Report of the EFTA Court

1999

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Foreword

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

The first *Report of the EFTA Court* covers the period from *1 January 1994 to 30 June 1995* and contains an overview of the activities of the Court and the decisions during that period. The Report also contains general information on the establishment of the Court, its jurisdiction, legal status and procedures. The reader is referred to the first Report of the Court for information on these general matters. Since then the EFTA Court has issued three 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 1999 to 31 December 1999.*

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 given 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 Permanent Missions to the European Union in Brussels. During the period covered by this Report, the Committee has, *inter alia*, been dealing with the budget of the Court and the appointment of judges, cf. II below.

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

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

Provisions for the internal administration of the Court are laid down in the Staff Regulations and Rules and in the Financial Regulations and Rules as adopted on 4 January 1994, with amendments most recently of 25 November 1998.

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

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

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

http://www.efta.int/structure/court/efta-crt.cfm

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

The Court may be reached by e-mail at the following address:

eftacourt@eftacourt.lu

II. Judges and Staff

The members of the Court in 1999 were as follows:

Mr Bjørn HAUG (nominated by Norway)
Mr Thór VILHJÁLMSSON (nominated by Iceland)
Mr Carl BAUDENBACHER (nominated by Liechtenstein)

Judge Haug was appointed for a period of six years commencing 1 January 1994. Judge Vilhjálmsson was appointed (under the then-existing rotation rules) for a period of three years from 1 January 1994 and was reappointed for a period of six years commencing 1 January 1997. Judge Baudenbacher was appointed for a period of six years commencing 6 September 1995.

Judge Haug was elected President of the Court on 18 January 1995 and was re-elected on 5 December 1996 for a period of three years, commencing 1 January 1997.

Mr Gunnar Selvik was appointed Registrar of the Court for a period of three years commencing 1 September 1998.

On 24 October 1997, the ESA/Court Committee decided by common accord to approve for a three-year period a list of persons who may be chosen to serve as *ad hoc* Judges when a regular Judge is prevented from acting in a particular case pursuant to Article 15 of the Statute. The following *ad hoc* Judges were appointed:

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

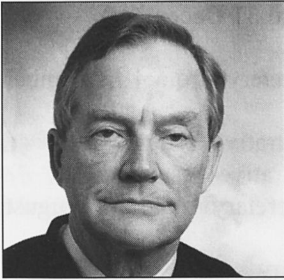
Nominated by Liechtenstein:
Mr Marzell Beck, lawyer
Mr Martin Ospelt, lawyer

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

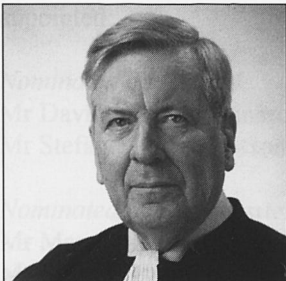
In addition to the Judges, the following persons were employed by the Court in 1999:

Mr Åsle AARBAKKE, Norwegian, Legal Secretary (until 31 December)
Ms Svava ARADÓTTIR, Icelandic, Secretary
Mr Davíð Þór BJÖRGVINSSON, Icelandic, Legal Secretary (from 1 September 1999)
Ms Harriet BRUHN, Norwegian, Financial and Administrative Officer
Ms Hrafnhildur EYJÓLFSDÓTTIR, Icelandic, Administrative Assistant
Ms Dóra GUÐMUNDSDOTTIR, Icelandic, Legal Secretary (until 31 August 1999)
Ms Sigrid HAUSER-MARTINSEN, Norwegian, Secretary
Ms Janet JACKSON, British, Secretary
Mr Thomas NORDBY, Norwegian, Lawyer-Linguist (until 31 August 1999)
Mr Meinhard NOVAK, Austrian, Legal Secretary
Mr Gilles PELLETIER, French, Caretaker
Mr Gunnar SELVIK, Norwegian, Registrar
Ms Diana L. TORRENS, Canadian, Lawyer-Linguist
Mr Nils-Ola WIDME, Norwegian, Lawyer-Linguist (from 1 September 1999)

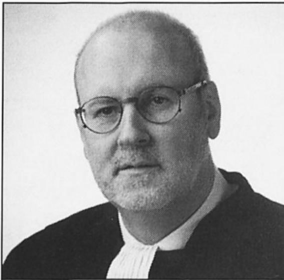
CURRICULA VITAE OF THE JUDGES AND THE REGISTRAR



Bjørn HAUG
Born 16 December 1928 Oslo, Norway.
Studies: University of Oslo, cand jur 1954; University of California, Berkeley, LLM 1958.
Professional career: Lawyer in a Norwegian industrial concern (speciality: mergers and acquisitions, licensing agreements, joint ventures) 1962–72; Director, member of the concern administration (planning, investments, budgetary control) 1967–72; Attorney General (Civil Affairs) ("Regjeringsadvokat", i.e. attorney for the Government and State bodies) 1972–1993.
Other national functions: Chairman of the Committee on the Pricing of North Sea Oil, 1973-76; Chairman of the Committee Revising Oil and Gas Legislation 1973–76; National Mediator of Labour Disputes 1982–88; Chairman of the Commission on Employee Participation 1973–93; Chairman of the Board, Oslo Chamber of Commerce Institute of Arbitration, 1983–95; Member of the Board of Directors, Christiania Bank og Kreditkasse, Oslo, 1991–1993.
International assignments: Chairman or member of arbitral tribunals in international commercial arbitration, since 1979; Member of the Panel of Arbitrators of the IEA Dispute Settlement Centre, Paris, since 1981; Fellow of the Chartered Institute of Arbitrators, London, since 1982; Member of the ICC Commission on International Arbitration, Paris, since 1983; Member of the Panel of International Arbitrators, Stockholm, since 1991; Judge of the EFTA Court since 1 January 1994, President since 18 January 1995.



Thór VILHJÁLMSSON
Born 9 June 1930 in Reykjavik, Iceland.
Studies: St. Andrews University, Scotland; University of Iceland (cand jur 1957); New York University; University of Copenhagen.
Professional career: Journalist 1957–1958; Deputy Judge, Reykjavík Civil Court, 1960–62; Judge 1962–67; Professor 1967–76; Dean, Faculty of Law, 1968–70; Director, Institute of Law, 1974–76; Judge, European Court of Human Rights, Strasbourg, 1971-1998; Vice-President of that Court 1998; Judge, Supreme Court of Iceland, 1976–1993, President 1983–84 and 1993; Judge of the EFTA Court since 1 January 1994.
Member of Icelandic delegations to UN General Assembly 1963, UN Sea-Bed Committee 1972 and 1973, Law of the Sea Conference 1974 and 1975 and other international conferences. President, Association of Icelandic Lawyers, 1971–74; Editor, Icelandic Law Review, 1973–83.



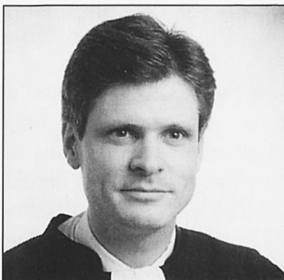
Carl BAUDENBACHER

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; offered the Chair of German and European Private, Commercial and Economic law at the University of Bochum, 1994; Member of the Supreme Court of the Principality of Liechtenstein, 1994-1995; Judge of the EFTA Court since 6 September 1995.

Publications: 15 books and over 70 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.



Gunnar SELVIK

Born 13 November 1963 in Bergen, Norway.

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

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

III. Decisions of the Court

Case E-4/97

Norwegian Bankers' Association
v
EFTA Surveillance Authority, supported by the Kingdom of Norway

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Exceptions under Article 59(2) EEA – Procedures)

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Summary of the Judgment

1. In order to determine which procedural rules are applicable to the proceedings of the EFTA Surveillance Authority, it is necessary to consider the substantive matters that are relevant for such determination. It would not be compatible with the EFTA Court's review function if it were to be entirely bound by the findings of the EFTA Surveillance Authority in its consideration of the procedure. An institution with legal qualities such as those of Husbanken, is an undertaking within the meaning of Articles 61 and 59 EEA, and the case must consequently be viewed as a State aid case to be dealt with pursuant to Article 61 EEA and Protocol 3 to the Surveillance and court agreement.

2. In case of existing aid the EFTA Surveillance Authority is, according to Article 1(2) of Protocol 3 to the Surveillance and court agreement not explicitly required to open formal proceedings. The EFTA Surveillance Authority is under no obligation to open formal proceedings on the basis of the complaint from the Applicant.

3. As regards the plea of error in law and error in assessment under Article 59(2) EEA, the EFTA Court cannot substitute its own assessment for that of the EFTA Surveillance Authority

in a case which involves assessments of an economic and social nature which must be made within an EEA context. In reviewing the substantive issues, the EFTA Court must confine itself to verifying whether the EFTA Surveillance Authority has accurately stated the facts on which the contested finding was based and whether there has been any manifest error of assessment or a misuse of powers.

4. It is primarily for the EFTA Surveillance Authority to assess whether certain services are "services of general economic interest" within the meaning of Article 59(2) EEA. In this assessment, the nature of the undertaking entrusted with the services is not of decisive importance, nor whether the undertaking is entrusted with exclusive rights, but rather the essence of the services deemed to be of general economic interest and the special characteristics of this interest that distinguish it from the general economic interest of other economic activities.

5. An institution performing the tasks of Husbanken may be considered as an undertaking entrusted with the operation of a service of general economic interest within the meaning of Article 59(2) EEA. The aid in question was necessary for Husbanken to perform the tasks entrusted to it.

6. As regards the effect on trade between the Contracting Parties, the test of whether the performance of the service of general economic interest does not affect competition and unity of the common market in a disproportionate manner is of a negative nature. It examines whether the measure adopted is not disproportionate, but it is not a requirement that the measure adopted be the least restrictive possible. A reasonable relationship between the aim and the means employed is satisfactory.

7. Article 59(2) EEA must be interpreted as providing that the operation of undertakings entrusted with services of general economic interest must not affect the development of trade "to such an extent as would be contrary to the interests of the Contracting Parties".

8. The decision of the EFTA Surveillance Authority shows that a number of points have not been considered to the extent necessary to comply with Article 59(2) EEA.

9. The decision is accordingly annulled, and the EFTA Surveillance Authority is ordered to bear the costs of the Norwegian Bankers' Association.

JUDGMENT OF THE COURT
3 March 1999

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Exceptions under Article 59(2) EEA – Procedures)

In Case E-4/97

Norwegian Bankers' Association, represented by Counsel Mr Jonas W. Myhre, Hjort Law Office, Akersgaten 2, 0105 Oslo, Norway,

applicant,

v

EFTA Surveillance Authority, represented by Mr Håkan Berglin, Director of the Legal and Executive Affairs Department, acting as Agent, 74 rue de Trèves, Brussels, Belgium,

defendant,

supported by the **Kingdom of Norway**, represented by the Office of the Attorney General (Civil Affairs), Mr Ingvald Falch, acting as Agent and Mr Morten Goller, acting as Co-agent, P.O. Box 8012 Dep., 0030 Oslo, Norway,

intervener,

APPLICATION for annulment of Decision No. 177/97COL of 9 July 1997 of the EFTA Surveillance Authority concerning alleged infringement of the competition and State aid provisions of the EEA Agreement owing to the framework conditions for the Norwegian State Housing Bank,

THE COURT

Composed of: Bjørn Haug, President, Carl Baudenbacher and Thór Vilhjálmsson (Rapporteur), Judges,

Registrar: Gunnar Selvik,

having regard to the written observations of the parties and the intervener and the written observations of the Commission of the European Communities, represented by Mr Francisco Santaolalla, Principal Legal Advisor and Mr Dimitris Triantafyllou and Mr Xavier Lewis, Members of the Commission's Legal Service, acting as Agents,

having regard to the revised Report for the Hearing,

after hearing oral argument from the parties and the intervener and the oral observations of the Government of Iceland, represented by Mr Einar Gunnarsson, Legal Officer in the Ministry of Foreign Affairs, acting as Agent, and of the Commission of the European Communities, at the hearing on 4 November 1998,

gives the following

Judgment

1 Husbanken, the Norwegian State Housing Bank (hereinafter "Husbanken") was established by an act of the Norwegian Parliament (Storting) on 1 March 1946 (Act No. 3 of 1 March 1946 on the Norwegian State Housing Bank (*Lov om Den Norske Stats Husbank*, hereinafter "the Act")). The primary capital of Husbanken was contributed by the State. An indemnity fund was established to cover losses on loans and guarantees, with the initial amount being contributed partly by the State and partly by local authorities. According to the Act, further deposits can be made to the fund, as determined by the Parliament, and the Bank can receive funding from the Treasury.

2 Following an amendment in 1992, the only task of Husbanken has been the financing of housing pursuant to the Act and a number of regulations laid down by the public authorities. Husbanken provides loans to individuals for the building of new dwellings. Loans are also provided *inter alia* to nursery schools, rental

housing, special-purpose and sheltered housing, new nursing home places and other care facilities. Improvement loans are granted for the purposes of assisting people with special needs and for the purposes of urban renewal. First home loans and purchase loans are granted, following means testing, to under-privileged groups. In addition, Husbanken offers grants and allowances for some of the purposes mentioned above.

3 It is open for anyone to apply for those loans and grants that are not means-tested. However, certain requirements and conditions are imposed, such as limits on cost and size and functional or planning requirements. An overview submitted by the Government of Norway concerning loans, grants and allowances given by Husbanken in 1996 shows that a little under one-third of loans for construction of new housing, including special care and day care centres, renovation loans and special first home loans, were means-tested (NOK 2434 million out of NOK 7777 million). Grants and allowances are typically restricted to certain groups, but are rarely means-tested. Husbanken requires, as a main rule, a first-priority mortgage in the dwelling for which the loan is granted.

4 Originally, interest rates for Husbanken were directly set by the Parliament in regulations. Since 1 January 1996, however, the lending terms of Husbanken have followed directly the interest rate on government securities, with an added margin of 0.5%, instead of being fixed yearly by political decisions. The Parliament decides the lending quota. Since 1996, Husbanken has provided loans either with fixed or floating interest rates. The floating rate is based on short-term government securities (0-3 months' term) observed six to three months before implementation of a new interest rate, adjusted quarterly. The rate of fixed interest is based on government bonds with a remaining term of approximately five years, observed nine to three months before implementation, adjusted every half a year.

5 *Den Norske Bankforening* (the Norwegian Bankers' Association, hereinafter variously "the Applicant" or "the Association") is an association of banks, mortgage institutions and other financial institutions which are entitled by law to carry on activities in Norway. By a letter of 7 November 1995, the Association lodged a complaint with the EFTA Surveillance Authority, asking it to assess whether the framework conditions for Husbanken were in conformity with the Agreement on the European Economic Area (hereinafter "EEA").

6 The complaint was based on Article 61 EEA on State aid and contended that the arrangement distorted competition to the detriment of credit institutions in competition with Husbanken and that the monopoly on subsidized lending constituted an economic barrier to free trade in financial services and affected cross-border trade. The Association further contended that the arrangement went

beyond what was required by the interests of the population groups targeted by the subsidies and beyond the scope of necessity implicit in Article 59 EEA regarding public undertakings.

7 The initial complaint was later supplemented by letters and faxes from November 1995 through March 1997. On 25 June 1996, officials of the EFTA Surveillance Authority met with representatives of the Association to discuss and exchange information. The EFTA Surveillance Authority requested information from the Norwegian authorities on 22 January 1996 and met with officials of the Royal Ministry of Local Government and Labour on 13 September 1996. Information from the Government of Norway was received in letters dated 1 March 1996 and 22 October 1996.

