



Report of the EFTA Court

2003

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2003

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 composed 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 six 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 2003 to 31 December 2003*.

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

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

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

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I. Administration of the Court

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

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.

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. Most notably, the Supreme Court of Norway (the Chief Justice and 16 out of 19 Justices) paid a visit to the EFTA Court (and the Court of Justice of the European Communities and the Court of First Instance) on 15-17 October. The annual seminar for judges from Iceland, Liechtenstein and Norway took place on 23-24 October.

The home page of the Court is found via the following Internet address:

<http://www.eftacourt.lu>

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

The Court's e-mail address is:

eftacourt@eftacourt.lu

II. Judges and Staff

The members of the Court in 2003 were as follows:

Mr Carl BAUDENBACHER (nominated by Liechtenstein)

Mr Per TRESSELT (nominated by Norway)

Mr Thorgeir ÖRLYGSSON (nominated by Iceland)

The judges are appointed by common accord of the Governments of the EFTA States. 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 Örlygsson was appointed for a period of six years commencing 1 January 2003.

Judge Baudenbacher was elected President of the Court on 15 January 2003 for a period of three years, ending 31 December 2005.

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

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

Nominated by Iceland:

Ms Dóra Guðmundsdóttir, lögfræðingur

Mr Stefán Már Stefánsson, professor

Nominated by Liechtenstein:

Mr Marzell Beck, Rechtsanwalt

Mr Martin Ospelt, Rechtsanwalt

Nominated by Norway:

Mr Henrik Bull, førsteamanuensis

Ms Bjørg Ven, advokat

In addition to the Judges, the following persons were employed by the Court in 2003:

Ms Svava ARADÓTTIR, Secretary
Mr Davíð Þór BJÖRGVINSSON, Legal Secretary (until 31 August 2003)
Ms Harriet BRUHN, Financial and Administrative Officer
Mr Dirk BUSCHLE, Legal Secretary
Ms Evanthia COFFEE, Lawyer-Linguist
Mr Lucien DEDICHEN, Registrar
Ms Hrafnhildur EYJÓLFSDÓTTIR, Administrative Assistant
Ms Kristin HARALDSDOTTIR, Legal Secretary (from 7 August 2003)
Ms Sigrid HAUSER-MARTINSEN, Secretary
Ms Linda HELLAND, Lawyer-Linguist
Mr Mads MAGNUSSEN, Legal Secretary (until 31 January 2003)
Ms Katinka MAHIEU, Legal Secretary (from 1 February 2003)
Mr Gilles PELLETIER, Caretaker-Messenger
Ms Kerstin SCHWIESOW, Secretary

CURRICULA VITAE OF THE JUDGES AND THE REGISTRAR



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; President of the EFTA Court since 15 January 2003.

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.



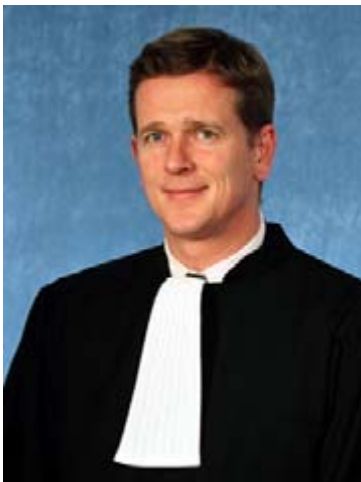
Thorgeir ÖRLYGSSON

Judge of the EFTA Court (2003)

Born 13 November 1952 in Reykjavík, Iceland.

Graduation from the University of Iceland 1978. LL.M. (Public and Private International Law) from Harvard Law School, Cambridge, Massachusetts, USA, in 1980. Assistant Judge, City Court of Reykjavík, 1978 – 1982. Legal Secretary to the Supreme Court Justices, Supreme Court of Iceland, 1982 – 1984. Associate Professor, Faculty of Law, University of Iceland, 1984 – 1986. Judge, City Court of Reykjavík, 1986 – 1987. Professor (Property Law, Law of Obligations, Private International Law), Faculty of Law, University of Iceland, 1987 – 1999.

Dean, Faculty of Law, University of Iceland, 1995 – 1997. Vice – President of the University of Iceland, 1996 – 1997. Permanent Secretary, Ministry of Industry and Trade of Iceland, 1999 – 2002. Judge of the EFTA Court from 1 January 2003. Chairman of the Icelandic Patent and Trade Mark Appeal Committee from 1984 – 1990. Chairman of the Icelandic Data Protection Commission from 1986 – 1999.



Lucien DEDICHEN

Born 14 February 1962 in Oslo, Norway.

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

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

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

Photo: Pierre Lindberg

III. Decisions of the Court

Case E-1/02

EFTA Surveillance Authority

v

The Kingdom of Norway

(Failure of a Contracting Party to fulfil its obligations – Equal Rights Directive - Reservation of academic positions for women)

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Summary of the Judgment

1. By maintaining in force a rule which permits the reservation of a number of academic posts exclusively for members of the under-represented gender, Norway has failed to fulfil its obligations under Articles 7 and 70 of the EEA Agreement and Articles 2(1), 2(4) and 3(1) of Directive 76/207/EEC of 9 February on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as referred to in point 18 of Annex XVIII to the EEA Agreement.

2. Article 2(4) of the Directive permits measures that although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality that may exist in the reality of social life. Measures relating to access to employment, including

promotion, that give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men come within the scope of Article 2(4) of the Directive.

Preferential treatment of female candidates in sectors where they are under-represented can fall within the scope of Article 2(4) of the Directive if such preferential treatment is capable of counteracting the prejudicial effects on female candidates of societal attitudes and behaviour and reducing actual instances of inequality. However, such a measure may not guarantee absolute and unconditional priority for women in promotion, but shall be subject to a flexibility clause, guaranteeing an objective assessment of all candidates, taking into account their individual cir-

cumstances. Such an assessment, which shall not be based on criteria that discriminate against women, can then override the priority accorded to women if the assessment tilted the balance in favour of the male candidate.

In assessing the qualifications of candidates, certain positive and negative criteria can be used, which, while formulated in gender neutral terms, are intended to reduce gender inequalities that occur in practice in social life. Among such criteria are capabilities and experiences acquired by carrying out family work. Negative criteria that should not detract from assessment of qualifications include part-time work, leaves and delays as a result of family work. Family status and partner's income shall be viewed as immaterial and seniority, age and date of last promotion shall not be given undue weight.

3. The Directive is based on the recognition of the right to equal treatment as a fundamental right of the individual. In determining the scope of a derogation from an individual right, regard must be had to the principle of proportionality, which requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim pursued.

National rules and practices derogating from the individual right can only be permissible when they show sufficient flexibility to allow a balance between

the need for the promotion of the under-represented gender and the opportunity for candidates of the opposite gender to have their situation objectively assessed. There must, as a matter of principle, be a possibility that the best-qualified candidate obtains the post. Even for training positions, the law requires a system that is not totally inflexible. An absolute rule exceeds what is acceptable under Article 2(4) of the Directive.

4. Since the entry into force of the Directive substantial changes have occurred in the legal framework of the Community, providing *inter alia* for increased Community competences in matters relating to gender equality. Inevitably, the interpretation of the Directive will reflect both the evolving legal and societal context in which it operates.

Under the present state of the law, the criteria for assessing the qualifications of candidates are essential. In such an assessment, there appears to be scope for considering those factors that, on empirical experience, tend to place female candidates in a disadvantaged position in comparison with male candidates. Directing awareness to such factors could reduce actual instances of gender inequality. Furthermore, giving weight to the possibility that in numerous academic disciplines female life experience may be relevant to the determination of the suitability and capability for, and performance in, higher academic positions, could enhance the equality of men and women, which concern lies at the core of the Directive.

JUDGMENT OF THE COURT

24 January 2003

*(Failure of a Contracting Party to fulfil its obligations – Equal Rights Directive -
Reservation of academic positions for women)*

In Case E-1/02,

EFTA Surveillance Authority, represented by Dóra Sif Tynes, Officer, Legal & Executive Affairs, acting as Agent, 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 Ingeborg Djupvik, Legal Adviser, Ministry of Foreign Affairs, acting as Co-Agent, PO Box 8012 Dep, 0030 Oslo, Norway,

Defendant,

APPLICATION for a declaration that, by applying its legislation so as to reserve a certain number of academic positions exclusively for women, the Kingdom of Norway has failed to fulfil its obligations under the EEA Agreement.

THE COURT,

composed of: Carl Baudenbacher, President (Judge-Rapporteur), Per Tresselt and Dóra Guðmundsdóttir (ad hoc), Judges,

Registrar: Lucien Dedichen,

having regard to the written pleadings of the parties and the written observations of the Commission of the European Communities, represented by John Forman,

Legal Adviser, and Nicola Yerrell, Member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Applicant, represented by its Agent Dóra Sif Tynes, the Defendant, represented by its Agent Fanny Platou Amble, and the Commission of the European Communities, represented by its Agent Nicola Yerrell, at the hearing on 18 October 2002,

gives the following

Judgment

I Facts

- 1 By an application lodged at the Court on 22 April 2002, the EFTA Surveillance Authority brought an action under Article 31(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (the “Surveillance and Court Agreement”) for a declaration that, by maintaining in force a rule which reserves a number of academic posts exclusively for women, Norway has failed to fulfil its obligations under Articles 7 and 70 of the EEA Agreement and Articles 2(1), 2(4) and 3(1) of Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, referred to in point 18 of Annex XVIII to the Agreement.
- 2 The present case involves permanent and temporary academic positions earmarked for women either by direction of the Norwegian Government or by the University of Oslo (hereinafter, the “University”), pursuant to Article 30(3) of the Norwegian Act No 22 of 12 May 1995 relating to Universities and Colleges (hereinafter, the “University Act”). That provision reads as follows:

“The appointing body advertises academic posts. A member of the Department’s Steering Committee or of the Appointments Committee can however always request the Board to advertise the post itself. If one sex is clearly under-represented in the category of post in the subject area in question, applications from members of that sex shall be specifically invited. Importance shall be attached to considerations of equality when the appointment is made. The Board can decide that a post shall be advertised as only open to members of the underrepresented sex.”
- 3 Based on that provision, the Norwegian Government in 1998 allocated 40 so-called post-doctoral research grants, funded through the national budget, to universities and university colleges. Of these 40 posts 20 were assigned to the University. A post-doctoral scholarship is obtainable after completion of a

doctoral degree and is designed to be a temporary position with a maximum duration of four years. The scholarships were intended to improve the recruitment base for high-level academic positions. According to the directions issued by the Ministry of Education, Research and Church Affairs, these positions were to be made available in fields where the recruitment of women needed to be strengthened. Fields where women are clearly under-represented were also to be taken into consideration. Pursuant to Article 30(3) of the University Act, the University earmarked all of these positions for women. Of the 179 post-doctoral appointments at the University from 1998 to 2001, 29 were earmarked for women. Of the 227 permanent academic appointments during that period, four were earmarked for women.

- 4 Under the University's Plan for Equal Treatment 2000-2004, another 10 post-doctoral positions and 12 permanent academic positions are to be earmarked for women. According to the Plan, the University will allocate the permanent positions to the faculties by way of an evaluation of, *inter alia*: academic fields where women in permanent academic positions are considerably under-represented, giving priority to fields with less than 10 percent female academics; and academic fields where women in permanent academic positions are under-represented as compared to the number of female students.

II Legal background

- 5 Article 7 EEA provides that acts referred to or contained in the Annexes to the Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties, and be, or be made, part of their internal legal order.

- 6 Article 70 EEA stipulates that the Contracting Parties shall promote the principle of equal treatment for men and women by implementing the provisions specified in Annex XVIII to the Agreement.

- 7 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, promotions and working conditions (1976 OJ L 39, p. 40-42, hereinafter, the "Directive") is listed in Annex XVIII to the EEA Agreement.

- 8 Article 2(1) of the Directive states:

"For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status."

- 9 Article 2(2) of the Directive states:

"This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training

leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.”

10 Article 2(4) of the Directive states:

“This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities...”

11 Article 3(1) of the Directive states:

“Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.”

12 The Directive has been amended by Directive 2002/73/EC, (OJ L 269/15, 5.10.2002). In its amended version, paragraph 4 of Article 2 is replaced by new paragraph 8, which provides, “Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women.” Article 2, paragraph 3 of Directive 2002/73/EC further provides that Member States shall communicate to the Commission, every four years, the texts of laws, regulations and administrative provisions of any measures adopted pursuant to Article 141(4) of the Treaty as well as reports on these measures and their implementation.

13 At the oral hearing, the Commission indicated, that it was likely to take some 6 to 12 months to make the amended Directive, which is to be implemented in the Member States of the Community by 5 October 2005, a part of the EEA Agreement.

III Pre-litigation procedure

14 In August 2000, the EFTA Surveillance Authority received a complaint alleging that by reserving a number of academic positions for women, Norway was in breach of the EEA Agreement. In the course of subsequent examinations, the EFTA Surveillance Authority sent a request for information to the Government of Norway. In its reply, the Government of Norway referred to the under-representation of women in academic positions, despite the availability of qualified female applicants and maintained that its legislation was in compliance with EEA law, namely with Article 2(4) of the Directive.

15 On 6 June 2001, the EFTA Surveillance Authority sent a letter of formal notice to Norway. With reference to the case law of the Court of Justice of the European Communities, it contended that measures promoting women could only be regarded as compatible with the exception clause laid down in Article 2(4) of the Directive if they did not automatically and unconditionally give priority to women where men and women were equally qualified. Moreover, according to

the EFTA Surveillance Authority, the candidates in question must be subject to an objective assessment, which takes into account the specific personal situations of all candidates.

- 16 In answering the letter of formal notice, the Government of Norway again referred to the under-representation of women in higher academic positions when compared to the proportion of female students. Moreover, the Government pointed to the fact that a need for affirmative action measures is widely recognised in international law, particularly in Article 4(1) of the United Nations Convention on the Elimination of all forms of Discrimination Against Women (hereinafter, “CEDAW”). Furthermore, the Government contended that the Directive must be interpreted in the light of Article 141(4) EC, which provision allows affirmative action measures. Finally, the Government took the view that affirmative action measures are permissible under Article 2(4) of the Directive as interpreted by the Court of Justice of the European Communities, provided that they are proportionate; and, since the measures in question are temporary and form part of a special programme favouring women in a last attempt to achieve a more balanced representation of the sexes, they have to be considered proportionate.
- 17 On 28 November 2001, the EFTA Surveillance Authority sent a reasoned opinion to the Government of Norway, maintaining its position that the measures in question were in breach of the EEA Agreement. Norway was asked to take the necessary measures to comply with the reasoned opinion within three months following notification thereof.
- 18 In its reply of 27 February 2002, the Government of Norway reiterated its position that the measures taken were in compliance with the Directive. With regard to the principle of proportionality, the Government again referred to the case law of the Court of Justice of the European Communities, and contended that even discriminatory effects of affirmative action measures could be counterbalanced by an objective fact, such as the under-representation of women, as long as these measures do not exceed what is necessary.
- 19 Since the Government of Norway did not take any measures to comply with the reasoned opinion, the EFTA Surveillance Authority filed the application that gives rise to the present proceedings.

IV Arguments of the parties

- 20 The application is based on one plea in law, namely that the Kingdom of Norway has failed to fulfil its obligations under EEA law by maintaining in force a rule that permits the reservation of academic positions exclusively for women.
- 21 The *Applicant* submits that the measures in question, by totally excluding men from the selection procedure, entail differential treatment on grounds of gender

and thus encroach upon the individual right to equal treatment as laid down in Article 2(1) of the Directive.

- 22 As to possible justification, the Applicant argues that even if the social reality of a given sector is characterized by gender inequality, a measure giving priority automatically and unconditionally to women constitutes a violation of the Directive. Such a rule precludes any objective assessment of a possible male candidate and therefore does not allow for the examination of the individual criteria specific to such a candidate. The contested Norwegian legislation can therefore in the view of the Applicant not be justified, neither under Article 2(4) of the Directive nor under the principle of proportionality. Whether the Defendant has failed, by the employment of other means, to achieve its goals in the area of gender equality is, in the Applicant's view, irrelevant.
- 23 The Applicant further argues that the provisions of international law invoked by the Defendant do not support the latter's position. With regard to Article 141(4) EC, the Applicant maintains that the measures in question would not be lawful under that provision, which, in any event, is not part of EEA law.
- 24 The Applicant's view is supported by the *Commission of the European Communities*. The Commission argues in particular that measures giving automatic and unconditional priority to women are not compatible with the individual right to equal treatment. Article 2(4) of the Directive is in itself an expression of the proportionality test. The total exclusion of one gender from the selection procedure cannot, in the Commission's view, be justified.
- 25 The *Defendant* invites the Court to adopt an alternative to the interpretation of the Directive developed by the Court of Justice of the European Communities, under which affirmative action measures are legally defined as derogations from the prohibition on discrimination. According to the Defendant, an interpretation is warranted that views affirmative action measures aimed at gender equality in practice, not as constituting discrimination but rather as an intrinsic dimension of the very prohibition thereof.
- 26 The Defendant does not dispute that Section 30(3) of the University Act, in allowing certain academic positions to be earmarked for women, provides an automatic and unconditional preference for one gender. The Defendant is, however, of the opinion that the rule in question is not in breach of Articles 2(1) and 3(1) of the Directive. The Defendant argues that formal equality in treatment is not sufficient to achieve substantive equality. The modest number of women in academia stands in glaring contrast to the percentage of women in the student body. The Defendant points to the fact that women tend to leave academic careers before they are qualified for higher academic positions. The aim of the disputed legislation is to achieve long-term equality between men and women as groups.
- 27 The Defendant seeks support for its view in provisions of international agreements such as Article 4(1) of CEDAW, Article 14 of the European

Convention on Human Rights, Protocol 12 to the same Convention, Articles 2 and 5 of the ILO Convention 111 concerning Discrimination in Respect of Employment and Occupation, as well as Recommendation No R (85) 2 from the Council of Europe. The provisions of the Directive must, in the Defendant's view, be interpreted in the light of those provisions.

- 28 The Defendant also refers to Article 141(4) EC, maintaining that affirmative action measures like the one in question fall within the scope of that provision. Since the amended Directive 2002/73/EC makes direct reference to Article 141(4) EC, the latter provision will, once the new Directive is made part of EEA law, apply as a part of the EEA Agreement for the purposes and within the scope of the new Directive. The Defendant asks the Court to apply Article 141(4) to the case at hand by analogy.
- 29 With regard to possible justification, the Defendant invokes Article 2(2) of the Directive, maintaining that the allocation of earmarked positions within the University of Oslo is premised on a need for female members of faculty that are able to meet the students' legitimate needs.
- 30 The Defendant further contends that the Court of Justice of the European Communities has not yet had an opportunity to rule on whether earmarking of specific posts for women may fall within the scope of Article 2(4) of the Directive.
- 31 The Defendant is of the view that the judgments of the Court of Justice of the European Communities in Cases C-79/99 *Schnorbus* [2000] ECR I-10997 and C-476/99 *Lommers* [2002] ECR I-2891 support its position. Whereas in *Schnorbus*, preference was automatically accorded to persons who had completed compulsory military or civilian service, the sole purpose of the Norwegian earmarking scheme is to compensate for an actual disadvantageous situation, namely the significant under-representation of women in higher academic posts. With regard to *Lommers*, the Defendant maintains that whereas in that case all the employer's nursery places were reserved for women, the Norwegian earmarking scheme only applies to a limited number of academic positions at the University of Oslo with the consequence that there is otherwise ample opportunity to take special account of male applicants.
- 32 The Defendant argues further that its contested legislation is proportionate to the aim pursued. Post-doctoral posts are temporary appointments with a maximum duration of four years. In the Defendant's view, the measures at stake in Case C-158/97 *Badeck and Others* [2000] ECR I-1875 concerning training positions were very similar to those provided for in the Norwegian legislation. Permanent professorships earmarked for women will lapse at the latest when the professors in question retire.
- 33 In the Defendant's view, the measure at issue in Case C-407/98 *Abrahamsson* [2000] ECR I-5539, was significantly more disadvantageous to the other gender than the measures at issue in the present case, the latter being at least neutral as

regards quality and not involving the adverse effect of a rejection on a researcher's reputation.

- 34 The Defendant also emphasizes that the earmarked posts represent only a minor part of all new temporary and permanent appointments; the limited numbers are of significant importance when assessing proportionality.
- 35 Moreover, the Defendant submits that the positions earmarked for women at the University of Oslo are new posts constituting a real extension of the total number of available posts. Therefore, male applicants are not in a more difficult position with respect to career advancement than they would be without the earmarked posts.

V Findings of the Court

- 36 The legal basis for deciding the present application is provided by the Directive, which has been made part of EEA law by the reference in point 18 of Annex XVIII to the EEA Agreement. According to Article 6 EEA and Article 3(2) of the Surveillance and Court Agreement, the case law of the Court of Justice of the European Communities is relevant for the Court when interpreting the Directive.
- 37 The Court of Justice of the European Communities has, in the context of Community law, consistently held that Article 2(4) of the Directive permits measures that although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality that may exist in the reality of social life. Measures relating to access to employment, including promotion, that give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men come within the scope of Article 2(4) of the Directive (Case 312/86 *Commission v France* [1988] ECR 6315, at paragraph 15; C-450/93 *Kalanke v Freie Hansestadt Bremen*, [1995] ECR I-3051, at paragraphs 18-19; C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363, at paragraphs 26-27; *Badeck*, cited above, at paragraph 19; *Lommers*, cited above, at paragraph 32). In *Kalanke* however, the Court of Justice of the European Communities found that Article 2(4), as a derogation from an individual right, had to be interpreted strictly and that the national rules at issue guaranteeing women in the case of equal qualifications absolute and unconditional priority for appointment or promotion in the public service were incompatible with the Directive. The Court, following the Opinion of Advocate General Tesouro, found that such measures went beyond promoting equal opportunities and substituted equality of representation for equality of opportunity (*Kalanke*, cited above, at paragraphs 21-23).
- 38 In *Marschall*, the Court of Justice of the European Communities considered the impact of prejudices and stereotypes concerning the role and capacities of women in working life and found that the mere fact that a male and a female

candidate are equally qualified does not mean that they have the same chances (see *Marschall*, cited above, at paragraphs 29-30). Preferential treatment of female candidates in sectors where they are under-represented could therefore fall within the scope of Article 2(4) of the Directive if such preferential treatment was capable of counteracting the prejudicial effects on female candidates of societal attitudes and behaviour and reducing actual instances of inequality. However, such a measure may not guarantee absolute and unconditional priority for women in promotion, but should be subject to a savings clause (flexibility clause), guaranteeing an objective assessment of all candidates, taking into account their individual circumstances. Such an assessment, which should not be based on criteria that discriminate against women, could then override the priority accorded to women if the assessment tilted the balance in favour of the male candidate (*Marschall*, cited above, at paragraph 35; see also *Badeck*, cited above, at paragraph 23).

- 39 At issue in *Badeck* was national legislation where binding targets were set for the proportion of women in appointments and promotions. The Court of Justice of the European Communities found that such a rule that gave priority to equally qualified women in a sector where women are under-represented, if no reasons of greater legal weight were opposed, and subject to an objective assessment of all candidates, fell within the scope of Article 2(4) of the Directive. The Court of Justice of the European Communities further indicated that in assessing the qualifications of candidates, certain positive and negative criteria could be used, which, while formulated in gender neutral terms, were intended to reduce gender inequalities that occur in practice in social life. Among such criteria were capabilities and experiences acquired by carrying out family work. Negative criteria that should not detract from assessment of qualifications included part-time work, leaves and delays as a result of family work. Family status and partner's income should be viewed as immaterial and seniority, age and date of last promotion should not be given undue weight (*Badeck*, cited above, at paragraphs 31-32).
- 40 In *Badeck*, the Court of Justice of the European Communities held that a regime prescribing that posts in the academic service are to be filled with at least the same proportion of women as the proportion of women among the graduates and the holders of higher degrees in the discipline in question is compatible with the Directive. The Court of Justice of the European Communities thereby followed Advocate General Saggio's Opinion according to which such a system does not fix an absolute ceiling, but fixes one by reference to the number of persons who have received appropriate training, which amounts to using an actual fact as a quantitative criterion for giving preference to women (*Badeck*, cited above, at paragraphs 42-43; Opinion of Advocate General Saggio in *Badeck*, point 39).
- 41 In *Badeck*, the Court of Justice of the European Communities further accepted a rule according to which women are to be taken into account to the extent of at least one half in allocating training places in trained occupations in which women are under-represented. The Court of Justice of the European Communities found that the allocation of training places to women did not entail total inflexibility.

The state did not have a monopoly on training places, as they were also available in the private sector. No male was therefore definitely excluded (*Badeck*, cited above, at paragraphs 51 and 53).

- 42 In *Abrahamsson*, the Court of Justice of the European Communities considered a Swedish statutory provision under which a candidate for a professorship who belongs to the under-represented gender and possesses sufficient qualifications for that post may be chosen in preference to a candidate of the opposite gender who would otherwise have been appointed, where this would be necessary to secure the appointment of a candidate of the under-represented gender, and the difference between the respective merits of the candidates would not be so great as to give rise to a breach of the requirement of objectivity in making appointments. It was found that this provision was incompatible with Article 2(1) and (4) of the Directive. The portent of the savings clause relating to the requirement of objectivity could not be precisely determined, implying that the selection would ultimately be based on the mere fact of belonging to the under-represented gender.
- 43 As the case law outlined above shows, the Court of Justice of the European Communities has accepted as legitimate certain measures that promote substantive equality under Article 2(4) of the Directive. In determining the scope of a derogation from an individual right, such as the right to equal treatment of men and women laid down by the Directive, regard must, however, be had to the principle of proportionality, which requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim pursued (see *Lommers*, cited above, at paragraph 39).
- 44 The Court will now deal with the invocation of the case law of the Court of Justice of the European Communities as it applies to the arguments of the Defendant.
- 45 In the light of the homogeneity objective underlying the EEA Agreement, the Court cannot accept the invitation to redefine the concept of discrimination on grounds of gender in the way the Defendant has suggested. The Directive is based on the recognition of the right to equal treatment as a fundamental right of the individual. National rules and practices derogating from that right can only be permissible when they show sufficient flexibility to allow a balance between the need for the promotion of the under-represented gender and the opportunity for candidates of the opposite gender to have their situation objectively assessed. There must, as a matter of principle, be a possibility that the best-qualified candidate obtains the post. In this context the Court notes that it appears from the Defendant's answer to a written question from the Court that it cannot be excluded that posts may be awarded to women applicants with inadequate qualifications, if there is not a sufficient number of qualified women candidates.
- 46 The Defendant's submission to the effect that Article 2(2) of the Directive applies in the present case, as gender constitutes a genuine occupational

qualification to ensure the quality of the occupational activity and thus constitutes a determining factor for carrying out the activities in question, cannot be accepted. Such an interpretation does not find support in the wording of the Directive nor in the case law of the Court of Justice of the European Communities. The provision, which allows Member States to exclude from the field of the Directive certain occupational activities has primarily been applied in instances where public security calls for the reservation of certain policing or military activities for men only (see, for instance, Cases 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; C-273/97 *Sirdar* [1999] ECR I-7403).

- 47 The Defendant has invoked the judgments of the Court of Justice of the European Communities in Cases *Lommers* and *Schnorbus*. In *Lommers*, the Court of Justice of the European Communities held that a scheme reserving a limited number of subsidized nursery places for female officials fell within the scope of the derogation provided for in Article 2(4) of the Directive, since in cases of emergency, it permitted male officers access to them, thus allowing for individual assessment of the officials' needs for day care facilities. What was held decisive in *Lommers* was that men were not totally excluded from these benefits because the regulation at issue contained a flexibility clause and additional nursery places were available in the private sector. As the Applicant points out, that ruling shows that an absolute rule such as the one contested in the present case exceeds what is acceptable under Article 2(4) of the Directive.
- 48 The rules at issue in *Schnorbus* were found to constitute indirect discrimination, which, however, was justified as the rules sought to reduce the inequality suffered by men as a result of fulfilling their obligation to perform military or civilian service, being objective in nature and prompted solely by the desire to counterbalance to some extent the effect of the delay in the progress of men's education (*Schnorbus*, cited above, at paragraph 44). The *Schnorbus* case concerned a special constellation. It follows that the measures taken by the Defendant cannot be justified by way of recourse to the judgments of the Court of the European Communities in cases *Lommers* and *Schnorbus*.
- 49 The Defendant has highlighted the training aspects of the contested post-doctoral positions. These positions, which are limited in time, are intended to offer holders of doctoral degrees the possibility to qualify for permanent academic posts and develop the necessary competence to compete for higher academic positions. The postdoctoral positions are further described as research posts, where teaching and administrative obligations are at a minimum. The Defendant has in this respect sought to rely on the principles developed by the Court of Justice of the European Communities in *Badeck*.
- 50 As the Commission of the European Communities has emphasized, the Court of Justice of the European Communities has drawn a distinction between training for employment and actual places in employment. With regard to training positions, it has relied on a restricted concept of equality of opportunity allowing the reservation of positions for women, with a view to obtaining qualifications

necessary for subsequent access to trained occupations in the public service (*Badeck*, cited above, at paragraphs 52 and 55). The Court finds that even for training positions, the law requires a system that is not totally inflexible. Moreover, alternatives for post-doctoral positions in the private sector appear to be rather limited.

- 51 In the Court's view, the Norwegian rule goes further than the Swedish legislation in *Abrahamsson*, where a selection procedure, involving an assessment of all candidates was foreseen at least in principle. Since that Swedish rule was held by the Court of Justice of the European Communities to be in violation of the principle of equal treatment of women and men, the Norwegian rule must fall foul of that principle *a fortiori*.
- 52 It has been argued that the positions in question are new posts and that male applicants are not in a more difficult position with respect to career advancement than they would be without the earmarking scheme. The Court notes, however, that it is unlikely that newly created professorship posts would be allocated to specific disciplines, subjects or institutions without an evaluation of already existing posts, or without regard to future needs and expected consequential adjustments of teaching or research staff. It therefore appears that the earmarking scheme will have an impact on the number of future vacancies open to male applicants in any field in which it has been applied. The Defendant has not even alleged that in the case at hand the situation could be different.
- 53 The argument that the permanent professorships set up and earmarked for women are temporary in nature since they will lapse at the latest when such a professor retires cannot be accepted.
- 54 On the principles laid down in the foregoing, the Norwegian legislation in question must be regarded as going beyond the scope of Article 2(4) of the Directive, insofar as it permits earmarking of certain positions for persons of the under-represented gender. The last sentence of Article 30(3) of the University Act as applied by the University of Oslo gives absolute and unconditional priority to female candidates. There is no provision for flexibility, and the outcome is determined automatically in favour of a female candidate. The Defendant has argued that the criteria of unconditional and automatic priority do not exhaust the scope of the proportionality principle. The Court notes, in this respect, that other aspects of the Norwegian policy on gender equality in academia – including target measures for new professorship posts, priority in allocation of positions to fields with less than 10 percent female academics and in fields with high proportion of female students and graduates – have not been challenged by the EFTA Surveillance Authority, except with regard to the earmarking of positions exclusively for female candidates.
- 55 As to the Defendant's submissions to the effect that Article 141(4) EC and the new Directive 2002/73/EC of 23 September 2002 amending Directive 76/207/EEC should apply to the present case by analogy, the Court observes that these provisions have not been made part of EEA law. They therefore do not

provide a legal basis to decide the present application either directly or by analogy.

- 56 The Court notes, however, that since the entry into force of the Directive substantial changes have occurred in the legal framework of the Community, providing *inter alia* for increased Community competences in matters relating to gender equality. Under Article 2 EC the Community shall have as its task to promote equality between men and women. Article 3(2) EC states that the Community shall, in carrying out the activities referred to in the first paragraph of that provision, aim to eliminate inequalities and to promote equality between men and women. Article 13 EC gives the Council the competence to take appropriate action to combat discrimination based on sex. According to Article 141(4) EC, the principle of equal treatment shall, with a view to ensuring full equality in practice between men and women in working life, not prevent Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Inevitably, the interpretation of the Directive will reflect both the evolving legal and societal context in which it operates.
- 57 Under the present state of the law, the criteria for assessing the qualifications of candidates are essential. In such an assessment, there appears to be scope for considering those factors that, on empirical experience, tend to place female candidates in a disadvantaged position in comparison with male candidates. Directing awareness to such factors could reduce actual instances of gender inequality. Furthermore, giving weight to the possibility that in numerous academic disciplines female life experience may be relevant to the determination of the suitability and capability for, and performance in, higher academic positions, could enhance the equality of men and women, which concern lies at the core of the Directive.
- 58 The Defendant cannot justify the measures in question by reference to its obligations under international law. CEDAW, which has been invoked by the Defendant, was in force for Community Member States at the time when the Court of Justice of the European Communities rendered the relevant judgments concerning the Directive. Moreover, the provisions of international conventions dealing with affirmative action measures in various circumstances are clearly permissive rather than mandatory. Therefore they cannot be relied on for derogations from obligations under EEA law.
- 59 Based on the foregoing, the Court holds that by maintaining in force a rule which permits the reservation of a number of academic posts exclusively for members of the under-represented gender, Norway has failed to fulfil its obligations under Articles 7 and 70 of the EEA Agreement and Articles 2(1), 2(4) and 3(1) of Directive 76/207/EEC of 9 February on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as referred to in point 18 of Annex XVIII to the EEA Agreement.

VI Costs

60 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The EFTA Surveillance Authority has 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 Commission of the European Communities are not recoverable.

On those grounds,

THE COURT

hereby:

- 1. Declares that by maintaining in force a rule which permits the reservation of a number of academic posts exclusively for members of the under-represented gender, Norway has failed to fulfil its obligations under Articles 7 and 70 of the EEA Agreement and Articles 2(1), 2(4) and 3(1) of Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as referred to in point 18 of Annex XVIII to the EEA Agreement;**
- 2. Orders the Kingdom of Norway to pay the costs of the proceedings.**

Carl Baudenbacher

Per Tresselt

Dóra Guðmundsdóttir

Delivered in open court in Luxembourg on 24 January 2003.

Lucien Dedichen
Registrar

Carl Baudenbacher
President

REPORT FOR THE HEARING
in Case E-1/02

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

EFTA Surveillance Authority

and

The Kingdom of Norway

seeking a declaration that, by applying its legislation so as to allow the University of Oslo to reserve certain post-doctoral positions for women only, the Kingdom of Norway has failed to fulfil its obligations under Articles 7 and 70 EEA as well as Articles 2(1), 2(4) and 3(1) of Directive 76/207/EEC.

I. Introduction

1. The case at hand concerns a provision in the Norwegian Act relating to Colleges and Universities providing for preferential treatment of women when advertising academic posts. The measure is intended to facilitate the recruitment of women to permanent academic positions in which women are generally underrepresented. It was applied by the University of Oslo, which reserved a number of post-doctoral and permanent academic positions for women in 1998 and 2000.

2. The EFTA Surveillance Authority's application is based on one plea in law, which is that the Norwegian legislation on Universities and Colleges, insofar as it permits the reservation of academic posts exclusively for women, is in breach of the EEA law provisions on gender equality.

II. Legal background, pre-litigation procedure and procedure before the Court

Legal background

EEA law

3. Article 7 EEA provides that acts referred to or contained in the Annexes to the Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties, and be, or be made, part of their internal legal order.

4. Article 70 EEA stipulates that the Contracting Parties shall promote the principle of equal treatment for men and women by implementing the provisions specified in Annex XVIII to the Agreement.

5. Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, promotions and working conditions¹ (hereinafter the “Directive”) is listed in Annex XVIII to the EEA Agreement.

6. Article 2(1) of the Directive states that:

“For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on the grounds of sex either directly or indirectly by reference in particular to marital or family status.”

7. Article 2(2) states that:

“This Directive shall be without prejudice to the right of member states to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context of which they are carried out, the sex of the worker constitutes a determining factor.”

8. Article 2(4) of the Directive states that:

“This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities...”

9. Article 3(1) of the Directive states that:

“Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the

¹ 1976 OJ L 39, p. 40-42.

sector or branch of activity, and to all levels of the occupational hierarchy.”

The contested national law

10. Article 30(3) of the Norwegian Act No. 22 of 12 May 1995 relating to Universities and Colleges (hereinafter the “contested Act”) reads as follows:

“The appointing body advertises academic posts. A member of the Department’s Steering Committee or of the Appointments Committee can however always request the Board to advertise the post itself. If one sex is clearly under-represented in the category of post in the subject area in question, applications from members of that sex shall be specifically invited. Importance shall be attached to considerations of equality when the appointment is made. The Board can decide that a post shall be advertised as only open to members of the underrepresented sex.”

11. On 17 July 1998, a new type of post-doctoral scholarship was established by amendment to Regulation 1983 No. 1608 of 11 November,² which is obtainable after completion of a doctoral degree and was designed as a temporary position with a maximum duration of four years.³ It was intended to improve recruitment for high-level academic positions. According to the Directions issued by the Ministry of Education, Research and Church Affairs No. 87-1998 of 6 November 1998, these positions were to be made available in fields where recruitment needed to be strengthened. Fields where women are clearly underrepresented were also to be taken into consideration.

12. Based on the regulations outlined above, in 1998 the University of Oslo officially reserved 20 post-doctoral positions intended to stimulate the recruitment of women to permanent academic positions.⁴ Furthermore, according to the University’s Plan for Equal Treatment 2000-2004, adopted on 7 March 2000, another 10 post-doctoral positions and 12 permanent academic positions are to be reserved for women.

² As the Government of Norway states more precisely, post-doctoral posts at universities and university colleges were already introduced by the Norwegian research councils in the 1980s. However, in 1998 a number of new post-doctoral research grants were for the first time funded through the Norwegian national budget and allocated by the Government to universities and university colleges, *inter alia* to the University of Oslo. Since 1998, a total of 218 new post-doctoral research grants were funded through the national budget, of which the Government decided that 40 should be reserved for women.

³ According to the Government of Norway, normal duration is three years, four years if one year of teaching duties is included.

⁴ The Government of Norway additionally refers to the purposes of developing particular competence in the research fields of priority of each university, to further mobility between various research communities, and to promote gender equality, as mentioned in the NIFU Report No. 25/2001, pages 37-38.

13. According to the Plan, the University will allocate the permanent positions to the faculties by way of a competition, based mainly on the following four criteria:

- Academic fields where women in permanent academic positions are considerably underrepresented. Fields with less than 10 percent female academics will be given priority;
- Academic fields where women in permanent academic positions are underrepresented compared to the number of female students;
- Academic fields where there is a sufficient number of qualified women for recruitment;
- The faculty must finance a research fellow position or a post-doctoral position linked to the permanent position.

14. Reserving positions implies that only a defined group may apply, in this case only women.

Pre-litigation procedure

15. On 16 August 2000, the EFTA Surveillance Authority received a complaint alleging that, by reserving a number of academic positions at the University of Oslo for women only, Norway was in breach of the EEA Agreement. In the course of its examination of the complaint, the EFTA Surveillance Authority sent a request for information to the Government of Norway on 25 August 2000.

16. In its reply, received by the EFTA Surveillance Authority on 26 October 2000, the Government of Norway stated that Article 30(3) of the contested Act was in compliance with the EEA Agreement, as the provision was in accordance with the purpose of Article 2(4) of the Directive. The Government concluded that, since the number of women recruited to academic positions had declined during the nineties despite the existing pool of qualified female applicants, the opportunities presented to equally qualified males and females were unequal. Basing itself on the judgment of the Court of Justice of the European Communities in the *Marschall* case,⁵ the Government maintained that the measures were permissible since the best means available to obtain equality was to reserve certain academic positions for women.

17. On 6 June 2001, the EFTA Surveillance Authority sent a letter of formal notice to Norway, concluding that, by maintaining a rule such as that provided for in Article 30(3) of the contested Act, Norway has failed to fulfil its

⁵ Case 409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363, paragraphs 29 and 30 (hereinafter "*Marschall*").

obligations under Articles 7 and 70 EEA and Articles 2(1), 2(2), 2(4) and 3(1) of the Directive. The EFTA Surveillance Authority acknowledged that measures intended to promote women in sectors in which they are underrepresented, may be regarded as compatible with the exception clause laid down in Article 2(4) of the Directive and the relevant case law from the Court of Justice of the European Communities. However, with particular reference to the judgment of the Court of Justice of the European Communities in the *Abrahamsson* case,⁶ the EFTA Surveillance Authority observed that such measures could only be accepted under EEA law if they did not automatically and unconditionally give priority to women when women and men were equally qualified. Moreover, the candidates in question must be subject to an objective assessment, which takes into account the specific personal situations of all candidates.

18. In its reply to the letter of formal notice of 10 September 2001, the Government of Norway maintained its view that the Norwegian system of reserving certain post-doctoral positions for women at the University of Oslo was in full compliance with the obligations of Norway under the EEA Agreement. The Government firstly referred to the serious under-representation of women in higher educational institutions. Although women have constituted 50% of the students for the past 20 years, they constitute only 29% of the associate professors and 13% of the professors. Moreover, the Government pointed to a need for positive action measures widely recognised in international law.⁷ Furthermore, the Government submitted that Article 70 EEA must be interpreted in the light of the homogeneity objective of the EEA Agreement. The Government concluded that the Directive must be interpreted and applied in the same manner in the EFTA/EEA States as in the EU Member States, unless there are adaptations or particulars of the situation that imply a difference has been intended. Therefore, the Directive must be interpreted in the light of Article 141(4) EC, which, after the treaty amendments made at Amsterdam, explicitly allows for positive action measures and, in the event of conflict, takes precedence over provisions in the Directive. The Government further pointed out that in a Commission proposal for amending the Directive,⁸ the existing Article 2(4) of the Directive is replaced by a simple reference to Article 141(4) EC. The Government also took the view that, in light of the rulings in *Abrahamsson* and the *Badeck* case,⁹ positive action measures are admissible under Article 2(4) of the Directive provided that they are proportionate. Since the measures in question were temporary and formed part of a special programme targeting women as a last attempt to achieve a more balanced representation of the sexes, it was

⁶ Case 407/98 *Abrahamsson and Anderson* [2000] ECR I-5539, paragraph 59 (hereinafter “*Abrahamsson*”).

⁷ *Inter alia*, Article 4(1) of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, Article 4(2), and ILO-Convention No. 111 concerning Discrimination in Respect of Employment and Occupation.

⁸ Amended proposal of 7.6.2000, COM(2001) 321 final.

⁹ Case C-158/97 *Badeck and others* [2000] ECR I-1875, paragraph 23 (hereinafter “*Badeck*”).

maintained that they differed from the measures considered in *Abrahamsson* and were, therefore, proportionate.

19. On 28 November 2001, the EFTA Surveillance Authority sent a Reasoned Opinion to the Government of Norway. The EFTA Surveillance Authority maintained its view that the measures at issue were in breach of the EEA Agreement. The reasons given in the letter of formal notice were repeated. The EFTA Surveillance Authority particularly stressed that a rule whereby men are totally excluded from a selection process did not change the fact that it gave absolute and unconditional priority to women, contrary to the relevant jurisprudence of the Court of Justice of the European Communities concerning Community law. With regard to the argument put forward by the Government, whereby the provisions of the Directive must yield to Article 141(4) EC, the EFTA Surveillance Authority referred to the ruling in *Abrahamsson*, in which the Court of Justice of the European Communities held that the amendments to this Article had no influence on the conditions to be considered in this area as laid down in case law. As to the deletion of Article 2(4) of the Directive in the Commission proposal, the EFTA Surveillance Authority emphasized that positive action measures permitted under the proposed Directive cannot exceed that permitted in Article 141(4).

20. In a reply of 27 February 2002, the Government of Norway repeated its view that the measures taken were in compliance with the Directive. The arguments set forth in the reply to the letter of formal notice were invoked again. Additionally, in relation to its arguments concerning international agreements, the Government of Norway submitted that the Directive could not be interpreted in a manner contrary to other international obligations of the Contracting Parties. In that context, a specific reference was made to a recommendation of 15 June 2000 by the CEDAW Committee, in which said committee called upon the Government of Austria to introduce positive action measures to increase women's appointment to academic posts. Furthermore, the Government of Norway referred to the Court of Justice of the European Communities' judgment in the *Schnorbus* case,¹⁰ in which it upheld a discriminatory measure on the grounds that it was based on an objective fact, i.e. the completion of compulsory military service, a duty imposed only on men. The measure was not held to be disproportionate as it counterbalanced the detrimental effect suffered by the candidates in question only to some extent. The Government maintained that the Norwegian measures were similarly based on an objective fact, i.e. the under-representation of women, and did not exceed what was necessary to counterbalance the effects of this fact, since it constituted a last attempt to achieve a more balanced representation of women in academia.

¹⁰ Case 79/99 *Schnorbus* [2000] ECR I-10997, paragraphs 44-46 (hereinafter "*Schnorbus*").

Procedure before the Court

21. Against the background of these circumstances, the EFTA Surveillance Authority filed the application at issue here, which was registered at the Court on 22 April 2002.

III. Forms of order sought by the parties

22. The EFTA Surveillance Authority claims that the Court should:

- (i) *declare that by maintaining in force a rule which reserves a number of academic posts exclusively for women, Norway has failed to fulfil its obligations under Articles 7 and 70 of the EEA Agreement and Articles 2(1), 2(4) and 3(1) of the Act referred to in point 18 of Annex XVIII to the Agreement (Directive 76/207/EEC of 9 February on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions);*
- (ii) *order the Kingdom of Norway to pay the cost of these proceedings.*

23. The Kingdom of Norway contends that the Court should:

- (i) *dismiss the application as unfounded;*
- (ii) *order the EFTA Surveillance Authority to bear the costs.*

IV. Written procedure

24. Written arguments have been received from the parties:

- the EFTA Surveillance Authority represented by Dóra Sif Tynes, Officer, Legal and Executive Affairs, acting as Agent;
- the Government of Norway, represented by Fanny Platou Amble, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent, and Ingeborg Djupvik, Legal Adviser, Ministry of Foreign Affairs, acting as Co-Agent.

25. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

- the Commission of the European Communities, represented by John Forman, Legal Adviser, and Nicola Yerrell, Member of its Legal Service, acting as Agents.

V. Summary of the pleas in law and arguments

The EFTA Surveillance Authority

26. In its *application*, the EFTA Surveillance Authority begins by presenting the relevant case law of the Court of Justice of the European Communities at the outset. The EFTA Surveillance Authority submits that the correct legal basis for consideration of this case is the provisions of the Directive read in conjunction with the obligations imposed on the EFTA States, which are laid down in Articles 7 and 70 of the EEA Agreement. Article 141(4) of the EC Treaty, having been added by the Treaty of Amsterdam, does not apply in the present case. The EFTA Surveillance Authority submits that as the amendments made to the EC Treaty by the Treaty of Amsterdam have not been incorporated into the EEA Agreement they cannot provide a relevant legal basis in the present case. Relying on such a provision would extend the scope of application of the EEA Agreement beyond what the EFTA Court has deemed acceptable.¹¹

27. Moreover, the EFTA Surveillance Authority submits that the reference made by the Government of Norway to its obligations under different international agreements is unwarranted in the present case.

28. The Norwegian law at issue permits certain academic posts to be reserved exclusively for women. This means that priority is automatically and unconditionally given to women. The EFTA Surveillance Authority submits that this gives rise to a differential treatment within the meaning of Article 2(1) of the Directive. The situation of a female candidate and a male candidate are comparable, as both sexes will be seeking employment in academia. Given that the rule clearly entails differential treatment on grounds of sex, it must be assessed whether it may nevertheless be permissible under Article 2(4) of the Directive.

29. A measure giving automatic and unconditional preference to female candidates was held by the Court of Justice of the European Communities in the *Kalanke* case¹² to be in violation of the Directive. Furthermore, in *Marschall*, it was held that such a rule would preclude any objective assessment of a possible male candidate and therefore not allow for the examination of the individual criteria specific to such a candidate, which exceeds the exceptions permitted by Article 2(4).

30. According to the EFTA Surveillance Authority, it is settled case law, that in determining the scope of any derogation from a fundamental right such as the equal treatment of men and women, due regard must be had to the principle of

¹¹ Case E-1/01 *Einarsson v Iceland* [2002], not yet reported, paragraph 45 (hereinafter, “*Einarsson*”).

¹² Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051, paragraph 21 (hereinafter “*Kalanke*”).

proportionality. This requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the objective and that the principle of equal treatment must be reconciled as far as possible with the requirements of the goal thus pursued.¹³ The Norwegian rule, however, fails to meet these conditions. The EFTA Surveillance Authority submits that Norway has failed to show that the objective at issue cannot be achieved by less invasive measures.

31. The EFTA Surveillance Authority also submits that the ruling in *Schnorbus* does not alter this conclusion. In that case preferential treatment of men due to their compulsory military service was held to be proportionate as it was prompted solely by the desire to counterbalance to some extent the effects of delay. Furthermore, the Court of Justice of the European Communities held that the advantage conferred on the male applicants, whose enjoyment of priority might operate to the detriment of other applicants for up to 12 months, did not seem disproportionate as the delay they had suffered on account of the compulsory military service was at least equal to that period.¹⁴ In the present case, however, the rule in question allows for the reservation of permanent positions for women, thus allowing for indefinite rather than temporary preferential treatment.

32. In the *Lommers* case,¹⁵ the Court of Justice of the European Communities found that a scheme reserving a limited number of subsidised nursery places for female officials fell within the scope of the derogation provided for in Article 2(4), since, in cases of emergency, it permitted male officers access to them, thus allowing for individual assessment of the officials needs for day care facilities. The EFTA Surveillance Authority submits that this ruling shows, that an absolute rule such as the one contested in the present case clearly exceeds what is acceptable under Article 2(4).

33. In its *reply*, the EFTA Surveillance Authority affirms its position, limiting itself to addressing only one point of law raised by the Government in its defence and resubmitting that the earmarking of certain academic posts for women only encroaches upon the individual right to equality, laid down in Article 2(1) of the Directive. Contrary to the Government's point of view, the EFTA Surveillance Authority assumes that this measure cannot be justified with the principle of proportionality.

34. The EFTA Surveillance Authority submits that the Government has failed to show that Article 2(4) of the Directive permits the disputed measures. Article 2(1) of the Directive establishes the individual right to equal treatment. Article

¹³ Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 38; and Case C-273/97 *Sirdar* [1999] ECR I-7403, paragraph 38.

¹⁴ *Schnorbus*, paragraph 46.

¹⁵ Case C-476/99 *Lommers* [2002], not yet reported, judgment delivered 19 March 2002, paragraph 45 (hereinafter "*Lommers*").

2(4) of the Directive, constituting derogation from that right, must, in light of the case law of the Court of Justice of the European Communities, be interpreted strictly.¹⁶ It is settled case law that Article 2(4) of the Directive does not permit selection methods for employment that are unconditional and exclude an objective assessment of candidates taking into account their specific personal situations. According to the EFTA Surveillance Authority, it is for the Government to establish that the measures in question do not constitute such proscribed methods and are thus permitted by Article 2(4) of the Directive. In order for Article 2(4) of the Directive to apply, it is necessary to establish that the social reality of a given sector justifies the adoption of a positive action measure, i.e., that there is a clear case of existing inequality between the sexes. Secondly, the corrective measure in question has to fulfil two conditions. It cannot be unconditional, nor can it exclude an objective assessment, which takes into account the specific personal situations of all candidates.

35. To the Government of Norway's submission that the gender imbalance in the academic sector in Norway justifies the adoption of positive action measures, the EFTA Surveillance Authority replies that a rule permitting certain posts in academia to be earmarked for women only must be considered to be outside the derogation in Article 2(4) of the Directive. Such a rule is unconditional and precludes any objective assessment of male candidates since they are precluded from applying to the post. The EFTA Surveillance Authority, thus, submits that the earmarking of certain posts in academia for women only, interferes with the individual right laid down in Article 2(1) of the Directive. The EFTA Surveillance Authority further submits that it is irrelevant whether the Government has failed, by the employment of other means, to achieve its goals in the area of gender equality. Rather, what must be assessed is whether the measure in question encroaches upon the individual right to equality, laid down in Article 2(1) of the Directive. As the disputed measures preclude any assessment of prospective male candidates, they clearly overstep the bounds inherent in the derogation laid down by Article 2(4) of the Directive. In any event, the measures cannot be considered proportionate to the aim pursued as they are arbitrary in nature and interfere excessively with the individual right to equality laid down in the Directive.

The Kingdom of Norway

36. In its *defence*, the Government of Norway requests the Court to declare the application unfounded based on the following main submissions:

- The rule in question, a special measure aimed at accelerating *de facto* equality between women and men, is not in breach of Articles 2(1) and 3(1) of the Directive;

¹⁶ *Kalanke*, paragraph 22; *Marschall*, paragraph 33; *Badeck*, paragraph 23.

- The breach is in any way justified by Article 2(2) of the Directive and/or by its Article 2(4). In this connection, Article 141(4) EC is relevant to the interpretation of Article 2(4) of the Directive;
- The rule in question is not considered to be discriminatory within the meaning of relevant international conventions;
- The rule in question is proportional to the legitimate aim pursued, namely the promotion of gender equality in academia. The measure is temporary in nature, both for professors and post-doctors, and is employed only for a very limited number of the total appointments that take place in the University of Oslo. Other less invasive measures to raise the proportion of women in academic posts have been attempted in the whole university sector, but without discernible effect.
- The EFTA Surveillance Authority has not fulfilled its obligation under Article 31 of the Surveillance and Court Agreement.

Factual background of Norwegian policy on gender equality in academia

37. The Government points to the current under-representation of women in research, particularly in senior posts, at Norwegian universities; and notes that in almost all academic fields, the goal of equal gender representation in academia has not been reached, despite the fact that an increase in the percentage of women has been a main ambition in Norwegian research and education policy since the 1970s, and a number of relevant policy measures have been applied in order to achieve this goal. In the university sector, women comprised a mere 23% of the academic staff in 2000.¹⁷ The proportion of women in academia decreases significantly towards the top of the academic hierarchy. Even though the ratio has improved, there is still a dramatic imbalance.¹⁸

38. According to the Government, these numbers stand in glaring contrast to the percentage of women in the student body. In 1999, women comprised approximately 60% of the student body in humanities, social sciences and medicine/dentistry, more than 50% in law, more than 40% in natural sciences and approximately 30% in economics and technology. From the early 1980s, the proportion of female master degree students at Norwegian universities has been above 50%. In the 1990s, the proportion of women in the recruiting base for

¹⁷ Information from the Database for Statistics regarding Higher Education, compiled by the Norwegian Computer service for the Social Sciences, on behalf of the Ministry of Education and Science; the full database can be found at the website of the University of Bergen, cf. <http://www.nsd.uib.no/dbhvev/>.

¹⁸ Whereas there were 5% female professors in 1981, the ratio increased to 9% in 1991 and 13% in 2000, varying between the various academic fields. Cf. *O. Tvede, I.M. Larsen and P. Aasen*, "Recruitment to research and teaching in the university and college sector," Norwegian Institute of Research and Education, (NIFU), Report no 25/2001, December 2001, page 22.

academic posts rose markedly. In 2000, women comprised approximately one third of all doctor graduates.¹⁹

39. Despite the fact that the female recruiting base had never been better, the paradoxical experience in the late 1990s was that actual recruiting of women to academic posts levelled off. This gave the Government cause for concern, particularly in light of the significant number of permanent academic posts that must be filled in the Norwegian university and college sector over the next 10 years, due partly to the high average age of present academic staff, and partly to the Government's adopted policy – approved by the Norwegian Parliament – to increase the quality of Norwegian research.²⁰ The Government answers the question why women are still grossly underrepresented in academia, particularly in senior posts, although the recruitment base for quite some time has been adequate to ensure gender equality, by asserting that the traditional male dominance in research has led to a culture with values and standards that have the effect of indirectly discriminating against women.²¹

40. The fact that women leave academic careers before they are qualified for the top jobs is also observed in other European countries, and referred to as “the leaky pipeline.”²² As one of the main aims in Norwegian higher education and research policy is to increase the proportion of women in top academic posts and to recruit more women to disciplines where female representation is particularly low, it is a major challenge to develop and secure conditions which ensure that a higher proportion of qualified women continues to the next level at each important turning point in academic careers. According to the Government, the earmarking of post-doctoral and professor posts at issue in the case at hand are measures to this effect. As post-doctoral posts are pure research positions, normally without teaching or administrative obligations, they are particularly well suited as a means to plug the “leaky pipeline.” The use of post-doctoral

¹⁹ Information from the Database for Statistics regarding Higher Education, cited above.

²⁰ Described in St.meld. nr 39 (1998-99) “Forskning ved et tidsskille” and St.meld. nr 35 (2001-2002) ”Kvalitetsreformen. Om rekruttering til undervisnings- og forskerstillinger i universitets og høyskolesektoren,” page 33-46 and NIFU Report No. 25/2001, section 2.2. The Government further refers to a comprehensive description of women's participation in research and the status of gender equality given in a report prepared by the Research Council of Norway on behalf of the Ministry of Education and Research in 2002.

²¹ In this regard, the Government refers to the Report “How to recruit more women to senior posts in the university and university college sector,” prepared by the Ministry of Education and Research.

²² This phenomenon is later explained by experience, showing that in academic fields where women are in an extreme minority, they show an increased tendency to opt out. The reasons for this may be many. In fields where they are strongly under-represented, women experience a higher pressure towards student supervision and advising than their male colleagues, as many female students prefer advisers of the same sex. Further, the Norwegian Gender Equality Act in section 21 provides that at least 40% of each sex shall be represented on university councils, boards and committees. This represents a considerable extra workload in fields where women will have less time available to conduct research and thus fall behind in the competition for advancement.

posts is widespread in medicine and natural sciences, while far less common in humanities and social sciences.²³ In the field of natural sciences, the ratio of female post-doctoral research was 28% in 1999.²⁴ This number includes posts earmarked for women.

41. The Government of Norway further describes the situation in other European countries with regard to women in academia, quoting from the so-called ETAN (European Technology Assessment Network) report “Science Politics in the European Union.”²⁵ The Government concludes from it that Norway is not in a unique position in Europe when it comes to the low representation of women in academia and provides figures for several states.²⁶ As to positive action measures, the Government refers to the discussion in the ETAN Report²⁷ and summarizes that such measures are employed in many Member States to improve the situation of women in academia. The ETAN Report concludes with a set of recommendations. Recommendation 7 deals with positive action.²⁸

42. The Government concludes that the situation in Norway is similar to that found in other European countries with regard to the scarcity of women in senior academic posts, large discrepancies between disciplines and the “leaky pipeline” phenomenon. It further concludes that a whole range of positive action measures, including earmarking both of financial resources and positions, have been applied in Member States to alleviate this situation, encouraged by, *inter alia*, the ETAN Report. It is difficult to see that there are grounds to distinguish these measures legally from the earmarking at issue in the present case. Accordingly, it seems to the Government of Norway that the development of Member State policy in the field of gender equality in academia – a policy encouraged by the ETAN Report – is more dynamic than the development of EU law, as interpreted by the EFTA Surveillance Authority in application.

²³ NIFU Report No. 25/2001, page 38, table 30.

²⁴ NIFU Report No. 25/2001, pages 23 and 38.

²⁵ “Women and Science” is a project supervised by the European Commission, Research Directorate-General, as part of the 5th Framework Programme, covering Research, Technological Development and Demonstration activities. The complete Report can be found at <http://www.cordis.lu/improving/women/documents.htm>.

²⁶ According to the report, “[w]omen are lost from the academic pipeline at a greater rate than their male counterparts (...) the proportion of women declines markedly at the postdoctoral level, where the career tracks begin. For each step up the ladder hereafter, the proportion of women declines. The drop in women both at the postdoctoral level and after it has been attributed to a “leaky pipeline,” *ibid.* page 12. See also Fig. 2.4-2.6 comparing six EU Member States.

²⁷ *Ibid.* pages 24-25.

²⁸ “Positive action measures, although limited on their own, can be a powerful means of kick-starting change, and provide an incentive to the development of good practice. The Amsterdam Treaty allows for positive action of individuals in under-represented areas. However, such action can be more effective when used to tackle group disadvantage. There is plenty of scope for developing positive action measures in a wide range of areas related to women and science.”

43. The Government of Norway goes on to describe the various measures undertaken to attain a higher percentage of women in senior academic posts. Most of these measures have been employed for many years before earmarking of positions for women was first tried, but without – as the statistics show – having the desired effect. Article 30(3) of the contested Act allows in its final sentence for the earmarking of single posts in favour of the underrepresented sex. However, the two foregoing sentences prescribe that when advertising posts, applications from the under-represented sex in that category of post shall be specifically invited, and importance shall be attached to considerations of equality when the appointment is made. Article 30(3) of the contested Act thus provides for moderate action measures to be the general rule, to be supplied with the earmarking of specific posts as an extraordinary measure. Further, the Government describes a measure to promote gender equality in the public sector through a regulation laid down in the Basic Collective Agreement.²⁹ Other measures taken include the so-called “personal advancement” to professorships (of which a limited number was reserved for women),³⁰ gender equality action plans (now containing target percentages for women to be employed in academic posts), mentor programs for various groups of female academic staff, and other positive action measures to qualify women for further research carriers.³¹

44. In conclusion, the Government of Norway notes that the measures, still applied today, are too general, too limited or too modest to stimulate any discernable gender balancing in recruitment to research positions. The only exception was the reservation of a limited number of personal advancement posts for women in the mid 80s. Earmarking of posts for women is a special measure that is limited, temporary and targeted in scope, and at the same time has clear and immediate effects on reducing the present gender inequality in academia. Thus, in the opinion of the Government, earmarking is an important measure, to be applied temporarily and in addition to already existing measures.

²⁹ It reads: “*If there are applicants to a vacant post in the state government who are approximately equally qualified, applicants of the sex representing less than 40% in the pertinent occupational group shall be given priority to the post. Normally, priority in favour of men should not be agreed upon.*” Even though this clause is legally binding on all government bodies, including the university and university college sector, it has only been applied in a very limited number of appointment procedures and thus has not been effective to obtain gender equality. The reason for this is likely to be the wide and to a large extent subjective element of discretion embodied in the basic legal and factual condition to apply the clause, namely “*approximately equally qualified.*”

³⁰ Even if this procedure did not involve new appointments, this form of “earmarking” had significant effect: After more than 20 years without an increase in the percentage of women professors, that is approximately 4,5% from 1961-84, the percentage was doubled during the last part of the 1980s. After this period, no specific reservations or quotas for women have been attached to personal advancements, and the increase in the percentage of female professors almost stagnated, until the earmarking schemes of recent years were implemented.

³¹ Such as individual scholarships awarded to female academic staff, exemption from teaching obligations, and the prolongation of doctoral scholarships held by women. Further, the universities have adopted administrative routines including visibility of gender equality information on web sites etc., the anchoring of responsibility for promotion of gender equality in the top management of universities, and the appointment of special gender equality counsellors.

45. The earmarking of post-doctoral posts at the University of Oslo is mentioned in the current action plan of the University as one amongst several means of increasing the proportion of female staff; all concerning new posts funded through the national budget in 1998 (and 2001). Earmarking of academic posts for women is based on the concern that women deviate from the academic career path at a higher rate than their male counterparts. By being unable to attract more of its female research candidates to permanent academic posts and further to senior academic posts, valuable academic resources are lost to the University. This loss of resources represents a quality problem to the academic standards of the University, as well as a quality problem to students who request the availability of an adequate number of female teachers, lecturers and advisers. An extremely low proportion, or even complete absence of women, is unfortunate in academic fields having a large proportion of female students. However, such a fact is equally unfortunate when recruiting more female students to fields that are still strongly male dominated, e.g. technology, where female role models are sorely needed.

46. As to the allocation of post-doctoral positions, the Government explains that of the 40 positions funded over the national budget for 1998, 20 were assigned to the University of Oslo. The Ministry of Education and Research issued directions for the use of these grants stating *inter alia* that fields where women are clearly under-represented should be taken into consideration when allocating these posts. In accordance herewith, the board of the University decided that all 20 post-doctoral research grants for this year should be earmarked for women, as a singular effort to stimulate the gender balance in research recruiting. In 2001, 40 out of 90 new post-doctoral research grants were reserved for women directly in the national budget. The University of Oslo received 14 of these earmarked post-doctoral research grants.

47. As regards professorships, the University of Oslo shall earmark three permanent senior academic posts for women, according to the gender equality action plan for the period 2000-2004. This amounts to a total of 12 permanent posts by 2004. In allocating the earmarked posts between various faculties and institutes, a competition procedure is applied. The criteria for allocation are that the academic unit considered must (1) have less than 10% female professors, (2) be able to establish that there is a base of qualified women prospective applicants, and (3) conduct research which meets the academic priorities of the University.³²

³² The approach of recruiting in areas with less than 10% women is based on the assumption that where women are in an extreme minority in academia, they show an increased tendency to opt out, e.g. because of higher pressure towards student supervision and advising, as many female students prefer advisers of the same sex. Another reason given is the fact that the Gender Equality Act provides that at least 40% of each sex shall be represented in university councils, boards and committees, thus creating a considerable extra workload for women in areas where they are clearly under-represented.

48. Apart from the fact that they have been advertised as open only to women, all earmarked posts at the University of Oslo have been filled in accordance with regular employment procedures. In the competition to obtain the earmarked positions, solid interest and well-qualified recruiting bases were demonstrated, and competition was fierce. Of the posts that have been advertised and filled, the applicants have largely been very qualified. Qualification criteria have not been compromised in this process. In the opinion of the University and the Government of Norway, this procedure has contributed to strengthen rather than weaken the academic quality of the institution. It is in the best interests of the University of Oslo to employ measures that reduce the loss of quality inherent in losing a proportionally larger part of the female than of the male recruiting base.

49. Further, the Government presents statistics in order to prove that the earmarked posts constitute a small proportion of the total number of post-doctors and professors appointed at the University of Oslo during the period 1998-2002. According to these figures, there were 179 new appointments to post-doctoral research fellow positions in all faculties and institutions during 1998-2001, of which 91 were male and 88 were female. Of these, 29 post-doctoral posts were earmarked for women.³³ The earmarked positions have been established primarily in medicine, natural sciences and other academic fields with poor recruiting of women to permanent academic posts. The earmarking has contributed to the present gender balance in post-doctoral posts at the University of Oslo. As a post-doctoral grant is a recruiting measure for a permanent academic post, gender balance in this position is considered particularly important.

The law

50. As its first line of defence, the Government of Norway denies that the rule in question is in breach of Articles 2(1) and 3(1) of the Directive. As a second line of defence, the Government submits that Article 2(4) of the Directive should be interpreted in light of the recent amendments and proposed amendments to EU legislation, leading the Court to conclude that the earmarking scheme in question falls within the scope of Article 2(4) of the Directive. As its third line of defence, the Government submits that Article 2(4) as hitherto interpreted by the Court of Justice of the European Communities, and/or Article 2(2) of the Directive, permits the Norwegian practice.

51. The Government's legal appraisal is based on the assumption that formal equality in treatment is not sufficient to achieve material equality in effect. Therefore, the main focus of Norwegian policy and legislation is the concept of gender equality between men and women as groups, reducing the concept of non-

³³ The total number of appointments to permanent senior academic positions (associate professorships and professorships) during the last four years has been 227, out of which four have been subject to earmarking.

discrimination on a case-by-case basis to a secondary issue, and to a means rather than a goal in itself.

52. According to the Government of Norway, a focus on the ultimate goal of gender equality must, in social contexts where gender inequality is still substantial - as in academia, entail an acceptance of a differential treatment of the sexes in the short term, in order to achieve equality in effect for the under-represented sex as a group in the longer term. If formal equal treatment of the sexes is not likely to result in gender equality in practice within a reasonable time span, positive action measures such as the earmarking of academic posts may be applied.

53. In this context, the Government firstly presents its obligations under international law on gender equality, submitting that policy on women and gender equality is not a national or regional matter. The elimination of all inequalities between men and women is an internationally recognised objective. The concept of gender equality has evolved over time both internationally and within the European Community, under reciprocal influence.

54. The concept laid down in several international agreements and instruments, promoting positive action measures in order to eliminate inequalities between men and women, influences the legal basis for the Norwegian interpretation and practice of the principle of gender equality. In this context, it is submitted that the Court should pay due respect to the fact that the Norwegian rule in question, a special measure aimed at accelerating *de facto* equality between women and men, is not considered to be discriminatory within the meaning of several relevant conventions.

55. The Government of Norway particularly refers to the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW),³⁴ ratified by 169 countries including all EEA Members States. The aim of the Convention's ban on discrimination is to achieve not only equal opportunities *de jure*, but *de facto* equality (equality of outcome). As a consequence, the Convention bans direct and indirect discrimination against women, but goes on to state in Article 4(1) that specific temporary measures of positive action aimed at accelerating *de facto* equality between women and men shall not be considered discrimination.³⁵ In this sense, positive action measures in favour of women are

³⁴ UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), dated 18 December 1979, ratified by Norway on 3 September 1981, entered into force on the same date. On 5 March 2002, Norway further ratified the Optional Protocol to CEDAW, and thus recognized the competence of the Committee to receive and consider complaints from individuals or groups of individuals claiming to be victims of a violation of any of the rights set forth in the Convention.

³⁵ Furthermore, pursuant to the Convention Articles 3 and 11, the State Parties have a duty to take *all appropriate measures* to ensure equal rights for women in working life. The Government further refers to the general recommendation No. 23 on political and public life adopted by the Committee at its 16th session, in 1997. The Government quotes paragraph 15 of the

defined and interpreted as an intrinsic dimension of the very ban on discrimination. As an alternative to the interpretation chosen by the Court of Justice of the European Communities in relation to the Directive, according to which positive action measures are legally defined as derogations from the ban on discrimination, the Government suggests an interpretation according to which positive action measures – being aimed at gender equality in practice as the goal of gender equality legislation, rather than ensuring non-discrimination in every individual case – are considered an intrinsic dimension of the very ban on discrimination.

56. In the opinion of the Government, the latter definition applies in the context of the CEDAW Convention, as well as of the Norwegian gender equality legislation. CEDAW member states are even encouraged by the CEDAW Committee to actively implement positive action measures for women, such as quotas, to increase the number of women in occupations that are of particular social importance, such as in universities and courts of justice.³⁶ The Government concludes from the above that positive action measures such as the earmarking of post-doctoral and professorship posts at the University of Oslo, in accordance with section 30(3) of the contested Act, is a measure permitted and encouraged under CEDAW.

57. To the Government of Norway, it is inconceivable that measures permitted and promoted by a widely ratified UN convention, based on a common international understanding of the importance of gender equality, should be prohibited by the Directive in a situation where this is the only appropriate measure. The Government is therefore of the opinion that the relevant EU/EEA legislation ought to be interpreted in light of the Convention. Moreover, the objectives of the Directive and those of the CEDAW overlap to a large degree. Therefore, the objectives should be interpreted and applied in the same manner. According to the Government, this will be even more the case when the amendments to the Directive enter into force, whereby there will be a direct reference to CEDAW in recital 2 of the Preamble of the Directive.

58. The Government further points to Article 14 of the European Convention on Human Rights, Protocol 12 to the same Convention, and Articles 2 and 5 of

recommendation, titled “*Temporary special measures.*” A summary of CEDAW General recommendation 23 is to be found at <http://www.unhchr.ch/tbs/doc.nsf>.

³⁶ In this respect, the Government draws the attention of the Court to the CEDAW General recommendation No. 5 (General Comments) from 1988, cf. CEDAW General recommendation 5, A/43/38, to be found at <http://www.unhchr.ch/tbsldoc.nsf>. Moreover, the Government deems the comment on the combined third, fourth and fifth reports of Austria in 2000 particularly relevant to the case at hand. The Committee here expressed its concerns at the low representation of women in Academia, where women occupied only 25% of lower academic positions and only 4% at the level of professorships. The Committee commented on this as follows: “*The Committee also calls upon the Government to introduce affirmative action to increase women's appointments to academic posts at all levels and to integrate gender studies and feminist research in university curricula and research programmes*”. The reports are available at <http://www.un.org/tivomenwatch/daw/cedaw/Austria%20as%20adopted.html>.

Convention 111 concerning Discrimination in Respect of Employment and Occupation (ILO), as well as to Recommendation No. R (85) 2 from the Council of Europe.

59. The Government of Norway does not agree with the EFTA Surveillance Authority's opinion, that the reference made by the Government to its obligations under different international agreements is unwarranted in the present case. It stresses that the Court of Justice of the European Communities in several cases has considered international agreements relevant to the application of Community law. In Case C-377/98 *Netherlands v Parliament and Council*, the relationship to other international agreements was one of the issues the Court of Justice of the European Communities had to assess.³⁷ According to the Government, the EFTA Court has adopted the same approach.³⁸

60. Secondly, with regard to the amendment of the Community law provisions on gender equality implemented by the Amsterdam Treaty, the Government notes that the overall purposes of the Community as laid down in Article 2 EC, now provide, *inter alia*, that it is an important task to promote "*equality between men and women.*" Furthermore, for the purpose set out in Article 2 EC, all the activities of the Community in Article 3 EC shall now be interpreted in light of the concept of gender equality. The Government quotes Article 3(2) EC and concludes that the concept of gender equality may now be seen as a general and explicit principle based on the Treaty itself. Furthermore, these provisions show that the aim is to achieve *de facto* equality, not just equal opportunities and equal treatment in legal terms. To effect this objective, a positive action provision is now also included in the EC Treaty itself, in paragraph 4 of the amended Article 141 EC. In the opinion of the Government, the earmarking of academic posts at issue is a positive action measure that falls within the scope of Article 141(4) EC.

61. The Government of Norway further points to what it considers the corollary to this new provision, the proposal introduced by the Commission to amend the Directive. The Commission has suggested that Article 2(4) of the Directive is to be replaced by a reference to Article 141(4) EC.³⁹ Moreover, a reference to a joint declaration of the Member States,⁴⁰ expressing the aim of improving the situation of working women, has been inserted into the proposed amendment to the Directive, in recital 13 of the Preamble.

62. As to differences in scope between Article 141(4) EC and the Directive, the Government recalls that the Treaty of Amsterdam, in Article 141(4), introduced

³⁷ Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7019, at paragraphs 54 and 67.

³⁸ Case E-8/97 *TV 1000*, [1998] EFTA Court Report 68, at paragraph 26, concerning the ECHR.

³⁹ See COM 2000/0142 (COD). It is expected that the European Parliament will approve the proposed amendments in late June 2002. The Government particularly refers to Article 1, second paragraph, 4, *litra* (d) of the proposed amendments to the Directive.

⁴⁰ Declaration No. 28 by all the Member States, cf. OJ 1997 C 340, p. 136.

into Community gender equality law two important new concepts. Firstly, “*full equality in practice*” is now stated as the aim of those provisions. Further, there is now a specific reference to positive action measures (“*measures providing for specific advantages*”). Neither of these principles is found in the relevant articles of the present Directive, in particular its Article 2(4).

63. In Article 2(4), the focus is on equal opportunity (which in the opinion of the Government of Norway is something other than equality in effect) and measures providing for specific advantages to promote this goal. Measures that provide specific advantages for women are more far-reaching than measures that provide equal opportunity for women. Article 141(4) therefore allows the Member States a greater opportunity to make use of positive action measures than Article 2(4) of the Directive.

64. The Government further submits that existing Court of Justice of the European Communities case law on the Directive is construed so as to regard equal treatment as a goal in itself and thus positive action measures as derogations from the basic non-discrimination principle of the Directive.

65. However, the Government of Norway is of the opinion that the Court of Justice of the European Communities has confirmed its understanding in dealing with the relationship between Article 2(4) of the Directive and Article 141(4) EC. It submits that the wording of Article 141(4) EC indicates that the provision is to be interpreted more widely than Article 2(4) and refers to *Abrahamsson*.⁴¹

66. According to the Government, the Court of Justice of the European Communities does not consider the two provisions materially identical. On the contrary, when the Court of Justice of the European Communities assesses the provisions separately, it indicates that the scope of Article 141(4) is wider than that of Article 2(4) of the Directive. However, the Government mentions that *Abrahamsson* does not clarify this question, as the Court of Justice of the European Communities decided that case on the basis of lack of proportionality.⁴²

67. In the view of the Government of Norway, the amendments to the EC Treaty Articles 2 and 3, the wording of Article 141(4) EC and the amendment to the Directive, including the new Preamble, all indicate that Community law is moving towards a focus on gender equality for women as a group, rather than focusing on formal equal treatment of the sexes on a case-by-case basis. Thus, the Community is moving away from a formalistic interpretation towards a pragmatic interpretation and one in which the focus is on the ultimate goal of gender equality. Through the adoption of Article 141(4) EC and the amendments to the Directive, the Community has introduced a new basic legal approach in the field of gender equality and equal treatment of the sexes. The shift in focus -

⁴¹ *Abrahamsson*, paragraph 40.

⁴² Cf. *Abrahamsson*, paragraph 55.

which is in full conformity with the approach of relevant international conventions, particularly CEDAW - leads the Government to conclude that positive action measures should no longer be considered as derogations from the principle of equal treatment, as in *Kalanke*, but rather as an intrinsic dimension of the very ban on discrimination. Therefore, positive action measures, such as the earmarking of posts, are not contrary to Articles 2(1) and 3(1) of the Directive in the opinion of the Government.

68. With regard to a possible objection that no trace of such a revised legal basic approach can be seen in judgments rendered by the Court of Justice of the European Communities subsequent to the adoption of Article 141(4) in the Treaty of Amsterdam, particularly *Abrahamsson* and *Lommers*, the Government notes that, as it cannot be seen from these judgments that the relevant parties invoked such legal argument and submission, the Court of Justice of the European Communities had no occasion to address this issue.

69. As to the EFTA Surveillance Authority's opinion that Article 141(4) EC does not apply in the present case since the amendments made to the EC Treaty by the Treaty of Amsterdam have not been incorporated into the EEA Agreement, the Government recalls that in the *Einarsson* case, the defendant submitted that the intentions reflected in the Joint Declaration correspond to the objectives of Article 151(4) EC, and that, by analogy, this provision of the EC Treaty, which was introduced by the Treaty of Amsterdam, may be relied upon by the Court in the present case. The Court considered that it would not be a proper exercise of the judicial function to seek to extend the scope of application of the EEA Agreement on that basis.

70. The Government of Norway concurs with the Court's general approach, namely that it would not be a proper exercise of the judicial function to seek to extend the scope of application of the EEA Agreement. However, the Government is of the opinion that a distinction should be drawn between, on the one hand, a situation where the Court is called upon to interpret the EEA Agreement expansively and, on the other hand, a situation where the Court is called upon to define more precisely provisions of the EEA Agreement. In the opinion of the Government, only the first-mentioned situation has the potential of resulting in a broadening of the scope of the EEA Agreement, and thus contradicts a proper exercise of the judicial function.⁴³

⁴³ The Government gives an example of this distinction in the interpretation of Article 61(3) EEA. Article 87(3) EC, amended by the Treaty of Amsterdam, provides in section (d) that aid to promote culture and heritage conservation may be considered to be compatible with the common market. The EEA Agreement has not been amended since its entry into force on 1 January 1994 and, consequently, the parallel Article 61(3) EEA does not provide a sufficiently legal basis for accepting aid to promote culture and heritage conservation. However, it is clear that the EFTA Surveillance Authority interprets Article 61(3) in the light of Article 87(3) and, as far as the Government is informed, is prepared to accept aid to promote culture and heritage conservation under Article 61(3). The Government assumes that the EFTA Surveillance Authority does not consider such an interpretation to be an extension in the scope of the EEA Agreement, but

71. If the Court should come to the conclusion that a derogation from the EEA Agreement which already forms a part of Community law amounts to a broadening of the scope of the Agreement, the Government is of the opinion that the present case and the *Einarsson* case might be distinguished on several points.

72. Firstly, the Government recalls that the Court in the *Einarsson* case was faced with a Joint Declaration with intentions corresponding to Article 151(4) EC, but without any direct link to that Article. This may be the reason why the Court finds it would not be a proper exercise of the judicial function to seek to extend the scope of application of the EEA Agreement “on that basis” (cf. paragraph 45). In the case at hand, the issue is the interpretation of already existing EEA legislation, namely Directive 76/207/EC.

73. Secondly, the Government notes that the Directive, as amended, makes a direct reference to Article 141(4) EC, thus incorporating by reference Article 141(4) EC into the EEA Agreement. For the purposes and within the scope of the Directive, Article 141(4) will apply as a part of the EEA Agreement. The Government admits that this situation will not occur formally until the EEA Joint Committee incorporates the amended Directive into the EEA Agreement. However, given the objective of homogeneous application and interpretation within the two pillars, which is a fundamental principle the Court has found “so strongly expressed in the EEA Agreement,”⁴⁴ Article 141(4) should carry considerable weight as an interpretative factor for the Court.

74. The Government of Norway accordingly concludes that Norway is not in breach of Articles 2(1) and 3(1) of the Directive by maintaining the questioned earmarking practice at the University of Oslo pursuant to section 30(3) of the University Act.

75. If, however, the Court should find that the Government of Norway is in breach of Articles 2(1) and 3(1), the Government is of the opinion that the breach is justified under Article 2(2) of the Directive and/or under its Article 2(4).

76. According to Article 2(2) of the Directive, the equal treatment provisions of the Directive do not preclude consideration of sex in cases where sex is a genuine occupational qualification to ensure the quality of the occupational activities carried out.

77. The Court of Justice of the European Communities has recognized the Member States' need to apply Article 2(2) according to the already existing legal framework in the Member States, and thus that the provision will serve varying purposes in the different states. The Government particularly refers to paragraph

merely an *explicit adjustment* to a derogation that already forms a part of Community law. In the opinion of the Government, the situation in the above-mentioned example is parallel to the situation in the case at hand, when the Court is called upon to interpret Article 2(4) of the Directive in light of Article 141(4) EC.

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Case E-9/97 *Sveinbjornsdottir* [1998] EFTA Court Report 95.

34 of Case 248/83, *Commission v Germany*.⁴⁵ The Court of Justice of the European Communities did not rule on whether the practices mentioned are within the boundaries set forth in Article 2(2). However, according to the Government of Norway, the statement illustrates the various considerations Article 2(2) may comprise. The Government then quotes paragraph 36 of said judgment and notes that on this basis, the Court of Justice of the European Communities concluded that the provision in Article 2(2) could not be interpreted so as to bind the Member States to incorporate the provision in any given form.

78. Furthermore, the Government refers to Case 318/86 *Commission v France*, recognizing the earmarking of a certain number of posts to secure the appointment of both genders.⁴⁶ The question of separate recruitment, or quota systems, was not specifically discussed by the Court of Justice of the European Communities, as the parties agreed that national provisions prescribing the separate recruitment of men and women would not in itself constitute a breach of Article 2(2). The Court of Justice of the European Communities stressed that the application of Article 2(2) requires a specific consideration of the duties to be performed in individual cases, and that the practice of the derogation under Article 2(2) must be sufficiently transparent for supervision by the Commission. The separate recruitment practice was not found to be sufficiently transparent.⁴⁷

79. The Government concludes that, within the mentioned boundaries, separate recruitment, *inter alia* quota systems, in order to ensure the recruitment of both genders so that all necessary occupational tasks may be carried out in an appropriate manner, will constitute an appropriate measure under Article 2(2). Accordingly, Article 2(2) must be interpreted to allow gender quotas to meet reasonable demands from the customers.⁴⁸ The allocation of earmarked positions in the University of Oslo is determined by the need for female faculty staff within each institution. The substantial under-representation of female staff implies that students' legitimate need for female advisers, etc. is not met.

80. As for the obligation to assess the exemptions practised by the Member States according to Article 2(2) of the Directive, cf. Article 9(2), the Government points out that the contested earmarking of academic posts concerns temporary positions, and that the need for further earmarking of new positions will have to be reconsidered if new positions are to be advertised. The Government submits

⁴⁵ Case 248/83 *Commission v Germany* [1985] ECR 1459.

⁴⁶ Case 318/86 *Commission v France* [1988] ECR 3559, in particular at paragraph 23.

⁴⁷ See Case 318/86 *Commission v France* [1988] ECR 3559, paragraph 26.

⁴⁸ The Government refers to a Danish example. Denmark practised this provision in 1987 by allowing the Copenhagen Business School to introduce a quota for male students in the deaf interpreter training programme, wherein the overwhelming majority of students were women, to ensure that users of deaf interpreters would be able to choose a male interpreter if they wished. See the Danish *Ligestillingsradets årsberetning 1987*, at page 77 (In English: The Council for Gender Equality in Denmark, annual report 1987).

that the allocation of earmarked posts as practised by the University of Oslo constitutes an individual assessment of the duties to be performed in individual cases, and that this practice is sufficiently transparent for supervision to be undertaken. Thus, the Government submits that the contested earmarking of academic posts falls within the scope of Article 2(2) of the Directive.

81. As to Article 2(4) of the Directive, the Government reiterates its assertion that recent developments in EC law, reflected in recent EC legislation, should be taken into consideration by the Court in its interpretation of Article 2(4), thereby permitting a more liberal approach to positive action measures than what is provided for in the relatively strict interpretation of Article 2(4) as reflected in existing Court of Justice of the European Communities case law. The current discussion, however, presupposes that the Court is not convinced by the Government's arguments in this respect, and decides the case on the basis of an isolated view of Article 2(4).

82. The Government refers to a series of decisions from 1986 to date, through which the Court of Justice of the European Communities has ruled on the interpretation and scope of Article 2(4). In *Kalanke*, it was stated that the Article must be interpreted strictly, as it constitutes a derogation from an individual right laid down by the Directive. In the Government's view, this basic assumption ought to be modified in light of later legal developments.

83. In *Marschall*, the Court of Justice of the European Communities accepted the principle of moderate favour of women, i.e. that women - in sectors of public service where they are under-represented - may be given priority where male and female candidates are equally qualified for employment, provided that such favour takes place on the basis of an objective assessment which takes into account the specific personal situations of the candidates. Accordingly, automatic and unconditional priority to women will be incompatible with Community law, as further confirmed in *Badeck* and *Lommers*. In *Abrahamsson*, it was held that a national scheme of so-called radical favour of women - i.e. that women were given priority in the appointment to professorships over better-qualified men - was incompatible with the principles outlined above.

84. The Government of Norway summarizes that, if the above-mentioned criteria for the application of Article 2(4) are met, the Court of Justice of the European Communities has stated that measures giving priority to women must satisfy the proportionality test in order to fall within the scope of the Article, i.e. not exceed what is appropriate and necessary to achieve the objective.

85. In the Government's view, the Court of Justice of the European Communities has not yet been called upon to rule on whether earmarking of specific posts for women may fall within the scope of Article 2(4) of the Directive.

86. The facts of the *Badeck* case, concerning a German quota scheme for women, are considered very similar to earmarking schemes of the Government of Norway, as they both imply a certain element of automatic priority. Moreover, the German scheme applied to training positions, and is therefore directly comparable to the Norwegian post-doctoral posts. The Government specifically quotes paragraphs 39 and 55 of the *Badeck* judgment.

87. In light of the current manifest gender imbalance in Norwegian academia it is highly unlikely that the Norwegian earmarking scheme will bring the proportion of women in the career groups concerned anywhere near the proportion of women in the groups from which they are recruited. Further, the fact that the proportion of women in higher career brackets does not correspond to that in the group from which they are recruited may be an indication that an ostensibly gender-neutral recruitment procedure does not in fact prevent indirect gender discrimination.

88. Further, in the Government of Norway's view, the Court of Justice of the European Communities' case law rejecting measures giving automatic and unconditional priority to women cannot be construed too literally. Once quotas are considered compatible with Article 2(4), as the Court of Justice of the European Communities does in *Badeck*, a point is likely to be reached where the male employment quota has been filled and where all subsequent employments accordingly will lawfully be allocated to women, even if there are male applicants who are better qualified (or have the balance tilted in their favour due to specific personal factors).⁴⁹

89. Under the Norwegian scheme, the earmarked post-doctoral and professorship posts at the University of Oslo are new posts and therefore constitute a real extension of the total number of posts available. Therefore, male applicants are not in a more difficult career advancement position than they would be without the earmarked posts; rather to the contrary as some of their potential female competitors will be appointed to the earmarked posts.

90. According to the Government of Norway, the legal relevance of the fact that, even when priority is given to women, there exists access to the same type of benefit for men is also emphasised in *Lommers* (concerning nursery places, not academic posts).⁵⁰ Whereas *Lommers* concerned all the employer's nursery places, the Government notes that the Norwegian gender quota scheme only applies to a limited number of academic positions at the University of Oslo. There are many similar positions to those covered by the earmarking scheme, both in the University of Oslo as well as in other academic institutions covered by the University Act. There will, accordingly, be ample opportunity to take special account of a male applicant.

⁴⁹ See *Badeck*, paragraph 53.

⁵⁰ See *Lommers*, paragraph 44.

91. The Government of Norway further maintains that automatic priority to one sex is in accordance with Article 2(4), when the purpose is to counterbalance an actual disadvantage.

92. It refers to *Schnorbus*, concerning the automatic precedence accorded male candidates who had completed compulsory military or civilian service, for (all) legal adviser positions in Hessen, Germany.⁵¹ Judged on the basis of the principle of proportionality, the preference accorded to men did not go beyond what was necessary to compensate for the disadvantages entailed by compulsory military or community service.

93. Beyond the preference accorded men who had completed compulsory military or civilian service, there was a possibility of taking particular hardship into account. According to the Government, this must be viewed in connection with the fact that the measure concerned all positions as legal adviser in Hessen - a material circumstance that distinguishes that case from the Norwegian earmarking scheme.

94. In the opinion of the Government of Norway, *Schnorbus* strongly supports Norway's position in the present case. The Court of Justice of the European Communities here accepted preference being automatically accorded to persons who had completed compulsory military or civilian service, even though this constitutes indirect discrimination against women. The purpose of the preferential treatment was to compensate for a disadvantage in fact, namely the delay in education due to military service. Similarly, the sole purpose of the Norwegian earmarking scheme is to compensate for an actually disadvantageous situation, namely the strong under-representation of women in high academic posts.

95. In particular, with reference to *Badeck* and *Schnorbus*, the Government of Norway concludes that the contested earmarking of post-doctoral and professorship posts at the University of Oslo pursuant to section 30(3) of the University Act falls within the scope of Article 2(4) of the Directive.

96. Further, the Government of Norway submits that the earmarking in question satisfies the proportionality test.

97. The general principle underlying the Court of Justice of the European Communities case law on positive action is that the principle of proportionality shall be observed. This means that any special measure in favour of one sex shall serve a lawful purpose, it shall be appropriate and necessary for the attainment of its goal, and it must not exceed what is necessary to attain it. In the assessment of the principle of proportionality, the Court should take into account relevant international agreements and Article 141(4) EC.

⁵¹ The Government quotes the 4th question submitted by the German court and the answer given by the Court of Justice of the European Communities, particularly at paragraphs 39, 44 and 45.

98. The Government of Norway quotes the case *Commission v France*, being thus far the only infringement procedure concerning positive action that has been brought before the Court of Justice of the European Communities.⁵² In comparison with this case, the Norwegian provisions at issue are considered specific and narrow by the Government, and limited both in scope and duration.

99. Post-doctoral posts are temporary appointments with a maximum duration of three years. The professorships set up and earmarked for women will lapse at the latest when such professor retires. The earmarking of post-doctoral grants aims at qualifying women for further careers in research, more specifically, for appointment to permanent senior academic posts. It will, however, take time for this to result in an increased number of women professors. Thus, the earmarking of professorships aims at kick-starting the desired development, by increasing the number of women professors today, until the desired proportion of women in academia is achieved.

100. Further, the earmarked posts represent only a minor part of all new appointments to post-doctoral and professor posts at the University of Oslo. In the opinion of the Government, the numbers mentioned above are of significant importance when assessing proportionality.

101. Moreover, the types of academic post subjected to earmarking are limited to those types considered material, in various research reports including ETAN, to alleviate existing gender imbalances in senior academic posts and thus plug the “leaky pipeline” in academia.

102. The Government of Norway further maintains that the measures in question take into account the interests of qualified men. It refers to *Abrahamsson*, concerning Swedish legislation giving automatic priority to applicants of the under-represented sex who possess sufficient qualifications for a professorship over applicants of the opposite sex who are clearly better qualified, provided only that the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making the appointment.

