and Article 7 EEA.

4 The EFTA Surveillance Authority and the Government of Liechtenstein have consented to the oral procedure being dispensed with.

Facts and procedure

5 By letter of 7 August 1995, the Government of Liechtenstein notified the EFTA Surveillance Authority of the national measures considered to ensure partial implementation of the Directive. Reference was made to the *Personen- und Geschellschaftsrecht vom 20 Januar 1926 LGBl. 1926 Nr. 4* (Persons and Companies Act of 20 January 1926). It was also stated that further notification of implementing measures was envisaged. By letter of 10 January 1997, the Government of Liechtenstein notified the EFTA Surveillance Authority of further measures considered to ensure partial implementation of the Directive, namely, the *Gesetz vom 6. Dezember 1995 betreffend die Aufsicht über Versicherungsunternehmen LGBl. 1996 Nr. 23* (Act of 6 December 1995 on the Supervision of Insurance Undertakings) and the *Verordnung vom 1. Oktober 1996 zum Gesetz betreffend die Aufsicht über VersicherungsunternehmenLGBl. 1996 Nr. 41* (Ordinance of 1 October 1996 concerning the Supervision of Insurance Undertakings). Again, it was stated that further notification of implementing measures was envisaged.

6 In the absence of any further notifications from the Government of Liechtenstein regarding implementing measures, on 9 April 1997 the EFTA Surveillance Authority decided to initiate proceedings under Article 31 of the ESA/Court Agreement. On 21 April 1997, a letter of formal notice was sent to the Government of Liechtenstein, stating that the Principality of Liechtenstein had failed to take the measures necessary to comply with the Directive, and inviting the Government of Liechtenstein to submit its observations on the matter within two months of receipt.

7 By letter of 7 July 1997, the Government of Liechtenstein informed the EFTA Surveillance Authority that a full implementation of the Directive was planned for the autumn of 1997, when the Insurance Contract Act would be adopted. By letter of 27 November 1997, the Government of Liechtenstein informed the EFTA Surveillance Authority that the Insurance Contract Act was expected to be adopted in March 1998, and to enter into force in the summer of 1998.

8 In the absence of any subsequent information from the Government of Liechtenstein regarding the implementation of the Directive, on 15 April 1998 the EFTA Surveillance Authority delivered a reasoned opinion in which it concluded that, by failing to take the measures necessary to comply with Articles 3 (1), 4, 6 and 7, read in conjunction with Article 2 of the Directive, the Principality of Liechtenstein had failed to fulfil its obligations under Article 10 of the Directive and Article 7 EEA. The Government of Liechtenstein was requested to take the measures necessary to comply with the reasoned opinion within two months following notification thereof. That time-limit for compliance expired on 15 June 1998.

9 By letter of 19 June 1998, the Government of Liechtenstein provided its observations on the reasoned opinion, and stated that the Insurance Contract Act, by which the aforementioned provisions of the Directive would be implemented,

was expected to be adopted in the beginning of 1999. By letter of 15 February 1999, the Government of Liechtenstein again informed the EFTA Surveillance Authority that the necessary measures would enter into force in the fourth quarter of 1999. Lastly, by a letter of 18 May 2000, the Government of Liechtenstein informed the EFTA Surveillance Authority that the Insurance Contract Act was expected to be adopted in the autumn of 2000, and to enter into force by the end of 2000 at the latest.

10 Since the EFTA Surveillance Authority has received no further information that would allow it to conclude that the Principality of Liechtenstein has taken the measures necessary to ensure compliance with the Directive, the present application was brought before the Court.

Law

11 The application of the EFTA Surveillance Authority is based on one plea of law, viz. that, by failing to adopt, within the prescribed time-limit, the national measures necessary to comply with Articles 3(1), 4, 6 and 7 of the Directive, the Principality of Liechtenstein has failed to fulfil its obligations under Article 10 of the Directive and Article 7 EEA.

12 The time-limit for the Principality of Liechtenstein to take the measures necessary to comply with the Directive expired on 1 May 1995. In the light of that, and the above description of the facts and procedure, the EFTA Surveillance Authority asks the EFTA Court to grant the application and to order the Principality of Liechtenstein to bear the costs of the proceedings.