8 On 9 July 1997, the EFTA Surveillance Authority adopted the following decision (hereinafter the "Decision"): "The complaint initiated by letter of 7 November 1995 (Doc. No. 95-6439-A), concerning the framework conditions for the Norwegian State Housing Bank and their compatibility with the provisions of the EEA Agreement on State aid and competition, is closed without further action by the Authority. (...)" The Norwegian authorities, the Association and the Commission of the European Communities were informed of the Decision by means of a copy.

The contested Decision

9 In the Decision, the EFTA Surveillance Authority rejected the submission of the Government of Norway to the effect that privileges afforded to Husbanken as an instrument of the public housing policy were not governed by Articles 59 and 61 EEA. Regarding the assessment under Article 61 EEA, the contested Decision states the following:

> "...for a measure to constitute State aid in the meaning of Article 61(1) EEA it must
> 1. be granted through State resources;
> 2. distort or threaten to distort competition by favouring certain undertakings or the production of certain goods;
> 3. affect trade between Contracting Parties.
>
> It is clear that the first condition is fulfilled in the present case, as Husbanken's framework conditions are established by the State and its financial means are derived from State resources.
>
> Apart from a very small equity, consisting of risk and loss funds, Husbanken's core activity of providing loans for housing purposes is based on borrowings,

> which are obtained exclusively from the State(...) Husbanken, being a government agency financed by the State, enjoys the borrowing terms and favourable credit rating of the State. (...) Husbanken also in other ways clearly enjoys the financial backing of the State Treasury, for instance by way of budget appropriations, if needed, to cover the losses it incurs on loans as well as administrative expenses. It is therefore clear that as a State institution, Husbanken enjoys financial advantages of a kind not afforded to other providers of credit for housing purposes and which fulfil the condition referred to in point 2 above.(...) ...the Authority does not have reason to question the complainant's contention that potential distortions of competition have not been removed.
> (...)
>
> It ... cannot be ruled out that the financial advantages enjoyed by Husbanken may, at least potentially, affect trade between Contracting Parties to the EEA Agreement, although in practice such effects are likely to be limited."

10 As regards the derogation under Article 59(2) EEA, the Decision is worded as follows:

> "Article 59(2) in other words permits States parties to the EEA Agreement to confer on undertakings to which they entrust the operation of services of general economic interest, exclusive rights or other privileges which may hinder the application of the rules of the Agreement on competition and State aid, in so far as restrictions on competition, or even the exclusion of all competition by other economic operators, are necessary to ensure the performance of the particular tasks assigned to the undertakings concerned.
> (...)
>
> In view of the above facts and considerations, and given that there is no legislation at the EEA level providing a uniform definition of the boundaries of a social housing policy and public housing finance services, the Authority has no grounds to dispute that Husbanken is entrusted with the operation of services of general economic interest.
> (...)
>
> Husbanken is not a credit institution in the meaning of the relevant EEA legislation. It is not authorised to accept deposits from the public and therefore does not compete with credit institutions in that area. It does not engage in other financial services, e.g. payment intermediation, outside the scope of its core activity to provide credit for housing purposes.
>
> Given that the Norwegian authorities have entrusted Husbanken with the operation of loan schemes, whose interest rate terms are fixed by the Norwegian parliament, and these loans being considered to form an integral part of the

Government's social housing policy, *inter alia* by virtue of their nation-wide and universal availability and on uniform terms, irrespective of the economic situation of the recipients, the funding by the State to service these loan schemes must be deemed to be necessary for the performance of these services of general economic interest. This funding is earmarked to allow Husbanken to annually meet the lending quotas, also determined by the Norwegian parliament, of its individual loan schemes, which as stated above are not applied to go beyond Husbanken's core housing finance activity. The funding by the State Treasury is therefore genuinely needed to allow Husbanken to perform the particular tasks assigned to it and does not allow the undertaking to compete in lending activity outside its statutory functions.
(...)

In this context it must be acknowledged that in most developed countries, including most States parties to the EEA Agreement, governments, both at central and local level, intervene in housing and housing finance markets. This intervention takes different forms from one State to another, depending *inter alia* on certain realities in the housing markets, in particular the pattern of housing tenure, and the objectives of the housing policy of the governments concerned.
(...)

It shall furthermore be noted that the Authority is aware of no relevant case-law, according to which the EC Court of Justice has ruled on the compatibility with the State aid provisions of the EC Treaty of support granted through any of the numerous publicly supported housing finance institutions which exist in the EU Member States, or for that matter other types of institutions, which serve as instruments of public housing policy, nor is the Authority aware of any decision whereby the EC Commission has intervened to prohibit or limit the granting of such support.

As concerns assessment of whether restrictions or distortions of competition due to special measures in favour of public undertakings can be justified on the basis of the second paragraph of Article 59, the last sentence of that paragraph provides that "The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties". This implies that the assessment of the derogation shall be done in an EEA context, i.e. it is subject to a proviso intended to safeguard the interests of other Contracting Parties. Whereas it clearly does not require that trade effects be non-existent, measures involving major trade effects are excluded. As has been concluded above the Authority considers that although it cannot be excluded that the measures under consideration may affect trade between Contracting Parties, in practice such trade effects are likely to be only limited.

For the above reasons the Authority does not in the present circumstances consider that restrictions or distortions of competition as a result of the framework conditions for the Norwegian State Housing Bank go beyond what is required to

allow that undertaking to perform the services of general economic interest with which it has been entrusted."

Procedure and forms of order sought by the parties

11 By an application of 9 September 1997, received at the Court Registry on the same day, the Association brought the present action for annulment, 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")

12 On 24 November 1997, the Government of Norway lodged an application to intervene in support of the EFTA Surveillance Authority, pursuant to Article 36 of Protocol 5 to the Surveillance and Court Agreement. By a letter of 14 January 1998, the Court informed the Government of Norway of its decision to allow the intervention. A Statement in Intervention was received at the Court Registry on 6 February 1998.

13 On 9 December 1997, the EFTA Surveillance Authority lodged at the Court Registry a request pursuant to Article 87 of the Rules of Procedure of the EFTA Court, asking for the application to be dismissed as inadmissible. After hearing oral argument from the parties on 30 April 1998 on the question of admissibility, the Court, in a decision of 12 June 1998, declared the application admissible and decided to reserve the decision on costs.

14 The Court decided to open the oral procedure without any measures of enquiry. However, by a letter of 7 September 1998, the Court requested supplementary information on certain issues from the intervener, the Government of Norway, and asked the parties to give supplementary or rebuttal information regarding the information from the intervener, as the parties found necessary. The supplementary information from the Government of Norway was received at the Court Registry on 16 September 1998, and remarks to the supplementary information from the Association were received at the Court Registry on 1 October 1998.

15 The Applicant claims that the EFTA Court should:

- annul the Decision of the EFTA Surveillance Authority of 9 July 1997 (Dec. No. 177/97COL), and
- order the EFTA Surveillance Authority to bear the costs.

16 The EFTA Surveillance Authority claims that the EFTA Court should:

- dismiss the application as unfounded, and
- order the Applicant to pay the costs.

17 The Government of Norway, intervener in support of the EFTA Surveillance Authority, contends that the EFTA Court should:

- dismiss the application.

Pleas in law

18 The *Applicant* bases the application for annulment on three pleas: that the EFTA Surveillance Authority wrongfully did not commence formal proceedings concerning State aid; that the EFTA Surveillance Authority infringed essential procedural requirements by not providing adequate reasons as required by Article 16 of the Surveillance and Court Agreement; and, finally, that the EFTA Surveillance Authority wrongfully interpreted and applied Article 59(2) EEA.

Opening of proceedings under Article 1(2) of Protocol 3 to the Surveillance and Court Agreement

19 The *Applicant* claims that the EFTA Surveillance Authority has infringed a procedural requirement by not opening the formal proceedings under Article 1(2) of Protocol 3 to the Surveillance and Court Agreement (hereinafter "the Protocol").

Article 1 of the Protocol 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."

20 The Applicant claims that the EFTA Surveillance Authority should have opened formal proceedings under Article 1(2) of the Protocol, given the complexity of the case and because the EFTA Surveillance Authority considered the derogation under Article 59(2) EEA in the case. Alternatively, the Applicant maintains the view that the aid was "new aid" for which notification should have been given. The Applicant argues that the EFTA Surveillance Authority should have opened the formal proceedings to investigate the legality of the "new aid".

21 The *EFTA Surveillance Authority* adheres to the view that the possibility of opening a formal investigation under Article 1(2) of the Protocol applies both with regard to new aid and existing aid; however, the conditions for opening the proceedings are different.

22 The EFTA Surveillance Authority argues that the aid in question, which is made up of the financing arrangements for Husbanken established in the context of the national and fiscal budgets of 1980 and 1981, is existing aid. In particular, it submits that the changes introduced on 1 January 1996 concern the lending terms for loans and not the financing arrangements for Husbanken, and do not alter the category of the aid. The EFTA Surveillance Authority, supported by the

Government of Norway and the *Commission of the European Communities*, maintains that, under those circumstances, it was not within the powers of the EFTA Surveillance Authority to open formal proceedings without first addressing appropriate measures to the State concerned, a decision which lies entirely within the discretion of the EFTA Surveillance Authority and which third parties are not in a position to require.

23 In order to determine which procedural rules were applicable to the proceedings of the EFTA Surveillance Authority, it is necessary for the *Court* to consider the substantive matters that are relevant for such determination. It would not be compatible with the Court's review function if it were to be entirely bound by the findings of the EFTA Surveillance Authority in its consideration of the procedure.

24 The first factor decisive for the determination of applicable procedural rules is whether or not the funding of Husbanken constitutes State aid within the meaning of Article 61 EEA.

25 The EFTA Surveillance Authority considered the funding of Husbanken to be State aid contrary to Article 61 EEA and proceeded on that basis to consider whether such aid could be upheld under Article 59(2) EEA. The Applicant was in agreement with this.

26 The Government of Norway, supported by the *Government of Iceland*, submits principally that the system does not constitute aid contrary to Article 61(1) EEA. Husbanken is not an "undertaking" favoured by State resources within the meaning of Article 61 EEA, but rather is part of the State itself. The organization of the public sector, including transactions within that sector, is a prerogative of the Government. Thus, it is the loans granted by Husbanken to private consumers – and not the funding of Husbanken – which might be subject to an assessment under Article 61 EEA.

27 The Government of Norway argues that the interpretation provided by the EFTA Surveillance Authority, according to which the application of Article 61(1) EEA is dependent on the "nature of the service" (page 12 of the Decision), is not supported either by the wording of Article 61 EEA or by case law. When the Court of Justice of the European Communities (hereinafter "ECJ"), in its judgment in Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595, stated at paragraph 18 that Article 92 of the Treaty Establishing the European Community (hereinafter "EC"), which corresponds to Article 59 EEA, covers "all private and public undertakings and all their productions", it did not offer a definition of the term "undertaking". Furthermore, at paragraph 21 of that judgment, the ECJ went on to state:

> "The prohibition contained in Article 92(1) covers all aid granted by a Member State or through State resources without its being necessary to make a distinction whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid."

According to the Government of Norway, this implies that aid does not escape Article 92 EC simply by being granted through a public body – such as Husbanken – established for that purpose. However, the statement also indicates that it is the aid given by the public body, not the aid received by that body, that is subject to scrutiny under Article 92 EC.

28 For this reason, according to the Government of Norway, the EFTA Surveillance Authority should have closed the case on the grounds that no infringement was found of Article 59(1) EEA, read in conjunction with Article 61 EEA. Nevertheless, the Government of Norway finds that the Decision is valid and must be upheld, since the conclusion was correct that no infringement took place, although it was based on different reasoning.

29 The *Court* notes that the Governments of Norway and Iceland have not fully argued their submissions on this point. Moreover, the Applicant, the EFTA Surveillance Authority and the Commission of the European Communities have not submitted written or oral arguments regarding this issue.

30 The Court sees no reason to decide what the correct procedural route would be if the submissions of the two governments were to be approved. It finds that they cannot be accepted. Husbanken is a State institution set up by law, having its own directors and board of directors and a board of controllers, its own offices and its own annual accounts. This leads to the conclusion that it is an undertaking within the meaning of Articles 61 and 59 EEA. This conclusion is not altered by the fact that the policy and resources of Husbanken are decided on by the Government and the Parliament of Norway. Further, with regard to the argument of the Government of Norway that private consumers and not Husbanken are the recipients of the aid, the EFTA Surveillance Authority has, in its Decision, correctly considered that the derogation in Article 61(2)(a) EEA is not applicable, as the aid is not neutral with respect to operators in the credit market. Therefore, as already noted at paragraph 25 of the Court's decision of 12 June 1998 on admissibility, the Court finds that the case must be viewed as a State aid case to be dealt with pursuant to Article 61 EEA and the Protocol.

31 In reviewing cases concerning State aid, it is necessary, in order to determine what procedural rules are applicable, to consider whether the alleged State aid

constitutes "existing aid" or "new aid" within the meaning of Article 1 of the Protocol, since the procedural rules are different.

32 As regards existing aid, Article 1(1) of the Protocol requires the EFTA Surveillance Authority to keep all such aids in the EFTA States under constant review and to propose to the EFTA State concerned "any appropriate measures required by the progressive development or by the functioning of the EEA Agreement". If the EFTA Surveillance Authority considers that an existing aid is incompatible with the EEA Agreement, it must first present the EFTA State concerned with a specific proposal to correct the situation. There is no requirement that formal proceedings be opened before such a proposal is presented. The proposal is not legally binding, but non-compliance enables the EFTA Surveillance Authority to proceed with the contentious procedure provided for in the first paragraph of Article 1(2) of the Protocol.

33 As regards proposed new grants of aid by the EFTA States, Article 1(2) and (3) of the Protocol establish a procedure which must be followed before any aid can be regarded as lawfully granted. Under the first sentence of Article 1(3) of the Protocol, the EFTA Surveillance Authority is to be notified of any plans to grant or alter aid before those plans are implemented. The EFTA Surveillance Authority then conducts an initial review of the planned aid. If, at the end of that review, it considers a plan to be incompatible with the functioning of the EEA Agreement or is in serious doubt about the compatibility of such new aid, it must initiate without delay the procedure under the first paragraph of Article 1(2) of the Protocol. Accordingly, in the context of the procedure laid down by the Protocol, the preliminary stage of the procedure for reviewing new aid under Article 1(3) of the Protocol, which is intended merely to allow the EFTA Surveillance Authority to form a *prima facie* opinion on the partial or complete compatibility of the aid in question with the State aid provisions, must be distinguished from the examination under Article 1(2) of the Protocol, which is designed to enable the EFTA Surveillance Authority to be fully informed of all the facts of the case, see the judgments of the ECJ in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, at paragraph 22, and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, at paragraph 16.

34 The Court notes that, from the information available to it, it must be concluded that the aid in question is existing aid, the origin of which predates the signature of the EEA Agreement. The system in its present form dates back to 1981 and thus represented existing aid when the EEA Agreement entered into force. As regards changes to the rules made in 1996, the committee reports and proposals to the Parliament show that the main purpose and effect of the changes was to adjust the support given, for better implementation of the social policy program. The changes

are summed up as follows in a publication called *The Norwegian State Housing Bank*, issued by Husbanken in June 1996:

> "The Housing Bank's role as the government's main instrument in carrying out national housing policy was confirmed in Governmental Report to Parliament # 34, 1995. However, the government proposed significant changes in the Bank's instruments for carrying out this policy.
> These changes were implemented in the national budget for 1996. Subsidized interest rates, which were generally available for new construction in previous years, have been replaced with a system of grants and supplementary loans given for desirable housing and environmental qualities and to certain disadvantaged groups. Supplementary loans and grants for specific housing qualities are more directly aimed at influencing housing standards where the free market alone would not provide sufficient stimulus. Housing grants enable disadvantaged groups who would not receive loans from private credit institutions to establish themselves in a satisfactory home.
> In addition, the percentage of new construction to be financed by the Housing Bank has been lowered so that private credit institutions will be responsible for financing a larger share of new housing than has been the case in the recent past. The Housing Bank is expected to finance approximately 10,000 of an estimated 21 – 22,000 new homes in 1996."