103. The Court of Justice of the European Communities did not find this measure of radical favour of women to be justified pursuant to Article 2(4) of the Equal Treatment Directive or to Article 141(4) EC. The grounds for regarding the Swedish measure as incompatible with Article 141(4) EC illustrate the importance of the principle of proportionality in assessing the lawfulness of positive action.⁵³

⁵² Case 312/86 *Commission v France* [1988] ECR 6315. The Court of Justice of the European Communities’ objection to the French provision at issue was that it was general and applied for an indefinite period (see in particular paragraphs 14 and 22). Thus, France had gone beyond what was necessary and violated the principle of proportionality.

⁵³ See *Abrahamsson*, paragraph 55.

104. The measure at issue in *Abrahamsson* differed significantly from the Norwegian earmarking scheme and was, in the opinion of the Government, significantly more disadvantageous to the sex that was not given priority.

105. The Swedish selection method entailed that a clearly less qualified woman could be given preference over a better-qualified man. This would suggest that the Swedish method could be regarded as a quality-reduction method. This cannot be said of the Norwegian earmarking scheme. It is at least neutral as regards quality, and as such, appropriate for attracting highly qualified women who would not otherwise have applied, or for motivating women to improve their qualifications. In fact, earmarking may be deemed to promote the professional quality of the universities, as the large proportion of women lost from the academic career path implies a permanent loss to the universities of valuable academic resources.

106. The Swedish method was further particularly disadvantageous for the sex that was not given priority. A great deal of work is involved in writing an application for a professorship and compiling documentation of research qualifications. Applying for a professorship and being rejected is also likely to have an adverse effect on a researcher's reputation, especially as he or she is not likely to be particularly young.

107. According to the Government of Norway, the Norwegian earmarking scheme, therefore, is much more considerate to men than the Swedish selection method. The Norwegian arrangement merely entails the loss of an opportunity to apply and will not involve any waste of effort or loss of reputation.

108. The Norwegian earmarking scheme only applies to a small number of the academic positions in Norway and does not by any means prevent men from pursuing an academic career. Men have many other opportunities to obtain academic positions than the relatively few they lose because of the earmarking scheme at the University of Oslo.

109. The Government of Norway further maintains that less invasive measures are not available to alleviate the current under-representation of women in high academic positions. It refers to measures that are less restrictive than the earmarking mentioned earlier, that have been employed by the Norwegian universities in order to increase the proportion of women in academia. According to the Government, the statistics alone offer sufficient proof that these measures, some of which have been employed for decades, have not had any significant effect on raising this proportion to a level that can be considered satisfactory, even by the most conservative estimates. The only years when any discernible increase in the very slow growth rate for women professors can be seen, is when earmarking of posts for women has taken place, as in the personal advancement procedure of the mid-80s.

110. The Government of Norway concludes that earmarking of academic posts, as practised by the University of Oslo and giving rise to the case at hand, is proportional to the legitimate aim pursued, namely the promotion of gender equality in academia. This measure is temporary in nature, both for professors and post-doctors, and is employed only for a very limited number of the total appointments that take place at the University of Oslo. Other less invasive measures have been tried, throughout the university sector, in an attempt to raise the proportion of women in academic posts and plug “the leaky pipeline,” but without discernible effect.

111. Finally, the Government of Norway recalls that the infringement proceedings in the case at hand have been raised pursuant to Article 31 of the Surveillance and Court Agreement. It follows from long-standing case law of the Court of Justice of the European Communities that the Commission and, accordingly, the EFTA Surveillance Authority have the burden of proof to establish that the Government is in breach of the EEA Agreement. The Government refers to Case C-159/94, *Commission v France*.⁵⁴

112. The only part of the procedure where the burden of proof lies with the Government of Norway is the establishment of a possible justification. However, regarding the proportionality test in that assessment, the burden of proof lies again with the EFTA Surveillance Authority.⁵⁵ The Government refers to paragraph 44 of the application, where the EFTA Surveillance Authority notes that the scope of any derogation from the provision concerning positive action must be determined in accordance with the principle of proportionality. The EFTA Surveillance Authority then, wrongfully in the view of the Government, submits that the Government has failed to show that the aim in question cannot be achieved by less invasive measures.

113. In the opinion of the Government of Norway, it follows from the case law of the Court of Justice of the European Communities, which, according to Article 3(2) of the Surveillance and Court Agreement, is relevant in the interpretation of Article 31 of the same Agreement, that the EFTA Surveillance Authority has to show that the aim in question can be achieved by less invasive measures. Accordingly, in the case at hand the EFTA Surveillance Authority has not fulfilled its obligation under Article 31 of the Surveillance and Court Agreement.

114. In its *rejoinder*, the Government of Norway once more addresses the question of unconditional priority and proportionality and contests that the Court of Justice of the European Communities’ case law concerning the limits of the use of positive action is as consistent as the Commission implies in its observations. The Government again refers to *Schnorbus*, where the Court of

⁵⁴ Case C-159/94 *Commission v France* [1997] ECR I-5815, in particular at paragraph 102.

⁵⁵ In *Commission v France*, the Court of Justice of the European Communities discussed the Commission duty to assess a possible justification under article 90(2) EC (now Article 86(2) EC). The Government refers to paragraph 100 of this judgment.

Justice of the European Communities took a different approach to establishing the limits for the application of positive action under the Directive and did not apply the *Badeck* tests of whether a positive action measure is unconditional or absolute in the priority given to one sex. According to the Government, *Schnorbus* cannot be considered irrelevant, since the issue is not the area where positive action is applied, but the test that the Court of Justice of the European Communities applies when it considers whether a measure is compatible with Article 2(4) of the Directive. Further, both *Schnorbus* and the case at hand concern factual disadvantages that are general in nature, respectively a career delay that affect men as a group, and an academic career obstacle that affect women as a group. Should the Court find that the contested Act is contrary to Article 2(1) of the Directive, it is necessary to examine whether such discrimination may be justified before ruling on the compatibility with Article 2(4) or with Article 141(4) EC in accordance with *Schnorbus*.

115. Contrary to the EFTA Surveillance Authority's and the Commission's submissions, the criteria of unconditional and automatic priority formulated by the Court of Justice of the European Communities do not effectively exhaust the question of proportionality in these cases.

116. Further, the Government of Norway reiterates its view that the fact that Norway has tried applying other measures to address the under-representation of women in academia and that these measures have been unsuccessful, is of relevance with regards to the proportionality test in the present case.

117. With regard to the application of Article 141(4) EC in the present case, providing for a larger margin of discretion in the application of positive action measures as compared to Article 2(4) of the Directive, the Government of Norway refers again to the new Community legislation replacing Article 2(4) of the Directive with Article 141(4) EC, in particular to paragraphs 11 and 14 of the Commission's Explanatory Memorandum on the amendment of Directive 76/207/EEC. The Government infers from the statements quoted that the modifications of *Kalanke* established in subsequent rulings of the Court of Justice of the European Communities on the issue of positive action were not sufficient to meet the Member States' need for flexibility with regard to positive action measures. Furthermore, it shows that Article 141(4) EC is not limited to the moderate forms of positive action accepted by the Court of Justice of the European Communities under Article 2(4), i.e. preference of women in cases of equal qualifications, but has a wider scope. The Government further refers to Declaration 28 of the Amsterdam Treaty, supporting the conclusion that the scope of positive action measures favouring women shall be greater than those favouring men.

118. Finally, the Government of Norway points to the Court of Justice of the European Communities' case law on the discretion of Member States in

determining social policy objectives⁵⁶ and the principle of subsidiarity. The Government recalls that its earmarking policy, having been a central and defining feature of the social policy of successive Norwegian governments for more than twenty years, is part of a broad policy framework aimed at achieving gender equality in the area of employment.

The Commission of the European Communities

119. The Commission of the European Communities observes that men are, according to the Norwegian law in question, completely excluded from the selection procedure for certain post-doctoral posts at the University of Oslo. The Commission considers the key issue in the case to be whether such treatment may nevertheless fall within the scope of the exception in Article 2(4).

120. According to the consistent case law of the Court of Justice of the European Communities, Article 2(4) of the Directive is specifically designed to allow measures that, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality that may exist in the reality of social life. In principle, it may therefore permit a national measure relating to access to employment which gives a specific advantage to women with a view to improving their ability to compete on the labour market or pursue their careers on an equal footing with men.⁵⁷

121. However, as an exception to the fundamental principle of equal treatment, the derogation in Article 2(4) must be strictly interpreted. The Commission refers to *Kalanke*, where the Court of Justice of the European Communities held that a law giving automatic priority to a female candidate over an equally qualified male applicant in a sector where women were under-represented fell outside its proper scope. As was emphasized at paragraphs 21-22 of the judgment, national rules that guarantee women "*absolute and unconditional priority*" for appointment or promotion go beyond promoting equal opportunities, and the permitted limits of the exception.

122. A series of subsequent cases has further developed the principles that apply in assessing compatibility with Article 2(4) of the Directive. In *Marschall*, a regional German law provided that in sectors of the civil service where fewer women than men were employed in the higher grade post in a given career bracket, women were to be given priority for promotion in the event of equal suitability, competence and professional performance, *unless* reasons specific to an individual male candidate tilted the balance in his favour. In other words, unlike the rule at issue in *Kalanke*, this provided for a form of "savings" clause. The Court of Justice of the European Communities accepted that even where male and female candidates are equally qualified, this might not mean that they

⁵⁶ See Case C-226/98 *Jørgensen* [2000] ECR I-2447, paragraph 41; and Case C-167/97 *Seymour Smith* [1999] ECR I-623, paragraph 74.

⁵⁷ See for example *Kalanke*, paragraphs 18-19 and *Marschall*, paragraphs 26-27.

have the same chances (because of e.g. stereotypes concerning the role of women in working life, etc.). A rule designed to counteract such instances of inequality could fall within the scope of the exception in Article 2(4), but (as a derogation to the right to equal treatment) only if equally qualified male candidates were subject to an objective assessment taking account of all criteria specific to each individual candidate, and if the priority accorded to female candidates was overridden if one of those criteria favoured a male candidate.⁵⁸

123. In the Commission's view, it is quite clear from the above that in order to fall within the permitted limits of the exception, a measure designed to address under-representation of women in a given sector must comply with at least two basic conditions. Firstly, it must not give automatic and unconditional priority to women where male and female candidates have equal qualifications, and secondly, the candidates must be subject to an objective assessment that takes account of the specific personal situations of all candidates. This approach was further confirmed in *Badeck*⁵⁹ and *Abrahamsson*, where the selection procedure in question was found to fail this test by giving automatic preference to a candidate of the under-represented sex who was not equally qualified but merely "sufficiently" qualified.⁶⁰ According to the Commission, similar reasoning also appears to underlie *Lommers*, where the system of reserving a number of subsidised nursery places for female officials working at the Dutch Ministry of Agriculture was found to be compatible with the Directive only because male officials who in fact took care of their children could be granted access to the scheme on the same conditions as female officials.

124. The Norwegian rule in the present case guarantees women absolute and unconditional priority in the most extreme sense, since men are completely excluded from the selection procedure for the reserved posts from the outset. In other words, there is no question of any form of objective assessment of a male candidate's application because it cannot be taken into consideration at all. Further, since Article 2(4) of the Directive does not permit even a rule which grants automatic priority to a member of the under-represented sex in the case of their being equally qualified, it follows necessarily that a rule such as Article 30(3) of the 1995 Act relating to Universities and Colleges granting such priority without any reference to the circumstances of male candidates is clearly beyond its proper scope.

125. As to the Government's arguments put forward in the course of the administrative procedure, the Commission firstly suggests that Article 141(4) EC, as introduced by the Treaty of Amsterdam, explicitly promotes actions to "*ensure full equality in practice between men and women in working life,*" and that Article 2(4) of the Directive must be interpreted accordingly. Article 141(4)

⁵⁸ See *Kalanke*, especially paragraph 33.

⁵⁹ See *Badeck*, at paragraph 23.

⁶⁰ See *Abrahamsson*, in particular paragraphs 52 and 53.

was of course introduced *after* the entry into force of the EEA Agreement, and has not been expressly incorporated into the EEA provisions on equal treatment.⁶¹ In any event, it seems clear that by analogy with paragraphs 54-56 of *Abrahamsson*, Article 141(4) could not operate in such a way as to legitimise the rule in question here. Just as the measure granting automatic priority (without objective assessment) to a sufficiently qualified candidate of the under-represented sex was found to be incompatible with Article 2(4) of the Directive, so too could it not be justified by Article 141(4) on the grounds of its being disproportionate. In the Commission's view, similar reasoning would necessarily apply in this case (where *all* male candidates are *a priori* excluded from the selection process) with the result that Article 141(4) EC could not be used to alter the assessment of the Norwegian measure in the context of Article 2(4).

126. The Commission further points to a series of arguments essentially linked to the issue of proportionality, which were put forward by the Government. In the replies to the letter of formal notice and the reasoned opinion, it is argued that national measures are admissible under Article 2(4) provided that they are proportionate. This is not disputed. As the Court of Justice of the European Communities noted in Case C-273/97 *Sirdar*,⁶² “*in determining the scope of any derogation from an individual right such as the equal treatment of men and women, the principle of proportionality, one of the general principles of Community law, must also be observed.*” However, in the Commission's opinion, the key point here is rather that the principles developed by the Court of Justice of the European Communities' case law on Article 2(4) are themselves an expression of the proportionality test. It is precisely for this reason that a discriminatory measure intended to eliminate or reduce inequality that, as here, guarantees automatic and unconditional priority to female candidates without any objective assessment of the circumstances of male candidates, will fall beyond the permitted scope of Article 2(4).

127. With regard to the fact that the disputed rule relates only to temporary post-doctoral posts (with a maximum duration of 4 years) which form part of a special programme for women, the Commission, leaving aside the fact that it appears that full-time academic posts may also be affected under the University's 2000-2004 Equal Treatment Plan, deduces from the *Abrahamsson* case that a restriction of this kind is insufficient to counter-balance the absolute and disproportionate nature of the rule itself.⁶³

128. As for the Court of Justice of the European Communities' decision in *Schnorbus*, examining the German system of offering preferential admission to practical legal training for applicants who had *inter alia* completed compulsory

⁶¹ On extending the scope of the EEA Agreement by such means, see *Einarsson*, paragraph 45.

⁶² The Commission quotes Case C-273/97 *Sirdar*, cited above, paragraph 26; and Case 222/84 *Johnston*, cited above, paragraph 38.

⁶³ See *Abrahamsson*, in particular paragraphs 58-59.

military service (a possibility only affecting male applicants), the Commission is of the opinion that there is a fundamental distinction between that case and the present one: the measure in *Schnorbus* was limited to offering a form of compensation for a specific time disadvantage and, unlike the Norwegian rule at issue in the present case, did not seek to address a general case of under-representation of a particular group. Finally, it is emphasised that Articles 1, 6, 102 and 105 of the EEA Agreement are designed to ensure the homogeneous interpretation and application of the legal acts incorporated in the Agreement (via its Annexes) in both the EFTA States and the EC Member States. The Commission similarly underlines the importance of this principle, and in the light of its discussion of the interpretation of Article 2(4) above, would suggest that this serves precisely to reinforce the view that the rule at issue goes beyond the permitted limits of that derogation.

129. For all these reasons, the Commission concludes that Article 30(3) of the 1995 Act, as applied by the University of Oslo, does not fall within the scope of the exception in Article 2(4) of the Directive and that the contested measures are in breach of EEA law.

Carl Baudenbacher
Judge-Rapporteur

Case E-2/02

**Technologien Bau- und Wirtschaftsberatung GmbH and
Bellona Foundation**

v

EFTA Surveillance Authority

*(Action for annulment of a decision of the EFTA Surveillance
Authority – State aid – admissibility – locus standi)*

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Summary of the Judgment

1. Although the Court is not required by Article 3(1) of the Surveillance and Court Agreement to follow the reasoning of the Court of Justice of the European Communities when interpreting the main part of that Agreement, the reasoning which led that Court to its interpretations of expressions in Community law is relevant when those expressions are identical in substance to those which fall to be interpreted by the Court. This principle must apply equally to the issue of *locus standi* to bring an action for annulment.

2. Under the second paragraph of Article 36 of the Surveillance and Court Agreement, any natural or legal person may institute proceedings against a decision addressed to another person

only if the decision in question is of direct and individual concern to the former.

Persons other than the addressees of a decision, can not claim to be individually concerned, unless they are affected by that decision by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of these factors, are distinguished individually just as in the case of the person to whom a decision is addressed.

When determining whether the conditions set out in Article 36(2) of the Surveillance and Court Agreement are fulfilled by the Applicants, it is necessary to recall the purpose of the

Surveillance and Court Agreement are fulfilled by the Applicants, it is necessary to recall the purpose of the procedures provided for in State aid cases, in particular by Article 1(2) of Protocol 3 to the Surveillance and Court Agreement on the functions and powers of the EFTA Surveillance Authority in the field of State aid and Article 1(3) of the same Protocol.

The contested State aid decision was made on the basis of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, without the Defendant having initiated the formal procedure provided for by Article 1(2). Therefore, the Applicants must be regarded as individually concerned by the contested decision, *firstly*, if they are seeking to safeguard the procedural rights provided by Article 1(2) and, *secondly*, if it appears that they possess the status of “party concerned” within the meaning of that paragraph.

In the case at hand, the Applicants have challenged the contested decision based on arguments related to the first paragraph of Article 36 of the Surveillance and Court Agreement. The Applicants’ action must therefore be interpreted as claiming that the Defendant’s failure to initiate the formal procedure provided by Article 1(2) of Protocol 3 to the Surveillance and Court Agreement, has deprived them of the possibility to exercise procedural rights conferred by that paragraph. In the final analysis, the Applicants must therefore be deemed to be seeking to safeguard a procedural right.

“Parties concerned” within the meaning of Article 1(2) of Protocol 3 to the Surveillance and Court Agreement include not only the undertaking or undertakings benefiting from the aid, but also those persons, undertakings or associations whose interests might be affected by the grant of an aid, in particular competing undertakings and trade associations.

3. Where interests invoked concern business engagement or ventures that are prospective (in some instances hypothetical) or where any effect would be either indirect or remote, such effect would not be sufficient to provide a basis for *locus standi*.

The Court cannot grant *locus standi* to a legal entity that is not an association with a defined membership on the basis of a community of interests.

Even in the absence of provisions providing for a procedural system for complaints regarding State aid, an association’s involvement in the proceedings before the EFTA Surveillance Authority may, in certain circumstances, warrant standing for that association to bring action for annulment before the Court. However, this does not apply where there are no members who could be defined as “parties concerned” within the meaning of Article 1(2) of Protocol 3 to the Surveillance and Court Agreement, and thus be entitled to bring individual actions for the annulment of the said State aid decision.

JUDGMENT OF THE COURT

19 June 2003

*(Action for annulment of a decision of the EFTA Surveillance Authority
State aid – Admissibility – Locus standi)*

In Case E-2/02,

Technologien Bau- und Wirtschaftsberatung GmbH and **Bellona Foundation**, represented by Ian S. Forrester, QC, of the Scots Bar, White & Case, 62 rue de la Loi, 1040 Brussels, Belgium,

Applicants,

v

EFTA Surveillance Authority, represented by Niels Fenger, Director, Legal and Executive Affairs and Michael Sanchez Rydelski, Senior Officer, Legal and Executive Affairs, acting as Agents, 74 Rue de Trèves, Brussels, Belgium,

Defendant,

supported by the **Kingdom of Norway**, represented by Thomas Nordby, Advokat, of the Office of the Attorney General (Civil Affairs), acting as Agent, and Ingeborg Djupvik, Legal Adviser, Ministry of Foreign Affairs, acting as Co-Agent, P.O. Box 8012 Dep., 0030 Oslo, Norway,

Intervener

APPLICATION for annulment of the Defendant's decision No. 90/02/COL of 31 May 2002 concerning the notifications of a proposal for amended depreciation rules of the Petroleum Tax Act for production equipment and pipelines for gas linked to new large-scale liquefied natural gas (LNG) facilities located in Finnmark County or the municipalities of Kåfjord, Skjervøy, Nordreisa or Kvænangen in Troms county and the application of these rules to the Snøhvit project,

THE COURT,

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

Registrar: Lucien Dedichen

having regard to the application,

having considered the written pleadings of the parties, the intervener, and the Commission of the European Communities,

having regard to the revised Report for the Hearing,

having heard oral argument of the parties, the intervener, and the Commission of the European Communities at the hearing on 29 April 2003 on the question of admissibility,

gives the following

Judgment

Facts and procedure

- 1 In September 2001, the Norwegian Government proposed an amendment to the Petroleum Taxation Act No 35 of 13 June 1975 (hereinafter the “PTA”) designed to permit the Snøhvit liquefied natural gas project in the Barents Sea to go forward. The amendments, which involved distinctly favourable depreciation rates for large-scale liquefied natural gas projects in Norway, were later adopted by the Parliament.
- 2 On 11 December 2001, one of the Applicants, the Bellona Foundation brought a complaint to the Defendant claiming that the aforementioned amendments to the PTA were State aid under Article 61(1) of the Agreement on the European Economic Area (hereinafter the “EEA”) and thus incompatible with it. The Bellona Foundation (hereinafter “Bellona”) is a foundation, (“stiftelse”), established as a legal entity under the laws of Norway, whose main objective is to combat problems of environmental degradation, pollution-induced dangers to human health and the ecological impacts of economic development strategies.
- 3 In a letter to the Norwegian Government dated 18 March 2002, the Defendant stated its preliminary assessment that the depreciation rates under the amended PTA might be considered State aid within the meaning of Article 61(1) EEA. The Government was given an opportunity to present its views on whether or not the measure could fall within the derogations provided for in Article 61(2) and 61(3) EEA.

- 4 The Government adhered to its position that the measure did not constitute State aid, but argued in the alternative that it would fall within the derogation for regional aid under Article 61(3)(c) EEA. The Defendant, however, maintained that the contested measure was State aid under Article 61(1) and furthermore that its general nature would disqualify it from falling within the derogation for regional aid. In a meeting with the Norwegian Minister of Finance on 16 May 2002, the Defendant's President stated that unless changes were made to recently adopted amendments to the PTA, a formal examination procedure under Article 1(2) of Protocol 3 to the Surveillance and Court Agreement would be opened, as prescribed in point 5.2(1) of the Defendant's State Aid Guidelines.
- 5 On 27 May 2002, on the proposal of the Ministry of Finance, the Government approved a revised bill in which the geographical scope of the tax measure was limited to Finnmark County and the municipalities of Kåfjord, Skjervøy, Nordreisa and Kvænangen in Troms County. The Defendant was notified of the submission of the new Bill on the same day. On 30 May 2002, the Defendant was notified of a decision to apply the new proposed depreciation rules of the PTA to the Snøhvit project.
- 6 The Defendant approved the measure as regional aid by decision of 31 May 2002. The operative part of the decision reads as follows: "(1) The EFTA Surveillance Authority has decided not to raise objections to the proposed amendments to the Norwegian Petroleum Tax Act ..., as notified to the Authority by telefax dated 27 May 2002 ... (2) The EFTA Surveillance Authority has decided not to raise objections to the proposed application of the depreciation rules of the Norwegian Petroleum Tax Act to the Snøhvit project, as notified to the Authority ... (3) This decision is addressed to Norway." The revised bill was subsequently adopted, and entered into force on 28 June 2002.
- 7 By an application of 30 July 2002, Technogien, Bau- und Wirtschaftsberatung GmbH (hereinafter "TBW") and Bellona jointly brought an action before the EFTA Court under Article 36 of the Surveillance and Court Agreement for annulment of the aforementioned decision. The Applicant, TBW, is, on its own statement, a limited liability company, established under the laws of Germany, engaged in environmental consulting and organizational development. Its core services cover sectors such as water resource management, liquid waste management, solid waste management, energy technologies, resource-conserving soil use and anti-desertification measures.
- 8 On 8 November 2002, pursuant to Article 36 of the Statute of the Court, the Kingdom of Norway lodged an application to intervene in support of the Defendant. By letter of 11 February 2003, the Court informed the Norwegian Government of its decision to allow the intervention.
- 9 On 8 November 2002 the Defendant lodged at the EFTA Court an application for a decision on admissibility pursuant to Article 87 of the Rules of Procedure of the EFTA Court (hereinafter the "Rules of Procedure"). On 31 January 2003, the Applicants lodged a statement in response to that application.

- 10 On the basis of a preliminary report of the Judge-Rapporteur and with reference to Article 87(4) of the Rules of Procedure, the Court decided that an oral hearing would be held on the request for a decision on admissibility as a preliminary issue. The Court informed the parties of this decision by a letter dated 11 February 2003.

Arguments of the parties

- 11 The Defendant submits that the conditions laid down in Article 36(2) of the Surveillance and Court Agreement entitle the Applicants to challenge the contested decision only in so far as it is of direct and individual concern to them.
- 12 The Defendant further stresses that in the context of the corresponding provision of Community law, Article 230(4) EC, it is settled case law that persons, other than those to whom a decision is addressed, may claim *locus standi* only if that decision affects them by "... reason of certain attributes peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in case of the person addressed." This is supported by reference to the case law of the Court of Justice of the European Communities, *inter alia*: Case 25/62 *Plaumann v Commission* [1963] ECR 95, at p 107; Case 169/84 *Cofaz and Others v Commission* [1986] ECR 391, at paragraph 22; Case C-225/91 *Matra v Commission* [1993] ECR I-3203, at paragraph 14; Case C-309/89 *Codorniu v Council* [1994] ECR I-1853, at paragraph 20; Case T-69/96 *Hamburger Hafen- und Lagerhaus Aktiengesellschaft v Commission* [2001] ECR II-1037, at paragraph 35; Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, at paragraph 36. It is also submitted that the judgment in Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365 can not in any case be said to reflect the case law of the Community.
- 13 The Defendant points out that Article 36(2) of the Surveillance and Court Agreement is identical in substance to Article 230(4) EC. Despite the fact that the EFTA Court is not required by Article 3(1) of the Surveillance and Court Agreement to follow the reasoning of the Court of Justice of the European Communities when interpreting the main part of the Surveillance and Court Agreement, the case law of that Court on Article 230(4) EC is relevant when interpreting Article 36(2) of the Surveillance and Court Agreement. The Defendant refers in this regard to the judgment of the EFTA Court in Case E-2/94 *Scottish Salmon Growers Association v EFTA Surveillance Authority* [1995] EFTA Court Report 59, at paragraphs 11-13. Furthermore, the EFTA Court held in that judgment that when interpreting Article 36(2) of the Surveillance and Court Agreement, due account shall also be taken of the principles laid down in rulings of the Court of First Instance of the European Communities.
- 14 The Defendant argues that in order to establish whether the Applicants fulfil the criteria described above it is necessary to bear in mind the aim of the procedures

provided by the EEA legal framework in State aid cases, in particular Article 1(2) and (3) of Protocol 3 to the Surveillance and Court Agreement on the functions and powers of the EFTA Surveillance Authority in the area of State aid.

- 15 The Defendant asserts that a distinction must be made between a *prima facie* opinion on compatibility of the State aid in question and an examination under Article 1(2) of Protocol 3 to the Surveillance and Court Agreement, which imposes an obligation on the EFTA Surveillance Authority to give the “parties concerned” notice to submit their comments. The relevant provisions in Article 1(2) and (3) of Protocol 3 to the Surveillance and Court Agreement correspond in substance to Article 88(2) and (3) EC.
- 16 According to the case law of the Court of Justice of the European Communities, a decision, whereby the Commission finds on the basis of Article 88(3) EC that State aid is compatible with the functioning of the common market, can be challenged before the Court of First Instance of the European Communities by those persons who are intended to benefit from the procedural guarantees laid down in Article 88(2) EC. Thus, it is a precondition that the party seeking annulment of a decision can be considered to be a party concerned for the purpose of Article 88(2) EC, and that the person is asking for annulment of the decision taken on the basis of Article 88(3) EC in order to safeguard his procedural rights under Article 88(2) EC. The Court of First Instance of the European Communities has clarified that when applicants do not seek the annulment of a decision on the basis of Article 88(3) EC on the ground that the Commission was in breach of the obligation to initiate the procedure provided for in Article 88(2) EC or on the ground that the procedural safeguards provided for by Article 88(2) EC were infringed, the mere fact that the applicants may be considered to be parties concerned within the meaning of Article 88(2) EC cannot be sufficient to render the application admissible. In such a case, the action will be admissible only if the applicants are affected by the contested decision by reason of circumstances distinguishing them individually in like manner to the person to whom the decision is addressed.
- 17 The Defendant submits that it is settled Community case law that the alleged competitor of the beneficiary of the State aid must demonstrate that his competitive position in the market is affected by the grant of the aid. Special reference is made to *Cofaz and Others v Commission*, cited above.
- 18 The Defendant further submits that the Applicant TBW cannot be considered a direct competitor with undertakings involved in the Snøhvit project, since the Applicant TBW is a consultancy firm and not a natural gas producer, its involvement in plant oil fuel and renewable biogas projects seems to be of an advisory nature and to be limited to development projects in Africa.
- 19 As to the Applicant Bellona, the Defendant submits that it is a non-profit and non membership environmental foundation, and as such, not a gas producer that itself competes with the licensees of the particular Snøhvit project. Further, the mere fact that Bellona made a complaint to the EFTA Surveillance Authority cannot

constitute sufficient circumstances peculiar to the Applicant based on the case law of the Community Courts.

- 20 The Intervener supports the Defendant's line of argument as to the relevance of the case law of the Court of Justice of the European Communities, the legal analysis of the dispute, the relevant factors for the assessment of the terms "parties concerned" and "individual concern" and as to the nature and status of the Applicants Bellona and TBW.
- 21 The Intervener also submits that the PTA is not an exceptional and abnormal advantage for a single project, since it is formulated generally and applicable to prospective projects as well.
- 22 The Applicants Bellona and TBW consider that they are "centrally concerned" by the contested decision, and add that they fulfil the test applied by the Court of Justice of the European Communities in *Plaumann v Commission*, cited above.
- 23 The Applicants submit that Bellona is directly concerned. It is evident that the Government's sole purpose in proposing amendments to the PTA, which revise the rules adopted earlier, was to give the depreciation rules for the Snøhvit project a form that the Defendant would approve. The extremely short interval between the approval of the revised scheme by the Defendant, and the decision of the Government to apply it to Snøhvit, could suggest that the procedures were regarded as mere formalities. Thus, the Applicants submit that the process involving the Defendant and Bellona's complaint was in effect the same process as the Defendant's hasty approval of the aid. Since this whole process was a continuum, Bellona is directly concerned.
- 24 The Applicant Bellona argues that the Court is not bound to follow the jurisprudence of the Community Courts on the question of admissibility. The application of this case law would defeat the interest of justice in the present case, since for the Applicants there is no national remedy for their problem, neither before the national courts nor other state or European institutions.
- 25 The Applicant Bellona submits that it is individually concerned since it brought the original complaint that led to an investigation by the Defendant, it had been a prominent player in relation to the Snøhvit project, both at the national and the EEA level, and had a decisive impact not only on the procedure of the case but also on its outcome. This fact distinguishes this case from Case T-585/93 *Stichting Greenpeace Council and Others v Commission* [1995] ECR II-2205 and associates it with *Cofaz and Others v Commission*, cited above, as well as the position of the applicant in Case T-114/00 *Aktionsgemeinschaft Recht und Eigentum v Commission* (not yet reported).
- 26 The Applicant Bellona argues that the contested decision will harm its activities, because it has shares and options in companies dealing with sustainable energy production, has investments in various environmental technologies and has approved the establishment of an affiliated commercial company, Bellona

Enviroventure AS, to manage these business interests. It has an option for shares in the company Water Power Industries (WPI), a company engaged in producing renewable energy from tidewater, and has been involved in various planned wind power projects and in a series of programs that promote renewable energy sources. Furthermore, the contested decision will harm the interests of Bellona's partners and supporters in the so called B7 programme, within which Bellona invites undertakings to enter into long-term agreements in order to develop strategic solutions to environmental problems.

- 27 The Applicants also submit that TBW's commercial activities, the production of energy using biogas and anaerobic technologies from various sources, will negatively be affected by the Defendant's decision, since the electricity produced by TBW competes with electricity produced by gas or liquid fossil fuels.
- 28 The Applicants further invite the Court to adopt a flexible interpretation of standing, and to decide how best justice may be served, in the context of the EEA Agreement. The standard *Plaumann* test prevents a person from bringing a legal challenge (see Case T-13/99 *Pfizer Animal Health v Council*, [2002] ECR II-3305), and fails to ensure appropriate judicial control in environmental cases. A more flexible approach would also be consistent with the Aarhus Convention of 1998 and more compatible with the principles set out in Articles 6 and 13 of the European Convention on Human Rights, as well as those in Article 47 of the Charter of Fundamental Rights of the European Union.
- 29 In support of that argument, the Applicants submit that the *Plaumann* test has been subject to many exceptions in the interest of justice. Reference is made to *Codorniu v Council*, cited above, Case T-448/93 and 449/93 *Associazione Italiana Tecnico Economica del Cemento v Commission* [1995] ECR II-1971 and *Aktionsgemeinschaft Recht und Eigentum v Commission*, cited above, concerning State aid (Case 730/79 *Philip Morris Holland v Commission* [1980] ECR 2671, and Case T-188 *Waterleiding Maatschappij v Commission* [1998] ECR II-3713), and anti-dumping (Case 264/82 *Timex v Council and Commission* [1985] ECR 849, Case C-358/89 *Extramet Industrie S.A. v Council* [1991] ECR I-2501, Case T-597/97 *Euromin v Council* [2000] ECR II-2419). Similar exceptions have been granted in competition law (Case 26/76 *Metro v Commission* [1977] ECR 1875).
- 30 The Commission of the European Communities submits that since a decision approving a scheme is in the nature of a regulation, it is difficult for an individual to demonstrate individual concerns.
- 31 The Commission argues that Bellona is not individually concerned by the contested decision insofar as that decision approves the individual aid for Snøhvit and still less as it approves the scheme, because it has not demonstrated that it is an undertaking engaged in a relevant economic activity within the meaning of Article 87(1) EC, nor that it has any competitive relationship of any kind with prospective beneficiaries of the aid scheme. Furthermore, the involvement in existing and planned energy projects is not sufficient to establish individual

concern, since individual concern cannot be established on the basis of plans about future economic activity.

- 32 The Commission draws particular attention to the judgment in *Stichting Greenpeace Council and Others v Commission*, cited above, and argues that following the judgment in *Union de Pequeños Agricultores v Council*, cited above, the reference to the judgment in *Jegó-Quéré v Commission*, cited above, cannot lead to the conclusion that the application is admissible.
- 33 The Commission submits that there is no competitive relationship of any kind between TBW and Snøhvit. It is not clear whether TBW produces energy or only supplies it, its role in relation to the physic-nut oil in Mali does not correspond to the production of energy, the reference to renewable biogas production indicates that TBW is rather the consultant, and TBW did not participate in the administrative procedure.
- 34 The Commission submits that TBW would not be individually concerned because in a phase 2 decision, an applicant must show that it has an actual and particular close competitive relationship with the prospective beneficiary. Reference is made to *Cofaz and Others v Commission*, cited above, Case T-435/93 *ASPEC and Others v Commission* [1995] ECR II-1281, Case T-442/93 *ACC and Others v Commission* [1995] ECR II-1381, and Case T-11/95 *BP Chemicals v Commission* [1998] ECR II-3235, at paragraph 71).

Findings of the Court

General remarks

- 35 The Defendant's contested State aid decision is in two parts. On the one hand it authorises a general aid scheme, *i.e.* the amendment to section 3 of the PTA, and on the other hand it approves the application of the general aid scheme specifically to the Snøhvit project. The reviewability of the decision is not questioned by the parties, but the Defendant, supported by the Intervener and the Commission of the European Communities, submits that the Applicants do not have *locus standi* to bring an action for annulment of said decision before the Court.
- 36 Access to justice is an essential element of the EEA legal framework. The EEA Agreement contains elaborate mechanisms and procedures with a view to ensuring homogeneous interpretation and application of EEA law. The eighth recital of the Preamble stresses the value of the judicial defence of rights conferred by the Agreement on individuals, and intended for their benefit. A Court of Justice for the EFTA pillar of the European Economic Area was established to uphold such rights, to review the surveillance procedures and to settle disputes. The Court held, on those grounds, in case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Court Report 97, at paragraph 59, that the EEA

Agreement is an international agreement *sui generis*, which contains a distinct legal order of its own. Access to the Court is, however, subject to those conditions and limitations that follow from EEA Law.

- 37 The Court is aware of the ongoing debate with regard to the issue of the standing of natural and legal persons in actions against Community institutions. That debate has been reflected within the Community courts, *inter alia*, in the Opinion of Advocate General Jacobs in Case C-50/00 *Unión de Pequeños Agricultores*, cited above. This discussion is important at a time when the significance of the judicial function appears to be on the increase, both on the national and international level. The idea of human rights inspires this development, and reinforces calls for widening the avenues of access to justice. The Court finds nevertheless that caution is warranted, not least in view of the uncertainties inherent in the current refashioning of fundamental Community law.

The relevance of the case law of the Court of Justice of the European Communities

- 38 The Applicants have stressed the independence of the Court in respect of the Community case law relevant to the present case, and have argued that the Court is not bound to follow that case law on the question of admissibility of challenges to Commission decisions. The Applicants submit that the Court has been, and should be, prepared to draw different conclusions if the application of that jurisprudence would defeat the interests of justice in the present case.
- 39 In this respect, the Court refers to the findings in its judgments in Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 15, at paragraphs 24, 33 and 34 and *Scottish Salmon Growers v EFTA Surveillance Authority*, cited above, at paragraph 11. Although the Court is not required by Article 3(1) of the Surveillance and Court Agreement to follow the reasoning of the Court of Justice of the European Communities when interpreting the main part of that Agreement, the reasoning which led that Court to its interpretations of expressions in Community law is relevant when those expressions are identical in substance to those which fall to be interpreted by the Court. As stated in *Scottish Salmon Growers v EFTA Surveillance Authority*, cited above, this principle must apply equally to the issue of *locus standi* to bring an action for annulment.
- 40 The same applies with regard to the rulings of the Court of First Instance, (see *Scottish Salmon Growers v EFTA Surveillance Authority*, cited above, at paragraph 13).

Locus standi

- 41 Under the second paragraph of Article 36 of the Surveillance and Court Agreement, any natural or legal person may institute proceedings against a

decision addressed to another person only if the decision in question is of direct and individual concern to the former. Since the contested decision was addressed to the Kingdom of Norway, it must be considered whether it is of individual and direct concern to the Applicants in the case at hand.

- 42 The fourth paragraph of Article 230 (ex Article 173) EC corresponds in substance to the second paragraph of Article 36 of the Surveillance and Court Agreement. As the Court held in *Scottish Salmon Growers v EFTA Surveillance Authority*, cited above, at paragraph 31, according to the case law of the Court of Justice of the European Communities, persons other than the addressees of a decision, can not claim to be individually concerned, unless they are affected by that decision by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of these factors, are distinguished individually just as in the case of the person to whom a decision is addressed. See, as far as the case law of Court of Justice of the European Communities is concerned, *Plaumann v Commission*, p 107, *Cofaz and Others v Commission*, at paragraph 22, Case T-11/95 *BP Chemicals v Commission*, at paragraph 7). The purpose of that provision is to ensure that legal protection is also available to a person who, whilst not the person to whom the contested measure is addressed, is in fact affected by it in the same way as is the addressee (Case 222/83 *Municipality of Differdange v Commission* [1984] ECR 2889, at paragraph 9).
- 43 When determining whether the conditions set out in Article 36(2) of the Surveillance and Court Agreement are fulfilled by the Applicants, it is necessary to recall the purpose of the procedures provided for in State aid cases, in particular by Article 1(2) of Protocol 3 to the Surveillance and Court Agreement on the functions and powers of the EFTA Surveillance Authority in the field of State aid and Article 1(3) of the same Protocol.
- 44 In the context of supervision of State aid, there is a preliminary stage of procedure for reviewing aid under Article 1(3). This procedure is intended merely to enable the EFTA Surveillance Authority to form a *prima facie* opinion on whether the measure concerned may be classified as State aid and on the partial or complete compatibility of the aid in question with the EEA Agreement. For the purpose of establishing *locus standi*, this procedure must be distinguished from the examination which takes place under Article 1(2) (see Case E-4/97 *Norwegian Bankers' Association v EFTA Surveillance Authority* [1999] EFTA Court Report 3, at paragraph 33). Only in connection with the latter examination, which is designed to enable the EFTA Surveillance Authority to be fully informed of all the facts of the case, is there an obligation to give the parties concerned notice to submit their comments (See *Norwegian Bankers' Association v EFTA Surveillance Authority - Admissibility* [1998] EFTA Court Report 40, at paragraph 25).
- 45 The Court has furthermore held in *Norwegian Bankers' Association v EFTA Surveillance Authority – Admissibility*, cited above, at paragraph 26, that where, without initiating the procedure under Article 1(2) of Protocol 3 to the

Surveillance and Court Agreement, the Authority finds, on the basis of Article 1(3) of the same protocol, that a certain aid is compatible with the EEA Agreement, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision of the Authority before the Court.

- 46 Therefore, where, in order to make use of the procedural guarantees provided by Article 1(2) of Protocol 3 to the Surveillance and Court Agreement, an action for the annulment of a decision of the EFTA Surveillance Authority is commenced at the end of the preliminary stage, it is necessary – and sufficient – for an applicant to demonstrate that it is a “party concerned” within the meaning of that provision in order to be regarded as individually concerned for the purposes of the second paragraph of Article 36 of the Surveillance and Court Agreement. See also *Cook v Commission*, at paragraphs 23 to 26; *Matra v Commission*, at paragraphs 17 to 20; *BP Chemicals v Commission*, at paragraphs 89 and 90; and, *Aktionsgemeinschaft Recht und Eigentum v Commission*, at paragraph 44 (all cited above).
- 47 The contested State aid decision was made on the basis of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, without the Defendant having initiated the formal procedure provided for by Article 1(2). Therefore, the Applicants must be regarded as individually concerned by the contested decision, *firstly*, if they are seeking to safeguard the procedural rights provided by Article 1(2) and, *secondly*, if it appears that they possess the status of “party concerned” within the meaning of that paragraph.
- 48 In light of the aforementioned, it must first be considered whether the Applicants, by way of this action, are seeking to safeguard procedural rights arising from Article 1(2) of Protocol 3 to the Surveillance and Court Agreement.
- 49 In the Application, the Applicants claimed that the decision of 31 May 2002 should be annulled on the grounds, *inter alia*, that the Defendant had infringed essential procedural requirements by failing to open formal proceedings provided for in Article 1(2) of Protocol 3 to the Surveillance and Court Agreement, despite there being considerable doubt about the compatibility of the State aid in question with Article 61 EEA. The Applicants consider that it was necessary to initiate such a procedure because an initial assessment of the aid in question raised serious difficulties in evaluating its compatibility with the EEA Agreement. The Applicants claim that the commencement of a formal procedure would have safeguarded their procedural rights.
- 50 The first paragraph of Article 36 of the Surveillance and Court Agreement provides that the EFTA Court shall have jurisdiction in actions brought to challenge a decision of the EFTA Surveillance Authority on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of the Surveillance and Court Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers. In the case at hand, the Applicants have challenged the contested decision based on arguments

related to the first paragraph of Article 36 of the Surveillance and Court Agreement. The Applicants' action must therefore be interpreted as claiming that the Defendant's failure to initiate the formal procedure provided by Article 1(2) of Protocol 3 to the Surveillance and Court Agreement, has deprived them of the possibility to exercise procedural rights conferred by that paragraph. In the final analysis, the Applicants must therefore be deemed to be seeking to safeguard a procedural right.

- 51 On that basis, it is in the second place necessary to consider whether the Applicants possess the status of "party concerned" within the meaning of Article 1(2) of Protocol 3 to the Surveillance and Court Agreement.
- 52 The Court found in *Norwegian Bankers' Association v EFTA Surveillance Authority - Admissibility*, cited above, at paragraph 30, that "parties concerned" within the meaning of Article 1(2) of Protocol 3 to the Surveillance and Court Agreement include not only the undertaking or undertakings benefiting from the aid, but also those persons, undertakings or associations whose interests might be affected by the grant of an aid, in particular competing undertakings and trade associations.
- 53 It is also settled Community case law that, in order for its application to be admissible, an undertaking other than the recipient of the aid must demonstrate that its competitive position in the market is affected by the granting of the aid. This approach has also been applied by the Court in *Norwegian Bankers' Association v EFTA Surveillance Authority - Admissibility*, cited above, at paragraph 33, where the Court found that the applicant Association had standing on the ground that it had shown that the decision of the EFTA Surveillance Authority might affect the legitimate interests of the members of the Association, by affecting their position in the market. Where that is not the case, the Court of First Instance of the European Communities has held that the applicant does not have the status of a "party concerned" within the meaning of Article 88(2) of the Treaty (see cases *Hamburger Hafen- und Lagerhaus*, at paragraph 41; *Aktionsgemeinschaft Recht und Eigentum*, at paragraph 51; *Waterleiding Maatschappij v Commission*, at paragraph 62, (all cited above).
- 54 As to the position of the Applicants, TBW and Bellona, the evaluation of their interests in challenging the contested decision must, due to differences in factual circumstances, be assessed separately.

Bellona

- 55 Bellona argues that the contested decision adversely affects its legitimate interests on three counts, each of which alone would enable it to challenge the decision before the Court.
- 56 *Firstly*, Bellona argues that its own commercial position and economic interests are adversely affected by the decision. In this respect, Bellona contends that it has concrete commercial interests in various aspects of the environment and the

energy sectors, for instance through its shareholdings, options or investments in various energy and energy related companies and undertakings, and its involvement in various environment friendly projects.

- 57 *Secondly*, Bellona argues that it, in a representative way, advances the interests of its partners and supporters, including a number of companies engaged in energy production. Bellona alleges that the interests of these partners and supporters are adversely affected by the State aid measure in question, and that Bellona is entitled to pursue those interests on their behalf.
- 58 *Thirdly*, Bellona invokes the fact that it lodged the complaint which led to the opening of the State aid administrative procedure in question, and corresponded with the Defendant during that procedure.
- 59 In respect of Bellona's first contention, the Court notes that Bellona is, according to its own information, a non-profit environmental foundation. Its main objectives are apparently motivated by non-commercial concerns: to combat problems of environmental degradation, pollution-induced dangers to human health and the ecological impacts of economic development strategies. Bellona is, and has been a participant in the political and civic discourse concerning these issues in Norway and internationally. The foundation's income appears to be derived chiefly from various contributions from the general public and from cooperating enterprises, as well as from the sale of supporting advertisements and from supporters who have undertaken to pay a periodic subscription.
- 60 It has not been argued that Bellona itself produces or sells gas or energy, or is engaged in other major commercial activities for its own account in direct competition with the recipients of the State aid at issue. Nor has it been shown that the foundation's capital or other endowments are invested in a manner that creates a risk of financial loss arising from any competitive relationship with any prospective State aid recipients.
- 61 Bellona argues that the contested decision is capable of affecting its interests as a shareholder, investor or partner in energy or energy related companies and programmes. As far as the approval of the general aid scheme is concerned, it has to be borne in mind that this part of the decision concerns Bellona merely by virtue of its objective capacity in the same manner as any other person who is, or might in the future be, in the same situation. It is therefore a measure of general application, covering situations that are determined objectively, and entails legal effects on categories of persons envisaged in a general and abstract manner, and could therefore not affect Bellona's interests in a manner that would provide a basis for *locus standi* (see, for comparison, *Kahn Scheepvaart v Commission*, cited above, at paragraph 41).
- 62 With regard to the part of the decision that approves the application of the general aid scheme to the individual Snøhvit project, the Court must determine whether the effect on the various interests invoked are sufficient for Bellona to be a considered a party concerned. From the information that has been supplied by

Bellona, the Court must conclude that the interests invoked concern business engagements or ventures that are prospective (in some instances hypothetical) or where any effect would be either indirect or remote. Under the standards established by the relevant case law, the Court finds that such effect would not be sufficient to provide a basis for *locus standi*.

63 It follows from the foregoing that Bellona has not adduced pertinent evidence to show that the contested decision may adversely affect its legitimate interests as a commercial or financial operator.

64 The Court will now examine whether Bellona may challenge the contested decision before the Court in a representative capacity for its partners and supporters.

65 Bellona submits that the State aid decision taken by the Defendant will seriously jeopardise not only the commercial position of Bellona itself, but also the economic interests of its partners and supporters. In this respect, the Court must first note that Bellona is a foundation, a legal entity representing itself, its officers or trustees. Bellona is not an association, and it has no members who play a part in the conduct of its affairs or are linked to it on the basis of any community of interest with the legal entity Bellona.

66 The Court has recognised *locus standi* for representative bodies for the purposes of challenging a decision of the EFTA Surveillance Authority under the second paragraph of Article 36 of the Surveillance and Court Agreement in relation to matters of State aid in respect of associations representing the interests of its members (see *Scottish Salmon Growers v EFTA Surveillance Authority*, cited above, at paragraph 22 and *Norwegian Bankers' Association v EFTA Surveillance Authority - Admissibility*, cited above, at paragraph 33). Such limits follow also from the case law of the Community courts on the fourth paragraph of Article 230 EC (*Stichting Greenpeace Council and Others v Commission*, cited above, at paragraph 59). Even taking into account the ongoing debate concerning matters relating to *locus standi* mentioned in paragraph 37, the Court cannot follow the suggestions that have been made in the present proceedings to grant *locus standi* to a legal entity that is not an association with a defined membership on the basis of a community of interests. On that reasoning, Bellona's second argument must fail.

67 The Court now turns to Bellona's third line of argument.

68 In this context, Bellona emphasizes the role it performed in the administrative proceedings that lead to the decision taken by the Authority on the matter. It is submitted that it follows from Community case law that "individual concern" can be demonstrated by a person's participation in the administrative procedure that lead to the contested decision.

69 The Court held in *Norwegian Bankers' Association v EFTA Surveillance Authority - Admissibility*, cited above, at paragraph 34, that even in the absence

of provisions providing for a procedural system for complaints regarding State aid, an association's involvement in the proceedings before the EFTA Surveillance Authority may, in certain circumstances, warrant standing for that association to bring action for annulment before the Court. This would particularly be so where the association is, as a representative of its members, at the origin of a complaint to the Authority and where its views were heard during the procedure and information was gathered from the State in question regarding the complaint from the Association (see *Cofaz and Others v Commission*, cited above). This may equally apply at the earlier stages of the procedure (see, for comparison, C-367/95 P *Commission v Sytraval* [1998] ECR 1998 I-1719), and in particular where a decision effectively is a decision not to object to the State aid at issue.

- 70 The case law on *locus standi* shows that the relevance and significance of an applicant's participation in the administrative procedure varies according to the applicable procedural rules and the substantive rules at issue. In the context of decisions approving State aid in "phase one" investigations, participation in the administrative procedure cannot, as a general rule, serve as a substitute for the requirement that the position in the market must be affected (see paragraph 53 above, for further references to case law).
- 71 Nevertheless, such participation in the administrative procedure may be of relevance in very specific circumstances. It has consistently been held by the Community Courts that an association formed for the protection of the collective interests of a category of persons, cannot be considered to be individually concerned for the purposes of the fourth paragraph of Article 230 (ex 173) EC by a measure affecting the general interests of that category, and is therefore not entitled to bring an action for annulment where its members may not do so individually (see *Stichting Greenpeace Council and Others v Commission*, cited above, at paragraph 59, and *Hamburger Hafen- und Lagerhaus and Others v Commission*, cited above, at paragraph 49). In *Stichting Greenpeace*, the Court of Justice of the European Communities further made mention of special circumstances, such as the role played by an association in a procedure that led to the adoption of an act within the meaning of Article 230 (ex 173) EC, which might justify holding admissible an action brought by an association whose members are not directly and individually concerned by the contested measure, citing Joined Cases 67, 38 and 70/85 *Van der Kooy and Others v Commission* [1988] ECR 219, at paragraphs 21 to 23, and Case C-313/90 *CIRFS and Others v Commission* [1993] ECR I-1125, at paragraphs 29 and 30. In both of these cases, which allowed an exception to the above described general rule under which the members of an association must be individually concerned in order to permit the association to bring an action for annulment based on the collective interests of its members, the decision to grant *locus standi* was based on the fact that professional organizations had been deeply involved in negotiations with the Commission and with other parties over matters related to the State aid decisions in question, and were found to have the position of negotiator that was affected by the decision in question.

- 72 It follows that if Bellona were an association and had members, and those members could be considered to be individually concerned within the meaning of Article 36 of the Surveillance and Court Agreement, which in the present context hinges on the notion of parties concerned in Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, then it would be possible to regard Bellona as being entitled to bring the present action to promote the collective interests of its members.
- 73 However, Bellona is not an association, and does not have any “members” that are economic operators who could be regarded as direct competitors of the beneficiaries of the aid at issue. In other words, there are no members who could be defined as “parties concerned” within the meaning of Article 1(2) of Protocol 3 to the Surveillance and Court Agreement, and thus be entitled to bring individual actions for the annulment of the said State aid decision. Consequently, Bellona, although at the origin of the complaint to the EFTA Surveillance Authority, can not be found entitled to bring the present action for annulment on behalf of any members who could have done so individually. Therefore, Bellona does not, in this respect, meet the requirements laid down by the Court in *Scottish Salmon Growers v EFTA Surveillance Authority*, at paragraph 22. The further observation of the Court of Justice of the European Communities in *Stichting Greenpeace Council and Others v Commission*, cited above, at paragraph 59, referred to in paragraph 71 *in fine*, clearly has no bearing on the present case.
- 74 It follows from all the foregoing that the contested decision does not constitute a decision of individual concern to Bellona, within the meaning of the second paragraph of Article 36 of the Surveillance and Court Agreement, and Bellona’s third line of argument must fail.
- 75 The Court does not overlook the role Bellona plays as a participant in the national and international environmental discourse. The main objective of the provisions in the EEA Agreement on State aid is, however, to protect competition in the European Economic Area. Although the significance of the protection of the environment as an area for cooperation among the Contracting Parties to the EEA Agreement has been recognized in Article 78 EEA, this does not entail that the EFTA Surveillance Authority is at liberty to take environmental factors into account when assessing whether State aid is compatible with the EEA Agreement. That power could only flow from a specific legal basis. Consequently, although the Applicant, Bellona, is a player on the environmental scene, this cannot contribute to providing a basis for *locus standi* for Bellona in the matter at hand.

TBW

- 76 With regard to the difference in circumstances and interests of the two Applicants in challenging the contested decision, it has not been argued that TBW

participated in formulating the complaint to the EFTA Surveillance Authority, nor otherwise took part in Bellona's exchanges with the Defendant prior to the contested decision.

- 77 In the Applicants' written observations, it is submitted that TBW is directly and individually concerned by the contested decision. It is asserted that TBW's commercial activity comprises, directly and in cooperation with others as consultants, the production of energy using biogas and anaerobic technologies from various sources of material. It is stated that TBW has initiated several hundred biogas plants in Europe, and considerable numbers on other continents. On this basis, it is claimed that the decision of the Defendant will adversely affect TBW's commercial activities.
- 78 According to the written and oral submissions of the Applicants, TBW's main field of activity is as a consultancy firm within the field of renewable energy. No sufficient information has been presented to the Court concerning TBW's involvement in actual energy production, such as production and sales volumes, market outlets, investments, or the commercial results of its energy business. Some of the commercial interests referred to appear to be quite remote from the activities of the beneficiaries of the State aid, and in some instances of a prospective or hypothetical nature. In those circumstances, the Court cannot find that TBW's market position will be affected by any competition arising from the adoption of the contested decision. It must also be held, based on the written and oral submissions, that the Applicant TBW has not proved that it is by any other means adversely affected by the contested decision.
- 79 It follows that the contested decision does not constitute a decision of individual concern to TBW, within the meaning of Article 36(2) of the Surveillance and Court Agreement.

Conclusion

- 80 Since neither of the Applicants has shown that it is individually concerned by the contested State aid decision, the application must be declared inadmissible, without any need to examine whether either is directly concerned by the decision.

Costs

- 81 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 pleading. The Defendant has asked for the Applicants to be ordered to pay the costs in the admissibility proceedings. Since the Applicant has been unsuccessful it must be ordered to pay the costs. The costs incurred by the Government of

Norway as Intervener 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 the application of 30 July 2002 inadmissible.**
- 2. Orders the Applicants to pay the costs of the Defendant.**

Carl Baudenbacher

Per Tresselt

Thorgeir Örlygsson

Delivered in open court in Luxembourg on 19 June 2003.

Lucien Dedichen
Registrar

Carl Baudenbacher
President

REPORT FOR THE HEARING

in Case E-2/02

Admissibility

-revised-*

DIRECT ACTION brought under Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter the “Surveillance and Court Agreement”) in the case brought by Technogien, Bau- und Wirtschaftsberatung GmbH (hereinafter “TBW”) and the Bellona Foundation (hereinafter “Bellona” and together with TBW, the “Applicants”), and seeking annulment of the decision of 31 May 2002 by the EFTA Surveillance Authority (hereinafter the “Defendant”).

Technogien, Bau- und Wirtschaftsberatung GmbH and the Bellona Foundation

v

EFTA Surveillance Authority

I. Facts and procedure

1. In September 2001, the Norwegian Government proposed an amendment to the Petroleum Taxation Act No 35 of 13 June 1975 (the “PTA”) designed to permit the Snøhvit liquefied natural gas project to go forward.¹ The amendments, which involved distinctly favourable depreciation rates for large-scale liquefied natural gas projects in Norway, were later adopted by the Parliament.

2. On 11 December 2001, the Applicant, Bellona, brought a complaint to the Defendant claiming that the aforementioned amendments to the Petroleum Taxation Act were State aid under Article 61(1) of the Agreement on the European Economic Area (hereinafter the “EEA”) and thus incompatible with it.

3. In a letter to the Norwegian Government dated 18 March 2002, the Defendant concluded that the depreciation rates for the Snøhvit project could be

* Amendments to paragraphs 24, 30, 33, 38, 39, 43, 45, 46, 47, 54, 55, 90 and 99.

¹ Ot. prp. nr. 16 (2001-2002).

considered State aid within the meaning of Article 61(1) EEA. The Government was further given an opportunity to present its viewpoints on whether or not the measure could fall under the derogations provided for in Article 61(2) and 61(3) EEA.

4. The Government adhered to its viewpoint that the measure was not State aid, but argued in the alternative that it would fall within the derogation for regional aid under Article 61(3)(c) EEA. The Defendant, however, concluded that the contested measure was State aid under Article 61(1) and furthermore that its general nature would disqualify it from falling within the derogation for regional aid. In a meeting with the Norwegian Minister of Finance on 16 May 2002, the Defendant stated that unless changes were made to recently adopted amendments to the Petroleum Taxation Act, it would open a formal examination procedure as prescribed in point 5.2(1) of the Defendant's State Aid Guidelines.

5. On 27 May 2002, on the proposal of the Ministry of Finance, the Government approved a revised bill in which the geographical scope of the tax measure was limited to Finnmark County and the municipalities of Kåfjord, Skjervøy, Nordreisa and Kvænangen in Troms County. The Defendant was notified the same day. On 30 May, the Defendant was notified of the application of the depreciation rules of the Petroleum Taxation Act to the Snøhvit project. The Defendant approved the measure as regional aid by decision of 31 May 2002. The revised bill was thereafter adopted and entered into force on 28 June 2002.²

6. By an application of 30 July 2002, received at the Court Registry on the 31 July 2002, TBW and Bellona jointly brought an action under Article 36 of the Surveillance and Court Agreement for annulment of the Defendant's decision of 31 May 2002. The application is based on the following grounds: (i) that the Defendant has, by reference to Article 5.2(1) in the EFTA Surveillance Authority's State Aid Guidelines,³ infringed an essential procedural requirement by deciding not to raise objections, and thereby not opening formal examination proceedings; (ii) that the Defendant has failed to comply with the obligation to provide proper reasons for its decision of 31 May 2002 and thereby has not fulfilled the requirement laid down in Article 16 of the Surveillance and Court Agreement. The Applicants further claim that the contested decision implies an infringement of Article 61(3)(c) EEA, and furthermore, that on the whole, the Defendant has misused its powers, contrary to relevant principles laid down in the case law of the Court of Justice of the European Communities, which should also lead to the annulment of the decision.

² Ot. prp. nr. 84 (2001-2002).

³ Procedural and Substantive Rules in the Field of State Aid. Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement (OJ 1994 L 231, EEA Supplement 03.02.94 No.32, as amended).

7. On 8 November 2002 and pursuant to Article 36 of Protocol 5 to the Surveillance and Court Agreement, the Kingdom of Norway lodged an application to intervene in support of the Defendant. By a letter of 11 February 2003, the Court informed the Norwegian Government of its decision to allow the intervention.

8. On 8 November, the Defendant lodged at the EFTA Court an application for a decision on admissibility pursuant to Article 87 of the Rules of Procedure of the EFTA Court (hereinafter the “Rules of Procedure”). On 31 January 2003, the Applicants lodged a statement in response to that application.

9. On the basis of a preliminary report of the Judge-Rapporteur and with reference to Article 87(4) of the Rules of Procedure, the Court decided that an oral hearing would be held on the request for a decision on admissibility, as a preliminary issue. The Court informed the parties of this decision by a letter dated 11 February 2003.

II. Form of order sought by the parties as regards admissibility of the Application

10. The claim of the Defendant, the EFTA Surveillance Authority, in the request for a decision on the admissibility is that the Court should:

- dismiss the application as inadmissible;
- order the Applicants to pay the costs.

11. The Norwegian Government, as intervener, supports the Defendant’s claim and asks the Court principally to:

- dismiss the application as inadmissible.

12. The claim of the Applicants, TBW and Bellona, as regards admissibility, is that the Court should:

- declare the application admissible;
- in the alternative, reserve its decision on admissibility pending its determination on the merits;
- award the Applicants the costs of the present proceedings.

III. Legal background

The EEA Agreement

13. Article 61 EEA provides:

“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.

2. The following shall be compatible with the functioning of this Agreement:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

3. The following may be considered to be compatible with the functioning of this Agreement:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.”

The Surveillance and Court Agreement

14. Article 1 of Protocol 3 to the Surveillance and Court Agreement, on the functions and powers of the EFTA Surveillance Authority in the field of State aid reads as follows:

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

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

If the EFTA State concerned does not comply with this decision within the prescribed time, the EFTA Surveillance Authority or any other interested EFTA State may, in derogation from Articles 31 and 32 of this Agreement, refer the matter to the EFTA Court directly.

On application by an EFTA State, the EFTA States may, by common accord, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the functioning of the EEA Agreement, in derogation from the provisions of Article 61 of the EEA Agreement, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the EFTA Surveillance Authority has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the EFTA States shall have the effect of suspending that procedure until the EFTA States, by common accord, have made their attitude known.

If, however, the EFTA States have not made their attitude known within three months of the said application being made, the EFTA Surveillance Authority shall give its decision on the case.

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

15. Article 16 of the Surveillance and Court Agreement states:

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

16. Article 36 of the Surveillance and Court Agreement states:

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

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

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

If the action is well founded the decision of the EFTA Surveillance Authority shall be declared void.”

17. Article 5.2(1) of the EFTA Surveillance Authority’s State Aid Guidelines states:

“The EFTA Surveillance Authority is obliged to open the procedure provided for in Article 1(2) of Protocol 3 to the Surveillance and Court Agreement whenever it is in any doubt about the compatibility of the aid with the functioning of the EEA Agreement.”

IV. Submissions of the parties and the intervener regarding admissibility

18. The Court has received the following submissions on the issue of admissibility:

- the Applicants, Technologien, Bau- und Wirtschaftsberatung GmbH and the Bellona Foundation, represented by Ian S. Forrester, Q.C.;
- the Defendant, EFTA Surveillance Authority, represented by Niels Fenger, Director, Legal and Executive Affairs and Michael Sánchez Rydelski, Senior Officer, Legal and Executive Affairs, acting as Agents;

- the Intervener, the Kingdom of Norway, represented by Thomas Nordby, Advokat, Office of the Attorney General acting as Agent, and Ingeborg Djupvik, Legal Adviser, Ministry of Foreign Affairs, acting as Co-Agent.
- the Commission of the European Communities, represented by James Flett, member of its Legal Service, acting as Agent.

The Defendant

19. As regards the question of admissibility, the Defendant refers to the conditions laid down in Article 36(2) of the Surveillance and Court Agreement. The Defendant points out that the contested decision is not addressed to the Applicants. Thus it follows from the wording of Article 36(2) that, under these circumstances, the Applicants are entitled to challenge the contested decision only in so far as it is of direct and individual concern to them.

20. The Defendant submits that in the context of the corresponding provision of Community law, Article 230(4) EC, it is settled case law that persons, other than those to whom a decision is addressed, may claim *locus standi* in relation to a decision only if that decision affects them by “ ... reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee.”⁴ The Defendant in particular points to *Unión de Pequeños Agricultores v Council* (at paragraph 36) and submits that the judgment in *Jégo-Quéré et Cie SA v Commission*,⁵ to which the Applicants refer, can not in any case be said to reflect the case law of the Community courts.

21. The Defendant submits that Article 36(2) of the Surveillance and Court Agreement is identical in substance to Article 230(4) EC. The EFTA Court is not required by Article 3(1) of Surveillance and Court Agreement to follow the reasoning of the Court of Justice of the European Communities when interpreting the main part of the Surveillance and Court Agreement. Nevertheless, in accordance with the judgment of the EFTA Court in the *SSGA*-case,⁶ the case law of the Court of Justice of the European Communities on Article 230(4) EC is relevant when interpreting Article 36(2) ESA/Court Agreement, *i.a.* on questions

⁴ Reference is made to the following case law: Case 25/62 *Plaumann v Commission* [1963] ECR 95, at paragraph 107; Case 231/82 *Spijker v Commission* [1983] ECR 2559, at paragraph 8; Case 169/84 *Cofaz and Others v Commission* [1986] ECR 391, at paragraph 22; Case C-225/91 *Matra v Commission* [1993] ECR I-3203, at paragraph 14; Case C-309/89 *Codorniu v Council* [1994] ECR I-1853, at paragraph 20; Case T-2/93 *Air France v Commission* [1994] ECR II-323, at paragraph 42; Case T-11/95 *BP Chemicals v Commission* [1998] ECR II-3235, at paragraph 71; Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Others v Commission* [1999] ECR II-3663, at paragraph 83; Case T-69/96 *Hamburger Hafen- und Lagerhaus Aktiengesellschaft v Commission* [2001] ECR II-1037, at paragraph 35; Case C-452/98 *Nederlandse Antillen v Council* [2001] ECR I-8973, at paragraph 60; and, Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, at paragraph 36.

⁵ Case T-177/01 *Jégo-Quéré et Cie SA v Commission*. Judgment 3 May 2002 (not yet reported).

⁶ Case E-2/94 *Scottish Salmon Growers Association (SSGA) v EFTA Surveillance Authority* [1995] EFTA Court Report 59 at paragraphs 11-13.

concerning who has *locus standi* to bring an action for the annulment of a decision. Furthermore, the EFTA Court has held that when interpreting Article 36(2) of the Surveillance and Court Agreement, due account shall also be taken of the principles laid down in rulings of the Court of First Instance of the European Communities.

22. The Defendant contends that in order to establish whether the Applicants fulfil the condition of *being affected*, it is necessary to bear in mind the aim of the procedures provided for by the EEA legal framework in State aid cases, in particular Articles 1(2) and 1(3) of Protocol 3 of the Surveillance and Court Agreement. Due account should also be given to the relevant case law concerning *locus standi* in the field of State aid.

23. The Defendant continues by describing the procedural framework and case law in the field of State aid. It is asserted that a distinction must be made between a *prima facie* opinion on compatibility of the aid in question and an *examination* under Article 1(2) of Protocol 3 of the Surveillance and Court Agreement. It is pointed out that it is only in connection with an examination on the basis of Article 1(2) of Protocol 3 to the Surveillance and Court Agreement that EEA law imposes an obligation on the Defendant to give the parties concerned notice to submit their comments. The relevant provisions in Article 1(2) and 1(3) of Protocol 3 to the Surveillance and Court Agreement correspond to those in Article 88(2) and 88(3) EC.

24. According to case law of the Court of Justice of the European Communities, a decision whereby the Commission finds on the basis of Article 88(3) EC that State aid is compatible with the functioning of the common market, can be challenged before the Court of First Instance of the European Communities by those persons who are intended to benefit from the procedural guarantees laid down in Article 88(2) EC. Thus, it is a precondition that the party seeking annulment of a decision can be considered to be a party concerned for the purpose of Article 88(2) EC, and that the person is asking for annulment of the decision taken on basis of Article 88(3) EC, in order to safeguard his procedural rights under Article 88(2) EC.⁷ The Court of First Instance of the European Communities has clarified that, when applicants do not seek the annulment of a decision on the basis of Article 88(3) on the ground that the Commission was in breach of the obligation to initiate the procedure provided for in Article 88(2) EC or on the ground that the procedural safeguards provided for by Article 88(2) EC were infringed, the mere fact that the applicants may be considered to be parties concerned within the meaning of Article 88(2) EC cannot be sufficient to render the application admissible. In such a case, the action will be admissible only if the applicants are affected by the contested

⁷ See, Case 198/91 *Cook v Commission* [1993] ECR-I 2487, at paragraphs 23 – 26.

decision by reason of circumstances distinguishing them individually in like manner to the person to whom the decision is addressed.⁸

25. The Defendant points out that in the case at hand the contested decision was taken on the basis of Article 1(3) of Protocol 3 to the Surveillance and Court Agreement, without the Defendant having initiated the formal procedure provided for in Article 1(2) of the same Protocol, on which grounds annulment is partially claimed. However, the Applicants could only be regarded, in relation to this claim, as directly and individually concerned by the contested decision, and substantiate this claim, if they have the status of “parties concerned” within the meaning of Article 1(2) of Protocol 3 to the Surveillance and Court Agreement.

26. It is the opinion of the Defendant that the Applicants cannot be held affected by the contested decision and are therefore not “parties concerned.”

27. The Defendant submits that it is settled case law within the Community that “parties concerned” within the meaning of Article 88(2) EC include not only the undertaking or undertakings benefiting from the aid, but also those persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations. The Defendant points out that the EFTA Court has followed this interpretation in *Norwegian Bankers’ Association v EFTA Surveillance Authority*.⁹ From this case law the Defendant draws the conclusion that, in order to be “parties concerned,” it is necessary for the Applicants to show that they are in a competitive position with the aid beneficiaries and that the aid affects their position in the market.

28. The Defendant furthermore submits that it is also settled case law in the Community that the alleged competitor must demonstrate that his competitive position in the market is affected by the grant of the aid. To support this argument the Defendant refers to the judgment in *Cofaz v Commission*,¹⁰ and draws the conclusion that an applicant must be adversely affected to a significant extent in order to have standing.

29. In order to assess whether an applicant’s position in the market is affected by the aid, the Defendant contends that the Court of First Instance of the European Communities has required concrete proof and looked in great detail into the question of whether the applicant was directly competing with the beneficiary of the aid or whether they were active in different markets. It is the view of the Defendant that this requirement reflects the general principle that the fact that a measure may influence an existing competitive position cannot, in itself, suffice to create standing for a trader in competition with the beneficiary of

⁸ Case T-266/94 *Skibsvaerftsforeningen and Others v Commission* [1996] ECR II-1399, at paragraph 45.

⁹ Case 4/97 *Norwegian Bankers’ Association v EFTA Surveillance Authority* [1998] EFTA Court Report 38.

¹⁰ See footnote 4.

the contested aid measure. See the judgements in *Hamburger Hafen- und Lagerhaus Aktiengesellschaft*¹¹ *Eridania*,¹² and *BP Chemicals*.¹³

30. The Defendant points out that the approach outlined above applies only where the aid, which the European Commission has found to be compatible with the common market, was an individual aid granted to a specific party. The present case, however, relates partly to the approval of an implementation of a tax provision of a general character where the potential beneficiaries are defined only in a general and abstract manner. The existence of an actual beneficiary presupposes the practical application of the aid scheme by the grant of individual aids. The Defendant submits that in this situation the assessment of whether an applicant is affected in a way that provides *locus standi* will then have to be undertaken by looking at the applicant's competitive position with respect to the actual beneficiaries of the aid. A reference is made to the judgment in *Kahn Scheepvaart*¹⁴ where the Court of First Instance of the European Communities also underlined that a complaint by an applicant to the Commission and, in that connection, correspondence and meetings with the Commission, could not constitute sufficient circumstances peculiar to the applicant on the basis of which it could be distinguished individually from all other persons, and thus confer on it standing to bring proceedings against a general aid scheme.

31. As to the position of the Applicants, TBW and Bellona, the Defendant submits that the evaluation of their interest in challenging the contested decision must be assessed in two parts.

32. In relation to the authorisation of the individual Snøhvit project, the relevant factor is whether the Applicant, TBW, is in a sufficiently direct competitive position with undertakings involved in the project and whether it can be said that TBW is affected to a significant degree by the aid to that particular project. The information available to the Defendant shows that TBW is a consultancy firm and not a natural gas producer. Furthermore, its involvement in plant oil fuel and renewable biogas projects seems to be of an advisory nature and seems to be limited to the development projects in Africa. The Defendant is therefore of the opinion that the Applicant has not even remotely shown that it is a competitor with any of the companies involved in the Snøhvit project. Nor has TBW adduced a shred of evidence demonstrating that its alleged position in the market is indeed affected by the aid in question to those companies. The Defendant further submits that even if TBW were able to show that the consultancy firm did, in fact, itself produce and sell plant oil and renewable biogas, the Applicant would be operating in a different market and would not be directly competing with the beneficiaries.

¹¹ See footnote 4.

¹² Joined cases 10/68 and 18/68 *Eridania and Others* [1969] ECR 459.

¹³ See footnote 4.

¹⁴ Case T-398/94 *Kahn Scheepvaart v Commission* [1996] ECR II-477, at paragraph 49.

33. Similar considerations apply in relation to the authorisation of the general aid scheme. TBW has not demonstrated that it is competing with undertakings actually benefiting from the advantageous depreciation rules. Similarly, TBW has not substantiated how it is even remotely adversely affected by such aid. In any event, even if one were to assume that TBW could find itself in a position whereby it was competing with undertakings benefiting from the PTA depreciation rules, TBW would not have standing to challenge the PTA rules since there would still not be any attributes peculiar to TBW which would differentiate it from all other persons and distinguish it in the same way as the addressee.

34. As to the Applicant, Bellona, the Defendant points out that Bellona is a non-profit and non-membership driven environmental foundation, and as such, not a gas producer that itself competes with the licensees of the particular Snøhvit project. Further, Bellona, has not even remotely substantiated that it is directly competing with undertakings benefiting either from the general depreciation rules in the PTA or from the application thereof to the Snøhvit project.

35. Further, based on the case law of the Court of Justice of the European Communities and the Court of First Instance of the European Communities, the Defendant submits that the mere fact that Bellona made a complaint to the EFTA Surveillance Authority cannot, in the present situation, where the Defendant decided not to open formal investigations, constitute sufficient circumstances peculiar to that Applicant by which it can be distinguished individually from all other persons, and thus confer on it standing to bring proceedings against the contested decision.

36. The Defendant concludes from the foregoing that in the present case, the Applicants cannot be considered to be “parties concerned.” Neither are there any attributes peculiar to the Applicants, which differentiate them from all other persons and distinguish them individually in the same way as the addressee. The Defendant consequently submits that the application be dismissed as inadmissible.

The Intervener, the Kingdom of Norway

37. The Intervener states that the facts of the case are adequately set out in the Defendant’s request for a decision on admissibility. Nevertheless the Intervener emphasizes that although the amendments to the PTA were based on the development in the Snøhvit field, it was formulated generally and applicable to prospective projects as well. Thus it was by no means an “exceptional and abnormal” advantage for a single project as alleged by the Applicants.

38. The Intervener first discusses the relevance of the case law of the Court of Justice of the European Communities and the Court of First Instance of the European Communities to the present case. It is submitted that Articles 3(1) and

(2) of the Surveillance and Court Agreement and Article 6 of the EEA are directly applicable in the case at hand, mainly because the assessment of *locus standi* is so closely linked to substantial rules that it in reality is a matter of an interpretation of these substantial rules. The substantial rules on State aid are identical in the EFTA and EU pillars. The Intervener submits that the same conclusion is reached by applying general rules of interpretation, such as the parties' intentions and preparatory works. It is argued that the regulation of *locus standi* is found in the Surveillance and Court Agreement rather than in the main part of the EEA Agreement only due to the systematisation of the EEA Agreement. Furthermore, reference is made to the judgment in *SSGA*.¹⁵

39. The Intervener contends that the findings as regards the relevance of the case law of the European Community Courts are also relevant as regards the case law of the Court of First Instance. Reference is again made to the judgment in *SSGA*. Finally, the Intervener argues that another approach to the relevance of the case law of the European Community Courts would jeopardise the principle of homogeneity laid down in Article 6 EEA and Article 3(2) of the Surveillance and Court Agreement, directly distort the economic playing field in the two pillars, and thus be detrimental to the functioning of the internal market.

40. The Intervener then turns to the Applicants' argument that there is no national remedy available for them since national courts lack competence to declare aid to be contrary to the EEA Agreement. However, the Intervener points out that in spite of this, Bellona, as an environmental organisation, would generally have standing before national courts in order to advance environmental considerations.

41. In addition, the contested decision by the Defendant can undoubtedly be brought before the Court. The question is not whether there can be a judicial review of the decision, but rather which natural or legal person is able to bring the case before the Court.

42. In the view of the Intervener, it follows from the foregoing that the Court has to distinguish between State aid cases decided by the Defendant, which may be challenged before the Court by natural or legal persons with *locus standi* and other cases, which may be challenged before the national courts.

43. As to the relevant criteria for *locus standi*, the Intervener agrees with the Defendant's general description, as to the test of direct and individual concern. In addition, the Intervener points out that the term "centrally concerned" used by the Court in *SSGA* must be read as the equivalent "individually concerned" developed by the Court of Justice of the European Communities.

44. As regards the test of direct and individual concern in State aid cases the Intervener submits that the special procedures provided for in Article 1 of

¹⁵ See footnote 6.

Protocol 3 to the Surveillance and Court Agreement are important when assessing the test of individual concern in State aid cases. Article 1, in particular paragraphs 2 and 3, should be construed in such a way that “parties concerned” should be able to challenge a decision based on Article 1(3) before the Court. In other words, the interpretation of the words “parties concerned” in Article 1(2) are decisive for the question of *locus standi* in relation to decisions taken pursuant to Article 1(3).

45. As to the interpretation of the words “parties concerned” the Intervener offers first some remarks on general and individual State aid schemes. The contested amendments to the PTA constitute a general aid scheme. Therefore, when assessing whether the Applicants have *locus standi* to challenge the amendments to the PTA, the relevant criteria are those applicable to such schemes, whose potential beneficiaries are defined only in a general and abstract manner.

46. The Intervener thereafter concentrates on the individual aid to the Snøhvit project. It is submitted that to be considered a party concerned as regards individual aid, the relevant party must be competing in the same market as the aid beneficiary and he must show an actual competitive position on that market. It is argued by the Intervener that Bellona activities are to a large extent of such a nature that its position in the market is only hypothetical and potential.

47. The Intervener also argues that the objective of the State aid rules in the EEA Agreement is to protect competition in the EEA market, not to safeguard environmental interests. Therefore, the Intervener is of the opinion that the fact that one of the Applicants is an important player in the national and European environmental scene cannot constitute a rationale for *locus standi* in the State aid case at hand. These environmental interests cannot suffice to create standing in the present State aid case, although they are relevant when assessing a possible standing based on national law.

48. The Intervener agrees with the Defendant that the fact that a measure may influence an existing competitive position cannot suffice to create standing. According to the case law of the Court of Justice of the European Communities, the market position of the undertakings concerned must be “significantly affected” by the aid in question. This view is supported by reference to the judgment in *Cofaz v Commission*.¹⁶

49. The Intervener then turns to the question of whether the Applicants can claim to be in a competitive position with respect to the aid beneficiaries. It is argued that a minimum requirement for awarding the Applicants *locus standi* is that they are in an actual competitive position with the aid beneficiaries. The Intervener submits that neither of the Applicants is an oil or gas company that is actively taking part in the production and sale of natural gas or other fuels. Thus

¹⁶ See footnote 4.

it is clear that the Applicants are not in direct competition with respect to the aid beneficiaries nor can they claim that they are an association representing possible competitors.

50. As to Bellona in particular, the Intervener points out: *firstly*, that owning shares and options in companies dealing with sustainable energy production is not sufficient to create *locus standi*. Further, the Intervener questions whether the products of these companies are a part of the same market as the gas from Snøhvit. In any event the Intervener finds it highly questionable whether the Snøhvit project will affect the price of gas keeping in mind that the size of the project in relation to the European gas market will only be 0.46 to 0.66 per cent.

51. *Secondly*, the Intervener is of the opinion that Bellona's involvement in the so called B7 programme (described further in paragraphs 66 and 77-87 below) does not make Bellona a competitor, since a co-operation, as consultant or partner, with trade and industry is not sufficient to create *locus standi*.

52. *Thirdly*, although the decision of the Defendant might have factual consequences for Bellona's interests, such consequences are not protected by the State aid rules and cannot suffice to create standing. A pretension to having economic interests by way of contribution to the development of framework conditions for trade and industry obviously cannot give standing within the scope of State aid rules.

53. *Fourthly*, as regards Bellona's argument that its promotion of renewable energy sources will be jeopardised by the aid given to Snøhvit, the Intervener questions whether renewable energy sources are a part of the same market as *liquefied natural gas*.

54. *Fifthly*, as to Bellona's Cleaner Oceans programme (B3) (referred to in paragraphs 70 and 73-74), the Intervener refers to the arguments stated in paragraph 52 above. *Sixthly*, the Applicants' arguments, related to planned wind-power projects and to draft agreements that have been made to preserve these plans, and to involvement in other renewable energy and clean fossil energy projects, refer to a hypothetical or potential position, not to Bellona's actual position.

55. *Seventhly*, the Intervener submits that the establishment of an affiliated commercial company that will handle Bellona's investments and shareholdings, the "Bellona Environventure AS", has no impact on the assessment of Bellona's *locus standi*. Bellona has only taken steps to establish this company, and Bellona's actual position is therefore not affected.

56. *Finally*, the Intervener, referring to the Applicants' arguments concerning possible harm to its partner and supporters, fails to see that potential harm to partners and supporters, including other non-profit environmental organisations, is of relevance in the assessment of the case at hand.

57. As to the position of TBW in particular, the Intervener submits that it fails to see that TBW has *locus standi* in the case. *Firstly*, it is questionable whether the company is active today since they have not been able to present annual reports for the past three years. *Secondly*, the company's activities include areas that are hardly in a competitive relationship with the Snøhvit project. *Thirdly*, many of their activities seem to be of hypothetical and potential nature. *Fourthly*, as stated earlier, it is highly questionable whether the Snøhvit project will affect the price of gas.

58. The Intervener concludes that in the present case the Applicants cannot be considered to be "parties concerned." Consequently, they do not have *locus standi*. Thus the application should be dismissed as inadmissible. In addition, the Applicants should be ordered to bear the costs.

The Applicants

59. The Applicants submit that their interest in the case is central to the matter at hand. They point out that Bellona's complaint of December 2001 brought an illegal and non-notified aid to the attention of the Defendant. Furthermore, Bellona has two separate but complementary roles, which are both centrally concerned by the contested decision. Firstly, Bellona advances the interests of its partners and supporters (including a number of companies engaged in energy production), which provide funding to Bellona because Bellona's activities are economically advantageous to them, particularly its influence on public authorities and its experience in promoting and developing the use of environmentally friendly energy sources. The interests of these partners and supporters are directly affected by the State aid measure in question. Further, Bellona's own economic interests – its investments, shareholdings, future funding and strategic goals – are directly concerned by the decision.

60. The Applicants also submit that TBW is centrally concerned by the decision. TBW is a German limited company (GmbH), whose commercial activity is the development of sustainable forms of energy production. The contested decision will directly and negatively affect TBW's commercial activities because the energy sources resulting from its activities will be used for heating and electricity production in direct competition with heating and electricity produced from the fuels resulting from the Snøhvit project. The Authority's decision will distort competition in these markets by giving Snøhvit gas an advantage compared to TBW's products, and by reducing prices for non-renewable energy sources.

61. As to the relevance of the case law of the Court of Justice of the European Communities, the Applicants stress the independence of the EFTA Court and that the Court is not bound to follow the jurisprudence of the Court of Justice of the European Communities and the Court of First Instance of the European Communities on the question of admissibility of challenges to Commission decisions. The EFTA Court has been, and should be, prepared to draw different

conclusions from those courts, if their application would defeat interests of justice in the present case. The Applicants also stress that there is no national remedy for their problem, neither before the national courts nor other state or European institutions.

62. The Applicants then turn to the question of whether they are directly and individually concerned within the meaning of Article 36 of the Surveillance and Court Agreement. They submit that they are centrally concerned with the contested decision. In particular, they refer to *Plaumann v Commission* (the *Plaumann* test).¹⁷ According to the *Plaumann* test, the Court will have to establish that the measure affects the Applicants “by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguish them individually just as in the case of the person addressed.” The Applicants maintain that they fulfil the *Plaumann* test, as the Court of Justice of the European Communities and the Court of First Instance of the European Communities have applied it.

63. First, the Applicants submit that Bellona is *directly concerned*. It is evident that the Government’s sole purpose in proposing amendments to the PTA, which revise the rules adopted earlier, was to give the depreciation rules for the Snøhvit project a form that the Defendant would approve. The immediate steps between receiving the blessing of the Defendant and entry into force were purely formalities. Thus, the Applicants submit that the process involving the Defendant and Bellona’s complaint, was in effect the same process as the Defendant’s hasty blessing of the aid. Since this whole process was a continuum, Bellona is directly concerned.

64. Bellona also submits that it is *individually concerned* by the contested decision. Bellona brought the original complaint that led to an investigation by the Defendant. It is also clear that the decision taken by the Defendant will adversely affect Bellona’s legitimate interests by seriously jeopardising not only the commercial position of Bellona itself, but also the interests of its partners and supporters. Bellona therefore fulfils the requirements set out in *Cofaz*.¹⁸ It also matches the position of the applicant in *Aktionsgemeinschaft Recht und Eigentum*.¹⁹

65. The Applicants also stress the role Bellona performed in the administrative proceedings. It is submitted that it follows from the case law of the Court of Justice of the European Communities that “individual concern” can be demonstrated by a person’s participation in the administrative procedure leading up to the contested measure. It is pointed out that in *Cofaz*²⁰ the Court of Justice

¹⁷ See footnote 4.

¹⁸ See footnote 4.

¹⁹ Case T-114/00 *Aktionsgemeinschaft Recht und Eigentum v Commission*. Judgment 5 December 2002 (not yet reported).

²⁰ See footnote 4.

of the European Communities pointed out that it was necessary to consider the part played by the applicant in the administrative procedure leading to the adoption of the contested measure. According to the judgment, the following factors should be taken into account: (i) the applicant had instigated the complaint which led to the opening of the investigation, (ii) its view had been communicated during that investigation, and (iii) it had produced a significant impact on the conduct of the procedure. It is stressed that Bellona had been a prominent actor in the matter to date, both at the national and the EEA level. Bellona's involvement has had a decisive effect not only on the procedure of the case but also its outcome. This fact clearly distinguishes it from, for instance, the position of Greenpeace in the *Stichting Greenpeace Council* case.²¹ In that case, Greenpeace brought an action two years after the initial Commission decision had been adopted. This case cannot be given significance for the present case as suggested by the Commission.

66. The Applicants also contend that the contested State aid will harm Bellona's activities. Bellona is an environmental foundation, supported by individuals and businesses, which aims to combat problems of environmental degradation, pollution induced dangers to human health, and the ecological impact of economic development strategies. It has concrete economic interests in various aspects of the environment and the energy sector, for instance through its shareholdings and investments in various companies, its involvement in various forms of clean energy production, and as a result of its so called B7 programme, through which it cooperates with trade and industry. These economic interests relate in particular to the production of energy and development of ways to achieve more environmentally friendly energy production.

67. As regards Bellona's various business and commercial interests in the energy market and the development of future sustainable sources of energy production, it is pointed out that Bellona has shares and options in companies dealing with sustainable energy production and has invested in various environmental technologies and has taken steps to establish an affiliated commercial company, Bellona Enviroventure AS, to manage these business interests. The establishment of this company was approved at Bellona's board meeting of February 19, 2001. The aim of the company is primarily to handle Bellona's investments and shareholdings in undertakings engaged in sustainable energy production.

68. The State aid granted to the Snøhvit project will, as pointed out below, jeopardise the competitiveness of production from renewable energy sources and the development of new technology for production of such energy. Moreover, a not insignificant part of the gas from the Snøhvit project will be used on the EEA energy market as "alternative energy" for electricity production in direct competition with other renewable energy produced from windmills and tidewater.

²¹ T-585/93 *Stichting Greenpeace Council and Others v Commission* [1995] ECR II-2205.

69. The Applicants refer to the fact that Bellona has an option for shares in the company Water Power Industries (WPI), a company engaged in producing renewable energy from tidewater. Bellona has also been involved in various planned wind power projects. It is submitted that the aid granted to Snøhvit will reduce the possibilities for companies to develop and commercialise new technology based on renewable energy, both by distorting competition and taking away incentives for the funding of such projects. It will also aggravate the conditions for marketing products leading from such projects. These interests of Bellona will therefore be jeopardised by the State aid granted to the Snøhvit project and the Defendant's approval of the aid.

70. The Applicants then proceed by referring to different programs with which Bellona is involved. They are: (i) The Environmental Capital and Economic Framework Programme, (ii) the Cleaner Energy Programme, and (ii) the Clean Ocean Programme.

71. The first programme involves a co-operation with large corporations to develop profitable, commercially feasible energy-friendly schemes. It is submitted on behalf of the Applicants that the State aid in the present case has been granted to an environmentally unsustainable project based on fossil fuel, which will be economically unprofitable without the aid. The granting of the aid threatens the position of the aforementioned projects aimed at developing cleaner methods of exploiting fossil fuel and contradicts the aims of Bellona's current activities under the Economic Framework programme. Bellona is therefore individually concerned by the Defendant's approval of the contested State aid measure.

72. The second programme involves identifying constructive solutions to ensure development of the energy sector and thus promoting increased use of light-impact, renewable energy sources such as wind, waves, bio mass, tidewater and solar energy. The finding, which the Applicants dispute, that the aid benefiting the Snøhvit project is "regional aid" gives rise to the assumption that the Norwegian government, in order to keep itself within the maximum aid ceiling, will have to impose stricter aid limits when it comes to supporting potentially more environmentally friendly energy projects within the region. The expected decline in the development of a renewable energy will make it harder to promote the production of such energy, and so it becomes harder for Bellona to find future partners and supporters. Thus, Bellona is individually concerned by the Defendant's decision approving State aid granted to Snøhvit, as this aid will have a negative impact on Bellona's sources of income.

73. The third programme, the Cleaner Ocean Programme, aims at protecting the ocean as a nutritional source and protecting its biodiversity. The threat posed by the Snøhvit project to fishing, aquaculture and fish breeding, and the likely increase in petroleum activities resulting from the Snøhvit project, directly impact Bellona's current work in this area under the Cleaner Ocean Programme and the efforts it is making to promote energy from renewable sources. As such,

Bellona is individually concerned by the Defendant's decision to approve the contested aid.

74. Taken together, the Applicants argue that the aid granted will disrupt the economic assumptions underlying energy exploitation in the EEA, to the detriment of Bellona's specific activities. The granting of the aid to an unprofitable and environmentally unsound project will jeopardise the future development of renewable energy and of "clean" fossil energy, and will make it more difficult to promote the production of such energy. As a result, it will be harder for Bellona to find future partners for programmes and projects such as the programmes described above. If it becomes too difficult to make money from pursuing economically wholesome policies, many of Bellona's partners will invest their limited resources elsewhere. Thus the State aid granted to Snøhvit will negatively influence Bellona's future sources of income and economically damage its environmentally friendly activities.

75. The Applicants further argue that the contested aid will harm the interests of Bellona's partners and supporters. First they point out that the 2% increase in CO₂ emissions resulting from the Snøhvit project will, as a consequence of the Kyoto protocol, have to be compensated by placing a burden on land-based industry. This will harm several of Bellona's partners and supporters, including several of the undertakings that are organised in the federation of Norwegian Process Industries, which were meant to enter into formal co-operation with Bellona through the B7 programme in February 2003. The burden is also likely to fall on members of the Norwegian Ferroalloy Producers Research Association, which has also signed the B7 agreement with Bellona.