13 In its statement of defence, the Government of Liechtenstein describes the reasons for the delay in adopting the Insurance Contract Act, which, in its submission, would bring about the full implementation in Liechtenstein of the Directive. It does not, however, dispute the order sought by the EFTA Surveillance Authority. As to costs, the Government of Liechtenstein asks that the Court order each party to bear its own costs of the proceedings.

14 The Court notes that the Principality of Liechtenstein was obliged to adopt national provisions necessary to comply with the Directive not later than 1 May 1995. On 15 June 1998, the date on which the time-limit given in the reasoned opinion of the EFTA Surveillance Authority expired, the Principality of Liechtenstein had still not adopted national measures necessary to comply with the reasoned opinion.

15 The Court notes that Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement (see Judgment of the EFTA Court in Case E-10/97 *EFTA Surveillance Authority* v *Norway* [1998] EFTA Court Report 134, at paragraph 15).

16 Furthermore, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee (see Judgment of the EFTA Court in Case E-7/97 *EFTA Surveillance Authority* v *Norway* [1998] EFTA Court Report 62, at paragraph 17).

17 It must therefore be held that, by failing to adopt, within the time-limit prescribed, the national provisions necessary to comply with Articles 3(1), 4, 6 and 7, read in conjunction with Article 2, of the Act referred to in point 6 of Annex IX to the EEA Agreement, i.e. Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance, as adapted by way of Protocol 1 to the EEA Agreement, the Principality of Liechtenstein has failed to fulfil its obligations under Article 10 of the Directive and Article 7 EEA.

Costs

18 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to bear the costs if they have been applied for in the successful party's pleadings. The EFTA Surveillance Authority has asked for the Principality of Liechtenstein to be ordered to bear the costs. Since the latter has been unsuccessful in its defence, it must be ordered to bear the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, that, by failing to adopt, within the time-limit prescribed, the national provisions necessary to comply with Articles 3(1), 4, 6 and 7, read in conjunction with Article 2, of the Act referred to in point 6 of Annex IX to the EEA Agreement, i.e. Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance, as adapted by way of Protocol 1 to the EEA Agreement, the Principality of Liechtenstein has failed to fulfil its obligations under Article 10 of the Directive and Article 7 EEA.

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

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Delivered in open court in Luxembourg on 5 December 2001.

Lucien Dedichen
Registrar

Thór Vilhjálmsson
President

CASES 1994 - 1999

	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
14	E-3/96	*Tor Angeir Ask and Others* v *ABB Offshore Technology AS and Aker Offshore Partner AS*	*Request for an Advisory Opinion from Gulating lagmannsrett, Norway* Council Directive 77/187/EEC – Transfer of part of a business	[1997] p 1

15	E-4/96	*Fridtjof Frank Gundersen* v *Oslo kommune*	*Request for an Advisory Opinion from Oslo byrett, Norway* Withdrawn	[1997] p 28
16	E-5/96	*Ullensaker kommune and Others* v *Nille AS*	*Request for an Advisory Opinion from Borgarting lagmannsrett, Norway* Admissibility – Free movement of goods – Licensing scheme	[1997] p 30
17	E-6/96	*Tore Wilhelmsen AS* v *Oslo kommune*	*Request for an Advisory Opinion from Oslo byrett, Norway* Alcohol sales – State monopolies of a commercial character – Free movement of goods	[1997] p 53
18	E-7/96	*Paul Inge Hansen* v *EFTA Surveillance Authority*	*Direct Action* Action for failure to act – Admissibility	[1997] p 100
19	E-1/97	*Fridtjof Frank Gundersen* v *Oslo kommune, supported by Norway*	*Request for an Advisory Opinion from Oslo byrett, Norway* Alcohol sales – State monopolies of a commercial character – Free movement of goods	[1997] p 108
20	E-2/97	*Mag Instrument Inc* v *California Trading Company Norway, Ulsteen*	*Request for an Advisory Opinion from Fredrikstad byrett, Norway* Exhaustion of trade mark rights	[1997] p 127
21	E-3/97	*Jan and Kristian Jæger AS, supported by Norwegian Association of Motor Car Dealers and Service Organisations* v *Opel Norge AS*	*Request for an Advisory Opinion from Nedre Romerike herredsrett, Norway* Competition – Motor vehicle distribution system – Compatibility with Article 53(1) EEA – Admission to the system – Nullity	[1998] p 1
22	E-4/97	*The Norwegian Bankers' Association* v *EFTA Surveillance Authority, supported by Kingdom of Norway*	*Direct Action* State Aid – Action for annulment of a decision of the EFTA Surveillance Authority – Admissibility – Exceptions under Article 59(2) EEA – Procedures	[1998] p 38 and [1999] p 2