Thus, from the information available to it, the Court concludes that the changes referred to by the Applicant did not constitute new aid but rather a decrease in the aid then existing. Accordingly, this change did not cause the State aid under scrutiny here to become new aid for which notification had to be given to the EFTA Surveillance Authority.

35 As regards existing aid, the Protocol does not explicitly require the EFTA Surveillance Authority to open formal proceedings. Nor is such a requirement established through the case law of the ECJ. The Court finds that there are indeed relevant differences between existing and new aid which speak in favour of different solutions with regard to the obligation to open formal proceedings. Firstly, the EFTA Surveillance Authority has a different role in supervising existing and new aid: the former is an ongoing process while the latter is a preventive control. Secondly, there are differences with regard to the consequences following from a decision to initiate formal proceedings. Thirdly, there are differences regarding the involvement of interested parties with regard to proposed new aid in comparison with existing aid.

36 The Court finds that the EFTA Surveillance Authority was under no obligation to open formal proceedings on the basis of the complaint from the Association. On the contrary, as pointed out by the EFTA Surveillance Authority, the appropriate

approach under Article 1(1) of the Protocol is to subject the State aid system to closer examination and analysis and, where warranted, propose to the State involved such appropriate measures as are found to be "required by the progressive development or by the functioning of the EEA Agreement". The EFTA Surveillance Authority enjoys broad discretion in both the prescribed review of existing aid and the appropriate measures it decides to propose.

37 The first plea of the Association must therefore be dismissed as unfounded.

Error in law and error in assessment

38 The third plea of the *Applicant*, which the Court finds should be discussed next, is that the EFTA Surveillance Authority wrongfully interpreted and applied Article 59(2) EEA, which reads:

> "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties."

39 The arguments of the parties may be considered in light of the elements brought out by Article 59(2) EEA: firstly, the question whether the services entrusted to Husbanken are services of general economic interest within the meaning of Article 59(2) EEA; secondly, if so, whether the application of the rules of the EEA Agreement would obstruct the performance, in law or in fact, of the particular tasks assigned to Husbanken; thirdly, the condition that the development of trade must not be affected to an extent contrary to the interests of the Contracting Parties by the application of the derogation. In connection with the second and third points, special attention has to be paid to the question of proportionality, in particular the question of whether social housing policy may be achieved through less distortive means.

40 The *Court* notes generally that, according to established case law of the ECJ, the Court cannot substitute its own assessment for that of the EFTA Surveillance Authority in a case such as the present one, which involves assessments of an economic and social nature which must be made within an EEA context (Case C-225/91 *Matra* v *Commission* cited above, paragraph 24). In reviewing the substantive issues of the case, the Court must confine itself to verifying whether the facts on which the contested finding was based have been accurately stated by

the EFTA Surveillance Authority and whether there has been any manifest error of assessment or a misuse of powers (see *inter alia* Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723.)

Services of general economic interest

41 The *Applicant* maintains that there is to be a strict definition of those undertakings that may take advantage of the derogation under Article 90(2) EC and Article 59(2) EEA and that the relevant test includes whether the services in question show "special characteristics" as compared with other economic activities. The Applicant further contends that it is for the government claiming the derogation to show that such special characteristics exist. The fact that the government in question finds the services to be of general economic interest or that the public authorities have entrusted the services in question to a particular undertaking will not suffice.

42 The Association argues that the EFTA Surveillance Authority has erred in not distinguishing the broad housing policy issues from the issue relevant for the application of Article 59(2) EEA. The offering of first-priority mortgage loans, without means-testing, for new dwellings does not, in the submission of the Association, exhibit special characteristics compared with similar services offered by most banks and mortgage institutions.

43 The Association further submits that the only truly public service obligation performed by Husbanken is the providing of means-tested loans and grants to people in a weak financial position. The only purpose of the State aid as regards the non-means-tested loans is to put Husbanken permanently in a more advantageous position in the commercial market of offering first-priority mortgage loans.

44 The *EFTA Surveillance Authority* emphasizes that Member States remain free, in principle and where no common policy is established, to designate which services they consider to be of general economic interest and to organize these services as they see fit, subject to the rules of the EEA Agreement, and the specific conditions laid down in Article 59(2) EEA. Consequently, the EFTA Surveillance Authority has expressly limited its scrutiny. The *Commission of the European Communities* argues in a similar vein, *viz.* that the competence to define such services lies with the Member States, subject to scrutiny by the Community institutions, which essentially must be conducted on a case-by-case basis.

45 The EFTA Surveillance Authority further submits that it may be concluded that an undertaking entrusted by the State with the performance of economic activities which the State considers to be in the interest of the general public is an undertaking "entrusted with the operation of services of general economic interest" within the meaning of Article 59(2) EEA, provided only that the activities exhibit special characteristics related to the public interest involved and distinguishing them from economic activities in general. Characteristics of the loans operated by Husbanken, in particular the obligation to keep the loans available on equal and preferential terms and the monitoring tasks linked to the operation of the loans, were clearly sufficient to distinguish them from loans generally offered on the market.

46 The *Government of Norway* claims that the housing sector must be regarded as exhibiting special characteristics as compared with the general economic interests of other economic activities and as being of direct benefit to the public. The Government of Norway further emphasizes that the tasks conferred on Husbanken have been entrusted to the Bank by acts of the public authorities, as required pursuant to Article 59(2) EEA.

47 The *Court* notes that, in the application of Article 59(2) EEA, it is primarily for the EFTA Surveillance Authority to assess whether certain services are "services of general economic interest" within the meaning of Article 59(2) EEA. In this assessment, the nature of the undertaking entrusted with the services is not of decisive importance, nor whether the undertaking is entrusted with exclusive rights, but rather the essence of the services deemed to be of general economic interest and the special characteristics of this interest that distinguish it from the general economic interest of other economic activities (See Case C-179/90 *Merci Convenzionali Porto di Genova*, [1991] ECR I-5889, at paragraph 27 and Case C-266/96 *Corsica Ferries France SA and Others* [1998] ECR I-3949, at paragraph 45). With regard to the discretion of the EFTA Surveillance Authority in this area, the Court cannot substitute the Authority's finding with its own assessment or annul the Decision on these grounds, provided that the outcome of the assessment is not manifestly wrong. It must also be kept in mind that it has been accepted by the Community judicature that Member States cannot be precluded from taking account of objectives pertaining to their national policy when defining the services of general economic interest which they entrust to certain undertakings (See Case C-202/88 *France* v *Commission* [1991] ECR I-1223, at paragraph 12 and Case C-159/94 *Commission* v *France* [1997] ECR I-5815, at paragraph 56).

48 The Court notes that the present housing policy in Norway dates back more than 50 years and is based on a political goal, which is to give priority to house building based on certain special presumptions or conditions by channelling capital to that sector and lending it to borrowers on more advantageous terms than are available

on the open, general Norwegian capital market. For this reason, Husbanken may be considered as an undertaking entrusted with the operation of a service of general economic interest, because the service of general economic interest is specifically defined by Norway. However, Norway, as a Contracting Party to the European Economic Area, has committed itself to following certain economic policies. The rules on these policies may direct, in a manner binding on Norway, what measures in the field of State aid and competition in general may be implemented.

49 Further, the facts presented to the Court show that the loans system operated by Husbanken is limited to certain categories of houses (which are not to exceed 120 m^2 for individuals), care facilities and projects relating to urban renewal, special needs of identified population groups, etc., and that the system applies to the entire territory of Norway, including sparsely populated areas, where asset evaluations are likely to differ compared to more densely populated areas.

50 Based on the foregoing, and taking into account the requirement of the system that loans must, in principle, be available to everyone on an equal basis, the Court does not find that the EFTA Surveillance Authority has manifestly erred in its assessment that the services in question are services of general economic interest, distinguishable from the economic interest of other economic activities, within the meaning of Article 59(2) EEA.

Obstruction of the performance of the particular tasks

51 The second argument raised by the *Applicant* under the plea of errors in law relates to the requirement that undertakings entrusted with the operation of services of general economic interest shall be subject to the rules contained in the EEA Agreement, in particular the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The Association submits that no evaluation of this has been made in the Decision. The Association further argues that the Government of Norway must show that the performance of the particular tasks assigned to Husbanken cannot be achieved with due application of the State aid rules, another point which is not set out or dealt with in the Decision. The Association refers in particular to Case C-320/91 *Corbeau* [1993] ECR I-2533 and Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229, at paragraph 178, for the nature of such a test and the necessary elements to be considered.

52 The *EFTA Surveillance Authority* maintains that the question of necessity must be examined on the basis of the tasks actually entrusted to Husbanken. The EFTA

Surveillance Authority argues that it is not even suggested by the Association that the funding exceeds what is needed for Husbanken to carry out the functions entrusted to it. Rather, the Association's arguments turn on the necessity of entrusting Husbanken with these tasks, which is not of relevance for the evaluation at hand. The EFTA Surveillance Authority maintains that, as Husbanken is to operate loan schemes with interest rate terms fixed by the Norwegian Parliament, and the funding by the State is earmarked to allow Husbanken to meet the lending quotas set by the Parliament, the funding is genuinely needed to allow Husbanken to perform the particular tasks assigned to it. The EFTA Surveillance Authority has further emphasized that, since Husbanken is not authorized to accept deposits from the public and does not engage in financial services outside house financing, there is no risk of cross-subsidization to other tasks of a competitive nature.

53 The *Government of Norway* submits that Husbanken would generally not be able to offer terms and interest rates better than private banks can offer if Husbanken was forced to operate on terms equal to those under which private banks operate. Husbanken would also be forced to raise prices in unprofitable parts of the market in order to compete in the profitable parts. Thus, the restriction imposed on competition by the State aid to Husbanken is genuinely needed in order to ensure the performance of the particular tasks assigned to Husbanken.

54 The *Court* finds that the Applicant has not been able to substantiate its plea that the EFTA Surveillance Authority erred in its assessment of whether the aid in question was necessary for Husbanken to perform the tasks entrusted to it. However, it is for the Court to examine this matter and it will be further dealt with in the framework of the assessment of the proportionality.

Development of trade and the interest of the Contracting Parties

55 As regards the effect on trade between the Contracting Parties, the *Applicant* submits that the EFTA Surveillance Authority is wrong in interpreting this condition as involving only major effects on trade. The Applicant maintains that at least the potential cross-border activity is greatly underestimated by the EFTA Surveillance Authority, and emphasizes the difficulties foreign banks have in penetrating the market and the possible isolation of markets. The Association distinguishes the situation at hand from the one at issue in Case C-159/94 *Commission* v *France*, cited above, regarding electricity and gas, on the grounds that these activities were not harmonized, unlike the field of financial services.

56 In this context, the Applicant claims that the EFTA Surveillance Authority has underestimated the distortion of competition in the relevant market, partly by applying a wrong definition of the relevant market, which the Applicant maintains

is the market for non-means-tested, first-priority mortgage loans. The Applicant submits that a proper analysis of the relative strength given to Husbanken in the relevant market as compared to its competitors would have led to even stronger conclusions under Article 61 EEA with respect to effect on trade, and also to a finding that the effect on trade is contrary to Article 59(2) EEA. The Applicant maintains that an examination of the relevant market is appropriate under Article 59(2) EEA (Joined Cases 296 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, at paragraph 24; Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, at paragraph 273).

57 The Applicant also claims that the EFTA Surveillance Authority erred in its interpretation of First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (hereinafter "the First Banking Directive") and of Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulation and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (hereinafter the "Second Banking Directive"), in finding that Husbanken is excluded from the scope of the Directives. The Applicant maintains that the EFTA Surveillance Authority erroneously found that mortgage credit institutions do not fall within the scope of the Directives and thus also underestimated the scope and effect of the actual and/or potential competition on the relevant market and the effect on trade between the Contracting Parties.

58 The *EFTA Surveillance Authority* maintains that the balancing of interests required under the second sentence of Article 59(2) EEA implies that any effect on trade must be assessed in the light of the relevant interests of the Contracting Parties and the state of development of intra-EEA trade in the sector concerned. Moreover, a reasonable balance must be struck between the various interests involved. The EFTA Surveillance Authority submits that its finding that the aid involved had limited effects on trade and was not contrary to the interests of the Contracting Parties is well-founded. In particular, the EFTA Surveillance Authority refers to the following factors in supporting its conclusion: the fact that Husbanken does not engage in other activities and that, consequently, there is no room for cross-subsidization; the fact that house financing markets in most EEA States are characterized by the presence of government intervention (central and local); the fact that no precedents of the ECJ rule out the compatibility of the State aid provisions with any of the numerous publicly supported house financing institutions in the European Union; the fact that there is no harmonization of this field in the EEA, which results in obstacles to cross-border operations with regard

to mortgage credits; and the fact that loans for house financing are predominantly of a local character.

59 The *Government of Norway* submits that the relevant question under the last sentence of Article 59(2) EEA is whether credit investments by foreign credit institutions would be considerably higher in Norway if Husbanken was deprived of the State aid. It estimates that the most likely scenario would be that branches of foreign credit institutions would cover a similar share of Husbanken's "vacant" portfolio as in the credit market for households in general, which in 1995 was under 19% of the total credit supply in Norway. It concludes that foreign credit institutions are only marginally affected. Furthermore, as the State interest involved is considerable, the effect on intra-State trade must, in the submission of the Government of Norway, be correspondingly substantial before the derogation under Article 59(2) EEA is precluded.

60 The Government of Norway emphasizes that an analysis of the relevant market may be a factor to be considered under Article 61 EEA as part of the assessment of whether or not Husbanken distorts competition. However, as the Applicant does not contest the finding of the EFTA Surveillance Authority with regard to Article 61 EEA, the Court is not invited to decide upon the application of Article 61 EEA and the legal relevance of this analysis to the case at hand is therefore not shown. The Government of Norway argues that the only relevance of an analysis of the relevant market concerns the assumed effects on inter-State trade. In this context, the relevant market is loans to private persons backed by mortgages in private dwellings.

61 The *Commission of the European Communities* submits that it is legitimate to take into account not just the segment of the banking sector engaged in housing loans but also other lending activities in assessing whether the aid gives rise to a disproportionate restriction on the provision of credit services. If housing loans form but a relatively small portion of the total lending business, any restrictions resulting from the aid granted to Husbanken will be so much the less for the other undertakings active on the market.

62 According to the Commission of the European Communities, it must be established that the performance of the service of general economic interest does not affect competition and unity of the common market in a disproportionate manner. The test is of a negative nature: it examines whether the measure adopted is not disproportionate, but it is not a requirement that the measure adopted be the least restrictive possible. A reasonable relationship between the aim and the means employed is satisfactory. The *Court* concurs with these views.

63 The Court does not find that the EFTA Surveillance Authority incorrectly interpreted Directives 77/780 and 89/646, the First and Second Banking Directives, in finding that those provisions of secondary legislation did not apply to specialized house financing institutions such as Husbanken, nor that the effects of harmonization achieved through these Directives, as well as through primary and other secondary EEA legislation, have been underestimated by the EFTA Surveillance Authority in its balancing of the interests of the EEA vis-à-vis those of the Norwegian authorities.