76. The Applicants also point out that the Snøhvit project will increase the Norwegian emissions of NO_x by 0,3%. Norway is under an obligation to reduce such emissions by 31% of its 2001 emissions by 2010. These commitments have now been transformed into EC law in directive 2001/81/EC, which will become EEA law in the near future. Bellona's partners in the process industry will have to carry the burden related to these obligations.

77. Bellona has also co-operated closely with other environmental organisations that are opposing the Snøhvit project. The interests of these organisations will also be affected by the project. Further, one of Bellona's partners, the Norwegian Fishing Vessel Association, has members whose livelihood in the fishing industry will be put at risk by the Snøhvit project.

78. In the opinion of the Applicants it is clear that the Defendant's decision to approve the State aid is of individual concern to Bellona's supporters and partners in a number of sectors.

79. The Applicants refer to the *Extramet* case.²² In that case, the Court of Justice of the European Communities held that the applicant was individually concerned because it had established the existence of a set of factors constituting a situation that is peculiar to the applicant, and that differentiates it, as regards the measure in question, from all other traders.

80. Bellona, in the present case, is differentiated from all other parties by virtue of the fact that: (i) Bellona has been extensively involved in the administrative procedure leading up to the adoption of the Defendant's decision, Bellona was the complainant whose intervention revealed the original illegality, it was thanks to Bellona that the Defendant intervened, it is in response to Bellona's criticism that the law was rewritten to make the illegal features less obvious; and, (ii) the decision will entail substantial adverse consequences for Bellona, rendering infeasible alternative energy projects that it has developed, turning away partners and supporters who would otherwise be interested in pursuing environmentally wise programmes, hindering the achievements of the aims of its B7 programme, and damaging the interests of actual and potential partners and supporters.

81. The Applicants then turn to the position of TBW. It is submitted that TBW is directly concerned by the Defendant's decision. TBW's commercial activity is the production of energy using biogas and anaerobic technologies from various sources of material. It is pointed out that over the last few years TBW has initiated several hundred biogas plants in Europe and thousands more, further afield. The Defendant's decision will individually and negatively affect TBW's commercial activities. The electricity produced by TBW competes with electricity from non-renewable sources on the open market, heat produced as a by-product competes with heat produced by gas or liquid fossil fuels.

82. It is further argued that the price of fossil fuel energy is crucial to the feasibility of biogas projects.

83. The Applicants then turn to a criticism of the *Plaumann* test described above. Firstly, they contest the appropriateness of the test and then point out that even if the test were correct, they, in any event, fulfil its requirements.

84. The Applicants point out that this test has been applied in series of cases since 1963, with a number of exceptions and relaxations. They are, however, of the opinion that a growing body of opinion asserts that the *Plaumann* test can lead to injustice and should be revised. The Applicants submit that the EFTA Court should ensure that justice is done in this case, by adopting a more flexible interpretation of standing, appropriate to modern times.

85. The Applicants then proceed by citing case law from the Court of Justice of the European Communities and Court of First Instance of the European

²² Case C-358/89 *Extramet Industrie S.A. v Council* [1991] ECR I-2501, at paragraph 17.

Communities, which, in their opinion, shows that a strict adherence to the test excludes so many parties from challenging acts of the EU institutions that it would be contrary to the interest of justice if the parties could take no other judicial route. As proof of the injustices that can follow from the *Plaumann* test the Applicants cite the judgments in *Pfizer v Council*²³ and *Sadam Zuccherifici v Council*.²⁴ In the view of the Applicants these judgments show that the standard *Plaumann* test prevents a person from bringing a legal challenge, even if that person is the only person in the world affected by an act and even if the body undertaking the act had the situation of that person in mind when acting. It is pointed out that the test has been the subject of repeated and rigorous criticism. The Court of Justice of the European Communities and the Court of First Instance of the European Communities have sought to limit the injustice to which it leads, by clarifying its application in certain spheres and extending the ambit of the test in two exceptional cases. Although the test has not been abandoned, it is in a state of flux and is increasingly isolated from the principle of standing applied at national level. The Applicants submit that the EFTA Court need not and should not adopt, as its criterion for direct and individual concern, a test which appears likely to lead to injustice, which is being heavily criticised by judicial figures, and which is inconsistent with the broad principle that a complete set of judicial remedies should exist.

86. The Applicants point out that the *Plaumann* test has been criticised for being too restrictive. In general terms it has been argued that the rule of law would be better served if citizens had the right to take action directly before the Court when their legal rights have been prejudiced by a Community measure, rather than by the current restrictive interpretation of standing deriving from the *Plaumann* test and subsequent case law.²⁵ The criticism of the *Plaumann* test serves to emphasize the need of the EFTA Court to take an objective view of the question of admissibility and to decide how best justice may be served, in the context of the EEA Agreement.

87. The criticism of the *Plaumann* test is particularly important in cases which involve damage to environmental interests where strict application of these criteria may in fact prevent the Courts from being able to fulfil their essential function of assessing whether the Community or EEA institutions have acted lawfully. If the *Plaumann* test was good law there would rarely, if ever, be a closed class of victims eligible to challenge an environmental decision. A reference is made to criticism of Advocate General Jacobs²⁶ and to the Commission's proposal for a Directive on Environmental Liability.²⁷ In the view

²³ Case T-13/99 *Pfizer v Council*. Judgment 11 September 2002 (not yet reported).

²⁴ Case C-41/99 P *Sadam Zuccherifici v Council* [2001] ECR I-4239.

²⁵ Smith and Herzog in their *Commentary on the EEC Treaty*, Vol. 5 at p 379.

²⁶ Francis G. Jacobs: "Access to Justice, the Rule of Law and due Process," presented at the Nordic Conference of the European Union, Access to Justice, the Rule of Law and the Due Process, 6-8 November 1998.

²⁷ See in particular Explanatory Memorandum to Proposal for a Directive of the European Parliament and the Council of environmental liability with regard to the prevention and remedying of environmental damage, COM (2002) 17 final, 23 January 2002.

of the Applicants, the draft proposal is an acknowledgement of, and an attempt to remedy the failure of the criteria of “direct and individual concern” to ensure appropriate judicial control in environmental cases. The Applicants submit that the EFTA Court should ensure that such a failure does not arise in the case at hand. This is especially important since access to national courts in State aid cases is blocked. If the Applicants’ challenge to the legality of the State aid is inadmissible, no one will force judicial review of the State aid. Alternative environmentally friendly techniques of generating energy in Scandinavia will wither.

88. Furthermore, a more flexible approach to *locus standi* would be consistent with the Aarhus Convention of 1998. It is also pointed out that pursuant to the “Second Working Document on [a Directive for] Access to Justice in Environmental Matters” adopted under the same Convention on 22 July 2002, legal standing should, within the framework of national legislation, be conferred upon “members of the public concerned – who have a sufficient interest.” The acts recognise the need to remedy the gap in judicial remedies for environmental matters. Their aims and provisions should be taken into due consideration in this case. Furthermore, a broad interpretation of *locus standi* in the present case would also be compatible with the principles set out in Article 6 and 13 of the European Convention on Human Rights, as well as those in Article 47 of the Charter of Fundamental Rights of the European Union.

89. The Applicants point out that the Court of Justice of the European Communities and the Court of First Instance of the European Communities have clarified the test as it applies to particular sectors, notably State aid, anti-dumping and competition law. In essence it amounts to a softer approach to the overly rigid *Plaumann* test. Although, in State aid cases, only the Commission and a Member state are concerned from a formalistic point of view; private individuals can be involved at various stages, and decisions in such cases may affect them in different ways. In line with this, the Court of Justice of the European Communities has in State aid cases, recognised that the *Plaumann* test cannot be applied without causing significant injustice. Thus, beneficiaries of the aid (see judgment in *Philip Morris*)²⁸ and competitors (see judgment in *Waterleiding Maatschappij*)²⁹ have been allowed to bring action. Reference is also made to *Associazione Italiana Tecnico Economica del Cemento*³⁰ and *Aktionsgemeinschaft Recht und Eigentum*.³¹ From this case law, the Applicants draw the conclusion that the *Plaumann* test has been the subject of many exceptions and its strictness is being continuously eroded in the interest of justice. It has been demonstrated how both its own interests and those of its partners and supporters will be detrimentally affected by the grant of aid to the Snøhvit project. It is submitted that the EFTA Court should, by parity of reasoning, find the present case

²⁸ Case 730/79 *Philip Morris Holland v Commission* [1980] ECR 2671.

²⁹ Case T-188/95 *Waterleiding Maatschappij v Commission* [1998] ECR II-3713.

³⁰ Joined cases T-447/93, 448/93 and 449/93 *Associazione Italiana Tecnico Economica del Cemento and Others v Commission* [1995] ECR II-1971.

³¹ See footnote 19.

admissible just as the Court of First Instance of the European Communities did in *Aktionsgemeinschaft Recht und Eigentum*.³²

90. The Applicants are of the opinion that the *Kahn Scheepvaart v Commission*³³ case is not relevant for the present case, since there is nothing general about an aid scheme (even though it is granted by way of a tax measure) that benefits only one project. The Snøhvit project is specifically intended as the beneficiary of the contested State aid. The *Kahn Scheepvaart* case involved a general aid scheme, and not a targeted focused act of fiscal generosity favouring one investor and its partners in one region.

91. The Applicants argue, that the Defendant's and the Commission's reference to Council Regulation 659/1999 in their submissions, to support their view that the Applicants do not have *locus standi*, is irrelevant since this Regulation is not in force in the EEA.

92. The Applicants then turn to *locus standi* in anti-dumping cases. They argue that such cases follow distinctive procedure. They point out that in such cases the Court of Justice of the European Communities has recognised that legislation imposing anti-dumping duties is of direct and individual concern to producers and exporters who are able to establish that they were identified in the measure adopted by the Commission or the Council or were concerned by the preliminary investigations.³⁴ Actions brought by such persons against the measures are admissible. Equally, in the *Timex* case, the Court of Justice of the European Communities decided that a direct action brought by a complainant was admissible because of the rights accorded to a complainant by the basic regulation, and the role played in the preliminary investigation. This, in the view of the Applicants, echoes the role of Bellona in the present case. However, actions brought by independent importers are not admissible, unless they can fulfil the special conditions set out in *Extramet*³⁵ or satisfy the test set out in *Euromin*³⁶ – namely that they prompted the Community institutions' intervention or formed a part of the *raison d'être* of the Regulation itself.

93. The Applicants assert that the standing requirement in anti-dumping cases has clearly evolved over the past 20 years with a view to ensuring that justice be done. With their acknowledgement of the special circumstances present in *Extramet* and the "*raison d'être*" exception set out in *Euromin*, the Court of Justice of the European Communities and the Court of First Instance of the European Communities have whittled down the extreme effects of the traditional *Plaumann* test.

³² See footnote 19.

³³ See footnote 14.

³⁴ See Case 53/83 *Allied Corporation and Others v Council* [1985] ECR 1621, at paragraph 4.

³⁵ See footnote 35.

³⁶ Case T-597/97 *Euromin v Council* [2000] ECR II-2419.

94. In the present case it may also be noted that Bellona's actions prompted and formed a part of the decision's "*raison d'être*." Furthermore, Bellona's role in the investigation has been crucial. Echoing the aforementioned judgments, Bellona's participation in the process should demonstrate the admissibility of the present case.

95. The Applicants also point out that a further example of the flexible interpretation of the requirement for direct and individual concern can be found in the field of competition, where the Court has recognised that participation in an administrative procedure culminating in the administrative determination of a party's rights may result in a presumption of standing to challenge that determination. In support of this view a reference is made to the judgment in *Metro*.³⁷ It is asserted by the Applicants, that by acknowledging standing in the case, the Court of Justice of the European Communities has adopted a common sense approach, enabling justice to be done, and permitting the most concerned parties to challenge acts that affect them.

96. It is further argued that in two exceptional cases, *Codorniu*³⁸ and *Extramet*,³⁹ the Court of Justice of the European Communities and the Court of First Instance of the European Communities have been prepared to depart from *Plaumann* and create new law. These cases indicate that the *Plaumann* test is not a rigid rule and that the courts are willing to depart from it in the interest of justice. Echoing the criteria used in *Extramet*, the Applicants would argue that their business activities "depend" to a very large extent upon the continuing viability of alternative energy sources. And echoing *Codorniu*, the Applicants would argue that the contested measure would prevent them from pursuing their own corporate objectives.

97. The Applicants assert that attempts to reform the *Plaumann* test are apparent. To support this they refer to the criticism put forth by Advocate General Jacobs,⁴⁰ where he argues that the *Plaumann* test creates a serious gap in the system of judicial remedies established by the EC Treaty. They also argue that the recent judgment in *Jégo-Quéré*⁴¹ reflects a change in the case law. In that case, the Court of First Instance held that in order to ensure effective legal protection, a person should be regarded as individually concerned by a Community measure of general application if that measure affects his legal position in a manner which is definite and immediate, such as by restricting his rights or by imposing obligations. This was justified by the Court's duty to ensure effective judicial protection.

³⁷ Case 26/76 *Metro v Commission* [1977] ECR 1875.

³⁸ See footnote 4.

³⁹ See footnote 22.

⁴⁰ See footnote 26.

⁴¹ See footnote 5.

98. The Applicants point out that the judgment in *Unión de Pequeños Agricultores*⁴² is a witness of possible return to a narrow interpretation. The Applicants, however, stress that in this judgment the Court noted that alternative courses of action before national courts might be possible for the unsuccessful appellant.

99. The Applicants also argue that the *Aktionsgemeinschaft Recht und Eigentum* case, where standing of the association was approved, points to a different direction. The criteria used in that case apply to the present case. In fact, Bellona finds itself in a stronger position than the German association. Firstly, Bellona challenges the Defendant's failure to open the procedure set out in Article 1(2) of Protocol 3 of the Surveillance and Court Agreement, which would have safeguarded its procedural rights. Secondly, Bellona advances legal grounds, which demonstrate the existence of serious issues of compatibility with the EEA Agreement, which should have obliged ESA to open the formal procedure. Thirdly, the competitive position of Bellona's partners and supporters is affected by the aid; and, fourthly, Bellona itself is affected by and insofar as it submitted the initial complaint to the Defendant. Given the direct link between the Defendant's assessment of March 18, 2002 and its subsequent decision of May 31, 2002, Bellona submits that its current application should be considered no less admissible than that of *Aktionsgemeinschaft Recht und Eigentum*.

100. The Applicants then turn to the issue of how the *Plaumann* test compares to standing requirements around the world. The Applicants offer a description of the legal situation in Norway, the EU Member States and the USA. Their main conclusion is that the *Plaumann* test compares unfavourably with the standing requirements in other developed democracies. In fact, the case law of the Court of Justice of the European Communities is increasingly out of line with more liberal developments in the laws of other jurisdictions. A broader interpretation of the rules governing standing would thus not represent a particularly bold or unusual step by the EFTA Court.

101. As concluding remarks on admissibility, the Applicants submit the following:

a) The EFTA Court should hesitate to apply a strict interpretation of a test that has been so widely criticised as an inadequate formula by many academics and members of the EC Courts in their private capacity. The current debate about the traditional test for standing puts in question the legitimacy of this test. Fortunately, the EFTA Court is not obliged to apply it, and can elect to follow its own test, such as that which it used in *SSGA*.⁴³

b) Today, there are a number of compelling reasons why the EFTA Court should maintain its more inclusive approach to admissibility.

⁴² See footnote 4.

⁴³ See footnote 6.

c) The case law on admissibility as established by the Community Courts is inconsistent and in flux. This is illustrated by the extraordinary changes in direction taken by the Community Courts in 2002.

d) It is pointed out that the Council and the Commission have opposed a broader interpretation of the notion of individual concern than that adopted in the existing case law, on the grounds that such an interpretation would result in an unmanageable flood of additional challenges to Community acts. The Applicants, even assuming such doubtful “floodgates” theories are well founded, submit that the same argument cannot be made in respect of the EFTA Court, where the number of cases is fewer. Moreover, other effective methods for addressing this issue exist, such as time limits for bringing an appeal and the requirements of the “centrally concerned” test of *SSGA*.⁴⁴

e) A more expansive approach to admissibility would also permit courts to hear the substantive issues of the cases before them in a timely manner, rather than being bogged down by admissibility questions. The speed alone with which the Defendant’s decision in this case was taken gives rise to doubt, or at least offers no reassurance to alleviate doubts, as to its legality. Legal certainty would be better assured via efficient and immediate judicial review.

f) Additionally, a broader test is appropriate in the present case where the EFTA Court provides the sole avenue of legal redress for the Applicants. There is no alternative remedy available under Norwegian law. Furthermore, as indicated above, there is no ombudsman on whom the Applicants may rely to promote their rights. If the EFTA Court were to find that the present action was inadmissible, the Applicants would be denied effective judicial remedy.

g) A broader test is also in line with the national rules in Norway, major EU countries and the USA. As noted above, in England, for example, the establishment of judicial review has greatly enhanced public satisfaction with the accountability of government and the administration. US courts have had lengthy experience in dealing with judicial review in the environmental field. They have noted the absence of safeguards for environmental interests which are merely aesthetic or recreational, rather than individual or competition-driven, and have developed from scratch a test to ensure judicial fairness.

h) Finally, the Applicants do fulfil the more expansive interpretation given to the *Plaumann* test in the *Aktionsgemeinschaft Recht und Eigentum* case.⁴⁵ The Court of First Instance of the European Communities in that case clearly recognised the interest of a representative organisation itself having standing to bring an application for annulment. The Applicants submit that the EFTA Court should do no less in this case.

⁴⁴ See footnote 6.

⁴⁵ See footnote 19.

102. The Applicants are not requesting that the EFTA Court take over the role of the EFTA Surveillance Authority in reviewing the validity of State aid measures. The Applicants are simply asking the EFTA Court to ensure that proper procedure has been followed, that the facts and the law have been properly assessed and that the decision in question has been adequately reasoned.

The Commission of the European Communities

103. The Commission points out that the Applicants seek annulment of the contested decision in its entirety, *i.e.* both in relation to the approval of the scheme and in relation to the approval of the individual aid. Since a decision approving a scheme is in the nature of a regulation, it is more difficult for an individual to demonstrate individual concerns.

104. The Commission draws attention to the distinction between *phase 2* State aid decisions and *phase 1* State aid decisions. In the former case, to be individually concerned, an applicant must demonstrate a sufficient and actual competitive relationship with the putative beneficiary. In the latter case the “parties concerned” within the meaning of Article 88(2) EC will be individually concerned, but they must still demonstrate a competitive relationship with the putative beneficiary, albeit less than in the case of a phase 2 decision. The Commission also points out that a participation in the administrative procedure is a factor that may be taken into account when assessing admissibility. The Commission refers in particular to *Landbouwschap v Commission*,⁴⁶ *Kahn Scheepvaart v Commission*,⁴⁷ *Waterleiding v Commission*,⁴⁸ and *Hamburger Haf- und Lagerhaus v Commission*.⁴⁹

105. As to the Applicant, Bellona, the Commission states that the Applicant has not demonstrated that it is an undertaking engaged in a relevant economic activity, within the meaning of Article 87(1) EC, nor has it demonstrated that it has any competitive relationship of any kind with Snøhvit or other putative beneficiaries of the scheme. Thus, Bellona is not individually concerned by the contested decision insofar as that decision approves the individual aid for Snøhvit, and still less as it approves the scheme. If the application would be considered admissible, that would mean that Bellona would have standing to seek judicial review of just about any State aid decision, since just about any State aid could be described as at least capable of having some kind of an effect on the environment. The consequence would be that anyone could attack anything and that would empty the term “individual concern” of meaning.

106. Furthermore, the Commission points out that Bellona alleges “to be involved in existing and planned energy projects related e.g. to hydrogen-energy and fuel cells.” This bare assertion is not sufficient to establish individual

⁴⁶ C-295/92 *Landbouwschap v Commission* [1992] ECR I-5003, at paragraph 12.

⁴⁷ See footnote 14, at paragraph 12.

⁴⁸ See footnote 19.

⁴⁹ See footnote 4, at paragraph 41.

concern for several reasons. *Firstly*, the phrase “to be involved” is not sufficiently precise and without any explanation. *Secondly*, the reference to “planned” projects is insufficient since individual concern cannot be established on the basis of subjective intentions or plans about future economic activity. *Thirdly*, the term “e.g.” is inappropriate and needs clarification. *Fourthly*, the phrase “hydrogen-energy and fuel cells” requires elaboration. *Fifthly*, no evidence is offered to support any of the assertions made, and none can be added. *Sixthly*, following the judgment in *Unión de Pequeños Agricultores v Council*,⁵⁰ the reference to *Jégo- Quéré v Commission*⁵¹ cannot be considered sufficient to conclude that application is admissible. The Commission draws particular attention to the judgment in *Stichting Greenpeace Council and Others v Commission*,⁵² confirmed on appeal,⁵³ where the application was confirmed to be inadmissible. In these circumstances, the only possible conclusion is that Bellona is not individually concerned by the contested decision and the application is therefore inadmissible insofar as made by Bellona.

107. As to the Applicant, TBW, the Commission states that its situation is essentially no different from that of Bellona. TBW did not participate in the administrative procedure and appears to have been added in an attempt to bolster the case on admissibility. Bare assertions to the effect that TBW is “an energy company” and engaged in the business of supplying energy, are not supported by any evidence and are insufficient to establish individual concern for several reasons. First, it is not clear whether TBW, who describes itself as “consultants” is producing energy or only supplying it. Second, clarification is required about what type of energy, on what scale it is being offered in which market, and why it competes with Snøhvit. Third, the reference to “plant oil fuels” also appears on the web site, which refers to the production of physic-nut oil in Mali. There would not appear to be any competitive relationship at all between this activity and Snøhvit. Fourth, TBW’s role in relation to the physic-nut oil in Mali is described as “technical and strategic backup support” which does not correspond to the production or supply of energy. Fifth, the reference to renewable biogas production does not indicate that TBW is the producer or the supplier of that energy, but rather the consultant, and the project seems to be in the area of development and there is no explanation about how they might compete with Snøhvit. So, in short, there appears to be no competitive relationship of any kind between TBW and Snøhvit. TBW’s involvement in the case appears to reflect environmental concern as does Bellona’s, and thus the application is inadmissible for the same reasons. The competitive link, which the Applicants attempt to establish, is in any event so remote that it could never form the basis for a determination that TBW would be individually concerned.

⁵⁰ See footnote 4.

⁵¹ See footnote 5.

⁵² See footnote 23.

⁵³ Case C-321/95 P *Greenpeace Council and Others v Commission* [1998] ECR II-1651, at paragraphs 27-35.

108. Contrary to the Applicants' assertion, there is no prospect that TBW would be individually concerned by a phase 2 decision. Although that question does not need to be answered in the present case, the Commission wishes to point out, that the case law shows that, *vis a vis* a phase 2 decision, an applicant must show that it has an actual and particular close competitive relationship with the putative beneficiary. In *Cofaz*⁵⁴ the Court referred to the requirement that the applicant's position in the market be significantly affected by the alleged aid – their *actual* position, not a potential one. The judgment in *ASPEC*⁵⁵ confirms the application of the *Plaumann* criteria in the context of phase 2 State aid decisions, where reference was made to actual, but not potential, competition. The same is true about the judgment in *ACC and Others v Commission*.⁵⁶ Similarly, the *Skibsvaerftsforeningen and Others v Commission*⁵⁷ case is based on the determination that the putative beneficiary admitted that it was in direct competition with two of the applicants. In *BP Chemicals*,⁵⁸ the application was considered inadmissible notwithstanding the fact that the applicant was an actual competitor of the putative beneficiary. In the light of this case law, the Commission respectfully submits that there is no doubt that TBW would not be individually concerned by a phase 2 decision in the present case. Furthermore, for the reasons given above, the application does not establish or evidence that TBW has any basis to assert that it is individually concerned by the contested decisions.

109. The Commission submits that the application is manifestly inadmissible and manifestly unfounded and that the facts as they appear in the contested decision and which are not disputed by the Applicants are more than sufficient to arrive at such a conclusion. Therefore, the Commission invites the Court to dismiss the application.

Thorgeir Örlygsson
Judge-Rapporteur

⁵⁴ See footnote 4.

⁵⁵ Case T-435/93 *ASPEC and Others v Commission* [1995] ECR II-1281.

⁵⁶ Case T-442/93 *ACC and Others v Commission* [1995] ECR II-1381.

⁵⁷ See footnote 8.

⁵⁸ See footnote 4.

Case E-3/02

Paranova AS v Merck & Co., Inc. and Others

(Parallel imports – Article 7(2) of Directive 89/104/EEC – Use of coloured stripes on the parallel importer’s repackaging design – Legitimate reasons)

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Summary of the Judgment

1. Trade mark rights have to be considered essential elements of the system of undistorted competition, which the EEA Agreement is intended to establish and maintain. Nevertheless, the free movement of goods, aiming in particular at avoiding artificial partitioning of the markets in the EEA forms a fundamental principle of that system, which confers on the parallel importer rights that have been characterized as “a certain license”.

As far as the balancing of interests under Article 7(2) of Directive 89/104/EEC is concerned, derogations from the principle of free movement of goods are justifiable only to the extent necessary to enable the trade mark proprietor to safeguard rights that form part of the specific subject-matter of the mark, as understood in the light of its essential function, the function of origin. As to the interest in the free move-

ment of goods, regard must be had to the specific market situation.

2. The territoriality of national trade mark rights would, as a matter of principle, lead to an artificial partitioning of the EEA market. Permitting parallel imports and repackaging are means which aim at securing the free movement of goods. The parallel importer’s right to repackage is justified because it makes an important contribution to overcoming the partitioning of the EEA market along national boundaries.

The necessity requirement as established in the case-law of the Court of Justice of the European Communities is relevant to the issue of establishing the parallel importer’s right to repackage as such, where the conduct of the trade mark proprietor and factual or legal trade barriers hinder effective access to the market of the State of importation. Where the right to repackage is beyond

Case E-3/02

Paranova AS v Merck & Co., Inc. med flere

(Parallellimport – Rådsdirektiv 89/104/EØF artikkel 7(2) – Bruk av fargestriper på parallellimportørens ompakningsdesign – Berettiget grunn)

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Sammendrag av avgjørelsen

1. Varemerkerettighetene må anses som et vesentlig element i en ordning med uinnskrenket konkurranse, som EØS-avtalen er ment å etablere og opprettholde. Ikke desto mindre utgjør det frie varebytte, som særlig har til hensikt å motvirke en kunstig oppdeling av markedene innen EØS et grunnleggende prinsipp innen denne ordningen, som tildeler parallellimportøren rettigheter som er blitt karakterisert som “en vis beføyelse”

Med hensyn til avveiningen av interessene under artikkel 7(2) i direktivet, er fravik fra prinsippet om fri bevegelse for varer bare berettiget i den utstrekning det er nødvendig for å gjøre varemerkeinnhaveren i stand til å beskytte rettighetene som utgjør en del av varemerkets særlige gjenstand, sett i lys av dets hovedfunksjon, opprinnelsesgaranti. Når det gjelder de interessene som er knyttet til det frie varebytte må den

konkrete markedssituasjonen tas i betraktning.

2. Den territorielle avgrensningen av nasjonale varemerkerettigheter vil, i prinsippet, føre til en kunstig oppdeling av EØS-markedet. Det å tillate parallellimport og ompakning tar sikte på å sikre det frie varebytte. Parallellimportørens rett til ompakning er, med andre ord, berettiget fordi den innebærer et viktig bidrag til å motvirke en oppdeling av EØS-markedet etter nasjonale grenser.

Nødvendighetskravet er relevant for spørsmålet om parallellimportørens rett til ompakning som sådan, hvor varemerkeinnhaverens atferd og faktiske eller rettslige handelshindringer forhindrer effektiv adgang til markedet i importstaten. Der retten til ompakning er utvilsom, og parallellimportøren, ved å utøve denne, har oppnådd effektiv adgang til markedet, kan nødvendighetskravet ikke være avgjørende ved for-

JUDGMENT OF THE COURT

8 July 2003*

(Parallel imports – Article 7(2) of Directive 89/104/EEC – Use of coloured stripes on the parallel importer’s repackaging design – Legitimate reasons)

In Case E-3/02,

REQUEST to the Court by *Norges Høyesterett* (the Supreme Court of Norway) for an Advisory Opinion under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case pending before it between

Paranova AS

and

Merck & Co., Inc. and Others

on the interpretation of Article 7(2) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p 1), as referred to in point 4 of Annex XVII to the EEA Agreement (hereinafter “the Directive”),

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Tresselt and Thorgeir Örlygsson, Judges,

Registrar: Lucien Dedichen,

* Language of the Request: Norwegian.

EFTA-DOMSTOLENS DOM

8 juli 2003*

(Parallellimport – Rådsdirektiv 89/104/EØF artikkel 7(2) – Bruk av fargestriper på parallellimportørens ompakningsdesign – Berettiget grunn)

I sak E-3/02,

ANMODNING til EFTA-domstolen fra Norges Høyesterett om rådgivende uttalelse i medhold av artikkel 34 i Avtale mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol i saken for denne domstol mellom

Paranova AS

og

Merck & Co., Inc. med flere

vedrørende tolkningen av artikkel 7(2) i det første rådsdirektiv 89/104/EØF av 21 desember 1988 om innbyrdes tilnærming av medlemsstatenes lovgivning om varemerker (EFT 1989 L 40, s 1.), som vist til i vedlegg XVII, punkt 4 til EØS-avtalen (heretter “direktivet”),

EFTA-DOMSTOLEN,

sammensatt av: president og saksforberedende dommer Carl Baudenbacher, Per Tresselt og Thorgeir Örlygsson, dommere,

justissekretær: Lucien Dedichen,

* Språket i anmodningen om en rådgivende uttalelse: Norsk.

having considered the written observations submitted on behalf of:

- Paranova AS, represented by Jonas W. Myhre, Høyesterettsadvokat;
- Merck & Co., Inc. and Others, represented by Aase Gundersen, Advokat;
- the EFTA Surveillance Authority, represented by Elisabethann Wright, Senior Officer, and Dóra Sif Tynes, Officer, Legal and Executive Affairs, acting as Agents;
- the Commission of the European Communities, represented by Niels Bertil Rasmussen, Member of its Legal Service, acting as Agent,
- the Kingdom of Norway, represented by Inger Holten, Adviser, Ministry of Foreign Affairs, and Thomas Nordby, Advokat, Office of the Attorney-General (Civil Affairs), acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Paranova AS, represented by Jonas W. Myhre; Merck & Co., Inc. and Others, represented by Aase Gundersen; the EFTA Surveillance Authority, represented by Elisabethann Wright; the Commission of the European Communities, represented by Niels Bertil Rasmussen, and the Kingdom of Norway, represented by Inger Holten at the hearing on 21 May 2003,

gives the following

Judgment

I Facts and procedure

- 1 By a reference dated 17 December 2002, registered at the Court on 24 December 2002, *Norges Høyesterett* made a request for an Advisory Opinion in the case pending before it between Paranova AS (hereinafter the “Appellant”) and Merck & Co., Inc., USA, Merck Sharp & Dohme B.V., the Netherlands, and MSD Norge AS (hereinafter, jointly the “Respondents”).
- 2 The dispute before the national court concerns the parallel import of pharmaceutical products and the question of whether the parallel importer may use its own packaging design with vertical or horizontal coloured stripes or other graphic elements for the repackaging, to which the pharmaceutical producer’s trade mark is reaffixed.
- 3 The Appellant is part of Paranova-Gruppen A/S, which has its main office in Denmark. Paranova-Gruppen A/S has specialised in the parallel importation of

etter å ha vurdert prosesskrifter inngitt av:

- Paranova AS, representert ved Jonas W. Myhre, høyesterettsadvokat;
- Merck & Co., Inc. med flere, representert ved Aase Gundersen, advokat;
- EFTAs overvåkningsorgan, representert ved Elisabethann Wright, senior saksbehandler, og Dóra Sif Tynes, saksbehandler, avdeling for juridiske saker og eksekutivsaker, som partsrepresentanter;
- Kommisjonen for De europeiske fellesskap, representert ved Niels Bertil Rasmussen, juridisk rådgiver, rettsavdelingen, som partsrepresentant,
- Kongeriket Norge, representert ved Inger Holten, rådgiver, Utenriksdepartementet og Thomas Nordby, advokat, Regjeringsadvokatens kontor, som partsrepresentanter,

med henvisning til rettsmøterapporten; og

etter å ha hørt muntlig prosedyre for Paranova AS, representert ved Jonas W. Myhre; Merck & Co., Inc. med flere, representert ved Aase Gundersen; EFTAs overvåkningsorgan, representert ved Elisabethann Wright; Kommisjonen for De europeiske fellesskap, representert ved Niels Bertil Rasmussen, og Kongeriket Norge, representert ved Inger Holten, under høringen 21 mai 2003,

avsier slik

Dom

I Faktum og prosedyre

- 1 Ved en anmodning datert 17 desember 2002, mottatt ved EFTA-domstolen 24 desember 2002, ber Høyesterett om en rådgivende uttalelse i en sak mellom Paranova AS (heretter “den ankende part”) og Merck & Co., Inc., USA, Merck Sharp & Dohme B.V., Nederland, og MSD Norge AS (heretter “ankemotpartene”).
- 2 Saken for den nasjonale domstolen gjelder parallellimport av legemidler og spørsmålet om parallellimportørens adgang til å bruke sin egen pakningsutforming med vertikale eller horisontale fargestriper eller andre grafiske elementer, ved utformingen av egen ompakket emballasje, hvor legemiddelprodusentens varemerke er gjenpåført.
- 3 Den ankende part er en del av Paranova-Gruppen A/S, som har hovedkontor i Danmark. Paranova-Gruppen A/S har spesialisert seg på parallellimport av

pharmaceutical products to the Scandinavian countries as well as Finland and Austria, via subsidiaries in these countries. The Appellant repackages the pharmaceutical products in new outer packaging or affixes stickers to the original packaging. The actual repackaging takes place in Denmark.

- 4 The Respondents belong to the Merck group, a worldwide group of companies in the pharmaceutical industry. In these proceedings, the Merck group is represented by: the parent company, Merck & Co., Inc., USA, which is the proprietor of the trade mark that is the subject of this case; the subsidiary, Merck Sharp & Dohme B.V., the Netherlands, the company holding the marketing rights and selling the group's products from the Netherlands to the Norwegian market; and, the Norwegian subsidiary, MSD Norge AS, which conducts the marketing in Norway.
- 5 The Appellant launched the sale of parallel imported pharmaceutical products in Norway for the first time on 1 May 1995. Since then, the Appellant has gradually expanded its product range. The Appellant sells, in the Norwegian market, original pharmaceutical products purchased in other EEA States, mostly from countries in southern Europe, where prices for pharmaceutical products are lower. In Norway the Appellant sells only to wholesalers, who in turn sell to pharmacies and hospitals. The parallel imported pharmaceutical products are sold in direct competition with the producer's/direct importer's own sales in the Norwegian market. They are, however, only available by prescription.
- 6 The packaging the Respondents utilised in the country where the Appellant purchases the product is most often different from that utilised in Norway, in respect of appearance and often also of volume. When making purchases abroad, the Appellant and other parallel importers are usually only able to purchase pharmaceutical products in small packages, e.g. with 30 tablets: while in Norway, they are mainly sold in larger packages of around 100 tablets. Therefore, prior to sale in Norway, the Appellant packs the pharmaceutical products in new outer boxes with Norwegian text. The inner packaging, so-called blister packs containing e.g. 7 or 10 tablets per pack, are marked by the parallel importer, but are otherwise not affected by the repackaging. According to *Høyesterett*, it is established that the condition of the goods has not been changed or impaired, and that the pharmaceutical market is partitioned along national boundaries.
- 7 The outer packaging indicates that the pharmaceutical product is produced by the Respondents and that the Appellant is the re-packer and parallel importer. The Respondents' product trade mark, which is also the product's trade name, is re-affixed by the Appellant to its new packaging.
- 8 When it first started marketing in Norway in 1995, the Appellant also affixed to the repackaged boxes its own trade mark in a particular font as well as its own logo, a multi-coloured pentagon. Moreover, the Appellant affixed vertical or horizontal coloured stripes to the edges of the repackaging. The colour of the stripes varied depending on the producer – the Respondents or others – as the

legemidler til de skandinaviske landene, samt Finland og Østerrike, via datterselskaper i disse landene. Den ankende part pakker om legemidlene i ny ytteremballasje eller påkleber originalpakningene etiketter. Selve ompakkingen skjer i Danmark.

- 4 Ankemotpartene tilhører Merck-konsernet, som er en verdensomspennende gruppe selskaper innen farmasøytisk industri. I denne saken er Merck-gruppen representert ved morselskapet Merck & Co., Inc., USA, som er innehaver av de varemerkerettigheter som nærværende sak handler om, datterselskapet Merck, Sharp & Dohme B.V., Nederland, som er det selskapet som har markedsføringstillatelse og selger konsernets produkter fra Nederland til det norske marked, og det norske datterselskapet, MSD (Norge) AS, som forestår markedsføringen i Norge.
- 5 Den ankende part lanserte parallellimporterte legemidler for salg i Norge første gang 1 mai 1995. Siden den gang har den ankende part gradvis utvidet varetilbudet. Den ankende part selger på det norske markedet originale legemidler innkjøpt i andre EØS-land, stort sett fra land i Sør-Europa, hvor legemiddelprisene er lavere. I Norge selger den ankende part kun til grossister, som deretter selger videre til apotek og sykehus. De parallellimporterte legemidlene selges i Norge i direkte konkurranse med produsentens/direkteimportørens eget salg til det norske markedet. Legemidlene er imidlertid bare tilgjengelige på resept.
- 6 Emballasjen ankemotpartene benytter i det landet der den ankende part kjøper produktene, er oftest forskjellig fra den som benyttes i Norge, både med hensyn til utseende og ofte også størrelse (antall tabletter). Ved innkjøp i utlandet får den ankende part og andre parallellimportører vanligvis kjøpt legemidlene i små pakninger, for eksempel med 30 tabletter, mens det i Norge hovedsaklig selges større pakninger, med rundt 100 tabletter. Forut for salget i Norge ompakker derfor den ankende part legemidlene i ny ytteremballasje (esker) med norsk tekst. Innerpakningene, de såkalte blisterbrettene med eksempelvis 7 eller 10 tabletter på hvert Brett, merkes av parallellimportøren, men berøres for øvrig ikke av ompakkingen. Ifølge Høyesterett er det på det rene at varene ikke er blitt endret eller svekket, og at legemiddelmarkedet er oppdelt langs nasjonale grenser.
- 7 På ytteremballasjen opplyses det at legemiddelet er produsert av ankemotpartene, og at den ankende part er ompakker og parallellimportør. Ankemotpartenes varemerke, som også er produktets navn, gjenpåsføres av den ankende part på den nye emballasjen.
- 8 Da den ankende part startet markedsføringen i Norge i 1995 påførte denne, i tillegg sitt eget varemerke i en bestemt skrifttype samt sin egen logo, en flerfarget femkant, på den ompakkete emballasjen. Videre påførte den ankende part vertikale eller horisontale fargestriper langs kantene på den ompakkete emballasjen. Stripenes farger varierte avhengig av produsentene – ankemotpartene eller andre – idet den ankende part benytter farger som kunne

Appellant employed colours reminiscent of those used by the producer itself in the Scandinavian market. Whether the stripes were vertical or horizontal depended on the shape of the packaging.

- 9 By a writ of summons dated 15 August 1995, the Respondents brought suit against the Appellant before the Asker and Bærum *herredsrett* (county court), demanding that the Appellant be prohibited from marketing “Renitec” and “Sinemet,” which were at that time the only Merck-produced pharmaceutical products that the Appellant sold in Norway. The case was later expanded to include all those Merck-produced pharmaceutical products that the Appellant sold in Norway for which the Respondents have registered the product name as a trade mark. The *herredsrett* rendered judgment on 21 January 1999 in favour of the Respondents.
- 10 Following the *herredsrett*’s judgment, the Appellant changed its packaging by removing its own trade mark and the pentagon logo. The vertical or horizontal stripes along the edges of the packaging remained, but the Appellant changed the colours from dark green and light green to dark green and charcoal grey, so that they became more similar to the Respondents’ own colour scheme (dark green and grey). That colour scheme is also protected as a Community Trade Mark, registered at the OHIM under No. 000077701 for Merck & Co., Inc., USA.
- 11 The following picture, submitted by the Respondents without objection, shows an example of the front side of an original packaging of the Respondents (left) and of a repackaging used by the Appellant subsequent to the *herredsrett*’s judgment (right).



- 12 The Appellant appealed the judgment to Borgarting *lagmannsrett* on 23 March 1999. The Respondents opposed the new packaging in preparatory appellate procedure. At what point in time the Respondents first lodged an objection to the Appellant’s use of coloured stripes is disputed.
- 13 Borgarting *lagmannsrett* rendered judgment on 14 January 2002 in favour of the Respondents. In its reasons, the *lagmannsrett* found that “*by employing its own design – including coloured stripes – on the packaging of products produced by others, in this case Merck, Paranova contributes to blurring the distinction between producer and distributor/importer.*” The *lagmannsrett* further found that the Appellant’s use of coloured stripes on the new packaging “... *on the whole merely (contributes) to recognition of Paranova itself.*” In paragraph 2 of the

minne om dem produsenten selv anvendte på det skandinaviske markedet. Hvorvidt stripene var vertikale eller horisontale var avhengig av emballasjens utforming

- 9 Ved stevning av 15 august 1995 til Asker og Bærum herredsrett reiste ankemotpartene søksmål mot den ankende part, med påstand om at den ankende part skulle forbys å markedsføre “Renitec” og “Sinemet,” som på det tidspunktet var de eneste Merck-produserte legemidler den ankende part markedsførte i Norge. Saken ble senere utvidet til å gjelde samtlige Merck-produserte legemidler som den ankende part markedsførte i Norge, og hvis produktnavn er ankemotpartenes registrerte varemerke. Herredsretten avsa dom i saken 21 januar 1999 i tråd med ankemotpartenes påstand.
- 10 Som følge av herredsrettens dom endret den ankende part emballasjen ved at dets eget varemerke og den femkantede logoen ble fjernet. De vertikale og horisontale stripene langs endekantene ble beholdt, men den ankende part endret fargene fra mørkegrønt og lysegrønt til mørkegrønt og gråsort, slik at de ble mer like ankemotpartenes egen fargebruk (mørkegrønt og grått). Denne fargebruken er også beskyttet som et Fellesskapsvaremerke, registrert ved OHIM under nr 000077701 for Merck & Co., Inc., USA.
- 11 Bildet nedenfor, som er fremlagt av ankemotpartene uten innsigelse fra den ankende part, viser et eksempel på forsiden av ankemotpartenes originalpakning (venstre) og av den ompakkede emballasje brukt av den ankende part etter herredsrettens dom (høyre):



- 12 Den ankende part anket dommen til Borgarting lagmannsrett 23 mars 1999. Ankemotpartene fremmet innsigelse mot den nye emballasjen under saksforberedelsen i ankesaken. Det er omtvistet på hvilket tidspunkt ankemotpartene for første gang fremmet innsigelse mot den ankende parts bruk av fargestriper.
- 13 Borgarting lagmannsrett avsa 14 januar 2002 dom i saken i samsvar med ankemotpartenes påstand. Lagmannsretten la til grunn at “(m)ed sin bruk av egen design – herunder fargestriper – på emballasjen på produkter fremstilt av andre, i nærværende sak Merck, bidrar Paranova til å utviske skillet mellom produsent og distributør/importør.” Lagmannsretten la videre til grunn at den ankende parts bruk av fargestriper på den nye emballasjen “... i all hovedsak bare (bidrar) til en gjenkjennelse av Paranova selv.” I følge punkt 2 i lagmannsrettens

operative part of the *lagmannsrett*'s judgment the Appellant "*is prohibited from marketing repackaged products that are labelled with the trade marks "Aldomet," "Blocadren," "Clinoril," "Indocid," "Mevacor," "Renitec," "Sinemet" or "Zocor" when the products' new packaging is labelled with a trade mark and/or logo of Paranova AS and/or other graphic elements that make up a part of the packaging's design and that are affixed by or for Paranova AS. Correspondingly, Paranova AS is prohibited from marketing products that are not repackaged, but on which a label has been affixed to the original packaging.*"

- 14 Even though the Appellant disputed the correctness of the *lagmannsrett*'s prohibition, it chose to comply with the prohibition pending a final decision. It therefore notified both the Respondents and the market that it would shift to white packaging with black writing, the package design which is still used at present.
- 15 The Appellant notified *Statens Legemiddelverk* (the Norwegian Medicines Control Authority) in order to obtain the mandatory marketing license and approval of the packaging. In a decision of 26 February 2002, the Authority refused to approve the Appellant's use of white packaging with black lettering. The Authority found that extensive use of such packaging could lead to increased confusion and incorrect usage of pharmaceuticals. On administrative appeal, the Ministry of Health agreed with the Authority's reasoning, but found that the relevant national regulation did not authorise the denial of approval on those grounds. On that basis, the Authority then granted a temporary approval of the simplified packaging. The Authority has subsequently proposed to amend the regulation, so as to give the Authority express powers to require the inclusion of graphic elements and colours in the packaging of pharmaceuticals, with a view to reducing the danger of confusion or erroneous use.
- 16 The Appellant appealed paragraph 2 of the operative part of the *lagmannsrett*'s judgment to *Høyesterett*. *Høyesterett* seeks to clarify whether packaging onto which have been affixed vertical or horizontal coloured stripes along the edges can be prohibited by virtue of the exclusive right of the trade mark proprietor, *i.e.* whether in accordance with Article 7(2) of the Directive the Respondents had "legitimate reasons" for opposing the Appellant's use of coloured stripes. It referred the following questions to the Court:
 1. *Do "legitimate reasons" exist within the meaning of Article 7(2) of Council Directive 89/104/EEA, cf. Articles 11 and 13 EEA, in a case where the conditions for permitting a parallel importer to undertake repackaging of pharmaceutical products and reaffixing of the trade mark have been met, but where the trade mark proprietor opposes the marketing of the repackaged product with the trade mark reaffixed in a packaging that the parallel importer has equipped with coloured stripes and/or other graphic elements that make up a part of the design of the packaging?*

domsslutning forbys den ankende part *“å markedsføre ompakkete produkter som er påført varemerkene “Aldomet,” “Blocadren,” “Clinoril,” “Indocid,” “Mevacor,” “Renitec,” “Sinemet” eller “Zocor” når produktets nye pakning er påført varemerke og/eller logo for Paranova AS og/eller andre grafiske elementer som utgjør en del av emballasjens design og som er påført av eller for Paranova AS. I samme utstrekning forbys Paranova AS å markedsføre produkter som ikke er ompakket, men originalemballasjen påført etikett.*

- 14 Selv om den ankende part bestred berettigelsen av lagmannsrettens forbud, valgte man å innrette seg etter forbudet inntil det foreligger rettskraftig avgjørelse. Man varslet derfor både ankemotpartene og markedet om at man ville foreta en omlegging til hvit emballasje med svart skrift. Denne designen er fortsatt i bruk i dag.
- 15 Den ankende part søkte Statens Legemiddelverk (SLV) om den obligatoriske markedsføringstillatelsen og godkjenning av emballasjen. I vedtak av 26 februar 2002 nektet SLV å godkjenne den ankende parts bruk av hvit emballasje med svart skrift. Begrunnelsen var at utstrakt bruk av slik emballasje, kan føre til økt forvekslingsfare og feilbruk. Under klagebehandlingen sluttet Helsedepartementet seg til SLV's begrunnelse, men fant at den aktuelle nasjonale forskriften ikke ga hjemmel til å nekte godkjenning på dette grunnlaget. Ut fra dette ga SLV en midlertidig godkjenning av den forenklete emballasjen. Senere har SLV foreslått å endre forskriften slik at SLV uttrykkelig gis myndighet til å kreve at emballasje for legemidler påføres grafiske elementer og farger, med sikte på å redusere faren for forveksling eller feilbruk.
- 16 Den ankende part påanket avsnitt 2 i lagmannsrettens domsslutning til Høyesterett. Høyesterett ønsker å avklare hvorvidt emballasje som er blitt påført vertikale eller horisontale fargestriper langs kantene, kan forbys i kraft av varemerkeinnhaverens enerett, med andre ord om ankemotpartene har *“berettiget grunn”* til å motsette seg den ankende parts bruk av fargestriper i henhold til direktivets artikkel 7(2). Høyesterett forela EFTA-domstolen følgende spørsmål:
 1. *Foreligger det “berettiget grunn” i Rådskonklusjon 89/104/EØF artikkel 7 nr 2's forstand, jf EØS-avtalen artikkel 11 og 13, i et tilfelle hvor vilkårene for at parallellimportøren kan foreta ompakking av et legemiddel med gjenpåføring av varemerket er oppfylt, men varemerkeinnhaver motsetter seg markedsføring av det ompakkete produktet med varemerket gjenpåført i en emballasje som parallellimportøren har utstyrt med fargestriper og/eller andre grafiske elementer, som utgjør en del av emballasjens utforming?*

2. *In answering the question, it should be indicated whether the criterion of necessity that the Court of Justice of the European Communities has applied in interpreting “legitimate reasons” within the meaning of Article 7(2) of Council Directive 89/104/EEA applies also to the more specific design of the packaging, or if the more specific design of the packaging is to be assessed solely on the basis of the condition that the repackaging must not adversely affect the reputation of the trade mark proprietor or the trade mark.*
- 17 As *Høyesterett* has stressed, the case before it does not concern the parallel importer’s repackaging and reaffixing of a trade mark in itself, but rather the question of whether the proprietor of a trade mark, by invoking its trade mark rights, is entitled to prohibit the use of the trade mark on the new packaging on grounds of the characteristics of the packaging’s design.
- 18 The Court notes that the questions referred to it are solely related to the use of the vertical or horizontal stripes. As has been confirmed by both parties to the main proceedings in the oral hearing before the Court, the use of other graphic elements on the package design is no longer of relevance in the proceedings before *Høyesterett*.
- 19 The Court notes furthermore that similar cases have been brought before national courts of Member States of the European Communities. Judgments by the Supreme Court of Denmark delivered on 4 January 2002 in Case II 51/2000 *Orifarm v AstraZeneca*; on 22 April 2002 in Case II 146/2000 *Orifarm v Hoechst Marion Roussel*; and, on 19 December 2002 in Case 214/2001 *Handelsselskabet af 5. januar 2002 v Løvens Kemiske Fabrik*, show that the legal issues facing the Court are being dealt with in the judiciary of other Contracting Parties to the EEA Agreement. Reference is also made to the judgment of the English High Court of Justice of 6 February 2002, [2003] EWHC 110 (Ch).

II Legal background

- 20 Article 11 of the EEA Agreement reads:
- “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Contracting Parties.”
- 21 Article 13 of the EEA Agreement reads:
- “The provisions of Articles 11 and 12 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties.”

2. *Ved besvarelsen av spørsmålet bør det angis om det nødvendighetskriterium som Domstolen for De europeiske fellesskap har anvendt ved fortolkningen av "berettiget grunn" i Rådsdirektiv 89/104/EØF artikkel 7 nr 2 også får anvendelse på den nærmere utformingen av emballasjen, eller om den nærmere utformingen av emballasjen kun skal vurderes ut fra vilkåret om at ompakningen ikke må kunne skade varemerkeinnehavers eller varemerkets omdømme.*

- 17 Høyesterett har understreket at saken for Høyesterett ikke gjelder parallellimportørens ompakking og gjenpåføring av varemerket som sådan, men snarere spørsmålet om innehaveren av varemerket, ved å utøve sine varemerkerettigheter, kan forby bruken av varemerket på den nye pakningen på grunnlag av pakningsdesignens karakteristika.
- 18 EFTA-domstolen bemerker at spørsmålene den er forelagt kun gjelder bruken av vertikale eller horisontale striper. Som bekreftet av begge parter i saken under den muntlige høringen ved EFTA-domstolen, er bruken av andre grafiske elementer i pakningens design ikke lenger relevant for Høyesteretts behandling av saken.
- 19 EFTA-domstolen bemerker dessuten at liknende saker er blitt fremmet for nasjonale domstoler i Det europeiske fellesskaps medlemsstater. Dommene fra Danmarks Høyesterett den 4 januar 2002 i sak II 51/2000 *Orifarm v AstraZeneca*, 22 april 2002 i sak II 146/2000 *Orifarm v Hoechst Marion Roussel* og 19 desember 2002 i sak 214/2001 *Handelsselskabet af 5. januar 2002 v Løvens Kemiske Fabrik* viser at de juridiske problemsstillinger EFTA-domstolen står ovenfor er blitt behandlet av domstolene i andre EØS-land. Det vises også til den engelske *High Court of Justice's* dom av 6 februar 2002, [2003] EWHC 110 (Ch).

II Rettslig bakgrunn

- 20 EØS-avtalens artikkel 11 lyder som følger:

“Kvantitative importrestriksjoner og alle tiltak med tilsvarende virkning skal være forbudt mellom avtalepartene.”

- 21 EØS-avtalens artikkel 13 lyder som følger:

“Bestemmelsene i artikkel 11 og 12 skal ikke være til hinder for forbud eller restriksjoner på import, eksport eller transitt som er begrunnet ut fra hensynet til offentlig moral, orden og sikkerhet, vernet om menneskers og dyrs liv og helse, plantelivet, nasjonale skatter av kunstnerisk, historisk eller arkeologisk verdi eller den industrielle eller kommersielle eiendomsrett. Slike forbud eller restriksjoner må dog ikke kunne brukes til vilkårlig forskjellsbehandling eller være en skjult hindring på handelen mellom avtalepartene.”

22 Article 7 of the Directive reads:

“1. The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.

2. Paragraph 1 shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market.”

23 Pursuant to Article 65(2) of the EEA Agreement and point 4(c) of Annex XVII thereto, Article 7(1) of the Directive was, in the EEA context, replaced by the following:

“The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in a Contracting Party under that trade mark by the proprietor or with his consent.”

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

III Observations submitted to the Court

25 The Appellant submits that there are no legitimate reasons for the trade mark proprietor to oppose its use of coloured stripes on the packaging. It questions the suitability of the necessity criterion for the assessment of the packaging design. Pursuant to the necessity concept, as derived from the case law of the Court of Justice of the European Communities, the decisive issue would be whether the packaging design was necessary in order for the parallel importer to gain market access in the Member State of importation. If that criterion were applicable, the Appellant argues, the trade mark proprietor would have unrestricted control over whatever design the parallel importer might choose and could force the latter to remove all elements of design from the packaging. Instead, the assessment should be solely based on the criterion of whether the use of these stripes is liable to damage the reputation of the trade mark. In addition, the Appellant stresses the importance of its packaging design to avoid confusion on the part of the consumer and thus to contribute to the protection of public health. At the oral hearing the Appellant added that the use of colours for identification purposes is a common practice in the trade of pharmaceuticals. Finally, the Appellant submits that the Respondents had lost their right to rely on their trade mark rights due to passivity.

26 The Respondents claim that they are entitled to oppose the use of coloured stripes on the parallel importer’s packaging in order to safeguard the essential function of the trade mark and in compliance with the necessity test. By opposing only the marketing of the products in the repackaging in question, they do not deny

22 Direktivets artikkel 7 lyder som følger:

“1. Rettigheten til varemerket skal ikke gi innehaveren rett til å forby bruken av det for varer som av innehaveren selv eller med dennes tillatelse er brakt på markedet i Fellesskapet.

2. Nr 1 skal ikke få anvendelse dersom innehaveren har berettiget grunn til å motsette seg den videre ervervsmessige utnyttelsen av varene, og særlig dersom varenes stand er blitt endret eller svekket etter at de ble markedsført.”

23 I henhold til artikkel 65(2) i EØS-avtalen og dens vedlegg XVII, nr 4(c), ble artikkel 7(1) i direktivet i EØS-sammenheng erstattet med følgende:

“Rettigheten til varemerket skal ikke gi innehaveren rett til å forby bruken av det for varer som av innehaveren selv eller med dennes tillatelse er brakt på markedet i en avtalepart.”

24 Det vises til rettsmøterapporten for en fyldigere beskrivelse av den rettslige rammen, de faktiske forhold, saksgangen og de skriftlige saksfremstillingene fremlagt for EFTA-domstolen, som i det følgende bare vil bli omtalt og drøftet så langt det er nødvendig for domstolens begrunnelse.

III Anførsler for EFTA-domstolen

25 Den ankende part anfører at varemerke innehaveren ikke har berettiget grunn til å motsette seg dens bruk av fargestriper på emballasjen. Det settes spørsmålstegn ved anvendeligheten av nødvendighets-kriteriet for bedømmelsen av pakningsdesignen. I henhold til et nødvendighets-konsept, slik dette er utviklet i rettspraksis fra Domstolen for De europeiske fellesskap, vil det avgjørende være hvorvidt pakningsdesignen var nødvendig for at parallellimportøren skulle få adgang til markedet i importstaten. Hvis dette kriteriet skulle være anvendelig, hevder den ankende part at varemerke innehaveren ville ha ubegrenset kontroll over hva slags design parallellimportøren kunne velge, og kunne tvinge sistnevnte til å fjerne alle elementer av design fra emballasjen. I stedet burde vurderingen alene baseres på hvorvidt bruken av disse stripene er egnet til å skade varemerkets omdømme. I tillegg understreker den ankende part pakningsdesignens betydning for å unngå forveksling hos forbrukerne, og dermed til å beskytte folkehelsen. Under den muntlige høringen la den ankende part til at bruken av farger for identifikasjonsformål er vanlig praksis i legemiddelindustrien. Endelig anfører den ankende part at ankemotpartene hadde tapt sin rett til å påberope seg varemerkerettighetene som følge av passivitet.

26 Ankemotpartene hevder at de har rett til å motsette seg bruken av fargestriper på parallellimportørens emballasje for å beskytte varemerkets hovedfunksjon og i overensstemmelse med nødvendighetstesten. Ved å motsette seg salg av produktene i den aktuelle ompakningen, forhindrer de ikke markedsadgangen for

market access for the parallel imported products. The Respondents furthermore submit that the Appellant's trade dress leads to association with the original product and deprives them of the goodwill generated by the sale and use of their goods. The uniform style of the packaging design for a whole series of products marketed by the Appellant creates the impression of a "Paranova product range" comprising products from different manufacturers. At the oral hearing, the Respondents stated that the main reason to oppose the use of coloured stripes was to prevent the Appellant from establishing a common packaging design for all the products it imports. Since the Appellant is not the only parallel importer repackaging and marketing the Respondents' products on the Norwegian market, a situation may occur where the same product under the same trade mark owned by the Respondents is marketed in various package designs, which situation has the inherent risk of degeneration of the relevant trade mark.

- 27 The EFTA Surveillance Authority argues that the necessity test is precluded in the present case. However, there may be "legitimate reasons," such as damage done to the reputation of the trade mark or the creation of an impression that there is a commercial connection between the Appellant and the Respondents within the meaning of Article 7(2) of the Directive. The EFTA Surveillance Authority submits further that there may also be a potential for causing confusion as to which of the undertakings is the manufacturer of the product and for suggesting that there is a special relationship between the two undertakings. In the absence of a risk that the public will be led to believe so, any additional advantage gained by a parallel trader from its graphic design would not, however, be subject to prohibition under Article 7(2) of the Directive and the difficulties faced by the Respondents would not seem sufficient to invoke this provision.
- 28 The Commission of the European Communities submits that the necessity test applies to the act of repackaging, not to the presentation of the repackaged product. Under the trade mark's function of origin, however, the proprietor may oppose the presentation of the products if the presentation is liable to damage the distinctive character of the trade mark or if the presentation of the repackaged goods is liable to damage the reputation of the trade mark and its owner. In circumstances where it is established that the marketing of the repackaged goods is customary in the reseller's sector of trade, the recognition of "legitimate reasons" depends upon whether the use of the trade mark seriously damages its reputation.
- 29 The Kingdom of Norway states that graphic elements such as different colours on the packaging minimise the risk of harm to public health, whereas packaging of similar appearance will increase the risk of confusion and of incorrect use of pharmaceuticals. While the use of graphic elements has not been prohibited in Community law by the Court of Justice of the European Communities, the need to safeguard public health must be taken into consideration when interpreting the Directive.

de parallellimporterte produktene. Ankemotpartene anfører videre at den ankende parts pakningsdesign fører til assosiasjon med det originale produktet og berøver ankemotpartene for goodwill opptjent ved salg og bruk av deres varer. Den enhetlige pakningsdesignen som anvendes for en hel rekke produkter markedsført av den ankende part skaper inntrykk av et "Paranova produktutvalg" som omfatter produkter fra ulike produsenter. Under den muntlige høringen uttrykte ankemotpartene at hovedgrunnen til å motsette seg bruken av fargestriper var å forhindre den ankende part i å etablere en felles pakningsdesign for alle produktene den importerer. Siden den ankende part ikke er den eneste parallellimportøren som ompakker og markedsfører ankemotpartens produkter på det norske markedet, kan det oppstå en situasjon hvor det samme produktet blir markedsført under det samme varemerket eiet av ankemotpartene i ulike pakningsdesign, noe som innebærer fare for degenerering av det aktuelle varemerket.

- 27 EFTAs overvåkningsorgan anfører at nødvendighets-testen ikke kan anvendes i nærværende sak. Det kan imidlertid foreligge "berettiget grunn," slik dette brukes i artikkel 7(2) i direktivet, slik som skade påført varemerkets omdømme eller fremkallelse av et inntrykk av at det er en kommersiell forbindelse mellom den ankende part og ankemotpartene. EFTAs overvåkningsorgan anfører videre at det også kan være en mulighet for at det skapes forvirring med hensyn til hvilket av selskapene som produserer produktet og hvorvidt det består et spesielt forhold mellom de to. Dersom det ikke foreligger noen risiko for at publikum vil bli ledet til å tro dette, kan imidlertid ikke eventuelle andre fordeler parallellforhandleren oppnår som følge av dens grafiske design falle inn under forbudet i direktivets artikkel 7(2), og vanskelighetene ankemotpartene står overfor synes ikke tilstrekkelig til å påberope denne bestemmelsen.
- 28 Kommisjonen for De europeiske fellesskap anfører at nødvendighetstesten kommer til anvendelse på ompakningshandlingen, ikke på presentasjonen av det ompakkete produktet. På grunnlag av varemerkets opprinnelsesfunksjon kan imidlertid innehaveren motsette seg presentasjonen av produktet dersom denne er egnet til å skade varemerkets distinkte karakter eller hvis presentasjonen av det ompakkete produktet er egnet til å skade varemerkets eller varemerkeinnehaverens omdømme. Under omstendigheter hvor det er på det rene at markedsføringen av de ompakkete varene er vanlig i videreselgerens bransje, avhenger anerkjennelsen av "berettiget grunn" av om bruken av varemerket alvorlig skader dets omdømme.
- 29 Kongeriket Norge uttaler at grafiske elementer, slik som ulike farger på emballasjen, reduserer risikoen for skade på folkehelsen, mens emballasje med likt utseende vil øke risikoen for forveksling og feilbruk av legemidler. All den tid bruken av grafiske elementer ikke har vært forbudt innenfor fellesskapsretten av Domstolen for De europeiske fellesskap, må behovet for å beskytte folkehelsen tas i betraktning ved fortolkningen av direktivet.

IV Findings of the Court

- 30 *Høyesterett* essentially asks whether, in a case where it has been established that repackaging of a pharmaceutical product was necessary to allow a parallel importer effective access to the market, “legitimate reasons” within the meaning of Article 7(2) of the Directive exist on the grounds that the parallel importer has equipped the new packaging with coloured stripes, and whether the use of such packaging design should be measured against a “necessity test,” along the lines developed in the case law of the Court of Justice of the European Communities to assess the conditions for effective access to the market, or whether the assessment should relate solely to adverse effects on the reputation of the trade mark or of the trade mark proprietor.

Preliminary Remarks

- 31 Article 7(1) of the Directive is framed in terms corresponding to those used by the Court of Justice of the European Communities in judgments that, in interpreting Articles 28 (ex 30) and 30 (ex 36) EC, have recognized in Community law the principle of exhaustion of the rights conferred by a trade mark. According to that Court’s case law, the owner of a trade mark protected by the legislation of a Member State cannot rely on that legislation to prevent the importation or marketing of a product that was put on the market in another Member State by it or with its consent. In other words, the specific subject-matter of trade marks consists in particular in guaranteeing to the proprietor of the trade mark that it has the right to use that mark for the purpose of putting a product into circulation for the first time (see, in particular, Cases 16/74 *Centrafarm v Winthrop* [1974] ECR 1183, at paragraphs 7 to 11; C-3/78 *Centrafarm v American Home Products* [1978] 1823, at paragraph 11; C-10/89 *CNL-SUCAL v HAG GF (‘HAG II’)* [1990] ECR I-3711, at paragraph 12; and C-9/93 *IHT Internationale Heiztechnik v Ideal Standard* [1994] ECR I-2789, at paragraphs 33 and 34).
- 32 The case law cited above is now reflected in Article 7 of the Directive which is worded in general terms and comprehensively regulates the issue of the exhaustion of trade mark rights for products traded in the European Economic Area (see Case E-2/97 *Mag Instrument v California Trading Company Norway* [1997] EFTA Ct. Rep. 127, at paragraph 17).
- 33 The Directive must, however, be interpreted in the light of primary law rules on the free movement of goods (see, for comparison, Court of Justice of the European Communities Case C-427/93 *Bristol-Myers Squibb and Others v Paranova* [1996] ECR I-3457, at paragraph 27). It follows that Article 13 EEA and Article 7 of the Directive, which pursue the same result, are to be interpreted in the same way (see, with regard to Article 30 (ex 36) EC, the Court of Justice of the European Communities in *Bristol-Myers Squibb*, at paragraph 40).
- 34 In codifying the principle of exhaustion, the Community legislature appears to have intended to reconcile the interest in protecting trade mark rights on the one

IV Rettens bemerkninger

- 30 Høyesterett spør i hovedsak hvorvidt det, i en sak hvor det er slått fast at ompakking av et legemiddelprodukt var nødvendig for å gi en parallellimportør effektiv adgang til markedet, foreligger “berettiget grunn” i henhold til artikkel 7(2) i direktivet som følge av at parallellimportøren har påført den nye emballasjen fargestriper, og om bruken av slik pakningsdesign skal vurderes i forhold til en “nødvendighets-test,” slik denne er utviklet i Domstolen for De europeiske fellesskaps rettspraksis for å vurdere betingelsene for effektiv adgang til markedet, eller om vurderingen kun skal gjelde skade på varemerkets eller varemerkeinnhaverens omdømme.

Innledende bemerkninger

- 31 Artikkel 7(1) i direktivet er utformet i tråd med uttalelser av Domstolen for De europeiske fellesskap i dommer som, ved fortolkningen av artikkel 28 (tidligere 30) og 30 (tidligere 36) EF, har anerkjent prinsippet om konsumpsjon av varemerkerettigheter i fellesskapsretten. I følge den domstolens rettspraksis, kan ikke en innehaver av et varemerke som er beskyttet av lovgivningen i en medlemsstat påberope seg denne lovgivningen for å forhindre import eller markedsføring av et produkt som ble satt i omsetning på markedet i en annen medlemsstat av varemerkeinnhaveren, eller med dennes samtykke. Med andre ord, varemerkets særlige gjenstand består i at varemerkeinnhaveren garanteres retten til å bruke varemerket for å sette produktet i omsetning for første gang (se særlig, sakene 16/74 *Centrafarm v Winthrop* [1974] ECR 1183, avsnittene 7 til 11; C-3/78 *Centrafarm v American Home Products* [1978] 1823, avsnitt 11; C-10/89 *CNL-SUCAL v HAG GF ('HAG II')* [1990] ECR I-3711, avsnitt 12; og C-9/93 *IHT Internationale Heiztechnik v Ideal Standard* [1994] ECR I-2789, avsnittene 33 og 34).
- 32 Den rettspraksis som er referert til ovenfor er nå reflektert i artikkel 7 i direktivet, hvis ordlyd er gitt generell form og som utgjør en sammenfattende regulering av spørsmålet om konsumpsjon av varemerkerettigheter for produkter som omsettes innen det Europeiske Økonomiske Samarbeidsområdet (se sak E-2/97 *Mag Instrument v California Trading Company Norway* [1997] EFTA Ct. Rep. 127, avsnitt 17).
- 33 Direktivet må imidlertid tolkes i lys av de grunnleggende reglene om fri bevegelse for varer (se, for sammenligning, Domstolen for De europeiske fellesskap sak C-427/93 *Bristol-Myers Squibb and Others v Paranova* [1996] ECR I-3457, avsnitt 27). Følgelig må artikkel 13 EØS og artikkel 7 i direktivet, som tilstreber samme resultat, fortolkes på samme måte (se, med hensyn til artikkel 30 (tidligere 36) EF, Domstolen for De europeiske fellesskap i *Bristol-Myers Squibb*, avsnitt 40).
- 34 Ved kodifiseringen av prinsippet om konsumpsjon, synes det som om fellesskapslovgiverne mente å forene, på den ene siden, interessen i å beskytte

hand and the interest in the free movement of goods on the other. With regard to the weight to be given to these interests, the Court observes the following: Trade mark rights have to be considered essential elements of the system of undistorted competition, which the EEA Agreement is intended to establish and maintain (see, with regard to Community law, *Hag II*, at paragraph 13). Nevertheless, the free movement of goods, aiming in particular at avoiding artificial partitioning of the markets in the EEA (Case E-1/98 *Astra Norge* [1998] EFTA Ct. Rep. 140, at paragraph 16), forms a fundamental principle of that system, which confers on the parallel importer rights that have been characterized as “a certain license” by the Court of Justice of the European Communities with regard to Community law in Case 102/77 *Hoffmann-La Roche* [1978] ECR 1139, at paragraph 11.

- 35 As far as the balancing of interests under Article 7(2) of the Directive is concerned, derogations from the principle of free movement of goods are justifiable only to the extent necessary to enable the trade mark proprietor to safeguard rights that form part of the specific subject-matter of the mark, as understood in the light of its essential function (see, to this extent, the Court of Justice of the European Communities in Case C-143/00 *Boehringer Ingelheim and Others* [2002] ECR I-3759, at paragraph 28).
- 36 The essential function of the trade mark is the function of origin, *i.e.* to guarantee the identity of the origin of the marked product to the consumers or ultimate users by enabling them, without any possibility of confusion, to distinguish that product from products which have another origin and by ensuring that all the goods or services bearing the mark have been manufactured or supplied under the control of a single undertaking that is responsible for their quality.
- 37 As to the interest in the free movement of goods, regard must be had to the specific market situation. In this context, the Court notes that parallel importers in the pharmaceutical sector are often in a position to offer the goods at a price lower than the one asked by the original producer for the same product (see, to that extent, the Court of Justice of the European Communities in Case 104/75 *De Peijper* [1976] ECR 613, at paragraph 25) and thereby provide less expensive drugs for the benefit of both patients and the national health care systems.
- 38 The Court recalls that under the procedure provided for by Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, it has to give the national court guidelines for the interpretation of EEA law that are required for the decision of the matter before it. It is for the national court to examine and evaluate evidence and to make factual findings, and then apply the relevant EEA law to the facts of the case (see, for instance, Case E-8/00 *LO and NKF v KS and Others* [2002] EFTA Ct. Rep. 114, at paragraph 48).

The Question

- 39 In applying these considerations to the present case, the Court notes that it is undisputed between the parties to the main proceedings that the Appellant in

varemerkerettighetene med, på den andre siden, interessen i fri bevegelighet for varer. Med hensyn til hvilken vekt disse interessene skal tillegges, bemerker EFTA-domstolen følgende: varemerkerettighetene må anses som et vesentlig element i en ordning med uinnskrenket konkurranse, som EØS-avtalen er ment å etablere og opprettholde (se, for så vidt angår fellesskapsretten, *Hag II*, avsnitt 13). Ikke desto mindre utgjør det frie varebytte, som særlig har til hensikt å motvirke en kunstig oppdeling av markedene innen EØS (sak E-1/98 *Astra Norge* [1998] EFTA Ct. Rep. 140, avsnitt 16), et grunnleggende prinsipp innen denne ordningen, som tildeler parallellimportøren rettigheter som er blitt karakterisert som “en vis beføjelse” av Domstolen for De europeiske fellesskap med hensyn til fellesskapsretten i sak 102/77 *Hoffmann-La Roche* [1978] ECR 1139, avsnitt 11.

- 35 Med hensyn til avveiningen av interessene under artikkel 7(2) i direktivet, er fravik fra prinsippet om fri bevegelighet for varer bare berettiget i den utstrekning det er nødvendig for å gjøre varemerke innehaveren i stand til å beskytte rettighetene som utgjør en del av varemerkets særlige gjenstand, sett i lys av dets hovedfunksjon (se Domstolen for De europeiske fellesskap i sak C-143/00 *Boehringer Ingelheim and Others* [2002] ECR I-3759, avsnitt 28).
- 36 Varemerkets hovedfunksjon er opprinnelsesfunksjonen, det vil si å garantere identiteten til det varemerkede produktets opprinnelse for forbrukerne eller sluttbrukerne ved å gjøre dem i stand til, uten forvekslingsfare, å skille dette produktet fra andre produkter som har annen opprinnelse, og ved å sikre at alle varene eller tjenestene som bærer dette varemerket, er produsert eller levert under kontroll av et enkelt foretak som er ansvarlig for deres kvalitet.
- 37 Når det gjelder de interessene som er knyttet til det frie varebytte må den konkrete markedssituasjonen tas i betraktning. I denne sammenheng bemerker EFTA-domstolen at parallellimportørene i legemiddelindustrien ofte er i stand til å tilby produktene til en lavere pris enn hva den opprinnelige produsenten tar for det samme produktet (se Domstolen for De europeiske fellesskap i sak 104/75 *De Peijper* [1976] ECR 613, avsnitt 25) og derved levere rimeligere medisiner til fordel for både pasientene og nasjonale helseordninger.
- 38 EFTA-domstolen minner om at den i henhold til artikkel 34 i Avtale mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol, skal gi de nasjonale domstolene retningslinjer for fortolkningen av EØS-retten som er nødvendige for at de skal kunne avsi dom i den aktuelle saken. Det er den nasjonale domstolens oppgave å vurdere og bedømme bevis og klargjøre faktum, for så å anvende den relevante EØS-retten på sakens faktum (se, for eksempel, sak E-8/00 *LO and NKF v KS and Others* [2002] EFTA Ct. Rep. 114, avsnitt 48).

Spørsmålet

- 39 Ved anvendelsen av disse betraktningene på nærværende sak, bemerker EFTA-domstolen at det er uomtvistet mellom partene i hovedsøksmålet at den ankende

principle is entitled to repackage the Respondents' products and reaffix the latter's trade marks to the repackaging under the conditions established in Community law (see *Hoffmann-La Roche*, at paragraph 14, with regard to Article 30 EC and *Bristol-Myers Squibb*, at paragraph 50, with regard to Article 7(2) of the Directive).

- 40 That case law is relevant for the Court when interpreting the Directive. The criteria that determine the extent to which the trade mark proprietor may rely on its trade mark rights to prevent the use of its mark by the parallel importer, or whether the parallel importer may rely on its rights flowing from the free movement of products that have been lawfully placed on the market, with respect to repackaging or further marketing, may be summarized as follows:
- whether the upholding of the trade mark rights of the proprietor, having regard to its marketing system, will contribute to the artificial partitioning of the markets between Contracting Parties;
 - whether it is shown that the repackaging cannot adversely affect the original condition of the product;
 - whether the parallel importer has given prior notice of the marketing of the repackaged product to the trade mark proprietor;
 - whether the new packaging clearly states the name of the manufacturer;
 - whether the new packaging clearly states the name of the repackager;
 - whether the parallel importer has, on demand, supplied the trade mark proprietor with a specimen of the repackaged product; and
 - whether, and to what extent, the presentation of the repackaged product is such as to be liable to damage the reputation of the trade mark and of its owner.
- 41 On the basis of the first criterion, it will be established whether the parallel importer has a right to repackage the product and reattach the manufacturer's trade mark, whereas the other criteria determine conditions for the exercise of this right in order to safeguard legitimate interests of the trade mark proprietor.
- 42 The territoriality of national trade mark rights would, as a matter of principle, lead to an artificial partitioning of the EEA market. Permitting parallel imports and repackaging are means which aim at securing the free movement of goods. Obstacles to be surmounted by the parallel importer through repackaging exist, for example, where pharmaceutical products purchased by the parallel importer cannot be placed on the market in the Member State of importation in their original packaging by reason of national rules or practices relating to packaging, or where health insurance rules make reimbursement of medical expenses dependent on a certain packaging or where well-established medical prescription

part i prinsippet har rett til å ompakke ankemotpartenes produkter og gjenpåføre sistnevntes varemerke på den ompakkete emballasjen, på de vilkår som er fastslått i fellesskapsretten (se *Hoffmann-La Roche*, avsnitt 14, med hensyn til artikkel 30 EF og *Bristol-Myers Squibb*, avsnitt 50, med hensyn til artikkel 7(2) i direktivet).

40 Denne rettspraksis er relevant for EFTA-domstolen ved tolkningen av direktivet. Kriteriene som avgjør i hvilken utstrekning varemerke innehaveren kan påberope seg sine varemerkerettigheter for å forhindre parallellimportøren i å bruke førstnevntes varemerke, eller hvorvidt parallellimportøren kan påberope seg rettigheter som springer ut av det frie varebytte av varer som er satt i omsetning på lovlig måte, med hensyn til ompakking eller videre markedsføring, kan oppsummeres som følger:

- hvorvidt anerkjennelsen av innehaverens varemerkerettigheter, under hensyntagen til dennes markedsføringssystem, vil bidra til en kunstig oppdeling av markedene mellom avtalepartene;
- hvorvidt det er påvist at ompakkingen ikke kan skade produktets opprinnelige tilstand;
- hvorvidt parallellimportøren har gitt forhåndsvarsel om markedsføringen av det ompakkete produktet til varemerke innehaveren;
- hvorvidt den nye emballasjen klart angir navnet på produsenten;
- hvorvidt den nye emballasjen klart angir navnet på ompakkeren;
- hvorvidt parallellimportøren, etter påkrav, har gitt varemerke innehaveren et prøveeksemplar av det ompakkede produktet, og
- hvorvidt, og i hvilken utstrekning, presentasjonen av det ompakkede produktet kan skade varemerkets og varemerke innehaverens omdømme.

41 På grunnlag av det første kriteriet vil det avgjøres om parallellimportøren har en rett til å ompakke produktet og gjenpåføre produsentens varemerke, mens de øvrige kriteriene fastsetter vilkårene for utøvelsen av denne retten med sikte på å beskytte varemerke innehaverens legitime interesser.

42 Den territorielle avgrensningen av nasjonale varemerkerettigheter vil, i prinsippet, føre til en kunstig oppdeling av EØS-markedet. Det å tillate parallellimport og ompakking tar sikte på å sikre det frie varebytte. Hindringer som må overvinnes av parallellimportøren ved ompakking foreligger, for eksempel, hvor legemiddelprodukter innkjøpt av parallellimportøren ikke kan markedsføres i importstaten i sin originalpakning som følge av nasjonale regler eller praksis med hensyn til emballasje, eller hvor refusjon i henhold til syketrygdregler er avhengig av en viss emballasje, eller hvor veletablert praksis for medisinerrecepter er basert, blant annet, på standardstørrelser anbefalt av

practices are based, *inter alia*, on standard sizes recommended by professional groups and health insurance institutions (see, for comparison, *Bristol-Myers Squibb*, at paragraphs 53 and 54; Case C-443/99 *Merck Sharpe & Dohme* [2002] ECR I-3703, at paragraph 26) or in cases of strong resistance from a significant proportion of consumers to relabelled pharmaceutical products (see, for comparison, *Boehringer*, at paragraph 52).

- 43 The parallel importer's right to repackage is, in other words, justified because it makes an important contribution to overcoming the partitioning of the EEA market along national boundaries. It is against this background that the Court of Justice of the European Communities has in Community law established the necessity test central to the dispute in the main proceedings. That Court held that the power of the owner of the trade mark protected in a Member State to oppose the marketing of repackaged products under that trade mark should be limited only in so far as the repackaging undertaken by the importer is necessary in order to market the product in the Member State of importation (*Bristol-Myers Squibb*, at paragraph 56; Case C-379/97 *Pharmacia & Upjohn v Paranova* [1999] I-6927, at paragraph 19). In other words, where repackaging is necessary to allow the product imported in parallel to be marketed in the importing state, opposition of the trade mark proprietor to the repackaging of the pharmaceutical products is to be regarded as constituting artificial partitioning of the markets (*Merck Sharpe & Dohme*, at paragraph 24).
- 44 It follows that the necessity requirement is relevant to the issue of establishing the parallel importer's right to repackage as such, where the conduct of the trade mark proprietor and factual or legal trade barriers hinder effective access to the market of the State of importation. Where, as in the present case, the right to repackage is beyond doubt and the parallel importer has, in exercising it, achieved effective access to the market, the necessity requirement cannot be decisive when interpreting the term "legitimate reasons" in Article 7(2) of the Directive.
- 45 Such a treatment of the parallel importer would not reflect its rights and functions under the fundamental principle of the free movement of goods in an appropriate way. After lawfully having repackaged the products and reattached the trade mark proprietor's trade mark, the parallel importer is to be considered as an operator on basically equal footing with the manufacturer and trade mark proprietor within the limits set by the Directive. Imposing the necessity requirement on the market conduct of the parallel importer after having gained market access, in particular on its strategy of product presentation, such as advertising or packaging design, would constitute a disproportionate restriction on the free movement of goods.
- 46 As the EFTA Surveillance Authority and the Commission of the European Communities have stated, it follows from the judgment of the Court of Justice of the European Communities in the *Dior* case, that together with the exhaustion of the trade mark proprietor's right to prohibit the use of its trade mark, the right to use the trade mark for the purpose of bringing to the public's attention the further

yrkesgrupper og helseforsikringsinstitusjoner (se, for sammenligning, *Bristol-Myers Squibb*, avsnittene 53 and 54, sak C-443/99 *Merck Sharpe & Dohme* [2002] ECR I-3703, avsnitt 26) eller i tilfeller av sterk motstand fra en vesentlig andel av forbrukerne mot ometiketterte legemiddelprodukter (se, for sammenligning, *Boehringer*, avsnitt 52).

- 43 Parallellimportørens rett til ompakking er, med andre ord, berettiget fordi den innebærer et viktig bidrag til å motvirke en oppdeling av EØS-markedet etter nasjonale grenser. Det er på denne bakgrunn at Domstolen for De europeiske fellesskap innen fellesskapsretten har etablert nødvendighetstesten som står sentralt i tvisten i hovedsøksmålet. Den domstolen har slått fast at varemerkeinnhaverens adgang til å motsette seg markedsføringen av ompakkete produkter under dennes varemerke bare bør begrenses for så vidt ompakkingen foretatt av importøren er nødvendig for å markedsføre produktet i importmedlemsstaten (*Bristol-Myers Squibb*, avsnitt 56; sak C-379/97 *Pharmacia & Upjohn v Paranova* [1999] I-6927, avsnitt 19). Med andre ord, der ompakking er nødvendig for å markedsføre det parallellimporterte produktet i importstaten, må innsigelser fra varemerkeinnhaveren mot ompakking av legemiddelproduktene anses som en kunstig oppdeling av markedene (*Merck Sharpe & Dohme*, avsnitt 24).
- 44 Det følger at nødvendighetskravet er relevant for spørsmålet om parallellimportørens rett til ompakking som sådan, hvor varemerkeinnhaverens atferd og faktiske eller rettslige handelshindringer forhindrer effektiv adgang til markedet i importstaten. Der retten til ompakking er utvilsom, som i nærværende sak, og parallellimportøren, ved å utøve denne, har oppnådd effektiv adgang til markedet, kan nødvendighetskravet ikke være avgjørende ved fortolkningen av begrepet "berettiget grunn" i direktivets artikkel 7(2).
- 45 En slik behandling av parallellimportøren ville ikke reflektere dennes rettigheter og funksjoner under det grunnleggende prinsippet om fri bevegelighet for varer på en adekvat måte. Etter å ha foretatt en lovlig ompakking av produktene og gjenpåført varemerkeinnhaverens varemerke, er parallellimportøren å anse som en aktør på like fot med produsenten og varemerkeinnhaveren innenfor de grensene som er angitt i direktivet. Å anvende nødvendighetskriteriet på parallellimportørens markedsatferd etter at denne har oppnådd markedsadgang, særlig på dens strategi med hensyn til produktpresentasjon, som reklame eller pakningsdesign, ville utgjøre en uforholdsmessig begrensning av det frie varebytte.
- 46 Som uttalt av EFTAs overvåkningsorgan og Kommisjonen for De europeiske fellesskap, følger det av Domstolen for De europeiske fellesskaps avgjørelse i *Dior* at sammen med konsumpsjonen av varemerkeinnhaverens rett til å forby bruken av sitt varemerke, er også retten til å bruke varemerket for å informere publikum om videre kommersialisering av disse produktene konsumert (sak

commercialization of those goods is also exhausted (Case C-337/95 *Parfums Christian Dior v Evora* [1997] I-6013, at paragraphs 36 and 37).

- 47 In applying Article 7(2) of the Directive to the presentation of parallel imported pharmaceuticals, the national court cannot limit itself to mechanically applying the necessity test in question, but has to carry out a comprehensive factual investigation leading to a careful balancing of interests.
- 48 When interpreting the term “legitimate reasons” regard must be had to the need to guarantee the function of origin as the essential function of the trade mark right.
- 49 This function requires that the original condition of the product inside the packaging must not be affected, and that the reaffixing is not done in such a way that it may damage the reputation of the trade mark or of its owner. It is undisputed that the pharmaceutical products repackaged by the Appellant have not been subject to interference in such a way as to affect their original condition.
- 50 Moreover, the protection of the trade mark as a guarantee of origin also requires that the repackaging must not be done in such a way that it is liable to damage the reputation of the trade mark, and thus of its owner (see, for comparison, *Bristol-Myers Squibb*, at paragraph 75; and *Dior*, at paragraph 43). Impairment of the reputation of the trade mark, and thus of its owner, may therefore, in principle, constitute “legitimate reasons” within the meaning of Article 7(2).
- 51 With respect to the circumstances that may be liable to damage the trade mark’s reputation, and thus constitute “legitimate reasons,” the Court of Justice of the European Communities held in *Bristol-Myers Squibb*, at paragraph 76, that defective, poor quality or untidy packaging might have that effect. Such damage, and consequently “legitimate reasons,” may also result from the use of the trade mark in order to bring to the public’s attention the further commercialisation of the goods (see *Dior*, at paragraph 48; Case C-63/97 *BMW and BMW Nederland v Deenik* [1999] I-905, at paragraph 49).
- 52 In order to establish whether there is a risk of damage to the reputation of the trade mark, the national court will have to take account of whether there is an inappropriate presentation of the repackaged product. In such a case, the trade mark proprietor has a legitimate interest, related to the specific subject-matter of the trade mark right, in being able to oppose the marketing of the product. Apart from instances of defective, poor quality or untidy packaging, the national court may also take account of circumstances outside the actual package design such as advertisements published by the Appellant. The Court is not aware of anything that would indicate that affixing coloured stripes along the edges of the product packaging could damage the reputation of the trade mark, and thus that of the Respondents.
- 53 A further basis for “legitimate reasons,” with reference to damage to the reputation of the trade mark, was established by the Court of Justice of the

C-337/95 *Parfums Christian Dior v Evora* [1997] I-6013, avsnittene 36 og 37).

- 47 Ved anvendelsen av artikkel 7(2) i direktivet på presentasjonen av parallellimporterte legemidler, kan ikke den nasjonale domstolen begrense seg til å anvende den omtalte nødvendighetstesten mekanisk, men må foreta en omfattende faktisk vurdering som gir en omhyggelig interesseavveining.
- 48 Ved fortolkningen av begrepet “berettiget grunn” må det tas hensyn til behovet for å beskytte varemerkets hovedfunksjon, nemlig å garantere varens opprinnelse.
- 49 Denne funksjonen krever at produktets originale tilstand, innenfor emballasjen, ikke må bli påvirket, og at gjenpåføringen av varemerket ikke er gjort på en slik måte at den kan skade varemerket eller varemerkeinnhaverens omdømme. Det er uomtvistet at legemidlene ompakket av den ankende part ikke har vært gjenstand for inngrep på en slik måte at det påvirker deres opprinnelige tilstand.
- 50 Beskyttelsen av varemerket som opprinnelsesgaranti krever også at ompakkingen ikke må foretas på en slik måte at den er egnet til å skade varemerkets omdømme, og dermed varemerkeinnhaverens omdømme, se til sammenligning *Bristol-Myers Squibb*, avsnitt 75, og *Dior*, avsnitt 43. Skade på varemerkets omdømme, og dermed varemerkeinnhaverens omdømme, kan derfor i prinsippet utgjøre “berettiget grunn” i henhold til artikkel 7(2) i direktivet.
- 51 Med hensyn til omstendigheter som kan være egnet til å skade varemerkets omdømme, og således utgjøre “berettiget grunn”, uttalte Domstolen for De europeiske fellelskap i *Bristol-Myers Squibb*, avsnitt 76, at en defekt emballasje, en emballasje av dårlig kvalitet eller som har et uordentlig preg, kan ha slik virkning. Slik skade, og dermed “berettiget grunn”, kan også være et resultat av bruken av varemerket til å gjøre offentligheten kjent med den videre omsetningen av varene (se *Dior*, avsnitt 48, sak C-63/97 *BMW and BMW Nederland v Deenik* [1999] I-905, avsnitt 49).
- 52 Med sikte på å klargjøre om det er fare for skade på varemerkets omdømme, må den nasjonale domstolen ta i betraktning om det foreligger en upassende presentasjon av det ompakkete produktet. I så fall har varemerkeinnhaveren berettiget grunn, knyttet til varemerkerettens særlige gjenstand, til å motsette seg markedsføringen av produktet. Ut over tilfeller med defekt emballasje, emballasje av dårlig kvalitet eller emballasje som har et uordentlig preg, kan den nasjonale domstolen også ta hensyn til omstendigheter utenom selve pakningsdesignen, slik som reklame publisert av den ankende part. EFTA-domstolen kjenner ikke til noe som kunne indikere at det å påføre fargestriper langs endekantene av produktets emballasje skulle kunne skade varemerkets omdømme, og dermed ankemotpartenes omdømme.
- 53 Med hensyn til skade på varemerkets omdømme, ble et ytterligere grunnlag for “berettiget grunn” etablert av Domstolen for De europeiske fellelskap i *BMW*

European Communities in *BMW and BMW Nederland v Deenik*. In that case, it was held in paragraph 51 that where the trade mark is used in such a way that it may give rise to the impression that there is a commercial connection between the reseller and the trade mark proprietor, and in particular, that the reseller's business is affiliated with the trade mark proprietor's distribution network or that there is a special relationship between the two undertakings, "legitimate reasons," within the meaning of Article 7(2) of the Directive, may exist. In assessing whether the use of coloured stripes would in fact give rise to such an impression, the national court must take into account the level of knowledge and consciousness of doctors and pharmacists, since the products at issue are prescription drugs. Moreover, regard must be had to common practice in the design of packaging for pharmaceutical products. The Appellant has stated that the use of colours in package design is customary in the pharmaceutical trade, and this assertion has not been contested. At first sight, the coloured stripes affixed along the edges of the product packaging would not appear to create a risk of confusion as to whether there is a connection between the parties in question.