23	E-5/97	*European Navigation Inc* v *Star Forsikring AS, under offentlig administrasjon (under public administration)*	*Request for an Advisory Opinion from Høysteretts kjæremålsutvalg, Norway* Withdrawn	[1998] p 59
24	E-7/97	*EFTA Surveillance Authority* v *Kingdom of Norway*	*Direct Action* Failure of a Contracting Party to fulfil its obligations – Safety and health protection of workers in surface and underground mineral – extracting industries – Council Directive 92/104/EEC	[1998] p 62
25	E-8/97	*TV 1000 Sverige AB* v *Norwegian Government*	*Request for an Advisory Opinion from Oslo byrett, Norway* Council Directive 89/552/EEC – Transfrontier television broadcasting – Pornography	[1998] p 68
26	E-9/97	*Erla María Sveinbjörnsdóttir* v *Government of Iceland*	*Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland* Council Directive 80/987/EEC – Incorrect implementation of a directive – Liability of an EFTA State	[1998] p 95
27	E-10/97	*EFTA Surveillance Authority* v *Kingdom of Norway*	*Direct Action* Failure of a Contracting Party to fulfill its obligations – Health protection for workers exposed to vinyl chloride monomer – Council Directive 78/610/EEC	[1998] p 134
28	E-1/98	*Norwegian Government* v *Astra Norge AS*	*Request for an Advisory Opinion from Borgarting lagmannsrett, Norway* Free movement of goods – Copyright – Disguised restriction on trade	[1998] p 140
29	E-2/98	*Federation of Icelandic Trade (Samtök verslunarinnar – Félag íslenskra stórkaupmanna, FIS)* v *Government of Iceland and the Pharmaceutical Pricing Committee (Lyfjaverðsnefnd)*	*Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland* Pricing of pharmaceutical products – General price decrease – Price control system	[1998] p 172

30	E-3/98	*Herbert Rainford-Towning*	*Direct Action* Right of establishment – Residence requirement for managing director of a company	[1998] p 205
31	E-4/98	*Blyth Software Ltd* v *AlphaBit AS*	*Request for an Advisory Opinion from Oslo byrett, Norway* Withdrawn	[1998] p 239
32	E-6/98	*Government of Norway* v *EFTA Surveillance Authority*	*Direct Action* State aid – Suspension of operation of a measure – Action for annulment of a decision of the EFTA Surveillance Authority – General measures – Effect on trade – Aid schemes	[1998] p 242 and [1999] p 74
33	E-5/98	*Fagtún ehf* v *Byggingarnefnd Borgarholtsskóla, Government of Iceland, City of Reykjavík and Municipality of Mosfellsbær*	*Request for an Advisory Opinion from Hæstiréttur Íslands, Iceland* General prohibition on discrimination – Free movement of goods – Post-tender negotiations in public procurement proceedings	[1999] p 51
34	E-1/99	*Storebrand Skadeforsikring AS* v *Veronika Finanger*	*Request for an Advisory Opinion from Norges Høyesterett, Norway* Motor Vehicle Insurance Directives – Driving under the influence of alcohol – Compensation for passengers	[1999] p 119

The EFTA Court was set up under the Agreement on the European Economic Area (the EEA Agreement) of 2 May 1992. The EEA Agreement entered into force on 1 January 1994. The EFTA Court is now composed of three judges. The EFTA States party to the EEA Agreement are Iceland, Liechtenstein and Norway.

This report contains information on the EFTA Court and the administration of the Court for the period from 1 January 2000 to 31 December 2001. It has a short section on the Judges and the staff.

The report also includes the full texts of the nine decisions of the EFTA Court as well as the reports for the hearings prepared by the Judge-Rapporteurs during this period. A list of these cases is to be found on page III of the Report. This Report also contains an index of decisions printed in the prior editions of the EFTA Court Reports.

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