64 As to whether the social policy objectives of the Government of Norway in the housing sector could be achieved by means less distortive to competition than the existing rules, the Applicant argues that there are several possibilities, some of which are already set out in official documents. The main one, in the submission of the Applicant, is a system in which the borrower may choose finance options freely from among competing bids from different financial institutions, through which the authorities might provide a loan or a direct subsidy. Other possibilities pointed out by the Applicant are the so-called Models 3 and 4 in the Report from the Norwegian Commission on State banks, NOU 1995:11, The State Banks Under Amended Framework Conditions.

65 The EFTA Surveillance Authority stresses the freedom of States to define their policies and organize general interest services, leaving it no power to take a position on the organization and scale of the service or the expediency of political choices made (See Case T-106/95 *FFSA and Others* v *Commission*, cited above). The EFTA Surveillance Authority submits that the Applicant's claim on this point is manifestly unfounded and that the circumstances do not lend themselves to the conclusion that there was an error on the part of the EFTA Surveillance Authority.

66 The Commission of the European Communities submits that, even if it were successfully shown that the scheme in question was not an optimally efficient one, this alone would not lead to the conclusion that the EFTA Surveillance Authority had made a manifest error in stating that the distortive effects are not disproportionate to the goals assigned. The choice of the means belongs exclusively to the national authorities, within the boundaries set by the EEA law.

67 The Court notes, as already mentioned in this judgment, that Article 59(2) EEA provides that the operation of undertakings entrusted with services of general economic interest must not affect the development of trade "to such an extent as would be contrary to the interests of the Contracting Parties". The services under consideration in the present case are financial in nature. There is no doubt that the word "trade" in Article 59(2) EEA applies to them.

68 In its Decision, the EFTA Surveillance Authority did not go into depth on this condition. It states in its Decision that even if it cannot "be excluded that the measures under consideration may affect trade between Contracting Parties, in practice such trade effects are likely to be only limited."

69 The Court notes that the parties disagree as to which market is relevant in this case. It is also disputed whether there are alternative means less distortive to competition than those presently applied whereby the housing policy of the Norwegian State can be achieved. The Applicant has further argued that an analysis of the costs and benefits of the State aid, as has been required by the ECJ in judgments in some of the State aid cases referred to above, can be done in this case. The Court cannot conclude that these points have been considered to the extent necessary by the EFTA Surveillance Authority in its Decision. At least the Decision itself does not bear witness to that.

70 These questions call for complex analyses and assessments which the Court cannot carry out but which must be done by the EFTA Surveillance Authority. Article 59(2) EEA calls for an application of a proportionality test to assess whether the required balance has been struck between the common interests of the Contracting Parties to the EEA Agreement and the legitimate interests of Norway. The common interests require extensive freedom in the field of services whereas the interests of Norway could be said to be that the Government and Parliament must be permitted to regulate Norwegian housing policy according to the political goals set. In other words, the EFTA Surveillance Authority must strike a balance between the right of Norway to invoke the exemption and the interest of the Contracting Parties in avoiding distortions of competition. For these reasons, the Court concludes that the EFTA Surveillance Authority, by not carrying out the tests described, wrongly interpreted and applied Article 59(2) EEA. Accordingly, the Decision under scrutiny must be annulled.

Statement of reasons

71 *The Applicant* has submitted that it is an independent basis for annulment that the Decision is not reasoned as required by Article 16 EEA. Those appearing before the Court have set out their views on this submission. The *Court* has already found that the Decision must be annulled on the basis of the arguments set out above which are, in part, closely linked to the arguments concerning the statement of reasons. The Court finds that it is not necessary to deal further with whether the reasoning is sufficient.

Costs

72 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 Applicant has asked for the EFTA Surveillance Authority to be ordered to pay the costs of the Applicant in both the admissibility proceedings and the substantive proceedings. Since the latter has been unsuccessful in its defence, it must be ordered to pay the costs. The costs incurred by the Government of Norway as intervener, the Government of Iceland and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

On those grounds,

THE COURT

hereby

1. **Annuls Decision No. 177/97COL of 9 July 1997 of the EFTA Surveillance Authority.**

2. **Orders the EFTA Surveillance Authority to bear the costs of the Applicant in both the admissibility proceedings and the substantive proceedings. The Government of Norway as intervener, the Government of Iceland and the Commission of the European Communities shall bear their own costs.**

Bjørn Haug　　　　Thór Vilhjálmsson　　　　Carl Baudenbacher

Delivered in open court in Luxembourg on 3 March 1999.

Gunnar Selvik　　　　Bjørn Haug
Registrar

REPORT FOR THE HEARING
in Case E-4/97
- revised [1]-

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 by the Norwegian Bankers' Association for annulment of the Decision of 9 July 1997 of the EFTA Surveillance Authority in the case between

Norwegian Bankers' Association

and

EFTA Surveillance Authority

I. Facts and procedure

1. By a letter of 7 November 1995, *Den Norske Bankforening* (the Norwegian Bankers' Association, hereinafter variously "the Applicant" and "the Association") lodged a complaint with the EFTA Surveillance Authority asking the Authority to assess whether the framework conditions for *Husbanken* (The Norwegian State Housing Bank, hereinafter "Husbanken") were in conformity with the Agreement on the European Economic Area ("EEA"). The complaint was based on Article 61 EEA on State aid and contended that the arrangement distorted competition to the detriment of credit institutions in competition with Husbanken and that the monopoly on subsidized lending constituted an economic barrier to free trade in financial services and affected cross-border trade. The Association further contended that the arrangement went beyond what was required by the interests of the population groups targeted by the subsidies and beyond the scope of necessity implicit in Article 59 EEA regarding public undertakings.

[1] Amendments in paragraphs 4, 28, 30 and 65.

2. On 9 July 1997, the EFTA Surveillance Authority adopted the following decision (hereinafter the "Decision"): "The complaint initiated by letter of 7 November 1995 (Doc. No. 95-6439-A), concerning the framework conditions for the Norwegian State Housing Bank and their compatibility with the provisions of the EEA Agreement on State aid and competition, is closed without further action by the Authority. (...)"

3. In the decision, the EFTA Surveillance Authority rejected the submission of the Norwegian Government to the effect that privileges afforded to Husbanken as an instrument of the public housing policy were not governed by Articles 59 and 61 EEA. Regarding the assessment under Article 61 EEA, the contested decision states the following:

"...for a measure to constitute State aid in the meaning of Article 61(1) EEA it must
1. be granted through State resources;
2. distort or threaten to distort competition by favouring certain undertakings or the production of certain goods;
3. affect trade between Contracting Parties.

It is clear that the first condition is fulfilled in the present case, as Husbanken's framework conditions are established by the State and its financial means are derived from State resources.

Apart from a very small equity, consisting of risk and loss funds, Husbanken's core activity of providing loans for housing purposes is based on borrowings, which are obtained exclusively from the State(...) Husbanken, being a government agency financed by the State, enjoys the borrowing terms and favourable credit rating of the State. (...) Husbanken also in other ways clearly enjoys the financial backing of the State Treasury, for instance by way of budget appropriations, if needed, to cover the losses it incurs on loans as well as administrative expenses. It is therefore clear that as a State institution, Husbanken enjoys financial advantages of a kind not afforded to other providers of credit for housing purposes and which fulfil the condition referred to in point 2 above.(...) ...the Authority does not have reason to question the complainant's contention that potential distortions of competition have not been removed.
(...)

It ... cannot be ruled out that the financial advantages enjoyed by Husbanken may, at least potentially, affect trade between Contracting Parties to the EEA Agreement, although in practice such effects are likely to be limited."

4. As regards the derogation under Article 59(2) EEA, the decision is worded as follows:

"Article 59(2) in other words permits States parties to the EEA Agreement to confer on undertakings to which they entrust the operation of services of general economic interest, exclusive rights or other privileges which may hinder the application of the rules of the Agreement on competition and State aid, in so far as restrictions on competition, or even the exclusion of all competition by other economic operators, are necessary to ensure the performance of the particular tasks assigned to the undertakings concerned.
(...)

In view of the above facts and considerations, and given that there is no legislation at the EEA level providing a uniform definition of the boundaries of a social housing policy and public housing finance services, the Authority has no grounds to dispute that Husbanken is entrusted with the operation of services of general economic interest.
(...)

Husbanken is not a credit institution in the meaning of the relevant EEA legislation. It is not authorised to accept deposits from the public and therefore does not compete with credit institutions in that area. It does not engage in other financial services, e.g. payment intermediation, outside the scope of its core activity to provide credit for housing purposes.

Given that the Norwegian authorities have entrusted Husbanken with the operation of loan schemes, whose interest rate terms are fixed by the Norwegian parliament, and these loans being considered to form an integral part the Government's social housing policy, *inter alia* by virtue of their nation-wide and universal availability and on uniform terms, irrespective of the economic situation of the recipients, the funding by the State to service these loan schemes must be deemed to be necessary for the performance of these services of general economic interest. This funding is earmarked to allow Husbanken to annually meet the lending quotas, also determined by the Norwegian parliament, of its individual loan schemes, which as stated above are not applied to go beyond Husbanken's core housing finance activity. The funding by the State Treasury is therefore genuinely needed to allow Husbanken to perform the particular tasks assigned to it and does not allow the undertaking to compete in lending activity outside its statutory functions.
(...)

In this context it must be acknowledged that in most developed countries, including most States parties to the EEA Agreement, governments, both at central and local level, intervene in housing and housing finance markets. This intervention takes different forms from one State to another, depending *inter alia* on certain realities in the housing markets, in particular the pattern of housing tenure, and the objectives of the housing policy of the governments concerned.
(...)

It shall furthermore be noted that the Authority is aware of no relevant case-law, according to which the EC Court of Justice has ruled on the compatibility with the State aid provisions of the EC Treaty of support granted through any of the numerous publicly supported housing finance institutions which exist in the EU Member States, or for that matter other types of institutions, which serve as instruments of public housing policy, nor is the Authority aware of any decision whereby the EC Commission has intervened to prohibit or limit the granting of such support.

As concerns assessment of whether restrictions or distortions of competition due to special measures in favour of public undertakings can be justified on the basis of the second paragraph of Article 59, the last sentence of that paragraph provides that "The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties". This implies that the assessment of the derogation shall be done in an EEA context, i.e. it is subject to a proviso intended to safeguard the interests of other Contracting Parties. Whereas it clearly does not require that trade effects be non-existent, measures involving major trade effects are excluded. As has been concluded above the Authority considers that although it cannot be excluded that the measures under consideration may affect trade between Contracting Parties, in practice such trade effects are likely to be only limited.

For the above reasons the Authority does not in the present circumstances consider that restrictions or distortions of competition as a result of the framework conditions for the Norwegian State Housing Bank go beyond what is required to allow that undertaking to perform the services of general economic interest with which it has been entrusted."

5. By an application of 9 September 1997, received at the Court Registry on the same day, the Association brought an action under Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("Surveillance and Court Agreement") for annulment of the above-mentioned Decision. The application is based on the grounds that the EFTA Surveillance Authority did not commence formal proceedings concerning State aid; that the EFTA Surveillance Authority infringed essential procedural requirements by

not providing adequate reasons as required by Article 16 of the Surveillance and Court Agreement; and, finally, that the EFTA Surveillance Authority wrongfully interpreted and applied Article 59(2) EEA.

6. Pursuant to Article 36 of Protocol 5 to the Surveillance and Court Agreement ("Statute of the EFTA Court"), the Norwegian Government lodged an application to intervene in support of the EFTA Surveillance Authority. The Application for Intervention and Written Observations were received at the Court Registry on 24 November 1997. By a letter of 14 January 1998, the Court informed the Norwegian Government of its decision to allow the intervention. A Statement in Intervention was received at the Court Registry on 6 February 1998.

7. Pursuant to Article 20 of the Statute of the EFTA Court, the Commission of the European Communities submitted its written observations, received at the Court Registry on 19 December 1997.

8. On 9 December 1997, the EFTA Surveillance Authority lodged at the Court Registry a request pursuant to Article 87 of the Rules of Procedure of the EFTA Court, asking for the application to be dismissed as inadmissible. After hearing oral argument from the parties on 30 April 1998 on the question of admissibility, the Court, in a decision of 12 June 1998, declared the application admissible and decided to reserve the decision on costs.

9. The Defence of the EFTA Surveillance Authority was received at the Court Registry on 23 July 1998, a Reply from the Association on 27 August 1998 and the Rejoinder from the EFTA Surveillance Authority on 2 October 1998. By a letter of 7 September 1998, the Court requested supplementary information on certain issues from the intervener, the Government of Norway, and asked the parties to give supplementary or rebuttal information regarding the information from the intervener, as the parties found necessary. The supplementary information from the Government of Norway was received at the Court Registry on 16 September 1998, and remarks to the supplementary information from the Association were received at the Court Registry on 1 October 1998.

II. Form of order sought by the parties

10. The Applicant claims that the EFTA Court should:
- annul the Decision of the EFTA Surveillance Authority of 9 July 1997 (Dec. No. 17/97), and
- order the EFTA Surveillance Authority to bear the costs.

11. The EFTA Surveillance Authority contends that the EFTA Court should:
- dismiss the application as unfounded, and
- order the Applicant to pay the costs.

12. The Government of Norway, intervener in support of the EFTA Surveillance Authority, submits that the EFTA Court should:
- dismiss the application.

III. Legal background

The EEA Agreement

13. Article 59 EEA provides:

"1. In the case of public undertakings and undertakings to which EC Member States or EFTA States grant special or exclusive rights, the Contracting Parties shall ensure that there is neither enacted nor maintained in force any measure contrary to the rules contained in this Agreement, in particular to those rules provided for in Articles 4 and 53 to 63.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.

3. The EC Commission as well as the EFTA Surveillance Authority shall ensure within their respective competence the application of the provisions of this Article and shall, where necessary, address appropriate measures to the States falling within their respective territory."

14. Article 61(1) and (2) 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."*

The Surveillance and Court Agreement

15. 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."

National legislation

16. The framework conditions for Husbanken are *inter alia* laid down in Act No. 3 of 1 March 1946 on the Norwegian State Housing Bank, as amended. The following provisions outline the object of Husbanken, its funding, its lending practices and the possibility of housing allowances:

"Chapter I. Objects and organisation

Secion 1. The objects of the Norwegian State Housing Bank are:

a) to provide mortgage loans or guarantees for loans on collateral security in developed properties,

b) to arrange funding from the State and local authorities for the building of housing and other related purposes,

c) to grant or guarantee building loans under Section 16.

If special reasons dictate, the Bank may provide mortgage loans or guarantees for loans without collateral security in developed property subject to further regulations issued by the Ministry. The Bank can demand other types of security for such loans. The Ministry can lay down regulations determining to what extent Ch. IV shall take effect with respect to such loans and guarantees.

In special cases, the Housing Bank may also be assigned tasks other than those stated above. The Ministry can provide specific guidelines or regulations governing such operations.

Section 2. The Bank has primary capital of twenty million [Norwegian] kroner, which shall be contributed by the State.

(...)

Chapter II. *The Bank's funding*

Section 10. *The Bank can receive funding from the Treasury.*
(...)

Chapter IV. *The Bank's lending practices*

Section 13. *The King can set limits for the Bank's lending growth and for the mortgage loans it grants. Special limits may be set for lending for special purposes and in certain parts of the country.*
(...)

Section 16. *The Bank's mortgage loans or loans guaranteed by the Bank shall have a first mortgage on the developed property.*

If conditions so dictate, the Bank may however give mortgage loans or guarantees for loans having priority after other loans or charges.