- 54 With regard to the suggestion that the Applicant is pursuing the goal of generating a "Paranova product range," the EFTA Surveillance Authority has rightly observed that the mere fact that a parallel importer gains additional advantage from a particular type of graphic design is, in itself, immaterial.
- 55 The Respondents have observed that products under the same trade mark owned by them may be marketed by various parallel importers with various package designs. They have argued that this would evoke the risk of degeneration of the trade mark. The Court holds that such a risk may, in principle, constitute "legitimate reasons" within the meaning of Article 7(2) of the Directive. It is for the national court to make the necessary factual assessments. In its examination, the national court will have to take into account that the products in question are prescription drugs, and that decisions to use them are made by members of the medical profession on the basis of specialist knowledge and professional responsibility. Only if the coloured stripes constitute the main factor in creating the risk of degeneration, may that risk form a "legitimate reason" to oppose the use of those coloured stripes. This must be distinguished from other causes of degeneration, such as the trade mark owner's own conduct, or developments in the market. Furthermore, the common use of one trade mark by more than one undertaking is an inevitable consequence of the privilege conferred on parallel importers in recognition of their contribution to free trade.
- 56 If coloured stripes affixed along the edges of the product repackaging could create a risk of confusion as to the identity of the manufacturer, that might in theory cause damage to the reputation of the trade mark. However, the repackager's duty to clearly state the name of the manufacturer as well as its own name is intended to counteract any blurring of the distinction between the manufacturer and the parallel importer. Therefore, the use of coloured stripes could not alone constitute a "legitimate reason" within the meaning of Article 7(2) of the Directive, as long as the names of the manufacturer and the parallel

and *BMW Nederland v Deenik* (omtalt ovenfor). I denne saken ble det uttalt i avsnitt 51 at dersom varemerket blir brukt på en slik måte at det kan skape inntrykk av at det er en kommersiell forbindelse mellom videreforsandleren og varemerke innehaveren, og særlig at videreforsandlerens virksomhet er tilknyttet varemerke innehaverens distribusjonsnett, eller at det er et spesielt forhold mellom de to foretakene, kan det foreligge "berettiget grunn" i henhold til artikkel 7(2) i direktivet. I vurderingen av om de fargede stripene faktisk vil kunne skape et slikt inntrykk, må den nasjonale domstolen se hen til legers og apotekansattes kunnskaps- og bevissthetsnivå, siden de aktuelle produktene er reseptbelagte. Videre må det ses hen til hva som er vanlig praksis for utforming av emballasje for legemidler. Den ankende part har anført at bruk av farger ved utforming av emballasje er vanlig i farmasøytisk industri, og denne anførselen er ikke blitt bestridt. I utgangspunktet synes ikke fargede striper langs kanten på emballasjen å medføre risiko for at det kan skapes et inntrykk av at det er en slik tilknytning mellom partene.

- 54 Med hensyn til antydningen om at den ankende part har som formål å etablere et "Paranova produktutvalg," har EFTAs overvåkningsorgan korrekt bemerket at det faktum at en parallellimportør høster tilleggsfordeler av en spesiell type grafisk design, i seg selv er uten betydning.
- 55 Ankemotpartene har bemerket at de samme produktene, under det samme varemerket som innehas av ankemotpartene, kan bli markedsført av ulike parallellimportører i ulik pakkingsdesign. De har anført at dette vil kunne medføre fare for degenerering av varemerket. EFTA-domstolen finner at en slik fare i prinsippet kan utgjøre "berettiget grunn" i henhold til direktivets artikkel 7(2). Det er den nasjonale domstolens oppgave å foreta de nødvendige vurderingene av fakta. Ved denne vurderingen, må den nasjonale domstolen ta i betraktning at de aktuelle produktene er reseptbelagte medisiner, og at beslutninger om å anvende disse tas av leger på grunnlag av særlig kunnskap og profesjonsansvar. Bare dersom fargestripene er hovedårsaken til at det skapes fare for degenerering, kan denne risikoen utgjøre en "berettiget grunn" til å motsette seg bruken av disse fargestripene. Dette må holdes atskilt fra andre grunner til degenerering, slik som varemerke innehaverens egen atferd, eller utviklingen i markedet. Videre er den felles bruken av et varemerke av mer enn ett foretak en uunngåelig følge av det privilegium som er innrømmet parallellimportørene i erkjennelse av deres bidrag til den frie varehandelen.
- 56 Dersom fargede striper langs kanten på emballasjen vil kunne skape tvil med hensyn til produsentens identitet, kan det i prinsippet skade varemerkets omdømme. Imidlertid er ompakkerens plikt til tydelig å påføre produsentens og ompakkerens navn ment å forhindre at skillet mellom produsenten og parallellimportøren utviskes. Følgelig kan ikke bruk av fargede striper alene utgjøre "berettiget grunn" i henhold til direktivets artikkel 7(2), så lenge

importer are adequately stated, *i.e.* whether the names in question are printed in such a way as to be understood by a person with normal eyesight, exercising a normal degree of attentiveness (see, for comparison, *Bristol-Myers Squibb*, at paragraph 71).

57 The argument put forward by the Appellant that the Respondents have lost their right to invoke their trade mark right due to passivity has not been commented upon by the latter. It is for the national court to make the necessary findings and to express itself on the relevance of this issue.

58 The answer to the question referred to the Court must be that:

- “Legitimate reasons” within the meaning of Article 7(2) of the Directive to oppose the further commercialisation of repackaged pharmaceutical products may exist where the packaging has been equipped with coloured stripes along the edges if this is liable to damage the reputation of the trade mark. Whether this is the case, is to be answered by the national court on the basis of the relevant facts.
- The question of whether “legitimate reasons” exist if coloured stripes are used in the described presentation of a product cannot mechanically be assessed on the basis of the necessity test as developed by the Court of Justice of the European Communities.

V Costs

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

produsentens og parallellimportørens navn er tilstrekkelig tydelig påført, det vil si slik at det vil oppfattes av en person med normalt syn som utviser en alminnelig grad av oppmerksomhet (se til sammenligning *Bristol-Meyers Squibb*, avsnitt 71).

- 57 Den ankende parts anførsel om at ankemotpartene har mistet retten til å påberope seg sin varemerkerett som følge av passivitet er ikke blitt kommentert av sistnevnte. Det er den nasjonale domstolens oppgave å foreta de nødvendige vurderinger og å uttale seg om relevansen av dette spørsmålet.
- 58 Svaret på spørsmålet som er forelagt EFTA-domstolen må etter dette være at
- “berettiget grunn” i henhold til direktivets artikkel 7(2) til å fremme innsigelse mot videre kommersiell utnyttelse av ompakkete legemidler kan foreligge hvor emballasjen er blitt utstyrt med fargestriper langs endekantene, hvis dette er egnet til å skade varemerket eller varemerkeinnhaverens omdømme. Hvorvidt dette er tilfelle, må besvares av den nasjonale domstolen på grunnlag av de foreliggende fakta.
 - Spørsmålet om hvorvidt det foreligger “berettiget grunn” hvis fargestriper er benyttet i den beskrevne presentasjonen av et produkt, kan ikke vurderes mekanisk på grunnlag av nødvendighetstesten som er utviklet av Domstolen for De europeiske fellesskap.

V Saksomkostninger

- 59 Omkostninger som er påløpt for EFTAs overvåkningsorgan, Kommisjonen for De europeiske fellesskap og Kongeriket Norge, som har gitt saksfremstillinger for EFTA-domstolen, kan ikke kreves dekket. For så vidt gjelder partene i hovedsøksmålet, er foreleggelsen for EFTA-domstolen en del av rettergangen for den nasjonale domstolen. Avgjørelsen av saksomkostninger er derfor en sak for denne domstolen.

On those grounds,

THE COURT,

in answer to the question referred to it by *Høyesterett* by a reference of 17 December 2002, hereby gives the following Advisory Opinion:

1 “Legitimate reasons” within the meaning of Article 7(2) of the Directive to oppose the further commercialisation of repackaged pharmaceutical products may exist where the packaging has been equipped with coloured stripes along the edges if this is liable to damage the reputation of the trade mark. Whether this is the case, is to be answered by the national court on the basis of the relevant facts.

2 The question of whether “legitimate reasons” exist if coloured stripes are used in the described presentation of a product cannot mechanically be assessed on the basis of the necessity test as developed by the Court of Justice of the European Communities.

Carl Baudenbacher

Per Tresselt

Thorgeir Örlygsson

Delivered in open court in Luxembourg on 8 July 2003.

Lucien Dedichen
Registrar

Carl Baudenbacher
President

På dette grunnlag avgir

EFTA-DOMSTOLEN,

som svar på spørsmålet som er forelagt av Høyesterett ved anmodning av 17 desember 2002, følgende rådgivende uttalelse:

1 “Berettiget grunn” i henhold til direktivets artikkel 7(2) til å fremme innsigelse mot videre kommersiell utnyttelse av ompakkete legemidler kan foreligge hvor emballasjen er blitt utstyrt med fargestriper langs endekantene, hvis dette er egnet til å skade varemerket eller varemerkeinnhaverens omdømme. Hvorvidt dette er tilfelle, må besvares av den nasjonale domstolen på grunnlag av de foreliggende fakta.

2 Spørsmålet om hvorvidt det foreligger “berettiget grunn” hvis fargestriper er benyttet i den beskrevne presentasjonen av et produkt, kan ikke vurderes mekanisk på grunnlag av nødvendighetstesten som er utviklet av Domstolen for De europeiske fellesskap.

Carl Baudenbacher

Per Tresselt

Thorgeir Örlygsson

Avsagt i åpen rett i Luxembourg den 8 juli 2003.

Lucien Dedichen
Justissekretær

Carl Baudenbacher
President

REPORT FOR THE HEARING
in Case E-3/02

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the *Høyesterett* (Supreme Court), Oslo, Norway in a case pending before it between

Paranova AS

and

Merck & Co Inc. and others

concerning the interpretation of Article 7(2) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks,¹ as referred to in Annex XVII, point 4 to the EEA Agreement.

I. Introduction

1. By a reference dated 17 December 2002, registered at the Court on 24 December 2002, the *Høyesterett* made a request for an advisory opinion in a case pending before it between Paranova AS (hereinafter the “Appellant”) and Merck & Co Inc. and others (hereinafter the “Respondents”).

II. Facts and procedure

2. The case concerns the parallel import of pharmaceutical products and the question of whether the parallel importer may use its own packaging design with vertical or horizontal coloured stripes or other graphic elements in designing the repackaging, where the pharmaceutical producer’s trade mark is reaffixed.

¹ OJ No L 40, 11.2.1989, p. 1.

RETTSMØTERAPPORT

i sak E-3/02

ANMODNING til EFTA-domstolen om rådgivende uttalelse i medhold av artikkel 34 i Avtale mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol fra Norges Høyesterett, i saken for denne domstol mellom

Paranova AS

og

Merck & Co., Inc., med flere

vedrørende tolkningen av artikkel 7(2) i det første rådsdirektiv 89/104/EØF av 21 desember 1988 om innbyrdes tilnærming av medlemsstatenes lovgivning om varemerker,¹ som vist til i vedlegg XVII, punkt 4 til EØS-avtalen.

I. Innledning

1. Ved en beslutning datert 17 desember 2002, mottatt ved EFTA-domstolen 24 desember 2002, anmodet Norges Høyesterett om en rådgivende uttalelse i en sak innbrakt for denne mellom Paranova AS (heretter “ankende part”) og Merck & Co., Inc., med flere (heretter “ankemotpartene”).

II. Faktum og prosedyre

2. Saken gjelder parallellimport av legemidler og spørsmålet om parallellimportørs adgang til å bruke sin egen pakningsutforming med vertikale eller horisontale fargestriper eller andre grafiske elementer, ved utformingen av egen ompakket emballasje, hvor legemiddelprodusentens varemerke er gjenpåført.

¹ EFT 1989 L 40, s 1.

3. The Appellant is part of Paranova-Gruppen A/S, which has its main office in Denmark. Paranova-Gruppen A/S has specialised in the parallel importation of pharmaceutical products to the Scandinavian countries as well as Finland and Austria, via subsidiaries in these countries. The Appellant repackages the pharmaceutical products in new outer packaging or affixes stickers to the original packaging. The actual repackaging occurs in Denmark.

4. The Respondents belong to the Merck group, which is a worldwide group of companies in the pharmaceutical industry. In these proceedings, the Merck group is represented by the following companies: the parent company, Merck & Co Inc., USA, which is the proprietor of the trade mark that is the subject of this case; the subsidiary, Merck Sharp & Dohme B.V., the Netherlands, which is the company holding the marketing rights and selling the group's products from the Netherlands to the Norwegian market; and the Norwegian subsidiary, MSD Norge AS, which conducts the marketing in Norway.

5. Parallel import of pharmaceutical products to Norway from other EEA States has been permitted since the EEA Agreement entered into force 1 January 1994. For patented pharmaceutical products, which are generally more expensive, parallel import has been permitted since 1 January 1995. The parallel imported pharmaceutical products are sold in Norway in direct competition with the producer's/direct importer's own sales in the Norwegian market.

6. The Appellant launched the sale of parallel imported pharmaceutical products in Norway for the first time on 1 May 1995. Since then, the Appellant has gradually expanded its product range. The Appellant sells, in the Norwegian market, original pharmaceutical products purchased in other EEA States, mostly from countries in southern Europe, where prices for pharmaceutical products are lower. The parallel imported pharmaceutical products at issue are produced by the Respondents and are identical in medicinal effect to those pharmaceutical products that the Respondents themselves sell in the Norwegian market (direct import), but may vary in form, colour and additives. The Appellant's sales in Norway are only to wholesalers, who in turn sell to pharmacies and hospitals.

7. The packaging the Respondents utilise in the country where the Appellant purchases the product is most often different from that utilised in Norway, in respect of appearance and often also volume (number of tablets). When making purchases abroad, the Appellant and other parallel importers are usually only able to purchase pharmaceutical products in small packages, e.g. with 30 tablets, while in Norway, they are mainly sold in larger packages of around 100 tablets. Therefore, prior to sale in Norway, the Appellant packs the pharmaceutical products in new outer packaging (boxes) with Norwegian text. The inner packaging, so-called blister packs containing e.g. 7 or 10 tablets per pack, are marked by the parallel importer, but are otherwise not affected by the repackaging. According to the *Høyesterett*, it is established that the condition of the goods has not been changed or impaired, and also that the pharmaceutical

3. Ankende part er en del av Paranova-Gruppen A/S, som har hovedkontor i Danmark. Paranova-Gruppen A/S har spesialisert seg på parallellimport av legemidler til de skandinaviske landene, samt Finland og Østerrike, via datterselskaper i disse landene. Den ankende part pakker om legemidlene i ny ytteremballasje eller påfører originalpakningene etiketter. Den rent fysiske ompakking skjer i Danmark.

4. Ankemotparten tilhører Merck-konsernet, som er en verdensomspennende selskapsgruppe innen farmasøytisk industri. I denne saken er Merck-gruppen representert ved følgende selskaper: Morselskapet Merck & Co., Inc., USA, som er innehaver av de varemerkerettigheter som nærværende sak handler om, datterselskapet Merck, Sharp & Dohme B.V., Nederland, som er det selskapet som har markedsføringstillatelse og selger konsernets produkter fra Nederland til det norske marked, og det norske datterselskapet, MSD (Norge) AS, som forestår markedsføringen i Norge.

5. Parallellimport av legemidler til Norge fra andre EØS-land har vært tillatt siden EØS-avtalen trådte i kraft 1 januar 1994. For patenterte legemidler, som gjennomgående har en høyere pris, har parallellimport vært tillatt fra 1 januar 1995. De parallellimporterte legemidlene selges i Norge i direkte konkurranse med produsentens/direkteimportørs eget salg til det norske markedet.

6. Den ankende part lanserte parallellimporterte legemidler for salg i Norge første gang 1 mai 1995. Siden den gang har den ankende part gradvis utvidet varetilbudet. Den ankende part selger på det norske markedet originale legemidler innkjøpt i andre EØS-land, stort sett fra land i Sør-Europa, hvor legemiddelprisene er lavere. De parallellimporterte legemidlene saken gjelder, er produsert av ankemotpartene, og er identiske med hensyn til medisinsk virkning med de legemidlene ankemotpartene selv selger på det norske markedet (direkteimport), men kan variere i form, farge og hjelpestoffer. Den ankende parts salg i Norge skjer kun til grossister, som deretter selger videre til apotek og sykehus.

7. Emballasjen ankemotpartene benytter i den ankende parts innkjøpsland, er oftest forskjellig fra den som benyttes i Norge, både med hensyn til utseende og ofte også størrelse (antall tabletter). Ved innkjøp i utlandet får den ankende part og andre parallellimportører vanligvis kjøpt legemidlene i små pakninger, for eksempel med 30 tabletter, mens det i Norge hovedsaklig selges større pakninger, med rundt 100 tabletter. Forut for salget i Norge legger derfor den ankende part legemidlene i ny ytteremballasje (esker) med norsk tekst (ompakking). Innerpakningene, de såkalte blisterbrettene med eksempelvis 7 eller 10 tabletter på hvert Brett, blir merket av parallellimportøren, men blir for øvrig ikke berørt av ompakkingen. Ifølge Høyesterett er det på det rene at varenes stand ikke er blitt endret eller svekket, og at det objektivt sett foreligger nasjonalt oppdelte

market is nationally partitioned, *inter alia*, as a result of the fact that varying package volumes are utilised in the different countries.

8. The outer packaging indicates that the Appellant is the re-packager and parallel importer and that the pharmaceutical product is produced by the Respondents. The Respondents' product trade mark, which is also the product's trade name, is reaffixed to the Appellant's new packaging.

9. Since it first started marketing in Norway in 1995, the Appellant has affixed vertical or horizontal coloured stripes to the edges of the repackaging. The colour of the stripes varies depending on the producer – the Respondents or others – as the Appellant employs colours reminiscent of those used by the producer itself in the Scandinavian market. Whether the stripes are vertical or horizontal will depend on the shape of the packaging.

10. By a writ of summons dated 15 August 1995, the Respondents brought suit against the Appellant before the Asker and Bærum *herredsrett* (county court), demanding that the Appellant be prohibited from marketing "Renitec" and "Sinemet," which were at that time the only Merck-produced pharmaceutical products that the Appellant marketed in Norway. The case was brought on grounds of both patent and trade mark infringement, but the claim of patent infringement was later dropped. However, the case was expanded to include all those Merck-produced pharmaceutical products that the Appellant marketed in Norway on which the Respondents have registered the product name as a trade mark.

11. By agreement between the parties, the main case before Asker and Bærum *herredsrett* was suspended pending a decision by the Court of Justice of the European Communities in the *Bristol-Myers Squibb* case.² The judgment in *Bristol-Myers Squibb* was rendered on 11 July 1996. The case before Asker and Bærum *herredsrett* was resumed in the fall of 1997, and the *herredsrett* rendered judgment on 21 January 1999 in favour of the Respondents. In paragraph 1.1 of this judgment, the Appellant "*is prohibited from using the trade marks "Aldomet," "Blocadren," "Clinoril," "Indocid," "Mevacor," "Renitec," "Sinemet" or "Zocor" for products that are imported, offered or put on the market by Paranova AS, when the packaging is also labelled with a trade mark and/or a logo for Paranova AS or a related company, and/or a symbol depicting the Norwegian flag.*"

12. The Appellant appealed the judgment to Borgarting *lagmannsrett* on 23 March 1999. Thereafter, the Appellant changed its packaging by removing the trade mark and the logo. It also has changed the colours of the vertical or horizontal stripes along the edges on its packaging of the Respondents' products, as dark green and light green were replaced by dark green and charcoal grey, so that it became more similar to the Respondents' own colour usage (dark green

² Joined Cases C-427/93 et al. *Bristol-Myers Squibb and others v Paranova* [1996] ECR I-3457.

legemiddelmarkeder, blant annet som følge av at det benyttes forskjellige pakningsstørrelser i de forskjellige landene.

8. På ytteremballasjen opplyses det at den ankende part er ompakker og parallellimportør, og at legemiddelet er produsert av ankemotpartene. Ankemotpartenes varemerke, som også er produktets navn, gjenpåføres den ankende parts nye emballasje.

9. Den ankende part har siden starten av markedsføringen i Norge i 1995 påført vertikale eller horisontale fargestriper på endekantene av den ompakkete emballasjen. Stripenes farger varierer etter hvem som er produsent – ankemotpartene eller andre – idet den ankende part bruker farger som minner om dem produsenten selv bruker på det skandinaviske markedet. Hvorvidt stripene er vertikale eller horisontale vil avhenge av emballasjens utforming.

10. Ved stevning av 15 august 1995 til Asker og Bærum herredsrett reiste ankemotpartene søksmål mot den ankende part, med påstand om at den ankende part skulle forbys å markedsføre “Renitec” og “Sinemet,” som på det tidspunkt var de eneste Merck-produserte legemidler den ankende part markedsførte i Norge. Saken ble reist både på patentrettslig og varemerkerettslig grunnlag, men det patentrettslige grunnlaget ble senere frafalt. Saken ble imidlertid utvidet til å gjelde samtlige Merck-produserte legemidler som den ankende part markedsførte i Norge, hvor ankemotpartene har registrert produktnavnet som varemerke.

11. Etter avtale mellom partene ble hovedsaken for Asker og Bærum herredsrett stanset, i påvente av dom fra De europeiske fellesskaps domstol i *Bristol-Myers Squibb*-saken.² Dommen i *Bristol-Myers Squibb* ble avsagt 11 juli 1996. Saken for Asker og Bærum herredsrett ble igangsatt høsten 1997, og herredsretten avsa 21 januar 1999 dom i saken i tråd med ankemotpartenes påstand. Det følger av herredsrettens domsslutning punkt 1.1 at den ankende part *“forbys å bruke varemerkene “Aldomet,” “Blocadren,” “Clinoril,” “Indocid,” “Mevacor,” “Renitec,” “Sinemet” eller “Zocor” for produkter som importeres, utbys eller bringes i omsetning av Paranova AS, når produktets emballasje også er påført varemerke og/eller logo for Paranova AS eller selskap i samme konsern, og/eller symbol med gjengivelse av norsk flagg.”*

12. Den ankende part anket 23 mars 1999 dommen til Borgarting lagmannsrett. Den ankende part endret deretter emballasjen ved at varemerket og logoen ble fjernet. Den ankende part endret også fargene på de horisontale stripene på sin emballasje for ankemotpartenes produkter, idet mørkegrønt og

² Forente saker C-427/93, C-429/93 og C-436/93, *Bristol-Myers Squibb and Others v Paranova* [1996] ECR I-3457.

and grey). In preparatory appellate procedure, by a pleading dated 7 February 2000, the Respondents opposed that packaging. The Appellant's use of the coloured stripes on the packaging thus became a separate issue for the *lagmannsrett*, and the application of "graphic elements that make up a part of the packaging's design" was formulated as a separate demand in the Respondents' complaint. At what point in time the Respondents first lodged an objection to the Appellant's use of coloured stripes is disputed.

13. The case before the *lagmannsrett* concerned *inter alia* the conditions for repackaging/re-labelling, as well as the design of various categories of packaging utilised by the Appellant. Borgarting *lagmannsrett* rendered judgment on 14 January 2002 in favour of the Respondents. In its reasons, the *lagmannsrett* found that "*by employing its own design – including coloured stripes – on the packaging of products produced by others, in this case Merck, Paranova contributes to blurring the distinction between producer and distributor/importer.*" The *lagmannsrett* further found that the Appellant's use of coloured stripes on the new packaging "... *on the whole merely (contributes) to recognition of Paranova itself.*" The *lagmannsrett*'s assessment and findings of fact on this point are disputed.

14. In paragraph 2 of the operative part of the *lagmannsrett*'s judgment the Appellant "*is prohibited from marketing repackaged products that are labelled with the trade marks "Aldomet," "Blocadren," "Clinoril," "Indocid," "Mevacor," "Renitec," "Sinemet" or "Zocor" when the products' new packaging is labelled with a trade mark and/or logo of Paranova AS and/or other graphic elements that make up a part of the packaging's design and that are affixed by or for Paranova AS. Correspondingly, Paranova AS is prohibited from marketing products that are not repackaged, but on which a label has been affixed to the original packaging.*" Paragraph 2 of the *lagmannsrett*'s judgment, regarding the design of the packaging, thus implies a broadening of paragraph 1.1 of the *herredsrett*'s judgment.

15. Even though the Appellant disputed the correctness of the *lagmannsrett*'s prohibition, it chose to comply with the prohibition pending a legally binding decision. It therefore notified both the Respondents and the market that it would shift to white packaging with black writing. *Statens Legemiddelverk* (the Norwegian Medicines Control Authority, hereinafter "SLV") was also notified by letter dated 12 February 2002; the reason being that all pharmaceutical special preparations must, in order to be legally marketed in Norway, have a marketing license from SLV.³ In connection with the granting of marketing licenses, SLV also approves the packaging.

16. In a decision of 26 February 2002, SLV refused to accept the Appellant's use of white packaging with black lettering. The grounds were that extensive use

³ Cf. § 8(3) of the Pharmaceuticals Act, with appurtenant regulation No. 951 of 22 October 1993, regarding pharmaceutical special preparations.

lysegrønt ble skiftet ut med mørkegrønt og gråsort, slik at det ble mer likt Mercks egen fargebruk (mørkegrønt og grått). Under forberedelsene i ankesaken, i prosesskrift av 7 februar 2000, fremmet ankemotpartene innsigelse mot denne emballasjen. Den ankende parts bruk av fargestriper på emballasjen ble således et særskilt tema for lagmannsretten, og påføring av “grafiske elementer som utgjør en del av emballasjens design” ble formulert som eget krav i ankemotpartenes påstand. Det er omtvistet på hvilket tidspunkt ankemotpartene for første gang fremmet innsigelse mot den ankende parts bruk av fargestriper.

13. Saken for lagmannsretten gjaldt blant annet vilkår for ompakking/ometikettering, samt utformingen av ulike grupper av emballasje benyttet av den ankende part. Borgarting lagmannsrett avsa 14 januar 2002 dom i saken i samsvar med ankemotpartenes påstand. Lagmannsretten la til grunn at *“(m)ed sin bruk av egen design – herunder fargestriper – på emballasjen på produkter fremstilt av andre, i nærværende sak Merck, bidrar Paranova til å utviske skillet mellom produsent og distributør/importør.”* Lagmannsretten la videre til grunn at den ankende parts bruk av fargestriper på den nye emballasjen *“... i all hovedsak bare bidrar til en gjenkjennelse av Paranova selv.”* Lagmannsrettens bevisvurdering og konklusjon på dette punktet er omtvistet.

14. I følge punkt 2 i lagmannsrettens domsslutning forbys den ankende part *“å markedsføre ompakkete produkter som er påført varemerkene “Aldomet,” “Blocadren,” “Clinoril,” “Indocid,” “Mevacor,” “Renitec,” “Sinemet” eller “Zocor” når produktets nye pakning er påført varemerke og/eller logo for Paranova AS og/eller andre grafiske elementer som utgjør en del av emballasjens design og som er påført av eller for Paranova AS. I samme utstrekning forbys Paranova AS å markedsføre produkter som ikke er ompakket, men originalemballasjen påført etikett.* Punkt 2 i lagmannsrettens domsslutning, vedrørende utformingen av emballasjen, innebærer således en utvidelse i forhold til punkt 1.1 i herredsrettens domsslutning.

15. Selv om den ankende part bestridte riktigheten av lagmannsrettens forbud, valgte man å innrette seg etter forbudet inntil det foreligger rettskraftig avgjørelse. Man varslet derfor både ankemotpartene og markedet om at man ville foreta en omlegging til hvit emballasje med svart skrift. Statens Legemiddelverk (SLV) ble også varslet ved brev av 12 februar 2002. Bakgrunnen for dette er at alle farmasøytiske spesialpreparater må ha markedsføringstillatelse fra SLV for lovlig å kunne markedsføres i Norge.³ I forbindelse med tildeling av markedsføringstillatelse godkjenner også SLV emballasjen.

16. I vedtak av 26 februar 2002 nektet SLV å godta at Paranova benyttet hvite pakninger med svart skrift. Begrunnelsen var at utstrakt bruk av slik emballasje,

³ Jf legemiddeloven § 8(3), med tilhørende forskrift nr 951 av 22 oktober 1993, om farmasøytiske spesialpreparater.

of such packaging could lead to increased confusion and incorrect usage. That decision was appealed to the superior administrative body, i.e. the Ministry of Health. On 10 September 2002, SLV decided to maintain its decision, and the matter has been forwarded as a complaint to be dealt with by the Ministry of Health.

17. The case before the *Høyesterett* does not concern the parallel importer's repackaging and re-labelling of a trade mark in itself, but rather the question of whether the proprietor of a trade mark, by invoking its trade mark rights, is entitled to prohibit the use of the trade mark on the new packaging on grounds of the characteristics of the packaging's design. The Respondents' objections to the type of packaging used by the Appellant since 1999 are solely related to the use of the vertical or horizontal stripes. The Respondents allege that this results in a consistent use of uniform design that mainly leads to recognition of the Appellant itself. The Appellant disputes this.

18. The legal question on which the *Høyesterett* must decide is whether packaging onto which have been affixed vertical or horizontal coloured stripes along the edges, or other "*graphic elements that make up a part of the packaging's design and that are affixed by or for Paranova AS,*"⁴ can be prohibited on those grounds by virtue of the exclusive right of the trade mark proprietor. The *Høyesterett* thus faces the question of whether the Appellant's use of coloured stripes on the repackaging on which the Respondents' trade mark was also reattached was an infringement of the Respondents' trade mark, i.e. that in accordance with Article 7(2) of the Trade Marks Directive (hereinafter "the Directive"),⁵ the Respondents had "legitimate reasons" for opposing the Appellant's use of coloured stripes. According to the *Høyesterett*, central to the dispute between the parties is the question of whether the criterion of necessity, which has been developed through the case law of the Court of Justice of the European Communities in interpreting Article 7(2) of the Directive, only applies to the issue of the parallel importer's repackaging and reattachment of the trade mark, or whether it also applies to the issue of the trade mark proprietor's objections to the design of the parallel importer's packaging.

III. Questions

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

(1) Do "legitimate reasons" exist within the meaning of Article 7(2) of Council Directive 89/104/EEA, cf. Articles 11 and 13 EEA, in a case where the conditions for permitting a parallel importer to undertake repackaging of pharmaceutical products and reattachment of the trade

⁴ cf. paragraph 2 of the operative part of the *lagmannsrett*'s judgment

⁵ OJ No L 40, 11.2.1989, p.1.

kan føre til økt forvekslingsfare og feilbruk. Vedtaket er påklaget til overordnet forvaltningsorgan, dvs Helsedepartementet. I brev av 10 september 2002 besluttet SLV å opprettholde sitt vedtak, og saken er sendt videre for klagebehandling i Helsedepartementet.

17. Saken for Høyesterett gjelder ikke en parallellimportørs ompakking og gjenpåføring av varemerket i seg selv, men spørsmålet om varemerkeinnhaver under henvisning til sin varemerkerett, er berettiget til å forby bruken av varemerket på den nye emballasjen på grunn av emballasjens nærmere utforming. Ankemotpartenes innvendinger mot den typen emballasje den ankende part har benyttet siden 1999, gjelder utelukkende bruken av de vertikale eller horisontale fargestriper. Ankemotpartene anfører at dette utgjør en konsekvent bruk av en enhetlig design som i all hovedsak bidrar til en gjenkjennelse av den ankende part. Den ankende part bestrider dette.

18. Det rettsspørsmålet Høyesterett må ta stilling til, er hvorvidt en emballasje, fordi den er påført vertikale eller horisontale fargestriper på endekantene eller andre *“grafiske elementer som utgjør en del av emballasjens design og som er påført av eller for Paranova AS,”*⁴ kan forbys med hjemmel i varemerkeinnhavers enerett. Høyesterett står således overfor spørsmålet om den ankende parts bruk av fargestriper på emballasjen, hvor også ankemotpartenes varemerke var gjenpåført, var et inngrep i ankemotpartenes varemerkerettigheter, det vil si om ankemotpartene hadde *“berettiget grunn”* til å motsette seg den ankende parts bruk av fargestriper etter varemerkedirektivet artikkel 7 nr 2 (heretter *“direktivet”*).⁵ Sentralt i tvisten, ifølge Høyesterett, står spørsmålet om det nødvendighetskriteriet som er utviklet gjennom De europeiske fellesskaps domstols praksis ved tolkningen av direktivets artikkel 7(2), kun får anvendelse på spørsmålet om parallellimportørens ompakking og gjenpåføring av varemerket, eller om det også får anvendelse på spørsmålet om varemerkeinnhavers innsigelser mot emballasjens utforming.

III. Spørsmål

19. Følgende spørsmål ble forelagt EFTA-domstolen:

(1) Foreligger det “berettiget grunn” i Rådsdirektiv 89/104/EØF artikkel 7 nr 2’s forstand, jf EØS-avtalen artikkel 11 og 13, i et tilfelle hvor vilkårene for at parallellimportøren kan foreta ompakking av et legemiddel med gjenpåføring av varemerket er oppfylt, men

⁴ Jf avsnitt 2 i lagmannsrettens domsslutning.

⁵ EFT 1989 L 40, s 1.

mark have been met, but where the trade mark proprietor opposes the marketing of the repackaged product with the trade mark reaffixed in a packaging that the parallel importer has equipped with coloured stripes and/or other graphic elements that make up a part of the design of the packaging?

(2) In answering the question, it should be indicated whether the criterion of necessity that the Court of Justice of the European Communities has applied in interpreting “legitimate reasons” within the meaning of Article 7(2) of Council Directive 89/104/EEA applies also to the more specific design of the packaging, or if the more specific design of the packaging is to be assessed solely on the basis of the condition that the repackaging must not adversely affect the reputation of the trade mark proprietor or the trade mark.

IV. Legal background

20. § 4 of the Norwegian Trade Marks Act reads as follows:

“The right to a sign in accordance with sections 1 to 3 has the effect that no one other than the holder may in the course of trade use the same sign for his goods, cf. the third period. This applies whether the sign is used on the goods or their packaging, in advertising, in business documents or in any other way, including the use thereof in the spoken word, and regardless of whether the goods are intended to be sold or offered in any other way in this country or abroad, or imported into this country. In the context of the present Act, “the same sign” shall be understood to mean a sign that is so similar to another sign, that it is liable to be confused with this sign in the ordinary course of trade, cf. section 6.

It shall also be regarded as unlawful use if anyone in selling or offering spare parts, accessories, or the like, refers to a sign which is the property of someone else in such a way as to give the wrongful impression that the goods offered originate from the holder of that sign or that he has consented to the use of that sign.

Where a sign as referred to in sections 1 to 3 has been in legitimate use for a product and the product afterwards has been substantially altered by processing, repairs, or the like by someone other than the holder of the sign, the sign must not, without the consent of the holder, be kept or used for the product if the product is subsequently imported, sold or offered in the course of trade, unless the alteration is clearly indicated or is otherwise apparent from the circumstances.”

21. According to the *Høyesterett*, that provision must, in light of EEA law, be interpreted in a manner so as to limit the scope of its language. In connection with parallel import, the trade mark proprietor’s exclusive right to control the trade mark must be construed as implying an exception thereto. The salient point

varemerke innehaver motsetter seg markedsføring av det ompakkete produktet med varemerket gjenpåført i en emballasje som parallellimportøren har utstyrt med fargestriper og/eller andre grafiske elementer, som utgjør en del av emballasjens utforming?

(2) Ved besvarelsen av spørsmålet bør det angis om det nødvendighetskriterium som De europeiske fellesskaps domstol har anvendt ved fortolkningen av “berettiget grunn” i Rådskonklusjon 89/104/EØF artikkel 7 nr 2 også får anvendelse på den nærmere utformingen av emballasjen, eller om den nærmere utformingen av emballasjen kun skal vurderes ut fra vilkåret om at ompakkingen ikke må kunne skade varemerke innehavers eller varemerkets omdømme.

IV. Rettslig bakgrunn

20. § 4 i den norske varemerkeloven lyder som følger:

“Rett til varekjennetegn etter §§ 1 til 3 har den virkning at ingen annen enn innehaveren i næringsvirksomhet kan bruke samme kjennetegn, jf tredje punktum, for sine varer. Dette gjelder enten kjennetegnet brukes på varen eller dens innpakning, i reklame, forretningsdokumenter eller på annen måte, herunder også innbefattet muntlig omtale, og uansett om varen er bestemt til å selges eller på annen måte frembys her i riket eller i utlandet, eller innføres hit. Med samme kjennetegn forstås i denne lov et kjennetegn som er så likt et annet at det er egnet til å forveksles med dette i den alminnelige omsetning, jf § 6.

Som ulovlig bruk ansees det også at noen som selger eller frembyr reservedeler, tilbehør eller lignende herunder henviser til den annens varekjennetegn på en slik måte at det kan gi uriktig inntrykk av at det som således tilbys skriver seg fra innehaveren av dette kjennetegnet eller at han har tillatt kjennetegnet brukt.

Hvis et kjennetegn som nevnt i §§ 1-3 rettmessig er brukt for en vare, og varen etterpå er blitt vesentlig endret ved bearbeidelse, reparasjon o.l. foretatt av en annen enn den som har retten til kjennetegnet, må kjennetegnet ikke uten samtykke av innehaveren beholdes eller brukes for varen, hvis den senere blir innført, solgt eller frembudt i næringsvirksomhet, med mindre endringen blir tydelig angitt eller tydelig fremgår av forholdene for øvrig.”

21. I følge Høyesterett, må bestemmelsen, i lys av EF/EØS-retten, tolkes innskrenkende. I forbindelse med parallellimport må det innfortolkes et unntak i varemerke innehaverens enerett til å råde over varemerket. Det springende punkt

is how far this exception reaches, i.e. to what extent an exception must be implied in § 4 of the Trade Marks Act in light of what must be deemed to be “legitimate reasons” within the meaning of Article 7(2) of the Directive.

22. Article 7 of the Directive reads:

“1. The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent. 2. Paragraph 1 shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market.”

Pursuant to Article 65(2) of the EEA Agreement and Annex XVII, point 4(c) thereto, Article 7(1) of the Directive was, in the EEA context, replaced by the following: “The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in a Contracting Party under that trade mark by the proprietor or with his consent.”

23. Article 11 of the EEA Agreement reads:

“Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Contracting Parties.”

24. Article 13 of the EEA Agreement reads:

“The provisions of Articles 11 and 12 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties.”

V. Written Observations

25. 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 Appellant, represented by Jonas W. Myhre, Supreme Court Advocate, Wikborg Rein & Co., Oslo;
- the Respondents, represented by Aase Gundersen, Advocate, Bugge, Arentz-Hansen & Rasmussen, Oslo;

er hvor langt dette unntaket rekker, det vil si i hvilken grad varemerkeloven § 4 skal tolkes innskrenkende på bakgrunn av hva som anses som "berettiget grunn" i varemerkedirektivet artikkel 7 nr 2's forstand.

22. Direktivets artikkel 7 lyder som følger:

"1. Rettigheten til varemerket skal ikke gi innehaveren rett til å forby bruken av det for varer som av innehaveren selv eller med dennes tillatelse er brakt på markedet i Fellesskapet.

2. Nr 1 skal ikke få anvendelse dersom innehaveren har berettiget grunn til å motsette seg den videre ervervsmessige utnyttelsen av varene, og særlig dersom varenes stand er blitt endret eller svekket etter at de ble markedsført."

I henhold til artikkel 65(2) i EØS-avtalen og dens vedlegg XVII, nr 4(c), ble artikkel 7(1) i direktivet i EØS-sammenheng erstattet med følgende: "Rettigheten til varemerket skal ikke gi innehaveren rett til å forby bruken av det for varer som av innehaveren selv eller med dennes tillatelse er brakt på markedet i en avtalepart."

23. Artikkel 11 i EØS-avtalen lyder som følger:

"Kvantitative importrestriksjoner og alle tiltak med tilsvarende virkning skal være forbudt mellom avtalepartene."

24. Artikkel 13 i EØS-avtalen lyder som følger:

"Bestemmelsene i artikkel 11 og 12 skal ikke være til hinder for forbud eller restriksjoner på import, eksport eller transitt som er begrunnet ut fra hensynet til offentlig moral, orden og sikkerhet, vernet om menneskers og dyrs liv og helse, plantelivet, nasjonale skatter av kunstnerisk, historisk eller arkeologisk verdi eller den industrielle eller kommersielle eiendomsrett. Slike forbud eller restriksjoner må dog ikke kunne brukes til vilkårlig forskjellsbehandling eller være en skjult hindring på handelen mellom avtalepartene."

V. Skriftlige saksfremstillinger

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

- Den ankende part, representert ved Jonas W. Myhre, høyesterettsadvokat, Wikborg, Rein & Co., Oslo;
- Ankemotpartene, representert ved Aase Gundersen, advokat, Bugge, Arentz-Hansen & Rasmussen, Oslo;

- the EFTA Surveillance Authority, represented by Elisabethann Wright, Senior Legal Officer, and Dóra Sif Tynes, Legal Officer, acting as Agents;
- the Commission of the European Communities, represented by Niels Bertil Rasmussen, Member of its Legal Service, acting as Agent;
- The Kingdom of Norway, represented by Inger Holten, Legal Advisor, Ministry of Foreign Affairs, and Thomas Nordby, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents.

Paranova AS

26. With regard to the interpretation of Article 7(2) of the Directive and the term “legitimate reasons,” the Appellant suggests that the Court first determine the applicability of the criteria proposed by the *Høyesterett* and whether additional criteria should be taken into account. The proposed criteria are both based on the case law of the Court of Justice of the European Communities starting with *Bristol-Myers Squibb*. The first is the criterion of necessity (“*necessary in order to market the product in the Member State of importation*”), used as a test to determine whether there exists artificial market partitioning. The second criterion is that the repackaging/reaffixing must not be considered an “*inappropriate presentation of the repackaged product*,” *i.e.* that it must not be “*liable to damage the reputation of the trade mark*” (the “reputation” criterion).

27. The Appellant questions the suitability of the necessity criterion, arguing that it only applies to the assessment of the legality of repackaging/re-labelling of pharmaceuticals and reaffixing of the trade mark on the new packaging, and does not apply to the assessment of coloured stripes and/or other graphic elements used on the new packaging. Instead, the Appellant is of the opinion that the assessment of graphic elements used on the new packaging should be solely based on the reputation criterion. When judging the parallel importer’s behaviour, the fact that repackaging is considered a *per se* infringement of the essential function of trade mark right is of no significance when it comes to the use of graphic elements, which in itself does not constitute an infringement.

28. As for the irrelevance of the necessity criterion to the present case, the Appellant refers to the Court of Justice of the European Communities, which makes a distinction between the applicability of the necessity criterion and other criteria, *i.e.* the legitimate interests. The necessity criterion cannot be understood as obliterating all other criteria. The criteria of “necessity” and “reputation” are equal and cumulative and they apply to different elements in the parallel import process leading up to marketing of the repackaged product. The particularities of marketing of pharmaceuticals must be taken into account when assessing the case at hand.

- EFTAs overvåkningsorgan, representert ved Elisabethann Wright, senior saksbehandler, og Dóra Sif Tynes, saksbehandler, som partsrepresentanter;
- Kommisjonen for De europeiske fellesskap, representert ved Niels Bertil Rasmussen, ansatt i rettsavdelingen, som partsrepresentant;
- Kongeriket Norge, representert ved Inger Holten, juridisk rådgiver, Utenriksdepartementet, og Thomas Nordby, advokat, Regjeringsadvokatens kontor, som partsrepresentanter.

Paranova AS

26. Med hensyn til tolkningen av artikkel 7(2) i direktivet og begrepet “berettiget grunn,” foreslår den ankende part at EFTA-domstolen først tar stilling til hvorvidt de kriteriene som er foreslått av Høyesterett kommer til anvendelse, og hvorvidt ytterligere kriterier bør tas i betraktning. De kriteriene som er foreslått er begge basert på De europeiske fellesskaps domstols rettspraksis fra og med *Bristol-Myers Squibb*. Det første er nødvendighetskriteriet (“*nødvendig for at markedsføre produktet i importmedlemsstaten*”), anvendt som en test for å avgjøre hvorvidt det foreligger en kunstig markedsoppdeling. Det andre kriteriet er at ompakkingen/gjenpåføringen ikke må anses som en “*inadækvat præsentation af det ompakkede produkt,*” det vil si at den ikke er av en slik karakter, at den “*er egnet til at skade mærkets omdømme*” (“omdømmekriteriet”).

27. Den ankende part setter spørsmålsteget ved anvendeligheten av nødvendighetskriteriet. Det anføres at dette kriteriet bare kommer til anvendelse ved bedømmelsen av rettmessigheten av ompakking/gjenpåføring av varemerke på ny emballasje, og ikke ved bedømmelsen av fargestriper og/eller andre grafiske elementer påført den nye emballasjen. Den ankende part mener derimot at bedømmelsen av grafiske elementer påført den nye pakningen kun bør baseres på omdømme-kriteriet. Ved bedømmelsen av parallellimportørens adferd, er det faktum at ompakking *per se* er ansett å gjøre inngrep i varemerkerettens særlige gjenstand ikke av betydning når det gjelder bruken av grafiske elementer, som i seg selv ikke utgjør et inngrep.

28. For så vidt gjelder nødvendighetskriteriets manglende relevans i den foreliggende saken, viser den ankende part til De europeiske fellesskaps domstol, som sonderer mellom anvendelsen av nødvendighetskriteriet og andre kriterier, det vil si rettmessige interesser. Nødvendighetskriteriet kan ikke forstås slik at det utelukker alle andre kriterier. Nødvendighetskriteriet og omdømme-kriteriet er likeverdige og kumulative, og finner anvendelse på ulike deler av parallellimportprosessen som leder frem til markedsføring av det ompakkete produktet. Særegenhetene ved markedsføring av legemidler må tas i betraktning ved vurderingen av nærværende sak.

29. According to the Appellant, it must further be taken into account that the application of the necessity criterion would result in a situation where the direct importer/producer has unrestricted control over whatever design the parallel importer might choose for the new packaging. No matter how “neutral” the packaging may be, the trade mark proprietor can always claim that the design is not “objectively necessary” and consequently that it represents an infringement of its trade mark rights. The content of the trade mark rights would be construed in a way that in effect gives the trade mark owner the possibility of hindering all marketing of parallel imported pharmaceuticals. Market access, initially being granted through the demonstration of objective necessity with regard to repackaging and reaffixing of the trade name, would be denied or seriously impaired in the second round because of the assumed right of the producer/direct importer to use its trade mark rights to defeat any design which the parallel importer might employ on the packaging. The application of the necessity test on the designing of the packaging tips the balance grossly in favour of the trade mark proprietor and does not accord with the principle of proportionality. The Respondents’ main reservation, that any design used in a systematic, consistent or uniform manner is illegal, would not only have serious practical consequences for the Appellant’s production process, but would also amount to inconsistency and lead to confusion. The Appellant therefore seeks clarification from the Court in order to avoid parallel importers being left with uncertainty as to the design of their new packaging.

30. In addition, the Appellant stresses the relevance of interests other than commercial for the assessment of “legitimate reasons” and the overall assessment of whether the free movement of goods may be prevented. It is argued that the interest of public health is more important than the trade mark owner’s right to protect its commercial interest. The main purpose of the Appellant’s use of coloured stripes is to avoid confusion and misuse on the part of the end user, *i.e.* the consumer/patient using the medicine. This is achieved by varying the colour of the stripes on the pharmaceutical packaging in accordance with the colour of the packaging of the producers.

31. In this regard, the Appellant maintains it is in compliance with the rules laid down in Directive 2001/83/EC on the Community code relating to medicinal products for human use. These rules set out a balancing of the trade mark owner’s interests with the interests of free movement and the public’s interests in protecting health. Protecting public health by avoiding confusion/misuse of pharmaceuticals is also enshrined in Article 13 EEA and must constitute the overriding element in assessing “legitimate reasons.” It was wrongly considered to be of no relevance in the judgment of Borgarting *lagmannsrett* in the present matter and in the Danish Supreme Court’s two judgments of 4 January 2002⁶ and

⁶ In Case II 51/2000 *Orifarm v AstraZeneca*.

29. Ifølge den ankende part må det videre tas i betraktning at en anvendelse av nødvendighetskriteriet ville lede til en situasjon hvor den direkte importør/produsent har ubegrenset kontroll med hensyn til hvilken design parallellimportøren kan velge for den nye emballasjen. Uansett hvor “nøytral” emballasjen er, vil varemerke innehaveren alltid kunne hevde at designet ikke er “objektivt sett nødvendig” og at det derved representerer et inngrep i dens varemerkerettigheter. En slik fortolkning av varemerkerettens innhold ville i praksis gi varemerke innehaveren muligheten til å hindre all markedsføring av parallellimporterte legemidler. Den markedsadgang, som i utgangspunktet er innrømmet gjennom en påvisning av objektiv nødvendighet med hensyn til ompakking og gjenpåføring av varemerket, ville i neste omgang bli nektet eller alvorlig svekket som følge av produsentens/direkte importørs angivelige rett til å benytte sine varemerkerettigheter til å forkaste ethvert design som parallellimportøren måtte anvende på emballasjen. Anvendelsen av nødvendighetstesten på pakningens design innebærer en grov balanseforskyvning i favør av varemerke innehaveren og samstemmer ikke med proporsjonalitetsprinsippet. Ankemotpartenes hovedanførsel om at enhver systematisk, konsekvent og enhetlig bruk av design er ulovlig, ville ikke bare ha alvorlige praktiske konsekvenser for den ankende parts produksjonsprosess, men ville også innebære inkonsekvens og føre til forvirring. Den ankende part ber derfor EFTA-domstolen om en avklaring for å unngå usikkerhet med hensyn til parallellimportørers nye pakningsdesign.

30. Videre understreker den ankende part betydningen av ikke-kommersielle hensyn ved vurderingen av “berettiget grunn” og ved den generelle vurderingen av hvorvidt den frie varebevegelsen er forhindret. Det hevdes at hensynet til folkehelsen er viktigere enn varemerke innehaverens rett til å beskytte sine kommersielle interesser. Hovedformålet med den ankende parts bruk av fargestriper er å unngå forvirring og feilbruk hos sluttbruker, det vil si forbrukerne/pasientene som bruker medisinen. Dette oppnås ved å variere fargen på stripene på legemiddelpakningen i samsvar med fargen på pakningen til produsenten.

31. I denne forbindelse hevder den ankende part at den overholder reglene i rådsdirektiv 2001/83/EF om opprettelse av en fellesskapskodeks for humanmedisinske legemidler (heretter “legemiddeldirektivet”). Disse reglene foretar en avveining mellom varemerke innehaverens interesser og hensynet til den frie varebevegelsen og det offentliges interesse i vern av menneskers liv og helse. Vern av folkehelsen ved unngåelse av forvirring om/feilbruk av legemidler er også tatt med i artikkel 13 EØS, og må være av overordnet betydning ved vurderingen av “berettiget grunn.” Det ble feilaktig ansett å være uten betydning i Borgarting lagmannsretts dom i den foreliggende saken og i den danske høyesteretts to avgjørelser av 4 januar 2002⁶ og 22 april 2002,⁷ hvor bruken av

⁶ I sak II 51/2000 *Orifarm v AstraZeneca*.

⁷ I sak II 146/2000 *Orifarm v Hoechst Marion Roussel*.

22 April 2002,⁷ where the use of colours/graphic elements on the pharmaceutical packaging was considered a trade mark infringement.

32. With regard to the Norwegian Medicines Control Authority's ("SLV's") decision of 26 February 2002, the Applicant points to the decision of 22 October 2002 of the Ministry of Health.⁸ According to the Appellant, the Ministry would have preferred the use of colours and/or other graphic elements to distinguish pharmaceutical packaging as a requirement for granting marketing authorisation. However, the Ministry clearly expressed the need for an explicit national rule formally allowing the SLV in Norway to require such elements as a condition for granting marketing authorisation. The SLV proposed amendments to the existing regulation on the marking of pharmaceutical products on 19 March 2003.⁹ A similar rule entered into force in Denmark on 18 January 2003.¹⁰ Similar developments can be observed in Sweden and in the UK.¹¹ In the view of the Appellant, these developments demonstrate the importance of public health interests. The Appellant assumes that the authorities require it to use coloured stripes and/or other graphic elements. Given the judgments of the national courts, parallel importers are left unable to comply with both the regulatory demand for clear differences between a parallel importer's packaging, and the trade mark owner's demand for white packaging with black writing.

33. The Appellant finds support for the opinion that the use of coloured stripes on its packaging has a legitimate function in the opinions of Advocate General Jacobs in *Bristol-Myers Squibb*,¹² *Boehringer*¹³ and *Merck*.¹⁴ In those cases the

⁷ In Case II 146/2000 *Orifarm v Hoechst Marion Roussel*.

⁸ In this decision, the Ministry of Health expressed the opinion that "*weighty arguments are against an allowance of use of white packaging with black writing, and that there is no hindrance in EEA law for such a result.*"

⁹ The proposed change of 4-21 reads as follows: "*The packaging of pharmaceutical products is to be made in such a manner that the danger of confusion or erroneous use is reduced. The final packaging is to be authorised by the Statens Legemiddelverk. Statens legemiddelverk may demand that the packaging of pharmaceuticals is to be "equipped" with graphic elements including the use of colours.*"

¹⁰ It reads: "*Marking and package leaflet must not be misleading and must not be qualified to cause confusion with other pharmaceuticals, forms of pharmaceuticals or strengths. In order to clarify the distinctions between different pharmaceutical packaging, different sizes of writing, colours, different designing of packaging or similar is to be used.*"

¹¹ The Applicant refers to a Memo of 13 June 2002 by the Swedish Health Authority (Läkemedelsverket) concerning use of colours on packaging and the UK Medicines Control Agency's "Best practice guidance on the labelling and packaging of medicines" as implemented on 1 March 2003. In the introduction in section 1 of the Best Practice Guidance it is stated: "*Problems with labelling have also been associated with a high percentage of errors (3). Within the current regulatory framework there is the potential for improving the layout of medicines labelling to aid clarity. This would assist health professionals and patients/carers to select the correct medicine and use it safely, thereby helping to minimise medication errors.*" It follows from section 4.4 of the Best Practice Guidance that: "*Innovative pack design that may incorporate the judicious use of colour is to be encouraged to ensure accurate identification of the medicine.*"

¹² At paragraph 109.

farger/grafiske elementer på legemiddelpakningen ble ansett som et inngrep i varemerkeretten.

32. Med hensyn til Statens Legemiddelverks (“SLV”) vedtak av 26 februar 2002, viser den ankende part til Helsedepartementets vedtak av 22 oktober 2002.⁸ Ifølge den ankende part ville departementet ha foretrukket anvendelse av farger og/eller andre grafiske elementer for å skille mellom legemiddelpakninger som et vilkår for å gi markedsføringstillatelse. Departementet ga imidlertid klart uttrykk for behovet for en klar nasjonal regel som formelt tillater SLV å stille krav om slike elementer ved tildeling av markedsføringstillatelse i Norge. SLV foreslo endringer i den gjeldende forskriften om markedsføring av legemidler den 19 mars 2003.⁹ En liknende regel trådte i kraft i Danmark 18 januar 2003.¹⁰ En tilsvarende utvikling kan observeres i Sverige og i Storbritannia.¹¹ Etter den ankende parts oppfatning, viser denne utviklingen betydningen av hensynet til folkehelsen. Den ankende part antar at myndighetene krever at den tar i bruk fargestriper og/eller andre grafiske elementer. Etter avgjørelsene av de nasjonale domstolene, er det umulig for parallellimportørene å overholde både det forskriftsmessige kravet til klart skille mellom en parallellimportørs emballasje, og varemerkeinnhaverens krav om hvit emballasje med sort skrift.

33. Den ankende part finner støtte for den oppfatning at bruken av fargestriper på emballasjen har en legitim funksjon i generaladvokat *Jacobs* forslag til dom i *Bristol-Myers Squibb*,¹² *Boehringer*¹³ og *Merck*.¹⁴ I disse sakene uttrykte

⁸ I denne avgjørelsen uttrykte Helsedepartementet at *“tungtveiende hensyn taler mot tillatelse til bruk av hvit pakning med sort skrift, og at det ikke er EU/EØS-rettslige hindringer for et slikt resultat.”*

⁹ Den foreslåtte endringen i § 4-21 lyder som følger: *“Legemiddelpakninger skal utformes på en slik måte at fare for forveksling og feilbruk unngås. Endelig pakningsutforming godkjennes av Statens legemiddelverk. Statens legemiddelverk kan kreve at legemiddelpakninger skal utstyres med grafiske elementer, herunder bruk av farger.*

¹⁰ Den lyder: *“Mærkning og indlægsseddel kan må ikke være vildledende og må ikke være egnet til at fremkalde forveksling med andre lægemidler, lægemiddelformer eller –styrker. Til tydeliggjørelse af forskelle mellem lægemiddelpakninger anvendes forskellige skriftstørrelser, farver, forskellig pakningsudformning eller lignende.”*

¹¹ Den ankende part viser til et memo av 13 juni 2002 fra det svenske legemiddelverket (Läkemedelsverket) vedrørende bruk av farger på emballasje og det britiske legemiddelverkets (the UK Medicines Control Agency) *“Best practice guidance on the labelling and packaging of medicines”* som ble implementert 1 mars 2003. I innledningen til punkt 1 i denne veiledningen heter det: *“Problemer med merking har også vært forbundet med en høy andel av feil (3). Det er innenfor det gjeldende regelverket rom for forbedring av layouten til medisinetikettene for å skape klarhet. Dette ville bistå helsearbeidere og pasienter/pleiere i å velge korrekt medisin og til å bruke det på en trygg måte, og derved tjene til å minimalisere feilmedisinering.”* Det følger av punkt 4.4 av *“the Best Practice Guidance”* at: *“Nyskapende pakningsdesign som på en skjønnsom måte kan innlemme bruk av farger må ansøres for å sikre nøyaktig identifisering av legemiddelet.”*

¹² I avsnitt 109.

¹³ Sak C-143/00 *Boehringer Ingelheim and others* [2002] ECR, I-3759.

¹⁴ Sak C-443/99 *Merck Sharpe & Dome* [2002] ECR, I-3703.

Advocate General expressed the view that there was nothing illegal with Paranova's use of coloured stripes. He believed that with regard to the product's origin, the coloured stripes were not confusing for the consumers. On the contrary, he wrote that the use of coloured stripes made it possible to identify the products. The Appellant also refers to the Court's judgment in *Astra Norge*,¹⁵ where it ruled with reference to the medicinal rules now codified in the Medicinal Directive, that public health interests must prevail over attainment of industrial property rights if there is a conflict between the two.

34. Instead of applying the necessity criterion, the Appellant invites the Court to deem the reputation criterion, to which the requirements to clearly mark who had performed the repackaging and the name of the producer are closely related, alone applicable to an assessment of "legitimate reasons." It is submitted that the Court of Justice of the European Communities in stipulating these conditions in *Bristol-Myers Squibb*, stated the extent to which the goodwill and reputation of the trade mark and the trade mark proprietor was to be recognised. If the Court of Justice of the European Communities were of the opinion that the criterion of necessity applied to the design of new packaging, then there would be no reason to add the reputation criterion. Furthermore, the reputation criterion, contrary to the necessity criterion, opens up for attainment of interests other than the commercial interest of the trade mark owner, in particular public health interests. The use of the coloured stripes and/or other graphic elements cannot be considered an inappropriate presentation damaging the reputation of the Respondents' trade mark.

35. If the Court does not deem the reputation criterion applicable as the sole criterion in the assessment of "legitimate reasons," the Appellant argues that it is necessary for the Court to decide upon the applicability of supplemental criteria. If the first question were answered in the negative, the *Høyesterett* would not be given guidance on whether or not the two criteria mentioned are exhaustive in the assessment of "legitimate reasons."

36. In this regard, the Appellant suggests that the characteristics of the coloured stripes and/or other graphic elements used in the design of the packaging are relevant elements, to the extent that their use is perceived as having identifiable features that have distinctive character and which are used for the sole purpose of promoting the parallel importer. However, by establishing the condition that the packaging clearly identify the repackager/importer and producer, the Court of Justice of the European Communities has indirectly set out what is sufficient information in order to secure the protection of origin.

¹³ Case C-143/00 *Boehringer Ingelheim and others* [2002] ECR, I-3759.

¹⁴ Case C-443/99 *Merck Sharpe & Dome* [2002] ECR, I-3703.

¹⁵ Case E-1/98 *Astra Norge* [1998] Ct. Rep., 140, at paragraphs 17 to 20.

generaladvokaten den oppfatning at det ikke var noe ulovlig ved Paranovas bruk av fargestriper. Med hensyn til produktenes opprinnelse, fant han at fargestripene ikke var til forvirring for forbrukerne. Derimot skrev han at bruken av fargestriper gjorde det mulig å identifisere produktene. Den ankende part viser også til EFTA-domstolens avgjørelse i *Astra Norge*,¹⁵ hvor den under henvisning til de farmasøytiske reglene som nå er kodifisert i legemiddeldirektivet, kom til at hensynet til folkehelsen må gå foran hensynet til industrielle eiendomsrettigheter ved motstrid mellom disse to.

34. Istedet for å anvende nødvendighetskriteriet oppfordrer den ankende part EFTA-domstolen til å anse omdømme-kriteriet, som er nært knyttet til kravet om at det skal fremgå klart hvem som har foretatt ompakkingen og navnet på produsenten, som alene anvendelig ved vurderingen av “berettiget grunn.” Det anføres at De europeiske fellesskaps domstol ved å oppstille disse vilkårene i *Bristol-Myers Squibb*, fastslo i hvilken utstrekning varemerkets og varemerkeinnhaverens goodwill og omdømme skal tillegges vekt. Dersom De europeiske fellesskaps domstol var av den oppfatning at nødvendighetskriteriet gjaldt designet på den nye emballasjen, ville det ikke være grunn til å tilføye omdømme-kriteriet. Videre åpner omdømme-kriteriet, i motsetning til nødvendighetskriteriet, for imøtekommelse av andre hensyn enn varemerkeinnhaverens kommersielle interesser, særlig hensynet til folkehelsen. Bruken av fargestriper og/eller andre grafiske elementer kan ikke anses som en upassende presentasjon som ødelegger omdømmet til ankemotpartenes varemerke.

35. Dersom EFTA-domstolen ikke anser omdømme-kriteriet som det eneste kriteriet ved vurderingen av “berettiget grunn,” anfører den ankende part at EFTA-domstolen må ta stilling til anvendelsen av tilleggskriterier. Dersom det første spørsmålet ble besvart benektende, vil Høyesterett ikke bli gitt veiledning i hvorvidt de to nevnte kriteriene er uttømmende ved vurderingen av “berettiget grunn.”

36. I denne sammenheng anfører den ankende part at utførelsen av fargestripene og/eller andre grafiske elementer benyttet i emballasjens design er relevante elementer, i den utstrekning anvendelsen av disse oppfattes å ha identifiserende egenskaper med karakteristiske trekk og de er brukt med det ene formål å markedsføre parallellimportøren. De europeiske fellesskaps domstol har imidlertid, ved å oppstille vilkåret om at emballasjen tydelig skal identifisere ompakkeren/importøren og produsenten, indirekte fastsatt hva som er tilstrekkelig informasjon for å sikre opprinnelsebeskyttelse.

¹⁵ Sak E-1/98 *Astra Norge* [1998] EFTA Ct. Rep., 140, i avsnittene 17 til 20.

37. Another important element will be whether the parallel importer has acted in accordance with accepted trade practice in the relevant product market - in the present case the sale of pharmaceutical products. It has not been alleged by the Respondents that the packaging design applied by the Appellant is not in accordance with accepted practice for repackaging of pharmaceutical products. On the contrary, the Appellant complies with the condition that the repackaging should not interfere with the original product, *i.e.* the individual tablet or capsule, not including the packaging. Furthermore, there is a clear indication on the new packaging of who performed the repackaging of the product and the name of the producer. Also, the packaging of the repackaged product cannot be considered “inappropriate,” and the Appellant has complied with the requirement to clearly mark that the Respondents are the producers of the pharmaceutical products in question and that the Appellant has repackaged and imported the products to Norway. The origin of the products is thus duly brought to the knowledge of prescribing doctors, pharmacies delivering the product, and end users, *i.e.* customers/patients. The fact that the pharmaceutical products originate from the Respondents is further strengthened by the use of coloured stripes with colours similar to the colours used by the Respondents on the Norwegian market.

38. In order to support its approach towards the criteria to be applied in interpreting the “legitimate reasons,” the Appellant makes particular reference to the judgments of the Court of Justice of the European Communities in *Dior*¹⁶ and *BMW*.¹⁷ According to the former, the trade mark proprietor cannot use its trade mark rights to decide the manner and in what context the trade mark is to be used. Unlike in *Dior*, there is no question of the parallel importer’s marketing being susceptible to seriously affecting or damaging the reputation of the Respondents’ trade marks in the case at hand. Using coloured stripes for the identification of the product constitutes the only legal means by which the parallel importer can communicate to the customer its own function and that of the producer. This necessary use of the trade mark for the Appellant’s further commercialisation cannot be used as grounds for denying the right to use graphic elements even if it were for promoting the Appellant. In the present case the use of coloured stripes corresponding to the colours used by the Respondents on the Norwegian market helps to identify the product as a Merck product and to emphasise the lack of commercial connection between the Appellant as the reseller and the Respondents as the trade mark proprietors. It must be considered within accepted trade practice and in accordance with the proportionality test.

39. Meant as a general supplemental criterion for the Court’s assessment, the Appellant submits that the Respondents presently do not have the right to invoke their trade mark right due to passive behaviour. The fact that the Respondents did not oppose or take any action to inform the Appellant of their view or to stop its

¹⁶ Case C-337/95 *Parfums Christian Dior v Evora* [1997] ECR, I-6013, in particular at paragraph 54.

¹⁷ Case C-63/97 *BMW and BMW Nederland v Deenik* [1999] ECR, I-905, in particular at paragraph 53.

37. Et annet viktig moment er hvorvidt parallellimportøren har opptrådt i samsvar med akseptert bransjepraksis i det relevante produktmarkedet – i dette tilfellet salg av legemiddelprodukter. Det har ikke vært anført av ankemotpartene at den ankende parts pakningsdesign ikke er i samsvar med akseptert praksis for ompakking av legemiddelprodukter. Tvert imot oppfyller den ankende part kravet om at ompakkingen ikke må berøre varens originale tilstand, det vil si den enkelte tablett eller kapsel, med unntak av emballasjen. Videre er det klart angitt på den nye emballasjen hvem som har foretatt ompakkingen av varen samt navnet på produsenten. Den nye emballasjen kan heller ikke anses som “upassende,” og den ankende part har oppfylt kravet om tydelig å angi at ankemotpartene er produsentene av de aktuelle legemiddelproduktene og at den ankende part har ompakket og importert produktene til Norge. Produktenes opprinnelse er således på behørig måte brakt til de foreskrivende legenes, apotekenes og sluttbrukernes, det vil si kundenes/pasientenes, kunnskap. At legemiddelproduktene stammer fra ankemotpartene tydeliggjøres ytterligere ved bruken av striper med samme farge som de fargene ankemotpartene benytter på det norske markedet.

38. Som støtte for sitt syn på hvilke kriterier som skal anvendes ved tolkningen av “berettiget grunn,” viser den ankende part særlig til De europeiske fellelesskaps domstols avgjørelser i *Dior*¹⁶ og *BMW*.¹⁷ Ifølge førstnevnte avgjørelse kan varemerkeinnhaveren ikke bruke sine varemerkerettigheter til å bestemme måten og i hvilken sammenheng varemerket skal benyttes. I motsetning til i *Dior*, er det i nærværende sak ikke reist spørsmål med hensyn til hvorvidt parallellimportørens markedsføring er egnet til alvorlig å påvirke eller skade omdømmet til ankemotpartenes varemerke. Bruken av fargestriper for å identifisere produktene er den eneste lovlige måten parallellimportøren kan formidle til kundene sin egen og produsentens roller. Denne nødvendige bruken av varemerket for den ankende parts videre ervervsmessige utnyttelse kan ikke gi grunnlag for å nekte denne retten til å bruke grafiske elementer selv om dette var for å fremme den ankende part. I foreliggende sak bidrar anvendelsen av fargestriper i tilsvarende farger som de ankemotpartene benytter på det norske markedet til å identifisere produktet som et Merck-produkt og til å understreke den manglende kommersielle forbindelsen mellom den ankende part som videreselger og ankemotpartene som varemerkeinnhavere. Det må anses å være i tråd med akseptert bransjepraksis og i overensstemmelse med proporsjonalitetstesten.

39. Som et generelt tilleggsmoment for EFTA-domstolens vurdering anfører den ankende part at ankemotpartene som følge av passivitet på dette tidspunktet ikke har rett til å påberope seg sin varemerkerett. Det faktum at ankemotpartene ikke protesterte eller foretok seg noe for å informere den ankende part om sitt synspunkt eller forsøkte å stoppe dennes bruk i god tro av fargestriper før

¹⁶ Sak C-337/95 *Parfums Christian Dior v Evora* [1997] ECR, I-6013, særlig avsnitt 54.

¹⁷ Sak C-63/97 *BMW and BMW Nederland v Deenik* [1999] ECR, I-905, særlig avsnitt 53.

use in good faith of coloured stripes until 7 February 2000, must be a central element in the assessment of whether the Respondents may exercise their trade mark rights today.¹⁸ There is an obligation on the part of the trade mark proprietor to take into consideration the legitimate interest of the parallel importer to market the products as soon as the marketing authorisation has been obtained. Consequently, the trade mark proprietor must act within reasonable time if it wants to protest against the marketing by the parallel importer. Passive behaviour on the part of the trade mark proprietor should, under the circumstances, be considered in itself as lack of “legitimate reason” for the trade mark proprietor to invoke its trade mark rights. If the trade mark proprietor waits until the parallel importer has performed the repackaging of a considerable stock and put the repackaged products on the market before protesting, this could result in great economic losses for the parallel importer. As to the “reasonable time,” a time-limit of not more than six months is suggested.

40. The Appellant suggests to answer the questions as follows:

“The trade mark proprietor does not have “legitimate reasons” according to the Trade Marks Directive Article 7(2) to oppose a parallel importer’s marketing of a repackaged product in a packaging, where the conditions for the repackaging with the trade mark reaffixed have been met, and which is equipped with coloured stripes and/or other graphic elements that make part of the design of the packaging, provided such use of coloured stripes and/or other graphic elements does not adversely affect the reputation of the trade mark or the trade mark proprietor.”

41. Alternatively, i.e. based on supplementary criteria, the Appellant suggests to answer the questions as follows:

The trade mark proprietor does not have “legitimate reasons” according to the Trade Marks Directive Article 7(2) to oppose a parallel importer's marketing of a repackaged product in a packaging, where the conditions for the repackaging with the trade mark reaffixed have been met, and which is equipped with coloured stripes and/or other graphic elements that make part of the design of the packaging, provided either:

- *that the coloured stripes and/or other graphic elements do not have some identifiable features with distinctive characteristics, which serve the purpose to promote the parallel importer, or*
- *that, in case the coloured stripes and/or other graphic elements do have some identifiable features with distinctive characteristics, which*

¹⁸ With regard to the determination of what constitutes “reasonable time”, the Appellant refers to the judgment of the Court of Justice of the European Communities in *Boehringer*, at paragraph 66 and 67.

7 februar 2000, må være et sentralt moment ved vurderingen av hvorvidt ankemotpartene kan utøve sine varemerkerettigheter i dag.¹⁸ Varemerkeinnhaveren er forpliktet til å ta hensyn til parallellimportørens berettigede interesse i å markedsføre produktene så snart den er tildelt markedsføringstillatelse. Innehaveren av varemerket må således handle innen rimelig tid dersom den ønsker å protestere mot parallellimportørens markedsføring. Passivitet hos innehaveren av varemerket burde, omstendighetene tatt i betraktning, i seg selv anses som fravær av “berettiget grunn” for innehaveren av varemerket til å påberope seg sine varemerkerettigheter. Dersom innehaveren av varemerket venter med å protestere til parallellimportøren har foretatt ompakking av en betydelig varemengde og sendt denne ut på markedet, kan dette medføre store økonomiske tap for parallellimportøren. Med tanke på hva som kan anses som “rimelig tid,” er det foreslått at tidsfristen ikke bør overstige seks måneder.

40. Den ankende part foreslår at spørsmålene besvares som følger:

“Innehaveren av varemerket har ikke “berettiget grunn” i henhold til varemerkedirektivets artikkel 7(2) til å motsette seg en parallellimportørs markedsføring av et ompakket produkt i en emballasje som oppfyller vilkårene for ompakking med gjenpåført varemerke, og som er utstyrt med fargestriper og/eller andre grafiske elementer som utgjør en del av emballasjens design, forutsatt at slik bruk av fargestriper og/eller andre grafiske elementer ikke har en uheldig virkning for varemerkets omdømme eller for innehaverens omdømme.”

41. Subsidiært, det vil si basert på tilleggsmomenter, foreslår den ankende part at spørsmålene besvares som følger:

“Innehaveren av varemerket har ikke “berettiget grunn” i henhold til varemerkedirektivets artikkel 7(2) til å motsette seg en parallellimportørs markedsføring av et ompakket produkt i en emballasje som oppfyller vilkårene for ompakking med gjenpåført varemerke, og som er utstyrt med fargestriper og/eller andre grafiske elementer som utgjør en del av emballasjens design, dersom enten:

- fargestripene og/eller andre grafiske elementer ikke har identifiserende egenskaper med karakteristiske trekk, som har til formål å markedsføre parallellimportøren, eller*
- fargestripene og/eller andre grafiske elementer har identifiserende egenskaper med karakteristiske trekk, som har til formål å markedsføre*

¹⁸

Med hensyn til bestemelsen av hva som utgjør “rimelig tid”, viser den ankende part til De europeiske fellesskaps domstols dom i *Boehringer*, avsnittene 66 og 67.

serve the purpose to promote the parallel importer, such use of the coloured stripes and/or other graphic elements are:

- *either in accordance with accepted trade practice for the marketing of pharmaceutical products*
- *and/or in accordance with recognised public health interests.”*

42. As a separate alternative of general application, the Appellant suggests the following answer:

“Without regard to the above answers, the trade mark proprietor does not have “legitimate reasons” according to the Trade Marks Directive Article 7(2) to oppose a parallel importer's marketing of a repackaged product, provided the trade mark proprietor has not reacted against the repackaging of the pharmaceutical product, the reaffixing of the trade mark or the designing of the packaging within reasonable time after the parallel importer has put the repackaged pharmaceutical product on the market.”

The Respondents

43. The Respondents argue that the answer to the first question referred to the Court follows unequivocally from the case law of the Court of Justice of the European Communities in repackaging cases, and is most recently confirmed in *Boehringer*.¹⁹ Further reference is made to the judgments in *Hoffmann La Roche*,²⁰ *Bristol-Myers Squibb*, *Upjohn*²¹ and *Ballantine*²² as well as to the judgments of the national supreme courts of Denmark and the United Kingdom.²³

44. Taking into account the guarantee of origin as the essential function of the trade mark,²⁴ the trade mark proprietor may always, subject only to the second sentence of Article 30 EC, assert its trade mark rights to prevent the use of its trade mark by the parallel importer after the repackaging of the product. In terms of the Directive, this means that there exist “legitimate reasons.” When the

¹⁹ In particular at paragraphs 30-35.

²⁰ Case 102/77 *Hoffman-La Roche* [1978] ECR, 1139.

²¹ Case C-379/97 *Pharmacia & Upjohn v Paranova* [1999] ECR, I-6927.

²² Case C-349/95 *Loendersloot v Ballantine* [1997] ECR, I-6227, in particular at paragraph 46.

²³ Cf. the Danish Supreme Court's rulings of 4 January 2002 and 22 April 2002, cited above, and of 19 December 2002, Case 214/2001 *Handelsselskabet af 5. januar 2002 v Løvens Kemiske Fabrik*; High Court of Justice, Chancery Division, [2003] EWHC 110 (Ch), of 6 February 2002, at paragraphs 19 and 20.

²⁴ As defined in Case C-10/89 *Hag GF* [1990] ECR, I-3711, at paragraph 13.

parallellimportøren, og slik bruk av fargestriper og/eller andre grafiske elementer:

- *enten er i samsvar med akseptert bransjepraksis for markedsføring av legemiddelprodukter*
- *og/eller er i samsvar med anerkjente offentlige helseinteresser.”*

42. Som et separat alternativ for generell anvendelse, foreslår den ankende part følgende svar:

“Uten hensyn til svarene ovenfor, har innehaveren av varemerket ikke “berettiget grunn” i henhold til varemerkedirektivet artikkel 7(2) til å motsette seg en parallellimportørs markedsføring av et ompakket produkt, dersom innehaveren av varemerket ikke har fremsatt innsigelser mot ompakkingen av legemiddelproduktet, gjenpåføringen av varemerket eller emballasjens design innen rimelig tid etter at parallellimportøren har brakt det ompakkete legemiddelproduktet på markedet.”

Ankemospartene

43. Ankemospartene anfører at svaret på det første spørsmålet som er stilt til EFTA-domstolen følger utvetydig av De europeiske fellesskaps domstols rettspraksis i ompakkingssaker, og er senest bekreftet i *Boehringer*.¹⁹ Det vises videre til avgjørelsene i *Hoffmann La Roche*,²⁰ *Bristol-Myers Squibb*, *Upjohn*²¹ og *Ballantine*²² samt til avgjørelsene av de nasjonale høyesterettene i Danmark og Storbritannia.²³

44. Med utgangspunkt i varemerkets særlige funksjon, opprinnelsesgarantien,²⁴ kan innehaveren av varemerket alltid, kun med de forbehold som følger av annen setning i artikkel 30 EF, gjøre gjeldende sine varemerkerettigheter for å forhindre at parallellimportøren anvender varemerket etter ompakking av produktet. I henhold til direktivets ordlyd betyr dette at det må foreligge “berettiget grunn.” Når innehaveren velger å utøve sine

¹⁹ Særlig avsnittene 30-35.

²⁰ Sak 102/77 *Hoffman-La Roche* [1978] ECR, 1139.

²¹ Sak C-379/97 *Pharmacia & Upjohn v Paranova* [1999] ECR, I-6927.

²² Sak C-349/95 *Loendersloot v Ballantine* [1997] ECR, I-6227, særlig i avsnitt 46.

²³ Jf den danske høyesteretts avgjørelse av 4 januar 2002 og 22 april 2002, henvist til ovenfor, og av 19 desember 2002, Sak 214/2001 *Handelsselskabet af 5. januar 2002 v Løvens Kemiske Fabrik*; High Court of Justice, Chancery Division, [2003] EWHC 110 (Ch), av 6 februar 2002, avsnittene 19 og 20.

²⁴ Som definert i sak C-10/89 *Hag GF* [1990] ECR, I-3711, i avsnitt 13.

proprietor chooses to exercise its trade mark rights to oppose the further marketing of the product in a particular package because of the appearance of that package, then it is this action that must be scrutinised to see if it amounts to a restriction of trade. The trade mark owner may not pursue objections that will lead to a denial of market access for the parallel imported product, but is free, for the purpose of safe-guarding the essential function of the trade mark, to pursue objections that do not restrict the effective access to the market. The tool for determining in what situations the objections of the trade mark proprietor, to further commercialisation of the goods under its trade mark, amounts to a disguised restriction of trade, is the necessity test.²⁵ At the heart of the necessity test lies the question of whether a repackaging that implies a less intrusive use of the proprietor's trade marks is possible and sufficient to enable access to the market for the product in question, *i.e.* the proportionality principle. The significance of the necessity test as a result of a careful balancing of the conflicting considerations of free movement of goods and protection of trade mark rights is expressed by Advocate General *Jacobs* in his opinion in *Boehringer*.²⁶

45. The Respondents accept that the exclusive trade mark may not be relied on to oppose such alterations to the product packaging that are necessary to make parallel trade feasible. Therefore, they have not objected to the re-boxing as such where this is objectively necessary to obtain a package size that has access to the market. However, they do oppose the marketing of their products under their trade marks in the Appellant's packaging by reference to the design used on the new packaging.

46. The Respondents further note that the Court of Justice of the European Communities does not distinguish between the different forms of repackaging when it comes to the application of Article 7(2) of the Directive. Re-boxing, *i.e.* repackaging in a new external packaging and re-labelling, *i.e.* sticking labels onto the original packaging are thus treated as equal. Both forms entail the use of the proprietor's trade mark. Beyond the mere use of the trade mark on the altered packaging there are various ways in which this repackaging may interfere with the proprietor's trade mark rights. The Respondents draw further distinctions between *re-branding*, *i.e.* replacing the original trade mark of the product and affixing on the new packaging (whether in the form of a new box or one or more labels) another trade mark of the proprietor, enabling trading under the same trade mark as used by the proprietor in the import state;²⁷ *de-branding*, *i.e.* the marketing of the product in new packaging without reference to the trade mark of the proprietor;²⁸ *co-branding*, *i.e.* the use of the trade mark on packaging that is also branded by the parallel importer by the use of its own trade mark and/or its

²⁵ As established in *Bristol-Myers Squibb*, at paragraph 56.

²⁶ In particular at paragraphs 111 and 113.

²⁷ As was the case in *Upjohn*.

²⁸ As was one of the objections in *Boehringer*.

varemerkerettigheter ved å motsette seg videre markedsføring av produktet i en bestemt emballasje på grunn av denne emballasjens utseende, er det denne handlingen som må granskes for å bedømme om den utgjør en handelshindring. Innehaveren av varemerket kan ikke fremme innsigelser som ville resultere i at det parallellimporterte produktet ble nektet adgang til markedet, men står fritt, med sikte på å sikre varemerkets særlige funksjon, til å fremme innsigelser som ikke forhindrer effektiv adgang til markedet. Nødvendighetstesten²⁵ er et verktøy for å bestemme i hvilke situasjoner varemerkeindehaverens innsigelser mot videre ervervsmessig utnyttelse av varene under dennes varemerke, utgjør en skjult handelshindring. Det avgjørende spørsmål i nødvendighetstesten er hvorvidt en ompakking som er mindre inngripende i forhold til rettighetshaverens varemerke er mulig og tilstrekkelig for å gi det aktuelle produktet adgang til markedet, det vil si proporsjonalitetsprinsippet. Betydningen av nødvendighetstesten, som et resultat av en nøye avveining av de motstridende hensynene til fri varebevegelse og til beskyttelse av varemerkerettigheter, er uttrykt av generaladvokat *Jacobs* i hans forslag til dom i *Boehringer*.²⁶

45. Ankemotpartene aksepterer at den eksklusive varemerkeretten ikke kan gi grunnlag for innsigelser mot slike endringer av varens emballasje som er nødvendig for å gjøre parallellhandel mulig. De har derfor ikke protestert mot ompakkingen som sådan hvor dette objektivt sett er nødvendig for å oppnå en pakningsstørrelse som har tilgang til markedet. De protesterer imidlertid mot markedsføringen av deres produkter under deres varemerker i den ankende parts emballasje på grunnlag av den nye pakningens design.

46. Ankemotpartene bemerker videre at De europeiske fellesskaps domstol ikke skiller mellom forskjellige former for emballasje ved anvendelsen av artikkel 7(2) i direktivet. *Ompakking*, det vil si ompakking i ny ytteremballasje, og *om-etikettering*, det vil si påføring av merkelapper på originalemballasjen, er således behandlet likt. Begge formene medfører bruk av innehaverens varemerke. Ved siden av selve anvendelsen av varemerket på den endrede pakningen, er det flere måter denne ompakkingen kan gripe inn i innehaverens varemerkerettigheter. Ankemotpartene foretar et ytterligere skille mellom *re-branding*, det vil si å bytte ut varens originale varemerke ved å påføre den nye emballasjen (enten i form av en ny eske eller en eller flere merkelapper) et av innehaverens øvrige varemerker, noe som muliggjør markedsføring under det samme varemerket som innehaveren benytter i importstaten;²⁷ *de-branding*, det vil si markedsføring av produktet i ny emballasje uten henvisning til innehaverens varemerke;²⁸ *co-branding*, det vil si bruk av varemerket på emballasje som også er merket av parallellimportøren ved bruk av dennes eget

²⁵ Som etablert i *Bristol-Myers Squibb*, avsnitt 56.

²⁶ Særlig i avsnittene 111 og 113.

²⁷ Som var tilfelle i *Upjohn*.

²⁸ Som var en av innsigelsene i *Boehringer*.

house style get-up (or trade dress).²⁹ The repackaging by the Appellant in its uniform style of trade dress amounts to a co-branding between the Respondents' trade marks and the Appellant's trade dress. In all these situations, the issue the national court needs to determine is whether the reliance on trade mark rights to oppose the changes brought about by the repackaging in issue amounts to a denial of access to the relevant market.³⁰ The necessary test is thus applicable.

47. Certain features of the packaging's trade dress are obviously necessary, such as any writing of information that is required by law and the regulatory authorities. If a packaging design is not capable of obtaining approval without additional features, then any such features will also be deemed necessary. However, in the present case, it is clear that the Appellant will have access to the market by the use of a neutral packaging without any graphic design elements in the form of colour, stripes or otherwise. Thus, it is not necessary for the Appellant to market the Respondents' products in packaging featuring the Appellant's own trade dress.

48. Even if the Court should disagree and conclude that the objections to the package design are not to be determined on the basis of the necessity requirement, the same result will follow from the general principles set out in the jurisprudence of the Court of Justice of the European Communities. Co-branding constitutes an interference with the essential function of the trade mark, the guarantee of origin.³¹ That the goodwill generated by the marketing and use of the goods should be associated with the proprietor's trade mark and with any other indicia distinctive of the proprietor, e.g. the trade dress of the packaging, is one of the key benefits of a trade mark. This association occurs because of the way in which products and the trade marks are presented to the public. The various marks on the pack are presented in a manner which the proprietor thinks will be of most benefit to the proprietor. That includes the use of a particular get-up for the packaging. If another trader, such as an importer, is allowed to have its trade dress design put on the packs of the proprietor's goods together with the trade marks, the trade marks and the goods become associated with that trader. The parallel importer is then in a position to exploit the public's appreciation of the goods to generate goodwill in its trade dress and use that goodwill to its own commercial advantage. The valuable goodwill of the product is therefore re-directed to the importer.

49. The impact of this on the trade mark proprietor is particularly clear where the importer packages a range of goods from different manufacturers into packaging having a common design style. The Appellant's use of its own trade dress across the range of pharmaceutical products it repackages, creates the

²⁹ An underlying issue in *Boehringer*.

³⁰ *Upjohn*, at paragraph 43; *Boehringer*, at paragraphs 34 and 35.

³¹ Advocate General *Jacobs*' Opinion in *Boehringer*, at paragraph 95.

varemerke og/eller dennes pakningsdesign.²⁹ Ompakkingen foretatt av den ankende part til dennes enhetlige type pakningsdesign utgjør en co-branding mellom ankemotpartenes varmerker og den ankende parts pakningsdesign. I samtlige av disse tilfellene må den nasjonale domstolen ta stilling til hvorvidt anvendelse av varmerket, som grunnlag for å motsette seg de endringene ompakkingen medfører, forhindrer adgang til det relevante markedet.³⁰ Nødvendighetstesten kommer således til anvendelse.

47. Visse elementer ved pakningens utførelse er åpenbart nødvendige, slik som enhver skriftlig informasjon pålagt ved lov og av tilsynsmyndighetene. Dersom et emballasjedesign ikke kan godkjennes uten tilleggselementer, må slike eventuelle elementer også anses nødvendige. I den foreliggende saken er det imidlertid klart at den ankende part vil ha tilgang til markedet ved bruk av en nøytral emballasje uten noen grafiske designelementer i form av farge, striper eller lignende. Det er således ikke nødvendig for den ankende part å markedsføre ankemotpartenes produkter i emballasje utformet med den ankende parts egen pakningsdesign.

48. Selv om EFTA-domstolen skulle være uenig og konkludere med at innsigelser mot emballasjens design ikke skal bedømmes i henhold til nødvendighetstesten, vil resultatet bli det samme etter de generelle prinsippene som følger av De europeiske fellesskaps domstols rettspraksis. Co-branding utgjør et inngrep i varemerkets særlige funksjon, opprinnelsesgarantien.³¹ En av de viktigste fordelene ved varemerkerettigheten er at den goodwill som genereres ved markedsføring og anvendelse av varene skal assosieres med innehaverens varemerke og med andre kjennetegn som er særegne for innehaveren, for eksempel pakningsdesign. Denne assosiasjonen oppstår som følge av den måten produktene og varemerkene presenteres for kundene på. De ulike merkene på esken presenteres på en måte som innehaveren tror vil være mest fordelaktig for seg. Dette innbefatter bruken av et spesielt design på pakningen. Dersom en annen videreforsandler, som for eksempel en importør, tillates å anvende sin pakningsdesign på innehaverens varer sammen med varemerkene, blir varemerkene og varene assosiert med denne videreforsandleren. Parallellimportøren er da i en situasjon hvor den kan utnytte publikums verdsettelse av varene til å opparbeide goodwill i sin pakningsdesign og bruke denne goodwillen til sin egen kommersielle fordel. Produktets verdifulle goodwill omdirigeres således til importøren.

49. Denne innvirkningen på varemerkeinnehaveren er spesielt tydelig hvor importøren pakker et utvalg av varer fra ulike produsenter i emballasje med felles design. Den ankende parts bruk av egen pakningsdesign på det samlede utvalg av legemiddelprodukter den foretar ompakking på, skaper et inntrykk av et

²⁹ Underliggende tema i *Boehringer*.

³⁰ *Upjohn*, avsnitt 43; *Boehringer*, avsnittene 34 og 35.

³¹ Generaladvokat *Jacobs'* forslag til dom i *Boehringer*, avsnitt 95.

impression of a “Paranova product range” that comprises all these products. Products from different manufacturers will appear to be from a common source, or to have some other connection. Such co-branding serves only the purpose to secure a commercial advantage for the Appellant who in fact uses the parallel colour stripes as a branding device in advertisements together with its registered trade mark. If a trade mark proprietor has to accept the use of its trade mark by different importers in a variety of packaging there is a real risk of the trade mark turning generic. As to the Appellant’s submission that only package design meeting certain qualifications (that “there must exist some identifiable feature that has the distinctive characteristic of a trade mark, or at least can be perceived as an individual design”) can be opposed by the trade mark owner, the Respondents maintain that virtually any graphic element has the inherent ability of becoming distinctive through use. Therefore, even if a particular package design is not regarded as meeting these criteria at the outset, this may change over time. By then, the harm will have been caused to the trade marks used with this package design as a result of the co-branding.

50. The Respondents suggest to answer the questions as follows:

“(1) Article 7(2) of the Directive should be interpreted as meaning that a trade mark proprietor may rely on his trade mark rights in order to prevent a parallel importer from marketing repackaged pharmaceutical products under the trade mark in a particular package design, unless the exercise of those rights contributes to artificial partitioning of the market within the European Economic Area.

(2) The trade mark proprietor’s objection to the use of his trade mark on the grounds of the design of the packaging used by the parallel importer contributes to artificial partitioning of the market, if such package design is objectively necessary to secure the parallel imported product effective access to the market concerned.

It will not be objectively necessary to utilise a particular package design if the use of another package design, which is less intrusive to the specific subject matter of the trade mark rights, will ensure the parallel imported product effective access to the market concerned.”

The EFTA Surveillance Authority

51. According to the EFTA Surveillance Authority, the question of whether or not the Respondents can oppose the use of their trade mark on their goods that have been repackaged by the Appellant with various graphic elements does not belong to the discussion of repackaging and reaffixing of a trade mark by a parallel trader as a matter of “necessity.” The determination of what is necessary repackaging goes to the restriction on the free movement of goods and difficulties faced by parallel traders in placing a product on the market in the

“Paranova-produktutvalg” som omfatter alle disse produktene. Produkter fra forskjellige produsenter fremtrer som om de har samme opprinnelse, eller annen tilknytning. Slik co-branding tjener kun til å sikre en kommersiell fordel for den ankende part som bruker de parallelle fargestripene som redskap i markedsføringen for å bygge sitt eget kjennetegn sammen med sitt registrerte varemerke. Dersom varemerkeinnhaveren må akseptere at varemerket brukes av ulike importører i forskjellige emballasjer foreligger det en reell fare for at varemerket blir generisk. Med hensyn til den ankende parts anførsel om at varemerkeinnhaveren kun kan motsette seg et pakningsdesign som oppfyller visse vilkår (at “det må foreligge kjennetegn som har distinkt preg som varemerke, eller i alle fall kan oppfattes som individuell eller særegen design”), fremholder ankemotpartene at praktisk talt ethvert grafisk element har den iboende egenskap å bli distinktiv ved bruk. Selv om en bestemt emballasje ikke anses å oppfylle disse kriteriene til å begynne med, kan dette derfor forandre seg over tid. Innen den tid vil skaden på varemerket brukt sammen med dette pakningsdesignet allerede være skjedd som følge av co-branding.

50. Ankemotpartene foreslår å besvare spørsmålene på følgende måte:

“(1) Direktivets artikkel 7(2) må tolkes slik at en varemerkeinnhaver på grunnlag av sine varemerkerettigheter kan forhindre en parallellimportør i å markedsføre ompakkete legemiddelprodukter under dette varemerket i et særskilt pakningsdesign, dersom utøvelsen av disse rettighetene ikke bidrar til en kunstig oppdeling av markedet innenfor det Europeiske Økonomiske Samarbeidsområde.

(2) Varemerkeinnhaverens innsigelser mot bruk av dennes varemerke på grunn av pakningsdesignet som anvendes av parallellimportøren bidrar til en kunstig oppdeling av markedet, dersom et slikt pakningsdesign er objektivt sett nødvendig for å sikre det parallellimporterte produktet effektiv adgang til det aktuelle markedet.

Det vil ikke være objektivt sett nødvendig å benytte et særskilt pakningsdesign dersom et annet pakningsdesign, som er mindre inngripende overfor varemerkerettens særlige gjenstand, vil sikre det parallellimporterte produktet effektiv adgang til det aktuelle markedet.”

EFTAs overvåkningsorgan

51. Ifølge EFTAs overvåkningsorgan er spørsmålet om hvorvidt ankemotpartene kan motsette seg anvendelsen av deres varemerke på deres varer, hvor disse har vært gjenstand for ompakking med ulike grafiske elementer av den ankende part, ikke en del av diskusjonen om ompakking og gjenpåføring av varemerke av en parallellforhandler som et spørsmål om “nødvendighet.” Vurderingen av hva som er nødvendig ompakking vedrører begrensningen av den frie varebevegelsen og vanskelighetene parallellforhandlere støter på ved

importing EEA State. It is acknowledged that in the present case repackaging was necessary in order for the Appellant to market the products in Norway. This precludes the necessity argument. If one were to apply the necessity test to the design of the packaging of parallel traded products, the question must arise of how one could establish the criteria by which to determine the “necessity” of variable elements such as colour or typeface. In support, the EFTA Surveillance Authority refers to the case law of the Court of Justice of the European Communities that suggests that a distinction is to be made between the repackaging of a product and its subsequent presentation to the consumer.³²

52. In the opinion of the EFTA Surveillance Authority, the matter should be addressed in the context of the extent to which the Appellant is entitled pursuant to Article 7(2) of the Directive, to create its own trade dress on the packaging of another undertaking’s trade marked products. With regard to *Boehringer*,³³ this means that the trade mark proprietor must demonstrate that the use of its trade mark on packaging that includes the Appellant’s graphic design would constitute “legitimate reasons” for safeguarding the rights in the Respondents’ trade mark even if the free movement of goods is thereby compromised.

53. Damage done to the reputation of a trade mark may, in principle, be a “legitimate reason.” However, the proprietor of a trade mark may not rely on Article 7(2) to oppose the use of the trade mark, in ways customary in the reseller’s sector of trade, for the purpose of bringing to the public’s attention the further commercialisation of the trade-marked goods, unless it is established that such use seriously damages the reputation of the trade mark.³⁴ The EFTA Surveillance Authority submits that it is common practice in the pharmaceutical sector that both the trade mark of the original manufacturer and that of the parallel trader appear on repackaged products. Moreover, it is not unknown for a parallel trader to add, for example, a distinctive colour to the packaging.

54. The fact that the trade mark is used in a reseller’s advertising in such a way that it may give rise to the impression that there is a commercial connection between the reseller and the trade mark proprietor, and in particular that the reseller’s business is affiliated with the trade mark proprietor’s distribution network or that there is a special relationship between the two undertakings, may constitute a legitimate reason for the trade mark holder to rely on the provisions of Article 7(2) of the Directive.³⁵ The same may be argued with respect to the use by a parallel trader of the original trade mark on repackaging that is designed in such a manner that it gives rise to the impression that there is a commercial connection between the reseller and the trade mark proprietor. The extent to

³² Cf. *Ballantine*, at paragraph 33, *Bristol-Myers Squibb*, and *Boehringer*, at paragraph 75.

³³ At paragraph 28.

³⁴ *BMW*, at paragraph 49.

³⁵ *BMW*, at paragraph 51.

markedsføringen av et produkt i den importerende EØS-staten. Det erkjennes at ompakking var nødvendig for den ankende part for å markedsføre produktene i Norge i den foreliggende saken. Dette utelukker nødvendighetsargumentet. Dersom man skulle anvende nødvendighetstesten på pakkingsdesignet til et parallellforhandlet produkt, oppstår spørsmålet om hvordan en kan etablere kriterier til å bedømme “nødvendigheten” av variable elementer som farge eller skriftbilde. Som støtte viser EFTAs overvåkningsorgan til rettspraksis fra De europeiske fellesskaps domstol som antyder at det foretas et skille mellom ompakking av et produkt og den påfølgende presentasjonen av dette til kundene.³²

52. I henhold til EFTAs overvåkningsorgan må spørsmålet ses i sammenheng med hvilke rettigheter artikkel 7(2) i direktivet gir den ankende part med hensyn til å skape sin egen pakkingsdesign på emballasjen til produkter som andre selskaper har knyttet varemerkerettigheter til. Med hensyn til *Boehringer*,³³ betyr dette at varemerkeinnhaveren må vise at anvendelsen av dennes varemerke på emballasjen som inkluderer den ankende parts grafiske design ville utgjøre en “berettiget grunn” til å sikre ankemotpartenes rettigheter i henhold til varemerket, selv om dette går ut over den frie bevegelsen av varene.

53. Skade påført et varemerkes omdømme kan i prinsippet utgjøre en “berettiget grunn.” Innehaveren av et varemerke kan imidlertid ikke på grunnlag av artikkel 7(2) motsette seg en bruk av varemerket som er vanlig i videreforhandlerens bransje, med sikte på å gjøre publikum oppmerksom på den videre ervervsmessige utviklingen av de varemerkede varene, med mindre det påvises at slik bruk er til alvorlig skade for varmerkets omdømme.³⁴ EFTAs overvåkningsorgan anfører at det er vanlig praksis i legemiddelsektoren at både varemerket til den opprinnelige produsenten og varemerket til parallellforhandleren er påført ompakkete produkter. Det er heller ikke uvanlig at en parallellforhandler gir pakningen for eksempel en særegen farge.

54. Det faktum at varemerket er brukt i videreforhandlerens reklamevirksomhet på en slik måte at det kan gi inntrykk av at det er en kommersiell forbindelse mellom videreforhandleren og varemerkeinnhaveren, og spesielt at videreforhandlerens virksomhet er tilknyttet varemerkeinnhaverens distribusjonsnett, eller at det er et særlig forhold mellom de to selskapene, kan utgjøre en berettiget grunn for varemerkeinnhaveren til å påberope seg bestemmelsene i direktivets artikkel 7(2).³⁵ Det samme kan anføres med hensyn til en parallellforhandlers bruk av det originale varemerket på en ny pakning som er designet slik at det gis inntrykk av at det er en kommersiell forbindelse mellom videreforhandleren og varemerkeinnhaveren. I denne

³² Jf. *Ballantine*, avsnitt 33, *Bristol-Myers Squibb*, og *Boehringer*, avsnitt 75.

³³ Avsnitt 28.

³⁴ *BMW*, avsnitt 49.

³⁵ *BMW*, avsnitt 51.

which a parallel trader may legitimately use selected distinctive colours in a particular manner may fall to be considered under this aspect.

55. If, on the other hand, there is no risk that the public will be led to believe that there is a commercial connection between the reseller and the trade mark proprietor, the mere fact that the reseller derives an advantage from using the trade mark in advertisements for the sale of goods protected by the mark, which are in other respects honest and fair and lend an aura of quality to its own business, does not constitute a legitimate reason within the meaning of Article 7(2) of the Directive.³⁶ It might be argued that, given the nature of the products at issue, in marketing of the kind occurring in the present case, there is no risk that the public will be led to believe that there is a commercial connection between the reseller and the trade mark proprietor. If such were the case, any additional advantage gained by a parallel trader from a particular type of graphic design would not be subject to prohibition due to the provisions of Article 7(2) of the Directive. Potential arguments to be made concerning unfair trade practices have not been introduced by the referring court.

56. The situation which arises in the present case, in which a parallel trader is effectively permitted to create its own trade dress on medicinal products manufactured by another undertaking, has arguably some potential for causing confusion as to which of the undertakings is the manufacturer of the product. There also exists the potential for suggesting that there is a special relationship between the two undertakings closer than is, in fact, the case. Nevertheless, in the environment of parallel trade in pharmaceutical products, and given the implication for the free movement of goods in circumstances such as those in the present case, the EFTA Surveillance Authority submits that the difficulties faced by the Respondents do not seem sufficient to permit it to rely on the provisions of Article 7(2) of the Directive.

57. The EFTA Surveillance Authority suggests to answer the questions as follows:

“In a case, such as that current pending before the referring court, the circumstances for reliance by a trade mark proprietor on the provisions of Article 7(2) of the First Council Directive of 21 December 1988 to approximate the laws of the Member States relating to trade marks cannot be held to have been fulfilled where the conditions for permitting a parallel importer to undertake repackaging of pharmaceutical products and reaffixing of the trade mark have been met, but where the trade mark proprietor opposes the marketing of the repackaged product with the trade mark reaffixed in a package that the parallel importer has equipped with graphic elements that make up a part of the design of the packaging unless it can be demonstrated by the trade mark proprietor that its trade mark needs to be protected against the damage that such use by a parallel

³⁶

BMW, at paragraph 53.

sammenheng kan det være nødvendig å vurdere i hvilken utstrekning en parallellforhandler er berettiget til å benytte utvalgte særpregede farger på en bestemt måte.

55. På den annen side, dersom det ikke er noen fare for at publikum vil bli ledet til å tro at det er en kommersiell forbindelse mellom videreforhandleren og varemerke innehaveren, kan ikke det faktum alene at videreforhandleren drar fordel av å bruke varemerket i sin markedsføring av varer som er beskyttet av dette varemerket, dersom markedsføringen for øvrig er ærlig og redelig og formidler et kvalitetspreg, utgjøre en berettiget grunn i henhold til direktivets artikkel 7(2).³⁶ Hensett til varenes art, kunne det hevdes at den form for markedsføring denne saken gjelder ikke innebærer noen fare for at publikum vil ledes til å tro at det er en kommersiell forbindelse mellom videreforhandleren og varemerke innehaveren. Dersom dette var tilfellet, ville en eventuell tilleggsfordel oppnådd av parallellforhandleren som følge av en spesiell type design ikke være rammet av forbud ut fra bestemmelsene i artikkel 7(2). Den henvisende domstolen har ikke vist til mulige argumenter med hensyn til uredlig markedsføring.

56. Den situasjonen som oppstår i nærværende sak, hvor en parallellforhandler er gitt faktisk adgang til å skape sitt eget pakningsdesign på legemiddelprodukter produsert av et annet selskap, kan muligens skape forvirring med hensyn til hvilket av selskapene som er produsent av varen. Muligheten er også til stede for å antyde at det er et særlig forhold mellom de to selskapene som er nærmere enn det faktisk er. Ikke desto mindre, med de rammevilkår som gjelder parallellhandel av legemiddelprodukter, og gitt konsekvensene for den frie varebevegelsen under omstendigheter som i den foreliggende saken, anfører EFTAs overvåkningsorgan at de vanskelighetene ankemotpartene står ovenfor, ikke synes tilstrekkelige til at de kan påberope seg bestemmelsene i artikkel 7(2) i direktivet.

57. EFTAs overvåkningsorgan foreslår å besvare spørsmålene på følgende måte:

“I en sak, slik som den som verserer for den henvisende domstolen, kan vilkårene for at en varemerke innehaver kan påberope seg bestemmelsene i artikkel 7(2) i det første rådsdirektiv av 21 desember 1988 om innbyrdes tilnærming av medlemsstatenes lovgivning om varemerker ikke anses å være oppfylt, hvor betingelsene for å tillate en parallellimportør ompakking av legemiddelprodukter og gjenpåføring av varemerket er til stede, men hvor varemerke innehaveren motsetter seg markedsføring av det ompakkete produktet med varemerket påført en pakning som parallellimportøren har utstyrt med grafiske elementer som utgjør en del av pakningens design, dersom det ikke kan påvises av varemerke innehaveren at dennes varemerke trenger beskyttelse mot den

³⁶

BMW, avsnitt 53.

trader could cause even if the free movement of goods is thereby compromised.”

The Commission of the European Communities

58. The Commission refers to *Bristol-Myers Squibb*,³⁷ according to which the trade mark proprietor may oppose the further commercialisation of repackaged goods unless, *inter alia*, the “necessity requirement” and the “reputation requirement” are met. The questions in the present case concern in particular whether it is a requirement that the inclusion of additional elements is “necessary.” First, it appears clear to the Commission that the conditions have not been met if the presentation of the repackaged products is liable to damage the reputation of the trade mark and of its owner. Secondly, it appears equally clear that the requirement of “necessity” relates to the act of repackaging, not to the presentation of the repackaged product.

59. With regard to exemptions to the exhaustion of trade mark rights, the Commission submits that if it is established that the trade mark proprietor may oppose a particular use of the trade mark pursuant to Article 7(2) of the Directive, it does not automatically follow that the trade mark proprietor may oppose any use of the trade mark in relation to the goods. Even if the trade mark proprietor cannot oppose the further marketing of the goods it follows from the case law that the trade mark proprietor may still be able to oppose the use of the trade mark in advertising of the goods, as was held in *Dior*. It is necessary to assess whether the prerogative to oppose the repackaging of goods ultimately concerns the same prerogative which would allow the trade mark proprietor to oppose the marketing of the goods with additional elements such as the parallel importer’s own logo and/or coloured stripes and/or other graphic elements that make up part of the design of the packaging. If this is not the case, it is necessary to consider whether there are any other circumstances in which a trade mark proprietor may have “legitimate reasons” to oppose the marketing of repackaged products with additional elements.

60. With regard to the “necessity” argument in the case law of the Court of Justice of the European Communities on repackaging of trade marked goods, the Commission points to the two different aspects of the essential function of the trade mark as outlined by the Court of Justice of the European Communities in *Hoffmann La Roche* (to guarantee the identity of the origin of the trade marked product): first, the interest of the trade mark proprietor to maintain the distinct character of the trade mark which enables the consumer to distinguish between products of different commercial origin; and secondly, the interest of the trade mark proprietor to maintain the integrity of the product.

³⁷ At paragraph 79.

skaden slik bruk av en parallellimportør måtte forårsake, selv om den frie varebevegelsen derved settes i fare.”

Kommisjonen for De europeiske fellesskap

58. Kommisjonen viser til *Bristol-Myers Squibb*,³⁷ som gir varemerkeinnhaveren rett til å motsette seg videre kommersialisering av ompakkete varer, med mindre, blant annet, “nødvendighetskravet” og “omdømmekravet” er oppfylt. Spørsmålene i foreliggende sak gjelder særlig hvorvidt det er et vilkår at tilføyelse av tilleggselementer er “nødvendig.” For det første fremstår det som klart for Kommisjonen at kravene ikke er oppfylt dersom presentasjonen av det ompakkete produkt er egnet til å skade varemerket og dets innehavers omdømme. For det andre synes det like klart at kravet om “nødvendighet” gjelder ompakkingshandlingen, og ikke presentasjonen av det ompakkete produktet.

59. Med hensyn til unntak fra konsumpsjon av varemerkerettigheter, anfører Kommisjonen at dersom det fastslås at varemerkeinnhaveren kan motsette seg en spesiell bruk av varemerket i henhold til artikkel 7(2) i direktivet, følger det ikke automatisk at varemerkeinnhaveren kan motsette seg enhver bruk av varemerket i forhold til varene. Selv om varemerkeinnhaveren ikke kan motsette seg videre markedsføring av varene, følger det av rettspraksis at varemerkeinnhaveren fortsatt kan motsette seg bruken av varemerket i markedsføringen av varene, slik man kom til i *Dior*. Det er nødvendig å vurdere hvorvidt retten til å motsette seg ompakkingen av varene også medfører tilsvarende rett for varemerkeinnhaveren til å motsette seg markedsføring av varene med tilleggselementer slik som parallellimportørens egen logo og/eller fargestriper og/eller andre grafiske elementer som utgjør en del av pakningsdesignet. Dersom dette ikke er tilfellet, er det nødvendig å vurdere hvorvidt det er andre omstendigheter som kan gi en varemerkeinnhaver “berettiget grunn” til å motsette seg markedsføringen av ompakkete produkter med tilleggselementer.

60. Med hensyn til “nødvendighetsargumentet” i De europeiske fellesskaps domstols rettspraksis vedrørende ompakking av varemerkede produkter, peker Kommisjonen på to ulike aspekter ved varemerkerettens særlige funksjon som De europeiske fellesskaps domstol redegjorde for i *Hoffmann La Roche* (for å garantere identiteten til opprinnelsen av det varemerkede produktet): for det første, varemerkeinnhaverens interesse i å bevare varemerkets særegne karakter, som gjør kundene i stand til å skille mellom produkter med ulik kommersiell opprinnelse; og for det andre, varemerkeinnhaverens interesse i å bevare produktets integritet.

³⁷

Avsnitt 79.

61. Based on analysis of *Bristol-Myers Squibb*³⁸ and *Boehringer*,³⁹ the Commission submits that it is not only permitted to include elements other than the trade mark on the repackaged product, but that it is a requirement with regard to the indication of the person responsible for the repackaging. The *rationale* appears to remain the protection of the essential function of the trade mark, namely identification of the origin. However, it is not intended to safeguard the integrity of the product but, rather, to maintain the distinct character of the trade mark, which again enables customers to identify the commercial origin of the products as well as the “repackaging” of the products. The *rationale* behind the requirement to indicate the origin of the “repackaging” is, therefore, different from the *rationale* behind the requirement of “necessity” for accessing the market. Regardless of how the presentation of the repackaged products differs from that of products marketed by the trade mark proprietor, in order to make it clear that the owner is not responsible for the repackaging, it appears unthinkable that such presentation could ever “*interfere or create by its very nature the risk of interference with the original condition of the product.*”

62. Consequently, it is not justified to expand the requirement of “necessity” to the presentation of the repackaged product and/or the inclusion of the logo of the person responsible for the repackaging and/or of other graphic elements of the packaging. Thus, the trade mark proprietor cannot invoke “legitimate reasons” to oppose such inclusion on the mere basis that those elements cannot be considered “necessary” for the marketing of the goods. However, it follows from this reasoning that the trade mark proprietor has a “legitimate reason” to oppose the presentation of the products if the presentation is liable to damage the distinctive character of the trade mark, which would ultimately make it impossible for consumers to distinguish the trade marked goods from products which have another origin.

63. It is a general principle as regards the use of the trade mark in the commercialisation of goods, that the trade mark proprietor has “legitimate reasons” to oppose use of its trade mark which affects the distinctive character of the trade mark. In circumstances where there is no risk that the public will be led to believe that there is a commercial connection between the reseller and the trade mark proprietor, where the use of the trade mark is honest and fair, the trade mark proprietor may still oppose use of the trade mark provided the use of the trade mark seriously damages the reputation of the trade mark. “Legitimate reasons” may be invoked to oppose the further commercialisation of the repackaged goods if the inclusion of additional elements is likely to damage the distinct character of the trade mark or if the presentation of the repackaged goods is liable to damage the reputation of the trade mark and of its owner. In circumstances where it is established that the marketing of the repackaged goods can be said to be “customary in the reseller's sector of trade,” the trade mark

³⁸ At paragraph 67.

³⁹ At paragraph 34.

61. Basert på analyse av *Bristol-Myers Squibb*³⁸ og *Boehringer*,³⁹ anfører Kommisjonen at ikke bare er det tillatt å inkludere andre elementer enn varemerket på det ompakkete produktet, men det er også et krav om å opplyse hvem som er ansvarlig for ompakkingen. Begrunnelsen synes fortsatt å være beskyttelsen av varemerkets særlige funksjon, nemlig identifisering av opprinnelse. Det er imidlertid ikke ment å beskytte produktets integritet, men derimot å opprettholde varemerkets særskilte karakter, noe som igjen gjør kundene i stand til å identifisere produktenes kommersielle opprinnelse samt “ompakkingen” av produktene. Begrunnelsen for kravet om å opplyse opprinnelsen av “ompakkingen” er derfor en annen enn begrunnelsen for kravet om at ompakkingen skal være “nødvendig” for tilgang til markedet. Uavhengig av hvordan presentasjonen av de ompakkete produktene avviker fra presentasjonen av produktene som markedsføres av varemerke innehaveren, med sikte på å tydeliggjøre at innehaveren ikke er ansvarlig for ompakkingen, fremtrer det som utenkelig at en slik presentasjon skulle berøre, eller ut fra sin natur, medføre en risiko for å berøre legemiddelets originale tilstand.

62. Det er således ikke grunnlag for å utvide kravet om “nødvendighet til å omfatte presentasjonen av det ompakkete produktet og/eller tilføyelsen av logo for den som er ansvarlig for ompakkingen og/eller andre grafiske elementer på pakningen. Varemerke innehaveren kan derfor ikke påberope seg “berettiget grunn” til å motsette seg slike tillegg alene på grunnlag av at slike elementer ikke kan anses “nødvendige” for markedsføringen av varene. Det følger imidlertid av denne begrunnelsen at varemerke innehaveren har “berettiget grunn” til å motsette seg presentasjonen av produktene dersom presentasjonen er egnet til å skade varemerkets særegne karakter, noe som ville gjøre det umulig for forbrukerne å skille de varemerkede varene fra produkter med annen opprinnelse.

63. Det er et alminnelig prinsipp med hensyn til anvendelse av varemerke ved ervervsmessig utnyttelse av varer at varemerke innehaveren har “berettiget grunn” til å motsette seg bruk av varemerket som påvirker dets særegne karakter. Under omstendigheter hvor det ikke er fare for at publikum vil bli ledet til å tro at det er en kommersiell forbindelse mellom videreselger og varemerke innehaveren, hvor anvendelsen av varemerket er ærlig og redelig, kan varemerke innehaveren fortsatt motsette seg bruk av varemerket, dersom denne bruken er til alvorlig skade for varemerkets omdømme. “Berettiget grunn” til å motsette seg videre ervervsmessig utnyttelse av de ompakkete varene kan påberopes, dersom tilføyelsen av tilleggselementer er egnet til å skade varemerkets særegne karakter, eller dersom presentasjonen av produktet er egnet til å skade varemerkets eller dets innehavers omdømme. Under omstendigheter hvor det er fastslått at markedsføringen av de ompakkete varene kan anses som “vanlig i videreforsandlerens bransje,” kan varemerke innehaveren fortsatt påberope seg “berettiget grunn” til å motsette seg bruken av varemerket både i

³⁸ Avsnitt 67.

³⁹ Avsnitt 34.

proprietor may still invoke “legitimate reasons” to oppose use of the trade mark whether in advertising or in relation to the presentation of the product if it is established that the use of the trade mark for this purpose “seriously damages the reputation of the trade mark.”

64. Whether, however, the inclusion of the logo and/or of coloured stripes and/or other elements damages the reputation of the trade mark is an assessment of fact that is a matter for the national court. It is not entirely clear from the facts whether the inclusion of the coloured stripes is customary in the sector in general to identify a certain category of pharmaceuticals or whether it is the practice of the trade mark proprietor, ultimately contributing to the possible confusion between the origin of the goods.

65. The Commission of the European Communities suggests to answer the questions as follows:

“Legitimate reasons” may be invoked to oppose the further commercialisation of repackaged goods if the inclusion of additional elements is likely to damage the distinct character of the trade mark or if the presentation of the repackaged goods is liable to damage the reputation of the trade mark and of its owner. In circumstances where it is established that the marketing of the repackaged goods can be said to be “customary in the reseller's sector of trade”, the trade mark proprietor may still invoke “legitimate reasons” to oppose use of the trade mark, whether in advertising or in relation to the presentation of the product, if it is established that the use of the trade mark for this purpose seriously damages the reputation of the trade mark.

However, “legitimate reasons” may not be invoked solely on the ground that the inclusion of additional elements cannot be said to be “necessary.”

The Kingdom of Norway

66. In the view of the Kingdom of Norway, graphic elements, such as different colours, on pharmaceutical packaging minimise the risk of harm to public health. Unnecessary restrictions on packaging design will unavoidably result in many packaging of similar appearance and thus increase the risk of confusion and incorrect use of medicines, which could have serious and even fatal consequences. This would be contrary to EEA law.

67. The Kingdom of Norway submits, that if the specific graphic elements, such as colours, used on the new packaging are objectively necessary for the parallel imported products to gain effective market access, the trade mark proprietor may not oppose such repackaging provided that the criteria established by the Court of Justice of the European Communities relating to the packaging are respected. It is for the national court to decide whether the graphic elements

markedsføringen og ved presentasjonen av produktet dersom det er fastslått at bruken av varemerket for dette formålet “alvorlig skader varemerkets omdømme.”

64. Vurderingen av hvorvidt tilføyelsen av logoen og/eller fargestriper og/eller andre elementer skader varemerkets omdømme må imidlertid som et spørsmål om faktum foretas av den nasjonale domstolen. Det fremgår ikke helt klart av faktum om tilføyelsen av fargestriper er vanlig i bransjen generelt for å identifisere en viss kategori av legemidler, eller om det er varemerkeinnhaverens praksis, som til slutt bidrar til mulig forvirring med hensyn til produktenes opprinnelse.

65. Kommisjonen for De europeiske fellesskap foreslår at spørsmålene besvares på følgende måte:

“Berettiget grunn” kan påberopes for å motsette seg videre ervervsmessig utnyttelse av ompakkete varer dersom tilføyelsen av tilleggs-elementer kan skade varemerkets særegne karakter, eller dersom presentasjonen av de ompakkete produktene er egnet til å skade varemerkets og dets eiers omdømme. Under omstendigheter hvor det er påvist at markedsføringen av de ompakkete varene kan sies å være “vanlig i videreselgerens bransje”, kan varemerkeinnhaveren fortsatt påberope seg “berettiget grunn” til å motsette seg bruk av varemerket, både i markedsføring eller ved presentasjonen av produktet, dersom det påvises at bruken av varemerket for dette formålet er til alvorlig skade for varemerkets omdømme.

“Berettiget grunn” kan imidlertid ikke påberopes alene av den grunn at tilføyelsen av tilleggs-elementer ikke kan sies å være “nødvendig.”

Kongeriket Norge

66. Etter Kongeriket Norges oppfatning vil bruk av grafiske elementer som ulike farger på legemiddelpakninger minimalisere risikoen for skade på folkehelsen. Unødvendige restriksjoner på pakningsdesign vil uunngåelig medføre mange emballasjer i lik utførelse og således øke risikoen for forvirring og uriktig bruk av medisiner, som kan ha alvorlige, og til og med fatale, konsekvenser. Dette ville være i strid med EØS-retten.

67. Kongeriket Norge anfører at dersom de spesielle grafiske elementene, slik som farger, som er brukt på den nye emballasjen objektivt sett er nødvendig for at de parallellimporterte produktene skal få effektiv tilgang til markedet, kan varemerkeinnhaveren ikke motsette seg slik ompakking dersom kriteriene fastsatt av De europeiske fellesskaps domstol med hensyn til emballasjen er respektert. Det er den nasjonale domstolens oppgave å avgjøre hvorvidt de grafiske elementene som er påført pakningen av den ankende part i den

affixed to the package by the Appellant in the case at hand are in conformity with the requirements established by relevant case law. As repackaging must be carried out in such a way that the legitimate interests of the proprietor are respected,⁴⁰ the question for the Court to decide is whether there are legitimate reasons within the meaning of Article 7(2) for the trade mark proprietor to oppose the addition of new graphic elements to the new packaging.

68. The Court of Justice of the European Communities, while having established a set of conditions that the new packaging must meet in order to safeguard the legitimate interests of the trade mark proprietor,⁴¹ has not prohibited the use of (new) graphic elements, such as different colours. Furthermore, a general prohibition against adding graphic elements would result in a situation where a larger number of packages would lack distinctive graphic elements. This would in turn make it difficult to distinguish between different products. In the Norwegian Government's opinion, colours or other graphic elements on the packaging will generally not increase the risk that the reputation of the product will be negatively affected. However, the choice of graphic elements must not create the impression of a commercial link between the parallel importer and the trade mark proprietor and the repackaging can not be done solely in an attempt to secure a commercial advantage.⁴²

69. On the other hand, such elements do make it easier to distinguish between products. This is particularly important as regards pharmaceutical products, since incorrect use must be avoided. The Norwegian Government considers that this public health concern must be taken into consideration when interpreting the Directive. This is in conformity with relevant case law and with the wording of the relevant EEA rules, provided that there is no infringement of the legitimate rights of the trade mark proprietor.⁴³ The need to safeguard public health must be taken into consideration and given proper weight when answering the questions referred to the Court.

70. As shown by the increase in the number of applications for black and white (neutral) packages, unnecessary restrictions on packaging design will

⁴⁰ Cf. *Boehringer*, at paragraph 32.

⁴¹ Cf. *Bristol-Myers Squibb; Merck, Sharp & Dohme and Boehringer*.

⁴² *Merck, Sharp & Dohme*, at paragraph 27.

⁴³ Reference is made to the judgment of the Court in Case 3/00 [2000-2001] EFTA Ct. Rep., 73, at paragraph 27 and the decision from the Norwegian Ministry of Health, stating: "*As stated in the Norwegian Medicines Agency's decision, the conclusion is supported by the paramount importance of consideration for the safety of the consumer. One aspect of this involves avoiding confusion and mistaken use of medicinal products. The above-mentioned consideration has a very central place in both Norwegian and EU/EEA law. Pursuant to Article 13 of the EEA Agreement, on specified conditions, exceptions may be made from the basic principle of free trade if the exception is "justified on grounds of [...] protection of health and life of humans, animals or plants". The importance of the safety of the users is emphasized in a number of judgments passed by the EU and EFTA courts (for example case 104/75 "De Peijper" premise 15, case E-3/00 "Kellogg's" premise 27 and case 172/00 "Ferring" premise 34).*"

foreliggende saken er i samsvar med kravene som er nedfelt i relevant rettspraksis. Siden ompakking må foretas på en slik måte at varemerkeinnhaverens rettmessige interesser ivaretas,⁴⁰ må EFTA-domstolen ta stilling til om det foreligger berettiget grunn for varemerkeinnhaveren i henhold til artikkel 7(2) til å motsette seg påføringen av nye grafiske elementer på den nye pakningen.

68. De europeiske fellesskaps domstol har fastsatt et sett vilkår som den nye pakningen må oppfylle for å beskytte varemerkeinnhaverens rettmessige interesser,⁴¹ men den har ikke forbudt bruken av (nye) grafiske elementer, slik som forskjellige farger. Videre ville et generelt forbud mot å påføre grafiske elementer føre til en situasjon hvor et stort antall pakninger ville mangle karakteristiske grafiske elementer. Dette ville igjen gjøre det vanskelig å skille mellom ulike produkter. Etter den norske regjeringens oppfatning vil farger eller andre grafiske elementer på pakningen vanligvis ikke øke faren for at varens omdømme påvirkes negativt. Valget av grafiske elementer må imidlertid ikke skape inntrykk av at foreligger en kommersiell tilknytning mellom parallellimportøren og varemerkeinnhaveren, og ompakkingen kan ikke gjøres alene som et forsøk på å sikre en kommersiell fordel.⁴²

69. På den annen side gjør slike elementer det lettere å skille mellom produkter. Dette er særlig viktig med hensyn til legemiddelprodukter, siden uriktig bruk må unngås. Den norske regjering mener at dette hensynet til folkehelsen må tas i betraktning ved fortolkningen av direktivet. Dette er i overensstemmelse med relevant rettspraksis og ordlyden i det relevante EØS-regelverket, forutsatt at det ikke innebærer inngrep i varemerkeinnhaverens legitime rettigheter.⁴³ Behovet for å beskytte folkehelsen må tas i betraktning og tillegges vekt ved besvarelsen av spørsmålene som er referert til EFTA-domstolen.

70. Som vist ved økningen av søknader om sorte og hvite (nøytrale) pakninger, vil unødvendige restriksjoner på pakningsdesign uunngåelig resultere

⁴⁰ Jf. *Boehringer*, avsnitt 32.

⁴¹ Jf. *Bristol-Myers Squibb; Merck, Sharp & Dohme og Boehringer*.

⁴² *Merck, Sharp & Dohme*, avsnitt 27.

⁴³ Det vises til EFTA-domstolens avgjørelse i sak 3/00 [2000-2001] EFTA Ct. Rep., 73, avsnitt 27 og til det norske Helsedepartementets avgjørelse, som lyder: "Som det fremgår av SLV's vedtak støtter resultatet seg på det overordnede hensyn om sikkerhet for forbrukeren. En side av dette er å unngå forbyttning og feilbruk av legemidler. Nevnte hensyn står meget sentralt både i norsk rett og i EU/EØS-retten. Det følger av EØS-avtalens artikkel 13 at det, på nærmere vilkår, kan gjøres unntak fra det prinsipielle utgangspunktet om frin handel dersom unntaket er "begrunnet ut fra hensynet til...menneskers og dyrs liv og helse". Viktigheten av sikkerhet for brukerne er vektlagt i en rekke dommer avsagt av EU og EFTA domstolene (for eksempel sak 104/75 "De Peijper" premiss 15, sak E-3/00 "Kellogg's" premiss 27 og sak 172/00 "Ferring" premiss 34)."

unavoidably result in many packages of similar appearance and thus increase the risk of confusion. This will lead to more instances of incorrect use, which may have serious and even fatal consequences. If the packages are very different, for example in different colours, the risk of incorrect use is clearly reduced. There is no legitimate reason why the proprietor of a trade mark should, as a general rule, be allowed to enforce a prohibition that will result in such danger to the public health. A higher level of safety can be achieved by ensuring that packaging used by different preparations does not become too similar.⁴⁴

71. The Kingdom of Norway suggests to answer the questions as follows:

“The proprietor does not have “legitimate reasons” to oppose the use of graphic elements in a situation where the addition of graphic elements, such as colours, safeguards public health provided that the graphic elements do not infringe the specific subject-matter of the mark, as understood in the light of its essential function.”

Carl Baudenbacher
Judge-Rapporteur

⁴⁴ Norway also refers to the International Pharmaceutical Federation, acknowledging that both the incidence and the severity of errors can be reduced dramatically through the adaptation of systematic approaches to error prevention. The Federation therefore encourages regular and systematic review of product labelling and packaging by regulatory authorities and manufacturers with the specific aim of minimising medication errors. It recommends that the packaging and labelling on prescribed medicines should be designed with a view to minimising errors in selection and use, and recommends the use of innovative design to help practitioners distinguish between products that are already on the market. With a view to the requirements that may be made regarding documentation that a measure will have positive effects on health, Norway also refers to the precautionary principle, see *inter alia* Case E-3/00, *Kellogg's*, Report of the EFTA Court [2000-2001] 73.

i at mange pakninger får likt utseende og således øke faren for forveksling. Dette vil lede til flere tilfeller av feilbruk, noe som kan ha alvorlige, og til og med fatale, konsekvenser. Dersom pakningene er svært forskjellige, for eksempel i forskjellige farger, reduseres klart risikoen for feilbruk. Det finnes ingen legitim grunn til at varemerke innehaveren, som alminnelig regel, burde tillates å håndheve et forbud som vil resultere i slik fare for folkehelsen. En høyere grad av sikkerhet kan oppnås ved å sikre at emballasje anvendt ved ulike preparater ikke blir for like.⁴⁴

71. Kongeriket Norge foreslår at spørsmålene besvares som følger:

“Innehaveren har ikke “berettiget grunn” til å motsette seg bruken av grafiske elementer i et tilfelle hvor tilføyelsen av grafiske elementer, slik som farger, beskytter folkehelsen, forutsatt at de grafiske elementene ikke gjør inngrep i merkets spesielle innhold, forstått i lys av dets særlige funksjon.”

Carl Baudenbacher
Forberedende dommer

⁴⁴ Norge viser også til Det Internasjonale Legemiddelforbundet (the International Pharmaceutical Federation), som erkjenner at både hyppigheten og alvorligheten av feilene kan reduseres kraftig ved at en tar i bruk systematiske tilnæringer for forebygging av feil. Forbundet oppfordrer derfor til regelmessig og systematisk gjennomgang av produktmerking og emballasje av tilsynsmyndigheter og produsenter med det særskilte formål å minimalisere feil ved medisiner. Det anbefaler at emballasjen og merkingen på reseptbelagte medisiner bør utformes med sikte på å minimalisere feil ved valg og anvendelse, og anbefaler bruk av nytenkende design for å hjelpe praktiserende til åskille mellom produkter som allerede er på markedet. Når det gjelder kravene som kan bli stilt med hensyn til å dokumentere at et tiltak vil ha positive virkninger for helsen, viser Norge også til føre-var prinsippet, se blant annet sak E-3/00, *Kellogg's* [2000-2001] EFTA Ct. Rep. 73.

Case E-1/03

EFTA Surveillance Authority

v

The Republic of Iceland

(Failure of a Contracting Party to fulfil its obligations – free movement of services – higher tax on intra – EEA flights than on domestic flights)

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Summary of the Judgment

1. The tax system of an EEA/EFTA State is not covered by the EEA Agreement. The EEA/EFTA States must, however, exercise their taxation power consistently with EEA law.

2. Article 36 EEA prohibits not only discrimination based on nationality or place of residence, but also any restriction on the freedom to provide services, even if it applies without distinction to national providers of services and to those of other States party to the EEA Agreement. A measure that is liable to prohibit or otherwise impede the provision of services between EEA Contracting Parties as compared to the provision of services purely within one EEA Contracting Party constitutes a restriction.

Council Regulation (EEC) No 2408/92 on Access for Community air carriers to intra-Community air routes, which is

referred to in point 64a of Annex XIII to the EEA Agreement, defines the conditions for applying the principle of the freedom to provide services in the air transport sector. This Regulation must be interpreted in light of the general principle enshrined in Article 36 EEA.

Article 36 EEA and Regulation No 2408/92 aim at securing the freedom to provide services within the single market envisaged by the EEA Agreement. They confer a right upon individuals and economic operators to market access. This right precludes any unjustified restriction, however minor.

The amount of air passenger tax to be paid will directly and automatically influence the price of the journey. A difference in the taxes to be paid per passenger will thus imply that access to domestic flights is favoured over access to intra-EEA flights. A tax levied per passenger travelling on intra-EEA

JUDGMENT OF THE COURT

12 December 2003

(Failure of a Contracting Party to fulfill its obligations – free movement of services -higher tax on intra-EEA flights than on domestic flights)

In Case E-1/03,

EFTA Surveillance Authority, represented by Niels Fenger, Director, Legal & Executive Affairs, and Elisabethann Wright, Officer, Legal and Executive Affairs, acting as Agents, 74 Rue de Trèves, Brussels, Belgium,

Applicant,

v

The Republic of Iceland, represented by Anna Jóhannsdóttir, Legal Officer, Ministry of Foreign Affairs of Iceland, acting as Agent, Rauðarárstígur 25, 150 Reykjavík, Iceland, assisted by Kristín Helga Markúsdóttir, Legal Officer, Ministry of Transport, Ragnheiður Snorradóttir and Ingvi Már Pálsson, Legal Officers, Icelandic Ministry of Finance,

Defendant,

APPLICATION for a declaration that, by maintaining in force the Icelandic Act on Air Transport Infrastructure Budget and Revenues for Aviation Affairs No 31/1987 (*Lög nr. 31 frá 27. mars 1987 um flugmálaáætlun og fjáröflun til framkvæmda í flugmálum*), which subjects flights from Iceland to other EEA States to a higher tax rate than that charged for domestic flights and flights to Greenland and the Faroe Islands, the Republic of Iceland has failed to respect its obligations under Article 36 of the Agreement on the European Economic Area and Article 3(1) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on Access for Community air carriers to intra-Community air routes.

THE COURT,

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

Registrar: Lucien Dedichen,

having regard to the written pleadings of the parties and the written observations of the Commission of the European Communities, represented by John Forman, Legal Adviser, and Mikko Huttunen, Member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral arguments of the Applicant, represented by its Agents Niels Fenger and Elisabethan Wright, the Defendant, represented by its Agent Anna Jóhannsdóttir, Legal Officer, Ministry of Foreign Affairs of Iceland, acting as Agent, assisted by Kristín Helga Markúsdóttir, Legal Officer, Ministry of Transport, Ragnheiður Snorradóttir and Ingvi Már Pálsson, Legal Officers, Ministry of Finance, and the Commission of the European Communities, represented by its Agent John Forman, at the hearing on 17 October 2003,

gives the following

Judgment

I Facts and pre-litigation procedure

- 1 By an application lodged at the Court on 20 January 2003, the EFTA Surveillance Authority filed a request for a declaration that, by maintaining in force its Act on Air Transport Infrastructure Budget and Revenues for Aviation Affairs (*lög um flugmálaáætlun og fjáröflun til framkvæmda í flugmálum*, the “Aviation Infrastructure Act”), which subjects flights from Iceland to other EEA States to a higher tax rate than that charged for domestic flights and flights to Greenland and the Faroe Islands, the Republic of Iceland has failed to fulfil its obligations under Article 36 of the EEA Agreement and Article 3(1) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on Access for Community carriers to intra-Community air routes which was made part of the EEA Agreement by Decision No 7/94 of the EEA Joint Committee of 21 March 1994 and is listed in point 64a of Annex XIII to the EEA Agreement.
- 2 By a letter of 28 April 1998, the Applicant wrote to the Defendant requesting information concerning the Icelandic air passenger tax. In its response of 27 May 1998, the Defendant stated that the tax is a very important source of income for the financing of the airport infrastructure in Iceland and that it is used to finance the construction and operation of domestic airports.

- 3 On 16 December 1998, the Applicant sent a letter of formal notice to the Defendant concluding that, by maintaining legislation subjecting air passengers travelling from Iceland to other EEA States to a higher tax than those travelling on domestic flights and flights from Iceland to Greenland and the Faroe Islands, Iceland has failed to comply with its obligations under Article 36(1) EEA and Article 3(1) of Council Regulation (EEC) No 2408/92. For the sake of order it must be said that the EEA Agreement does not apply to the Faroe Islands and Greenland.
- 4 In its reply of 21 May 1998, the Defendant argued that the matter in question involved only taxation, which falls outside the scope of the EEA Agreement and that for geographical reasons, there is no breach of Article 36 EEA, since domestic and international air transport services in Iceland are not comparable; the longest domestic route being 379 km whereas the shortest international route is 1382 km. The Government of Iceland deduced from this fact that there is no competition between national and international routes, and thus no special advantage conferred on the domestic market.
- 5 The Applicant issued a reasoned opinion to Iceland on 16 September 1999. It maintained its view that the measures at issue were in breach of the EEA Agreement. It contended that an international air route between two EEA States was, by its nature and definition, a cross-border activity, which was adversely affected when it was subject to stricter conditions than those of a domestic air route. It argued that the tax applicable to most cross-border flights is higher than that applied to national flights, and is therefore liable to act mainly to the detriment of foreign service providers. In support of the existence of a cross-border element, the EFTA Surveillance Authority also contended that liberalisation of air transport would not have been necessary if all relevant elements were already confined within each individual EEA State.
- 6 In a reply of 17 November 1999, the Defendant maintained its view that the measures at issue were in compliance with EEA law. It argued that there was no cross-border element because there was no basis for any kind of comparison between flights within Iceland and international flights.
- 7 After the matter had been discussed by representatives of the parties the Defendant informed the Applicant that a bill would be put before the Parliament in October 2002 according to which airport taxes would be the same for domestic and international flights. The Applicant therefore refrained from initiating proceedings before the EFTA Court. However, when no additional information was received from the Defendant regarding the progress of the legislative process, it filed the application which gave rise to the present case.

II Legal background

EEA law

- 8 Article 36 EEA requires the abolition of all restrictions on the provision of services within the EEA 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.
- 9 Article 38 EEA states that the freedom to provide services in the field of transport shall be governed by the provisions of Chapter 6 of Part III of the Agreement. Article 39 EEA further provides that Articles 30 and 32 to 34, including the provision in Article 33 permitting special treatment of foreign nationals on grounds of public policy, public security or public health, shall also apply to the freedom to provide services.
- 10 The provisions of Articles 36, 38 and 39 EEA mirror the provisions of Articles 49, 51 (1) and 55 EC (ex Articles 59, 61(1) and 65 EC).
- 11 Article 7 EEA provides that acts referred to or contained in the Annexes to the Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties, and be, or be made, part of their internal legal order.
- 12 Council Regulation (EEC) No 2408/92 of 23 July 1992 on Access for Community air carriers to intra-Community air routes was incorporated into the EEA Agreement by Decision No 7/94 of the EEA Joint Committee and is listed in point 64a of Annex XIII to the EEA Agreement.
- 13 Regulation 2408/92 constitutes an element of what is known as the third “package” on air transport, which aims to ensure the freedom to provide air transport services and the application of the Community rules in this sector.
- 14 Article 3(1) of Regulation 2408/92 provides that subject to this Regulation, Community air carriers shall be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community.
- 15 “Traffic rights” are defined in Article 2(f) of Regulation 2408/92 as the right of an air carrier to carry passengers, cargo and/or mail on an air service between two Community airports.

The contested national legislation

- 16 Article 5(1) of the Aviation Infrastructure Act (*lög um flugmálaáætlun og fjáröflun til framkvæmda í flugmálum*), reads as follows:

“A separate airport tax shall be paid in respect of each individual travelling by aircraft from Iceland to other countries.”

Article 6(1) of the Aviation Infrastructure Act, reads as follows:

“The airport tax shall amount to ISK 1250 for each passenger travelling from Iceland to other countries...”

Article 7(1) of the Aviation Infrastructure Act, reads as follows:

“Airlines engaged in the transport of passengers within Iceland or to the Faroe Islands or Greenland shall pay a tax amounting to ISK 165 for each passenger travelling on these routes ...”

III Arguments of the parties

- 17 The application is based on the plea that the Defendant has failed to comply with its obligations under Article 36 of the Agreement on the European Economic Area and Article 3(1) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on Access for Community air carriers to intra-Community air routes.
- 18 It is not contended that the Icelandic legislation in question entails discrimination based on nationality or place of residence. However, the parties disagree as to whether that legislation constitutes a hindrance to the free movement of services.
- 19 The *Applicant* claims that since the amount of airport tax directly and automatically influences the price of a journey, a difference in tax of the degree at issue makes the provision of intra-EEA services more difficult than the provision of services solely within Iceland. Whether the effect on the provision of intra-EEA flight services is considerable or not, is, according to the Applicant, immaterial since there is no scope for a *de minimis* rule in respect of restriction on the freedom to provide services. Nor can the question of whether there is a competitive relationship between different routes play a role.
- 20 As far as a possible justification of the restriction is concerned, the Applicant maintains that the Defendant has not shown that the difference in the amounts levied on international and domestic passengers corresponds to a similar difference in costs for providing the services to the two groups of passengers, as would be required by the principle of proportionality. The Applicant, moreover, maintains that the public interest aims invoked by the Defendant, however laudable, cannot justify a difference in air passenger taxes dependant on whether they are charged for domestic or international air travel.
- 21 The *Defendant* maintains that the provisions at issue in no way restrict or impede the free provision of air services within the EEA. In its view the legislation in question does not produce any effect as to the provision of intra-EEA services. The Defendant submits that the Applicant has not established that the effects of the difference in the amount of tax levied on domestic and international passengers are such that the freedom to provide services is in any way restricted.

- 22 The Defendant further contends in this regard that the markets and services for international and domestic flights are not comparable, particularly in light of the geographical situation of Iceland: the longest air-route within the domestic market being 379 km, while the shortest route in service between Iceland and the rest of the EEA is approximately 1350 km. As Iceland is an island, there are no other means of rapid and convenient transport between the country and the rest of Europe. Geography, differences in services and customer demand, as well as the types and size of aircraft, lead to fundamental differences in competitive conditions for domestic and international air services in Iceland, with the consequence that any competition between the two markets is excluded. Hence, there is no possibility of a special advantage being secured for the provision of domestic flight services.
- 23 According to the Defendant, the taxes compensate airport services and facilities necessary for the processing of passengers, where the cost of these services is proportionately higher for international flights than for domestic flights.
- 24 The Defendant also argues that the tax rate on international flights is in line with comparable intra-EEA passenger charges. Moreover, the Defendant submits that the lower tax rate for domestic services is aimed at maintaining and stimulating competition in providing services in the small and isolated Icelandic market. Such indirect market support will, in the Defendant's view, benefit all service providers willing to offer their services in this market.
- 25 In the alternative, the Defendant contends that if the tax regime in question is considered a restriction on the freedom to provide services, it is in any event justified by compelling reasons of public interest since it constitutes a necessary source of revenue for maintaining and building airports and airport facilities both for international and domestic flight services. As these facilities are essential for residents of the peripheral regions to gain access to a population centre where administrative, medical and commercial services as well as education and culture are available, the reduced tax rate on domestic services is both necessary and proportionate. In that respect, the Defendant invokes both public policy and public security reasons. It contends that providing basic airport services to the many remote parts of Iceland is essential, for economic, environmental and social reasons, to maintain habitation in all parts of Iceland, and to protect social cohesion.

IV Findings of the Court

- 26 The *Court* notes that, as a general rule, the tax system of an EEA/EFTA State is not covered by the EEA Agreement. The EEA/EFTA States must, however, exercise their taxation power consistently with EEA law (see Cases E-6/98 *Norway v EFTA Surveillance Authority* [1999] EFTA Court Report 74, at

paragraph 34; E-1/01 *Hörður Einarsson v The Icelandic State* [2002] EFTA Court Report 1, at paragraph 17).

- 27 As stated in Article 1(1) EEA, one of the main objectives of the Agreement is to create a homogeneous European Economic Area. This objective has consistently informed the jurisprudence of the Court, (see, inter alia, Case E-9/97 *Sveinbjörnsdóttir v Iceland* [1998] EFTA Court Report 95, at paragraph 49; Case E-6/01 *CIBA v Norway* [2002] EFTA Court Report 281, at paragraph 33). In this regard, Article 6 EEA provides that the Court is bound by the relevant rulings of the European Court of Justice given prior to the EEA Agreement, and the second paragraph of Article 3 of the ESA/Court Agreement provides that the Court has to pay due account to later case law. The Court notes that the European Court of Justice in a recent case evoked the aim of the EEA Agreement, which is the realisation of the four freedoms within the whole of the European Economic Area, so that the internal market is extended to the EFTA States. In that context, the European Court of Justice noted the need to ensure uniform interpretation of rules of the EEA Agreement and the EC Treaty, which are identical in substance (see Case C-452/01 *Ospelt*, judgment of 23 September 2003, not yet reported, at paragraph 29).
- 28 Article 36 EEA requires not only the elimination of all discrimination based on nationality or place of residence, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other States party to the EEA Agreement. A measure that is liable to prohibit or otherwise impede the provision of services between EEA Contracting Parties as compared to the provision of services purely within one EEA Contracting Party constitutes a restriction (see, with regard to Article 49 EC, Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd* [1991] ECR, I-4221, at paragraph 12; Case C-205/99 *Analir* [2001] ECR I-1271, at paragraph 21). Council Regulation (EEC) No 2408/92 of 23 July 1992 on Access for Community air carriers to intra-Community air routes which is referred to in point 64a of Annex XIII to the EEA Agreement defines the conditions for applying the principle of the freedom to provide services in the air transport sector. That regulation must be interpreted in light of the general principle enshrined in Article 36 EEA. The question must therefore be examined whether the Defendant's legislation at issue is liable to make more difficult or render less attractive the provision of intra-EEA flight services.
- 29 The Defendant has rightly emphasised that comparability of services is a basic prerequisite for determining whether differences in fees or treatment are restrictive. As the Applicant has pointed out, the nature of air service is not altered by the fact that it crosses borders. In relation to the comparability of the services in the case at hand, the Defendant refers to factors that do not affect the nature of the service provided, such as geographic distance, and fails to show that the relevant domestic and international air services are by nature different. Comparability within the context of the freedom to provide services does not call for a market definition as developed in competition law. The Defendant's

argument that domestic flight services and intra-EEA flight services cannot be compared must therefore be rejected.

- 30 Article 36 EEA and Council Regulation (EEC) No 2408/92 of 23 July 1992 on Access for Community air carriers to intra-Community air routes aim at securing the freedom to provide services within the single market envisaged by the EEA Agreement. They confer a right upon individuals and economic operators to market access. This right precludes any unjustified restriction, however minor (see, with regard to Article 49 EC, Case C-49/89 *Corsica Ferries France* [1989] ECR 4441, at paragraph 8). Therefore, the realisation of the freedom to provide services cannot depend on whether an effect would be material.
- 31 As regards the existence of a restriction in the present case, it is sufficient to note that the amount of air passenger tax to be paid will directly and automatically influence the price of the journey. Differences in the taxes to be paid per passenger will automatically be reflected in the transport costs, and thus access to domestic flights is favoured over access to intra-EEA flights (see, for comparison, Case C-70/99 *Commission v Portugal* [2001] ECR I-04845, at paragraph 20). In the present case, the tax levied per passenger travelling on intra-EEA flights is more than seven times higher than the tax levied per passenger travelling on domestic flights. This clearly constitutes a restriction on the freedom to provide services.
- 32 The Defendant has argued that the passenger tax rate on international flights is in line with comparable intra-EEA passenger charges, and that the airport taxes and charges in most EEA States are higher than or similar to the rates on Icelandic international flights. These contentions are not relevant in the case at hand, where the basis for comparison is limited to domestic flights within Iceland and intra-EEA flights from Iceland.
- 33 Moreover, the invocation of the fact that the Commission of the European Communities had not undertaken action against the taxation regime of the United Kingdom concerning the Scottish Highlands and Islands cannot lead to the conclusion that the taxation regime of the Defendant is compatible with EEA law.
- 34 The Court now turns to the issue of whether the aforementioned restriction is justified. With respect to the Defendant's argument that additional and different services are offered to intra-EEA and international passengers, it suffices to state that according to the Defendant's own submissions the purpose of the contested legislation is to secure a special source of revenue to construct and maintain airports and airport facilities for air services in Iceland. The reduced air passenger tax on domestic flights is, in essence, indirect market support for air service providers who are willing to offer their services in this difficult and small market. In order for a difference in the type of services provided to domestic and to intra-EEA passengers to justify a difference in the air passenger tax, there must be a genuine connection between the costs related to providing the

respective services and the amount of the tax. The Defendant has not shown that such a connection exists, and the argument must therefore be rejected.

- 35 A restriction on the freedom to provide services which is prohibited under Article 36 EEA can in principle be justified on grounds of public interest such as securing access to medical, cultural and commercial infrastructure for the inhabitants of outer regions of Iceland and to prevent migration from rural areas. These goals must, however, be pursued in compliance with the principle of proportionality, according to which any measures taken have to be suitable and necessary. The Defendant has not shown that the differentiated air passenger tax is a necessary means to achieve the public interest goals in question. Moreover, whilst Regulation 2408/92 does, in certain circumstances, permit the imposition upon air carriers of public service obligations, which may be the subject of financial compensation, those obligations must be defined beforehand and any financial quid pro quo must be capable of being identified as specific compensation for the obligation in question (see, for comparison, Case C-70/99 *Commission v Portugal* [2001] ECR I-04845, at paragraph 34). It is undisputed that this has not happened in the case at hand.
- 36 Whether the special situation of the Defendant would entitle it to seek the EFTA Surveillance Authority's approval under the State aid rules is immaterial in a case brought under the combined provisions of Article 36 EEA and Article 3(1) of Regulation 2408/92.
- 37 The Court therefore holds that by maintaining in force the contested legislation, the Defendant is restricting the freedom to provide services in a manner that is incompatible with its obligations under Article 36 EEA and Article 3(1) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on Access for Community carriers to intra-Community air routes.

V Costs

- 38 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 Republic of Iceland 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 Commission of the European Communities are not recoverable.

On those grounds,

THE COURT

hereby:

- 1. Declares that by maintaining in force the Icelandic Act on Air Transport Infrastructure Budget and Revenues for Aviation Affairs No 31/1987 (*Lög nr. 31 frá 27. mars 1987 um flugmálaáætlun og fjáröflun til framkvæmda í flugmálum*), which imposes a higher tax per passenger travelling from Iceland to other EEA States than per passenger travelling on domestic flights, the Republic of Iceland has failed to respect its obligations under the combined provisions of Article 36 of the Agreement on the European Economic Area and Article 3(1) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on Access for Community air carriers to intra-Community air routes.**
- 2. Orders the Republic of Iceland to pay the costs of the proceedings.**

Carl Baudenbacher

Per Tresselt

Thorgeir Örlygsson

Delivered in open court in Luxembourg on 12 December 2003.

Lucien Dedichen
Registrar

Carl Baudenbacher
President

REPORT FOR THE HEARING
in Case E-1/03

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 Republic of Iceland

seeking an order from the EFTA Court that the Republic of Iceland has failed to respect its obligations, arising from Article 36 of the Agreement on the European Economic Area and Article 3(1) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, by maintaining in force the Icelandic Act on Air Transport Infrastructure Budget and Revenues for Aviation Affairs No 31/1987 (*Lög nr. 31 frá 27. mars 1987 um flugmálaáætlun og fjáröflun til framkvæmda í flugmálum*; the “Aviation Infrastructure Act”), according to which flights from Iceland to other EEA States are subject to a higher tax rate (ISK 1250, approximately € 15) than that charged for domestic flights and flights to Greenland and the Faroe Islands, (ISK 165 approximately € 2).

I Introduction

1. The case at hand concerns a provision in the Aviation Infrastructure Act whereby the tax charged on passenger flights by the Icelandic State varies substantially depending on whether the flight is domestic or intra-EEA.

2. The application from the EFTA Surveillance Authority is based on one plea in law, namely that the Icelandic legislation that subjects flights from Iceland to other EEA States to a higher tax rate than that charged on domestic flights and flights to Greenland and the Faroe Islands, is in breach of EEA law provisions on the free movement of services.

II Legal background

EEA law

3. Article 36 EEA requires the abolition of all restrictions on the provision of services within the EEA in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.

4. Article 38 EEA states that the freedom to provide services in the field of transport shall be governed by the provisions of Chapter 6 of Part III of the Agreement. Article 39 EEA further provides that Articles 30 and 32 to 34, including the provision in Article 33 permitting special treatment of foreign nationals on grounds of public policy, public security or public health, shall also apply to the freedom to provide services.

5. The provisions of Articles 36, 38 and 39 EEA reflect the provisions of Articles 49, 51 (1) and 55 EC (ex Articles 59, 61(1) and 65 EC).

6. Article 7 EEA provides that acts referred to or contained in the Annexes to the Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties, and be, or be made, part of their internal legal order.

7. Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes was incorporated into the EEA Agreement by Decision No 7/94 of the EEA Joint Committee and is listed in point 64a of Annex XIII to the EEA Agreement.

8. Regulation 2408/92 constitutes an element of what is known as the third “package” on air transport, which aims to ensure the freedom to provide air transport services and the application of the Community rules in this sector.

9. Article 3(1) of Regulation 2408/92 provides that:

“Subject to this Regulation, Community air carriers shall be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community.”

10. “Traffic rights” are defined in Article 2(f) of Regulation 2408/92 as the right of an air carrier to carry passengers, cargo and/or mail on an air service between two Community airports.

The contested national legislation

11. Article 5(1) of the Aviation Infrastructure Act, reads as follows:¹

“A separate airport tax shall be paid in respect of each individual travelling by aircraft from Iceland to other countries.”

12. Article 6(1) of the Aviation Infrastructure Act, reads as follows:

“The airport tax shall amount to ISK 1250 for each passenger travelling from Iceland to other countries...”

13. Article 7(1) of the Aviation Infrastructure Act, reads as follows:

*“Airlines engaged in the transport of passengers within Iceland or to the Faroe Islands or Greenland shall pay a tax amounting to ISK 165 for each passenger travelling on these routes ...”*²

III Procedure

Pre-litigation procedure

14. By letter of 28 April 1998, the Authority wrote to Iceland requesting information concerning the Icelandic air passenger tax. The Authority referred to information received from the Commission of the European Communities according to which Icelandic air transport taxes distinguished between domestic services and services to other EEA States. The Authority further stated that the Commission, basing itself on the judgment of the Court of Justice of the European Communities in the maritime transport case *Commission v France*,³ had initiated infringement procedures against EU Member States that had imposed different rates of air departure tax depending on whether the flight was bound for a domestic airport or an airport of another Member State.

15. In its response of 27 May 1998, the Icelandic Government emphasised that the air departure tax is a very important source of income for the financing of the airport infrastructure in Iceland. It stated that the income is used to finance the construction and operation of domestic airports in Iceland. The Government further stated that the same tax was charged irrespective of the nationality of the carrier, and that the distinction between domestic and international airport tax

¹ The translation of the Icelandic legislation into English was provided by the Icelandic Authorities to the EFTA Surveillance Authority during the pre-litigation procedure.

² Please note that the figures in the translation of the Aviation Infrastructure Act in Annex 5 to the Application are ISK 750 and ISK 100.

³ Case C-381/93, *Commission of the European Communities v France* [1994] ECR I-5145, at paragraph 21.

was due to the fact that the Icelandic authorities did not want to put too much burden upon domestic air services.

16. In its letter of formal notice to Iceland of 16 December 1998, the Authority concluded that, by maintaining legislation subjecting flights from Iceland to other EEA States to a higher tax rate than domestic flights and flights from Iceland to Greenland and the Faroe Islands,⁴ Iceland has failed to comply with its obligations under Article 36(1) EEA and Article 3(1) of Regulation 2408/92.

17. The Icelandic Government replied by letter of 21 May 1998. It argued that the matter at hand involved only taxation, which falls outside the scope of the EEA Agreement. Moreover, the Icelandic Government argued that, for geographical reasons, there is no breach of Article 36 EEA, since domestic and international air transport services in Iceland are not comparable; the longest domestic route being 379 km whereas the shortest international route is 1382 km. The Icelandic Government deduced from this fact that there is no competition between national and international routes, and thus no special advantage conferred on the domestic market. Referring to the decision of the Court of Justice of the European Communities in *Debauve*,⁵ and in the absence of any cross-border element in the present case, the Icelandic Government argued that *Commission v France*⁶ is not applicable to the present case as the domestic and international sea-routes in that case could easily be in direct competition with each other. The Icelandic Government also argued that Regulation 2408/92 Article 3(1) does not contain any requirements as to collection of taxes, and cannot be interpreted as placing a heavier burden on Member States than it explicitly states.

18. The EFTA Surveillance Authority issued a reasoned opinion to Iceland on 16 September 1999. The Authority maintained its view that the measures at issue were in breach of the EEA Agreement. The reasons given in the letter of formal notice were repeated. The Authority also recalled the discussion by the Court of Justice in *Colmer*⁷ regarding the need, in areas that do not fall within the EC Treaty, for Member States to adopt measures consistent with EC law and non-discrimination. Regarding the cross-border element, the Authority contended that an international air route between two EEA States was, by its nature and definition, a cross-border activity, which was adversely affected when it was subject to stricter conditions than those of a domestic air route. It argued that the tax applicable to most cross-border flights is higher than that applied to national flights, and is therefore liable to act mainly to the detriment of foreign service

⁴ The EEA Agreement does not apply to the Faroe Islands and Greenland.

⁵ Case 52/79 *Procureur du Roi v Marc J.V.C. Debauve and others* [1980] ECR 833, at paragraph 9.

⁶ Case C-381/93 (n 3 above).

⁷ Case C-264/96 *Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)*, [1998] ECR I-04695, at paragraph 19.

providers. In support of the existence of a cross-border element, the Authority also contended that liberalisation of air transport would not have been necessary if all relevant elements were already confined within each individual EEA State. The Authority argued that in *Commission v France*,⁸ the Court was not concerned with the examination of a competitive relationship between different sea routes, but with the restrictions on the right to exercise the basic freedoms guaranteed by the EC Treaty. Moreover, the Authority pointed out that there is no place for a *de minimis* rule with respect to Article 36 EEA.

19. In a reply of 17 November 1999, the Icelandic Government maintained its view that the measures at issue were in compliance with EEA law. The Government repeated its view expressed in its letter of 21 May 1999 that, contrary to the *Colmer*⁹ case, the airport departure tax does not discriminate against EEA citizens or companies on the basis of nationality. It reiterated the lack of a cross-border element by arguing that there is no basis for any kind of comparison between flights within Iceland and international flights.

20. Representatives from the Icelandic Government and the EFTA Surveillance Authority met on 8-9 May 2001 to discuss matters addressed in the reasoned opinion, and the Icelandic Government undertook to examine developments in other European countries and consider whether amendments to its legislation would be warranted. The Icelandic Government informed the Authority by a letter dated 29 June 2001 that a working group had been established to this end, and in a letter dated 19 December 2001 the Icelandic Government informed the Authority of its plan to replace the current air transport tax by a new air transport tax directly linked to the number of kilometres travelled. The Authority replied by a letter dated 22 February 2002 that such a tax did not seem to be in conformity with Article 36 EEA.

21. In a meeting on 29 May 2002, the Authority informed the Icelandic Government that it had decided, on 24 May 2002, to refer the matter to the EFTA Court, and invited the Icelandic Government to indicate, before 20 June 2002, a firm commitment to change the current airport tax system, in order to avoid the matter being brought before the EFTA Court. In a letter dated 19 June 2002, the Icelandic Government responded that the Government would put a bill before the Parliament in October 2002 according to which airport taxes would be the same for domestic and international flights. The Authority then decided to suspend proceedings, and suggested to the Icelandic Government in a letter dated 18 July 2002 that the new airport tax should apply from no later than 1 January 2003. No additional information was received by the EFTA Surveillance Authority from the Icelandic Government regarding the progress of the legislative process.

⁸ Case C-381/93 (n 3 above).

⁹ Case C-264/96 (n 7 above).

Procedure before the Court

22. Against the background of these circumstances, the EFTA Surveillance Authority filed the application at issue here, which was registered at the Court on 20 January 2003.

IV Forms of order sought by the parties

23. The EFTA Surveillance Authority claims that the Court should:

(i) declare that by maintaining in force the Icelandic Act on Air Transport Infrastructure Budget and Revenues for Aviation Affairs 31/1987 (Lög nr. 31 frá 27. mars 1987 um flugmálaáætlun og fjáröflun til framkvæmda í flugmálum), which subjects flights from Iceland to other EEA States to a higher tax rate than that charged for domestic flights and flights to Greenland and the Faroe Islands, the Republic of Iceland has failed to respect its obligations under Article 36 of the Agreement on the European Economic Area and Article 3(1) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on Access for Community air carriers to intra-Community air routes;

(ii) order the Republic of Iceland to pay the cost of these proceedings.

24. The Republic of Iceland claims that the Court should:

(i) dismiss the application as unfounded;

(ii) order the EFTA Surveillance Authority to bear the costs.

V Written observations

25. Written observations have been received from the parties:

- the EFTA Surveillance Authority represented by Niels Fenger, Director, Legal and Executive Affairs, and Elisabethann Wright, Officer, Legal and Executive Affairs, acting as Agents;
- the Republic of Iceland, represented by Anna Jóhannsdóttir, Legal Officer, Ministry of Foreign Affairs of Iceland, acting as Agent, assisted by Kristín Helga Markúsdóttir, Legal Officer, Ministry of Transport, Ragnheiður Snorradóttir and Ingvi Már Pálsson, Legal Officers, Ministry of Finance.

26. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

- the Commission of the European Communities, represented by John Forman, Legal Adviser, and Mikko Huttonen, Member of its Legal Service.

The EFTA Surveillance Authority

27. In its *application*, the EFTA Surveillance Authority presents the relevant case law of the Court of Justice of the European Communities concerning Article 49 EC (ex Article 59 EC). The Authority submits that those cases are also relevant when applying Article 36 EEA, by virtue of Article 6 EEA.

28. The starting point of the EFTA Surveillance Authority is that a difference in tax of the degree at issue must be disadvantageous to intra-EEA air service providers. In this regard the Authority refers to the comment by the Court of Justice of the European Communities that the amount of airport tax directly and automatically influences the price of a journey.¹⁰

29. The Authority does not dispute that taxation remains within the control of the EFTA States. However, the EEA States must, nonetheless, exercise that competence consistent with EEA law. They must, therefore, avoid any overt or covert discrimination by reason of nationality.¹¹

30. With regard to the existence of a cross-border element, the Court of Justice of the European Communities stated in *Debauve*,¹² that whether or not the elements of a case are confined within a single Member State depends on the findings of fact. Contrary to the Icelandic Government, the Authority contends that the factual situation must lead to the conclusion that the case at hand includes cross-border elements. The very fact that a distinction is made between the rates, at which a single passenger tax is charged, depending on whether the charge is levied on a domestic air route or on an international air route between two EEA States, means that, by its nature and definition, a cross-border activity is at issue.

31. The Authority recalls that it is a fundamental principle of EEA law that discrimination on the grounds of nationality is to be prohibited.

¹⁰ Case C-70/99 *Commission of the European Communities v Portuguese Republic*, [2001] ECR I-04845, at paragraph 20.

¹¹ Case E-1/01 *Hörður Einarsson* [2002] EFTA Court Report p 1, at paragraph 17, Case C-279/93 *Finanzamt Köln-Altstadt v Schumacker* [1995] ECR I-225, at paragraph 21, Case C-80/94 *G. H. E. J. Wielockx v Inspecteur der Directe Belastingen* [1995] ECR I-2493, at paragraph 16, Case C-107/94 *Asscher* [1996] ECR I-3089, at paragraph 36, Case C-250/95 *Futura Participations SA and Singer v Administration des contributions* [1997] ECR I-2471, at paragraph 19, Case C-118/96 *Jessica Safir*, [1998] ECR I-1897, at paragraph 21, and Case C-17/00 *Francois De Coster* [2001] ECR I-9445, at paragraph 25.

¹² Case 52/79 (n 5 above), at paragraph 9.

32. The Authority acknowledges that the disputed air passenger tax does not directly discriminate between service providers on grounds of nationality. It argues that Article 36 EEA excludes the application of national provisions that, without objective justification, restrict a service provider from exercising the freedom granted by that Article.¹³ Moreover, the Authority argues that Article 49 EC prohibits the application of a national provision that makes the provision of services between Member States more difficult than the provision of services solely within a single Member State.^{14 15}

33. The Authority claims that by requiring providers of intra-EEA air services to pay an air passenger tax in excess of seven times higher than the air passenger tax imposed on providers of domestic flights and flights to the Faroe Islands and Greenland, Icelandic law makes the provision of services between Member States more costly and difficult than the provision of domestic flight services.¹⁶

34. The absence of discrimination directly based on nationality cannot justify national provisions that restrict the fundamental freedom of non-nationals to provide services.¹⁷ The Authority asserts that the general principle governing the freedom to provide services goes beyond the mere prohibition of any direct discrimination on grounds of nationality, and that even in the absence of such discrimination, the air passenger tax is unacceptable if it is not warranted by mandatory public interest requirements, or if the same result can be obtained by less restrictive rules.¹⁸ In support of this argument, the Authority refers to *Sea-Land Service*.¹⁹

35. It is the view of the Authority that imposing an air passenger tax on international flights that is so much higher than that imposed on domestic flights and those to the Faroe Islands and Greenland, makes the provision of cross-border services, in the form of international flights, more costly than the provision of comparable domestic services. Therefore, in the absence of justification, on compelling grounds of public interest, that the measures enacted

¹³ Case C-381/93 (n 3 above), at paragraph 16.

¹⁴ Case C-447/99 *Commission of the European Communities v Italian Republic* [2001] ECR I-5203, at paragraph 12.

¹⁵ Case C-381/93 (n 3 above), at paragraph 17. See also, Case C-158/96 *Raymond Kohll* 1998 [ECR] I-1931, at paragraph 33, Case C-118/96 (n 11 above), at paragraph 23, Case C-157/99 *Smits and Peerboms* [2001] ECR I-5473, at paragraph 61, Case C-368/98 *Vanbraekel* [2001] ECR I-5363, at paragraph 44, Case C-17/00 (n 11 above), at paragraph 30, Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, at paragraph 30, and Case C-136/00 *Danner* [2002] ECR I-8147, at paragraph 29.

¹⁶ Case C-381/93 (n 3 above), at paragraph 17. See also, Case C-158/96 (n 15 above), at paragraph 33, Case C-118/96 (n 11 above), at paragraph 23, Case C-157/99 (n 15 above), at paragraph 61.

¹⁷ Case C-70/99 (n 10 above).

¹⁸ *Ibid.*

¹⁹ Case C-430/99 *Insepcteur van de Belastingdienst Douane, district Rotterdam v Sea-Land Services Inc. and Nedlloyd Lijnen BV*, [2002] ECR I-5235, at paragraph 32.

are necessary and proportionate, the tax constitutes a breach of the principle of freedom to provide services. According to the Authority, the Icelandic Government has not, to date, provided any grounds of public interest justifying this difference.

36. In *Sea-Land Service*,²⁰ the Court of Justice of the European Communities repeated its view that Article 59 EC (now Article 49 EC) requires not only the elimination of all discrimination on grounds of nationality against a person providing services, but also the abolition of any restriction, including a charge set by law for the performance of a service connected to a transport service. This requirement pertains even if the charge applies without distinction to national providers of services and to those from other Member States, when the restriction is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.

37. With regard to Regulation 2408/92, the purpose of which is to define the conditions for applying the principle of freedom to provide services in the air transport sector,²¹ the Authority refers to the first *Corsica Ferries*²² case, where the Court of Justice of the European Communities emphasised that rights arising from the freedom to provide transport services became tangible only following the adoption of secondary legislation containing the measures necessary to achieve freedom to provide services in maritime transport between Member States.

38. The Authority submits that the argument of the Icelandic Government that Regulation 2408/92 addresses solely the issue of access to air routes, as opposed to the collection of taxes, must be rejected. In support of this position, the Authority refers to the conclusion of the Court of Justice of the European Communities in *Commission v Italy*²³ that one of the purposes of Regulation No 2408/92 is to define the conditions for applying the principle of the freedom to provide services in the air transport sector.

39. As to the application of that regulation to airport taxes, the Authority argues that the reasoning of the Court of Justice of the European Communities in *Commission v Portugal*²⁴ is applicable to the case at hand. In that case, the Court of Justice concluded that the application of different rates of transport tax according to whether the journey in question was domestic or intra-Community ran counter to the principle of freedom to provide services, being a restriction on access to routes. The Authority contends that the Icelandic legislation does not

²⁰ Case C-430/99 (n 19 above), at paragraph 32.

²¹ Case C-447/99 (n 14 above), at paragraph 11.

²² Case 49/89 *Corsica Ferries France v Direction générale des douanes françaises* [1989] ECR 4441, at paragraph 10.

²³ Case C-447/99 (n 14 above), at paragraphs 11 and 12.

²⁴ Case C-70/99 (n 10 above), at paragraphs 20-22.

comply with the provisions of Regulation 2408/92 as interpreted in the light of Article 36 EEA, and states in this respect that it makes the provision of services between EEA States more difficult than the provision of services solely within one EEA State.

40. The Authority further cites *Portugal v Commission*,²⁵ where the Court of Justice of the European Communities found that, though applicable without discrimination, the national legislation at issue secured a special advantage for the domestic market by operating a distinction according to whether the vessels were engaged in internal transport or in intra-Community transport. In support of its finding of a restriction on the freedom to provide services, the Court of Justice of the European Communities further stated that the national legislation also conferred an advantage on carriers who operate more than others on domestic rather than international routes and so leads to dissimilar treatment being applied to equivalent transactions, thereby affecting free competition.

41. In support of its view that the Icelandic air passenger tax at issue is inconsistent with the freedom to provide services, the Authority refers to the recent judgment of the Court of Justice of the European Communities in a case governing the differentiated application of harbour dues for domestic and intra-Community traffic,²⁶ where the Court of Justice concluded that different harbour dues may be justified only where there are objective differences in the services provided to passengers.

42. The argument by the Icelandic Government that there is no basis for any kind of comparison between domestic and international flights, should, in the view of the EFTA Surveillance Authority, be rejected on the basis that there is no scope for a *de minimis* rule in respect of restriction on the freedom to provide services.²⁷

43. Moreover, the Authority asserts that the fact that the longest domestic route is 379 km, while the shortest route between Iceland and any other EEA State²⁸ is 1382 km, cannot justify a difference in taxes. In support of this allegation, the Authority refers to the opinion of the Court of Justice that distance or geographical location is not, in itself, sufficient to justify a difference in taxes.²⁹ Such a difference would be permissible only where there existed objective differences in the services provided to passengers by the airports.

²⁵ Case C-163/99 *Portuguese Republic v Commission of the European Communities* [2001] ECR I-2613, at paragraph 66.

²⁶ Case C-435/00 *Geha Naftiliaki EPE and others v NPDD Limeniko Tamio Dodekanisou and Elliniko Dimosio*, [2002] ECR I-10615, at paragraph 28.

²⁷ Case C-381/93 (n 3 above), Opinion of Advocate General Lenz, at paragraph 46.

²⁸ It is recalled that the EEA Agreement does not apply to Greenland and the Faroe Islands.

²⁹ Case C-435/00 (n 26 above), at paragraph 28.

44. In its *reply*, the Authority affirms its position, and stresses that it does not dispute the right, *per se*, of a State to impose a tax on international air passengers that is higher than that levied on domestic passengers, but that it continues to believe that the difference in the rates of air passenger tax in the present case is not justified.

45. The Authority elaborates on four points raised by the Icelandic Government in its statement of defence, namely:

- The claim that the markets are not comparable;
- The claim that there is no restriction on services;
- The arguments concerning costs; and
- Justifications on grounds of public interest.

46. With regard to the claim by the Icelandic Government that the markets are not comparable, the Authority submits that the Court of Justice of the European Communities has not been concerned with the examination of a competitive relationship between different routes, but rather with the restrictions on the right to exercise the basic freedoms guaranteed by the EEA Agreement.

47. The Authority suggests that the comment by the Court of Justice of the European Communities in *Portugal v Commission*³⁰ that flights from Lisbon to Porto and flights from Lisbon to Madrid are quite comparable, cannot be read to the effect that such comparability is a requirement. Likewise, the reference by the Court of Justice to the “*same number of landings of aircraft of the same type*”³¹ was simply a reference to the factual situation of the case.

48. According to the Authority, the Icelandic quote from *Sea-Land*³² is somewhat selective, and moreover, does not relate to Article 49 EC (ex 59 EC), but rather to the fundamental principle of non-discrimination.

49. The Authority states that the difference in air passenger tax is liable to impede or render less attractive the provision of international air services; and, no proof that a correlation exists between the amount of the international air passenger tax and the cost of the services benefiting international passengers has been forthcoming.

50. The Authority further raises a factual matter, namely the claim by the Icelandic Government that neither of the domestic airlines provides services to other EEA countries. The Authority questions this statement, since it is clear from the Annual Report of Icelandair for 2002 that one of the domestic airlines,

³⁰ Case C-163/99 (n 25 above).

³¹ Case C-163/99 (n 25 above)

³² Case C-430/99 (n 19 above).

Air Iceland (Flugfélag Íslands), is a sister company of Icelandair that provides scheduled flights between Iceland and European destinations.

51. Turning to the second issue, namely the Icelandic contention that there is no restriction on the freedom to provide services, the Authority responds that the fact that the level of airport taxes charged by other EEA States is higher or similar to those applicable in Iceland does not, in itself, constitute an adequate justification for the Icelandic air passenger tax at issue. The Authority emphasises that it is not the level of the tax that is at issue; it is rather the difference in the amount levied on domestic and international passengers.

52. The Authority further rejects the argument by the Icelandic Government that in examining restrictions on the freedom to provide services, it is necessary to look at airport taxes more broadly, and that air passenger tax merely constitutes one element. The Authority states that whether other taxes related to air travel constitute a restriction on the freedom to provide services contrary to Article 36 EEA is not the subject of the present action. It is solely the effect of the relative levels of air passenger tax imposed by Iceland that is relevant in the present case.

53. The Authority disputes the relevance of the scheme applicable in the Highlands and Islands of the United Kingdom. The inaction of the Commission with regard to that scheme cannot be interpreted as an endorsement of the British course of action. The Commission's choice not to pursue enforcement does not in any way dictate over the Authority. Moreover, it is settled case law that an EC State may not rely on the fact that other States have failed to perform their obligations in order to justify its own failure to fulfil its obligations under the EC Treaty³³ and this principle should also apply to the EFTA States under the EEA Agreement.

54. The Authority then turns to the third issue, namely the argument by the Icelandic Government that airport facilities required for international routes are more costly than those for domestic routes. The Authority admits that a difference in the type of service provided to domestic and to intra-EEA passengers may, as a matter of principle, justify a difference in the air passenger tax. However, the Authority contests that being so in the present case, since the available facts of the case do not fulfil the requirements set out in the case law. The Authority emphasises that the Icelandic Government has not thus far argued that the difference in the rates of air passenger tax is intended to compensate for the costs of providing the services and facilities required for international flights.

55. The Authority refers to *Sea Land Services*, according to which the mere imposition of a tax is a hindrance to the freedom to provide services. While such

³³ Case C-163/99 (n 25 above), at paragraph 22, Case C-146/89 *Commission of the European Communities v The United Kingdom of Great Britain and Northern Ireland*, [1991] ECR I-3533, at paragraph 47, and Case C-38/89 *Ministère Public v Guy Blanguernon* [1990] ECR I-0083, at paragraph 7.

a tax can be justified on the basis that it enables the State to cover the costs of providing the service to the persons subject to the particular tax, the principle of proportionality requires that there be a genuine connection between the costs connected to providing the service and the amount of the tax.³⁴

56. The Authority further states that where a tax differentiates between domestic and cross-border services, that difference in itself constitutes a restriction on the freedom to provide services.³⁵ It follows from the case law of the Court of Justice of the European Communities that it is then up to the State in question to demonstrate that the difference between the services provided to passengers on intra-EEA flights and those provided to passengers travelling between two airports within that State constitutes a compelling reason of public interest.³⁶ In that respect, economic aims do not constitute public policy grounds justifying different treatment of domestic and intra-EEA services.³⁷

57. The Authority admits that a difference in taxation between domestic and intra-EEA flights can be justified where the purpose and effect of the difference is to reflect the differing costs related to providing different services. However, the State concerned must prove that the difference in taxation is both necessary and proportionate.³⁸ The principle of proportionality requires that there be a genuine connection between the costs connected to providing the service and the amount of the tax.³⁹ If the amount levied includes cost factors chargeable to categories of persons or undertakings other than those subject to the particular tax this constitutes a breach of Article 36 EEA.⁴⁰ Moreover, as argued by Advocate General Alber, the State must actually show that the “*the rates of the passenger service tax ... [are] ...in fact proportionate to the expenditure necessary in each case*”.⁴¹ In other words, the difference in taxation must be demonstrated to correspond to an *associated* difference in costs connected with the provision of the service for which the tax is levied.⁴² Moreover, the level of a

³⁴ Case C-430/99, (n 19 above), at paragraph 41-42.

³⁵ Case C-381/93 (n 3 above), at paragraph 17. See also, Case C-158/96 (n 15 above), at paragraph 33, Case C-118/96 (n 11 above), at paragraph 23, Case C-157/99 (n 15 above), at paragraph 61, Case C-368/98 (n 15 above), at paragraph 44, Case C-17/00 (n 11 above), at paragraph 30, Case C-451/99 (n 15 above), at paragraph 30, Case C-136/00 (n 15 above), at paragraph 29, Case C-447/99 (n 14 above), at paragraphs 11 and 12, and Case C-163/99 (n 25 above), at paragraph 66.

³⁶ Case C-70/99 (n 10 above), at paragraph 30.

³⁷ Advocate General Alber in Case C-92/01, *Georgios Stylianakis v Elliniko Dimosio*, judgment of 2.3.2003, not yet reported, at paragraphs 29 and 33.

³⁸ Case C-70/99, (n 10 above), at paragraphs 29 and 30, and Case C-435/00 (n 26 above) at paragraphs 22-24.

³⁹ Case C-430/99 (n 19 above), at paragraphs 41-42.

⁴⁰ Case C-430/99 (n 19 above) at paragraph 43, and Advocate General Alber in Case C-435/00 (n 26 above), at paragraph 53.

⁴¹ Advocate General Alber in Case C-70/99 (n 10 above), at paragraph 52.

⁴² Case C-92/01 (n 37 above) at paragraphs 27 and 29.

particular amount levied must correspond, as far as possible, to the actual costs of providing the service.

58. The Authority points out that the Icelandic Government has not substantiated that the difference in the amount levied on the two groups of passengers is related to a corresponding difference in costs for providing the services. Moreover, the legislators' intention in having a different air passenger tax for domestic and international flights was, apparently, never to reflect an associated difference in the cost of providing services to the two groups of passengers, but rather to finance the construction and operation of domestic airports.

59. The Authority has submitted to the Court a study that it commissioned from an Icelandic economist, who concluded that the higher amount of the international air passenger tax did not reflect a similarly higher cost connected to the provision of services to international air passengers. In the absence of complete and accurate information, the economist based himself on a conservative approach, which is explained in detail by the Authority.⁴³ The economist calculated that, at the very most, the air passenger tax for international passengers should be ISK 608, and ISK 811 for domestic passengers.

60. The Authority points to one issue of legal interpretation that has not yet been addressed by the Court of Justice of the European Communities, namely the extent to which it is compatible with Article 49 EC, to require an individual user to finance part of the general related costs. The matter has, however, been discussed in detail by Advocate General Alber in *Sea-Land*,⁴⁴ where he concludes that it could not be ruled out that an individual user might be required to finance part of the general related costs as well as the specific costs of the services from which that individual benefits.

61. With regard to the standard of proof, *i.e.* the detail in which the State must prove that the difference in taxation corresponds to a similar difference in costs, the Authority refers to the requirement for actual figures set out by Advocate General Alber.⁴⁵

62. The Authority disputes the alternative argument by the Icelandic Government, that any restriction inherent in the different levels of air passenger tax is, in any event, justified on grounds of the public interest in the "compelling necessity" to provide basic airport services to remote parts of Iceland.⁴⁶ The laudable aim of constructing and maintaining airport facilities in the remote parts of the country cannot justify the difference in air passenger taxes at issue. The

⁴³ At paragraphs 33 to 40 in the Reply.

⁴⁴ Case C-430/99 (n 19 above), at paragraph 120 *et seq.*

⁴⁵ Advocate General Alber in Case C-70/99 (n 10 above), at paragraph 52. See also Case C-92/01 (n 37 above), at paragraphs 31-32.

⁴⁶ Paragraphs 2 and 51-72 of the Icelandic Government's Defence.

Authority also contends that the Icelandic Government has neither demonstrated, nor even argued, that the revenues from international and domestic air passenger taxes are used solely to build and maintain airport facilities for the group of persons that are subject to each type of tax.

63. The Authority also disputes that a justification on grounds of public interest can be based on the argument by the Icelandic Government that most domestic scheduled routes were on the verge of, or could in fact be made, public service obligation routes⁴⁷ and thereby either qualify or could qualify for State aid. In the Authority's opinion, the fact that a given measure might entail State aid cannot be used as a defence in relation to the assessment of whether that measure is compatible with the rules on free movement.⁴⁸ The principal aims which the Icelandic Government seeks to achieve with the air passenger tax might be fulfilled by some kind of aid scheme approved by the Authority under Article 61 EEA. However, State aid can only be granted if an aid scheme is in conformity with, *inter alia*, Article 36 EEA,⁴⁹ and this is not the case in relation to the air passenger tax. Furthermore, operating aid to air carriers can only be provided in two exceptional cases: either to compensate for public service obligations, or when the aid has a social character. The Authority concludes that neither of these possibilities appears to be fulfilled. In any event, proof of this nature cannot be made in the context of infringement proceedings relating to Article 36 EEA.

64. Referring to *Commission v Portugal*,⁵⁰ the Authority contends that a difference in the amounts of tax levied on domestic and international flights cannot be attributed to public service obligations designed to benefit certain regions where no public service obligation is in fact imposed upon the airlines serving those regions. Such obligations must be defined beforehand and any financial *quid pro quo* must be capable of being identified as specific compensation for those obligations. In this respect it is immaterial that the Icelandic Government explicitly states that its policy is not to impose public service obligations on the relevant flights. That policy decision obviously cannot serve as a justification for not following the obligations of the EEA Agreement.

The Republic of Iceland

65. In its *statement of defence*, the Icelandic Government states that its principal submission is that the lower rate of air passenger tax levied on flights within the domestic market, the Faeroe Islands and Greenland, in no way restricts or impedes the free provision of air services within the EEA. In support of this

⁴⁷ Paragraph 64 of the Icelandic Government's Defence.

⁴⁸ Case 249/81 *Commission v Ireland*, [1982] ECR-4005.

⁴⁹ Case C-225/91, *Matra SA v Commission*, [1993] ECR I-3203, at paragraph 41.

⁵⁰ Case C-70/99 (n 10 above).

submission, the Icelandic Government argues, firstly, that the taxes compensate airport services and facilities necessary for the processing of passengers, where the cost of these services is proportionately higher for international flights than domestic flights. Secondly, it argues that the markets are quite incomparable – eliminating the aspect of competition; and thirdly, the tax rate on international flights is in line with comparable intra-EEA passenger charges.

66. In the alternative, if the two-tiered tax is considered a hindrance to the provision of services, the Icelandic Government argues that it is in any event justified for compelling reasons of public interest. In support of this contention, it is argued that it is a necessary source of revenue for maintaining and building airports and airport facilities both for international and domestic flight services. These facilities are essential for the peripheral regions to secure a reliable means of transport to a population centre, which can provide administrative assistance, medical services and commercial facilities. The reduced tax rate on domestic services is therefore both necessary and proportional.

67. The Icelandic Government further contends that the lower tax rate for domestic services is aimed at maintaining and stimulating competition in providing services in the small and isolated Icelandic market. This is described as a transparent and simple way of providing indirect market support, to the benefit of all service providers willing to offer their services in this market.

Factual background and geographical situation

68. The Icelandic Government provides a detailed factual outline in support of its legal arguments. It states that the objective leading to the adoption of the Aviation Infrastructure Act was to secure a source of special revenue to construct and maintain airports and airport facilities necessary to provide air services in Iceland. At that time, there were many small airports in Iceland, most of them without any terminals and some with only gravel surface. There was one international airport situated in Keflavik, and no alternate airport was available if weather conditions were unfavourable. Facilities were quite unsatisfactory for security checks and customs clearance.

69. According to the Icelandic Government, there are currently scheduled flights to 13 airports in Iceland. Of those, nine airports can only accommodate landings by small and medium sized propeller driven aircraft. Three other domestic airports, Reykjavik, Akureyri and Egilsstadir, can accommodate larger aircraft such as jet transport aircraft, and are the alternative airports for international flights. The international airport in Keflavik has no scheduled domestic flights and approximately 98% of the international air traffic is handled there.

70. The 13 domestic airports serve a population of around 288,000 that live in a country with an area of approximately 103,000 km². More than two thirds of the population live within 50 km of the capital, Reykjavik, and the number of

passengers within the catchment area of each airport is very limited. The Icelandic Government states that it is difficult for the providers of air services to maintain a sustainable business. Scheduled domestic flight services have for the last few years been reduced severely. The airport infrastructure in Iceland has been aimed at serving regional population centres, so as to provide a minimum service to the outermost regions. Weather conditions can hamper flight services considerably within Iceland.

71. The Icelandic Government refers to the need for peripheral and regional areas to have minimum transport accessibility to a population centre for public services, commerce, education and culture. The criterion used in European discussion is that the travel time, using the fastest possible means of transport, should not exceed three hours. The Icelandic Government has stated that travelling time between any village in the country and Reykjavik, should never exceed three and a half hours. All scheduled flights within Iceland provide air transport between regional areas, which have a driving distance between major regional populations of between four and nine hours.

72. According to the Icelandic Government, there are two providers of scheduled passenger flight service within the domestic market and to the Faeroe Islands and Greenland,⁵¹ and neither of them provides services to other EEA countries. Currently there are also two companies operating scheduled flights between Iceland and European destinations.⁵² The Government states that neither of them offers domestic flights.