In special circumstances the Bank may also provide building loans for a sum no greater than the sum of the loans approved or guaranteed by the Bank, with the possible addition of loans from others with foregoing priority.

With respect to guarantees as stated in the first paragraph, the provisions under Sections 13, 13 a and 15 shall apply correspondingly.

Further rules governing the mortgage loans and guarantee schemes are laid down in regulations under Section 26.
(...)

Chapter V. *Housing allowences*

Section 23. According to guidelines issued by the Storting, housing allowances may be paid to persons living in certain categories of property if they are experiencing particular hardship in meeting their living expences.

The cost of housing allowances shall be met by the State and if required by the local authorities subject to guidelines issued by the Storting. (...)
(...)

Chapter VI. *Miscellaneous provisions*
(...)

Section. 26 *The Ministry shall issue further regulations governing the Bank's activities. The regulations can include provisions concerning the local authorities' treatment of matters pertaining to the Housing Bank.*

17. Pursuant to Act 3 of 1 March 1946, Sections 1 and 26, general regulations for the Norwegian State Housing Bank (*Alminnelige forskrifter for Den Norske Stats Husbank*) have been adopted, as well as specific regulations relating to construction loans (*Forskrift om oppføringslån fra Den Norske Stats Husbank*) of 20 December 1995, loans for sheltered housing, nursing homes, etc. and other care facilities (*Forskrift om lån til omsorgsboliger, sykehjemsplasser og lokaler for omsorgstiltak fra Den Norske Stats Husbank*) of 29 January 1998, loans for day care centres (*Forskrift um barnahagelån fra Den Norske Stats Husbank*) of 20 December 1995, improvement loans (*Forskrift om utbedringslån fra Den Norske Stats Husbank*) of 20 December 1995, first home loans (*Forskrift om etableringslån fra Den Norske Stats Husbank*) of 20 December 1995 and purchase loans (*Forskrift om kjøpslån fra den Norske Stats Husbank*) of 20 December 1995. Pursuant to the same provisions of the Act, regulations have been adopted relating to housing grants (*Forskrift om boligtilskudd fra Den Norske Stats Husbank*) of 20 December 1995, urban renewal grants (*Forskrift om tilskudd til byfornyelse fra*

Den Norske Stats Husbank) of 20 December 1995, start-up grants for housing designed for 24-hour nursing and care services (sheltered housing) and nursing home places (*Forskrift om tilskudd til omsorgsboliger og sykehjemsplasser og tilskudd til kompensasjon for utgifter til renter og avdrag fra Den Norske Stats Husbank*) of 29 January 1998, grants to improve housing quality (*Forskrift om tilskudd til boligkvalitet fra Den Norske Stats Husbank*) of 20 December 1995 and grants for development and information (*Forskrift om tilskudd til utvilklings- og informasjonsarbeid fra Den Norske Stats Husbank*) of 20 December 1995. Detailed guidelines are issued by Husbanken regarding each of the categories of loans and grants.

IV. Submissions of the Parties

18. The Applicant submits that the contested Decision should be annulled, partly because essential procedural requirements have not been fulfilled, the Authority has based its Decision on incorrect and/or incomplete facts, and the Authority has committed a manifest error in the assessment of those facts in interpreting the derogation in Article 59(2) EEA. The intervener, the Government of Norway, the EFTA Surveillance Authority and the Commission all submit, on the contrary, that such an error of assessment and procedural errors have not been substantiated.

Scope of review

19. The *EFTA Surveillance Authority* and the *Commission of the European Communities* submit that the scope of judicial review by the Court is limited with respect to a decision such as the one at hand. The Commission refers to Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203 and Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, to the effect that the Court cannot substitute its own assessment for that of the Commission or, in the case at hand, the EFTA Surveillance Authority, and that the Court must confine itself to verifying whether the Commission, in the present case the EFTA Surveillance Authority, complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. (See also Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, para. 25; Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, para. 62; Case C-174/87 *Ricoh* v *Council* [1992] ECR I-1335, para. 68; and Case C-225/91 *Matra* v *Commission*, cited above, para. 25).

20. The EFTA Surveillance Authority emphasizes the margin of discretion, which is even wider under Article 59(2) EEA than under Article 61 EEA, regard being had to the degree of latitude allowed the Member States with regard to Article 90(2) EC, cf. Case T-32/93 *Ladbroke* v *Commission* [1994] ECR II-1015, para. 37. The EFTA Surveillance Authority further points out that an assessment of a fact that ultimately has not had any decisive effect on the outcome of the examination of a case should not entail the annulment of a decision, even if it is shown to have been incorrect (Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229, para. 199; and Case C-174/87 *Ricoh* v *Council* [1992] ECR I-1335, para. 74.

21. The *Applicant* does not contest that it has been established through case law that the Authority enjoys a wide discretion in assessing the compatibility of State aid with the EEA Agreement, in particular when it comes to assessing the aid in the context of Article 59(2) EEA. While conceding on the EFTA Surveillance Authority's submission about an assessment of a fact that ultimately has not had a decisive effect on the outcome, the Applicant maintains that errors of

several elements of fact, each of which alone would not qualify as having the decisive effect on the outcome, may cumulatively have such an effect and may lead to annulment.

Opening of proceedings under Article 1(2) of Protocol 3 to the Surveillance and Court Agreement

22. The *Applicant* submits that the EFTA Surveillance Authority has infringed a procedural requirement by not opening the formal proceedings under Article 1(2) of Protocol 3 to the Surveillance and Court Agreement (hereinafter "the Protocol"). The Applicant bases this plea on the grounds that the EFTA Surveillance Authority found the aid in question to constitute State aid within the meaning of Article 61 EEA. Furthermore, the Applicant submits that the EFTA Surveillance Authority must be obliged to initiate such formal proceedings when it considers permitting the State aid under Article 59(2) EEA, as that Article provides for a limited derogation from the rules on State aid, calling for the opportunity of the parties to be heard before a decision is taken.

23. The complex question whether Husbanken was to be considered an entity entrusted with the services of general economic interest and the possible application of the derogation in Article 59(2) EEA did, in the Applicant's view, necessitate the formal proceedings (Case C-179/90 *Merci Convenzionali Porto de Genova* [1991] ECR I-5889, para. 27; Case T-106/95 *FFSA and Others* v *Commission*, cited above). As examples of cases which give rise to difficulties of assessment, the Applicant refers to Commission Cases C-64/97 – possible aid to West Deutsche Landesbank-Girocentrale (West LB) (OJ C140, 5.5. 1998, p. 9) and Case C-88/97 Aid to the Crédit Mutuel (OJ C 146, 12.5.1998, p. 6), in particular the conclusion of the Commission in the latter case, in VII at page 16. The Applicant further refers to Case C-89/97 (NN 144/07) (OJ 1998 C 144, 9 May 1998).

24. The Applicant submits that it is for the Court to ascertain whether the factual and legal circumstances would or ought to have given rise to difficulties. The Applicant submits that the EFTA Surveillance Authority has misinterpreted the requirements on applying the derogation in Article 59(2) EEA, as there was no testing of the possible special characteristics of Husbanken's services as compared with the general economic interest of other economic activities. This misinterpretation, the Applicant submits, influenced the Authority's evaluation of whether or not to open Article 1(2) proceedings.

25. As an alternative argument, the Applicant maintains its view that the aid was "new aid", which should have been notified. This is so, according to the Applicant, due to changes in Husbanken's loan system introduced on 1 January 1996 (from which time interest rates were to follow the interest rate on government securities, with an added margin of 0.5%, instead of being determined by Husbanken's resolutions) followed by substantial changes made in the system of funding of Husbanken in 1997. The Applicant argues that the EFTA Surveillance Authority should have opened the formal proceedings to investigate the legality of the "new aid". The Applicant claims that Case C-44/93 *Namur-les Assurances du Crédit SA* v *OND* [1994] ECR I-3829 supports its submissions that the aid was "new aid".

26. The Applicant further notes that the EFTA Surveillance Authority does not comment on the aim of the aid, as of 1996, to put Husbanken in a preferable position vis-à-vis its competitors in the commercial market for non-means-tested, first-priority mortgage loans. Nor has the EFTA Surveillance Authority commented on the fact that, as of 1997, the maximum amounts allocated for ordinary loans and means-tested loans were combined, leaving it to Husbanken, in principle,

to use the majority of the total means on the market for providing ordinary, non-means-tested, first-priority mortgage loans.

27. The Applicant maintains that the proceedings under the Protocol are the appropriate ones and not Article 59(3) EEA as argued by the EFTA Surveillance Authority.

28. The *EFTA Surveillance Authority* adheres to the view that the possibility of opening a formal investigation under Article 1(2) of the Protocol applies both with regard to new aid and existing aid; however, the conditions for opening the proceedings are different. Referring to the system established in Article 1(1) of the Protocol for the review of existing aid and to Case T-330/94 *Salt Union* v *Commission* [1996] ECR II-1475, the EFTA Surveillance Authority maintains that, after only a preliminary examination of existing aid and before addressing appropriate measures to the State, it is not within the powers of the EFTA Surveillance Authority to open proceedings under Article 1(2) of the Protocol. Moreover, if appropriate measures are proposed, it will depend on the attitude of the State concerned to the measures proposed whether the Authority will be in a position to open proceedings. For an illustration in practice to the matter, the EFTA Surveillance Authority refers to its own decision on the regionally differentiated social security contributions in Norway (Decision No. 165/98/COL of 2 July 1998) and a similar case before the Commission against Sweden.

29. The EFTA Surveillance Authority disagrees with the Applicant's submissions to the effect that the aid is "new aid", referring to it as common ground that the aid involved is not the benefits offered by Husbanken to its clients, but lies in the way in which Husbanken's activities are financed by the State treasury, notably by means of preferential borrowing terms for Husbanken's loans from the State. The principles for the financing arrangements were laid down by the Storting (parliament) in the context of the national and fiscal budgets for 1980 and 1981 and have not been changed since. Accordingly, the aid predates the EEA Agreement and constitutes existing aid within the meaning of Article 1(1) of the Protocol. Further, the amendments introduced on 1 January 1996 did not concern the principles for the financing arrangements for Husbanken, but rather the lending terms for loans offered by the bank to its clients. Admittedly, due to the way in which the financing of Husbanken is arranged, the total amount of aid will be affected indirectly by the amount of loans granted by the bank, which in turn may well be affected by the bank's lending terms. An amendment of the lending terms may indirectly affect the total amount of aid. However, such a potential effect on the aid paid out does not, according to the EFTA Surveillance Authority, amount to an alteration of the aid for the purposes of Article 1(3) of the Protocol, as long as the system remains the same (Case C-44/93 *Namur-Les Assurances du Crédit SA* v *OND*, cited above, para. 28.)

30. In its rejoinder, the EFTA Surveillance Authority states that modifications introduced in 1997 were not considered in the Decision. This was partly because the fact-finding part of the examination was completed in October 1996, there were no indications at the time either from the Applicant or the Government that the amendments would constitute new or altered aid, and any possible changes would, in any event, be considered by the Authority in its review of existing aid. The EFTA Surveillance Authority submits that the contested Decision concerns the framework conditions for Husbanken, as last modified by the 1996 amendments of its lending terms. Consequently, the question whether the amendments introduced in the context of the national budget for 1997 constitute new or altered aid falls outside the scope of review to be made by the Court in the present case. The EFTA Surveillance Authority adds, "for the sake of order", that the information submitted on the matter by the applicant and the Norwegian Government suffices to show that the modifications introduced in 1997 do not at all affect in substance the financial

arrangements for Husbanken found to involve State aid, but only the way in which these arrangements are technically shown in the State budget.

31. The EFTA Surveillance Authority submits two further grounds in support of its view that there was no obligation on the part of the EFTA Surveillance Authority to open the formal proceedings. These grounds apply irrespectively of whether the aid was existing aid or new aid.

32. First, the obligation arises when the Authority considers the aid to be incompatible with the EEA Agreement or where the circumstances give rise to serious doubts as to the compatibility of the aid. The complexity of the case is thus not the decisive criteria for opening formal proceedings, as illustrated by Case T-106/95 *FFSA* v *Commission*, cited above.

33. The EFTA Surveillance Authority maintains that, at the end of the preliminary examination, there was no finding by the Authority that the aid was incompatible with the EEA Agreement. An obligation to open formal proceedings could only be established if it could be said that the Authority still should have been in serious doubt as to the compatibility of the aid at the end of the examination. The EFTA Surveillance Authority disagrees with the Applicant's submissions to the effect that this was the case, as well as submissions to the effect that there were incomplete facts and insufficient and unclear information from the Norwegian authorities. The EFTA Surveillance Authority maintains that the examination carried out and the information available to the Authority at the end of that examination were adequate and sufficient to allow for the case to be decided upon without there being any need for further investigations.

34. The examination included contacts with the Applicant, the Government and an exchange of views with the Commission; there was ample and consistent documentation on the housing policy involved and the tasks entrusted to Husbanken; detailed information regarding financing of Husbanken's activities allowing for reasonably safe conclusions on the purpose and nature of the aid, as well as on the question on the possibility of cross-subsidies. Further, the EFTA Surveillance Authority examined a variety of statistics, studies and reports on the situation in the EEA with regard to housing finance and cross-border operations regarding mortgage landing. The EFTA Surveillance Authority emphasizes that it was indeed relevant and necessary to take into account the view of the Norwegian authorities to the effect that Husbanken is an instrument for the implementation of social housing policy. This alone, however, would not have been sufficient to justify the conclusion. The EFTA Surveillance Authority submits that it is evident from the Decision itself that the Authority's finding was not based on this observation alone.

35. The EFTA Surveillance Authority observes that, in cases of this kind, there may be issues that give rise to such serious difficulties that formal investigation proceedings are called for, such as the possibility of cross-subsidization. Such difficulties were not present in the case at hand, as it was clear already on the basis of the legislative and administrative framework that the funds at issue were earmarked only to allow Husbanken to carry out the particular tasks assigned to it by the State, and that Husbanken was not engaged in any activities other than the execution of those tasks.

36. Secondly, the EFTA Surveillance Authority maintains that a formal obligation to open proceedings under Article 1(2) of the Protocol was also excluded on the ground that, if necessary, the case should have been examined within the framework of the proceedings laid down in Article 59(3) EEA, but not under the Protocol. To take the view that the EFTA Surveillance Authority was obliged to open proceedings under Article 1(2) of the Protocol and thus ruling out Article 59(3) EEA, even as a possible venue, would seriously erode the value of that provision as

an instrument in ensuring compliance with the Agreement in the case of undertakings entrusted with services of general economic interest.

37. The intervener, the *Government of Norway*, refers to Case 84/82 *Germany* v *Commission* [1984] ECR 1451, para. 13. The Government of Norway states that the decisive factor is whether or not the EFTA Surveillance Authority was in doubt in determining the compatibility of the scheme with the EEA rules. The Government of Norway stresses that the parties were given an opportunity to submit comments in the preliminary procedure and that the EFTA Surveillance Authority has not expressed serious doubts as to whether the aid was compatible with the EEA Agreement. Consequently, the EFTA Surveillance Authority was under no obligation to initiate formal proceedings.