73. The Icelandic Government has twice held tenders for Public Service Obligation (“PSO”) flights, under the provisions of Article 4(1), Regulation 2408/92. No foreign air carrier showed any interest or made any bid as regards these tenders. In the Government’s view, it has therefore been very clear that the domestic market for air services in Iceland is very distinct and separate from the rest of the internal market of the EEA. In both instances, when deciding to allow PSO routes in Iceland, the Authority acknowledged that the air services at issue could be considered as services in the general economic interest.

74. According to the Icelandic Government, the geographical situation of Iceland makes the domestic market very distinct, in a manner which in no way places it in competition with international flights. The longest air-route within the domestic market is 379 km⁵³ while the shortest route in service between Iceland and the rest of the EEA is approximately 1350 km. As Iceland is an island, there are no other means of rapid and convenient transport between Iceland and the rest of Europe.

⁵¹ Flugfélag Íslands Ltd. and Íslandsflug Ltd.

⁵² Icelandair Ltd. and Iceland Express Ltd.

⁵³ It seems from the Statement of the Defence that the Government of Iceland here refers to routes within the island of Iceland and not to the Faroe Islands and Greenland, which are not covered by the EEA Agreement.

75. By its decision of 8 August 2001, the Authority has defined the regions of Iceland as regards assistance and levels of State aid in Iceland. The Icelandic Government emphasises that all airports in Iceland that only serve domestic flights are situated in areas which are defined as eligible for regional State aid by the Authority.

The Icelandic Government's principal submission

76. In support of its principal submission, that there is no restriction on the freedom to provide services, the Icelandic Government argues that the services at issue are not comparable and therefore the tax rates on those different services can not have the effect of impeding or restricting the provision of services in the markets. Only if the services were comparable, could the restrictive effect of dissimilar taxation or charges be assessed as a hindrance regarding the freedom to provide services.

77. The Icelandic Government refers to the ruling of the Court of Justice of the European Communities in *Commission v Portugal*,⁵⁴ where the Court of Justice stated that it has: “...had the occasion to rule that a measure that makes the provision of cross-border services more onerous than that of comparable domestic services amounts to a restriction of the freedom to provide services...”⁵⁵ In the same paragraph, a comparison is made between flights from Lisbon to Oporto and flights from Lisbon to Madrid, which are quite comparable. The Government states that no such comparison can be made regarding domestic flights and intra-EEA flights as regards Iceland.

78. The Icelandic Government further refers to the recent judgement *Stylinakis v Dimosio*,⁵⁶ where the Court of Justice of the European Communities also found that different taxation is justifiable where the services rendered for flights with higher taxation are more costly. The Court of Justice of the European Communities held that Article 3 (1) of Regulation 2408/92 should be interpreted as precluding different taxation, “...unless it is shown that those taxes compensate airport services necessary for the processing of passengers and that the cost of these services provided to passengers flying to other Member States is proportionally higher than the cost of those services necessary for the processing of passengers on domestic flights.”⁵⁷

79. The Government recalls that comparability is also a key issue in other rulings of the Court of Justice of the European Communities, which refer to

⁵⁴ Case 70/99 (n 10 above).

⁵⁵ At paragraph 28.

⁵⁶ Case C-92/01 (n 37 above).

⁵⁷ At paragraph 29.

“*analogous provision of services at domestic level*”⁵⁸ and “*comparable domestic services*.”⁵⁹

80. The Icelandic Government submits that there are significant differences in services between intra-EEA flights and domestic flights in Iceland. The services needed to accommodate international flights in Iceland are much more extensive and costly than those required for domestic flights. The differences in services result from the different facilities, personnel and technological equipment necessary, the different customs rules applicable, and the different requirements for small aircraft compared to jets.

81. The type of aircraft that can be used in domestic flights is limited to propeller driven planes less than 25 tons, and in fact only aircraft below 10 tons operate on routes to the nine airports that only serve domestic traffic. Purely domestic airports can only accommodate small, propeller driven aircraft that require shorter runways with less sophisticated surface and fewer facilities than jet planes. Only jet transport aircraft are used in international flights. The facilities and services available for aircraft operating in the domestic market are very small and simple, based on the requirements of the air carriers and the limited number of passengers using them. The domestic terminals are not built for customs inspections or passport control.

82. The Icelandic Government recalls that as Iceland is a party to the EEA Agreement, it is not part of the customs union of the EU. In *Commission v Portugal*,⁶⁰ Advocate General Alber refers to the fact that no passport control or customs checks are necessary within the Community. His reasoning is that this should support lower tax within the Community, compared to international flights.⁶¹ As Iceland has for the last two years been a party to the Schengen Agreement, passengers on flights originating within the Schengen area do not need to go through passport control. This is, however, not the case regarding intra-EEA flights from the United Kingdom and Ireland, since those EEA Members are not Schengen Members. Full passport control is needed for passengers on those flights, making the required provision of services for part of the EEA exactly the same as for flights for non-EEA destinations.

83. The Government states that in addition, there is always a need for customs checks irrespective of the country in which the flight originates. The EEA Agreement does not establish a customs union but only provides, in Article 21, for co-operation in the field of customs and facilitation of border controls. Therefore the requirements for facilities for customs clearance, technical equipment in that regard, and increased personnel to handle customs clearance

⁵⁸ Case C-381/93 (n 3 above), at paragraph 5.

⁵⁹ Case C-70/99 (n 10 above), at paragraph 28.

⁶⁰ *Ibid.*

⁶¹ Case C-70/99 (n 10 above), at paragraph 50.

are only needed for international flights. This constitutes a fundamental difference between domestic flights and international flights in Iceland, including EEA flights, which does not exist in EU countries.

84. The extensive services, facilities, and personnel required for accommodating international flights require space. In addition, technological equipment is much more sophisticated for international flights, due to various obligations arising from international police cooperation. The air terminals for international flights are required to have facilities to accommodate all these additional services and personnel. The three alternative airports also need facilities to keep cross-border passengers separate from domestic passengers, due to customs rules and security control.

85. In addition to the differences in services between domestic and international flights outlined above, the Icelandic Government contends that the intra-EEA air services are a distinct and separate market from the domestic Icelandic market.

86. The Icelandic Government submits that the tax rate on international flights, including flights from other EEA countries to Iceland, neither constitutes a barrier to the freedom to provide services nor renders it more difficult to provide intra-EEA air services. The distinctive markets of domestic and international air services in Iceland, with different types of aircraft, very different lengths of air routes and different geographical and meteorological conditions, create a situation that excludes any competition between the two markets. No service provider in the domestic market can effectively compete with the service providers in the international market, because of the distinctive and different requirements and demands of the consumers.

87. In support of its contention that the markets are separate, the Icelandic Government reiterates and develops the factual description of the domestic and international markets.

88. The market for air services within Iceland constitutes approximately 335 thousand passengers per year. On each domestic flight, there are 13-14 passengers on average. Domestic flight services are in direct competition with bus services and the use of private cars, since there are no train services in Iceland, and ferry services to only two scheduled flight destinations, the Westmann Islands and Grimsey Island. The potential consumer market is mostly domestic traffic, which is limited on grounds of the number of inhabitants, 288,000 people, although there is in addition some tourist traffic.

89. The market for international air services to and from Iceland constitutes approximately 1,400,000 passengers per year, with an average of approximately 80 passengers on each flight.

90. In support of its argument, the Icelandic Government refers to the statement of the Court of Justice of the European Communities in *Sea Land Services*,⁶² where the relevant markets were domestic transport services on the one hand, and intra-EEA services on the other: “...it is also true that a difference of treatment cannot constitute discrimination unless the circumstances in question are comparable...” and further, “...there are in this case objective differences between sea-going vessels longer than 41 meters and inland waterway vessels, in particular as concerns their respective markets - differences which reveal, moreover, that those two categories of means of transport are not comparable.”⁶³

91. The Icelandic Government emphasises that intra-EEA air services are a distinct and separate market from the Icelandic market. Because of this very clear distinction between the two markets, there is no possibility of a special advantage being secured for domestic service providers. Thus, the risk that different levels of taxation will allow domestic service providers to be indirectly compensated and supported through their international services is non-existent.

92. The Icelandic Government contrasts this situation with that in *Portugal v Commission*,⁶⁴ where the Court of Justice pointed out that the different landing charges in Portugal conferred an advantage on carriers who operated more on domestic routes rather than international routes. The Court of Justice of the European Communities stated that this led to dissimilar treatment being applied to equivalent transactions and therefore affected free competition.⁶⁵ In the same paragraph, the Court refers to the “...same number of landings of aircraft of the same type.” Contrarily, in Iceland, there are obvious differences in type, size, facilities, and quality.

93. In the view of the Government, therefore, the different types of aircraft, different length of air routes and different geographical and meteorological conditions, create a situation which excludes any competition between the two markets. No service provider in the domestic market can effectively compete with the service providers in the international market, because of the distinctive and different requirements and demands of the consumers

94. The Icelandic Government states that the only realistic option for travelling to neighbouring countries from Iceland is by air. There is no question of choosing whether to go by train or ferry from Iceland to a destination in the EEA. The providers of intra-EEA flights to and from Iceland are in direct competition with each other in offering services to destinations within the EEA, and they have a choice of four airports that can accommodate international flights

⁶² Case C-430/99 (n 19 above), at paragraph 36.

⁶³ Case C-430/99 (n 19 above), at paragraph 37.

⁶⁴ Case C-70/99, (n 10 above).

⁶⁵ Case C-163/99 (n 25 above), at paragraph 66.

in Iceland. There is, however, no overt or covert discrimination resulting from the reduced tax on the domestic flights, as the domestic and international markets are quite distinct and separate.

95. The Icelandic Government submits that the rate of airport taxes and charges in most EEA-States are higher than or similar to the rates on international flights to Iceland, and refers in this respect to a comparison of data accumulated by the Civil Aviation Administration in Iceland. With regard to passenger charges in particular, the Icelandic Government submits that passenger charges on international flights to Iceland are similar to or lower than in most neighbouring countries in Europe.

96. The total charges on each flight to European airports comprise many factors, including passenger service taxes, security taxes, landing charges and various other elements. When examining whether any one such tax constitutes a restriction on the freedom to provide air services, it is necessary to look at the whole picture, not just a fragment of it. When considering the overall effect of the various taxes and charges, it is not possible to see how the air passenger tax in Iceland can in any way be a hindrance to any air service provider looking to expand his market and offer his services in Iceland, when taxes and charges in other EEA countries are not considered to be such a restriction.

97. Airport taxes have not been harmonised within the EU and certainly not within the EEA, as direct taxation falls outside the application of the EEA Agreement. The Government therefore has full competence to decide the rate of its taxes, including air passenger taxes, within the limits of its obligations under the EEA Agreement.

98. The Icelandic Government submits that population dispersion and the characteristics of the outlying regions of Iceland should be taken into consideration when estimating the effect on free provision of services. In this regard, the Icelandic Government refers to the new air passenger tax system within the United Kingdom established in 2001, according to which £10 is the standard intra-EEA tax, while double the amount is charged for 1st class or luxury fares. However, certain passengers, and all flights on small aircraft (less than 10 tons), as well as all flights to peripheral areas in Scotland, usually referred to as “Highlands and Islands” are exempted from the air passenger tax.

99. In determining the areas where these exemptions apply, the UK has used a criterion based on population density, which shall not exceed 12.5 inhabitants per kilometre. In comparison, population density in Iceland is approximately 2.8 inhabitants per square kilometre or 4.7 if interior highlands are excluded. With regard to the special scheme of tax exemption in the Scottish Highlands and Islands, the Icelandic Government submits that the exemption from air passenger duties is considered vital in recognition of the reliance on air transport of the remote regions, even if there are both road transport and rail transport facilities available within most of the Scottish Highlands.

100. The Icelandic Government remarks that the Commission of the European Union has not seen reason to challenge the system in the United Kingdom, which has been in effect despite the recent judgments of the Court of Justice of the European Communities regarding air passenger taxes. The Authority seems to have adopted a different and much more stringent approach in the interpretation of the provisions regarding freedom to provide air services.

The Icelandic Government's alternative submission

101. The Icelandic Government then turns to its *alternative submission*, namely that even if the two different tax rates for the separate categories of air services in Iceland constitute a restriction on the freedom to provide services, such restriction is justified on grounds of public interest, in accordance with the case law of the Court of Justice of the European Communities.⁶⁶

102. The Government refers to the four main conditions established by the Court of Justice of the European Communities for such restrictions to be justified:

- The restriction has to be applied in a non-discriminatory manner;
- It must be justified by compelling reason of public interest;
- It has to be suitable for securing the attainment of the objective; and
- It must not go beyond what is necessary to attain that objective.

103. As to the first condition, the Government expresses the view that there is no discrimination entailed in the application of the measure at hand, and that the Authority seems to acknowledge this in its application, at paragraph 47.

104. With regard to the second condition, the Government asserts the existence of compelling reasons of public interest. In essence, the Government invokes both public policy and public security reasons, based on the necessity to provide basic airport services to the many remote parts of Iceland, and the importance of a special source of revenue for the construction and maintenance of such airport facilities.

105. Firstly, it is public policy in Iceland that the regional areas shall be provided with all the services possible to maintain the regional population and to prevent the depopulation of the regions towards the urban area in the south-western part of Iceland. It is essential for economic, environmental and social reasons to maintain habitation, although sparse, in all parts of Iceland. This is a policy widely accepted in the EEA and supported by the policy makers in the EU with structural assistance and legislation, taking social cohesion into account.

⁶⁶ Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, at paragraph 37, Case C-70/99 (n 10 above) Advocate General's opinion, at paragraph 48, Case C-430/99 (n 19 above), at paragraph 39.

106. The taxation on air passengers aims at securing the financing for building and maintaining an infrastructure of airports in Iceland, which has been an essential aspect of the regional policy, as well as part of Iceland's contribution to facilitate the provision of services and movement of people and goods, under the EEA Agreement.

107. A great emphasis has also been put on building alternate international airports in Akureyri in the North of Iceland, and in Egilsstaðir in the East of Iceland, so as to provide secure and dependable air services internationally. This has been very costly. The airport in Keflavik is still the main international airport in Iceland and the building of facilities there was a priority, especially in relation to Iceland's participation in the EEA, and later Schengen.

108. The alternatives available for transport to Iceland are few. Being an island, Iceland has no intra-EEA land transport by road or rail. Domestically, public or private transport by car is the only realistic option if there are no flight services, however, most roads are dirt roads and illumination of roads is very limited, Roads are often closed for periods of time in the winter.

109. Secondly, with regard to public security, the Icelandic Government emphasises the necessity of a good and secure airport network. Iceland does not have many optimally equipped hospitals and treatment centres. Many hospital services can only be provided in the capital. The need for a good airport infrastructure to transport patients by ambulance flights, to the sophisticated high-technology hospital services in the capital or other major cities, is therefore vital.

110. The revenues from the passenger tax have enabled the development of four airports in Iceland that can accommodate international flights. Service providers have taken advantage of these possibilities and sometimes offered services directly from the northern and eastern regions, mainly in the summer when the passenger traffic is sufficient to sustain such services.

111. In relation to public policy considerations and security concerns, the Government further states that the basic objective of the difference in taxation is to allocate the costs fairly, so that the passengers and airlines requiring the most costly services and facilities (international flights) also provide revenue that takes those issues into account.

112. The annual financing of the airport system in Iceland far exceeds the revenue from the air passenger service tax. The Government submits that a decision on tax rate and redistribution of financial support to the airport infrastructure and maintenance is within its exclusive competence.

113. In further support of compelling reasons of public interest, the Icelandic Government further invokes a public service aspect. In this respect the Government submits that profit margins on most scheduled domestic flights are

very narrow, due to the limited number of passengers. Most domestic services are on the verge of, or could in fact be made Public Service Obligation flights, according to Article 4(1) of Regulation 2408/92. Two scheduled air services, the Akureyri-Gjögur route, and Reykjavik-Höfn route, were made into PSO routes in 1999 and 2001 respectively, when it was foreseen that no airline would continue services there, unless compensation and market support were offered.

114. According to the Government, its policy has been to limit State aid in this sector as much as possible, changing air-routes into PSO flights only in very extreme situations. By levying a reduced air passenger tax on domestic flights, the Government endeavours to enable all service providers to maintain services in spite of the limited number of passengers, and also facilitates access to the Icelandic market for new service providers. Through this approach, the Government tries to ensure the necessary minimum public services, in relation to passengers, services, cargo and supplies. The reduced air passenger tax is therefore, in essence, indirect market support for air service providers who are willing to offer their services in this difficult and small market.

115. The Icelandic Government refers in this context to the Commission's guidelines on State aid in the aviation sector,⁶⁷ according to which direct operational subsidisation of air routes can be accepted, either in accordance with Article 4 (1) of Regulation 2408/92, or, on social grounds: "*The aid must have a social character, i.e. it must, in principle, only cover specific categories of passengers travelling on a route (e.g. children, handicapped people, low income people). However, in case the route concerned links an underprivileged region, mainly islands, the aid could cover the entire population of this region.*"⁶⁸ The Government asserts that this is directly relevant in the case of Icelandic domestic air services.

116. With regard to the third condition, that the restriction has to be suitable for securing the attainment of the objective, the Icelandic Government submits that differentiated air passenger taxes are quite suitable for the twofold purpose to be achieved: firstly, to enable more service providers to offer their services within the internal market, including the Icelandic market, and secondly, to maintain a minimum standard of service to the public in the regional and secluded areas of Iceland to enable transport of passengers and goods within the country.

117. In this regard the Icelandic Government contends that the provisions of Article 36 EEA, and the provisions of Regulation 2408/92, should not be interpreted to the effect that competition and freedom to provide services shall be reduced, by forcing more flights into Public Service Obligation requirements. This would not be in the spirit of the EEA Agreement. Nevertheless, this will be the outcome in the Icelandic market if the Authority's demands are

⁶⁷ Commission of the European Communities: *Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector* (94/C 350/07).

⁶⁸ *Ibid.*, at paragraph 24.

acknowledged. The small domestic market for air services would thereby to a large extent be supported directly by the State, giving one or two air carriers an effective monopoly and making it very difficult and unattractive for new service providers to enter the market.

118. The differentiated air passenger tax is the least interventionist means whereby the Government may facilitate the provision of air services in the Icelandic market by all service providers, irrespective of nationality or place of establishment. Putting most of the flights out to tender, under the provisions of Article 4(1) of Regulation 2408/92, would be a much more rigorous and restrictive method.

119. As to the fourth condition, the principle of proportionality, (that the restriction must not go beyond what is necessary to attain that objective) the Government submits that the air passenger tax is proportional in regard to both the services rendered and the cost of the flights. The alternative way of achieving the policy goals at issue, namely state aid to certain flight operators and monopoly on certain air routes as Article 4(1) of Regulation 2408/92 foresees, cannot be considered a more suitable approach. There is no provision in the Regulation, nor is there determined case law stating that no other provisions can be accepted than the ones found in that Article, as concerns special requirements of small and peripheral markets.

120. In its *Rejoinder*, the Government maintains its position and provides further arguments with regard to three of its main positions;

- the legal reasoning concerning comparable markets in relation to restriction of services;
- the relation between the air passenger tax and cost of services; and
- the regional and peripheral aspects regarding authorised support and state aid in air transport.

121. As to the first issue, the Government states that comparability is a prerequisite for differences in fees or treatment to be viewed as restrictive or discriminative.⁶⁹ The Government reiterates the citation from *Sea Land Services*, at paragraph 36, and extends it to include the references by the Court of Justice of the European Communities to *Francovich*⁷⁰ and *Germany v Commission*.⁷¹ The Government further analyses the factual background in *Sea Land Services*, stating that irrespective of its conclusion, the Court of Justice found real and valid differences between domestic and international transport, which led to the clear statement that the markets were not comparable.⁷²

⁶⁹ Case C-70/99 (n 10 above), at paragraph 28.

⁷⁰ Case C-479/93 *Francovich*, [1995] ECR I-3843, at paragraph 23.

⁷¹ Case C-156/98 *Germany v Commission*, [2000] ECR I-6857, at paragraph 84.

⁷² Case C-430/99 (n 19 above), at paragraph 37.

122. The Government disagrees with the EFTA Surveillance Authority that what is at issue is the *difference* in the amount of tax levied on domestic and international passengers, *per se*, and asserts that it is rather the *effects* of that difference. It is necessary to look at the case in real terms and reasonably examine whether a restriction may exist, based on the effect of the tax, not only consider the situation in elevated hypothetical terms that have little to do with the real situation. The Government submits that the Authority has not established that the *effects* of this difference in taxation are such that the freedom to provide services, protected by Article 36 EEA, is in any way restricted.

123. The Government explains that its comparison in its defence between Iceland and the Scottish Highlands, where no tax is charged on domestic flights, was based on the special situation concerning peripheral and regional areas in Iceland, difficult transportation and dangerous roads, weather conditions and other aspects that necessitate secure, affordable and dependable domestic air services. The EEA Agreement has as its goal to reach a dynamic and homogeneous European Economic Area, with common rules and equal conditions of competition. In light of the need for a harmonized approach in interpretation, enforcement and obligations in the internal market, the Government saw reason to draw attention to the practice of the Commission.

124. Turning to the second issue, the relation between taxation and cost of services, the Government identifies two elements that in its view constitute the essence of the dispute between the parties; firstly, whether there are objective justifications for the higher tax on international flights, such as the cost of the services rendered; and secondly, whether the tax on international passengers is in fact mainly used to subsidise and finance infrastructure and maintenance of domestic airports, and does therefore not benefit the passengers who pay the tax.

125. With regard to both of these issues, the Government reiterates that the cost of services rendered to international passengers far exceeds the revenue from the air passenger tax. According to the Government, the economic report commissioned by the EFTA Surveillance Authority and submitted to the Court in the *reply* suffers from misconceptions and miscalculations, which the Government seeks to correct by providing statistical data, and by explaining them in detail. Based on the calculations at hand, the tax has been very cautiously and fairly set, and is far from covering the cost that the State has of providing international air services.

126. The costs of upgrading the Akureyri and Egilsstaðir merely for domestic flights would have been approximately ISK 561 and 681 million respectively, as opposed to the actual costs of upgrading those airports to also accommodate international flights, which were ISK 925 and 1.836 million respectively.

127. The Government further states that the various tasks undertaken by the Icelandic Defence Force at the Keflavik Airport by virtue of an extensive bilateral Defence Agreement between the Government and the United States

entail costs that do not appear as statistics in the State Accounts and are therefore difficult to calculate at this juncture.

128. The operating cost for the Keflavik Civil Aviation Administration and the District Commissioner of Keflavik, whose activities solely relate to the international airport in Keflavik was close to ISK 1.122 million in 2001. The contribution from landing fees was ISK 590 million. The operating cost of the Keflavik air terminal can cautiously be estimated at ISK 878 million per year.

129. According to calculations by the Icelandic Aviation Authority submitted to the Court by the Icelandic Government, 38.4% of the total cost of operations regarding airports and air services within their field of operation, is attributable to international aviation services. The methodology underlying this finding is supported by the economic report submitted by the EFTA Surveillance Authority, which calculated a slightly higher percentage of costs attributable to international flights (42,1%). However, contrary to that report, the analysis by the Icelandic Aviation Authority takes into account all necessary factors.

130. While the total costs attributable to international operations, during the fifteen years that the airport tax has been in effect (1987-2002), is ISK 7.308 million, the total revenue from the air passenger tax on international passengers during the same period of time amounts to ISK 7.758 million. This specific cost, has therefore constituted approximately 94.2% of the total revenue, leaving 5.8% for other purposes. Consequently, there has hardly been any revenue to compensate the contributions from the State Budget to Keflavik Air Terminal, Keflavik Civil Aviation Authority or the District Commissioner at Keflavik Airport.

131. The Government submits that only a fraction of the cost of services concerning international aviation and international airports in Iceland is charged to passengers by means of the air passenger tax. The total annual revenue from the tax, including the domestic air passenger tax, only contributes a maximum 28-29% of a cautiously estimated and calculated, un-updated total cost.

132. The Government contends that it has acted in accordance with the statements of Advocate General Alber's Opinion in *Sea Land Services* on how thoroughly the charge or tax must be calculated.⁷³

133. The Government further notes that in *Sea Land Services*, the vessels on inland waterways (domestic traffic) did not have to pay part of the general cost of the system. Advocate General Alber came to the conclusion in *Sea Land Services* that the fact that other traffic did not have to bear these costs did not in itself constitute a breach of the principle of proportionality. That would only have been

⁷³ Case 430/99 (n 19 above), Advocate General Alber's Opinion at paragraph 123.

the case if the paying vessels would have to contribute to the cost of all of the vessels.⁷⁴

134. The Government submits that there is no obligation to charge a similar percentage of the cost of providing domestic services, to passengers on domestic routes, in which case the tax would have to be very high on the shortest routes, although the services are not expensive.

135. With regard to the third main issue addressed by the Government, the considerations of regional and peripheral policy, the Government emphasises that the comparison with the State aid rules, is primarily intended to establish two things. First, that by defining certain domestic routes as Public Service Obligation routes and compensating one air carrier for operating that route, in accordance with Regulation 2408/92, access for other air carriers to this route is hindered. Establishing PSO routes is therefore far more restrictive, in the sense of Article 36 EEA, than the contested Icelandic Act. Secondly, the two PSO tenders that were published in the Official Journal in 1999 and 2001 did not, as expected, attract any offers from non-domestic flight operators, which further demonstrate that the two markets in question are distinctly separate and not comparable.

136. The Government holds that in its view, and contrary to the EFTA Surveillance Authority, the air passenger tax does have a social aspect. The tax does not impose the total cost of providing a domestic network of air services necessary to maintain basic living conditions on the few domestic passengers. It rather recovers one-fourth to one-third of the cost of the extensive services enjoyed by international passengers.

137. The cost of building a domestic airport network is paid by the State. The cost is therefore borne by all the taxpayers in Iceland irrespective of whether they need air services regularly, only on occasion or only in case of a need for an ambulance flight. The Government does not believe that this policy can be contrary to its obligations under the EEA Agreement.

The Commission of the European Communities

138. The Commission points out that the first two recitals of Regulation 2408/92 make it clear that the very purpose of the Regulation is to define the conditions for applying in the air transport sector the principle of the freedom to provide services. Article 3(1) of that Regulation does not make any distinction between routes within a Member State and those between Member States: all routes are “routes within the Community” or, for the purposes of the EEA Agreement, “routes within the EEA.”

⁷⁴ Case 430/99 (n 19 above), at paragraph 127.

139. The Commission states that the principle of the freedom to provide services 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 purely within one Member State, irrespective of whether there is discrimination on the grounds of nationality or residence.

140. The Commission refers in particular to *Commission v Portugal*,⁷⁵ Case C-447/99 *Commission v Italy*⁷⁶ and *Stylianakis v Dimosio*,⁷⁷ and states that the situation in those cases was essentially identical to the present case. Differences in the taxes to be paid by passengers will automatically be reflected in the transport cost so that, if the tax is lower for domestic flights, access to such flights will be favoured over access to intra-EEA flights.

141. Furthermore, even if the criterion used to differentiate the amount of tax imposed were ostensibly neutral, the principles referred to above would, nevertheless, apply where the most onerous tax would specifically concern non-domestic flights.

142. With regard to the argument by the Icelandic Government that the matter at hand only concerns taxation, the Commission states that national authorities must exercise their competence in respect of direct taxation consistently with EEA law, and refers in this respect to *Hörður Einarsson v The Icelandic State*⁷⁸ and to judgments by the Court of Justice of the European Communities.⁷⁹

143. On this basis, the Commission comes to the conclusion, which coincides with that of the Authority, that the Republic of Iceland has failed to respect its obligations under Article 36 EEA and Article 3(1) of Council Regulation (EEC) No 2408/92.

Per Tresselt
Judge-Rapporteur

⁷⁵ Case C-70/99 (n 10 above).

⁷⁶ Case C-447/99 (n 14 above).

⁷⁷ Case C-92/01 (n 37 above).

⁷⁸ Case E-1/01 *Hörður Einarsson v The Icelandic State*, at paragraph 17.

⁷⁹ Case C-136/00 *Danner*, (n 15 above), at paragraph 28, Case C-80/94 *Wielockx* (n 11 above) at paragraph 16, Case C-264/96 (n 7 above), at paragraph 19, Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, at paragraph 19, and Case C-35/98 *Verkooijen* [2000] ECR I-4071, at paragraph 32.

Case E-2/03

Ákærvaldið (The Public Prosecutor)

against

Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson

(Jurisdiction – admissibility – fish products – Protocol 9 to the EEA Agreement – rules of origin – Protocol 4 to the EEA Agreement – Free Trade Agreement EEC-Iceland)

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Summary of the Judgment

1. The procedure provided for by Article 34 of the Surveillance and Court Agreement is a specially established means of judicial co-operation between the Court and national courts with the aim of providing the national courts with the necessary elements of EEA law to decide the case before them. It is for the national court to determine, in light of the particular circumstances of the case, both the need for an Advisory Opinion in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. The Court is bound, under Article 34 of the Surveillance and Court Agreement, to give interpretations of the EEA Agreement where that is considered necessary to enable a national court to give judgment. However, the Court does not answer general or hypothetical questions.

2. Provisions of the EEA Agreement as well as procedural provisions of the Surveillance and Court Agreement are to be interpreted in the light of fundamental rights. The provisions of the European Convention of Human Rights and the judgments of the European Court of Human Rights are important sources for determining the scope of these rights.

As a means of inter-court cooperation in cases where the interpretation of EEA law becomes necessary, the procedure established under Article 34 of the Surveillance and Court Agreement contributes to the proper functioning of the EEA Agreement to the benefit of individuals and economic operators. There is no reason to consider the allegation that the reference of the case to the EFTA Court prolongs the duration of proceedings and thereby infringes Arti-

Mál E-2/03

Ákærvaldið

gegn

Ásgeiri Loga Ásgeirssyni, Axel Pétri Ásgeirssyni og Helga Má Reynissyni

(Lögsaga – lagaskilyrði beiðni um ráðgefandi álit – fiskafurðir – bókun 9 við EES-samninginn – upprunareglur – bókun 4 við EES samninginn – fríverslunarsamningur EBE-Ísland)

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Samantekt

1. Málsmeðferð samkvæmt 34. gr. stofnanasamningsins felur í sér sérstakt samstarfsferli milli dómstólsins og landsdómstóla. Því ferli var komið á til að veita landsdómstólum nauðsynlegar skýringar á EES-löggjöf, svo kveða megi upp dóma í málum, sem rekin eru fyrir þeim. Það er landsdómstólsins að ákveða í ljósi málsatvika, bæði hvort nauðsynlegt sé að leita ráðgefandi álits og um þýðingu þeirra spurninga, sem beint er til EFTA-dómstólsins fyrir málið. EFTA-dómstólnum ber samkvæmt 34. gr. stofnanasamningsins að veita ráðgefandi álit á túlkun EES-samningsins, þegar það er talið nauðsynlegt til að landsdómstóll geti kveðið upp dóm í máli, sem rekið er fyrir honum. Dómstóllinn svarar hins vegar ekki spurningum, sem eru

almenns eðlis eða án tengsla við sakarefni máls.

2. Ákvæði EES-samningsins sem og málsmeðferðarreglna stofnanasamningsins ber að túlka með hliðsjón af grundvallarréttindum. Ákvæði Mannréttindasáttmála Evrópu og dómar Mannréttindadómstóls Evrópu eru mikilvægar heimildir til skilgreiningar á slíkum réttindum.

Það fyrirkomulag, sem mælt er fyrir um í 34. gr. stofnanasamningsins felur í sér samvinnu dómstóla í tilvikum, þar sem túlkun EES-réttar er nauðsynleg, og stuðlar þannig að réttri framkvæmd EES-samningsins til hagsbóta einstaklingum og aðilum í atvinnurekstri. Ekki er ástæða fyrir

cle 6 of the European Convention of Human Rights when, as in the present case, the time period from the registration of the request to the delivery of judgment amounts to a little more than five months.

3. Whereas the free trade agreements between the EFTA States and the then European Community in 1972 and 1973 were concluded on a bilateral basis and belong to the sphere of public international law, the conclusion of the multilateral EEA Agreement in 1992 led to a high degree of integration, with objectives which exceed those of a mere free trade agreement. It created an international treaty *sui generis* which contains a distinct legal order of its own. This legal order as established by the EEA Agreement is characterized by the creation of an internal market, the protection of the rights of individuals and economic operators and an institutional framework providing for effective surveillance and judicial review.

As a point of departure, the Court has no jurisdiction over the application or interpretation of the Free Trade Agreement between the European Economic Community and the Republic of Iceland, signed on 22 July 1972.

The Court is, however, competent under Article 34 of the Surveillance and Court Agreement to interpret the Protocols to the EEA Agreement unless another result clearly follows from the provisions of the Agreement. No provision of relevant law concerning its jurisdiction prevents the Court from interpreting Article 7 of Protocol 9. The provision is phrased in a way that explicitly calls for an assessment of which of two trade regimes is more favourable in a given factual situation. This scenario is to be distinguished from an interpretation of the Free Trade Agreement.

In light of the wording, scheme and purpose of Article 7 of Protocol 9, the term “trade regime” must be understood as not extending to the rules of origin contained in the Free Trade Agreement. The rules of origin contained in Protocol 4 to the EEA Agreement therefore apply.

4. Defrosting, heading, filleting, boning, trimming, salting and packing of fish frozen whole that was imported from outside the EEA does not constitute sufficient working and processing within the meaning of Protocol 4 EEA in order for the products to obtain EEA originating status. Whether the purpose was to simply preserve the fish or to produce a speciality remains irrelevant.

dómstólinn að fjalla um þá málsástæðu að álitsbeiðnin tefji málareksturinn og brjóti þar með gegn 6. gr. Mannréttindasáttmála Evrópu þegar tíminn frá skráningu málsins í málaskrá dómstólsins og þar til dómur er kveðinn upp er fimm mánuðir, líkt og í máli þessu.

3. Fríverslunarsamningar þeir, sem gerðir voru milli EFTA-rikkanna og þáverandi Efnahagsbandalags Evrópu árin 1972 og 1973 eru hefðbundnir tvíhliða þjóðréttarsamningar. Gerð hins fjölþjóðlega EES-samnings árið 1992 leiddi á hinn bóginn til samruna á háu stigi og setti markmið, sem ganga lengra en venjulegt er um fríverslunarsamninga. Til varð þjóðréttarsamningur sérstaks eðlis (*sui generis*), sem felur í sér sérstakt og sjálfstætt réttarkerfi. Það réttarkerfi, sem komið var á fót með EES-samningnum, einkennist af stofnun innri markaðar, vernd réttinda einstaklinga og aðila í atvinnurekstri og stofnanafyrirkomulag, sem tryggir virkt eftirlit með framkvæmd samningsins, og úrskurðarvald dómstóla í ágreiningsefnum.

Almennt verður að ganga út frá því, að dómstóllinn hafi ekki lögsögu til að túlka fríverslunarsamninginn milli Efnahagsbandalags Evrópu og Lýðveldisins Íslands, sem undirritaður var 22. júlí 1972.

Samkvæmt 34. gr. stofnanasamningsins hefur EFTA-dómstóllinn hins vegar lögsögu til að túlka bókanir við EES-samninginn, nema aðra niðurstöðu megi augljóslega leiða af ákvæðum samningsins. Engar viðeigandi réttarheimildir standa því í vegi, að dómstóllinn sé bær til að túlka 7. gr. bókunar 9 EES. Orðalag greinarinnar kallar skýrlega á mat á því, hvor samninganna veiti betri viðskiptakjör við tilteknar aðstæður. Gera verður greinarmun á slíku mati og túlkun á fríverslunarsamningnum.

Í ljósi orðalags, uppbyggingar og tilgangs 7. gr. bókunar 9 EES ber að skilja hugtakið “viðskiptakjör” svo að það nái ekki til upprunareglna fríverslunarsamningsins. Því ber að beita upprunareglum bókunar 4 EES.

4. Þíðun, hausun, flökun, beinhreinsun, snyrting, söltun og pökkun á heilfrystum fiski, sem var fluttur inn á EES, getur ekki talist nægileg aðvinnsla í skilningi bókunar 4 EES til þess að varan geti talist upprunnin á EES. Ekki skiptir máli hvort tilgangurinn var eingöngu að halda fiskinum óskemmdum eða að framleiða sérvöru.

JUDGMENT OF THE COURT

12 December 2003*

*(Jurisdiction – admissibility – fish products – Protocol 9 to the EEA Agreement –
rules of origin – Protocol 4 to the EEA Agreement – Free Trade Agreement EEC-
Iceland)*

In Case E-2/03,

REQUEST to the Court by the *Héraðsdómur Reykjaness* (Reykjanes District Court) under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in criminal proceedings brought by

Ákærvaldið (The Public Prosecutor)

against

Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson

on the interpretation of the rules of origin in trade in fish, as referred to in Protocols 4 and 9 to the EEA Agreement and Protocols 3 and 6 to the Free Trade Agreement between the European Economic Community and the Republic of Iceland of 22 July 1972,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Tresselt and Thorgeir Örlygsson, Judges,

Registrar: Lucien Dedichen,

* Language of the Request: Icelandic.

DÓMUR EFTA-DÓMSTÓLSINS

12. desember 2003*

(Lögsaga – lagaskilyrði beiðni um ráðgefandi álit – fiskafurðir – bókun 9 við EES-samninginn – upprunareglur – bókun 4 við EES-samninginn – fríverslunarsamningur EBE-Ísland)

Mál E-2/03

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

Ákærvaldið

gegn

Ásgeiri Loga Ásgeirssyni, Axel Pétri Ásgeirssyni og Helga Má Reynissyni

varðandi túlkun á upprunareglum, sem gilda um viðskipti með fisk, í bókunum 4 og 9 við EES-samninginn, og bókunum 3 og 6 við samninginn milli Efnahagsbandalags Evrópu og Lýðveldisins Íslands, sem undirritaður var 22. júlí 1972.

DÓMSTÓLLINN,

skipaður dómurinum Carl Baudenbacher, forseta og framsögumanni, Per Tresselt og Þorgeiri Örlygssyni,

dómritari: Lucien Dedichen

* Beiðni um ráðgefandi álit á Íslensku.

having considered the written observations submitted on behalf of:

- the Ríkislögreglustjóri, acting as Public Prosecutor, by Helgi Magnús Gunnarsson, Police Attorney;
- Ásgeir Logi Ásgeirsson, by Rúna S. Geirsdóttir, District Court Advocate;
- Axel Pétur Ásgeirsson, by Magnús Thoroddsen, Supreme Court Advocate;
- Helgi Már Reynisson, by Lárentsínus Kristjánsson, Supreme Court Advocate;
- the Government of Iceland, by Finnur Þór Birgisson, Legal Officer, Ministry of Foreign Affairs, acting as Agent;
- the EFTA Surveillance Authority, by Per Andreas Bjørgan and Arne Torsten Andersen, Officers, Legal & Executive Affairs, acting as Agents;
- the Commission of the European Communities, by Xavier Lewis, Member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

having heard oral argument of the Ríkislögreglustjóri, represented by Helgi Magnús Gunnarsson; Ásgeir Logi Ásgeirsson, represented by Rúna S. Geirsdóttir; Axel Pétur Ásgeirsson, represented by Magnús Thoroddsen; the Government of Iceland, represented by Finnur Þór Birgisson; the EFTA Surveillance Authority, represented by Per Andreas Bjørgan; the Commission of the European Communities, represented by Xavier Lewis at the hearing on 24 October 2003,

gives the following

Judgment

I Facts and procedure

- 1 By a decision dated 27 June 2003, registered at the Court on 9 July 2003, the Héraðsdómur Reykjaness submitted five questions to the Court for an Advisory Opinion in a case pending before it between the Ríkislögreglustjóri (The National Commissioner of the Icelandic Police, acting as Public Prosecutor in this case) and Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson (hereinafter, jointly, the “defendants”). Those questions arose from criminal proceedings initiated on the basis of a charge issued by the Ríkislögreglustjóri on 20 September 2002.

hefur með tilliti til skriflegra greinargerða frá:

- ríkislögreglustjóra, sem fer með ákærvaldið, í fyrirsvari er Helgi Magnús Gunnarsson, ftr.;
- ákærða, Ásgeiri Loga Ásgeirssyni, í fyrirsvari sem umboðsmaður er Rúna S. Geirsdóttir, hdl., Seltjarnarnesi;
- ákærða, Axel Pétri Ásgeirssyni, í fyrirsvari sem umboðsmaður er Magnús Thoroddsen, hrl., Reykjavík;
- ákærða, Helga Má Reynissyni, í fyrirsvari sem umboðsmaður er Lárentsínus Kristjánsson, hrl., Keflavík;
- ríkisstjórn Íslands, í fyrirsvari sem umboðsmaður er Finnur Þór Birgisson, lögfræðingur, utanríkisráðuneytinu;
- eftirlitsstofnun EFTA, í fyrirsvari sem umboðsmenn eru Per Andreas Bjørgan og Arne Torsten Andersen, á lögfræði- og framkvæmdasviði;
- framkvæmdastjórn Evrópubandalaganna, í fyrirsvari sem umboðsmaður er Xavier Lewis hjá lagadeildinni,

með tilliti til skýrslu framsögumanns,

og munnlegs málflutnings fulltrúa ríkislögreglustjóra, Helga Magnúsar Gunnarssonar; fulltrúa Ásgeirs Loga Ásgeirssonar, Rúnu S. Geirsdóttur; fulltrúa Axels Péturs Ásgeirssonar, Magnúsar Thoroddsen; fulltrúa ríkisstjórnar Íslands, Finns Þórs Birgissonar; fulltrúa Eftirlitsstofnunar EFTA, Per Andreas Bjørgan; fulltrúa framkvæmdastjórnar Evrópubandalaganna, Xavier Lewis, sem fram fór hinn 24. október 2003,

kveðið upp svofelldan

dóm

I Málsatvik og meðferð máls

- 1 Með úrskurði, dagsettum 27. júní 2003, og beiðni, sem skráð var í málaskrá EFTA-dómstólsins þann 9. júlí 2003, óskaði Héraðsdómur Reykjaness eftir ráðgefandi álitum um fimm spurningar, er upp komu í refsímáli, sem rekið er fyrir héraðsdómi, milli ákærvaldsins, sem er í höndum ríkislögreglustjóra, og Ásgeirs Loga Ásgeirssonar, Axels Péturs Ásgeirssonar og Helga Má Reynissonar (“ákærðu”). Refsimálið var höfðað með opinberri ákæru útgefinni af ríkislögreglustjóra þann 20. september 2002.

- 2 The defendant Ásgeir Logi Ásgeirsson and the defendant Axel Pétur Ásgeirsson were both employed as managing directors of the fish processing company Sæunn Axels ehf (“Sæunn Axels”). The defendant Helgi Már Reynisson was the managing director of the import/export company Valeik ehf (“Valeik”). The principal reproach of the Ríkislögreglustjóri is that the defendants violated the Customs Act (tollalög) and the General Penal Code (almenn hegningarlög) by having conspired to export illegally to five EC countries (namely Spain, Italy, Denmark, France and Greece), on 76 occasions, a total of 803,962 kg of processed cod products. The alleged violations took place between 15 January 1998 and 30 December 1999.
- 3 The fish had been caught off the coasts of Alaska and Russia by foreign fishing vessels. It was imported frozen by Valeik and the raw materials were subsequently processed by Sæunn Axels. The export of the processed products was undertaken by Valeik. It is alleged that the employees of Valeik made false declarations on invoices and export documents delivered to the Director of Customs and the District Commissioner of Akureyri, stating that the products originated in Iceland. As a result of these declarations, the products enjoyed tariff preferences when imported into the EC countries concerned, in accordance with Protocol 9 to the EEA Agreement, as if they had been of Icelandic origin. It is alleged that the defendants thus circumvented the obligation to pay customs duties on the products on their import. The aggregate customs duties that have allegedly been evaded in this manner total a minimum of ISK 56,976,103.
- 4 The Héraðsdómur referred the following questions to the Court:
 1. *Does the term “trade regimes” in Article 7 of Protocol 9 to the EEA Agreement and Appendix 3 to the same Protocol, extend to the rules of origin contained in the agreement between the European Economic Community and the Republic of Iceland, signed on 22 July 1972, so as to prevail over the rules of origin contained in Protocol 4 to the EEA Agreement?*
 2. *If the rules of origin contained in Protocol 4 to the EEA Agreement are, notwithstanding the provisions of Article 7 of Protocol 9 EEA, considered to apply to the circumstances of the case, then does defrosting, heading, filleting, boning, trimming, salting and packing fish that has been imported frozen whole to Iceland from countries outside the EEA constitute sufficient working and processing within the meaning of these rules for the product to be considered of Icelandic origin?*
 3. *Irrespective of whether the Court takes a position on the interpretation of Protocol 3 to the Agreement of 1972, interpretation is requested of the rules of origin contained in Protocol 4 to the EEA Agreement as to whether defrosting, heading, filleting, boning, trimming, salting and packing fish that has been imported into Iceland frozen whole from countries outside*

2. Ákærðu, Ásgeir Logi Ásgeirsson og Axel Pétur Ásgeirsson, voru báðir framkvæmdastjórar hjá fiskvinnslufyrirtækinu Sæunn Axels ehf. (“Sæunn Axels”). Ákærði, Helgi Már Reynisson, var framkvæmdastjóri hjá inn-/útflutningsfyrirtækinu Valeik ehf. (“Valeik”). Hinum ákærðu er í refsímalinu gefið að sök að hafa brotið gegn ákvæðum tollalaga og almenkra hegningarlaga með því að hafa sammælt um að flytja ólöglega út til fimm landa Evrópubandalagsins (Spánar, Ítalíu, Danmerkur, Frakklands og Grikklands) í 76 skipti samtals 803.962 kg af unnum þorskafuldum. Því er haldið fram, að hin meintu brot hafi átt sér stað á tímabilinu 15. janúar 1998 til 30. desember 1999.
3. Fiskurinn, sem um ræðir í málinu, var veiddur af erlendum fiskiskipum við strendur Alaska og Rússlands og fluttur frosinn til Íslands af Valeik, þar sem hann var unninn hjá Sæunni Axels. Valeik annaðist síðan útflutning á afurðunum. Því er haldið fram, að starfsmenn Valeikar hafi gefið út rangar yfirlýsingar á vörureikningum og útflutningsskýrslum með afurðunum, sem afhentar voru hjá embætti Tollstjórans í Reykjavík og Sýslumannsins á Akureyri, um að afurðirnar væru af íslenskum uppruna. Afurðirnar hafi vegna þessara röngu yfirlýsinga notið tollfríðinda við innflutning til áðurgreindra landa Evrópubandalagsins í samræmi við bókun 9 við EES samninginn sem væru þær íslenskar. Því er haldið fram, að ákærðu hafi með þessu komist hjá að greiða toll af afurðunum við innflutning, sem að lágmarki hafi numið 56,976,103 ísk. kr.
4. Í beiðni Héraðsdóms Reykjaness um ráðgefandi álit voru eftirfarandi spurningar bornar undir EFTA-dómstólinn:
 1. *Tekur orðið “viðskiptakjör” í 7. gr. bókunar 9 við EES-samninginn, sbr. og 3. viðbæti við þá bókun, til upprunareglna þeirra sem er að finna í samningi milli Efnahagsbandalags Evrópu og Lýðveldisins Íslands sem undirritaður var 22. júlí 1972, þannig að þær gangi framar upprunareglum þeim sem er að finna í bókun 4 við EES-samninginn?*
 2. *Ef upprunareglur bókunar 4 við EES-samninginn verða þrátt fyrir ákvæði 7. gr. bókunar 9, taldar eiga við um atvik málsins, telst þíðun, hausun, flökun, beinhreinsun, snyrting, söltun og pökkun fisks sem fluttur hefur verið heilfrystur til Íslands frá löndum utan EES-svæðisins nægileg aðvinnsla í skilningi þeirra reglna til þess að varan teljist af íslenskum uppruna?*
 3. *Án tillits til þess hvort dómstóllinn taki afstöðu til skýringar á bókun 3 við samninginn frá 1972 er óskað skýringa á upprunareglum bókunar 4 við EES-samninginn um það hvort þíðun, hausun, flökun, beinhreinsun, snyrting, söltun og pökkun fisks sem fluttur hefur verið heilfrystur til Íslands frá löndum utan EES-svæðisins teljist nægileg aðvinnsla til þess að varan teljist af íslenskum uppruna?*

the EEA constitutes sufficient working and processing for the product to be considered of Icelandic origin.

4. *If Article 7 of Protocol 9 to the EEA Agreement is considered to apply to the rules of origin contained in the Agreement between the European Economic Community and the Republic of Iceland referred to in question 1, and if these rules of origin are considered to prevail over the rules of origin contained in Protocol 4 to the EEA Agreement, and if the EFTA Court is competent to provide an opinion on the interpretation of the rules of origin of this agreement, is then the processing of the type described in question 2 sufficient working and processing in the sense of the Protocol in question in order for the product to be considered of Icelandic origin?*
5. *Subject to the same proviso regarding the competence of the EFTA Court to interpret the Agreement between the European Economic Community and the Republic of Iceland which was signed on 22 July 1972, to which member states of the European Union does Protocol 6 to that agreement apply?*

5 By a letter dated 8 October 2003, the Court made a request for clarification to the national court under Article 96(4) of the Rules of Procedure concerning two issues, namely which version of Protocol 4 EEA and Protocol 3 to the Free Trade Agreement the national court considered relevant and the nationality of the vessels that caught the fish. The national court replied to these questions by a letter dated 20 October 2003.

II Legal background

6 Article 2 EEA reads:

“For the purposes of this Agreement:

(a) the term "Agreement" means the main Agreement, its Protocols and Annexes as well as the acts referred to therein;...”

7 Article 20 EEA reads:

“Provisions and arrangements that apply to fish and other marine products are set out in Protocol 9.”

8 Article 119 EEA reads:

“The Annexes and the acts referred to therein as adapted for the purposes of this Agreement as well as the Protocols shall form an integral part of this Agreement.”

4. *Ef 7. gr. bókunar 9 við EES-samninginn verður talin taka til upprunareglna í samningi milli Efnahagsbandalags Evrópu og Lýðveldisins Íslands sem vísað er til í spurningu 1 og þær upprunareglur verða álitnar ganga framur upprunareglum bókunar 4 við EES-samninginn og EFTA-dómstóllinn verður talinn bær um að láta í té álit um skýringu upprunareglna þessa samnings, telst þá vinnsla af því tagi sem lýst er í spurningu 2 nægileg aðvinnsla í skilningi þeirrar bókunar til þess að varan verði talin af íslenskum uppruna?*
 5. *Með sama fyrirvara um bægni EFTA-dómstólsins til þess að skýra samninginn milli Efnahagsbandalags Evrópu og Lýðveldisins Íslands sem undirritaður var 22. júlí 1972, til hvaða aðildarlanda í Evrópusambandinu tekur bókun 6 við þann samning?*
- 5 Með vísan til 4. tl. 96. gr. starfsreglna EFTA-dómstólsins óskaði dómstóllinn þann 8. október 2003 eftir skýringu Héraðsdóms Reykjaness varðandi tvö atriði. Annars vegar hvaða útgáfur bókunar 4 við EES-samninginn og bókunar 3 við fríverslunarsamninginn héraðsdómur teldi eiga við í málinu. Hins vegar frá hvaða landi þau skip væru, sem veitt hefðu þann fisk, sem málið fyrir héraðsdómi varðar. Héraðsdómur svaraði þessum spurningum með bréfi dagsettu 20. október 2003.

II Löggjöf

- 6 Ákvæði 2. gr. EES er svohljóðandi:

“Í þessum samningi merkir:

(a) hugtakið “samningur” meginmál samningsins, bókanir við hann og viðauka auk þeirra gerða sem þar er vísað til;...”
- 7 Ákvæði 20. gr. EES er svohljóðandi:

“Ákvæði og fyrirkomulag varðandi fisk og aðrar sjávarafurðir er að finna í bókun 9.”
- 8 Ákvæði 119. gr. EES er svohljóðandi:

“Viðaukar, svo og gerðir sem vísað er til í þeim og aðlagðar eru vegna samnings þessa, skulu auk bókana vera óaðskiljanlegur hluti samningsins.”

9 Article 120 EEA reads:

“Unless otherwise provided in this Agreement and in particular in Protocols 41 and 43, the application of the provisions of this Agreement shall prevail over provisions in existing bilateral or multilateral agreements binding the European Economic Community, on the one hand, and one or more EFTA States, on the other, to the extent that the same subject matter is governed by this Agreement.”

10 Articles 2(1), 4, 5 and 6 of Protocol 4 to the EEA Agreement (“Protocol 4 EEA”), as replaced by Decision No 71/96 of the EEA Joint Committee of 22 November 1996 (OJ 1997 L 21, p. 12, applying from 1 January 1997) read as follows:

“Article 2 General requirements

1. A product shall be considered to be originating in the EEA within the meaning of this Agreement if it has been either wholly obtained there within the meaning of Article 4 or sufficiently worked or processed in the EEA within the meaning of Article 5. For this purpose, the territories of the Contracting Parties to which this Agreement applies, shall be considered as a single territory.

Article 4 Wholly obtained products

1. The following shall be considered as wholly obtained in the EEA:

- (a) mineral products extracted from their soil or from their seabed;
- (b) vegetable products harvested there;
- (c) live animals born and raised there;
- (d) products from live animals raised there;
- (e) products obtained by hunting or fishing conducted there;
- (f) products of sea fishing and other products taken from the sea outside the territorial waters of the Contracting Parties by their vessels;
- (g) products made aboard their factory ships exclusively from products referred to in subparagraph (f);
- (h) used articles collected there fit only for the recovery of raw materials, including used tyres fit only for retreading or for use as waste;
- (i) waste and scrap resulting from manufacturing operations conducted there;
- (j) products extracted from marine soil or subsoil outside their territorial waters provided that they have sole rights to work that soil or subsoil;
- (k) goods produced there exclusively from the products specified in subparagraphs (a) to (j).

9 Ákvæði 120. gr. EES er svohljóðandi:

“Ef ekki er kveðið á um annað í samningi þessum og einkum í bókunum 41 og 43 skulu ákvæði samningsins ganga framur ákvæðum í gildandi tvíhliða eða marghliða samningum sem Efnahagsbandalag Evrópu annars vegar og eitt eða fleiri EFTA-ríki hins vegar eru bundin af að því leyti sem samningur þessi tekur til sömu efnisatriða.”

10 Ákvæði 1. mgr. 2. gr. og 4., 5., og 6 gr. bókunar 4 við EES samninginn (“Bókun 4 EES”), eins og henni var breytt með ákvörðun sameiginlegu EES nefndarinnar nr. 71/96 frá 22. nóvember 1996 (OJ 1997 L 21, bls. 12, í gildi frá 1. janúar 1997), eru svohljóðandi:

“2. grein Almennar kröfur

1. Framleiðsluvara telst upprunnin á EES í skilningi þessa samnings ef hún er fengin að öllu leyti þar í skilningi 4. gr. eða hefur hlotið nægilega aðvinnslu á EES í skilningi 5. gr. Yfirráðasvæði samningsaðila sem þessi samningur tekur til, skal teljast eitt yfirráðasvæði að því er þetta varðar.

4. grein Framleiðsluvara fengin að öllu leyti

1. Eftirtaldar vörur teljast fengnar að öllu leyti á EES:

- (a) jarðefni unnin úr jörðu þess eða úr hafsbotni þess;
- (b) vörur úr jurtaríkinu sem þar eru ræktaðar;
- (c) lifandi dýr sem þar eru borin og alin;
- (d) afurðir lifandi dýra sem þar eru alin;
- (e) veiðibráð og fiskafurðir sem aflað er með veiðum þar;
- (f) sjávarafurðir og aðrar afurðir teknar úr sjó utan landhelgi samningsaðila af skipum þeirra;
- (g) vörur framleiddar um borð í verksmiðjuskipum þeirra, eingöngu úr afurðum sem getið er í f-lið;
- (h) notaðar vörur sem þar er safnað og eingöngu er unnt að nota til að vinna hráefni úr, þar á meðal notaðir hjólbarðar sem nýtast eingöngu til sólunar eða sem úrgangur;
- (i) úrgangur og rusl sem til fellur vegna framleiðslustarfsemi þar;
- (j) vörur unnar úr yfirborðslögum hafsbotnsins utan landhelgi samningsríkjanna, að því tilskildu að þau hafi einkarétt á að vinna úr þessum lögum;
- (k) vörur sem þar eru framleiddar eingöngu úr þeim framleiðsluvörum sem tilgreindar eru í a- til j-lið.

2. The terms ‘their vessels’ and ‘their factory ships’ in paragraph 1 (f) and (g) shall apply only to vessels and factory ships:

(a) which are registered or recorded in an EC Member State or an EFTA State;

(b) which sail under the flag of an EC Member State or an EFTA State;

(c) which are owned to an extent of at least 50 % by nationals of EC Member States or of an EFTA State, or by a company with its head office in one of these States, of which the manager or managers, Chairman of the Board of Directors or the Supervisory Board, and the majority of the members of such boards are nationals of EC Member States or of an EFTA State and of which, in addition, in the case of partnerships or limited companies, at least half the capital belongs to those States or to public bodies or nationals of the said States;

(d) of which the master and officers are nationals of EC Member States or of an EFTA State; and

(e) of which at least 75 % of the crew are nationals of EC Member States or of an EFTA State.

Article 5 Sufficiently worked or processed products

1. For the purposes of Article 2, products which are not wholly obtained are considered to be sufficiently worked or processed when the conditions set out in the list in Annex II are fulfilled.

The conditions referred to above indicate, for all products covered by this Agreement, the working or processing which must be carried out on non-originating materials used in manufacturing and apply only in relation to such materials. Accordingly, it follows that if a product which has acquired originating status by fulfilling the conditions set out in the list is used in the manufacture of another product, the conditions applicable to the product in which it is incorporated do not apply to it, and no account shall be taken of the non-originating materials which may have been used in its manufacture.

2. Notwithstanding paragraph 1, non-originating materials which, according to the conditions set out in the list, should not be used in the manufacture of a product may nevertheless be used, provided that:

(a) their total value does not exceed 10 % of the ex-works price of the product;

(b) any of the percentages given in the list for the maximum value of non-originating materials are not exceeded through the application of this paragraph.

This paragraph shall not apply to products falling within Chapters 50 to 63 of the Harmonized System.

3. Paragraphs 1 and 2 shall apply except as provided in Article 6.

Article 6 Insufficient working or processing operations

1. Without prejudice to paragraph 2, the following operations shall be considered as insufficient working or processing to confer the status of originating products, whether or not the requirements of Article 5 are satisfied:

2. Orðin “skip þeirra” og “verksmiðjuskip þeirra” í f- og g-lið 1. mgr. gilda aðeins um skip og verksmiðjuskip:

(a) sem eru skráð eða skrásett í aðildarríki EB eða EFTA-ríki;

(b) sem sigla undir fána aðildarríkis EB eða EFTA-ríkis;

(c) sem eru að minnsta kosti 50 af hundraði í eign ríkisborgara aðildarríkja EB eða EFTA-ríkis, eða í eign fyrirtækis sem hefur aðalstöðvar í einu þessara ríkja enda sé framkvæmdastjóri eða framkvæmdastjórar þess stjórnarformaður eða formaður umsjónarnefndar og meirihluti stjórnarnefndarmanna eða umsjónarnefndarmanna ríkisborgarar aðildarríkja EB eða EFTA-ríkis; auk þess sem að minnsta kosti helmingur höfuðstóls sé í eigu þessara ríkja eða opinberra stofnana eða ríkisborgara nefndra ríkja, ef um er að ræða sameignarfélög eða hlutafélög;

(d) þegar skipstjóri og yfirmenn eru ríkisborgarar aðildarríkis EB eða EFTA-ríkis; og

(e) þegar að minnsta kosti 75 af hundraði áhafnarinnar eru ríkisborgarar aðildarríkja EB eða EFTA-ríkis.

5. grein Framleiðsluvörur sem hlotið hafa nægilega aðvinnslu

1. Að því er varðar 2. gr. skulu framleiðsluvörur sem ekki eru fengnar að öllu leyti teljast hafa hlotið nægilega aðvinnslu hafi skilyrðum í II. viðauka verið fullnægt.

Skilyrði þessi kveða á um aðvinnslu efna sem eru ekki upprunaefni og eru notuð við framleiðslu þeirra vara sem samningur þessi tekur til, og gilda þau einungis um slík efni. Af þeim sökum skal framleiðsluvara sem telst upprunavara vegna þess að skilyrðum sem sett eru í lista um hana er fullnægt, og er notuð við framleiðslu annarrar vöru, ekki þurfa að fullnægja skilyrðum sem gilda um vöruna sem hún er sett saman við, og skal ekki taka tillit til þess að efnin sem notuð eru við framleiðslu hennar eru ekki upprunaefni.

2. Þrátt fyrir 1. mgr., skal efni sem ekki telst upprunaefni ekki notað við framleiðslu þessarar vöru, samkvæmt þeim skilyrðum sem sett eru í lista um hana, nema því aðeins að:

(a) heildarverðmæti þeirra sé ekki meira en 10 af hundraði af verksmiðjuverði framleiðsluvörunnar;

(b) ekki sé farið fram úr einni eða fleiri hundraðshlutatölum af því hámarksverðmæti sem gefið er upp fyrir efni sem ekki teljast upprunaefni og fram koma í listanum, vegna beitingar þessarar málsgreinar.

Þessi málsgrein gildir ekki um framleiðsluvörur sem teljast til 50. – 63. kafla í samræmdu tollskránni.

3. Ákvæði 1. og 2. mgr. gilda nema að því leyti sem kveðið er á um í 6. gr.

6. grein Ófullnægjandi aðvinnsla

1. Með fyrirvara um 2. mgr. teljast eftirfarandi aðgerðir ófullnægjandi aðvinnsla sem ekki veitir upprunaréttindi óháð því hvort kröfum 5. gr. hefur verið fullnægt:

- (a) operations to ensure the preservation of products in good condition during transport and storage (ventilation, spreading out, drying, chilling, placing in salt, sulphur dioxide or other aqueous solutions, removal of damaged parts, and like operations);
- (b) simple operations consisting of removal of dust, sifting or screening, sorting, classifying, matching (including the making-up of sets of articles), washing, painting, cutting up;
- (c) (i) changes of packaging and breaking up and assembly of packages;
- (ii) simple placing in bottles, flasks, bags, cases, boxes, fixing on cards or boards, etc., and all other simple packaging operations;
- (d) affixing marks, labels and other like distinguishing signs on products or their packaging;
- (e) simple mixing of products, whether or not of different kinds, where one or more components of the mixtures do not meet the conditions laid down in this Protocol to enable them to be considered as originating in the EEA;
- (f) simple assembly of parts to constitute a complete product;
- (g) a combination of two or more operations specified in subparagraphs (a) to (f);
- (h) slaughter of animals.

2. All the operations carried out in the EEA on a given product shall be considered together when determining whether the working or processing undergone by that product is to be regarded as insufficient within the meaning of paragraph 1.”

11 Article 2(1) of Protocol 9 to the EEA Agreement on Trade in Fish and other Marine Products (“Protocol 9 EEA”) reads as follows:

“The Community shall, upon entry into force of the Agreement, abolish custom duties on imports and charges having equivalent effect on the products listed in Table II of Appendix 2.”

12 Article 3 of Protocol 9 EEA reads as follows:

“The provisions of Articles 1 and 2 shall apply to products originating in the Contracting Parties. The rules of origin are set out in Protocol 4 EEA of the Agreement.”

13 Article 7 of Protocol 9 EEA reads as follows:

“The provisions of the agreements listed in appendix 3 shall prevail over provisions of this Protocol to the extent they grant to the EFTA States concerned more favourable trade regimes than this Protocol.”

(a) aðgerð til að tryggja að framleiðsluvörur haldist óskemmdar meðan á flutningi og geymslu standur (viðrun, breiðsla, þurrkun, kæling, þækilsöltun, niðurlagning í brennisteinsvatn eða aðrar vatnsupplausnir, fjarlæging skemmdra hluta og sambærilegar aðgerðir);

(b) einfaldar aðgerðir til að rykhreinsa, sigta eða sálða, sundurgreina, flokka, velja saman (þar á meðal að útbúa hluti í samstæður), þvo mála eða hluta í sundur;

(c) (i) skipti á umbúðum, svo og uppskipting og sameining;

(ii) einföld setning á flöskur, glös, í poka, kassa, öskjur, á spjöld eða töflur o.s.frv. og allar aðrar einfaldar þökkunaraðgerðir;

(d) festing merkja, miða eða annarra slíkra auðkenna á framleiðsluvörur eða umbúðir þeirra;

(e) einföld blöndun framleiðsluvara, hvort sem um er að ræða ólíkar vörur eða ekki, þar sem einn eða fleiri ihlutar blöndunnar fullnægja ekki skilyrðum þeim um uppruna á EES sem sett eru í þessari bókun;

(f) einföld samsetning vöruhluta þannig að úr verði fullgerð framleiðsluvara;

(g) sameining tveggja eða fleiri aðgerða sem tilgreindar eru í a- til f-lið;

(h) slátrun dýra.

2. Litið skal á allar aðgerðir, sem fara fram á EES á tiltekinni framleiðsluvöru, sem eina heild þegar ákvarðað er hvort aðvinnsla hennar teljist ófullnægjandi í skilningi 1. mgr.”

11 Ákvæði 1. mgr. 2. gr. bókunar 9 við EES-samninginn um viðskipti með fisk og aðrar sjávarafurðir (“bókun 9 EES”) er svohljóðandi:

“Bandalagið skal við gildistöku samningsins fella niður innflutningstolla og gjöld sem hafa samsvarandi áhrif af þeim vörum sem tilgreindar eru í töflu II í 2. viðbæti.”

12 Ákvæði 3. gr. bókunar 9 EES er svohljóðandi:

“Ákvæði 1. og 2. gr. skulu gilda um vörur sem eru upprunnar hjá samningsaðilum. Upprunareglur er að finna í bókun 4 við samninginn.”

13 Ákvæði 7. gr. bókunar 9 EES er svohljóðandi:

“Ákvæði samninganna sem taldir eru upp í 3. viðbæti skulu hafa forgangsgildi gagnvart ákvæðum þessarar bókunar að því leyti sem viðkomandi EFTA-ríkjum eru þar veitt betri viðskiptakjör en gert er í þessari bókun.”

- 14 Appendix 3 to Protocol 9 EEA refers to three Agreements concluded between the Community and individual EFTA States. With regard to Iceland, the Appendix mentions in its third indent:

“Article 1 of Protocol No 6 of the Agreement between the European Economic Community and the Republic of Iceland signed on 22 July 1972.”

- 15 The Agreement between the European Economic Community and the Republic of Iceland of 22 July 1972 (OJ 1972 L 301, p. 1; Special English Edition December 1972, p. 3; the “Free Trade Agreement”) was accompanied by, *inter alia* Protocols 3 and 6. Protocol 3 to the Free Trade Agreement contains the rules of origin and was amended several times, *inter alia* by Decision No 1/96 of the EC-Iceland Joint Committee of 19 December 1996 (OJ 1997 L 195, p. 101).
- 16 Protocol 6 to the Free Trade Agreement concerning the special provisions applicable to imports of certain fish products into the Community provides in its Article 1:

“1. As regards the products listed below and originating in Iceland:

(a) no new customs duty shall be introduced in trade between the Community and Iceland,

(b) Article 3(2), (3) and (4) of the Agreement shall apply to imports into the Community as originally constituted, Ireland and the United Kingdom. The date for the first tariff reduction shall, however, be 1 July 1973 and not 1 April 1973.

[the following table refers to certain products under, *inter alia*, Common Customs Tariff heading No 03.01 - Fish, fresh (live or dead), chilled or frozen: B. Saltwater fish: II.: Fillets: (b) frozen C. Livers and roes – No 03.02 – Fish, dried, salted or in brine; smoked fish, whether or not cooked before or during the smoking process: C. Livers and roes – No 16.04 – Prepared or preserved fish, including caviar and caviar substitutes: Caviar and caviar substitutes]

[...]

2. Customs duties on imports into the Community of the following products originating in Iceland:

[the following table refers to Common Customs Tariff heading No 03.01 – Fish, fresh (live or dead), chilled or frozen: B. Saltwater fish: I. Whole, headless or in pieces: ... (h) Cod (*Gadus morrhua* or *Gadus callarias*) ...]

shall be adjusted to the following levels:

[...]

for products falling within subheadings Nos 03.01 B I h ...

[the following table mentions “Rates applicable to imports into the Community as originally constituted and Ireland”, as well as to imports into the United Kingdom, Denmark and Norway. The rate applicable as from 1 January 1976 is 3,7.]

- 14 Viðbætur 3 með bókun 9 EES vísar til þriggja samninga milli bandalagsins og einstakra EFTA ríkja. Hvað Ísland varðar, segir í þriðja lið:

“Ákvæði 1. gr. bókunar nr. 6 við samninginn milli Efnahagsbandalags Evrópu og Lýðveldisins Íslands sem undirritaður var 22. júlí 1972.”

- 15 Við samninginn milli Efnahagsbandalags Evrópu og Lýðveldisins Íslands sem undirritaður var 22. júlí 1972 (OJ 1972 L 301, bls. 1; sérstakur viðbætur á ensku, desember 1972, bls. 3; hér eftir “fríverslunarsamningurinn”) voru m.a. gerðar tvær bókanir. Annars vegar bókun 3 og hins vegar bókun 6. Bókun 3 við fríverslunarsamninginn sem inniheldur upprunareglur hefur verið breytt nokkrum sinnum, m.a. með ákvörðun sameiginlegu nefndar EB og Íslands nr. 1/96 frá 19. desember 1996 (OJ 1997 L 195, bls. 101).

- 16 Í 1. gr. bókunar 6 við fríverslunarsamninginn, varðandi sérstök ákvæði um innflutning til bandalagsins á tilteknum sjávarafurðum, segir:

“1. Að því er varðar afurðir, sem taldar eru hér á eftir og upprunnar eru á Íslandi:

(a) verða engir nýir tollar teknir upp í viðskiptum Efnahagsbandalagsins og Íslands,

(b) verður ákvæðum 2., 3. og 4. tl. 3. gr. samningsins beitt við innflutning til Efnahagsbandalagsins, í upphaflegri mynd þess, til Írlands og til Bretlands, þó þannig að fyrstu tollalækkunarverðum 1. júlí 1973 í stað 1. apríl 1973.

[Eftirfarandi tafla vísar til tiltekinna vara í sameiginlegu tollskránni sem m.a. falla undir nr. 03.01– Fiskur, nýr (lifandi eða dauður), kældur eða frystur: B. úr sjó: II: flök (b) fryst C. lifur, hrogn og svil. - Nr. 03.02 – Fiskur, þurrkaður, saltaður eða í saltlegi; reyktur fiskur, einnig soðinn áður eða jafnframt reykingu: C. lifur, hrogn og svil. - Nr. 16.04 – Fiskur, tilreyddur eða niðursoðinn, þar með talin styrjuhrogn og eftirlíkingar þeirra: A. styrjuhrogn og eftirlíkingar þeirra.]

[...]

2. Innflutningstollar Efnahagsbandalagsins á eftirtöldum afurðum upprunnum á Íslandi:

[eftirfarandi tafla vísar til sameiginlegu tollskrárinnar nr. 03.01 – Fiskur, nýr (lifandi eða dauður), kældur eða frystur: B. úr sjó: I. heill, hausður eða skorinn í bita: ... (h) þorskur (Gadus morrhua or Gadus callarias) ...]

breytast þannig:

[...]

fyrir vörur í tollskrárnúmeri 03.01 B I h ...

[Eftirfarandi tafla vísar til tolls “á innflutning til bandalagsins, í upphaflegri mynd þess, og til Írlands”, sem og innflutnings til Bretlands, Danmerkur og Noregs. Tollurinn nemur 3.7 % frá og með 1. janúar 1976.]

The reference prices established in the Community for imports of these products shall continue to apply.”

- 17 The defendants argue that the 1996 amendment to Protocol 4 EEA as well as the 1996 amendment to Protocol 3 to the Free Trade Agreement were not lawfully published in Iceland. They therefore can not be applied to the case at issue in the main proceedings. This view is essentially shared by the Ríkislögreglustjóri. In response to the request for clarification made by the Court pursuant to Article 96(4) of the Rules of Procedure (see paragraph 5 hereof), the Héraðsdómur Reykjaness declared that it was unable to provide a definitive answer before the final judgment in the case is to be rendered.
- 18 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

III Findings of the Court

Admissibility of the questions

- 19 It is contested by the defendant, Mr Helgi Már Reynisson, that the questions referred to the EFTA Court by the Héraðsdómur Reykjaness, with the exception of the first question, fulfil the criterion of being “necessary” in the sense of Article 34(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (the “Surveillance and Court Agreement”). This view is shared by the defendant, Mr Axel Pétur Ásgeirsson, with regard to the second and the third questions, and by the Government of Iceland with regard to the first, fourth and fifth questions.
- 20 Whether an answer to the questions of the Héraðsdómur is necessary within the meaning of Article 34 of the Surveillance and Court Agreement is to be distinguished from the issue of the EFTA Court’s competence with regard to provisions of the Free Trade Agreement. The Court will deal with the latter issue in its answer to the first, fourth and fifth questions.
- 21 The Court refers to its settled case law according to which the procedure provided for by Article 34 of the Surveillance and Court Agreement is a specially established means of judicial co-operation between the Court and national courts with the aim of providing the national courts with the necessary elements of EEA law to decide the case before them. According to Article 34 of the Surveillance and Court Agreement, a national court or tribunal, if it considers it necessary to enable it to render judgment, may request the EFTA Court to give an Advisory Opinion. From the wording, which in essential parts is identical to that in Article 234 EC, it follows that it is for the national court to assess whether an interpretation of the EEA Agreement is necessary for it to give judgment (see

Varðandi innflutning þessara afurða gildir það viðmiðunarverð, sem Efnahagsbandalagið ákveður.”

- 17 Ákærðu halda því fram, að þær breytingar, sem gerðar voru á bókun 4 EES árið 1996, og þær breytingar, sem gerðar voru á bókun 3 við fríverslunarsamninginn sama ár, hafi ekki verið birtar með lögmætum hætti á Íslandi. Af þeim sökum eigi þær ekki við í máli því, sem rekið er fyrir Héraðsdómi Reykjaness. Ríkislögreglustjóri tekur í grundvallaratriðum undir þetta sjónarmið. Í svari Héraðsdóms Reykjaness við beiðni EFTA-dómstólsins um skýringu á grundvelli 4. tl. 96. gr. starfsreglna dómstólsins, sem vísað er til í 5. málsgrein dóms þessa, kom fram, að ekki væri unnt að gefa ákveðið svar við spurningunum, áður en dómur héraðsdóms yrði kveðinn upp.
- 18 Vísað er til skýrslu framsögumanns um frekari lýsingu löggjafar, málsatvika og meðferðar málsins, svo og um greinargerðir, sem dómstólnum bárust. Þessi atriði verða ekki rakin eða rædd hér á eftir, nema forsendur dómsins krefji.

III Álit dómstólsins

Lagaskilyrði beiðni um ráðgefandi álit

- 19 Ákærði, Helgi Már Reynisson, mótmælir því, að skilyrði 2. mgr. 34. gr. samningsins milli EFTA-ríkjana um stofnun eftirlitsstofnunar og dómstóls (hér eftir “stofnanasamningurinn”), um nauðsyn fyrirspurnar, sé fullnægt að því er varðar aðrar spurningar en þá fyrstu. Ákærði Axel Pétur Ásgeirsson tekur undir þessi mótmæli að því er varðar aðra og þriðju spurningu og ríkisstjórn Íslands að því er varðar fyrstu, fjórðu og fimmtu spurningu.
- 20 Álitaefni um nauðsyn þess að beina fyrirspurn til EFTA-dómstólsins í skilningi 34. gr. stofnanasamningsins verður að greina frá því álitaefni, hvort dómstóllinn sé bær til að túlka fríverslunarsamninginn. Dómstóllinn mun fjalla um síðarnefnda álitaefnið í svari sínu við fyrstu, fjórðu og fimmtu spurningu.
- 21 Dómstóllinn vísar til fyrri úrlausna sinna, þar sem fram kemur, að málsmeðferð samkvæmt 34. gr. stofnanasamningsins felur í sér sérstakt samstarfsferli milli dómstólsins og landsdómstóla. Því ferli var komið á til að veita landsdómstólum nauðsynlegar skýringar á EES-löggjöf, svo kveða megi upp dóma í málum, sem rekin eru fyrir þeim. Samkvæmt 34. gr. stofnanasamningsins getur dómstóll í EFTA-ríki, ef hann telur það nauðsynlegt til að geta kveðið upp dóm, farið fram á, að EFTA-dómstóllinn veiti honum ráðgefandi álit. Af þessu orðalagi, sem er í grundvallaratriðum samhljóða 234. gr. Rómarsamningsins, leiðir, að mat á því, hvort nauðsynlegt sé að leita ráðgefandi álits, er í höndum landsdómstóla (sjá mál E-1/95 *Samuelsson* gegn *Svíþjóð* [1994-1995] skýrsla EFTA-dómstólsins 145, 13. lið). Það er landsdómstólsins að ákveða í ljósi málsatvika, bæði hvort nauðsynlegt sé að leita ráðgefandi álits og um þýðingu þeirra spurninga, sem beint er til EFTA-dómstólsins fyrir málið (sjá mál E-5/96 *Ullensaker kommune o. fl.* gegn *Nille* [1997] skýrsla EFTA-dómstólsins 30, 12. lið). EFTA-dómstólnum

Case E-1/95 *Samuelsson v Svenska Staten* [1994-1995] EFTA Ct. Rep. 145, at paragraph 13). It is for the national court to determine, in light of the particular circumstances of the case, both the need for an Advisory Opinion in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see Case E-5/96 *Ullensaker kommune and others v Nille* [1997] EFTA Ct. Rep. 30, at paragraph 12). The Court is bound, under Article 34 of the Surveillance and Court Agreement, to give interpretations of the EEA Agreement where that is considered necessary to enable a national court to give judgment. However, the Court does not answer general or hypothetical questions (see Case E-6/96 *Wilhelmsen v Oslo kommune* [1997] EFTA Ct. Rep. 53, at paragraph 40).

- 22 In the case at hand, the Héraðsdómur essentially seeks to clarify whether the fish products at issue in the main proceedings have to be regarded as being of EEA or Icelandic origin under the rules of origin provided for in either Protocol 4 EEA or Protocol 3 to the Free Trade Agreement. The five questions referred to the Court are phrased in a manner as to cover the issue comprehensively and to include every possible alternative. In this regard, they are closely related to each other and should be dealt with together. The subject matter of the case before the Héraðsdómur concerns the origin of the relevant products. Therefore it may be of relevance to establish whether EEA rules on that matter apply to the case and how they are to be interpreted. In these circumstances, it lies within the discretion of the national court to determine whether an Advisory Opinion is necessary (see, to that effect, Case E-5/96 *Nille*, at paragraph 13). In light of the above, the Court concludes that the questions cannot be regarded as being of general or hypothetical nature.
- 23 As regards Mr Reynisson's allegation that the reference of the case to the EFTA Court prolongs the duration of proceedings and thereby infringes Article 6 of the European Convention of Human Rights, the Court notes that it is not clear whether this issue has been raised before the national court. The Court adds that it has found on earlier occasions that provisions of the EEA Agreement as well as procedural provisions of the Surveillance and Court Agreement are to be interpreted in the light of fundamental rights (see to that extent, Case E-8/97 *TV 1000 Sverige v Norway* [1998] EFTA Ct. Rep. 68, at paragraph 26; Case E-2/02 *Technologien Bau- und Wirtschaftsberatung and Bellona v EFTA Surveillance Authority*, judgment of 19 June 2003, not yet reported, at paragraph 37). The provisions of the European Convention of Human Rights and the judgments of the European Court of Human Rights are important sources for determining the scope of these rights. Article 6(1) ECHR grants the right "to a fair and public hearing within a reasonable time". However, the European Court of Human Rights held in a case concerning a delay of two years and seven months due to a reference by the national court to the Court of Justice of the European Communities for a preliminary ruling, that this period of time cannot be taken into consideration in the assessment of the length of a particular set of proceedings. The European Court of Human Rights stated that "[...] to take it into account would adversely affect the system instituted by Article 177 of the EEC Treaty and work against the aim pursued in substance in that Article" (Case

- ber samkvæmt 34. gr. stofnanasamningsins að veita ráðgefandi álit á túlkun EES-samningsins, þegar það er talið nauðsynlegt til að landsdómstóll geti kveðið upp dóm í máli, sem er rekið fyrir honum. Dómstóllinn svarar hins vegar ekki spurningum, sem eru almenns eðlis eða án tengsla við sakarefni máls (sjá mál E-6/96 *Wilhelmsen gegn Oslo kommune* [1997] skýrsla EFTA-dómstólsins 53, 40. lið).
- 22 Með fyrirspurn sinni er héraðsdómur í meginatriðum að leita skýringa á því, hvort fiskur sá, sem um ræðir í aðalmálinu, teljist upprunninn á EES-svæðinu eða á Íslandi samkvæmt upprunareglum bókunar 4 EES eða bókunar 3 við fríverslunarsamninginn. Orðalag spurninganna fimm er með þeim hætti, að þær ná yfir álitafnin í heild sinni og taka til allra mögulegra kosta. Í þessu sambandi eru þær nátengdar, og því er rétt að fjalla um þær saman. Þar sem refsímálið fyrir héraðsdómi snertir uppruna viðkomandi vara, kann það að skipta máli, hvort upprunareglur EES-samningsins eigi við, og hvernig beri að túlka þær. Undir þessum kringumstæðum er það landsdómstólsins að ákvarða, hvort nauðsynlegt sé að leita ráðgefandi álits (sjá mál E-5/96 *Nille*, 13. lið). Samkvæmt þessu er það mat dómstólsins, að spurningarnar geti hvorki talist vera almennar né án tengsla við sakarefni aðalmálsins.
- 23 Að því er varðar þá málsástæðu Helga Mús Reynissonar, að álitsbeiðnin tefji málareksturinn og brjóti þar með gegn 6. gr. Mannréttindasáttmála Evrópu, tekur dómstóllinn fram, að ekki er ljóst, hvort þessari málsástæðu var hreyft fyrir landsdómstólnum. Því til viðbótar bendir dómstóllinn á, að hann hefur í fyrri úrlausnum talið, að ákvæði EES-samningsins sem og málsmeðferðarreglna stofnanasamningsins beri að túlka með hliðsjón af grundvallarréttindum (sjá, mál E-8/97 *TV 1000 Svíþjóð gegn Noregi* [1998] skýrsla EFTA-dómstólsins 68, 26. lið; mál E-2/02 *Technologien Bau- und Wirtschaftsberatung og Bellona gegn Eftirlitsstofnun EFTA*, frá 19. júní 2003, ekki enn útgefið, lið 37). Ákvæði Mannréttindasáttmála Evrópu og dómur Mannréttindadómstóls Evrópu eru mikilvægar heimildir til skilgreiningar á slíkum réttindum. Í 1. mgr. 6. gr. Mannréttindasáttmála Evrópu er mælt fyrir um réttinn til “réttlátrar og opinberrar málsmeðferðar innan hæfilegs tíma”. Í máli sem rekið var fyrir Mannréttindadómstóli Evrópu varðandi tveggja ára og sjö mánaða töf á málsmeðferð vegna þess að landsdómstóll óskaði eftir forúrskurði dómstóls Evrópubandalaganna, var það samt sem áður niðurstaða Mannréttindadómstólsins, að ekki ætti að líta til þess tímabils við mat á lengd tiltekinnar málsmeðferðar. Í dómi Mannréttindadómstólsins sagði: “[...] að líta til þess myndi skaða það fyrirkomulag, sem mælt er fyrir um í 177. gr. Rómarsamningsins, og ganga gegn markmiðum þeirrar greinar. (Mál *Pafitis o. fl.* gegn *Grikklandi*, frá 26. febrúar 1998, skýrsla 1998-I, lið 95).

Pafitis and others v Greece, judgment of 26 February 1998, Reports 1998-I, at paragraph 95).

- 24 The same must apply with regard to the procedure established under Article 34 of the Surveillance and Court Agreement. As a means of inter-court cooperation in cases where the interpretation of EEA law becomes necessary, this procedure contributes to the proper functioning of the EEA Agreement to the benefit of individuals and economic operators. In the present case, the time period from the registration of the request to the delivery of judgment amounts to a little more than five months. There is thus no reason for the Court further to consider the issue in question.

First, fourth and fifth questions

- 25 By its first, fourth and fifth questions, which shall be considered together, the national court essentially asks whether the rules of origin established under the Free Trade Agreement are applicable to the case at hand in the main proceedings and whether the EFTA Court has jurisdiction to interpret them.
- 26 Those who have submitted observations to the Court are of the opinion that the EFTA Court has no competence to interpret international agreements other than the EEA Agreement. It is particularly emphasised by the Government of Iceland and the Commission of the European Communities that the Free Trade Agreement does not form a part of the EEA Agreement, and its interpretation or application must consequently be considered as falling outside the scope of EEA law.
- 27 According to Article 34(1) of the Surveillance and Court Agreement, the EFTA Court has jurisdiction to rule on the “interpretation of the EEA Agreement”. Pursuant to Article 1(a) of the Surveillance and Court Agreement, the term “EEA Agreement” includes “the main part of the EEA Agreement, its Protocols and Annexes as well as the acts referred to therein”. This definition corresponds to the one given in Article 2(a) EEA. Pursuant to Article 119 EEA, the annexes and protocols to the EEA Agreement shall form “an integral part” of the Agreement. From these provisions it is clear that the EFTA Court is competent under Article 34 of the Surveillance and Court Agreement to interpret the Protocols to the EEA Agreement unless another result clearly follows from the provisions of the Agreement.
- 28 The free trade agreements concluded between the EFTA States and the then European Economic Community in 1972 and 1973 have not been terminated by the entry into force of the EEA Agreement, but continue to co-exist separately. Whereas the free trade agreements were concluded on a bilateral basis and belong to the sphere of public international law, the conclusion of the multilateral EEA Agreement in 1992 led to a high degree of integration, with objectives which exceed those of a mere free trade agreement (see Court of First Instance of the European Communities in Case T-115/94 *Opel Austria v Council* [1997] ECR II-39, at paragraph 107). It created an international treaty *sui generis* which

- 24 Sömu sjónarmið og að ofan greinir eiga við um það fyrirkomulag, sem mælt er fyrir um í 34. gr. stofnanasamningsins. Það felur í sér samvinnu dómstóla í tilvikum, þar sem túlkun EES-réttar er nauðsynleg, og stuðlar þannig að réttri framkvæmd EES-samningsins til hagsbóta einstaklingum og aðilum í atvinnurekstri. Í máli því, sem hér um ræðir, er tíminn frá skráningu þess í málaskrá dómstólsins og þar til dómur er kveðinn upp rúmlega fimm mánuðir. Það er því ekki ástæða fyrir dómstólinn að fjalla frekar um þetta atriði.

Fyrsta, fjórða og fimmta spurning

- 25 Með fyrstu, fjórðu og fimmtu spurningu, sem fjallað verður um saman, óskar landsdómstóllinn í meginatriðum svara við því, hvort upprunareglur fríverslunarsamningsins eigi við í aðalmálinu, og hvort EFTA-dómstóllinn hafi lögsögu til að túlka þær.
- 26 Þeir, sem sent hafa greinargerðir til dómstólsins, halda því fram, að EFTA-dómstóllinn sé ekki bær til að túlka aðra þjóðréttarsamninga en EES-samninginn. Er í því sambandi lögð á það sérstök áhersla af hálfu ríkisstjórnar Íslands og framkvæmdastjórnar Evrópubandalaganna, að fríverslunarsamningurinn sé ekki hluti af EES-samningnum, og að túlkun hans og beiting falli því utan sviðs EES-réttar.
- 27 Samkvæmt 1. mgr. 34. gr. stofnanasamningsins hefur EFTA-dómstóllinn lögsögu til að gefa ráðgefandi álit varðandi “túlkun á EES-samningnum”. Samkvæmt a-lið 1. gr. stofnanasamningsins felur hugtakið “EES-samningur” í sér “meginmál EES-samningsins, bókanir og viðauka við hann, auk þeirra gerða sem þar er vísað til”. Þessi skilgreining er í samræmi við skilgreiningu a-liðar 2. gr. EES. Samkvæmt 119. gr. EES skulu viðaukar og bókanir við EES-samninginn “vera óaðskiljanlegur hluti” hans. Af þessum ákvæðum er ljóst, að EFTA-dómstóllinn hefur samkvæmt 34. gr. stofnanasamningsins, lögsögu til að túlka bókanir við EES-samninginn, nema aðra niðurstöðu megi augljóslega leiða af ákvæðum samningsins.
- 28 Fríverslunarsamningar þeir, sem gerðir voru milli EFTA-ríkjanna og þáverandi Efnahagsbandalags Evrópu árin 1972 og 1973, féllu ekki úr gildi, þegar EES-samningurinn kom til framkvæmda, heldur héldu þeir sjálfstætt gildi sínu samhliða EES-samningnum. Fríverslunarsamningarnir eru hefðbundnir tvíhliða þjóðréttarsamningar. Gerð hins fjölpjóðlega EES-samnings árið 1992 leiddi á hinn bóginn til samruna á háu stigi og setti markmið, sem ganga lengra en venjulegt er um fríverslunarsamninga (sjá mál T-115/94 *Opel Austria* gegn *Council* [1997] ECR II-39, 107. lið). Til varð þjóðréttarsamningur sérstaks eðlis (*sui generis*), sem felur í sér sérstakt og sjálfstætt réttarkerfi (mál E-9/97 *Erla María Sveinbjörnsdóttir* gegn *Íslandi* [1998] skýrsla EFTA-dómstólsins 95, 59. lið). Það réttarkerfi, sem komið var á fót með EES-samningnum, einkennist af stofnun innri markaðar (sjá mál C-452/01 *Ospelt*, dómur frá 23. september 2003, enn ekki útgefinn, 29. lið), vernd réttinda einstaklinga og aðila í atvinnurekstri og stofnanafyrirkomulag, sem tryggir virkt eftirlit með framkvæmd samningsins, og úrskurðarvald dómstóla í ágreiningsefnum. Þegar þetta er haft í huga og sú

contains a distinct legal order of its own (Case E-9/97 *Sveinbjörnsdóttir v Iceland* [1998] EFTA Ct. Rep. 95, at paragraph 59). This legal order as established by the EEA Agreement is characterized by the creation of an internal market (see the Court of Justice of the European Communities in Case C-452/01 *Ospelt*, judgment of 23 September 2003, not yet reported, at paragraph 29), the protection of the rights of individuals and economic operators and an institutional framework providing for effective surveillance and judicial review. The EFTA Court is an institution established under the EEA Agreement and the Surveillance and Court Agreement. As a point of departure, it has no jurisdiction over the application or interpretation of the Free Trade Agreement.

- 29 However, exceptions to the general rule of separation between the EEA Agreement and the free trade agreements exist in the form of clauses connecting both sets of law. In that respect, Article 120 EEA provides that the EEA Agreement shall prevail over provisions in bilateral agreements between the European Economic Community and one of the EFTA States on the same subject matter. By way of an exception to this general principle, Article 7 of Protocol 9 stipulates that the provisions of the agreements listed in Appendix 3 shall prevail over Protocol 9 to the extent that they grant to the EFTA States concerned more favourable trade regimes than Protocol 9. Appendix 3 to Protocol 9 mentions, in its third indent, Article 1 of Protocol 6 to the Free Trade Agreement.
- 30 The Icelandic Government contended in the oral hearing that the EFTA Court does not have competence under Article 34 of the Surveillance and Court Agreement to interpret Article 7 of Protocol 9. This argument was essentially based on Protocol 9 constituting *lex specialis* in EEA law, leading to the conclusion that the EFTA Court does not have competence to interpret Protocol 9 at all. Both the EFTA Surveillance Authority and the Commission of the European Communities expressed another view based on the fact that the protocols to the EEA Agreement form an integral part of the EEA Agreement. The EFTA Surveillance Authority submitted that while certain provisions of Protocol 9 might be covered by separate dispute settlement mechanisms, and therefore be outside the competence of the EFTA Court, this is not the case with regard to the provisions relevant to the present matter.
- 31 The Court holds that no provision of relevant law concerning its jurisdiction prevents it from interpreting Article 7 of Protocol 9. The arguments put forward by the Icelandic Government with respect to the Court's jurisdiction are thus rejected.
- 32 With regard to the issue of whether the Court is competent to interpret a provision of the Free Trade Agreement to which the EEA Agreement and its protocols refer, it is to be noted that Article 7 of Protocol 9 is phrased in a way that explicitly calls for an assessment of which of two trade regimes is more favourable in a given factual situation. As the Commission of the European Communities has rightly stated, this scenario is to be distinguished from an interpretation of the Free Trade Agreement.

staðreynd að EFTA-dómstóllinn er stofnun, sem var sett á fót á grundvelli EES-samningsins og stofnanasamningsins, verður almennt að ganga út frá því, að dómstóllinn hafi ekki lögsögu til að túlka fríverslunarsamninginn.