38. As regards the argument that the new principles for fixing the interest rates on Husbanken's loans, implemented as of 1 January 1996, involve new aid, the Government of Norway refers to the evaluation of the EFTA Surveillance Authority that these changes were likely to reduce the level of direct interest subsidization and thus the distortive effects on competition. The Norwegian Government argues that these changes did not call for the initiation of formal proceedings under Article 1(2) of the Protocol. In its supplementary information submitted to the Court, the Government of Norway has given a further account of the financing of Husbanken, stating *inter alia* that, in principle, no alteration in the funding of Husbanken's lending has been made since 1980 and that all alterations to borrowings after that date have been technical changes in the calculation of costs, with the objective of refining the principles laid down in 1980. The changes have been without real economic substance, except for the withdrawal of aid in 1996 (resulting from the change in Husbanken's lending).[2] The changes in 1997 illustrate the simplified system of borrowing in the budget. At that time Husbanken's borrowing rates were set equal to Husbanken's actual interest income, including the 0.5% margin.

39. The *Commission of the European Communities* submits that the Applicant has failed to demonstrate an infringement of an essential procedural requirement in not opening the formal proceedings. The Commission refers to Case T-277/94 *AITEC* v *Commission* [1996] ECR II-351, para. 66 and cases there referred to, to support the proposition that the Authority enjoys a wide margin of discretion and is not bound to, nor can be required to, open formal proceedings. This discretion is fettered only in the case of serious difficulties in determining the compatibility of an aid (Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, para. 29), a condition which the Applicant has not shown to be fulfilled in this case.

Reasoning of the Decision

40. The *Applicant* argues that the EFTA Surveillance Authority has failed to provide an adequate statement of reasons under Article 16 of the Surveillance and Court Agreement as regards its finding that the derogation under Article 59(2) EEA applies. Referring to Case E-2/94 *Scottish Salmon Growers* [1994-1995] EFTA Court Report 59, para. 26, the Applicant claims that the EFTA Surveillance Authority "must set out, in a concise but clear and relevant manner, the principal issues of law and fact upon which it is based and which are necessary in order that the reasoning which led the authority to its Decision may be understood." The Applicant maintains this is not the case.

[2] The Norwegian Government uses the term "lending" exclusively to describe the relationship between Husbanken and its customers, and "borrowing" to describe the technical calculation used to illustrate the cost of Husbanken's lending in the national budget.

41. The Applicant states that, for analysing Article 59(2) EEA, it is necessary to evaluate two main elements, i.e. first the impact of the State aid rules on the entity's performance and, second, proportionality, i.e. whether the performance of the assigned tasks can be achieved by less restrictive means. The Applicant maintains that, from the reasoning of the Decision (pp. 17-20), it is not possible to understand whether such an analysis has been performed.

42. As regards the impact of the State aid rules on the performance of Husbanken's assigned tasks, the Applicant maintains that no grounds have been given, only a reference to the decision of the Norwegian authorities to entrust Husbanken with certain tasks. As regards proportionality, the Applicant submits that no evaluation seems to have been made, and in particular that alternative, less distortive means put forth by the Applicant were not evaluated. Rather, the EFTA Surveillance Authority discusses government support for new residential housing in comparison with other Scandinavian countries, a factor which, in the Applicant's view, is irrelevant and gives rise to the question whether the EFTA Surveillance Authority's reasoning is well founded.

43. As part of the proportionality analysis, the EFTA Surveillance Authority discusses possible restrictions or distortions of competition as a consequence of the State aid. The Applicant maintains that this reasoning is unsatisfactory. In particular, the Applicant submits that the EFTA Surveillance Authority provides no analysis of the relevant market, but refers to several markets which are not relevant, such as the credit market outside the housing finance business and market for other financial services, such as payment intermediation.

44. The Applicant refers to Case C-367/95 P *Commission* v *Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval) et al.*, Judgment of 2 April 1998 (not yet published) paras. 51, 62 and 63, to the effect that the Commission recognizes its obligation to examine all the facts and points of law brought forward by the complainant, and that the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, and may be affected *inter alia* by the interest which the addressees of the measure or other parties to whom it is of direct and individual concern may have in obtaining explanations. In Joined Cases T-371/94 and T-394/94 *British Airways et al.* v *Commission*, Judgment of 25 June 1998 (not yet published) para. 273, the Court of First Instance found that the Commission had not given sufficient grounds for its decision regarding a measure not constituting State aid, more specifically that a sufficiently comprehensive assessment of the markets at issue was not given in the assessment of the distortive effect of the aid in question.

45. The Applicant submits that it is not possible to ascertain by reading the Decision (pp. 19-20) why the development of trade is not affected to such an extent as would be contrary to the interests of the Contracting Parties and no grounds in the Decision address the dynamic element of the assessment of "the development of trade". The doubt about whether the EFTA Surveillance Authority based itself on a correct interpretation of the scope of the First and Second Banking Directives carries over to the correct assessment of the negative effect on the development of EEA trade, a doubt which, the Applicant submits, is not erased because of insufficient grounds.

46. The Applicant submits that there is a close relationship between the insufficient statement of reasons and errors in law. An erroneous interpretation as to, e.g., the proportionality issue, the distortion of competition and the aid involved and the relevant market in which Husbanken operates, would seem, the Applicant submits, also to have been reflected in insufficient grounds for the Authority's Decision.

47. The *EFTA Surveillance Authority* submits that concise reasoning on the principal issues fulfils the requirement of Article 16 of the Surveillance and Court Agreement. There is no need to state reasons separately with regard to each individual issue, as long as sufficient reasons can be deducted from the context of all the findings stated in support of the decision as a whole (see, e.g. Case 2/56 *Geitling* v *High Authority* [1957-1958] ECR 3, page 15). Nor is it necessary to address all issues raised by parties or complainants.

48. The EFTA Surveillance Authority submits that the reasons given were sufficient and that the Authority's findings on all three principal questions, i.e. whether Husbanken was entrusted with services of general economic interest, the question of necessity (i.e. that the rules of the EEA Agreement apply inasmuch as they do not obstruct the performance of the particular tasks) and balancing of interests (i.e. that the development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties) were correct. The EFTA Surveillance Authority refers to its Decision (pp. 16-20) in particular the following statement "...The Authority does not in the present circumstances consider that restrictions or distortions of competition as a result of the framework conditions for the Norwegian State Housing Bank go beyond what is required to allow that undertaking to perform the services of general economic interest with which it has been entrusted...." (p. 20), and states that even if when read literally this could be seen as referring only to the question of necessity, it is clear from the context that this is not the case and that the conclusion is based on a discussion of circumstances such as the market situation and the effect on intra-EEA trade of the measures at issue.

49. With regard to the specific points raised by the Applicant with regard to lack of reasoning, the EFTA Surveillance Authority submits that the first of these issues, the impact of an application of the State aid rules on the assigned tasks of Husbanken, was indeed illustrated clearly enough. As regards the remaining three points, i.e. that the EFTA Surveillance Authority failed to evaluate correctly the proportionality and the distortion of competition of the aid involved and to define the relevant market, the EFTA Surveillance Authority argues that these amount to alleged errors in law rather than lack of reasoning. The same applies to several new points raised by the Applicant in the Reply. The EFTA Surveillance Authority submits that the claim of the Applicant that the EFTA Surveillance Authority failed to state reasons for the contested Decision is unfounded and should be dismissed.

50. The intervener, the *Government of Norway*, submits that the EFTA Surveillance Authority has adequately stated the reasons for its Decision in a manner pursuant to its obligations under Article 16 of the Surveillance and Court Agreement. In particular, the Government of Norway states that the reasoning regarding the assessment of proportionality in Article 59(2) EEA is adequately set out by the EFTA Surveillance Authority in its discussion about effects that withdrawal of funding by the State would have on Husbanken's ability to fulfil its tasks. As regards other issues raised by the Applicant, in particular regarding distortion of competition and analysis of the relevant market, the Government of Norway submits that the submissions of the Applicant concern the EFTA Surveillance Authority's material findings and do not regard the issue of inadequate reasoning as such.

51. The *Commission of the European Communities* submits that a statement of reasons has a two-fold purpose: to permit the Courts to exercise their judicial control and to permit interested parties to be informed of the justification for the measure (Joined Cases C-9/95, C-23/95 and C-156/95 *Belgium and Germany* v *Commission* [1997] ECR 1997 I-645, para. 44; and Joined Cases C-71/95, C-155/95 and C-271/95 *Belgium* v *Commission* [1997] ECR I-687, para. 53). There is no requirement for exhaustive detail (Case C-22/94 *Irish Farmers Association and others* v *Minister for Agriculture, Food and Forestry, Ireland and the Attorney General* [1997] ECR I-

1809, para. 39; Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, para. 17; and Case C-285/94 *Italy* v *Commission* [1997] ECR I-3519, para. 48), but legal and factual considerations for the conclusion are required (Case T-77/95 *SFEI and others* v *Commission* [1997] ECR II-1, para. 90).

52. The Commission submits that the EFTA Surveillance Authority has provided reasons for its conclusion that the aid scheme is necessary for the service of general economic interest furnished by Husbanken. Further, the Commission points out that the Applicant has not challenged the EFTA Surveillance Authority's statements on pages 16-17 of the Decision, on the nature of the services of general economic interest and thereby accepts the description as adequate. The Commission also submits that the Decision contains sufficient reasons why the aid scheme is considered to come within the derogation in Article 59(2) EEA. Part of the Applicant's submission regarding adequate reasoning is, in the view of the Commission, closely linked with the substantive ground that the EFTA Surveillance Authority has made a manifest error in applying the test of proportionality; this will be commented upon under the discussion on errors in law.

Error in law

53. The *Applicant* agrees with the finding of the EFTA Surveillance Authority that the financial advantages Husbanken enjoys as a State institution constitute State aid which cannot be justified under Article 61 EEA. However, the Applicant questions the finding that Husbanken is considered to be an undertaking entrusted with the operation of services of general economic interest, on the following grounds: "...Husbanken's activity in the relevant market ... is of such considerable scope and addressed to such a broad range of borrowers, that it is not correct to characterize its main lending activity as social housebuilding."

54. The Applicant emphasizes the main concern of the Association, i.e. that the housing policy can be implemented without providing Husbanken with the existing framework conditions which go beyond providing privileged financing for identified social groups and which drastically reduce the possibilities of ordinary credit institutions to compete on equal terms with Husbanken in the market of providing loans for private housing.

55. The Applicant refers to the Report of the Commission to the Council of Ministers: "Services of General Economic Interest in the Banking Sector", adopted 17 June 1998, to be presented at the ECOFIN Council in October 1998. The Applicant refers to the views expressed by the Commission as being in line with the argument presented by the Applicant: that intervention by Member States in the financial services sector risks causing significant distorting effects; that it can be questioned whether distribution of loans services itself can be regarded as a service of general economic interest; and that the State aid nature of the intervention can be eliminated if all institutions have the opportunity to compete on an equal basis for the service to be rendered.

56. In its description of Husbanken's activities, the Applicant has stressed that through the present financing scheme of Husbanken, applicable as of January 1996, the Government has attached great importance to Husbanken's ability to offer competitive interest rates compared to what is available in the private credit market (Report No. 34 (1994-1995) to the Storting).

57. The Applicant claims that Husbanken's share of in the market for financing of new houses was just over 50% in the early 1980s; 80-90% in the period 1990-1993; 70-80% in 1994

and 1995 and the proposed quota for 1996 corresponds to almost 45% of the estimated housing starts. The Applicant claims that statistics up to July 1997 show Husbanken regaining market share, to about 50%, after a drop down to 40 % following a fall in interest rates.

58. With regard to the contested Decision and alleged error in assessment of the derogation in Article 59(2) EEA, the Applicant discusses three issues:

59. First, the Applicant argues that Husbanken cannot be considered an undertaking entrusted with the operation of services of general economic interest within the meaning of Article 59(2) EEA. It follows from case law that there is to be a strict definition of those undertakings that can take advantage of the derogation under Article 90(2) EC and Article 59(2) EEA, see Case 127/73 *BRT* v *SABAM and NV FONIOR* [1974] ECR 313, and the relevant test includes whether the services in question show "special characteristics" as compared with the general economic interest of other economic activities (Case C-179/90 *Merci Convenzionali Porto di Genova*, cited above, para. 27). The Applicant submits that nothing in the contested Decision indicates that the Authority has applied this test to the present case. The Applicant further refers to Case 172/80 *Züchner* v *Bayerische Vereinsbank* [1981] ECR 2021, para. 8, implicitly rejecting the view that nationalized banks might be regarded as undertakings entrusted with services of general economic interest, and Case 226/87 *Commission* v *Greece* [1988] ECR 3611.

60. Second, the Applicant claims that the EFTA Surveillance Authority has wrongfully interpreted Article 59(2) EEA by accepting the framework conditions for Husbanken, primarily by referring to the fact that the Norwegian authorities have entrusted Husbanken with the loan schemes in question. The Applicant submits that it is up to the government in question to prove that the achievement of the performance of the particular assigned tasks cannot be achieved with due application of the provisions on State aid. The Applicant argues that in the Decision there are no traces of the burden of proof on part of the Norwegian government. The EFTA Surveillance Authority accepts without further scrutiny the policy statements of the Norwegian government. This represents, in the Applicant's view, a manifest error in the assessment on part of the Authority.

61. The Applicant submits that the only truly public service obligation performed by Husbanken is the providing of means-tested loans and grants to people in a weak financial position. The only purpose of the State aid as regards the non-means-tested loans is to put Husbanken permanently in a more advantageous position in the commercial market of offering first-priority mortgage loans. In the Applicant's view, the Decision does not distinguish the broad housing policy issues from the issue relevant for the application of Article 59(2) EEA. Further, no necessity test has been performed in the Decision according to what has been stated in Case T-106/95 *FFSA and Others* v *Commission*, cited above, para. 178. The Applicant concludes that a manifest error in the assessment of the requirement of necessity has been demonstrated.

62. Third, the Applicant claims that the EFTA Surveillance Authority has underestimated the distortion of competition in the relevant market, as shown by the following issues. The Applicant argues that all these issues attribute to the conclusion that the EFTA Surveillance Authority committed a manifest error of assessment:

- by applying a wrong definition of the relevant market. The Applicant maintains its position that Husbanken has a dominant position in the market for non-means-tested, first-priority mortgage loans and that this fact is an important element in deciding the distortion of competition. The Applicant submits that, with a proper analysis of the relative strength given to Husbanken in the relevant market as compared to its competitors, this would have led to

even stronger conclusions with respect to effect under Article 61 EEA on trade, and also for the finding of effect on trade contrary to Article 59(2) EEA. The Applicant maintains that examination of the relevant market is appropriate under Article 59(2) EEA (Joined Cases 296 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, para. 24; Cases T-371/94 and T-394/94 *British Airways et al.* v *Commission*, cited above, para. 273.)

- by using an incorrect interpretation of the First and Second Banking Directives when finding that Husbanken is excluded from the scope of the Directives.[3] The Applicant stresses that lending and mortgage credit are expressly mentioned in the list of activities subject to mutual recognition according to the Second Banking Directive, cf. item 2 in the Annex. While conceding the fact that Husbanken has no longer the right to receive deposits from the public following an amendment in 1992, the Applicant maintains that credit institutions and mortgage credit institutions falling within the definition of a "credit institution" in Article 1 of the First Banking Directive, such as all the mortgage credit institutions listed according to Article 3, item 7, of the First Banking Directive, will be covered by the Banking Directives. The Applicant maintains that, as a consequence of the EFTA Surveillance Authority's misconception that mortgage credit institutions do not fall within the scope of the Directives, the Authority has also underestimated the scope and effect of the actual and/or potential competition on the relevant market and effects on trade between the Contracting Parties.

- by making erroneous use of statistics as a relevant factor. The Applicant claims that reference to statistics on subsidies to housing construction as a percentage of GNP is of no legal importance.

- by applying case law incorrectly. The Applicant argues that some of the cases referred to by the EFTA Surveillance Authority are either not relevant (Commission Decisions Nos. 193/95 and 44/96), distinguishable (Case NN/44/96, Crédit Foncier de France) or not cited (Case C-484/93 *Svenson and Gustavsson* v *Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955).

63. As regards the effect on trade between the Contracting Parties, the Applicant submits that the EFTA Surveillance Authority is wrong in interpreting this condition only as involving major trade effects. The Applicant maintains that at least the potential cross-border activity is greatly underestimated by the EFTA Surveillance Authority and emphasizes the difficulties foreign banks have in penetrating the market and the possible isolation of markets.

64. The Applicant submits that the Commission's Report to the Council, referred to above, should serve as a basis for assessing the balancing of interests in the EEA (i.e. that the development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties). The Applicant submits that mortgage financing is a part of the liberalized financial markets in the EEA but the Authority's Decision does not make reference to a possible limited liberalization in the market for mortgage loans. The EFTA Surveillance Authority has failed to consider the increasing cross-border element illustrated by the establishment of EEA banks and financial institutions in Norway and providing services, including provision of mortgage loans. This process will be facilitated by the introduction of the "Euro" on 1 January 1999. The Applicant maintains that the intervention by the Norwegian Government by offering Husbanken State subsidies and favourable terms for competition risks causing significant distorting effects. As the services can just as well be provided by other

[3] Directive 77/780/EEC and Directive 89/646.

operators, there is no overriding interest in favour of applying the derogation under Article 59(2) EEA. The Applicant maintains that the Authority has committed a manifest error of assessment on this point as well.

65. Lastly, the Applicant argues that the EFTA Surveillance Authority, erroneously, did not find that the social housing policy could be achieved through less distortive means (Decision pp. 18 - 19). The Applicant stresses that there is no need for the preferential funding treatment of Husbanken, an element that the EFTA Surveillance Authority has failed to question. The main alternative, in the Applicant's submission, is a system where the borrower has a free choice of finance options from competing bids from different financial institutions, through which the authorities might provide a loan or a direct subsidy. Other alternatives are the so-called Model 3 and 4 in the Report from the Commission on State banks, NOU 1995:11, The State Banks under amended Framework conditions. This element also demonstrates that the Authority has committed a manifest error of assessment.

66. As regards Article 59 EEA, the *EFTA Surveillance Authority* stresses that Member States remain free, in principle and where no Community policy is established, to designate which services they consider to be of general economic interest and to organize these services as they see fit, subject to the conditions of necessity (i.e. that the rules of the EEA Agreement apply in so far as they do not obstruct the performance of the particular tasks) and balancing of interests (i.e. that the development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties) (Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paras. 55-56 and Case T-105/96 *FFSA and Others* v *Commission*, cited above, para. 192, and the EC Commission's Notice on Services of General Interest in Europe (OJ 1996 C 281, p. 3)).

67. Even if the freedom to define the general interest service is not without limitation (see Case C-179/90 *Merci Convenzionali Porto di Genova,* cited above, para. 27 (dock services) compared with Case T-105/96 *FFSA and Others* v *Commission*, cited above, para. 106, and Case C-159/94 *Commission* v *France*, cited above, paras. 60-68), the EFTA Surveillance Authority submits that it may be concluded that an undertaking entrusted by the State with the performance of economic activities which the State considers to be in the interest of the general public is an undertaking "entrusted with the operation of services of general economic interest" within the meaning of Article 59(2) EEA, provided only that the activities show special characteristics related to the public interest involved, distinguishing them from economic activities in general. Characteristics of the loans operated by Husbanken were clearly sufficient to distinguish them from loans generally offered on the market, notably the obligation to keep the loans available on equal and preferential terms and the monitoring tasks linked to the operation of the loans.

68. As to the necessity test, the relevant question regarding whether or not an undertaking entrusted with the operation of services of general economic interest escapes the rules of the EEA Agreement is whether these rules would obstruct the performance of the tasks assigned to the undertaking. The survival of the undertaking need not be threatened by the application of the rules; it is sufficient that it would not be possible to carry out the assigned tasks under economically acceptable conditions (see Case C-159/94 *Commission* v *France*, cited above, paras. 95-96, and paras. 49, 54-59) or that the undertaking is able to perform its public service obligations under conditions of economic equilibrium (Case T-106/95 *FFSA and others* v *Commission*, cited above, para. 178).

69. The Applicant does not question Husbanken's need for the aid involved in order for it to be able to carry out its tasks, but rather the organization of the services which, the EFTA

Surveillance Authority maintains, is not relevant for the determination of the issue under consideration.

70. The EFTA Surveillance Authority maintains that it follows from the margin of discretion afforded to the State in defining and organizing its general interest services that the condition that measures must not affect trade to such an extent as would be contrary to the interests of the Contracting Parties cannot be taken to imply any obligation generally to organize such services so as necessarily to minimize the effects on trade. Thus, the EFTA Surveillance Authority submits that it is not necessary to establish positively that the measure at issue is the only one available or the least restrictive one, but only that it is not disproportionate (Case C-159/94 *Commission* v *France*, cited above, para. 101).

71. Furthermore, the concept of "effect on trade" in Article 59(2) EEA is different from that in Article 61(1) EEA and calls for a different kind of test. Under Article 59(2) EEA, the relevant test is whether the measure at issue affects "the development of trade" in a way "contrary to the interests of the Contracting Parties". Not all measures having a negative effect on trade can automatically be considered as being contrary to the interests of the Contracting Parties, given that the EEA Agreement covers fields such as environment, social policy and consumer protection (see Case C-159/94 *Commission* v *France*, cited above, paras. 113 and 115).

72. The EFTA Surveillance Authority concludes that the balancing of interests required under the second sentence of Article 59(2) EEA implies that any effect on trade must be assessed in the light of relevant interests of the Contracting Parties and the state of development of intra-EEA trade in the sector concerned and that a reasonable balance must be struck between the various interests involved. As regards the Applicant's reference to the Commission's Report to the Council, the EFTA Surveillance Authority points out that the Report contains only very general observations relating mainly to the financial services sector as a whole and no specific information regarding mortgage loans or government intervention in house financing.

73. The EFTA Surveillance Authority submits that its finding that the aid involved had limited effects on trade and was not contrary to the interests of the Contracting Parties is well founded. In view of the legitimate policy interests of the Contracting Parties and the factual appraisal, the Authority would not have been justified to rule out, as being contrary to the interests of the Contracting Parties, measures of the kind involved. The EFTA Surveillance Authority points out, in particular, as relevant for the assessment, that:

- Husbanken did not engage in other activities and consequently there was no room for cross-subsidies;
- housing finance markets in most EEA States are characterized by government intervention (central and local);
- there is no precedent ruling out the compatibility of the State aid of any of the numerous publicly supported housing finance institutions in the EU;
- there is lack of harmonization in EEA, resulting in obstacles to cross-border operations with regard to mortgage credits; and
- loans for housing finance are predominantly of local character.

74. The EFTA Surveillance Authority maintains that the Authority found the conditions referred to above to be fulfilled in the case at hand and disputes the submissions of the Applicant regarding manifest errors in law. The EFTA Surveillance Authority primarily points out that the Applicant has accepted the policy objectives involved and that the tasks of Husbanken have been

entrusted to it in pursuance of these objectives. The EFTA Surveillance Authority stresses that, in the Decision, the Authority found that Husbanken is an undertaking entrusted with services of general economic interest, as the tasks were entrusted to it by the State, the entrusted tasks were carried out in pursuance of the government's housing policy and, even with regard to the non-means-tested loans complained of in particular, the terms and conditions of the loans involved public policy objectives which imposed certain obligations on Husbanken. The EFTA Surveillance Authority maintains that these facts fully justify its finding on this point.

75. The EFTA Surveillance Authority disagrees with the Applicant's submissions that Article 59(2) EEA was not applied strictly, that the EFTA Surveillance Authority underestimated the distortion of competition, that the EFTA Surveillance Authority misinterpreted the First and Second Banking Directives, that the EFTA Surveillance Authority erred by referring to statistics on subsidies in certain States to housing construction as a percentage of GNP and that the EFTA Surveillance Authority erred in its application of case law, *inter alia* with reference to the EFTA Surveillance Authority's margin of discretion and that either the Applicant has not substantiated the errors, and/or that such weight was given to the respective points, that they can be considered to have affected the outcome.

76. As regards the Applicant's claim that the EFTA Surveillance Authority erred by not finding that the policy objectives could have been achieved by less distortive means, the EFTA Surveillance Authority stresses the freedom of States to define the policies and organize the general interest services, leaving the Authority no power to take a position on the organization and scale of the service or the expediency of political choices made (See Case T-106/95 *FFSA and Others* v *Commission*, cited above). The EFTA Surveillance Authority submits that the Applicant's claim on this point is manifestly unfounded, and that the circumstances do not lend themselves to the conclusion that there was an error on the part of the Authority.

77. The intervener, the *Government of Norway*, maintains that Husbanken is not an "undertaking" within the meaning of Article 61 EEA, but rather a part of the State itself, the organization of which is a prerogative of the government. The Government of Norway further argues that only the loans granted by Husbanken to private consumers might be subject to an assessment under Article 61 EEA, but that the criteria set out in Article 61(1) EEA are not met and that, consequently, there was no infringement of Article 59(1) EEA taken in conjunction with Article 61 EEA. However, given the pleas of the parties, the Government of Norway bases its submissions on the assumption that Husbanken has been granted State aid incompatible with Article 61 EEA.

78. As regards the application of Article 59(2) EEA, the Government of Norway argues that the nature and structure of the service in question – to provide credit for housing purposes – is not dissimilar to those services accepted by the Court of Justice of the European Communities ("ECJ") as being of "general economic interest".[4] The housing sector must be regarded as exhibiting special characteristics as compared with the general economic interests of other

[4] The Government refers to the following cases, where the concept "general economic interest" is clarified: Case 10/71 *Ministère Public Luxembourg* v *Müller* [1971] ECR 723; Case 155/73 *Sacchi* [1974] ECR 409; Case 41/83 *Italy* v *Commission* [1985] ECR 873; Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941; Case 96/82 *IAZ* v *Commission* [1983] ECR 3369; Case 66/86, *Ahmend Saeed Flugreisen and others* v *Zentrale Zur Bekämpfung Unlauteren Wettbewerbs* [1989] ECR 803; Case C-320/91 *Corbeau* [1993] ECR I-2533; Case C-393/92 *Almelo* [1994] ECR I-1477; Cases C-157/94, C-158/94, C-159/94 and C-160/94 *Commission* v *the Netherlands/ Italy / France/ Spain*, judgments of 23 October 1997; Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889.

economic activities (Case C-179/90 *Merci Convenzionali Porto di Genova*, cited above, para. 14) and of direct benefit for the public (*Merci Convenzionali Porto di Genova*, Opinion of the Advocate General, para. 27). This is in conformity with the purpose of Article 59(2) EEA as expressed in *inter alia* Case C-159/94 *Commission* v *France*, cited above, (paras. 55-56), that the States are permitted to make allowance for objectives related to their domestic policy.

79. The Government of Norway further argues that the tasks of general economic interest have appropriately been conferred on Husbanken, as defined by the ECJ, i.e. by act of the public authority, including administrative acts or a grant of a concession governed by public law (Case C-393/92 *Almelo* [1994] ECR I-1477, paras. 65-66.)

80. The Government of Norway submits that, as the aim is legitimate, the Court is restricted to monitoring the means selected by the State, in particular whether the means are appropriate and the least restrictive available (see Case C-159/94 *Commission* v *France*, cited above, paras. 53-59 and 95-96). Article 90(2) EC and Article 59(2) EEA are applicable if the derogation is necessary in order to fulfil the tasks on acceptable financial terms. The Government of Norway submits that Husbanken will not generally be able to offer terms and interest rates to the population better than those terms and rates private banks are able to offer if Husbanken is forced to operate on terms equal to those on which private banks operate. Husbanken would also be forced to raise the prices in unprofitable parts of the market in order to compete in the profitable parts. Another consequence, the Government of Norway argues, would be that requirements concerning quality, standard and costs would suffer. The restriction imposed on the competition by granting Husbanken State aid is thus genuinely needed in order to ensure the performance of the particular tasks assigned to Husbanken.

81. The Government of Norway further maintains that the objectives of the housing policy cannot be achieved to the same degree at the same cost through less distortive means. The Government of Norway submits that it is for the Applicant to establish that such alternative ways are possible and maintains that the possibilities brought up by the Applicant before the Court[5] entail that the public housing policy objectives established by the Storting (Parliament) and the Government of Norway will largely be altered to be less ambitious than current objectives and the particular tasks assigned to Husbanken obstructed.

82. The Government of Norway contests the legal relevance of the Applicant's submissions regarding "the relevant market". The only relevance the Government of Norway finds concerns the assumed effects on inter-State trade. In this context, the Government of Norway submits that the relevant market is the whole market for mortgage-backed loans.

83. In the supplementary information submitted to the Court, the Government of Norway emphasizes that analysis of the relevant market may be a relevant factor under Article 61 EEA as part of the assessment of whether or not Husbanken distorts competition. However, the Applicant does not contest the finding of the Authority that Husbanken is the recipient of aid and, accordingly, the Court is not invited to decide upon the application of Article 61 EEA and the legal relevance of this analysis to the case at hand is therefore not shown.

84. The Government of Norway submits, however, additional information and analysis on the concept of the relevant market and submits that, from the point of view of interchangeability on the lending market, it is appropriate to distinguish between mortgage-backed loans and other

[5] So-called model 3 and model 4, as described in NOU (Norwegian Official Report) 1995:11, The State Banks under amended Framework Conditions.

loans. It is also possibly appropriate to distinguish between mortgage-backed personal loans and mortgage-backed business loans. It follows, in the submission of the Government of Norway, that the relevant market should be held to be loans to private persons backed by mortgages in private dwellings.

85. Husbanken's total share of the market as thus defined has decreased from 26% in December 1993 to just over 14% in December 1997. The Government of Norway submits that a market share of between 14% and 17% in 1996 and 1997 constitutes a small part of the total market and can hardly cause major distortions in the relevant market as claimed by the Association.

86. As to the condition in Article 59(2) EEA, that the derogation is precluded if the development of trade would be affected "to such an extent as would be contrary to the interests of the Contracting Parties", the Government of Norway submits that the relevant question is whether credit investments by foreign credit institutions will be considerably higher in Norway if Husbanken is deprived of the State aid. Referring to the assessment of the EFTA Surveillance Authority in its Decision, that this financial service is predominantly of a local character and normally does not involve any direct cross-border transactions, the Government of Norway estimates that the most likely scenario is that branches of foreign credit institutions will cover a similar share of Husbanken's "vacant" portfolio as in the credit market for households in general, which in 1995 was under 19% of the total credit supply in Norway. The Government of Norway concludes that foreign credit institutions are only marginally affected. Furthermore, as the State interest involved is considerable, the effect on intra-State trade must be correspondingly substantial before the derogation under Article 59(2) EEA is precluded.

87. The *Commission of the European Communities* submits that the Applicant has not clearly established that the EFTA Surveillance Authority has committed a manifest error in adopting its Decision. The Commission recalls the wide margin of discretion the EFTA Surveillance Authority has in applying Articles 59 and 61 EEA, as the Commission has in applying Articles 90 and 92 EC (Case C-301/87 *France v Commission* [1990] ECR I-307, para. 49; Case T-106/95 *FFSA and Others* v *Commission*, cited above, para. 100) and the correspondingly limited role of the Court in reviewing decisions such as the one in the present case (Case C-56/93 *Belgium* v *Commission*, cited above, para. 11).