- 29 Undantekningar frá hinni almennu reglu um skilin milli EES-samningsins og fríverslunarsamningsins má hins vegar finna í ákvæðum, sem tengja þessa samninga saman. Í því sambandi mælir 120. gr. EES fyrir um, að EES-samningurinn skuli ganga framar ákvæðum tvíhliða samninga milli Efnahagsbandalags Evrópu og EFTA-ríkjanna, sem taka til sömu efnisatriða. Líta verður á 7. gr. bókunar 9 EES sem undantekningu frá þessari almennu reglu, hvað varðar viðskipti með fisk og aðrar sjávarafurðir. Greinin mælir fyrir um, að ákvæði samninganna, sem taldir eru upp í 3. viðbæti, skulu ganga framar bókun 9 EES að því leyti, sem viðkomandi EFTA-ríkjum eru þar veitt betri viðskiptakjör en bókunin gerir. Í 3. lið viðbætis 3 við bókun 9 EES er vísað til 1. gr. bókunar 6 við fríverslunarsamninginn.
- 30 Ríkisstjórn Íslands hélt því fram við munnlegan málflutning í máli þessu, að EFTA-dómstóllinn hefði ekki á grundvelli 34. gr. stofnanasamningsins lögsögu til að túlka 7. gr. bókunar 9 EES. Meginrökin voru þau, að bókun 9 EES fæli í sér sérreglur innan EES-réttarins (*lex specialis*), sem leiddi til þeirrar niðurstöðu, að EFTA-dómstóllinn hefði ekki lögsögu til að túlka bókunina í heild sinni. Bæði eftirlitsstofnun EFTA og framkvæmdastjórn Evrópubandalaganna tjáðu ólíka afstöðu í þessum efnum og byggðu í því sambandi á, að bókanir við EES-samninginn væru óaðskiljanlegur hluti hans. Eftirlitsstofnun EFTA hélt því fram, að tiltekin ákvæði bókunar 9 EES féllu að vísu undir sérstaka málsmeðferð varðandi lausn deilumála, og væru þau af þeim sökum undanskilin lögsögu dómstólsins. Það ætti hins vegar ekki við um þau ákvæði bókunar 9 EES, sem mál þetta snerti.
- 31 Að mati dómstólsins standa engar viðeigandi réttarheimildir því í vegi, að dómstóllinn sé bær til að túlka 7. gr. bókunar 9 EES. Af þeim sökum er rökum ríkisstjórnar Íslands um lögsögu dómstólsins hafnað.
- 32 Um það álitaefni, hvort dómstóllinn hafi lögsögu til að fjalla um ákvæði fríverslunarsamningsins, skal tekið fram, að orðalag 7. gr. bókunar 9 EES kallar skýrlega á mat á því, hvor samninganna veiti betri viðskiptakjör við tilteknar aðstæður. Eins og framkvæmdastjórn Evrópubandalaganna hefur réttilega haldið fram, verður að gera greinarmun á slíku mati og túlkun á fríverslunarsamningnum.

- 33 At the core of the first question of Héraðsdómur Reykjaness lies the issue of how far the reference in Article 7 of Protocol 9 and Appendix 3 to the same Protocol reaches, in particular whether it includes only Article 1 of Protocol 6 to the Free Trade Agreement or whether it also encompasses the rules of origin as established in Protocol 3 to the Free Trade Agreement. This is advocated by the defendants, but disputed by the Ríkislögreglustjóri, the EFTA Surveillance Authority and the Commission of the European Communities.
- 34 Unlike the reference in the second indent of Appendix 3 to Protocol 9 to the free trade agreement with Norway, the third indent of Appendix 3 to Protocol 9 is restricted to one single provision, namely Article 1 of Protocol 6 to the Free Trade Agreement.
- 35 In the view of the Court, the wording and scheme of Article 7 of Protocol 9 and Appendix 3 to that Protocol, as well as the fact that Article 7 of Protocol 9 is an exception to Article 120 EEA, speak in favour of a restrictive interpretation thereof. However, it has to be examined further whether the term “trade regime” in Article 7 of Protocol 9 must, in light of its purpose, be understood in a broad manner, i.e. as including the rules of origin.
- 36 It follows from Article 7 of Protocol 9 that the comparison to be made is one between Protocol 9 on the one side and the provisions of the agreements listed in Appendix 3 on the other. The concept of the term “trade regime” as a basis for the comparison must necessarily be construed in the same manner with respect to both texts. In order to determine the purpose of the term “trade regime” it is thus necessary to establish the main subject matter of Protocol 9 EEA. This Protocol deals as a *lex specialis* with the provisions and arrangements that apply to fish and other marine products, cf. Article 20 EEA. It essentially concerns abolition or reduction of customs duties on certain fish and other marine products by the EFTA States and the Community, cf. Articles 1 and 2 of the Protocol. The Protocol does not lay down rules of origin of the products but refers to Protocol 4 EEA in that respect, cf. Article 3 of Protocol 9 EEA. Consequently the notion of “trade regime” cannot be construed as to cover rules of origin.
- 37 The answer to the first question must therefore be that the term “trade regime” in Article 7 of Protocol 9 EEA and its Appendix 3 does not extend to the rules of origin contained in the Free Trade Agreement. The rules of origin contained in Protocol 4 EEA therefore apply. Having reached that conclusion, it is not necessary for the Court to answer the fourth and fifth questions posed by the national court.

Second and third questions

- 38 By its second and third questions, which should be considered together, the national court essentially asks whether under the rules of origin as established under Protocol 4 EEA, defrosting, heading, filleting, boning, trimming, salting and packing can confer EEA originating status on fish of non-EEA origin.

- 33 Fyrsta spurning Héraðsdóms Reykjaness lýtur í meginatriðum að því, hversu viðtæk tilvísun 7. gr. bókunar 9 og 3. viðbæti við bókunina er. Þá er einkum átt við, hvort hún feli eingöngu í sér tilvísun til 1. gr. bókunar 6 við fríverslunarsamninginn, eða hvort hún taki einnig til upprunareglna bókunar 3 við fríverslunarsamninginn. Síðarnefndu túlkuninni er haldið fram af hinum ákærðu, en þeirri túlkun hafa ríkislögreglustjóri, eftirlitsstofnun EFTA og framkvæmdastjórn Evrópubandalaganna hafnað.
- 34 Ólíkt þeirri tilvísun, sem er í 2. lið viðbæti 3 við bókun 9 EES til fríverslunarsamnings Noregs, er tilvísun 3. liðar viðbæti 3 við bókun 9 EES takmörkuð við eina grein, þ.e. 1. gr. bókunar 6 við fríverslunarsamninginn.
- 35 Að mati dómstólsins bendir orðalag og uppbygging 7. gr. bókunar 9 EES og viðbæti 3 við þá bókun, sem og sú staðreynd, að 7. gr. bókunar 9 er undantekning frá 120. gr. EES, til þess, að rétt sé að beita 7. gr. þröngri lögskýringu. Þrátt fyrir það er rétt að kanna frekar, hvort hugtakið “viðskiptakjör” í 7. gr. bókunar 9 EES beri samkvæmt tilgangi sínum að skilja rýmri skilningi, þ.e. þannig að það taki til upprunareglna.
- 36 Af 7. gr. bókunar 9 EES leiðir, að sá samanburður, sem gera þarf, er milli bókunar 9 EES annars vegar, og hins vegar ákvæða þeirra samninga, sem tilgreindir eru í viðbæti 3 við bókunina. Hugtakið “viðskiptakjör” er grundvöllur samanburðarins, og tekur það því óhjákvæmilega til sömu þátta í báðum samningum. Það verður því að skilgreina megininntak bókunar 9 EES til að komast að niðurstöðu um tilgang hugtaksins “viðskiptakjör”. Bókunin felur í sér sérreglur (*lex specialis*) varðandi fisk og aðrar sjávarafurðir, sbr. 20. gr. EES-samningsins. Hún varðar fyrst og fremst afnám og lækkun tolla af hálfu EFTA-ríkjanna og bandalagsins á tilteknum fisktegundum og sjávarafurðum, sbr. 1. og 2. gr. bókunarinnar. Bókunin hefur ekki að geyma reglur um uppruna varanna, heldur vísar til bókunar 4 EES hvað þær reglur varðar, sbr. 3. gr. bókunar 9 EES. Af þessu leiðir, að ekki er unnt að líta svo á, að hugtakinu “viðskiptakjör” sé ætlað að ná til upprunareglna.
- 37 Svárið við fyrstu spurningunni er því, að hugtakið “viðskiptakjör” í 7. gr. bókunar 9 EES og 3. viðbæti við hana nær ekki til upprunareglna fríverslunarsamningsins. Því ber að beita upprunareglum bókunar 4 EES. Að þessari niðurstöðu fenginni er ekki þörf á, að dómstóllinn svari fjórðu og fimmtu spurningu Héraðsdóms Reykjaness.

Önnur og þriðja spurning

- 38 Með annarri og þriðju spurningu, sem rétt er að fjalla um saman, óskar landsdómstóllinn í meginatriðum svara við því, hvort upprunareglur bókunar 4 EES verði skildar svo, að þíðun, hausun, flökun, beinhreinsun, snyrting, söltun og pökkun fisks geti veitt upprunaréttindi.

- 39 Protocol 4 EEA on rules of origin was amended several times since its entry into force together with the main part of the EEA Agreement on 1 January 1994. The version applicable under EEA law at the time of the alleged violations in the case at issue before the national court is the text as replaced by Decision No 71/96 of the EEA Joint Committee of 22 November 1996, as applied from 1 January 1997. However, the parties to the main proceedings contend that these amendments to Protocol 4 have not entered into force in Iceland due to failure to lawfully publish them and the original Protocol 4 EEA is deemed to apply to the present case. The defendants consider drawing erroneous conclusions as to the applicable rules in such a situation an excusable error of law.
- 40 The Court notes firstly that the issue of whether the lack of lawful publication leads to a finding of *error juris* or has any other legal consequence under national law is for the national court to decide. It is not prevented from doing so by the provisions and principles of EEA law.
- 41 With regard to the substance of the questions raised by the Héraðsdómur, it is clear from the answer the Court received from the national court to a request for clarification under Article 96(4) of the Rules of Procedure that the cod at issue in the main proceedings was not fished within the territorial waters of the EEA Contracting Parties, cf. Article 4(1)(e) of Protocol 4 EEA. Nor did it fulfil any of the criteria that Article 4(2) of Protocol 4 sets out in order to make it possible to consider the products as originating in the EEA via the notion of an EEA vessel in the case of fishing undertaken outside EEA territorial waters, cf. Article 4(1)(f) of Protocol 4 EEA. According to the information provided by the national court, most of the fish was caught by vessels sailing under the United States' flag. Therefore, the Court bases itself on the assumption that the cod imported to Iceland was to be considered non-originating in the EEA at the time it entered the territory of the Republic of Iceland.
- 42 The Court notes that under Part II of the EEA Agreement on the free movement of goods, Article 10 EEA provides that customs duties on imports and exports shall be prohibited between the Contracting Parties. According to Article 8(2) EEA, this rule is contingent upon the precondition that the products in question originate in the Contracting Parties. Article 9(1) EEA provides that the rules of origin are dealt with in Protocol 4 EEA.
- 43 Pursuant to Article 2 of Protocol 4 EEA, a product that has not been wholly obtained in the EEA within the meaning of Article 4 of Protocol 4 EEA has to be sufficiently worked or processed in the EEA within the meaning of Article 5 of Protocol 4 EEA to be considered as originating in the EEA. Article 5(1) of Protocol 4 EEA stipulates that such products have to fulfil the conditions set out in the list in Annex II in order to be considered to be sufficiently worked or processed. Whether or not the requirements of Article 5 of Protocol 4 EEA are satisfied, the operations listed in Article 6 of Protocol 4 EEA shall be considered as insufficient working or processing to confer the status of originating products. Article 6 of Protocol 4 EEA mentions, *inter alia*, operations to ensure the

- 39 Bókun 4 EES um uppruna vara hefur verið breytt nokkrum sinnum, eftir að hún tók gildi samhliða meginhluta EES-samningsins þann 1. janúar 1994. Sú útgáfa, sem var gild að EES-rétti á þeim tíma, sem hin meintu lögbrot, sem aðalmálið varðar, áttu sér stað, er texti bókunar 4 EES eins og honum var breytt með ákvörðun sameiginlegu EES-nefndarinnar nr. 71/96 frá 22. nóvember 1996, sem tók gildi 1. janúar 1997. Aðilar aðalmálsins halda því hins vegar fram, að þessar breytingar á bókun 4 EES hafi ekki tekið gildi á Íslandi, þar sem þær hafi ekki verið birtar með lögum hætti, og af þeim sökum verði að beita upprunalegri útgáfu bókunar 4 í málinu. Ákærðu telja, að undir slíkum kringumstæðum sé það afsakanleg lögvilla að draga rangar ályktanir um, hvað sé gildandi réttur.
- 40 Dómstóllinn bendir í fyrsta lagi á, að það er landsdómstólsins að ákveða, hvort ófullnægjandi birting réttarreglna leiði til þess, að um afsakanlega lögvillu sé að ræða eða slíkt hafi aðrar réttarverkanir að landsrétti. Reglur EES-réttar hindra landsdómstóllinn ekki í því.
- 41 Ljóst er af því svari, sem dómstólnum barst frá Héraðsdómi Reykjaness við beiðni dómstólsins um skýringu, sbr. 4. tl. 96. gr. starfsreglna dómstólsins, að sá þorskur, sem aðalmálið varðar, var ekki veiddur í landhelgi EES-samningsaðila, sbr. e-liður 1. mgr. 4. gr. bókunar 4 EES. Þá er heldur ekki fullnægt þeim skilyrðum, sem 2. mgr. 4. gr. bókunar 4 EES setur fyrir því, að skip geti talist samningsaðila, þannig að fiskur, sem af þeim er veiddur utan landhelgi, teljist upprunninn á EES, sbr. f-liður 1. mgr. 4. gr. bókunar 4 EES. Samkvæmt upplýsingum Héraðsdóms Reykjaness var megnið af fiskinum veitt af skipum, sem sigla undir bandarískum fána. Með vísan til þessa leggur dómstóllinn til grundvallar, að þorskur sá, sem var fluttur inn til Íslands, hafi ekki talist upprunninn á EES á þeim tíma, sem hann kom inn í íslenska lögsögu.
- 42 Samkvæmt 10. gr. EES, sem er að finna í II. hluta EES-samningsins um frjálsa vöruflutninga, eru tollar á innflutning og útflutning bannaðir milli samningsaðila. Samkvæmt 2. mgr. 8. gr. EES tekur þessi grein einungis til framleiðsluvara, sem eru upprunnar í ríkjum samningsaðila. Samkvæmt 1. mgr. 9. gr. er fjallað um upprunareglur í bókun 4 EES.
- 43 Samkvæmt 2. gr. bókunar 4 EES þurfa framleiðsluvörur, sem ekki eru “fengnar að öllu leyti” í skilningi 4. gr. bókunar 4 EES, að hljóta nægilega aðvinnslu í skilningi 5. gr. bókunar 4 EES svo þær geti talist upprunnar á EES. Samkvæmt 1. mgr. 5. gr. bókunar 4 EES verður skilyrðum II. viðauka að vera fullnægt, til að slíkar vörur teljist hafi fengið nægilega aðvinnslu. Hvort sem skilyrðum 5. gr. bókunar 4 EES er fullnægt eða ekki, teljast þær aðgerðir, sem taldar eru í 6. gr. bókunar 4 EES ófullnægjandi aðvinnsla, og geta ekki veitt upprunaréttindi. Í 6. gr. bókunar 4 EES kemur m.a. fram, að til ófullnægjandi aðvinnslu teljist aðgerðir, sem eiga að tryggja, að framleiðsluvörur haldist óskemmdar meðan á flutningi og geymslu stendur, s.s. viðrun, breiðsla, þurrkun, kæling, pækilsöltun og sambærilegar aðgerðir (liður a), einfaldar aðgerðir, s.s. að þvo og hluta í sundur (liður b); eða sameining tveggja eða fleiri aðgerða sem tilgreindar eru í framangreindum liðum (liður g).

preservation of products in good condition during transport and storage, such as, among others, ventilation, spreading out, drying, chilling, placing in salt and like operations (litra a); simple operations consisting of, among other things, washing and cutting up (litra b); or, a combination of two or more operations specified in the aforementioned subparagraphs (litra g).

- 44 Under Protocol 4 EEA, the list in Annex II is a starting point when determining whether a product that has not been wholly obtained in the EEA has been sufficiently worked or processed to be considered as originating in the EEA. The list in Annex II stipulates that all the materials of Chapter 3 of the EU Harmonized Commodity Description and Coding System, “fish and crustaceans, molluscs and other aquatic invertebrates” used “must be wholly obtained” in order to confer EEA originating status. Working or processing will never lead to conferring originating status on these products under Article 5(1) of Protocol 4 EEA. As the Ríkislögreglustjóri, the Government of Iceland, the EFTA Surveillance Authority and the Commission of the European Communities have rightly stated, fish products must necessarily be wholly obtained within the EEA.
- 45 The defendant, Mr Ásgeir Logi Ásgeirsson, has contended that the processing of the cod in the present case, in particular the salting, was not simply motivated by the need to preserve it in unfrozen condition. Such processing is in his view to be considered as part of the production process for a specific product, sought-after in many areas of the world.
- 46 The fact that dried, salted codfish, often referred to as “bacalao” or “bacalhau”, is a speciality in countries such as, for instance, Spain and Portugal and can be found on the menus of restaurants serving anything from simple to gourmet cuisine cannot change the result of the legal appraisal with regard to Article 5(1) of Protocol 4 and Annex II thereto. These rules apply regardless of the motives for processing and working. Whether the purpose was to simply preserve the fish or to produce a speciality therefore remains irrelevant.
- 47 As to the question of whether the processing of the cod at issue may fall under the so called “10% clause” in Article 5(2)(a) of Protocol 4 EEA, the Court notes that according to Article 5(3) of that Protocol, Article 5(2)(a) is only applicable if the processing methods used are not considered insufficient under Article 6 of the Protocol. Article 6(1)(a) of Protocol 4 EEA, in the version applicable under EEA law at the relevant time, generally mentions “drying”, “placing in salt” and like operations, as examples of operations to ensure the preservation of products in good condition during transport and storage. These operations have therefore to be considered insufficient working or processing to confer the status of fish products originating in the EEA.
- 48 The answer to the second and third questions must therefore be that defrosting, heading, filleting, boning, trimming, salting and packing of fish frozen whole that was imported from outside the EEA does not constitute sufficient working and processing within the meaning of Protocol 4 EEA in order for the products to obtain EEA originating status.

- 44 Þegar metið er, hvort vara, sem er ekki að öllu leyti fengin á EES, hefur fengið nægilega aðvinnslu, þannig að hún geti talist upprunnin á EES, er upptalningin í viðauka II við bókun 4 EES sú viðmiðun, sem ganga verður út frá. Samkvæmt viðauka II þarf framleiðsluvara, sem heyrir til 3. kafla sameiginlegu tollskrárinnar, “fiskur og krabbadýr, lindýr og aðrir vatna- og sjávarhryggleysingar”, að vera “fengin að öllu leyti” til þess að geta talist upprunnin á EES. Aðvinnsla getur aldrei leitt til þess, að þessar vörur hljóti upprunaréttindi á grundvelli 1. mgr. 5. gr. bókunar 4 EES. Eins og ríkislögreglustjóri, ríkisstjórn Íslands, eftirlitsstofnun EFTA og framkvæmdastjórn Evrópubandalaganna hafa réttilega haldið fram, verða fiskafurðir að vera að öllu leyti fengnar á EES.
- 45 Ákærði, Ásgeir Logi Ásgeirsson, heldur því fram, að vinnslan, sem fór fram á þorskinum, sem mál þetta varðar, og þá sérstaklega söltunin, hafi ekki eingöngu farið fram í því skyni að halda honum óskemmdum. Vinnslan er að hans mati hluti af framleiðsluferli sérstakrar vöru, sem er eftirsótt víðsvegar um heiminn.
- 46 Sú staðreynd, að þurrkaður og saltaður þorskur, oft nefndur “bacalao” eða “bacalhau”, er sérvara í sumum löndum, t.d. Spáni og Portúgal, og má finna á matseðlum veitingahúsa af ýmsum gerðum, breytir ekki niðurstöðu hins lögfræðilega mats á 1. mgr. 5. gr. bókunar 4 EES og viðauka II við hana. Þessar reglur eiga við óháð tilgangi aðvinnslnnar. Af þeim sökum skiptir ekki máli, hvort tilgangurinn var eingöngu að halda fiskinum óskemmdum eða að framleiða sérvöru.
- 47 Hvað hina svonefndu “10% reglu” í a-lið 2. mgr. 5. gr. bókunar 4 EES varðar og það álitaefni, hvort þorskurinn, sem um er að ræða, falli undir hana, tekur dómstóllinn fram, að samkvæmt 3. mgr. 5. gr. bókunarinnar verður a-lið 2. mgr. 5. gr. aðeins beitt, ef sú aðvinnsla, sem notuð er, telst ekki ófullnægjandi samkvæmt 6. gr. bókunarinnar. Í a-lið 1. mgr. 6. gr. bókunar 4 EES í þeirri útgáfu, sem dómstóllinn fjallar um, er vísað með almennum hætti til “þurrkunar”, “þækilsöltunar” og sambærilegra aðgerða sem dæma um aðferðir, sem ætlað er að halda vöru óskemmdri, á meðan á flutningi eða geymslu stendur. Af þeim sökum verða þessar aðferðir að teljast ófullnægjandi aðvinnsla, sem geta ekki veitt fisk upprunaréttindi.
- 48 Svárið við annarri og þriðju spurningu er því, að þíðun, hausun, flökun, beinhreinsun, snyrting, söltun og pökkun á heilfrystum fiski, sem var fluttur inn á EES, getur ekki talist nægileg aðvinnsla í skilningi bókunar 4 EES til þess að varan geti talist upprunnin á EES.

IV Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the *Héraðsdómur Reykjaness* by a reference of 27 June 2003, hereby gives the following Advisory Opinion:

1. The term “trade regime” in Article 7 of Protocol 9 to the EEA Agreement and its Appendix 3 does not extend to the rules of origin contained in the Free Trade Agreement between the European Economic Community and the Republic of Iceland, signed on 22 July 1972. The rules of origin contained in Protocol 4 to the EEA Agreement therefore apply.

2. Defrosting, heading, filleting, boning, trimming, salting and packing of fish frozen whole that was imported from outside the EEA does not constitute sufficient working and processing within the meaning of Protocol 4 to the EEA Agreement in order for the products to obtain EEA originating status.

Carl Baudenbacher

Per Tresselt

Thorgeir Örlygsson

Delivered in open court in Luxembourg on 12 December 2003.

Lucien Dedichen
Registrar

Carl Baudenbacher
President

IV Málskostnaður

- 49 Eftirlitsstofnun EFTA, framkvæmdastjórn Evrópubandalaganna og ríkisstjórn Íslands sem hafa skilað greinargerðum til dómstólsins, skulu bera sinn málskostnað. Hvað aðila málsins varðar, ber að líta á málsmeðferð fyrir EFTA-dómstólnum sem þátt í meðferð málsins fyrir Héraðsdómi Reykjaness, og kemur það í hlut þess dómstóls að kveða á um málskostnað.

Með vísan til framangreindra forsendna lætur

DÓMSTÓLLINN

uppi svohljóðandi ráðgefandi álit um spurningar þær sem Héraðsdómur Reykjaness beindi til dómstólsins 27. júní 2003:

1. Hugtakið “viðskiptakjör” í 7. gr. bókunar 9 við EES-samninginn og viðbæti 3 við hana nær ekki til upprunareglna fríverslunarsamningsins milli Efnahagsbandalags Evrópu og Lýðveldisins Íslands, sem undirritaður var 22. júlí 1972. Því ber að beita upprunareglum bókunar 4 við EES-samninginn.

2. Þíðun, hausun, flökun, beinhreinsun, snyrting, söltun og pökkun á heilfrystum fiski, sem var fluttur inn á EES, getur ekki talist nægileg aðvinnsla í skilningi bókunar 4 við EES-samninginn til þess að varan geti talist upprunnin á EES.

Carl Baudenbacher

Per Tresselt

Thorgeir Örlygsson

Kveðið upp í heyranda hljóði í Lúxemborg 12. desember 2003.

Lucien Dedichen
dómritari

Carl Baudenbacher
forseti

REPORT FOR THE HEARING
in Case E-2/03

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the *Héraðsdómur Reykjaness* (Reykjanes District Court), Reykjanes, Iceland, in a case pending before it between

Ákærvaldið (The Public Prosecutor)

and

Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson

concerning the interpretation of the rules of origin in trade in fish, as referred to in Protocols 4 and 9 to the EEA Agreement and Protocols 3 and 6 to the Agreement between the European Economic Community and the Republic of Iceland of 22 July 1972¹ (the “Free Trade Agreement”).

I. Introduction

1. By a decision dated 27 June 2003, the *Héraðsdómur Reykjaness* made a request for an advisory opinion, registered at the Court on 9 July 2003, in a case pending before it between the Ríkislögreglustjórinn (The National Commissioner of the Icelandic Police, acting as Public Prosecutor in this case) and Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson (the “defendants”).

II. Facts and procedure

2. The questions referred to the Court arise from criminal proceedings initiated on the basis of a charge issued by the Ríkislögreglustjórinn on 20 September 2002. The facts, as described by the *Héraðsdómur* in its decision of 27 June 2003, can be summarized as follows:

¹ OJ L 301 31.12.1972, p. 2.

SKÝRSLA FRAMSÖGUMANNS í máli E-2/03

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

Ákærvaldið

gegn

Ásgeiri Loga Ásgeirssyni, Axel Pétri Ásgeirssyni og Helga Má Reynissyni

varðandi túlkun á upprunareglum um fisk í bókunum 4 og 9 við EES-samninginn (“EES”) og bókunum 3 og 6 við samninginn milli Efnahagsbandalags Evrópu og Lýðveldisins Íslands sem undirritaður var 22. júlí 1972¹ (“fríverslunarsamningurinn”).

I. Inngangur

1. Með úrskurði dagsettu 27. júní 2003 og beiðni, sem skráð var í málaskrá dómstólsins þann 9. júlí 2003, óskaði Héraðsdómur Reykjaness eftir ráðgefandi áliti í máli sem rekið er fyrir dómstólnum milli ákærvaldsins, sem er í höndum ríkislögreglustjóra, og Ásgeirs Loga Ásgeirssonar, Axels Péturs Ásgeirssonar og Helga Más Reynissonar (“ákærðu”).

II. Málavextir og meðferð málsins

2. Spurningar þær sem beint er til dómstólsins eru vegna dómsmáls sem höfðað var með opinberri ákæru útgefni 20. september 2002. Eftirfarandi er samantekt á málavöxtum, eins og þeim er lýst í úrskurði Héraðsdóms Reykjaness frá 27. júní 2003:

¹ OJ L 301 31.12.1972, bls. 2.

3. The defendant Ásgeir Logi Ásgeirsson and the defendant Axel Pétur Ásgeirsson were both employed as managing directors of the fish processing company Sæunn Axels ehf (“Sæunn Axels”). The defendant Helgi Már Reynisson is the managing director of the import/export company Valeik ehf (“Valeik”).

4. The Ríkislögreglustjórinn’s principal reproach is that the defendants violated the Customs Act and the General Penal Code by having conspired to illegally export to five EC countries (namely Spain, Italy, Denmark, France and Greece), on 76 occasions, a total of 803,962 kg of processed cod products. The violations allegedly took place between 15 January 1998 and 30 December 1999.

5. The fish had been caught off the coasts of Alaska and Russia by foreign fishing vessels. It was imported frozen by Valeik and the raw materials were subsequently processed by Sæunn Axels. The export of the processed products was undertaken by Valeik. Allegedly, the employees of Valeik made false declarations on invoices and export documents delivered to the Director of Customs and the District Commissioner of Akureyri, stating that the products originated in Iceland. As a result of these declarations, the products enjoyed tariff preferences when imported into the EC countries, in accordance with Protocol 9 to the EEA Agreement, as if they had been Icelandic. It is alleged that the defendants thus circumvented the obligation to pay customs duties on the products on their import. The aggregate customs duties that have allegedly been evaded in this manner total a minimum ISK 56,976,103.

6. The case was accepted for trial on 8 April 2003 and proceeded pursuant to Article 131 of Icelandic Act No 19/1991 on Criminal Procedure. The defendants entered a primary plea of not guilty and, alternatively, requested a pardon in the event of conviction. It was argued, *inter alia*, that the rules on origin of products imported and processed in the manner described are so unclear that if their good faith interpretation resulted in violation, it would constitute *error juris* in favour of the defendants.

7. At a hearing on 20 June 2003, the Ríkislögreglustjórinn and the defendants expressed themselves concerning the proposal submitted by the judges to seek the opinion of the EFTA Court. The legal counsel of the defendants objected to the proposal, while the Ríkislögreglustjórinn unequivocally supported it. Subsequently, the Héraðsdómur rendered the decision by which it sought an advisory opinion from the EFTA Court.

3. Ákærði, Ásgeir Logi Ásgeirsson og ákærði, Axel Pétur Ásgeirsson, voru báðir framkvæmdastjórar hjá fiskvinnslufyrirtækinu Sæunn Axels ehf. (“Sæunn Axels”). Ákærði, Helgi Már Reynisson, var framkvæmdastjóri hjá inn-/útflutningsfyrirtækinu Valeik ehf. (“Valeik”).

4. Hinum ákærðu er gefið að sök að hafa sammælt um að flytja ólöglega út til fimm landa Evrópubandalagsins (Spánar, Ítalíu, Danmerkur, Frakklands og Grikklands) í 76 skipti samtals 803.962 kg. af unnum þorskafurðum. Því er haldið fram að meint brot hafi átt sér stað á tímabilinu 15. janúar 1998 til 30. desember 1999.

5. Fiskurinn, sem var veiddur af erlendum fiskiskipum við strendur Alaska og Rússlands, var fluttur frosinn inn til landsins af Valeik þar sem hann var unnin hjá Sæunni Axels. Valeik annaðist síðan útflutning á afurðunum unnum. Því er haldið fram að starfsmenn Valeikar hafi gefið út rangar yfirlýsingar á vörureikningum og útflutningsskýrslum með afurðunum, sem afhentar voru hjá embætti Tollstjórans í Reykjavík og Sýslumannsins á Akureyri, um að afurðirnar væru af íslenskum uppruna. Afurðirnar hafi vegna þessara röngu yfirlýsinga notið tollfríðinda við innflutning til áðurgreindra landa Evrópubandalagsins, í samræmi við bókun 9 við EES samninginn, sem væru þær íslenskar. Því er haldið fram að ákærðu hafi með þessu komið í veg fyrir að greiða þyrfti toll af afurðunum við innflutning sem að lágmarki hafi numið ISK 56,976,103.

6. Málið var dómtekið 8. apríl 2003. Eftir dómtöku taldi dómurinn rétt að framhaldsmeðferð færi fram í málinu í samræmi við 131. gr. laga nr. 19/1991 um meðferð opinberra mála. Ákærðu kröfðust aðallega sýknu og til vara að refsing verði felld niður kæmi til sakfellingar. Kom m.a. fram er þeir reifuðu sjónarmið sín og lagarök að upprunareglur afurða, sem fluttar eru inn og unnar með þeim hætti sem áður er lýst, væru svo óljósar að leiddi rétt túlkun þeirra til þess að um brot væri að tefla þá væri um afsakanlega lögvilla að ræða.

7. Í þinghaldi þann 20. júní 2003 tjáðu málflytjendur sig um þá hugmynd dómenda að leitað yrði ráðgefandi álits EFTA-dómstólsins. Verjendur ákærðu lýstu sig mótfallna þessari hugmynd, en af hálfu ríkislögreglustjóra var hún studd eindregið. Í kjölfarið kvað Héraðsdómur Reykjaness (“Héraðsdómur”) upp þann úrskurð að leitað skyldi eftir ráðgefandi áliti EFTA-dómstólsins.

III. Questions

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

(1) Does the term “trade regimes” in Article 7 of Protocol 9 to the EEA Agreement and Appendix 3 to the same Protocol, extend to the rules of origin contained in the agreement between the European Economic Community and the Republic of Iceland, signed on 22 July 1972, so as to prevail over the rules of origin contained in Protocol 4 to the EEA Agreement?

(2) If the rules of origin contained in Protocol 4 to the EEA Agreement are, notwithstanding the provisions of Article 7 of Protocol 9 EEA, considered to apply to the circumstances of the case, then does defrosting, heading, filleting, boning, trimming, salting and packing fish that has been imported frozen whole to Iceland from countries outside the EEA constitute sufficient working and processing within the meaning of these rules for the product to be considered of Icelandic origin?

(3) Irrespective of whether the Court takes a position on the interpretation of Protocol 3 to the Agreement of 1972, interpretation is requested of the rules of origin contained in Protocol 4 to the EEA Agreement as to whether defrosting, heading, filleting, boning, trimming, salting and packing fish that has been imported into Iceland frozen whole from countries outside the EEA constitutes sufficient working and processing for the product to be considered of Icelandic origin.

(4) If Article 7 of Protocol 9 to the EEA Agreement is considered to apply to the rules of origin contained in the Agreement between the European Economic Community and the Republic of Iceland referred to in question 1, and if these rules of origin are considered to prevail over the rules of origin contained in Protocol 4 to the EEA Agreement, and if the EFTA Court is competent to provide an opinion on the interpretation of the rules of origin of this agreement, is then the processing of the type described in question 2 sufficient working and processing in the sense of the Protocol in question in order for the product to be considered of Icelandic origin?

(5) Subject to the same proviso regarding the competence of the EFTA Court to interpret the Agreement between the European Economic Community and the Republic of Iceland which was signed on 22 July 1972, to which member states of the European Union does Protocol 6 to that agreement apply?

III. Álitæfni

8. Eftirfarandi spurningar voru bornar undir EFTA-dómstólinn:

(1) Tekur orðið “viðskiptakjör” í 7. gr. bókunar 9 við EES-samninginn, sbr. og 3. viðbæti við þá bókun, til upprunareglna þeirra sem er að finna í samningi milli Efnahagsbandalags Evrópu og Lýðveldisins Íslands sem undirritaður var 22. júlí 1972, þannig að þær gangi framur upprunareglum þeim sem er að finna í bókun 4 við EES-samninginn?

(2) Ef upprunareglur bókunar 4 við EES-samninginn verða þrátt fyrir ákvæði 7. gr. bókunar 9, taldar eiga við um atvik málsins, telst þíðun, hausun, flökun, beinhreinsun, snyrting, söltun og pökkun fisks sem fluttur hefur verið heilfrystur til Íslands frá löndum utan EES-svæðisins nægileg aðvinnsla í skilningi þeirra reglna til þess að varan teljist af íslenskum uppruna?

(3) Án tillits til þess hvort dómstóllinn taki afstöðu til skýringar á bókun 3 við samninginn frá 1972 er óskað skýringa á upprunareglum bókunar 4 við EES-samninginn um það hvort þíðun, hausun, flökun, beinhreinsun, snyrting, söltun og pökkun fisks sem fluttur hefur verið heilfrystur til Íslands frá löndum utan EES-svæðisins teljist nægileg aðvinnsla til þess að varan teljist af íslenskum uppruna?

(4) Ef 7. gr. bókunar 9 við EES-samninginn verður talin taka til upprunareglna í samningi milli Efnahagsbandalags Evrópu og Lýðveldisins Íslands sem vísað er til í spurningu 1 og þær upprunareglur verða álitnar ganga framur upprunareglum bókunar 4 við EES-samninginn og EFTA-dómstóllinn verður talinn bær um að láta í té álit um skýringu upprunareglna þessa samnings, telst þá vinnsla af því tagi sem lýst er í spurningu 2 nægileg aðvinnsla í skilningi þeirrar bókunar til þess að varan verði talin af íslenskum uppruna?

(5) Með sama fyrirvara um bægni EFTA-dómstólsins til þess að skýra samninginn milli Efnahagsbandalags Evrópu og Lýðveldisins Íslands sem undirritaður var 22. júlí 1972, til hvaða aðildarlanda í Evrópusambandinu tekur bókun 6 við þann samning?

IV. Legal background

The EEA Agreement

9. Article 2 EEA reads:

“For the purposes of this Agreement:

(a) the term "Agreement" means the main Agreement, its Protocols and Annexes as well as the acts referred to therein; ...”

10. Article 8(3) EEA reads:

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

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

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

11. Article 20 EEA reads:

“Provisions and arrangements that apply to fish and other marine products are set out in Protocol 9.”

12. Article 119 EEA reads:

“The Annexes and the acts referred to therein as adapted for the purposes of this Agreement as well as the Protocols shall form an integral part of this Agreement.”

13. Article 120 EEA reads:

“Unless otherwise provided in this Agreement and in particular in Protocols 41 and 43, the application of the provisions of this Agreement shall prevail over provisions in existing bilateral or multilateral agreements binding the European Economic Community, on the one hand, and one or more EFTA States, on the other, to the extent that the same subject matter is governed by this Agreement.”

IV. Löggjöf

EES-samningurinn

9. Ákvæði 2. gr. EES er svohljóðandi:

“Í þessum samningi merkir:

(a) hugtakið “samningur” meginmál samningsins, bókanir við hann og viðauka auk þeirra gerða sem þar er vísað til; ...”

10. Ákvæði 3. mgr. 8. gr. EES er svohljóðandi:

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

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

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

11. Ákvæði 20. gr. EES er svohljóðandi:

“Ákvæði og fyrirkomulag varðandi fisk og aðrar sjávarafurðir er að finna í bókun 9.”

12. Ákvæði 119. gr. EES er svohljóðandi:

“Viðaukar, svo og gerðir sem vísað er til í þeim og aðlagðar eru vegna samnings þessa, skulu auk bókana vera óaðskiljanlegur hluti samningsins.”

13. Ákvæði 120. gr. EES er svohljóðandi:

“Ef ekki er kveðið á um annað í samningi þessum og einkum í bókunum 41 og 43 skulu ákvæði samningsins ganga frammar ákvæðum í gildandi tvíhliða eða marghliða samningum sem Efnahagsbandalag Evrópu annars vegar og eitt eða fleiri EFTA-ríki hins vegar eru bundin af að því leyti sem samningur þessi tekur til sömu efnisatriða.”

14. Articles 2(1), 3, 4 and 5 of the original Protocol 4 to the EEA Agreement on rules of origin (“Protocol 4 EEA”) read as follows:

“Article 2 Origin criteria

1. A product shall be considered to be originating in the EEA within the meaning of this Agreement if it has been either wholly obtained or sufficiently worked or processed in the EEA. For this purpose, the territories of the Contracting Parties, including the territorial waters, to which this Agreement applies, shall be considered as a single territory.

Article 3 Wholly obtained products

1. The following shall be considered as wholly obtained in the EEA:

- (a) mineral products extracted from its soil or from its seabed;*
- (b) vegetable products harvested therein;*
- (c) live animals born and raised therein;*
- (d) products from live animals raised therein;*
- (e) products obtained by hunting or fishing conducted therein;*
- (f) products of sea fishing and other products taken from the sea outside the territorial waters of the Contracting Parties by their vessels;*
- (g) products made aboard factory ships of the Contracting Parties exclusively from products referred to in subparagraph (f);*
- (h) used articles collected there fit only for the recovery of raw materials, including used tyres fit only for retreading or for use as waste;*
- (i) waste and scrap resulting from manufacturing operations conducted therein;*
- (j) goods produced there exclusively from the products specified in subparagraphs (a) to (i).*

2. The terms ‘their vessels’ and ‘factory ships of the Contracting Parties’ in paragraphs 1(f) and (g) shall apply only to vessels and factory ships:

- (a) which are registered or recorded in an EC Member State or an EFTA State;*
- (b) which sail under the flag of an EC Member State or an EFTA State;*
- (c) which are owned to an extent of at least 50 per cent by nationals of EC Member States or EFTA States, or by a company with its head office in one of these States, of which the manager or managers, chairman of the board of directors or the supervisory board, and the majority of the members of such boards are nationals of EC Member States or EFTA States and of which, in*

14. Ákvæði 1. mgr. 2. gr., 3. gr., 4. gr. og 5. gr. upprunalegs texta bókunar 4 við EES samninginn um upprunareglur (“bókun 4 EES”) eru svohljóðandi:

“2. grein Upprunaviðmiðanir

1. Framleiðsluvara telst upprunnin á EES í skilningi þessa samnings ef hún er að öllu leyti fengin eða hefur hlotið nægilega aðvinnslu á EES. Yferráðasvæði samningsaðila, ásamt landhelgi, sem þessi samningur tekur til, skal teljast eitt yferráðasvæði að því er þetta varðar.

3. grein Vara að öllu leyti fengin

1. Eftirtaldar vörur teljast að öllu leyti fengnar á EES:

(a) jarðefni unnin úr jörðu þess eða úr hafsbotni þess;

(b) vörur úr jurtaríkinu sem þar eru ræktaðar;

(c) lifandi dýr sem þar eru borin og alin;

(d) afurðir lifandi dýra sem þar eru alin;

(e) veiðibráð og fiskafurðir sem aflað er með veiðum þar;

(f) sjávarafurðir og aðrar afurðir teknar úr sjó utan landhelgi samningsaðila af skipum þeirra;

(g) vörur framleiddar um borð í verksmiðjuskipum samningsaðila, eingöngu úr afurðum sem getið er í f-lið;

(h) notaðar vörur sem þar er safnað og eingöngu er unnt að nota til að vinna hráefni úr, þar á meðal notaðir hjólbarðar sem nýtast eingöngu til sólunar eða sem úrgangur;

(i) úrgangur og rusl sem til fellur vegna framleiðslustarfsemi þar;

(j) vörur sem þar eru framleiddar eingöngu úr þeim framleiðsluvörum sem tilgreindar eru í a- til i-lið.

2. Orðin “skip þeirra” og “verksmiðjuskip samningsaðila” í f- og g-lið 1. mgr. gilda aðeins um skip og verksmiðjuskip:

(a) sem eru skráð eða skrásett í aðildarríki EB eða EFTA-ríki;

(b) sem sigla undir fána aðildarríkis EB eða EFTA-ríkis;

(c) sem eru að minnsta kosti 50 af hundraði í eign ríkisborgara aðildarríkja EB eða EFTA-ríkja, eða í eign fyrirtækis sem hefur aðalstöðvar í einu þessara ríkja enda sé framkvæmdastjóri eða framkvæmdastjórar þess, stjórnarformaður eða formaður umsjónarnefndar og meirihluti stjórnarnefndarmanna eða umsjónarnefndarmanna ríkisborgarar aðildarríkja EB eða EFTA-ríkja; auk þess

addition, in the case of partnerships or limited companies, at least half the capital belongs to those States or to public bodies or nationals of the said States;

(d) of which the master and officers are nationals of EC Member States or EFTA States; and

(e) of which at least 75 per cent of the crew are nationals of EC Member States or EFTA States.

Article 4 Sufficiently worked or processed products

1. For the purposes of Article 2, products which are not wholly obtained in the EEA are considered to be sufficiently worked or processed there when the conditions set out in the list in Appendix II are fulfilled. These conditions indicate, for all products covered by the Agreement, the working or processing which must be carried out on the non-originating materials used in the manufacture of these products, and apply only in relation to such materials. Accordingly, it follows that if a product, which has acquired originating status by fulfilling the conditions set out in the list for that product, is used in the manufacture of another product, the conditions applicable to the product in which it is incorporated do not apply to it, and no account shall be taken of the non-originating materials which may have been used in its manufacture.

2. Notwithstanding paragraph 1 and except as provided in Article 11(4), non-originating materials which, according to the conditions set out in the list for a given product, should not be used in the manufacture of this product may nevertheless be used, provided that:

(a) their total value does not exceed 10 per cent of the ex-works price of the product;

(b) where, in the list, one or several percentages are given for the maximum value of non-originating materials, such percentages are not exceeded through the application of this paragraph.

This paragraph shall not apply to products falling within Chapters 50 to 63 of the Harmonized System.

3. Paragraphs 1 and 2 shall apply except as provided in Article 5.

Article 5 Insufficient working or processing operations

1. The following operations shall be considered as insufficient working or processing to confer the status of originating products, whether or not the requirements of Article 4 are satisfied:

sem að minnsta kosti helmingur höfuðstóls sé í eigu þessara ríkja eða opinberra stofnana eða ríkisborgara nefndra ríkja, ef um er að ræða sameignarfélög eða hlutafélög;

(d) þegar skipstjóri og yfirmenn eru ríkisborgarar aðildarríkis EB eða EFTA-ríkis; og

(e) þegar að minnsta kosti 75 af hundraði áhafnarinnar eru ríkisborgarar aðildarríkja EB eða EFTA-ríkja.

4. grein Framleiðsluvörur sem hlotið hafa nægilega aðvinnslu

1. Að því er varðar 2. gr. skulu framleiðsluvörur sem ekki eru að öllu leyti fengnar á EES teljast hafa hlotið nægilega aðvinnslu þar hafi skilyrðum í II. viðbæti verið fullnægt. Skilyrði þessi kveða á um aðvinnslu efna sem eru ekki upprunaefni og eru notuð við framleiðslu þeirra vara sem samningur þessi tekur til, og gilda þau einungis um slík efni. Af þeim sökum skal framleiðsluvara sem telst upprunavara vegna þess að skilyrðum sem sett eru í lista um hana er fullnægt, og er notuð við framleiðslu annarrar vöru, ekki þurfa að fullnægja skilyrðum sem gilda um vöruna sem hún er sett saman við, og skal ekki taka tillit til þess að efnið sem notuð eru við framleiðslu hennar eru ekki upprunaefni.

2. Þrátt fyrir 1. mgr., en með þeirri undantekningu sem leiðir af 4. mgr. 11. gr., skal efni sem ekki telst upprunaefni ekki notað við framleiðslu þessarar vöru, samkvæmt þeim skilyrðum sem sett eru í lista um hana, nema því aðeins að:

(a) heildarverðmæti þeirra sé ekki meira en 10 af hundraði af verksmiðjuverði framleiðsluvörunnar;

(b) ekki sé farið fram úr einni eða fleiri hundraðshlutatölum af því hámarksverðmæti sem gefið er upp fyrir efni sem ekki teljast upprunaefni og fram koma í listanum, vegna beitingar þessarar málsgreinar.

Þessi málsgrein gildir ekki um framleiðsluvörur sem teljast til 50. – 63. kafla í samræmdu tollskránni.

3. Ákvæði 1. og 2. mgr. gilda nema að því leyti sem kveðið er á um í 5. gr.

5. grein Ófullnægjandi aðvinnsla

1. Eftirfarandi aðgerðir teljast ófullnægjandi aðvinnsla sem ekki veitir upprunaréttindi óháð því hvort kröfum 4. gr. hefur verið fullnægt:

(a) operations to ensure the preservation of products in good condition during transport and storage (ventilation, spreading out, drying, chilling, placing in salt, sulphur dioxide or other aqueous solutions, removal of damaged parts, and like operations);

(b) simple operations consisting of removal of dust, sifting or screening, sorting, classifying, matching (including the making-up of sets of articles), washing, painting, cutting up;

(c) (i) changes of packaging and breaking up and assembly of packages;

(ii) simple placing in bottles, flasks, bags, cases, boxes, fixing on cards or boards, etc., and all other simple packaging operations;

(d) affixing marks, labels and other like distinguishing signs on products or their packaging;

(e) simple mixing of products, whether or not of different kinds, where one or more components of the mixtures do not meet the conditions laid down in this Protocol to enable them to be considered as originating in the EEA;

(f) simple assembly of parts to constitute a complete product;

(g) a combination of two or more operations specified in subparagraphs (a) to (f);

(h) slaughter of animals.

2. All the operations carried out in the EEA on a given product shall be considered together when determining whether the working or processing undergone by that product is to be regarded as insufficient within the meaning of paragraph 1."

15. The text of Protocol 4 EEA was replaced by Decision No 71/96 of the EEA Joint Committee of 22 November 1996² ("Decision No 71/96"). Articles 2(1), 4, 5 and 6 of this version read as follows:

"Article 2 General requirements

1. A product shall be considered to be originating in the EEA within the meaning of this Agreement if it has been either wholly obtained there within the meaning of Article 4 or sufficiently worked or processed in the EEA within the meaning of Article 5. For this purpose, the territories of the Contracting Parties to which this Agreement applies, shall be considered as a single territory.

²

OJ 1997 L 21, p. 12, applying from 1 January 1997.

(a) aðgerð til að tryggja að framleiðsluvörur haldist óskemmdar meðan á flutningi og geymslu stendur (viðrun, breiðsla, þurrkun, kæling, pækilsöltun, niðurlagning í brennisteinsvatn eða aðrar vatnsupplausnir, fjarlæging skemmdra hluta og sambærilegar aðgerðir);

(b) einfaldar aðgerðir til að rykhreinsa, sigta eða sálda, sundurgreina, flokka, velja saman (þar á meðal að útbúa hluti í samstæður), þvo, mála eða hluta í sundur;

(c) (i) skipti á umbúðum, svo og uppskipting og sameining;

(ii) einföld setning á flöskur, glös, í poka, kassa, öskjur, á spjöld eða töflur o.s.frv. og allar aðrar einfaldar þökkunaraðgerðir;

(d) festing merkja, miða eða annarra slíkra auðkenna á framleiðsluvörur eða umbúðir þeirra;

(e) einföld blöndun framleiðsluvara, hvort sem um er að ræða ólíkar vörur eða ekki, þar sem einn eða fleiri i hlutar blöndunnar fullnægja ekki skilyrðum þeim um uppruna á EES sem sett eru í þessari bókun;

(f) einföld samsetning vöruhluta þannig að úr verði fullgerð framleiðsluvara;

(g) sameining tveggja eða fleiri aðgerða sem tilgreindar eru í a- til f-lið;

(h) slátrun dýra.

2. Litið skal á allar aðgerðir, sem fara fram á EES á tiltekinni framleiðsluvöru, sem eina heild þegar ákvarðað er hvort aðvinnsla hennar teljist ófullnægjandi í skilningi 1. mgr. ”

15. Með ákvörðun sameiginlegu EES nefndarinnar nr. 71/96 frá 22. nóvember 1996² leysti nýr texti eldri texta bókunar 4 EES af hólmi. Ákvæði 1. mgr. 2. gr., 4. gr., 5. gr. og 6. gr. bókunarinnar eins og henni var breytt eru svohljóðandi:

“2. grein Almennar kröfur

1. Framleiðsluvara telst upprunnin á EES í skilningi þessa samnings ef hún er fengin að öllu leyti þar í skilningi 4. gr. eða hefur hlotið nægilega aðvinnslu á EES í skilningi 5. gr. Yfiráðasvæði samningsaðila sem þessi samningur tekur til, skal teljast eitt yfiráðasvæði að því er þetta varðar.

Article 4 Wholly obtained products

1. The following shall be considered as wholly obtained in the EEA:

- (a) mineral products extracted from their soil or from their seabed;*
- (b) vegetable products harvested there;*
- (c) live animals born and raised there;*
- (d) products from live animals raised there;*
- (e) products obtained by hunting or fishing conducted there;*
- (f) products of sea fishing and other products taken from the sea outside the territorial waters of the Contracting Parties by their vessels;*
- (g) products made aboard their factory ships exclusively from products referred to in subparagraph (f);*
- (h) used articles collected there fit only for the recovery of raw materials, including used tyres fit only for retreading or for use as waste;*
- (i) waste and scrap resulting from manufacturing operations conducted there;*
- (j) products extracted from marine soil or subsoil outside their territorial waters provided that they have sole rights to work that soil or subsoil;*
- (k) goods produced there exclusively from the products specified in subparagraphs (a) to (j).*

2. The terms 'their vessels' and 'their factory ships' in paragraph 1 (f) and (g) shall apply only to vessels and factory ships:

- (a) which are registered or recorded in an EC Member State or an EFTA State;*
- (b) which sail under the flag of an EC Member State or an EFTA State;*
- (c) which are owned to an extent of at least 50 % by nationals of EC Member States or of an EFTA State, or by a company with its head office in one of these States, of which the manager or managers, Chairman of the Board of Directors or the Supervisory Board, and the majority of the members of such boards are nationals of EC Member States or of an EFTA State and of which, in addition, in the case of partnerships or limited companies, at least half the capital belongs to those States or to public bodies or nationals of the said States;*
- (d) of which the master and officers are nationals of EC Member States or of an EFTA State; and*

4. grein Framleiðsluvara fengin að öllu leyti

1. Eftirtaldar vörur teljast fengnar að öllu leyti á EES:

- (a) jarðefni unnin úr jörðu þess eða úr hafsbótnei þess;
- (b) vörur úr jurtaríkinu sem þar eru ræktaðar;
- (c) lifandi dýr sem þar eru borin og alin;
- (d) afurðir lifandi dýra sem þar eru alin;
- (e) veiðibráð og fiskafurðir sem aflað er með veiðum þar;
- (f) sjávarafurðir og aðrar afurðir teknar úr sjó utan landhelgi samningsaðila af skipum þeirra;
- (g) vörur framleiddar um borð í verksmiðjuskipum þeirra, eingöngu úr afurðum sem getið er í f-lið;
- (h) notaðar vörur sem þar er safnað og eingöngu er unnt að nota til að vinna hráefni úr, þar á meðal notaðir hjólbarðar sem nýtast eingöngu til sólunar eða sem úrgangur;
- (i) úrgangur og rusl sem til fellur vegna framleiðslustarfsemi þar;
- (j) vörur unnar úr yfirborðslögum hafsbótneisins utan landhelgi samningsríkjanna, að því tilskildu að þau hafi einkarétt á að vinna úr þessum lögum;
- (k) vörur sem þar eru framleiddar eingöngu úr þeim framleiðsluvörum sem tilgreindar eru í a- til j-lið.

2. Orðin “skip þeirra” og “verksmiðjuskip þeirra” í f- og g-lið 1. mgr. gilda aðeins um skip og verksmiðjuskip:

- (a) sem eru skráð eða skrásett í aðildarríki EB eða EFTA-ríki;
- (b) sem sigla undir fána aðildarríkis EB eða EFTA-ríkis;
- (c) sem eru að minnsta kosti 50 af hundraði í eign ríkisborgara aðildarríkja EB eða EFTA-ríkis, eða í eign fyrirtækis sem hefur aðalstöðvar í einu þessara ríkja enda sé framkvæmdastjóri eða framkvæmdastjórar þess stjórnarformaður eða formaður umsjónarnefndar og meirihluti stjórnarnefndarmanna eða umsjónarnefndarmanna ríkisborgarar aðildarríkja EB eða EFTA-ríkis; auk þess sem að minnsta kosti helmingur höfuðstóls sé í eigu þessara ríkja eða opinberra stofnana eða ríkisborgara nefndra ríkja, ef um er að ræða sameignarfélög eða hlutafélög;
- (d) þegar skipstjóri og yfirmenn eru ríkisborgarar aðildarríkis EB eða EFTA-ríkis; og

(e) of which at least 75 % of the crew are nationals of EC Member States or of an EFTA State.

Article 5 Sufficiently worked or processed products

1. For the purposes of Article 2, products which are not wholly obtained are considered to be sufficiently worked or processed when the conditions set out in the list in Annex II are fulfilled.

The conditions referred to above indicate, for all products covered by this Agreement, the working or processing which must be carried out on non-originating materials used in manufacturing and apply only in relation to such materials. Accordingly, it follows that if a product which has acquired originating status by fulfilling the conditions set out in the list is used in the manufacture of another product, the conditions applicable to the product in which it is incorporated do not apply to it, and no account shall be taken of the non-originating materials which may have been used in its manufacture.

2. Notwithstanding paragraph 1, non-originating materials which, according to the conditions set out in the list, should not be used in the manufacture of a product may nevertheless be used, provided that:

(a) their total value does not exceed 10 % of the ex-works price of the product;

(b) any of the percentages given in the list for the maximum value of non-originating materials are not exceeded through the application of this paragraph.

This paragraph shall not apply to products falling within Chapters 50 to 63 of the Harmonized System.

3. Paragraphs 1 and 2 shall apply except as provided in Article 6.

Article 6 Insufficient working or processing operations

1. Without prejudice to paragraph 2, the following operations shall be considered as insufficient working or processing to confer the status of originating products, whether or not the requirements of Article 5 are satisfied:

(a) operations to ensure the preservation of products in good condition during transport and storage (ventilation, spreading out, drying, chilling, placing in salt, sulphur dioxide or other aqueous solutions, removal of damaged parts, and like operations);

(b) simple operations consisting of removal of dust, sifting or screening, sorting, classifying, matching (including the making-up of sets of articles), washing, painting, cutting up;

(c) (i) changes of packaging and breaking up and assembly of packages;

(e) þegar að minnsta kosti 75 af hundraði áhafnarinnar eru ríkisborgarar aðildarríkja EB eða EFTA-ríkis.

5. grein Framleiðsluvörur sem hlotið hafa nægilega aðvinnslu

1. Að því er varðar 2. gr. skulu framleiðsluvörur sem ekki eru fengnar að öllu leyti teljast hafa hlotið nægilega aðvinnslu hafi skilyrðum í II. viðauka verið fullnægt.

Skilyrði þessi kveða á um aðvinnslu efna sem eru ekki upprunaefni og eru notuð við framleiðslu þeirra vara sem samningur þessi tekur til, og gilda þau einungis um slík efni. Af þeim sökum skal framleiðsluvara sem telst upprunavara vegna þess að skilyrðum sem sett eru í lista um hana er fullnægt, og er notuð við framleiðslu annarrar vöru, ekki þurfa að fullnægja skilyrðum sem gilda um vöruna sem hún er sett saman við, og skal ekki taka tillit til þess að efnin sem notuð eru við framleiðslu hennar eru ekki upprunaefni.

2. Þrátt fyrir 1. mgr., skal efni sem ekki telst upprunaefni ekki notað við framleiðslu þessarar vöru, samkvæmt þeim skilyrðum sem sett eru í lista um hana, nema því aðeins að:

(a) heildarverðmæti þeirra sé ekki meira en 10 af hundraði af verksmiðjuverði framleiðsluvörunnar;

(b) ekki sé farið fram úr einni eða fleiri hundradshlutatölum af því hámarksverðmæti sem gefið er upp fyrir efni sem ekki teljast upprunaefni og fram koma í listanum, vegna beitingar þessarar málsgreinar.

Þessi málsgrein gildir ekki um framleiðsluvörur sem teljast til 50. – 63. kafla í samræmdu tollskránni.

3. Ákvæði 1. og 2. mgr. gilda nema að því leyti sem kveðið er á um í 6. gr.

6. grein Ófullnægjandi aðvinnsla

1. Með fyrirvara um 2. mgr. teljast eftirfarandi aðgerðir ófullnægjandi aðvinnsla sem ekki veitir upprunaréttindi óháð því hvort kröfum 5. gr. hefur verið fullnægt:

(a) aðgerð til að tryggja að framleiðsluvörur haldist óskemmdar meðan á flutningi og geymslu stendur (viðrun, breiðsla, þurrkun, kæling, pækilsöltun, niðurlagning í brennisteinsvatn eða aðrar vatnsupplausnir, fjarlæging skemmdra hluta og sambærilegar aðgerðir);

(b) einfaldar aðgerðir til að rykhreinsa, sigta eða sálda, sundurgreina, flokka, velja saman (þar á meðal að útbúa hluti í samstæður), þvo mála eða hluta í sundur;

(c) (i) skipti á umbúðum, svo og uppskipting og sameining;

(ii) simple placing in bottles, flasks, bags, cases, boxes, fixing on cards or boards, etc., and all other simple packaging operations;

(d) affixing marks, labels and other like distinguishing signs on products or their packaging;

(e) simple mixing of products, whether or not of different kinds, where one or more components of the mixtures do not meet the conditions laid down in this Protocol to enable them to be considered as originating in the EEA;

(f) simple assembly of parts to constitute a complete product;

(g) a combination of two or more operations specified in subparagraphs (a) to (f);

(h) slaughter of animals.

2. All the operations carried out in the EEA on a given product shall be considered together when determining whether the working or processing undergone by that product is to be regarded as insufficient within the meaning of paragraph 1.”

16. The text of Protocol 4 EEA was subsequently amended by Decision No 114/2000 of the EEA Joint Committee of 22 December 2000³ (“Decision No 114/2000”), such that Article 6 was replaced with the following text:

“Article 6 Insufficient working or processing operations

1. Without prejudice to paragraph 2, the following operations shall be considered as insufficient working or processing to confer the status of originating products, whether or not the requirements of Article 5 are satisfied:

(a) preserving operations to ensure that the products remain in good condition during transport and storage;

(b) breaking-up and assembly of packages;

(c) washing, cleaning; removal of dust, oxide, oil, paint or other coverings;

(d) ironing or pressing of textiles;

(e) simple painting and polishing operations;

(f) husking, partial or total bleaching, polishing, and glazing of cereals and rice;

(g) operations to colour sugar or form sugar lumps;

(h) peeling, stoning and shelling of fruits, nuts and vegetables;

³

OJ 2001 L 52, p. 40, entered into force on 1 January 2001.

(ii) einföld setning á flöskur, glös, í poka, kassa, öskjur, á spjöld eða töflur o.s.frv. og allar aðrar einfaldar pökkunaraðgerðir;

(d) festing merkja, miða eða annarra slíkra auðkenna á framleiðsluvörur eða umbúðir þeirra;

(e) einföld blöndun framleiðsluvara, hvort sem um er að ræða ólíkar vörur eða ekki, þar sem einn eða fleiri ihlutar blöndunnar fullnægja ekki skilyrðum þeim um uppruna á EES sem sett eru í þessari bókun;

(f) einföld samsetning vöruhluta þannig að úr verði fullgerð framleiðsluvara;

(g) sameining tveggja eða fleiri aðgerða sem tilgreindar eru í a- til f-lið;

(h) slátrun dýra.

2. Litið skal á allar aðgerðir, sem fara fram á EES á tiltekinni framleiðsluvöru, sem eina heild þegar ákvarðað er hvort aðvinnsla hennar teljist ófullnægjandi í skilningi 1. mgr.”

16. Texta bókunar 4 EES var síðar breytt með ákvörðun sameiginlegu EES nefndarinnar nr. 114/2000 frá 22. desember 2000³ (“ákvörðun nr. 114/2000”) þannig að ákvæði 6. gr. bókunarinnar hljóðaði svo:

“6. grein Ófullnægjandi aðvinnsla

1. Með fyrirvara um 2. mgr. teljast eftirfarandi aðgerðir ófullnægjandi aðvinnsla sem ekki veitir upprunaréttindi óháð því hvort kröfum 5. gr. hefur verið fullnægt:

(a) aðgerðir til að tryggja að framleiðsluvörur haldist óskemmdar meðan á flutningi og geymslu stendur;

(b) uppskipting eða sameining vörusendinga;

(c) þvottur, hreinsun; ryk, ryð, olía, málning og annað yfirborðsefni fjarlægð;

(d) straujun og pressun textílefna;

(e) einfaldar aðgerðir til að mála og fægja;

(f) afhýðing, bleiking í heild eða að hluta, slípun og sykurlúðun korns og hrisgrjóna;

(g) aðgerðir til að lita sykurlúða eða búa til sykurmola;

(h) aðgerðir til að afhýða, taka steina úr og skurn af ávöxtum, hnetum og grænmeti;

- (i) sharpening, simple grinding or simple cutting;*
- (j) sifting, screening, sorting, classifying, grading, matching (including the making-up of sets of articles);*
- (k) simple placing in bottles, cans, flasks, bags, cases, boxes, fixing on cards or boards and all other simple packaging operations;*
- (l) affixing or printing marks, labels, logos and other like distinguishing signs on products or their packaging;*
- (m) simple mixing of products, whether or not of different kinds;*
- (n) simple assembly of parts of articles to constitute a complete article or disassembly of products into parts;*
- (o) a combination of two or more operations specified in subparagraphs (a) to (n);*
- (p) slaughter of animals.*

2. All operations carried out in the EEA on a given product shall be considered together when determining whether the working or processing undergone by that product is to be regarded as insufficient within the meaning of paragraph 1.”

17. The latest amendment by Decision No 38/2003 of the EEA Joint Committee of 14 March 2003⁴ replaced the then existing text of Protocol 4 EEA.

18. Appendix II to the original Protocol 4 EEA and Annex II to Protocol 4 EEA in the version replaced by Decision No 71/96 contain a “List of working or processing required to be carried out on non-originating materials in order that the product manufactured can obtain originating status”. Annex II provides that all the materials of Chapter 3 of the EU Harmonized Commodity Description and Coding System (the “Harmonized System” or “HS”), “Fish and crustaceans, molluscs and other aquatic invertebrates” used “must be wholly obtained” in order to confer originating status.

19. Article 2(1) of Protocol 9 to the EEA Agreement on Trade in Fish and other Marine Products (“Protocol 9 EEA”) reads as follows:

“The Community shall, upon entry into force of the Agreement, abolish custom duties on imports and charges having equivalent effect on the products listed in Table II of Appendix 2.”

⁴

OJ 2003 L 137, p. 46, applying from 1 July 2004.

- (i) *skerping, einföld slípun eða einfaldur skurður;*
- (j) *sigtun, sáldun, sundurgreining, flokkun, velja saman (þar á meðal að setja hluti í samstæður);*
- (k) *einföld setning á flöskur, í dósir, poka, öskjur, kassa, á spjöld eða töflur og allar aðrar einfaldar pökkunaraðgerðir;*
- (l) *festing merkja, miða, kennimerkja og annarra slíkra auðkenna á framleiðsluvörur eða umbúðir þeirra;*
- (m) *einföld blöndun framleiðsluvara, hvort sem um er að ræða ólíkar vörur eða ekki;*
- (n) *einföld samsetning vöruhluta þannig að úr verði fullgerð framleiðsluvara eða sundurhlutun framleiðsluvara;*
- (o) *sambland tveggja eða fleiri aðgerða sem tilgreindar eru í a- til n-lið;*
- (p) *slátrun dýra.*

2. *Litið skal á allar aðgerðir, sem fara fram á EES-svæðinu á tiltekinni framleiðsluvöru sem eina heild þegar ákvarðað er hvort aðvinnsla hennar teljist ófullnægjandi í skilningi 1. mgr.”*

17. Bókun 4 EES var síðast breytt með ákvörðun sameiginlegu EES nefndarinnar nr. 38/2003 frá 14. mars 2003⁴ þar sem þágildandi texti var leystur af hólmi í heild sinni með nýjum texta.

18. Viðbætur II með upprunalegri bókun 4 EES og viðauki II með bókun 4 EES eins og hún hljóðaði eftir ákvörðun nr. 71/96 inniheldur “Skrá yfir þá aðvinnslu efna er ekki teljast upprunaefni sem þarf til að framleiðsluvörur öðlist upprunaréttindi”. Í viðauka (viðbæti) II kemur fram að allar vörur sem lýst er í kafla 3 í samræmdu vörulýsingar- og vörunúmeraskránni (“samræmda tollskráin”), “Fiskur og krabbadýr, lindýr og aðrir vatna- og sjávarhryggleysingjar”, og notaðar eru “verða að vera að öllu leyti fengin” til þess að öðlast upprunaréttindi.

19. Ákvæði 1. mgr. 2. gr. bókunar 9 við EES-samninginn um viðskipti með fisk og aðrar sjávarafurðir (“bókun 9 EES”) er svohljóðandi:

“1. Bandalagið skal við gildistöku samningsins fella niður innflutningstolla og gjöld sem hafa samsvarandi áhrif af þeim vörum sem tilgreindar eru í töflu II í 2. viðbæti.”

20. Article 3 of Protocol 9 EEA reads as follows:

“The provisions of Articles 1 and 2 shall apply to products originating in the Contracting Parties. The rules of origin are set out in Protocol 4 EEA of the Agreement.”

21. Article 7 of Protocol 9 EEA reads as follows:

“The provisions of the agreements listed in appendix 3 shall prevail over provisions of this Protocol to the extent they grant to the EFTA States concerned more favourable trade regimes than this Protocol.”

22. Appendix 3 to Protocol 9 EEA refers to three Agreements concluded between the Community and individual EFTA States. With regard to Iceland, the Appendix mentions in its third indent:

“Article 1 of Protocol No 6 of the Agreement between the European Economic Community and the Republic of Iceland signed on 22 July 1972.”

The Free Trade Agreement

23. Article 34 of the Free Trade Agreement⁵ provides:

“The Annexes and Protocols to the Agreement shall form an integral part thereof.”

24. Articles 1, 4 and 5 of Protocol 3 to the Free Trade Agreement, concerning the definition of the concept of ‘originating products’ and methods of administrative cooperation⁶, read as follows:

“Article 1

For the purpose of implementing the Agreement, and without prejudice to the provisions of Articles 2 and 3 of this Protocol, the following products shall be considered as:

...

2. products originating in Iceland:

(a) products wholly obtained in Iceland;

(b) products obtained in Iceland in the manufacture of which products other than those referred to in (a) are used, provided that the said products have undergone sufficient working or processing within the meaning of Article 5. This condition shall not apply, however, to products which, within the meaning of this Protocol, originate in the Community.

⁵ OJ 1972 L 301, p. 2; Special English Edition December 1972, p. 4.

⁶ OJ 1972 L 301, p. 104; Special English Edition December 1972, p. 106.

20. Ákvæði 3. gr. bókunar 9 EES er svohljóðandi:

“Ákvæði 1. og 2. gr. skulu gilda um vörur sem eru upprunnar hjá samningsaðilum. Upprunareglur er að finna í bókun 4 við samninginn.”

21. Ákvæði 7. gr. bókunar 9 EES er svohljóðandi:

“Ákvæði samninganna sem taldir eru upp í 3. viðbæti skulu hafa forgangsgildi gagnvart ákvæðum þessarar bókunar að því leyti sem viðkomandi EFTA-rikkjum eru þar veitt betri viðskiptakjör en gert er í þessari bókun.”

22. Viðbætur 3 með bókun 9 EES vísar til þriggja samninga milli bandalagsins og einstakra EFTA-ríkja. Hvað Ísland varðar, segir í þriðja lið:

“Ákvæði 1. gr. bókunar nr. 6 við samninginn milli Efnahagsbandalags Evrópu og Lýðveldisins Íslands sem undirritaður var 22. júlí 1972.”

Fríverslunarsamningurinn

23. Ákvæði 34. gr. fríverslunarsamningsins⁵ er svohljóðandi:

“Viðaukar og bókanir, sem fylgja samningi þessum, eru óaðskiljanlegir hlutar samningsins.”

24. Ákvæði 1. gr., 4. gr. og 5. gr. bókunar 3 við fríverslunarsamninginn, varðandi skilgreiningu hugtaksins “upprunavörur” eða “vörur upprunnar...” og varðandi fyrirkomulag á samvinnu stjórnvalda⁶, er svohljóðandi:

“1. grein

Við framkvæmd samningsins milli Efnahagsbandalagsins og Íslands, og án þess að brotið sé í bága við 2. og 3. gr. þessarar bókunar, skulu eftirfarandi vörur taldar:

...

2. upprunnar á Íslandi:

(a) Vörur að öllu leyti fengnar á Íslandi;

(b) vörur fengnar á Íslandi, sem í eru notaðar aðrar vörur en þær, sem taldar eru í a-lið, að því tilskildu, að þær vörur hafi hlotið nægilega aðvinnslu í skilningi 5. gr. Þessu skilyrði þarf þó ekki að fullnægja að því er varðar vörur, sem eru upprunnar í Efnahagsbandalaginu í skilningi þessarar bókunar.

...

⁵ OJ 1972 L 301, bls. 2; sérstakur viðbætur á ensku, desember 1972, bls. 4.

⁶ OJ 1972 L 301, bls. 104; sérstakur viðbætur á ensku, desember 1972, bls. 106.

Article 4

The following shall be considered as wholly obtained either in the Community or in Iceland within the meaning of Article 1 (1) (a) and (2) (a):

- (a) mineral products extracted from their soil or from their seabed;*
- (b) vegetable products harvested there;*
- (c) live animals born and raised there;*
- (d) products from live animals raised there;*
- (e) products obtained by hunting or fishing conducted there;*
- (f) products of sea fishing and other products taken from the sea by their vessels;*
- (g) products made abroad their factory ships exclusively from products referred to in subparagraph (f);*
- (h) used articles collected there fit only for the recovery of raw materials;*
- (i) waste and scrap resulting from manufacturing operations conducted there;*
- (j) goods produced there exclusively from products specified in subparagraphs (a) to (i).*

Article 5

1. For the purpose of implementing Article 1 (1) (b) and (2) (b) the following shall be considered as sufficient working or processing:

- (a) working or processing as a result of which the goods obtained receive a classification under a tariff heading other than that covering each of the products worked or processed, except, however, working or processing specified in List A, where the special provisions of that list apply;*
- (b) working or processing specified in List B.*

'Sections', 'Chapters' and 'tariff headings' shall mean the Sections, Chapters and tariff headings in the Brussels Nomenclature for the Classification of Goods in Customs Tariffs.

4. grein

Eftirtaldar vörur eru taldar fengnar að öllu leyti annaðhvort í Efnahagsbandalaginu eða á Íslandi í skilningi a-liðs 1. tl. og a-liðs 2. tl. 1. gr.:

- (a) Jarðefni, sem unnin eru úr jörðu í landi þeirra eða úr hafsbotni þeirra;
- (b) vörur úr gróðurrikinu, sem þar eru ræktaðar;
- (c) lifandi dýr, sem þar eru borin og alin;
- (d) afurðir lifandi dýra, sem þar eru alin;
- (e) veiðibráð og fiskafurðir, sem aflað er með veiðum þar;
- (f) sjávarafurðir, sem aflað er frá skipum þeirra;
- (g) vörur framleiddar um borð í verksmiðjuskipum þeirra, algerlega úr efnivöru, sem við er átt í f-lið;
- (h) notaðar vörur, sem þar er safnað og ekki er hægt að nota aftur, nema sem hráefni;
- (i) úrgangsefni iðnaðar, sem þar er stundaður;
- (j) vörur, sem algerlega eru framleiddar þar úr efnivörum, sem taldar eru í lið a til i.

5. grein

1. Við beitingu ákvæða b-liðs 1. tl. og b-liðs 2. tl. 1. gr. teljast fullnægjandi:

(a) aðvinnsla, sem hefur í för með sér, að framleidd vara fellur undir annað tollskrárnúmer en það, sem efnivörunar falla undir hver fyrir sig, þó að undanskilinni meðferð, sem tiltekin er í lista A og hin sérstöku ákvæði listans eiga við;

(b) aðvinnsla, sem lýst er í lista B.

Með flokk, kafla og tollskrárnúmeri er átt við flokk, kafla og tollskrárnúmer í Bruxelles-tollnafnaskránni um flokkun vöruhegunda í tollskrá.

2. *When, for a given product obtained, a percentage rule limits in List A and in List B the value of the materials and parts which can be used, the total value of these materials and parts, whether or not they have changed tariff heading in the course of the working, processing or assembly within the limits and under the conditions laid down in each of those two lists, may not exceed, in relation to the value of the product obtained, the value corresponding either to the common rate, if the rates are identical in both lists, or to the higher of the two if they are different.*

3. *For the purpose of implementing Article 1 (1) (b) and (2) (b), the following shall still be considered as insufficient working or processing to confer the status of originating product, whether or not there is a change of tariff heading:*

(a) operations to ensure the preservation of merchandise in good conditions during transport and storage (ventilation, spreading out, drying, chilling, placing in salt, sulphur dioxide or other aqueous solutions, removal of damaged parts, and like operations);

(b) simple operations consisting of removal of dust, sifting or screening, sorting, classifying, matching (including the making up of sets of articles), washing, painting, cutting up;

(c) (i) changes of packing and breaking up and assembly of consignments;

(ii) simple placing in bottles, flasks, bags, cases, boxes, fixing on cards or boards, etc., and all other simple packing operations;

(d) affixing marks, labels or other like distinguishing signs on products or their packing;

(e) simple mixing of products, whether or not of different kinds, where one or more components of the mixtures do not meet the conditions laid down in this Protocol to enable them to be considered as originating either in the Community or in Iceland;

(f) simple assembly of parts of articles to constitute a complete article;

(g) a combination of two or more operations specified in subparagraphs (a) to (f);

(h) slaughter of animals.”

2. Þegar hundraðshluta efnivara, sem nota má í framleiðslu tiltekinnar vöru, eru takmörk sett í listum A eða B, getur heildarverðmæti þessara efnivara – miðað við verðmæti framleiddu vörunnar – ekki farið fram úr því verðmæti, sem svarar til sameiginlegs hámarks, ef hámrkin eru þau sömu í báðum listunum, eða þess, sem er hærra, ef þau eru mismunandi. Í þessu sambandi skiptir eigi máli, hvort vörunnar hafa færst milli tollskrárnúmera við aðvinnslna eða samsetninguna eða ekki, innan þeirra marka og með þeim skilyrðum, sem kveðið er á um í hvorum listanum um sig.

3. Við beitingu ákvæða b-liðs 1. tl. og b-liðs 2. tl. 1. gr. verður aðvinnsla eigi talin nægileg til að varan fullnægi skilyrðum um uppruna, hvort sem hún skiptir um tollskrárnúmer eða ekki:

(a) Þegar meðferðin miðar að því að tryggja, að varan haldist óskemmd, meðan á flutningi og geymslu stendur (viðrun, breiðsla, þurrkun, kæling, þækilsöltun, niðurlagning í brennisteinsvatn eða vatn, sem bætt er í öðrum efnum, hreinsun með því að fjarlægja skemmda hluta og lík meðferð);

(b) þegar um einfalda meðferð er að ræða til að rykhreinsa, sálda, sundurgreina, flokka, velja saman (þar á meðal söfnun í sett), þvo, mála eða hluta í sundur;

(c)(i) þegar skipt er um umbúðir eða vörum skipað í minni eða stærri sendingar;

(ii) þegar varan er aðeins sett á flöskur eða glös, í poka, hylki eða öskjur, á bakka o. s. frv. eða sett á annan einfaldan hátt í umbúðir;

(d) þegar sett eru merki, miðar eða önnur slík auðkenni á vörunnar sjálfar eða umbúðir þeirra;

(e) þegar um einfalda blöndun vara er að ræða, hvort sem um ólíkar vörur er að ræða eða ekki, ef einn eða fleiri hlutar blöndunnar fullnægja ekki skilyrðum þeim um uppruna, sem sett eru í þessari bókun;

(f) þegar hlutar eru settir saman á einfaldan hátt í því skyni að gera heilan hlut;

(g) þegar beitt er saman tveimur eða fleiri aðferðum, sem lýst er í a-f liðum hér að framan;

(h) þegar dýrum er slátrað.”

25. Protocol 3 to the Free Trade Agreement was amended several times, *inter alia* by Decision No 1/96 of the EC-Iceland Joint Committee of 19 December 1996⁷ (“Decision No 1/96”), which entered into force on 1 January 1997. Articles 2(2), 5, 6 and 7 of this version read as follows:

“Article 2 General requirements

2. For the purpose of implementing this Agreement, the following products shall be considered as originating in Iceland:

(a) products wholly obtained in Iceland within the meaning of Article 5 of this Protocol;

(b) products obtained in Iceland incorporating materials which have not been wholly obtained there, provided that such materials have undergone sufficient working or processing in Iceland within the meaning of Article 6 of this Protocol.

Article 5 Wholly obtained products

1. The following shall be considered as wholly obtained in the Community or Iceland:

(a) mineral products extracted from their soil or from their seabed;

(b) vegetable products harvested there;

(c) live animals born and raised there;

(d) products from live animals raised there;

(e) products obtained by hunting or fishing conducted there;

(f) products of sea fishing and other products taken from the sea outside the territorial waters of the Community or Iceland by their vessels;

(g) products made aboard their factory ships exclusively from products referred to in subparagraph (f);

(h) used articles collected there fit only for the recovery of raw materials, including used tyres fit only for retreading or for use as waste;

(i) waste and scrap resulting from manufacturing operations conducted there;

(j) products extracted from marine soil or subsoil outside their territorial waters provided that they have sole rights to work that soil or subsoil;

(k) goods produced there exclusively from the products specified in subparagraphs (a) to (j).

⁷

OJ 1997 L 195, p. 101.

25. Bókun 3 við fríverslunarsamninginn hefur verið breytt nokkrum sinnum, m.a. með ákvörðun sameiginlegu nefndar EB og Íslands nr. 1/96 frá 19. desember 1996⁷ (ákvörðun nr. 1/96), sem tók gildi 1. janúar 1997. Ákvæði 2. mgr. 2. gr., 5. gr., 6. gr. og 7. gr. eru svohljóðandi:

“2. grein Almennar kröfur

2. Framleiðsluvara telst upprunnin á Íslandi í skilningi þessa samnings:

(a) ef hún er fengin að öllu leyti þar í skilningi 5. gr.;

(b) ef hún er fengin á Íslandi og inniheldur efni sem ekki eru að öllu leyti fengin þar enda hafi hún hlotið nægilega aðvinnslu á Íslandi í skilningi 6. gr.

5. grein Framleiðsluvara fengin að öllu leyti

1. Eftirtaldar vörur teljast fengnar að öllu leyti í bandalaginu eða á Íslandi:

(a) jarðefni unnin úr jörðu þess eða úr hafsbótnei þess;

(b) vörur úr jurtaríkinu sem þar eru ræktaðar;

(c) lifandi dýr sem þar eru borin og alin;

(d) afurðir lifandi dýra sem þar eru alin;

(e) veiðibráð og fiskafurðir sem aflað er með veiðum þar;

(f) sjávarafurðir og aðrar afurðir teknar úr sjó utan landhelgi bandalagsins eða Íslands af skipum þeirra;

(g) vörur framleiddar um borð í verksmiðjuskipum þeirra, eingöngu úr afurðum sem getið er í f-lið;

(h) notaðar vörur sem þar er safnað og eingöngu er unnt að nota til að vinna hráefni úr, þar á meðal notaðir hjólbarðar sem nýtast eingöngu til sólunar eða sem úrgangur;

(i) úrgangur og rusl sem til fellur vegna framleiðslustarfsemi þar;

(j) vörur unnar úr yfirborðslögum hafsbótneisins utan landhelgi samningsríkjanna, að því tilskildu að þau hafi einkarétt á að vinna úr þessum lögum;

(k) vörur sem þar eru framleiddar eingöngu úr þeim framleiðsluvörum sem tilgreindar eru í a- til j-lið.

2. The terms 'their vessels' and 'their factory ships' in paragraph 1 (f) and (g) shall apply only to vessels and factory ships:

(a) which are registered or recorded in an EC Member State or in Iceland;

(b) which sail under the flag of an EC Member State or of Iceland;

(c) which are owned to an extent of at least 50 percent by nationals of EC Member States or of Iceland, or by a company with its head office in one of these States, of which the manager or managers, Chairman of the Board of Directors or the Supervisory Board, and the majority of the members of such boards are nationals of EC Member States or of Iceland and of which, in addition, in the case of partnerships or limited companies, at least half the capital belongs to those States or to public bodies or nationals of the said States;

(d) of which the master and officers are nationals of EC Member States or of Iceland; and

(e) of which at least 75 per cent of the crew are nationals of EC Member States or of Iceland.

Article 6 Sufficiently worked or processed products

1. For the purposes of Article 2, products which are not wholly obtained are considered to be sufficiently worked or processed when the conditions set out in the list in Annex II are fulfilled.

The conditions referred to above indicate, for all products covered by this Agreement, the working or processing which must be carried out on non-originating materials used in manufacturing and apply only in relation to such materials. Accordingly, it follows that if a product, which has acquired originating status by fulfilling the conditions set out in the list is used in the manufacture of another product, the conditions applicable to the product in which it is incorporated do not apply to it, and no account shall be taken of the non-originating materials which may have been used in its manufacture.

2. Notwithstanding paragraph 1, non-originating materials which, according to the conditions set out in the list, should not be used in the manufacture of a product may nevertheless be used, provided that:

(a) their total value does not exceed 10 per cent of the ex-works price of the product;

(b) any of the percentages given in the list for the maximum value of non-originating materials are not exceeded through the application of this paragraph.

This paragraph shall not apply to products falling within Chapters 50 to 63 of the Harmonized System.

2. Orðin “skip þeirra” og “verksmiðjuskip þeirra” í f- og g-lið 1. mgr. gilda aðeins um skip og verksmiðjuskip:

(a) sem eru skráð eða skrásett í aðildarríki EB eða Íslandi;

(b) sem sigla undir fána aðildarríkis EB eða Íslands;

(c) sem eru að minnsta kosti 50 af hundraði í eign ríkisborgara aðildarríkja EB eða Íslands, eða í eign fyrirtækis sem hefur aðalstöðvar í einu þessara ríkja enda sé framkvæmdastjóri eða framkvæmdastjórar þess stjórnarformaður eða formaður umsjónarnefndar og meirihluti stjórnarnefndarmanna eða umsjónarnefndarmanna ríkisborgarar aðildarríkja EB eða Íslands; auk þess sem að minnsta kosti helmingur höfuðstóls sé í eigu þessara ríkja eða opinberra stofnana eða ríkisborgara nefndra ríkja, ef um er að ræða sameignarfélög eða hlutafélög;

(d) þegar skipstjóri og yfirmenn eru ríkisborgarar aðildarríkis EB eða Íslands; og

(e) þegar að minnsta kosti 75 af hundraði áhafnarinnar eru ríkisborgarar aðildarríkja EB eða Íslands.

6. grein Framleiðsluvörur sem hlotið hafa nægilega aðvinnslu

1. Að því er varðar 2. gr. skulu framleiðsluvörur sem ekki eru fengnar að öllu leyti teljast hafa hlotið nægilega aðvinnslu hafi skilyrðum í II. viðauka verið fullnægt.

Skilyrði þessi kveða á um aðvinnslu efna sem eru ekki upprunaefni og eru notuð við framleiðslu þeirra vara sem samningur þessi tekur til, og gilda þau einungis um slík efni. Af þeim sökum skal framleiðsluvara sem telst upprunavara vegna þess að skilyrðum sem sett eru í lista um hana er fullnægt, og er notuð við framleiðslu annarrar vöru, ekki þurfa að fullnægja skilyrðum sem gilda um vöruna sem hún er sett saman við, og skal ekki taka tillit til þess að efnin sem notuð eru við framleiðslu hennar eru ekki upprunaefni.

2. Þrátt fyrir 1. mgr., skal efni sem ekki telst upprunaefni ekki notað við framleiðslu þessarar vöru, samkvæmt þeim skilyrðum sem sett eru í lista um hana, nema því aðeins að:

(a) heildarverðmæti þeirra sé ekki meira en 10 af hundraði af verksmiðjuverði framleiðsluvörunnar;

(b) ekki sé farið fram úr einni eða fleiri hundraðshlutatölum af því hámarksverðmæti sem gefið er upp fyrir efni sem ekki teljast upprunaefni og fram koma í listanum, vegna beitingar þessarar málsgreinar.

Þessi málsgrein gildir ekki um framleiðsluvörur sem teljast til 50. – 63. kafla í samræmdu tollskránni.

3. Paragraphs 1 and 2 shall apply except as provided in Article 7.

Article 7 Insufficient working or processing operations

1. Without prejudice to paragraph 2, the following operations shall be considered as insufficient working or processing to confer the status of originating products, whether or not the requirements of Article 6 are satisfied:

(a) operations to ensure the preservation of products in good condition during transport and storage (ventilation, spreading out, drying, chilling, placing in salt, sulphur dioxide or other aqueous solutions, removal of damaged parts, and like operations);

(b) simple operations consisting of removal of dust, sifting or screening, sorting, classifying, matching (including the making-up of sets of articles), washing, painting, cutting up;

(c) (i) changes of packaging and breaking up and assembly of packages;

(ii) simple placing in bottles, flasks, bags, cases, boxes, fixing on cards or boards, etc., and all other simple packaging operations;

(d) affixing marks, labels and other like distinguishing signs on products or their packaging;

(e) simple mixing of products, whether or not of different kinds, where one or more components of the mixtures do not meet the conditions laid down in this Protocol to enable them to be considered as originating in the Community or Iceland;

(f) simple assembly of parts to constitute a complete product;

(g) a combination of two or more operations specified in subparagraphs (a) to (f);

(h) slaughter of animals.

2. All the operations carried out in either the Community or Iceland on a given product shall be considered together when determining whether the working or processing undergone by that product is to be regarded as insufficient within the meaning of paragraph 1.”

26. Annex 2 to Protocol 3 to the Free Trade Agreement as amended by Decision No 1/96 corresponds, with regard to products under Chapter 3 HS, to Annex 2 to Protocol 4 EEA.

3. Ákvæði 1. og 2. mgr. gilda nema að því leyti sem kveðið er á um í 7. gr.

7. grein Ófullnægjandi aðvinnsla

1. Með fyrirvara um 2. mgr. teljast eftirfarandi aðgerðir ófullnægjandi aðvinnsla sem ekki veitir upprunaréttindi óháð því hvort kröfum 6. gr. hefur verið fullnægt:

(a) Aðgerð til að tryggja að framleiðsluvörur haldist óskemmdar meðan á flutningi og geymslu stendur (viðrun, breiðsla, þurrkun, kæling, pækilsöltun, niðurlagning í brennisteinsvatn eða aðrar vatnsupplausnir, fjarlæging skemmdra hluta og sambærilegar aðgerðir);

(b) einfaldar aðgerðir til að rykhreinsa, sigta eða sálda, sundurgreina, flokka, velja saman (þar á meðal að útbúa hluti í samstæður), þvo mála eða hluta í sundur;

(c) (i) skipti á umbúðum, svo og uppskipting og sameining;

(ii) einföld setning á flöskur, glös, í poka, kassa, öskjur, á spjöld eða töflur o.s.frv. og allar aðrar einfaldar þökkunaraðgerðir;

(d) festing merkja, miða eða annarra slíkra auðkenna á framleiðsluvörur eða umbúðir þeirra;

(e) einföld blöndun framleiðsluvara, hvort sem um er að ræða ólíkar vörur eða ekki, þar sem einn eða fleiri i hlutar blöndunnar fullnægja ekki skilyrðum þeim um uppruna í bandalaginu eða á Íslandi sem sett eru í þessari bókun;

(f) einföld samsetning vöruhluta þannig að úr verði fullgerð framleiðsluvara;

(g) sameining tveggja eða fleiri aðgerða sem tilgreindar eru í a- til f-lið;

(h) slátrun dýra.

2. Litið skal á allar aðgerðir, sem fara fram í bandalaginu eða á Íslandi á tiltekinni framleiðsluvöru, sem eina heild þegar ákvarðað er hvort aðvinnsla hennar teljist ófullnægjandi í skilningi 1. mgr.”

26. Viðauki 2 með bókun 3 við fríverslunarsamninginn, eins og henni var breytt með ákvörðun nr. 1/96, er samhljóða viðauka 2 við bókun 4 EES hvað varðar vörur sem falla undir kafla 3 í samræmdu tollskránni.

27. Protocol 6 to the Free Trade Agreement concerning the special provisions applicable to imports of certain fish products into the Community⁸ provides in its Article 1:

“As regards the products listed below and originating in Iceland:

(a) no new customs duty shall be introduced in trade between the Community and Iceland,

(b) Article 3(2), (3) and (4) of the Agreement shall apply to imports into the Community as originally constituted, Ireland and the United Kingdom. The date for the first tariff reduction shall, however, be 1 July 1973 and not 1 April 1973.

[the following table refers to certain products under, inter alia, Common Customs Tariff heading No 03.01 - Fish, fresh (live or dead), chilled or frozen: B. Saltwater fish: II.: Fillets: (b) frozen C. Livers and roes – No 03.02 – Fish, dried, salted or in brine; smoked fish, whether or not cooked before or during the smoking process: C. Livers and roes – No 16.04 – Prepared or preserved fish, including caviar and caviar substitutes: Caviar and caviar substitutes]

[...]

2. Customs duties on imports into the Community of the following products originating in Iceland:

[the following table refers to Common Customs Tariff heading No 03.01 – Fish, fresh (live or dead), chilled or frozen: B. Saltwater fish: I. Whole, headless or in pieces: ... (h) Cod (Gadus morrhua or Gadus callarias) ...]

shall be adjusted to the following levels:

[...]

for products falling within subheadings Nos 03.01 B I h ...

[the following table mentions “Rates applicable to imports into the Community as originally constituted and Ireland”, as well as to imports into the United Kingdom, Denmark and Norway. The rate applicable as from 1 January 1976 is 3,7.]

The reference prices established in the Community for imports of these products shall continue to apply.”

27. Í 1. gr. bókunar 6 við fríverslunarsamninginn, varðandi sérstök ákvæði um innflutning til Efnahagsbandalagsins á tilteknum sjávarafurðum segir⁸:

“Að því er varðar afurðir, sem taldar eru hér á eftir og upprunnar eru á Íslandi:

(a) verða engir nýir tollar teknir upp í viðskiptum Efnahagsbandalagsins og Íslands,

(b) verður ákvæðum 2., 3. og 4. tl. 3. gr. samningsins beitt við innflutning til Efnahagsbandalagsins, í upphaflegri mynd þess, til Írlands og til Bretlands, þó þannig að fyrstu tollalækkunarverðum 1. júlí 1973 í stað 1. apríl 1973.

[Eftirfarandi tafla vísar til tiltekinna vara í sameiginlegu tollskránni sem m.a. falla undir nr. 03.01 – Fiskur, nýr (lifandi eða dauður), kældur eða frystur: B. úr sjó: II: flök (b) fryst C. lifur, hrogn og svil. - Nr. 03.02 – Fiskur, þurrkaður, saltaður eða í saltlegi; reyktur fiskur, einnig soðinn áður eða jafnframt reykingu: C. lifur, hrogn og svil. - Nr. 16.04 – Fiskur, tilreyddur eða niðursoðinn, þar með talin styrjuhrogn og eftirlíkingar þeirra: A. styrjuhrogn og eftirlíkingar þeirra.]

[...]

2. Innflutningstollar Efnahagsbandalagsins á eftirtöldum afurðum upprunnum á Íslandi:

[eftirfarandi tafla vísar til sameiginlegu tollskrárinnar nr. 03.01 – Fiskur, nýr (lifandi eða dauður), kældur eða frystur: B. úr sjó: I. heill, hausaður eða skorinn í bita: ... (h) þorskur (Gadus morrhua or Gadus callarias) ...]

breytast þannig:

[...]

fyrir vörur í tollskrárnúmeri 03.01 B I h ...

[Eftirfarandi tafla vísar til tolls “á innflutning til bandalagsins, í upphaflegri mynd þess, og til Írlands”, sem og innflutnings til Bretlands, Danmerkur og Noregs. Tollurinn nemur 3.7 % frá og með 1. janúar 1976.]

“Varðandi innflutning þessara afurða gildir það viðmiðunarverð, sem Efnahagsbandalagið ákveður.”

V. Written Observations

28. 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 Ríkislögreglustjórinn, represented by Helgi Magnús Gunnarsson, Police Attorney;
- the defendant Ásgeir Logi Ásgeirsson, represented by Rúna S. Geirsdóttir, District Court Advocate, Seltjarnarnes;
- the defendant Axel Pétur Ásgeirsson, represented by Magnús Thoroddsen, Supreme Court Advocate, Reykjavík;
- the defendant Helgi Már Reynisson, represented by Lárentsínus Kristjánsson, Supreme Court Advocate, Keflavík;
- the Government of Iceland, represented by Finnur Þór Birgisson, Legal Officer, Ministry of Foreign Affairs, acting as Agent;
- the EFTA Surveillance Authority, represented by Per Andreas Bjørgan and Arne Torsten Andersen, Officers, Legal & Executive Affairs, acting as Agents;
- the Commission of the European Communities, represented by Xavier Lewis, Member of its Legal Service, acting as Agent.

Ríkislögreglustjórinn

29. Elaborating on the facts, the Ríkislögreglustjórinn states that the cod at issue were of the type *Gadus Morhua* (Atlantic Ocean cod) and *Gadus Macrocephalus* (Pacific Ocean cod), which, if originating in Russia and the United States, would have been subject to 13-20% import duty. The customs categories in question are 03053019 and 03056200 in the Harmonized System. It is also submitted that the raw material was fished entirely by vessels owned by and under the control of Russian and American fishing companies.

30. Further information is given with regard to the issue of accessibility of the relevant legal documents in Iceland. The amendments of 1996 and 2000 to Protocol 4 EEA were only published officially as part of an annual list, displaying not the detailed contents but only a reference to the EEA Supplement to the Official Journal of the European Communities. Therefore, it seems likely to the Ríkislögreglustjórinn, that the original Protocol 4 EEA is the one that applies to the defendants, as it was lawfully published. The amendment to Protocol 3 to the Free Trade Agreement by Decision No 1/96 was only published in the Official Journal of the European Communities and was not even referred to

V. Skriflegar greinargerðir

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

- Ríkislögreglustjóra. Í fyrirsvari er Helgi Magnús Gunnarsson, ftr.;
- Ákærða, Ásgeiri Loga Ásgeirssyni. Í fyrirsvari sem umboðsmaður er Rúna S. Geirsdóttir, hdl., Seltjarnarnesi;
- Ákærða, Axel Pétri Ásgeirssyni. Í fyrirsvari sem umboðsmaður er Magnús Thoroddsen, hrl., Reykjavík;
- Ákærða, Helga Má Reynissyni. Í fyrirsvari sem umboðsmaður er Lárentsínus Kristjánsson, hrl., Keflavík;
- Ríkisstjórn Íslands. Í fyrirsvari sem umboðsmaður er Finnur Þór Birgisson, lögfræðingur, utanríkisráðuneytinu;
- Eftirlitsstofnun EFTA. Í fyrirsvari eru sem umboðsmenn Per Andreas Bjørgan og Arne Torsten Andersen, lögfræðingar á lögfræði- og framkvæmdasviði;
- Framkvæmdastjórn Evrópubandalaganna. Í fyrirsvari sem umboðsmaður er Xavier Lewis hjá lagadeildinni.

Ríkislögreglustjóri

29. Í greinargerð um málsatvik, tekur ríkislögreglustjóri fram að þorskurinn sem um ræðir sé af tegundinni *Gadus Morhua* (Atlantshafsporskur) og *Gadus macrocephalus* (Kyrrahafsporskur) sem, ef hann ætti uppruna í Rússlandi eða Bandaríkjunum, bæri 13-20% innflutningstoll. Tollaflökkarnir sem um ræðir eru 03053019 og 03056200 í samræmdu tollskránni. Einnig er upplýst að hráefnið hafi verið veitt að öllu leyti af skipum í eigu og undir stjórn rússneskra og bandarískra útgerðarfyrirtækja.

30. Frekari upplýsingar eru gefnar varðandi aðgengi að viðkomandi samningum og bókunum á Íslandi. Fram kemur að breytingarnar frá 1996 og 2000 við Bókun 4 EES hafi verið birtar opinberlega sem hluti af árlegri skrá, þar sem ekki hafi komið fram efnisatriði, heldur aðeins tilvitnun til EES-viðauka við Stjórnartíðindi Evrópubandalaganna. Því virðist ríkislögreglustjóra líklegt að það sé hin upphaflega bókun 4 EES sem gildi gagnvart ákærðu, þar sem hún hafi birst með lögboðnum hætti. Breytingin á Bókun 3 við fríverslunarsamninginn skv. ákvörðun nr. 1/96 hafi aðeins birst í Stjórnartíðindum Evrópubandalaganna og ekki einu sinni verið getið í Stjórnartíðindum á Íslandi. Því sé ólíklegt að hún gildi um ákærðu, þar sem hún hafi ekki birst með lögboðnum hætti á Íslandi.

in the official Icelandic Gazette. Therefore, it is unlikely to apply to the defendants because it was not lawfully published in Iceland.

31. Regarding the first question, the Ríkislögreglustjórinn remarks that Article 1 of Protocol 6 to the Free Trade Agreement, to which Article 7 of Protocol 9 EEA and its Appendix 3 refer, only addresses import duties and their cancellation, but not the rules on origin. *E contrario*, it was not the intention to let the provisions of the Agreement on origin fall under the term “trade regimes”. The rules of origin are of a different nature than trade regimes.

32. The Ríkislögreglustjórinn further refers to Decision No 1/96, by which the rules of origin of Protocol 3 to the Free Trade Agreement were amended to correspond to the rules in Protocol 4 EEA. Therefore, the first question is considered to be academic in nature. However, given the failure to lawfully publish the amendments in Iceland, the EFTA Court’s opinion on this question may affect the conclusion of the case. Since the Héraðsdómur deems it important to obtain an interpretation of a provision of the EEA Agreement in order to answer the first question, the EFTA Court should respond to the question in light of Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”).

33. The Ríkislögreglustjórinn addresses the second and the third question jointly. Articles 4 and 5 of Protocol 4 EEA, as amended by Decision No 71/96, and Annex 2, discuss obtaining and processing products. The products in question do not fulfil the conditions of Article 4, as they are not fished by Icelandic vessels. According to Article 5(1) and Annex 2 to Protocol 4 EEA, processing fish products will never lead to a change in their origin. Since fish products must be wholly obtained under the list in Annex 2, they do not get an origination status upon processing. As the rules on processing in Protocol 4 EEA are not intended to apply to fish products, an interpretation is of no consequence. The questions are therefore only academic, even though the answers may be of importance to the Héraðsdómur in interpreting the earlier version of Protocol 3 to the Free Trade Agreement. The Ríkislögreglustjórinn invites the Court to dismiss the two questions according to Article 88(1) of the Rules of Procedure.

34. Should the Court, however, be of the opinion that it is in a position to interpret Article 6 of Protocol 4 EEA with respect to fish products, the processing, as described in the second question, is deemed insufficient. Such processing corresponds to what is listed in Article 6 as insufficient working or processing. In this connection, reference is made to Article 6(1)(a), (i), and (o) of Protocol 4 EEA, as amended by Decision No 114/2000. The processing of the fish in the present case simply consisted of parting and salting it for storage in unfrozen condition.

31. Að því er varðar fyrstu spurninguna, tekur ríkislögreglustjóri fram að 1. gr. bókunar 6 við fríverslunarsamninginn, sem 7. gr. bókunar 9 EES og 3. viðbæturinn við hana vísa til, fjalli einungis um innflutningstolla og niðurfellingu þeirra, en ekki um upprunareglur. Með gagnályktun megi ráða að ekki hafi verið ætlunin að ákvæði sammingsins um uppruna féllu undir hugtakið “viðskiptakjör”. Upprunareglur séu annars eðlis en viðskiptakjör.

32. Ríkislögreglustjóri vísar ennfremur til ákvörðunar nr. 1/96, þar sem upprunareglunum í bókun 3 við fríverslunarsamninginn var breytt til samræmis við reglurnar í bókun 4 EES. Því teljist fyrsta spurningin fræðilegs eðlis. Í ljósi þess, hins vegar, að breytingarnar hafi ekki verið ekki birtar með lögformlegum hætti á Íslandi, kunni álit EFTA-dómstólsins um þetta efni að hafa áhrif á niðurstöðu málsins. Þar sem Héraðsdómur telji mikilvægt að fá fram túlkun á ákvæði EES-sammingsins til þess að svara fyrstu spurningunni, beri EFTA-dómstólnum að svara spurningunni í ljósi 34. gr. sammingsins milli EFTA-ríkjana um stofnun eftirlitsstofnunar og dómstóls (“sammingsins um stofnun eftirlitsstofnunar og dómstóls”).

33. Ríkislögreglustjóri fjallar um aðra og þriðju spurninguna sameiginlega. Ákvæði 4. og 5. gr. bókunar 4 EES, með áorðnum breytingum skv. ákvörðun nr. 71/96 og viðauka 2, fjalli um með hvaða hætti framleiðsluvara teljist fengin að öllu leyti og um vinnslu vöru. Í umfjölluninni kemur fram að varan sem hér um ræðir uppfylli ekki skilyrði 4. gr. þar sem hún sé ekki veidd af íslenskum fiskiskipum. Skv. 1. mgr. 5. gr. og viðauka 2 við bókun 4 við EES samninginn geti aðvinnsla fiskafurða aldrei leitt til breytingar á uppruna þeirra. Þar sem fiskafurðir verði að öllu leyti að vera fengnar skv. skránni í viðauka 2 öðlist þær ekki upprunaréttindi við vinnslu. Þar sem reglunum um aðvinnslu í bókun 4 við EES-samninginn sé ekki ætlað að gilda um fiskafurðir, hafi túlkun á þeim ekkert gildi. Spurningarnar séu því einungis fræðilegar, jafnvel þótt svörin kunni að vera Héraðsdómi mikilvæg við túlkun á fyrri útgáfu bókunar 3 við fríverslunarsamninginn. Ríkislögreglustjóri leggur til að spurningunum tveimur verði vísað frá dómstólnum á grundvelli 1. mgr. 88. gr. starfsreglna dómsins.

34. Komist dómstóllinn hins vegar að þeirri niðurstöðu að hann sé til þess bær að skýra 6. gr. bókunar 4 við EES samninginn að því er varðar fiskafurðir, hljóti aðvinnslan, sem lýst er í annarri spurningunni, að teljast ófullnægjandi. Aðvinnsla af þessu tagi svarar til þess sem lýst er í 6. gr. sem ófullnægjandi aðvinnslu. Í þessu sambandi er vísað til a-, i- og o-liða 1. mgr. 6. gr. bókunar 4 EES, með áorðnum breytingum skv. ákvörðun nr. 114/2000. Aðvinnsla fisksins í þessu tilviki hafi einfaldlega falist í því að aðskilja og salta hann til geymslu í ófrosnu formi.

35. With regard to the fourth and the fifth question, the Ríkislögreglustjórinn is of the opinion that the EFTA Court has no jurisdiction to interpret the Free Trade Agreement and suggests these questions be dismissed in accordance with Article 88(1) of the Rules of Procedure. Even if the EFTA Court could deal with international agreements other than the EEA Agreement, e.g. due to their relationship with the EEA Agreement, the EFTA Court may not interpret the earlier version of Protocol 3 to the Free Trade Agreement, which has been invalidated by later amendments. It is not relevant in this respect that later amendments to Protocol 3 were not lawfully published according to Icelandic law. Consequently, the two questions are not considered to carry any logical weight in this case. Should the EFTA Court deem itself competent to address the interpretation of Protocol 3 to the Free Trade Agreement, the Ríkislögreglustjórinn reasserts its opinion that the products were insufficiently processed.

36. The Ríkislögreglustjórinn also refers to the view of one of the defendants, according to which it is sufficient processing in the sense of Articles 1(2)(b) and 5(1)(a) of Protocol 3 to the Free Trade Agreement, if the processed product falls under another customs registration number than the raw material. This is said to be the case for whole-frozen cod on the one hand and salted flattened or filleted cod on the other. This argument pertains to the original Protocol from 1972 and, as the case may be, to the amendment of 1985. The Ríkislögreglustjórinn disagrees and points to Article 5(3) of the original Protocol 3 to the Free Trade Agreement, which stipulates that the processing in litras (a)-(h) is considered insufficient for the purposes of Article 1(2)(b), irrespective of whether or not a product's customs registration number is changed. Special reference is made to litras (a), (b), (f) and (g).

Ásgeir Logi Ásgeirsson

37. Ásgeir Logi Ásgeirsson contends that a major part of the international law at issue does not apply due to lack of publication. Moreover, information concerning the rules of origin under the EEA Agreement and other free trade agreements or these provisions themselves are difficult to obtain. Despite various requests to several national authorities, Mr Ásgeirsson and his counsel were unable to obtain information on the applicability of those and did not receive the requested instructions and letters issued by the Customs Director. The Icelandic authorities have failed to fulfil the basic prerequisite for enforcing these rules of origin by failing to make them known and accessible to the public in a clear and comprehensible form. The fact that the EFTA Court's advice is sought by the Héraðsdómur on the question of which rules apply underlines the complexity of the issue and the lack of clarity surrounding it. Drawing erroneous conclusions as to the applicable rules in such a situation is considered an excusable error of law.

35. Að því er varðar fjórðu og fimmtu spurningu, telur ríkislögreglustjóri að það sé ekki á valdi EFTA-dómstólsins að skýra fríverslunarsamninginn og leggur til að þessum spurningum verði vísað frá dómstólnum skv. 1. mgr. 88. gr. starfsreglnanna. Jafnvel þótt EFTA-dómstóllinn gæti fjallað um alþjóðlega samninga aðra en EES-samninginn, t.a.m. vegna tengsla þeirra við EES-samninginn, geti EFTA-dómstóllinn ekki skýrt eldri útgáfu bókunar 3 við fríverslunarsamninginn, sem hafi verið ógilt með síðari breytingum. Ekki skipti máli í þessu sambandi að síðari breytingar við bókun 3 hafi ekki verið birtar með lögformlegum hætti að íslenskum lögum. Af þessum sökum teljist spurningarnar tvær ekki hafa neitt efnislegt gildi í máli þessu. Telji EFTA-dómstóllinn engu að síður að hann sé til þess bær að fjalla um túlkun á bókun 3 við fríverslunarsamninginn, ítrekar ríkislögreglustjóri þá skoðun sína að aðvinnsla vörunnar hafi verið ófullnægjandi.

36. Ríkislögreglustjóri vísar einnig til þeirrar skoðunar eins hinna ákærðu þess efnis að það teljist fullnægjandi aðvinnsla í skilningi b-liðar 2. mgr. 1. gr. og a-liðar 1. mgr. 5 gr. fríverslunarsamningsins ef hin unna afurð fellur undir annað tollskrárnúmer en hráefnið. Er því haldið fram að þetta eigi við um heilfrystan þorsk, annars vegar, og saltaðan, flattan eða flakaðan þorsk hins vegar. Þessi rök styðjast við upphaflegu bókunina frá 1972 og, eftir því sem við á, breytinguna frá 1985. Ríkislögreglustjóri er þessu ósammála og bendir í því sambandi á 3. mgr. 5. gr. hinnar upphaflegu bókunar 3 við fríverslunarsamninginn, þar sem kveðið er á um að aðvinnsla skv. a- til h-liðum teljist ófullnægjandi að því er varðar b-lið 2. mgr. 1. gr., hvort sem tollskrárnúmer vöru breytist eða ekki. Sérstaklega er vísað til a-, b-, f- og g-liða.

Ásgeir Logi Ásgeirsson

37. Ásgeir Logi Ásgeirsson heldur því fram að verulegur hluti þeirra alþjóðalaga sem málið varða gildi ekki vegna þess að löggin hafi ekki verið birt. Ennfremur sé erfitt að nálgast upplýsingar um upprunareglur samkvæmt EES-samningnum og öðrum fríverslunarsamningum og eigi það einnig við um ákvæðin sjálf. Þrátt fyrir ýmsar fyrirspurnir til nokkurra stjórnvaldsstofnana, hafi Ásgeiri Loga og lögmanni hans ekki tekist að afla upplýsinga um gildi þessara ákvæða og hafi þeir ekki heldur fengið í hendur umbeðin fyrirmæli og bréf sem gefin voru út af ríkistollstjóra. Hafi íslensk yfirvöld vanrækt að uppfylla grundvallarforsendur fyrir framkvæmd þessara upprunareglna með því að birta þær ekki og gera aðgengilegar almenningi í skýru og skiljanlegu formi. Undirstriki sú staðreynd hversu flókið og óskýrt málið sé að Héraðsdómur skuli nú fara fram á ráðgjöf EFTA-dómstólsins varðandi það hvaða reglur gildi. Verði að teljast afsakanleg lögvilla að draga rangar niðurstöður um gildandi reglur við slíkar aðstæður.

38. As regards the first question, Mr Ásgeirsson is of the opinion that the more liberal rules of origin in the Free Trade Agreement must prevail over the rules of origin under the EEA Agreement. This follows from Article 7 of Protocol 9 EEA and Annex 3 to this Protocol, which mentions Article 1 of Protocol 6 to the Free Trade Agreement and thus makes it logical to assume that the Free Trade Agreement applies to the present facts.

39. As to the second, third, fourth and fifth question, Mr Ásgeirsson focuses on the so-called 10% rule of Article 4(2)(a) of the original Protocol 4 EEA as the main provision on whether a product originates in the EEA due to sufficient processing. According to this rule, the value of raw materials from outside the EEA may not amount to more than 10% of the factory price of the final product. The complexity of the matter requires an appraisal of the product concerned in each instance. Therefore, there is no universal answer in particular to the second question, which is far too broad in scope. To support his view that the Héraðsdómur's questions do not correctly depict the case before it, Mr Ásgeirsson points to Article 5 of Protocol 4 EEA on insufficient processing. Applying this provision would be inadequate, since the salting of the fish was not intended primarily to prevent it from decay, but is rather part of the production process for a specific product, sought-after in many areas of the world.

40. Those arguments are forwarded with the reservation that, with the exception of the first question, the EFTA Court lacks jurisdiction to deal with questions concerning the Free Trade Agreement and consequently to answer the questions put to it by the national court.

Axel Pétur Ásgeirsson

41. With regard to the first question, Axel Pétur Ásgeirsson contends that the rules of origin contained in the original Protocol 3 to the Free Trade Agreement are more favourable than those contained in Protocol 9 EEA. This is inferred from the fact that Article 5a of Protocol 3 to the Free Trade Agreement refers to the changing of numbers in the Harmonized System, whereas no such reference is to be found in Protocol 9 EEA. Hence, the rules of the Free Trade Agreement should prevail over those in Protocol 4 EEA.

42. As the rules of origin in Protocol 4 EEA are not considered applicable in the present case, answers from the EFTA Court to the second and third questions are viewed as unnecessary.

43. As to the interpretation of the Free Trade Agreement, Mr Ásgeirsson contests the EFTA Court's jurisdiction to give a ruling in this matter under Article 34(1) SCA. The Court is only competent to interpret the EEA Agreement. Mr Ásgeirsson supports a cautious approach according to which jurisdiction has to be relinquished in all cases where doubt on that matter arises. Otherwise, a special court, such as the EFTA Court, would run the risk of usurpation of power in its judicial functions. Consequently, the interpretation of Protocols 3 and 6 to

38. Að því er varðar fyrstu spurninguna er Ásgeir Logi þeirrar skoðunar að víðari upprunareglur fríverslunarsamningsins hljóti að ganga framur upprunareglum skv. EES-samningnum. Leiði það af 7. gr. bókunar 9 EES og 3. viðbæti við þá bókun, sem vísar til 1. gr. bókunar 6 við fríverslunarsamninginn, sem valdi því að rökrétt sé að álykta að fríverslunarsamningurinn eigi við um málsatvik í máli þessu.

39. Að því er varðar aðra, þriðju, fjórðu og fimmtu spurningu, vísar Ásgeir Logi fyrst og fremst til hinnar svonefndu 10% reglu í a-lið 2. mgr. 4. gr. í upphaflegri bókun 4 við EES-samninginn sem meginákvæðið um það hvort vara teljist eiga uppruna sinn á Evrópska efnahagssvæðinu vegna fullnægjandi aðvinnslu. Samkvæmt þeirri reglu megi verðmæti hráefna sem eiga uppruna utan EES ekki nema meira en 10 af hundraði af verksmiðjuverði framleiðsluvörunnar. Sé málið svo flókið að nauðsynlegt sé að meta þá vöru sem um ræðir í hvert skipti. Því sé ekki til neitt eitt og algilt svar við annarri spurningunni, sem sé allt of víðtæk. Til stuðnings þeirri skoðun sinni að spurningar Héraðsdóms gefi ekki rétta mynd af málinu sem hann hefur til meðferðar, vísar Ásgeir Logi til 5. gr. bókunar 4 EES um ófullnægjandi aðvinnslu. Yrði beiting þess ákvæðis að teljast óviðeigandi, þar sem söltun fisksins hafi ekki þann tilgang fyrst og fremst að tryggja að varan haldist óskemmd, heldur sé söltun hluti af vinnsluferli tiltekinnar afurðar sem sé eftirsótt í mörgum heimshlutum.

40. Þessar röksemdir eru settar fram með þeim fyrirvara að fyrir utan fyrstu spurninguna sé EFTA-dómstóllinn ekki bær til þess að svara spurningum varðandi fríverslunarsamninginn og þar með til þess að svara spurningunum frá Héraðsdómi. Axel Pétur Ásgeirsson

Axel Pétur Ásgeirsson

41. Að því er varðar fyrstu spurninguna er því haldið fram af Axel Pétri Ásgeirssyni að upprunareglurnar í upphaflegu bókun 3 við fríverslunarsamninginn séu hagstæðari en reglurnar í bókun 9 EES. Þetta megi ráða af því að í a-lið 5. gr. bókunar 3 við fríverslunarsamninginn sé vísað til breytinga á númerum í samræmdu tollskránni, en enga slíka vísun sé að finna í bókun 9 EES. Þar með hljóti reglur fríverslunarsamningsins að ganga framur reglunum í bókun 4 EES.

42. Þar sem upprunareglurnar í bókun 4 EES teljist ekki eiga við í fyrirbyggjandi máli sé ekki þörf á svari frá EFTA-dómstólnum við annarri og þriðju spurningu.

43. Að því er varðar túlkun fríverslunarsamningsins, vefengir Axel Pétur bægni EFTA-dómstólsins til þess að úrskurða í málinu samkvæmt 1. mgr. 34. gr. samningsins um stofnun eftirlitsstofnunar og dómstóls. Dómstóllinn sé einungis bær til þess að túlka EES-samninginn. Telur Axel Pétur að beita verði varfærinni túlkun, en samkvæmt slíkri túlkun beri að hafna lögsögu í málum þar sem á henni leikur vafi. Ella ætti sérdómstóll eins og EFTA-dómstóllinn á hættu að fara út

the Free Trade Agreement, as requested in the fourth and the fifth question, is only for the Icelandic courts.

Helgi Már Reynisson

44. Mr Reynisson also points to the lack of clarity regarding the applicable rules, leading to *error iuris* on the part of the defendants. He claims that the case should be dealt with solely before the national court. He contends that the request does not fulfil the condition of being “necessary” under Article 34(2) SCA in order for the Héraðsdómur to give judgment. The reference of the case to the EFTA Court prolongs the duration of proceedings, which in itself is considered an infringement of Article 6 to the European Convention of Human Rights as well as national constitutional and criminal law. Therefore, Mr Reynisson suggests that all the questions with the exception of the first one should be dismissed for lack of significance to the subject-matter of the main proceedings.

45. The first question, however, should be answered in the affirmative in Mr Reynisson’s opinion. Trade terms must largely depend on the applicable rules of origin, as those rules strongly influence which trade terms are offered. The trade regimes under the Free Trade Agreement are considered more favourable with respect to the charges giving rise to the present case. The processing of the products had the effect that they were to be given a new Customs number, which, in turn, resulted in no customs duties being levied. It is further argued that Decision No 1/96, amending Protocol 3 to the Free Trade Agreement in order to conform to Protocol 4 EEA, had not taken effect in Iceland at the time of the alleged violations because it had not been published in conformity with Icelandic law.

46. All defendants request the EFTA Court to order costs in their favour.

The Government of Iceland

47. As to the first question, the Government of Iceland deems it logical that Article 7 of Protocol 9 EEA cannot apply if there is no difference in the substance and content of the provisions of the EEA Agreement and of the provisions in the Agreement referred to in Appendix 3 to Protocol 9 EEA. In this connection, the Government points to Decision No 1/96, linking the EEA Agreement with the Free Trade Agreement by replacing the text of Protocol 3 to the Free Trade Agreement. The Decision entered into force on 1 January 1997, before the acts in question were committed. Following the amendment, the rules of origin contained in Protocol 3 to the Free Trade Agreement cannot be considered to be more favourable to Iceland than the provisions of the EEA Agreement. Article 7 of Protocol 9 EEA therefore cannot have any bearing on the findings of the Héraðsdómur in the case pending before it. The Government submits that an advisory opinion is a specially established means of cooperation between the EFTA Court and national courts aimed at providing the latter with the necessary elements of EEA law to decide cases before them, but not a

fyrir valdsvið sitt. Af því leiði að skýring á bókunum 3 og 6 við fríverslunarsamninginn, sem farið sé fram á í fjórðu og fimmtu spurningu, heyri alfarið undir íslenska dómstóla.

Helgi Már Reynisson

44. Helgi Már vísar einnig til óskýrleika að því er varðar þær reglur sem beita skuli, sem leiði til lögvillu af hálfu ákærðu. Telur hann að málið heyri alfarið undir íslenska dómstóla. Heldur hann því fram að beiðnin uppfylli ekki það skilyrði að vera „nauðsynleg“, skv. 2. mgr. 34. gr. samningsins um stofnun eftirlitsstofnunar og dómstóls, til þess að Héraðsdómur geti kveðið upp dóm. Vísun málsins til EFTA-dómstólsins dragi málareksturinn á langinn, sem í sjálfu sér teljist brot á 6. gr. mannréttindasáttmála Evrópu, svo og á íslenskri stjórnskipunar- og refsilöggjöf. Af þeim sökum leggur Helgi Már til að öllum spurningunum, að frátalinni þeirri fyrstu, verði vísað frá EFTA-dómstólnum á þeim forsendum að þær séu efni málsins fyrir Héraðsdómi óviðkomandi.

45. Fyrstu spurningunni ber hins vegar að svara játandi, að mati Helga Mús. Viðskiptakjör hljóti að verulegu leyti að grundvallast á viðeigandi upprunareglum, þar sem slíkar reglur hafi mikil áhrif á þau viðskiptakjör sem boðin eru. Viðskiptakjörin samkvæmt fríverslunarsamningnum teljist hagstæðari að því er varðar þau atriði sem ákæran í málinu varðar. Aðvinnsla vörunnar hafi haft þau áhrif að þær fengu nýtt tollskrárnúmer, sem aftur hafi leitt til þess að engir tollar voru lagðir á. Ennfremur eru rök að því leidd að ákvörðun nr. 1/96, um breytingu á bókun 3 við fríverslunarsamninginn til samræmis við bókun 4 EES, hafi ekki verið komin í gildi á þeim tíma sem meint brot áttu sér stað þar sem hún hafði þá ekki verið birt skv. íslenskum rétti.

46. Allir ákærðu krefjast málskostnaðar sér til handa.

Ríkisstjórn Íslands

47. Að því er varðar fyrstu spurninguna, telur ríkisstjórn Íslands einsýnt að 7. gr. bókunar 9 við EES-samninginn geti ekki átt við ef enginn munur er á efni og innihaldi ákvæða EES-samningsins og ákvæða samningsins sem vísað er til í viðauka 3. Í því sambandi bendir ríkisstjórnin á ákvörðun nr. 1/96, sem tengir EES-samninginn við fríverslunarsamninginn með því að koma í stað texta bókunar 3 við fríverslunarsamninginn. Ákvörðunin tók gildi 1. janúar 1997, áður en það athæfi sem hér um ræðir átti sér stað. Eftir breytinguna geti upprunareglurnar í bókun 3 við fríverslunarsamninginn ekki talist hagstæðari fyrir Ísland en ákvæði EES-samningsins. Því geti 7. gr. bókunar 9 við EES samninginn ekki haft neina þýðingu fyrir niðurstöðu Héraðsdóms í því máli sem fyrir honum liggur. Er ríkisstjórnin þeirrar skoðunar að ráðgefandi álit sé sértækt úrræði til að koma á samstarfi milli EFTA-dómstólsins og landsdómstóla, sem miði að því að upplýsa hina síðarnefndu um nauðsynlega þætti EES-réttar til þess að gera þeim kleift að úrskurða um mál sem fyrir þeim liggja, en ekki til þess að

procedure to answer general or hypothetical questions. The EFTA Court is requested to deem the first question inadmissible.

48. With regard to the second and third question the Government of Iceland refers to Article 5 of Protocol 4 EEA, after being amended by Decision No 71/96, and Annex 2 thereto. Annex 2 states that the products that fall under Chapter 3 of the Harmonized System can only acquire originating status if they are wholly obtained. As a result, defrosting, heading, filleting, boning, trimming, salting and packing of fish products cannot constitute sufficient working and processing for these products to acquire originating status in the EEA, if they fail to meet the conditions laid out in Article 4 of Protocol 4 EEA.

49. As to the fourth and fifth question, the Government of Iceland refers to its observations regarding the first question and states that neither question can have any bearing on the decision of the Héraðsdómur in the case before it. For this reason, it considers these questions inadmissible, pursuant to Articles 88(1) and 96(2) of the Rules of Procedure. Furthermore, the Government points to Article 108(2) EEA and Article 34(1) SCA. These provisions are interpreted to the effect that they exclude the issues raised in the fourth and fifth question from the jurisdiction of the EFTA Court, which is restricted to the interpretation of EEA law. The Free Trade Agreement is a separate Agreement and as such, a distinct instrument under international law. Any questions concerning its interpretation or application fall outside the scope of EEA law.

50. The Government of Iceland suggests that the first, fourth and the fifth question should be found inadmissible and suggests to answer the second and third question as follows:

“Defrosting, heading, filleting, boning, trimming, salting and packing of fish products that are not wholly obtained in the EEA, does not constitute sufficient working and processing within the meaning of Protocol 4 to the EEA Agreement.”

The EFTA Surveillance Authority

51. By way of a general observation regarding the Court’s competence in the present case, the EFTA Surveillance Authority infers from Article 2(a) EEA and Article 1 SCA that the Protocols to the EEA Agreement form an integral part thereof. The EFTA Court, under Article 34 SCA, has jurisdiction to rule on the EEA Agreement, which also covers the Protocols to the EEA Agreement, unless the relevant provisions of the Protocols provide otherwise. It follows from Article 8(3) EEA that the products covered by Protocol 9 EEA are not subject to the general provisions of the EEA Agreement. Instead a separate system for these products has been established in Protocol 9 EEA. Disputes regarding these obligations may, in accordance with Article 6 of Protocol 9 EEA, be brought before the Joint Committee. Further, in the event the Joint Committee fails to reach agreement, the parties can apply Article 114 EEA *mutatis mutandis*. When

svara almennum eða fræðilegum spurningum. Er farið fram á það við EFTA-dómstólinn að hann úrskurði að fyrsta spurningin sé ekki dómtæk.

48. Að því er varðar aðra og þriðju spurninguna, vísar ríkisstjórnin til 5. gr. bókunar 4 EES, með áorðnum breytingum skv. ákvörðun nr. 71/96 og viðauka 2 við hana. Í viðauka 2 segir að vörur sem falla undir 3. kafla samræmdu tollskrárinnar geti því aðeins hlotið upprunaréttindi að þær séu að öllu leyti fengnar. Af því leiði að þíðun, hausun, flökun, beinhreinsun, snyrting, söltun og pökkun fisks geti ekki talist nægileg aðvinnsla til þess að vara öðlist upprunaréttindi á Evrópska efnahagssvæðinu ef hún uppfyllir ekki skilyrði bókunar 4 EES.

49. Að því er varðar fjórðu og fimmtu spurningu, vísar ríkisstjórnin til athugasemda sinna varðandi fyrstu spurninguna og heldur því fram að hvorug spurningin geti haft nokkra þýðingu fyrir ákvörðun Héraðsdóms í fyrirbyggjandi máli. Af þessum sökum telur hún spurningar þessar ekki dómtækar skv. 1. mgr. 88. gr. og 2. mgr. 96. gr. starfsreglna EFTA-dómstólsins. Ennfremur vísar ríkisstjórnin til 2. mgr. 108. gr. EES-samningsins og 1. mgr. 34. gr. samningsins um stofnun eftirlitsstofnunar og dómstóls. Þessi ákvæði eru túlkuð á þann veg að þau útiloki þau álitæfni sem vakin eru með fjórðu og fimmtu spurningu frá lögsögu EFTA-dómstólsins, sem takmarkast við túlkun EES-réttar. Fríverslunarsamningurinn sé sérstakur samningur og sem slíkur sé hann sjálfstæður þjóðréttarlegur gerningur. Hvers kyns álitamál um túlkun hans eða framkvæmd falli utan við EES-rétt.

50. Ríkisstjórn Íslands leggur til að úrskurðað verði að fyrsta, fjórða og fimmta spurning séu ekki dómtækar, en að annarri og þriðju spurningu verði svarað sem hér segir:

„Þíðun, hausun, flökun, beinhreinsun, snyrting, söltun og pökkun fisks, sem ekki er fenginn að öllu leyti á Evrópska efnahagssvæðinu, telst ekki nægileg aðvinnsla í skilningi bókunar 4 við EES-samninginn.“

Eftirlitsstofnun EFTA

51. Almennt varðandi lögsögu dómstólsins í fyrirbyggjandi máli dregur Eftirlitsstofnun EFTA þá ályktun af a-lið 2. gr. EES-samningsins og 1. gr. samningsins um stofnun eftirlitsstofnunar og dómstóls að bókanirnar við EES-samninginn teljist óaðskiljanlegir hlutar hans. Skv. 34. gr. samningsins um stofnun eftirlitsstofnunar og dómstóls sé EFTA-dómstóllinn bær til þess að úrskurða um EES-samninginn, og þar með um bókanir við EES-samninginn, enda sé ekki kveðið á um annað í ákvæðum viðkomandi bókana. Leiði af 3. mgr. 8. gr. EES-samningsins að vörurnar sem bókun 9 tekur til falli ekki undir almenn ákvæði EES-samningsins. Þess í stað hafi sérstöku fyrirkomulagi verið komið á með bókun 9 EES. Deilum varðandi þessar skuldbindingar megi, skv. 6. gr. bókunar 9 EES, vísa til sameiginlegu EES nefndarinnar. Ennfremur sé aðilum heimilt að beita 114. gr. EES-samningsins, að breyttu breytanda, ef sameiginlega

disputes regarding provisions of Protocol 9 EEA are covered by such separate dispute resolution mechanisms, it is for the Contracting Parties and not the EFTA Surveillance Authority and the EFTA Court to resolve the disputes.⁹

52. However, the fact that some provisions of Protocol 9 EEA fall outside the general surveillance and dispute mechanisms of the EEA Agreement does not entail that the EFTA Court's competence under Article 34 SCA is limited with respect to the provisions relevant to the present case. On the contrary, the EFTA Court is competent to rule on the interpretation of all relevant provisions of Protocols 4 and 9 EEA.

53. With regard to the EEA relevance of the argument put forward by the defendants, that the relevant rules of origin are so unclear that a good faith interpretation would constitute *error juris* in their favour, the EFTA Surveillance Authority refers to the case law of the Court of Justice of the European Communities.¹⁰

54. As regards the first question, the EFTA Surveillance Authority points to the amendments the Free Trade Agreement has undergone in order to create rules of origin similar to those in the EEA Agreement.

55. With regard to the question of whether the rules of origin in the Free Trade Agreement will prevail through the reference in Article 7 of Protocol 9 EEA, the EFTA Surveillance Authority refers to the general rule in Article 120 EEA. Article 7 of Protocol 9 EEA derogates from this provision, providing that specific provisions in other agreements will prevail over the rules in Protocol 9 EEA if they grant the EFTA States more favourable trade regimes. Whether this is the case with respect to Article 1 of Protocol 6 to the Free Trade Agreement, is dealt with under Protocol 3 to the Free Trade Agreement. As Article 7 of Protocol 9 EEA contains no reference to this latter set of rules, the term "Icelandic origin" in Article 1 of Protocol 6 to the Free Trade Agreement should be read in light of the rules of origin in Protocol 4 EEA, i.e. understood as "EEA origin" within the meaning of that Protocol. Had the Contracting Parties intended to include the rules of origin in Protocol 3 to the Free Trade Agreement, they would have made a direct reference thereto.¹¹ This is not contradicted by the Joint Statement in the Final Act of the EEA Agreement.¹² The Joint Statement only

⁹ Reference is made to the view submitted by the EFTA Surveillance Authority in Case E-2/94 *Scottish Salmon Growers* [1995] EFTA Court Report 59, concerning the State aid provision in Article 4 to Protocol 9 EEA.

¹⁰ Case C-262/99 *Paraskevas Louloudakis v Elliniko Dimosio* [2001] ECR I-5547.

¹¹ Reference is made to Article 11 of Protocol 2 to the EEA Agreement, which under certain circumstances provides for the application of Protocol 3 of the relevant Free Trade Agreement between the EEC and an EFTA State. Moreover, as for Norway, Appendix 3 to Protocol 9 EEA makes a reference to the entire Agreement between the European Economic Community and the Kingdom of Norway, including Annex I to that Agreement, which contains the rules of origin.

¹² Providing that "[t]he EEA Agreement shall not affect rights assured through existing agreements binding one or more EC Member States, on the one hand, and one or more EFTA

EES nefndin kemst ekki að niðurstöðu. Þegar deilur um ákvæði bókunar 9 EES falli undir sérákvæði af þessu tagi varðandi lausn deilumála, komi það í hlut samningsaðila sjálfra, en ekki Eftirlitsstofnunar EFTA eða EFTA-dómstólsins að leysa deiluna.⁹

52. Hins vegar hafi sú staðreynd að sum ákvæði bókunar 9 EES falla utan við almennt fyrirkomulag eftirlits og lausnar á deilum sem gert er ráð fyrir í EES-samningnum ekki þau áhrif að lögsaga EFTA-dómstólsins skv. 34. gr. um stofnun eftirlitsstofnunar og dómstóls skerðist að því er varðar þau ákvæði sem til álita koma í þessu máli. Þvert á móti sé EFTA-dómstóllinn til þess bær að úrskurða um túlkun allra viðeigandi ákvæða bókana 4 og 9 EES.

53. Að því er varðar tengsl þeirra raka ákærðu, að þær upprunareglur sem um ræðir séu svo óljósar að túlkun þeirra í góðri trú geti talist afsakanleg lögvilla af þeirra hálfu, við EES-rétt, vísar Eftirlitsstofnun EFTA til fordæma dómstóls Evrópubandalaganna.¹⁰

54. Að því er varðar fyrstu spurninguna bendir Eftirlitsstofnun EFTA á breytingar sem orðið hafa á fríverslunarsamningnum sem miða að því að koma á upprunareglum sem svipar til samsvarandi reglna í EES-samningnum.

55. Að því er varðar spurninguna um það hvort upprunareglurnar í fríverslunarsamningnum gangi framur EES-samningnum vegna tilvitnunarinnar sem er að finna í 7. gr. bókunar 9 EES, vísar Eftirlitsstofnun EFTA til almennu reglunnar í 120. gr. EES-samningsins. Í 7. gr. bókunar 9 EES felist undanþága frá þessu ákvæði, þar sem kveðið sé á um að sérstök ákvæði annarra samninga hafi forgangsgildi gagnvart ákvæðum bókunar 9 að því leyti sem EFTA-ríkjum eru þar veitt betri viðskiptakjör. Um það hvort þetta eigi við að því er varðar 1. gr. bókunar 6 við fríverslunarsamninginn sé fjallað í bókun 3 við fríverslunarsamninginn. Þar sem ekki sé að finna í 7. gr. bókunar 9 EES neina vísun til þessara síðari reglna, beri að skilja orðalagið „íslenskan uppruna” í 1. gr. bókunar 6 við fríverslunarsamninginn í ljósi upprunareglanna í bókun 4 EES, þ.e. sem „EES uppruna” í skilningi bókunarinnar. Hefði það verið ætlun samningsaðila að fella inn upprunareglurnar í bókun 3 við fríverslunarsamninginn, hefði það verið gert með beinni tilvitnun.¹¹ Í þessu felist engin mótsögn við sameiginlegu yfirlýsinguna í lokagerð EES-samningsins.¹² Í

⁹ Vísad er til álits sem sett var fram af Eftirlitsstofnun EFTA í máli nr. E-2/94, *Scottish Salmon Growers* [1995] EFTA Court Report 59, þar sem fjallað er um ríkisaðstoðarákvæðið í 4. gr. bókunar 9 EES.

¹⁰ Mál nr. C-262/99 *Paraskevas Louloudakis v Elliniko Dimosio* [2001] ECR I-5547.

¹¹ Vísad er til 11. gr. bókunar 2 EES, sem við tiltekna aðstæður gerir ráð fyrir beitingu bókunar 3 við viðeigandi fríverslunarsamning milli Efnahagsbandalags Evrópu og EFTA-ríkis. Ennfremur, í tilviki Noregs, er í viðbæti 3 við bókun 9 EES vitnað til samningsins í heild milli Efnahagsbandalags Evrópu og Noregs, þ.m.t. til viðauka I við þann samning, sem hefur að geyma upprunareglurnar.

¹² Þar segir: „EES-samningurinn hefur ekki áhrif á réttindi tryggð með gildandi samningum sem eru bindandi fyrir eitt eða fleiri aðildarríki EB annars vegar og eitt eða fleiri EFTA-ríki hins vegar, eða tvö eða fleiri EFTA-ríki, til að mynda samningum er varða einstaklinga, aðila í

refers to other agreements that are not subject to specific regulation in the EEA Agreement, such as is the case for the Free Trade Agreement.

56. As to the second and third questions, the EFTA Surveillance Authority refers to Article 5 of Protocol 4 EEA, as amended by Decision No 71/96, and Annex II thereto. In order for products classified under HS Chapter 3, all the fish used as raw material must be wholly obtained in accordance with Article 4 of Protocol 4 EEA. Therefore, the fish used as raw material must either be obtained within the territories of the Contracting Parties, including their territorial waters, or taken from the sea outside their territorial waters by their vessels. Fish caught outside the territorial waters of the EEA States by non-EEA vessels cannot obtain originating status by being worked or processed in the EEA.

57. An answer to the fourth question is only necessary, in the view of the EFTA Surveillance Authority, if the Court, in answering the first question, finds that the term “trade regimes” in Article 7 of Protocol 9 EEA extends to the rules of origin contained in Protocol 3 to the Free Trade Agreement. Even in that event, an answer to this question will not influence the result of the main proceedings, since the provisions regarding the rules of origin in Protocol 3 of the Free Trade Agreement have been amended in order to establish principles of origin similar to those laid down in Protocol 4 EEA.

58. Assuming that Protocol 3 of the Free Trade Agreement is covered by the term “trade regimes” in Article 7 of Protocol 9 EEA, the EFTA Surveillance Authority contends that an interpretation of the Free Trade Agreement lies outside the scope of competence of the EFTA Court. This is inferred from Article 34 SCA, pursuant to which the EFTA Court has jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.¹³ Comparable to Article 234 EC, this provision must be viewed as exhaustive.

59. Nevertheless, Article 7 of Protocol 9 EEA, a derogation from the general principle laid down in Article 120 EEA, provides for a comparison between the trade regime envisaged by the EEA Agreement and the trade regime set out in the Free Trade Agreement. Consequently, interpretation of the provisions of Protocol 3 to the Free Trade Agreement is necessary in order to determine which provisions prevail. Therefore, if the EFTA Court lacks competence to interpret all the relevant provisions of the Free Trade Agreement to which the EEA Agreement refers, it could only partially decide on what constitutes “more favourable trade regimes” in Article 7 of Protocol 9 EEA.

60. However, in the EFTA Surveillance Authority’s opinion such an argument will not take sufficient account of the fact that the Free Trade

States, on the other, or two or more EFTA States, such as among others agreements concerning individuals, economic operators, regional cooperation and administrative arrangements, until at least equivalent rights have been achieved under the Agreement.”

¹³ Reference is made to Case E-6/01 *CIBA* [2002] EFTA Court Report 283, at paragraphs 22-23.

sameiginlegu yfirlýsingunni sé aðeins vísað til annarra samninga sem ekki sé vísað sérstaklega til í EES-samningnum, eins og við á um fríverslunarsamninginn.

56. Að því er varðar aðra og þriðju spurninguna, vísar Eftirlitsstofnun EFTA til 5. gr. bókunar 4 EES, með áorðnum breytingum skv. ákvörðun nr. 71/96 og viðauka 2 við hana. Til þess að vörur geti flokkast undir kafla 3 í samræmdu tollaskránni þurfi allur fiskurinn sem notaður er sem hráefni að vera að öllu leyti fenginn í samræmi við 4. gr. bókunar 4 EES. Þannig verði fiskurinn, sem notaður er sem hráefni, annað hvort að vera fenginn á yfiráðasvæði samningsaðila, eða tekinn úr sjó utan landhelgi samningsaðila af skipum þeirra. Fiskur sem tekinn sé utan landhelgi EES-ríkja af skipum, sem ekki teljast skip frá EES-ríkjum, geti ekki öðlast upprunaréttindi með vinnslu innan EES.

57. Svar við fjórðu spurningunni er aðeins nauðsynlegt, að mati Eftirlitsstofnunar EFTA, ef dómstóllinn kemst að þeirri niðurstöðu í svari sínu við fyrstu spurningunni, að hugtakið “viðskiptakjör” í 7. gr. bókunar 9 EES taki til upprunareglanna í bókun 3 við fríverslunarsamninginn. Jafnvel þótt sú yrði niðurstaðan, hafi svarið við þessari spurningu ekki áhrif á niðurstöðu í málinu fyrir Héraðsdómi, þar sem búið sé að breyta upprunaákvæðunum í bókun 3 við fríverslunarsamninginn í því skyni að setja grundvallarreglur um uppruna sem séu sambærilegar við þær sem kveðið er á um í bókun 4 EES.

58. Teljist bókun 3 við fríverslunarsamninginn falla undir hugtakið “viðskiptakjör” í 7. gr. bókunar 9 við EES-samningin, er það skoðun Eftirlitsstofnunar EFTA að túlkun á fríverslunarsamningnum falli utan við lögsögu EFTA-dómstólsins. Er sú ályktun dregin af 34. gr. samningsins um stofnun eftirlitsstofnunar og dómstóls, en samkvæmt honum er EFTA-dómstóllinn til þess bær að veita ráðgefandi álit um túlkun EES-samningsins.¹³ Verði þetta ákvæði að skoðast sem tæmandi, sbr. 234. gr. EB.

59. Engu að síður sé í 7. gr. bókunar 9, sem er undanþáguákvæði frá þeirri almennu grundvallarreglu sem fram kemur í 120. gr. EES-samningsins, kveðið á um samanburð milli viðskiptakjaranna sem gert er ráð fyrir í EES-samningnum og viðskiptakjaranna sem kveðið er á um í fríverslunarsamningnum. Því sé nauðsynlegt að skýra ákvæði bókunar 3 við fríverslunarsamninginn til þess að ganga úr skugga um hvaða ákvæði gangi framár. Sé EFTA-dómstóllinn ekki til þess bær að skýra öll viðeigandi ákvæði fríverslunarsamningsins sem vísað er til í EES-samningnum, gæti hann aðeins ákveðið að hluta hvað teljist “betri viðskiptakjör” í 7. gr. bókunar 9 EES.

60. Að mati Eftirlitsstofnunar EFTA væri hins vegar ekki með slíkri afstöðu tekið nægilegt tillit til þeirrar staðreyndar að fríverslunarsamningurinn er sérstakur tvíhliða samningur þar sem ekki er kveðið á um stofnun dómstóls,

atvinnurekstri, samvinnu á tilteknum svæðum og stjórnvaldsráðstafanir, þar til að minnsta kosti samsvarandi réttindi hafa náðst með samningnum”.

¹³ Vísað er til máls nr. E-6/01 *CIBA* [2002] EFTA Court Report 283, 22.-23. mgr.

Agreement is a separate bilateral agreement, not establishing a court, but providing a system for dispute resolution, including on issues concerning the interpretation of that Agreement. According to Articles 23 and 28 of the Free Trade Agreement, it is for a Joint Committee to consider such disputes. Should the EFTA Court also be competent to deliver judgments on that Agreement, situations could occur in which the EFTA Court, in an EEA context, would interpret the Agreement differently than what would may result from the Agreement's own mechanism for dispute resolution.

61. Reference is also made to Article 307 EC, which contains a similar, albeit more extensive derogation, as compared to Article 7 of Protocol 9 EEA. The Court of Justice of the European Communities has explained that the purpose of Article 307 EC is to make it clear, in accordance with principles of international law, that the application of the Treaty does not affect earlier commitments of the Member States to respect the rights of non-member countries and to comply with their corresponding obligations. That Court has further held that in order to determine whether a Member State may rely on that provision in order not to comply with what follows from the Treaty, it is necessary to interpret the older agreements. However, in the context of a preliminary ruling it falls to the national court to ascertain the extent to which those obligations constitute an obstacle to the application of Community law.¹⁴ The Court of Justice of the European Communities thus considers it to be outside its scope of competence to give judgments that could affect such rights of non-member countries.

62. As both Iceland and the European Community are Contracting Parties to the EEA Agreement, concerns pertaining to interference with non-member countries' rights do not arise in the present case. However, the risk of conflicting interpretations of the content of the Free Trade Agreement exists also in the present case. Therefore, the meaning of the term "Icelandic origin" in Protocol 3 to the Free Trade Agreement should not be determined by the EFTA Court, and any comparison between Protocol 9 EEA and Protocol 3 to the Free Trade Agreement should be carried out by the national court.¹⁵

63. If the Court decides to answer the fourth question, the EFTA Surveillance Authority suggests that the answer should be that the national court should apply Protocol 3 to the Free Trade Agreement to the extent it grants Iceland a more favourable trade regime than what follows from Protocol 4 EEA. Whether that is the case, falls outside the competence of the EFTA Court.

¹⁴ Case C-13/93 *Office National de l'Emploi v Madeleine Minne* [1994] ECR I-371, at paragraph 18; Case C-158/91 *Jean-Claude Levy* [1993] ECR I-4287, at paragraph 21; Case C-324/93 *Evans Medical Ltd* [1995] ECR I-563, at paragraph 29; Case C-124/95 *Centro-Com Srl* [1997] ECR I-81, at paragraph 58.

¹⁵ As to the corresponding lack of competence for the Court of Justice of the European Communities to interpret the EEA Agreement applicable in an EFTA State which at a later stage became a Member State of the European Union, *in casu* Sweden, reference is made to Case C-321/97 *Ulla-Brith Andersson* [1999] ECR I-3551.

heldur um fyrirkomulag til lausnar á deilumálum, þ.m.t. um málefni sem varða túlkun samningsins. Samkvæmt 23. og 28. gr. fríverslunarsamningsins sé það í hlut sameiginlegu nefndarinnar að fjalla um slíkar deilur. Ef gert er ráð fyrir að EFTA-dómstóllinn sé einnig til þess bær að kveða upp dóma um fríverslunarsamninginn, gæti sú staða komið upp að EFTA-dómstóllinn kæmist að annarri niðurstöðu varðandi skýringu á samningnum í samhengi við EES en raunin kynni að verða skv. ákvæðum samningsins um lausn deilumála.

61. Einnig er vísað til 307. gr. EB, sem hefur að geyma svipað undanþáguákvæði, þó víðara sé, og 7. gr. bókunar 9 EES. Dómstóll Evrópubandalaganna hafi gefið út þá skýringu að tilgangurinn með 307. gr. EB sé að taka af tvímæli um það, í samræmi við grundvallarreglur þjóðarréttar, að framkvæmd Rómarsamningsins hafi ekki áhrif á fyrri skuldbindingar aðildarríkja um að virða rétt ríkja utan bandalagsins og uppfylla skyldur sínar þar að lútandi. Sami dómstóll hafi ennfremur lýst því að til þess að ákvarða hvort aðildarríki sé heimilt að byggja á því ákvæði í því skyni að víkja sér undan því sem leiðir af Rómarsamningnum, sé nauðsynlegt að skýra fyrri samninga. Þegar hins vegar sé um að ræða forúrskurð komi það í hlut landsdómstóls að kanna að hvaða marki viðkomandi skuldbindingar hindri að löggjöf Evrópubandalagsins nái fram að ganga.¹⁴ Dómstóll Evrópubandalaganna telji það þannig utan lögsögu sinnar að fella dóma sem gætu haft áhrif á þennan rétt ríkja utan bandalagsins.

62. Þar sem bæði Ísland og Evrópubandalagið eru aðilar að samningnum um Evrópska efnahagssvæðið, er ekki um að ræða nein álitamál varðandi réttindi þriðju ríkja í þessu máli. Hins vegar er fyrir hendi hætta á andstæðum skýringum á efni fríverslunarsamningsins í þessu máli. Þannig heyri skýringin á hugtakinu “íslenskur uppruni” í bókun 3 við fríverslunarsamninginn ekki undir EFTA-dómstólinn, og allur samanburður á bókun 9 EES og bókun 3 við fríverslunarsamninginn ætti að vera í höndum landsdómstóls.¹⁵

63. Ákveði dómstóllinn að veita svar við fjórðu spurningunni, er það mat Eftirlitsstofnunar EFTA að svarið ætti að vera á þá leið að landsdómstóllinn skuli beita bókun 3 við fríverslunarsamninginn að því marki sem hún veitir Íslandi betri viðskiptakjör en þau sem leiða af bókun 4 við EES-samninginn. Hvort sú sé raunin er álitamál sem falli utan við lögsögu EFTA-dómstólsins.

¹⁴ Mál nr. C-13/93 *Office National de l'Emploi v Madeleine Minne* [1994] ECR I-371, 18. mgr.; mál C-158/91 *Jean-Claude Levy* [1993] ECR I-4287, 21. mgr.; Mál C-324/93 *Evans Medical Ltd* [1995] ECR I-563, 29. mgr.; mál C-124/95 *Centro-Com Srl* [1997] ECR I-81, 58. mgr.

¹⁵ Að því er varðar samsvarandi skort á bæni dómstóls Evrópubandalaganna til þess að skýra gildi EES-samningsins gagnvart EFTA ríki, sem síðar gekk í Evrópusambandið, þ.e. Svíþjóð, er vísað til máls nr. C-321/97 *Ulla-Brith Andersson* [1999] ECR I-3551.

64. As to the fifth question, viewed against the background that the Free Trade Agreement was concluded in 1972 and thus before the accession of several current Member States to the European Union, the EFTA Surveillance Authority does not deem an answer necessary. This is based on the assumption that the Court follows its suggestion regarding the first question. Moreover, it falls to the national court alone to interpret the content of the Free Trade Agreement and to establish which countries are parties thereto.

65. That being said, the EFTA Surveillance Authority points out that countries joining the EU, as a general rule, automatically become Parties to any international agreements with third countries or other international organisations entered into by the European Community.¹⁶ According to this general rule, Member States that have joined the European Community after 1972 have become parties to the Free Trade Agreement. Therefore, the provisions of that Agreement, including Protocol 6, also apply to these Member States.

66. However, it might be that some provisions of Protocol 6 to the Free Trade Agreement do not apply to all Member States. This is because the tables in Article 1 of Protocol 6 to the Free Trade Agreement only refer to specific Member States. In this respect it is mentioned that transitory rules regarding the reduction of customs duties between Iceland on the one hand and the countries accessing the Community after 1972 on the other, were adopted in additional Protocols to the Free Trade Agreement.¹⁷

67. The EFTA Surveillance Authority suggests to answer the questions as follows:

Question 1:

“The term “trade regimes” in Article 7 of Protocol 9 to the EEA Agreement and Appendix 3 to the same Protocol does not extend to the rules of origin contained in the Agreement between the European Economic Community and the Republic of Iceland, signed on 22 July 1972.”

¹⁶ Reference is made, in the case of Spain and Portugal, to Article 4 of the Act of Accession which states that “*the agreements or conventions entered into by any of the Communities with one or more third States, with an international organization or with a national of a third State, shall, under the conditions laid down in the original Treaties and in this Act, be binding on the new Member State*”. Similar provisions are included in the Accession Acts for other new Member States.

¹⁷ Reference is made to the Additional Protocol to the Free Trade Agreement between the EEC and Iceland consequent on the accession of the Hellenic Republic to the Community signed on 6 November 1980, and the Additional Protocol to the Free Trade Agreement between the European Economic Community and the Republic of Iceland consequent on the accession of the Kingdom of Spain and the Portuguese Republic to the Community signed on 14 July 1986. As for Sweden, Finland and Austria, an additional protocol to the Free Trade Agreement was signed on 26 January 1996 after these countries became members of the European Union.

64. Að því er varðar fimmtu spurninguna telur Eftirlitsstofnun EFTA ekki nauðsynlegt að svara henni í ljósi þess að fríverslunarsamningurinn var gerður 1972, áður en sum núverandi aðildarríki gengu inn í Evrópusambandið. Er þá gengið út frá því að dómstóllinn fallist á tillögu eftirlitsstofnunarinnar varðandi fyrstu spurninguna. Ennfremur komi það alfarið í hlut landsdómstólsins að skýra innihald fríverslunarsamningsins og ákvarða hvaða lönd séu aðilar að honum.

65. Í þessu samhengi vill Eftirlitsstofnun EFTA hins vegar benda á að lönd sem ganga inn í Evrópusambandið gerast að jafnaði sjálfkrafa aðilar að öllum alþjóðlegum samningum sem Evrópubandalagið hefur gert við þriðju lönd eða aðrar alþjóðlegar stofnanir.¹⁶ Samkvæmt þessari almennu reglu, hafa aðildarríki sem gengu í Evrópubandalagið eftir 1972 orðið aðilar að fríverslunarsamningnum. Því ættu ákvæði þess samnings, þ.m.t. bókun 6, einnig að gilda um þessi ríki.

66. Hins vegar kann að vera að sum ákvæði bókunar 6 við fríverslunarsamninginn gildi ekki um öll aðildarríkin. Ástæða þess er sú að í tölflumum í 1. gr. bókunar 6 við fríverslunarsamninginn er aðeins vísað til tiltekinnna aðildarríkja. Í þessu sambandi er tekið fram að reglur til bráðabirgða varðandi lækkun tolla milli Íslands annars vegar og landanna sem gengu inn í Evrópubandalagið eftir 1972 hins vegar voru samþykktar með viðbótarbókunum við fríverslunarsamninginn.¹⁷

67. Eftirlitsstofnun EFTA leggur til að spurningunum verði svarað sem hér segir:

Spurning nr. 1

„Orðið „viðskiptakjör” í 7. gr. bókunar 9 við EES-samninginn, sbr. og 3. viðbæti við þá bókun, tekur ekki til upprunareglna þeirra sem er að finna í samningi milli Efnahagsbandalags Evrópu og Lýðveldisins Íslands sem undirritaður var 22. júlí 1972.”

¹⁶ Í tilviki Spánar og Portúgals er vísað til 4. gr. aðildarsamningsins, þar sem segir m.a.: „samningar eða sáttmálar sem eitthvert bandalaganna hefur gert við eitt eða fleiri ríki utan bandalagsins, við alþjóðlega stofnun eða ríkisborgara þriðja ríkis skulu, með þeim skilyrðum sem kveðið er á um í upprunalegu stofnsamningunum og þessu skjali, vera bindandi fyrir hið nýja aðildarríki.” Sambærileg ákvæði er að finna í aðildarsamningum annarra nýrra aðildarríkja.

¹⁷ Vísað er til viðbótarbókunar við fríverslunarsamninginn milli Efnahagsbandalags Evrópu og Íslands sem gerð var þegar Grikkland gekk inn í bandalagið og undirrituð var 6. nóvember 1980, og viðbótarbókunar við fríverslunarsamninginn milli Efnahagsbandalags Evrópu og Íslands sem gerð var þegar Spánn og Portúgal gengu inn í bandalagið og undirrituð var 14. júlí 1986. Að því er varðar Svíþjóð, Finnland og Austurríki, var gerð viðbótarbókun við fríverslunarsamninginn hinn 26. janúar 1996, eftir að þessi lönd gerðust aðilar að Evrópusambandinu.

Question 2 and 3:

“Defrosting, heading, filleting, boning, trimming, salting and packing fish that has been imported frozen whole to Iceland from countries outside the EEA does not constitute sufficient working and processing within the meaning of the rules of origin contained in Protocol 4 to the EEA Agreement in order for the products to obtain originating status.”

The Commission of the European Communities

68. The Commission of the European Communities, by way of general remarks, first contends that the EFTA Court has jurisdiction to interpret Article 7 of Protocol 9 EEA. A reading of Article 8(3)(a) EEA, according to which fish is not a product to which the normal rules on free movement apply, is rejected. Although fish is not covered by the normal rules on free movement contained in Part II of the EEA Agreement, it follows from Article 20 EEA that special rules do apply to fish. Those special rules are contained in Protocol 9 EEA. Moreover, it is clear from Articles 2(a) and 119 EEA that the Protocols form “an integral part” of the EEA Agreement. As a result, Article 34 SCA must mean that the EFTA Court has jurisdiction to give an advisory opinion on the interpretation of Protocol 9 EEA.

69. With regard to the question of whether the EFTA Court is competent to interpret the Free Trade Agreement, the Commission of the European Communities infers from Articles 2(a) and 119 EEA that the Free Trade Agreement does not form “an integral part” of the EEA Agreement. Should the EFTA Court interpret the Free Trade Agreement, the Court would in reality be adjudicating upon the mutual obligations of the European Community and Iceland.

70. However, the Commission of the European Communities is of the view that the EFTA Court is not called upon to interpret the terms of the Free Trade Agreement in the present case. It is asked in the first and fourth questions to determine whether Article 7 of Protocol 9 EEA and its Appendix 3 comprise a reference to Protocol 3 to the Free Trade Agreement in addition to an express reference to Protocol 6 to the Free Trade Agreement. It is an interpretation of the meaning of Protocol 9 EEA which is requested. The EFTA Court is competent to give such an interpretation.

Spurningar nr. 2 og 3:

„Þíðun, hausun, flökun, beinhreinsun, snyrting, söltun og pökkun fisks, sem fluttur hefur verið inn heilfrystur til Íslands frá löndum utan EES, telst ekki nægileg aðvinnsla í skilningi bókunar 4 við EES-samninginn þannig að varan öðlist upprunaréttindi.“

Framkvæmdastjórn Evrópubandalaganna

68. Almenn álit framkvæmdastjórnar Evrópubandalaganna er að EFTA-dómstóllinn sé til þess bær að skýra 7. gr. bókunar 9 EES. Hafnað er túlkun á a-lið 3. mgr. 8. gr. EES-samningsins á þann veg að fiskur sé ekki vara sem heyri undir almennar reglur um frjálsan flutning. Þótt fiskur falli ekki undir almennar reglur um frjálsan flutning í II. hluta EES-samningsins, leiði af 20. gr. samningsins að sérstakar reglur gildi um fisk. Þær sérstöku reglur sé að finna í bókun 9 EES. Ennfremur sé ljóst af a-lið 2. gr. og 119. gr. EES-samningsins að bókanirnar séu „óaðskiljanlegur hluti“ EES-samningsins. Af því leiði að 34. gr. samningsins um stofnun eftirlitsstofnunar og dómstóls beri að skilja svo að EFTA-dómstóllinn sé til þess bær að veita ráðgefandi álit um túlkun á bókun 9 EES.

69. Að því er varðar spurninguna um það hvort EFTA-dómstóllinn sé til þess bær að túlka fríverslunarsamninginn, dregur framkvæmdastjórnin þá ályktun af a-lið 2. gr. og 119. gr. EES að fríverslunarsamningurinn sé ekki „óaðskiljanlegur hluti“ EES-samningsins. Ef til þess kæmi að EFTA-dómstóllinn skýrði fríverslunarsamninginn, væri dómstóllinn í raun að dæma um gagnkvæmar skyldur Evrópubandalagsins og Íslands.

70. Hins vegar er framkvæmdastjórn Evrópubandalaganna þeirrar skoðunar að ekki sé eftir því kallað að EFTA-dómstóllinn skýri skilmála fríverslunarsamningsins í fyrirliggjandi máli. Í fyrstu og fjórðu spurningu sé þess farið á leit við dómstóllinn að hann ákvarði hvort í 7. gr. bókunar 9 EES og 3. viðbæti við hana felist vísun til bókunar 3 við fríverslunarsamninginn til viðbótar við ótvíræða tilvísun til bókunar 6 við fríverslunarsamninginn. Um sé að ræða beiðni um skýringu á merkingu bókunar 9 EES. Dómstóllinn sé bær til þess að veita slíka skýringu.

71. The Commission of the European Communities bases its observation on the assumption that the vessels were not registered in the shipping register of any Member State of the Community nor in any country to which Article 3 of Protocol 4 EEA¹⁸ applies. It is further assumed that no mixtures took place between fish captured in the circumstances described in the Héraðsdómur's request and fish which was clearly of Icelandic origin, in the sense that it was captured by Icelandic vessels.

72. In addressing the second and third questions first, the Commission of the European Communities submits that according to Protocol 4 EEA as amended by Decision No 71/96, the cod at issue cannot be considered as having Icelandic origin. To support this, it refers to Article 5 of Protocol 4 EEA and Annex II. For fish to be considered as originating in Iceland, all the materials of HS Chapter 3 must first be wholly obtained in accordance with Article 4 of Protocol 4 EEA. Hence all the fish that is processed must have been caught either in the territorial waters of Iceland (or the territorial waters of a Contracting Party) or be caught by a vessel flying the Icelandic flag (or that of a Contracting Party) if caught outside those territorial waters. As the fish in this case was caught outside any relevant territorial waters by "foreign vessels", it is not "wholly obtained". Processing or working, as described in Article 5 of Protocol 4 EEA, cannot turn that fish into Icelandic fish. In any case, the processing described in the request must, under Article 6 of Protocol 4 EEA, be considered as insufficient to enable non-wholly obtained fish to be considered of Icelandic origin.

73. With regard to the first and the fourth questions, the Commission of the European Communities basically submits that the rules of origin contained in the Free Trade Agreement do not apply in this case.

74. Article 7 of Protocol 9 EEA refers to "provisions of the agreements listed in Appendix 3", not to the agreements listed as a whole. Appendix 3 makes a precise reference to Article 1 of Protocol 6 to the Free Trade Agreement. It does not, in the case of Iceland, refer to a trade regime in Article 7 of Protocol 9 EEA as a whole, nor to Protocol 3 to the Free Trade Agreement. Consequently, the reference to a trade regime in Article 7 of Protocol 9 EEA must be taken to mean the provisions of Article 1 of Protocol 6 to the Free Trade Agreement exclusively. The term "trade regime" cannot be construed to mean a trading regime which includes the rules of origin contained in Protocol 3 to the Free Trade Agreement. Had the intention been otherwise, Appendix 3 to Protocol 9 EEA would have referred to the Free Trade Agreement as a whole, not just to one part of it. Appendix 3 contains such a reference to the whole of an agreement when it refers to the analogous agreements concluded between the European Community and Sweden, Switzerland and Norway.

¹⁸ As amended by Decision of the EEA Joint Committee No 45/1999 of 26 March 1999 with effect from 1 January 1999, OJ 1999 L 266, p. 53.

71. Framkvæmdastjórn Evrópubandalaganna byggir þessa athugasemd sína á þeirri forsendu að skipin hafi ekki verið skráð í neina skipaskrá neins aðildarríkis Evrópubandalagsins né nokkurs ríkis sem 3. gr. bókunar 4 EES¹⁸ gildir um. Ennfremur er gert ráð fyrir að engin blöndun hafi átt sér stað á fiski sem fenginn var við þær aðstæður sem lýst er í beiðni Héraðsdóms og fiski sem var ótvírætt af íslenskum uppruna í þeim skilningi að hafa verið veiddur af íslenskum skipum.

72. Ef litið er fyrst til annarrar og þriðju spurninga, er framkvæmdastjórn Evrópubandalaganna þeirrar skoðunar að skv. bókun 4 við EES-samninginn, með áorðnum breytingum skv. ákvörðun 71/96, geti þorskurinn sem hér um ræðir ekki talist hafa íslenskan uppruna. Þessu til stuðnings er vísað til 5. gr. bókunar 4 við EES-samninginn og viðauka II. Til þess að fiskur geti talist eiga uppruna á Íslandi þurfi allt efnið skv. 3. kafla samræmdu tollskrárinnar að vera fengið að öllu leyti í samræmi við 4. gr. bókunar 4 EES. Þannig þurfi allur fiskurinn sem unnin var að hafa verið tekinn annað hvort í landhelgi Íslands (eða landhelgi samningsaðila), eða veiddur af skipi sem siglir undir íslenskum fána (eða fána aðildarríkis) sé hann tekinn utan landhelgi þessara aðila. Þar sem fiskurinn sem um ræðir hafi verið veiddur utan þeirrar landhelgi sem um ræðir af „erlendum fiskiskipum” sé hann ekki „að öllu leyti fenginn” með þeim hætti sem krafist er. Vinnsla af því tagi sem lýst er í 5. gr. bókunar 4 EES, geti ekki breytt þeim fiski í íslenskan fisk. Hvað sem öðru líður hljóti sú vinnsla sem lýst er í beiðninni að teljast ófullnægjandi skv. 6. gr. bókunar 4 EES til þess að fiskur sem er ekki „að öllu leyti fenginn” teljist af íslenskum uppruna.

73. Að því er varðar fyrstu og fjórðu spurninguna, er það í megindráttum afstaða framkvæmdastjórnar Evrópubandalaganna að upprunareglurnar í fríverslunarsamningnum eigi ekki við í þessu tilviki.

74. Í 7. gr. bókunar 9 EES sé vísað til „ákvæð[a] samninganna sem taldir eru upp í 3. viðbæti”, ekki til samninganna í heild sem þar eru taldir upp. Í viðbæti 3 sé skýr vísun til 1. gr. bókunar 6 við fríverslunarsamninginn. Ekki sé, í tilviki Íslands, vísað til viðskiptakjaranna í 7. gr. bókunar 9 EES í heild, né heldur til bókunar 3 við fríverslunarsamninginn. Af því leiði að vísunina til viðskiptakjara í 7. gr. bókunar 9 við EES-samningin verði að skilja svo að einungis sé átt við ákvæði 1. gr. í bókun 6 við fríverslunarsamninginn. Orðið „viðskiptakjör” sé ekki unnt að skilja á þann veg að átt sé við viðskiptakjör sem fela í sér upprunareglurnar í bókun 3 við fríverslunarsamninginn. Hefði sú verið ætlunin, hefði í viðbæti 3 við bókun 9 EES verið vísað til fríverslunarsamningsins í heild, en ekki aðeins til eins hluta hans. Í viðauka 3 sé að finna slíka vísun til samnings í heild þegar vísað er til sambærilegra samninga sem gerðir voru milli Evrópubandalagsins og Svíþjóðar, Sviss og Noregs.

¹⁸ Með áorðnum breytingum skv. ákvörðun sameiginlegu EES-nefndarinnar nr. 45/1999 frá 26. mars 1999, í gildi frá 1. janúar 1999, sbr. OJ 1999 L 266, bls. 53.

75. Even if the mention of “products originating in Iceland” in Article 1(2) of Protocol 6 to the Free Trade Agreement was understood to mean in a broad sense to refer to the rules of origin in Protocol 3 to the Free Trade Agreement or was to make those rules apply, the fish would still not benefit from Icelandic origin. The wording in force at the relevant time of Protocol 3 to the Free Trade Agreement, as amended by Decision No 1/96, is materially the same as that which is found in Protocol 4 EEA.

76. The Commission of the European Communities is of the opinion that it is not necessary to answer the fifth question in the light of the answer proposed to the first and fourth questions. Nevertheless, it submits that the Free Trade Agreement and in particular its Protocol 6 applied to all Member States of the Community at the time the shipments in question were made in 1998 and 1999, including namely Denmark, Greece and Spain.¹⁹

77. The Commission of the European Communities suggests to answer the questions as follows:

Questions 2 and 3: “Protocol 4 to the EEA Agreement should be interpreted as meaning that defrosting, heading, filleting, boning, trimming, salting and packing fish captured by foreign vessels that has been imported into Iceland frozen whole from countries outside the EEA does not constitute sufficient working and processing for the product to be considered of Icelandic origin.”

Questions 3 and 4: “The term 'trade regimes' in Article 7 of Protocol 9 to the EEA Agreement and its Appendix 3 does not include the rules of origin of Protocol 3 to the Agreement between the European Economic Community and the Republic of Iceland, signed on 22 July 1972.”

Carl Baudenbacher
Judge-Rapporteur

¹⁹ For Denmark, the Free Trade Agreement entered into force on 1 January 1973, concomitantly with the accession of Denmark to the European Economic Community. For Greece, Article 4 of the Act of Accession to the Community provides that the Hellenic Republic shall be bound by the agreements or conventions entered into by the Community and one or more third State. That Act of Accession entered into force on 1 January 1981. Consequently, Greece was bound by the terms of the Free Trade Agreement at the time the shipments were made. For Spain, Article 4 of the Act of Accession to the Community is materially identical to Article 4 in the Act of Accession for Greece. The Act of Accession for Spain entered into force on 1 January 1986. Consequently, Spain was bound by the terms of the Free Trade Agreement at the time the shipments were made. Additional protocols to the Free Trade Agreement modified the particular provisions of Protocol 6 to the Free Trade Agreement to take account of the accession of new Member States to the Community. An additional protocol signed on 6 November 1980 adapted the timetable for the reduction of customs duties in relation to Greece and a similar additional protocol of 14 July 1986 did likewise in respect of Spain.

75. Jafnvel þótt tilvísun til „afurða upprunninna á Íslandi” í 2. mgr. 1. gr. í bókun 6 við fríverslunarsamninginn væri skilin svo að henni væri ætlað að vísa í víðum skilningi til upprunareglanna í bókun 3 við fríverslunarsamninginn, eða henni væri ætlað að láta þær reglur gilda, myndi fiskurinn samt ekki njóta íslensks uppruna. Orðalagið sem í gildi var í bókun 3 við fríverslunarsamninginn á þeim tíma sem um ræðir, með áorðnum breytingum skv. ákvörðun nr. 1/96, sé efnislega hið sama og í bókun 4 EES.

76. Það er álit framkvæmdastjórnar Evrópubandalaganna að ekki sé þörf á að svara fimmtu spurningunni í ljósi þeirra svara sem gefin eru við fyrstu og fjórðu spurningu. Engu að síður telur framkvæmdastjórnin að fríverslunarsamningurinn, einkum bókun 6 við hann, hafi gilt um öll aðildarríki Evrópubandalagsins á þeim tíma sem umræddar sendingar áttu sér stað á árunum 1998 og 1999, þ.m.t. um Danmörk, Grikkland og Spán.¹⁹

77. Framkvæmdastjórn Evrópubandalaganna leggur til að spurningunum verði svarað sem hér segir:

Spurningar nr. 2 og 3: „Bókun 4 við EES-samninginn ber að skýra svo að þíðun, hausun, flökun, beinhreinsun, snyrting, söltun og pökkun fisks, sem veiddur hefur verið af erlendum fiskiskipum og fluttur inn heilfrystur til Íslands frá löndum utan EES, teljist ekki nægileg aðvinnsla til þess að varan teljist af íslenskum uppruna.”

Spurningar nr. 3 og 4: „Orðið „viðskiptakjör” í 7. gr. bókunar 9 við EES-samninginn, sbr. og 3. viðbæti við þá bókun, tekur ekki til upprunareglanna í bókun 3 við samninginn milli Efnahagsbandalags Evrópu og Lýðveldisins Íslands sem undirritaður var 22. júlí 1972.”

Carl Baudenbacher
framsögumaður

¹⁹ Í tilviki Danmerkur tók fríverslunarsamningurinn gildi 1. janúar 1973, um leið og Danmörk gerðist aðili að Efnahagsbandalagi Evrópu. Að því er varðar Grikkland, kveður 4. gr. samningsins, um aðild þess að bandalaginu, svo á að Grikkland skuli bundið af þeim samningum og sáttmálum sem bandalagið hefur gert við eitt eða fleiri ríki utan bandalagsins. Aðildarsamningurinn gekk í gildi 1. janúar 1981. Af því leiðir að Grikkland var bundið af ákvæðum fríverslunarsamningsins á þeim tíma sem sendingarnar áttu sér stað. Í tilviki Spánar er 4. gr. samningsins um aðild að bandalaginu efnislega samhljóða 4. gr. í aðildarsamningi Grikklands. Aðildarsamningurinn fyrir Spán gekk í gildi 1. janúar 1986. Af því leiðir að Spánn var bundinn af ákvæðum fríverslunarsamningsins á þeim tíma sem sendingarnar áttu sér stað. Viðbótarbókanir við fríverslunarsamninginn breyttu tilteknum ákvæðum í bókun 6 við fríverslunarsamninginn þannig að tekið væri mið af aðild hinna nýju aðildarríkja að bandalaginu. Með viðbótarbókun sem undirrituð var 6. nóvember 1980 voru gerðar breytingar á tímaáætlun um lækun tolla varðandi Grikkland og með sambærilegri viðbótarbókun frá 14. júlí 1986 var hið sama gert varðandi Spán.

CASES 1994 - 2002

CASE	PARTIES	TYPE OF CASE	EFTA COURT REPORT
1	E-1/94 <i>Ravintoloitsijain Liiton Kustannus Oy Restamark</i>	<i>Request for an Advisory Opinion from Tullilautakunta, Finland</i> 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 <i>Scottish Salmon Growers Association Ltd v EFTA Surveillance Authority</i>	<i>Direct Action</i> 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 <i>Alexander Flandorfer Friedmann and Others v Republic of Austria</i>	Jurisdiction – Procedure – Admissibility – Legal aid	[1994-1995] p 83
4	E-4/94 <i>Konsumentombudsmannen v De Agostini (Svenska) Förlag AB</i>	<i>Request for an Advisory Opinion from Marknadsdomstolen, Sweden</i> Withdrawn	[1994-1995] p 89
5	E-5/94 <i>Konsumentombudsmannen v TV-shop i Sverige AB</i>	<i>Request for an Advisory Opinion from Marknadsdomstolen, Sweden</i> Withdrawn	[1994-1995] p 93
6	E-6/94 <i>Reinhard Helmers v EFTA Surveillance Authority and Kingdom of Sweden</i>	<i>Direct Action</i> Procedure – Admissibility – Application for revision	[1994-1995] p 97 and p 103
7	E-7/94 <i>Data Delecta Aktiebolag and Ronnie Forsberg v MSL Dynamics Ltd</i>	<i>Request for an Advisory Opinion from Högsta domstolen, Sweden</i> Withdrawn	[1994-1995] p 109

8	Joined Cases E-8/94 and E-9/94	<i>Forbrukerombudet v Mattel Scandinavia A/S and Lego Norge A/S</i>	<i>Request for an Advisory Opinion from Markedsrådet, Norway</i> 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	<i>Ulf Samuelsson v Svenska staten</i>	<i>Request for an Advisory Opinion from Varbergs tingsrätt, Sweden</i> Admissibility – Council Directive 80/987/EEC – National measures to counter abuse – Proportionality	[1994-1995] p 145
10	E-2/95	<i>Eilert Eidesund v Stavanger Catering A/S</i>	<i>Request for an Advisory Opinion from Gulating lagmannsrett, Norway</i> 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	<i>Torgeir Langeland v Norske Fabricom A/S</i>	<i>Request for an Advisory Opinion from Stavanger byrett, Norway</i> Council Directive 77/187/EEC – Transfer of rights to pension benefits	[1995-1996] p 36
12	E-1/96	<i>EFTA Surveillance Authority v Republic of Iceland</i>	<i>Discontinuance of proceedings</i>	[1995-1996] p 63
13	E-2/96	<i>Jørn Ulstein and Per Otto Røiseng v Asbjørn Møller</i>	<i>Request for an Advisory Opinion from Inderøy herredsrett, Norway</i> Council Directive 77/187/EEC – Transfer of rights to pension benefits	[1995-1996] p 65
14	E-3/96	<i>Tor Angeir Ask and Others v ABB Offshore Technology AS and Aker Offshore Partner AS</i>	<i>Request for an Advisory Opinion from Gulating lagmannsrett, Norway</i> Council Directive 77/187/EEC – Transfer of part of a business	[1997] p 1

15	E-4/96	<i>Fridtjof Frank Gundersen v Oslo kommune</i>	<i>Request for an Advisory Opinion from Oslo byrett, Norway</i> Withdrawn	[1997] p 28
16	E-5/96	<i>Ullensaker kommune and Others v Nille AS</i>	<i>Request for an Advisory Opinion from Borgarting lagmannsrett, Norway</i> Admissibility – Free movement of goods – Licensing scheme	[1997] p 30
17	E-6/96	<i>Tore Wilhelmsen AS v Oslo kommune</i>	<i>Request for an Advisory Opinion from Oslo byrett, Norway</i> Alcohol sales – State monopolies of a commercial character – Free movement of goods	[1997] p 53
18	E-7/96	<i>Paul Inge Hansen v EFTA Surveillance Authority</i>	<i>Direct Action</i> Action for failure to act – Admissibility	[1997] p 100
19	E-1/97	<i>Fridtjof Frank Gundersen v Oslo kommune, supported by Norway</i>	<i>Request for an Advisory Opinion from Oslo byrett, Norway</i> Alcohol sales – State monopolies of a commercial character – Free movement of goods	[1997] p 108
20	E-2/97	<i>Mag Instrument Inc v California Trading Company Norway, Ulsteen</i>	<i>Request for an Advisory Opinion from Fredrikstad byrett, Norway</i> Exhaustion of trade mark rights	[1997] p 127
21	E-3/97	<i>Jan and Kristian Jæger AS, supported by Norwegian Association of Motor Car Dealers and Service Organisations v Opel Norge AS</i>	<i>Request for an Advisory Opinion from Nedre Romerike herredsrett, Norway</i> Competition – Motor vehicle distribution system – Compatibility with Article 53(1) EEA – Admission to the system – Nullity	[1998] p 1
22	E-4/97	<i>The Norwegian Bankers' Association v EFTA Surveillance Authority, supported by Kingdom of Norway</i>	<i>Direct Action</i> 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	<i>European Navigation Inc v Star Forsikring AS, under offentlig administrasjon (under public administration)</i>	<i>Request for an Advisory Opinion from Høysteretts kjæremålsutvalg, Norway</i> Withdrawn	[1998] p 59
24	E-7/97	<i>EFTA Surveillance Authority v Kingdom of Norway</i>	<i>Direct Action</i> 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	<i>TV 1000 Sverige AB v Norwegian Government</i>	<i>Request for an Advisory Opinion from Oslo byrett, Norway</i> Council Directive 89/552/EEC – Transfrontier television broadcasting – Pornography	[1998] p 68
26	E-9/97	<i>Erla María Sveinbjörnsdóttir v Government of Iceland</i>	<i>Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland</i> Council Directive 80/987/EEC – Incorrect implementation of a directive – Liability of an EFTA State	[1998] p 95
27	E-10/97	<i>EFTA Surveillance Authority v Kingdom of Norway</i>	<i>Direct Action</i> 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	<i>Norwegian Government v Astra Norge AS</i>	<i>Request for an Advisory Opinion from Borgarting lagmannsrett, Norway</i> Free movement of goods – Copyright – Disguised restriction on trade	[1998] p 140
29	E-2/98	<i>Federation of Icelandic Trade (Samtök verslunarinnar – Félag íslenskra stórkaupmanna, FIS) v Government of Iceland and the Pharmaceutical Pricing Committee (Lyffjaverðsnefnd)</i>	<i>Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland</i> Pricing of pharmaceutical products – General price decrease – Price control system	[1998] p 172

30	E-3/98	<i>Herbert Rainford-Towning</i>	<i>Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein</i> Right of establishment – Residence requirement for managing director of a company	[1998] p 205
31	E-4/98	<i>Blyth Software Ltd v AlphaBit AS</i>	<i>Request for an Advisory Opinion from Oslo byrett, Norway</i> Withdrawn	[1998] p 239
32	E-6/98	<i>Government of Norway v EFTA Surveillance Authority</i>	<i>Direct Action</i> 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	<i>Fagtún ehf v Byggingarnefnd Borgarholtsskóla, Government of Iceland, City of Reykjavík and Municipality of Mosfellsbær</i>	<i>Request for an Advisory Opinion from Hæstiréttur Íslands, Iceland</i> General prohibition on discrimination – Free movement of goods – Post-tender negotiations in public procurement proceedings	[1999] p 51
34	E-1/99	<i>Storebrand Skadeforsikring AS v Veronika Finanger</i>	<i>Request for an Advisory Opinion from Norges Høyesterett, Norway</i> Motor Vehicle Insurance Directives – Driving under the influence of alcohol – Compensation for passengers	[1999] p 119
35	E-2/99	<i>EFTA Surveillance Authority v Kingdom of Norway</i>	<i>Direct Action</i> Failure of a Contracting Party to fulfil its obligations - Council Directive 92/51/EEC on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC	[2000-2001] p 1
36	E-1/00	<i>State Debt Management Agency v Íslandsbanki-FBA hf.</i>	<i>Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland</i> Free movement of capital – State guarantees issued on financial loans – Different guarantee fees for foreign and domestic loans	[2000-2001] p 8
37	E-2/00	<i>Allied Colloids and Others v Norwegian State</i>	<i>Request for an Advisory Opinion from Oslo byrett, Norway</i> Free movement of goods – Directives on dangerous substances and preparations – Joint Statements of the EEA Joint Committee	[2000-2001] p 35

38	E-3/00	<i>EFTA Surveillance Authority v Kingdom of Norway</i>	<i>Direct Action</i> Failure of a Contracting Party to fulfil its obligations – Fortification of foodstuffs with iron and vitamins – Protection of public health – Precautionary principle	[2000-2001] p 73
39	E-4/00	<i>Dr Johann Brändle</i>	<i>Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein</i> Right of establishment – Single practice rule – Justification by overriding reasons of general interest	[2000-2001] p 123
40	E-5/00	<i>Dr Josef Mangold</i>	<i>Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein</i> Right of establishment – Single practice rule – Justification by overriding reasons of general interest	[2000-2001] p 163
41	E-6/00	<i>Dr Jürgen Tschannet</i>	<i>Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein</i> Right of establishment – Single practice rule – Justification by overriding reasons of general interest	[2000-2001] p 203
42	E-7/00	<i>Halla Helgadóttir v Daniel Hjaltason and Iceland Insurance Company Ltd</i>	<i>Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland</i> Motor Vehicle Insurance Directives – Standardised compensation system – Compensation for victims	[2000-2001] p 246
43	E-5/01	<i>EFTA Surveillance Authority v Principality of Liechtenstein</i>	<i>Direct Action</i> Failure by a Contracting Party to fulfil its obligations - Council Directive 87/344/EEC on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance	[2000-2001] p 287
44	E-1/01	<i>Hörður Einarsson v The Icelandic State</i>	<i>Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland</i> Differentiated value-added tax on books – Article 14 EEA – Competing products – Indirect protection of domestic products	[2002]
45	E-2/02	<i>Dr Franz Martin Pucher</i>	<i>Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein</i> Right of establishment – Residence requirement	[2002]

			for at least one board member of a domiciliary company	
46	E-9/00	<i>EFTA Surveillance Authority v Norway</i>	<i>Direct Action</i> Failure of a Contracting Party to fulfil its obligations – State retail alcohol monopoly – licensed serving of alcohol beverages – discrimination	[2002]
47	E-8/00	<i>Landsorganisasjonen i Norge v Kommunenes Sentralforbund and Others</i>	<i>Request for an Advisory Opinion from Arbeidsretten, Norway</i> Competition rules – Collective agreements – Transfer of occupational pension scheme	[2002]
48	E-3/01	<i>Alda Viggósdóttir v Íslandspóstur hf.</i>	<i>Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland</i> Council Directive 77/187/EEC – Transfer of a State administrative entity to a State owned limited liability company	[2002]
49	E-8/01	<i>Gunnar Amundsen AS and Others v Vectura AS</i>	<i>Request for an Advisory Opinion from Borgarting lagmannsrett, Norway</i> Withdrawn	[2002]
50	E-4/01	<i>Karl K. Karlsson hf. v The Icelandic State</i>	<i>Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland</i> State alcohol monopoly – incompatibility with Article 16 EEA – State liability in the event of a breach of EEA law – Conditions of liability	[2002]
51	E-6/01	<i>CIBA and Others v The Norwegian State</i>	<i>Request for an Advisory Opinion from Oslo byrett, Norway</i> Rules of procedure – Admissibility – Jurisdiction of the Court – Competence of the EEA Joint Committee	[2002]
52	E-7/01	<i>Hegelstad and Others v Hydro Texaco AS</i>	<i>Request for an Advisory Opinion from Gulating lagmannsrett, Norway</i> Competition – Exclusive purchasing agreement – Service-station agreement – Article 53 EEA – Regulation 1984/83 – Nullity	[2002]