88. The Commission recalls that the ECJ has upheld a broad definition of what constitutes aid (Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, para. 13). When incompatible State aid is granted to an undertaking entrusted with the operation of a service of general economic interest, Article 90(2) EC and Article 59(2) EEA provide for a derogation which must, as a derogating rule, be interpreted restrictively (Case T-106/95 *FFSA and Others* v *Commission*, cited above, paras. 172 and 173).

89. There is no general, Community-wide definition of a service "of general economic interest".[6] The Member States thus remain, in principle, competent to designate which services they considered to be such, subject to scrutiny by the Community institutions (Case C-179/90 *Merci Convenzionali Porto di Genova*, cited above, para. 26). The methodology applied in defining the concept is that of an analysis on a case-by-case basis.

[6] Commission Communication on "Services of General Interest in Europe" does not provide one, see OJ 1996 C 281, p. 3.

90. As an additional safeguard, it must be established that the performance of the service does not affect in a disproportionate manner the rules of competition and the preservation of the unity of the common market. The test is of a negative nature: it examines whether the measure adopted is not disproportionate, but it is not required that the measure adopted is the least restrictive possible (Case 40/72 *Schroeder* v *Germany* [1973] ECR 125, para. 14). A reasonable relationship between the aim and the means employed is satisfactory (Case 44/79 *Hauer* v *Land Rheinland-Pfalz* [1979] ECR 3727, para. 29; Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paras. 11 and 12; and Case C-159/94 *Commission* v *France*, cited above, paras. 55 and 56).

91. The Commission submits that it is legitimate to take into account not just the segment of the banking sector engaged in housing loans but also other lending activities in assessing whether the aid creates a disproportionate restriction on the provision of credit services. If housing loans form but a relatively small proportion of the total lending business, any restrictions resulting from the aid granted to Husbanken will be so much the less for the other undertakings active on the market.

92. As regards the case at hand, the Commission notes that the Applicant does not challenge the relevance of the broad description of the tasks of Husbanken which the EFTA Surveillance Authority considers to fall within the ambit of the definition of services of general economic interest. In particular, the Applicant has not sought to question that the rules involve certain social policy objectives which impose certain monitoring obligations on Husbanken and criteria for the selection of the recipients of the loans. The Commission states that it doubts whether it would itself have accepted such a broad view of the service of general economic interest provided by Husbanken. However, the Commission does not suggest that the EFTA Surveillance Authority has committed an error of a manifest kind.

93. Such a doubt would have compelled the Commission to examine the proportionate nature of the restrictive and distortive effects in a rigorous light. The Commission is, however, not in a position to examine or state with clarity which effect might be disproportionate to the aim of the measure in the case at hand.

94. The Applicant's approach, to argue disproportional measures, rather than challenge the specific tasks allocated to Husbanken, render it, in the view of the Commission, more difficult to establish that, in light of the broadly defined social tasks entrusted to Husbanken, the nature of the aid granted is more than commensurate with the policy pursued. The Commission finds that the Applicant has not demonstrated that the social aims assigned to Husbanken have not been achieved by means of the aid granted; in particular the Applicant does not challenge that borrowers in lower socio-economic groups benefit from the system and, as regards loans granted without means-testing, the Commission points out that the Applicant has not called into question that borrowers in less favourable economic circumstances fall into the category of those who would tend to borrow for dwellings of 120 square meters or less.

95. The Commission submits that, even if it were successfully shown that the scheme in question was not an optimally efficient one, it would not lead to the conclusion that the EFTA Surveillance Authority had made a manifest error in stating that the distortive effects are not disproportionate to the goals assigned. The choice of the means belongs exclusively to national authorities.

96. Lastly, the Commission considers that the Applicant has failed to demonstrate that the aid granted to Husbanken has a deleterious effect on the financial position of the unaided banking sector.

Thór Vilhjálmsson
Judge-Rapporteur

Case E-5/98

Fagtún ehf.
v
Byggingarnefnd Borgarholtsskóla, the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær

(Request for an advisory opinion from Hæstiréttur Íslands (Supreme Court of Iceland))

(General prohibition on discrimination – Free movement of goods – Post-tender negotiations in public procurement proceedings)

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Summary of the Advisory Opinion

1. Provisions contained in public works contract specifications may be caught by the prohibition in Article 11 EEA. A building committee, acting on behalf of the Government, established by contract between the Government and a municipality, composed of members appointed by the same authorities, funded by public means and supervising construction of buildings owned by the state and municipalities together must be considered a public contracting authority. Consequently Article 11 EEA is applicable to a clause such as the one at issue in the main proceedings.

2. According to the case law of the EFTA Court and the Court of Justice of the European Communities this provision prohibits, as measures having an equivalent effect to quantitative restrictions on imports, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.

Mál E-5/98

Fagtún ehf.
gegn
Byggingarnefnd Borgarholtsskóla, íslenska ríkinu, Reykjavíkurborg og Mosfellsbær

(Beiðni um ráðgefandi álit frá Hæstarétti Íslands í áfrýjunarmálinu)

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Samantekt

1. *Dómstóllinn* telur að ákvæði í skilmálum opinbers verksamnings geti fallið undir bannið í 11. gr. EES-samningsins. Byggingarnefnd, sem kemur fram fyrir hönd ríkisstjórnarinnar, komið er á með samningi milli ríkisstjórnar og sveitarfélags, sem í eiga sæti meðlimir tilnefndir af sömu aðilum, kostuð er af opinberu fé og hefur eftirlit með byggingu mannvirkis sem er í eigu þessara opinberu aðila, telst opinbert samningsyfirvald. Því telur dómstóllinn að 11. gr. EES-samningsins verði beitt um ákvæði eins og það sem um er fjallað í aðalmálinu.

2. Samkvæmt fordæmum dómstóls EB bannar ákvæðið allar reglur um viðskipti settar af aðildarríkjum sem eru til þess fallnar að hindra viðskipti innan bandalagsins, beint eða óbeint, hugsanlega eða raunverulega. Eru þessar reglur taldar hafa samsvarandi áhrif og magntakmarkanir á innflutningi.

3. The contested clause was inserted into the final contract at the contract stage after the bids in the tender had been received and considered, at the contracting authority's request. This can, however, not lead to a different assessment with regard to the applicability of Article 11 EEA, as the post-tender negotiations cannot be separated from the procedure itself.

4. A provision in a works contract excluding all roof elements produced in another Contracting Party, amounts to clear discrimination in favour of national production.

5. If a Contracting Party claims to need protection from dangerous imported products, it will have to show that its actions are genuinely motivated by health concerns, that they are apt to achieve the desired objective and that there are no other means of achieving protection that are less restrictive of trade. In the case at hand, the Defendants have not shown that the use of roof elements built in another Contracting Party could lead to a danger for the health and life of humans within the meaning of Article 13 EEA. Furthermore, the provision in question leads to overt discrimination and, therefore, cannot be justified by reference to mandatory requirements within the meaning of the case law of the Court of Justice of the European Communities on Article 30 EC (now after modification Article 28 EC).

6. Article 4 EEA provides that, within the scope of application of the Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. It applies independently only to situations governed by EEA law in regard to which the EEA Agreement lays down no specific rules prohibiting discrimination. Since the contested clause is contrary to Article 11 EEA, it is not necessary to examine whether it is contrary to Article 4 EEA.

3. Hið umdeilda ákvæði var sett inn í endanlegan samning að kröfu samningsyfirvalds, á því stigi samningsgerðar er tilboð höfðu borist og þau höfðu verið athuguð. Þetta getur þó ekki leitt til annarrar niðurstöðu að því er lýtur að beitingu 11. gr. EES-samningsins, þar sem samningaumleitanir eftir útboð verða ekki greindar frá útboðinu sjálfu.

4. Ákvæði í verksamningi sem útilokar þakefni sem framleitt er í öðru samningsríki felur augljóslega í sér mismunun innlendri framleiðslu í hag.

5. Ef samningsaðili ber því við að vernd gegn hættulegum innfluttum vörum sé nauðsynleg verður viðkomandi ríki að sýna fram á að aðgerðir þess ráðist í raun af sjónarmiðum um heilbrigði, að þær séu til þess fallnar að ná því markmiði sem að er stefnt og að ekki séu aðrar leiðir færar til að ná því markmiði, sem hafi minni áhrif á viðskipti. Í máli þessu hafa stefndu ekki sýnt fram á að notkun þakeininga sem smíðaðar eru í öðru samningsríki geti verið hættuleg lífi og heilsu manna í skilningi 13. gr. EES-samningsins. Þá leiðir hið umdeilda ákvæði til beinnar mismununar og verður því ekki réttlætt með vísan til viðurkenndra lögmætra sjónarmiða í skilningi fordæma dómstóls EB um 30. gr. Stofnsáttmála EB (eftir breytingu 28. gr. Stofnsáttmála EB).

6. Ákvæði 4. gr. EES-samningsins mælir fyrir um þá meginreglu að hvers konar mismunun á grundvelli ríkisfangs sé bönnuð á gildissviði samningsins nema annað leiði af einstökum ákvæðum hans. Ákvæði 4. gr. verður aðeins beitt sjálfstætt um þau tilvik sem falla undir gildissvið samningsins sem önnur sértækari ákvæði taka ekki til. Þar sem hið umdeilda ákvæði telst brjóta gegn 11. gr. EES-samningsins er ekki nauðsynlegt að taka til skoðunar hvort það brýtur gegn 4. gr. EES-samningsins.

ADVISORY OPINION OF THE COURT
12 May 1999*

(General prohibition on discrimination – Free movement of goods – Post-tender negotiations in public procurement proceedings)

In Case E-5/98

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 Hæstiréttur Íslands (Supreme Court of Iceland) in a case on appeal between

Fagtún ehf.

and

Byggingarnefnd Borgarholtsskóla, the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær

on the interpretation of Articles 4 and 11 of the EEA Agreement.

THE COURT,

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

Registrar: Gunnar Selvik,

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

RÁÐGEFANDI ÁLIT
12. maí 1999*

(Almennt bann við mismunun – Frjálsir vöruflutningar – Samningar eftir opinbert útboð)

Mál E-5/98

BEIÐNI um ráðgefandi álit EFTA-dómstólsins, samkvæmt 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls, frá Hæstarétti Íslands í áfrýjunarmálinu

Fagtún ehf.

gegn

Byggingarnefnd Borgarholtsskóla, íslenska ríkinu, Reykjavíkurborg og Mosfellsbær

varðandi túlkun 4. og 11. gr. EES-samningsins.

DÓMSTÓLLINN,

skipaður: Bjørn Haug, forseta, Þór Vilhjálmssyni og Carl Baudenbacher (framsögumanni), dómurum,

dómritari: Gunnar Selvik,

* Beiðni um ráðgefandi álit var á íslensku.

after considering the written observations submitted on behalf of:

- the Appellant, Fagtún ehf., represented by Counsel Jakob R. Möller;
- the Defendants, Byggingarnefnd Borgarholtsskóla, the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær, represented by Counsel Árni Vilhjálmsson, Attorney at Law, Adalsteinsson & Partners, assisted by Mr. Óttar Pálsson;
- the Government of Norway, represented by Jan Bugge-Mahrt, Royal Ministry of Foreign Affairs, acting as Agent;
- the EFTA Surveillance Authority, represented by Helga Óttarsdóttir and Bjarnveig Eiríksdóttir, Officers, Legal & Executive Affairs, acting as Agents;
- the Commission of the European Communities, represented by Michel Nolin, member of its Legal Service, and Michael Shotter, a national official seconded to the Commission under an arrangement for the exchange of officials, acting as Agents;

having regard to the Report for the Hearing,

after hearing the oral observations of the Appellant, the Defendants, the EFTA Surveillance Authority and the Commission of the European Communities at the hearing on 5 March 1999,

gives the following

Advisory Opinion

Facts and procedure

1 By a request dated 26 June 1998, registered at the Court on the same day, the Supreme Court of Iceland made a request for an Advisory Opinion in a case on appeal between Fagtún ehf. (a private limited-liability company) (hereinafter the "Appellant") and Byggingarnefnd Borgarholtsskóla (the building committee of Borgarholt school, hereinafter referred to individually as the "building committee") the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær (hereinafter collectively the "Defendants").

2 In January 1995, an invitation to submit tenders for the award of a public contract for construction work for the school Borgarholtsskóli was sent out. The contracting authorities were the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær, and tenders were to be submitted to the State Trading Centre (*Ríkiskaup*). The building committee was the purchaser of

hefur, með tilliti til skriflegra greinargerða frá:

- Áfrýjanda, Fagtúni ehf. Í fyrirsvari er Jakob R. Möller hrl.;

- Stefndu, Byggingarnefnd Borgarholtsskóla, ríkisstjórn Íslands, Reykjavíkurborg og Mosfellsbæ. Í fyrirsvari er Árni Vilhjálmsson hrl., A & P Lögmenn, og honum til aðstoðar er Óttar Pálsson;

- Ríkisstjórn Noregs. Í fyrirsvari sem umboðsmaður er Jan Bugge-Mahrt, Konunglega utanríkisráðuneytinu;

- Eftirlitsstofnun EFTA. Í fyrirsvari sem umboðsmenn eru Helga Óttarsdóttir og Bjarnveig Eiríksdóttir, lögfræðingar í lagadeild;

- Framkvæmdastjórn Evrópubandalaganna (hér eftir "framkvæmdastjórnin"). Í fyrirsvari sem umboðsmenn eru Michel Nolin, lögfræðingur í lagadeild, og Michael Shotter, sérfræðingur frá aðildarríki sem starfar fyrir framkvæmdastjórnina samkvæmt samkomulagi um skipti á embættismönnum;

með tilliti til skýrslu framsögumanns og munnlegs málflutnings áfrýjanda, stefndu, Eftirlitsstofnunar EFTA og framkvæmdastjórnarinnar þann 5. mars 1999,

látið uppi svohljóðandi

Ráðgefandi álit

Málsatvik og meðferð málsins

1 Með beiðni dagsettri 26. júní 1998, sem skráð var hjá dómstólnum sama dag, óskaði Hæstiréttur Íslands eftir ráðgefandi áliti í áfrýjunarmáli milli Fagtúns ehf. (hér eftir "áfrýjandi") og Byggingarnefnd Borgarholtsskóla (hér eftir sérstaklega "byggingarnefndin"), íslenska ríkinu, Reykjavíkurborg og Mosfellsbæ (hér eftir "stefndu").

2 Í janúar 1995 voru boðnar út framkvæmdir við byggingu Borgarholtsskóla í Reykjavík. Útboðið var á vegum íslenska ríkisins, Reykjavíkurborgar og Mosfellsbæjar og skyldi tilboðum skilað til Ríkiskaupa. Verkkaupi var byggingarnefnd skólans og kom hún fram gagnvart bjóðendum. Um útboð þetta

the work and was responsible for contacts with tenderers. Act No. 65/1993 relating to the procedures for the award of contracts (*Lög um framkvæmd útboða*) was applicable to the award of the contract in question and, in the contract terms, an Icelandic standard (IST 30) was referred to as a part of the contractual documents. Byrgi ehf., a private limited-liability company, submitted a tender. As the use of roof elements was prescribed in the contractual documents, the company contacted the Appellant, which imports roof elements from Norway, asking for a tender regarding that particular part of the work. On 2 February 1995, the Appellant submitted a tender to Byrgi ehf. comprising the roof elements and their installation. The tender referred to the relevant points in the description of the work to be carried out contained in the contract notice. The Appellant's tender was for a total of 30 642 770 Icelandic crowns. In the tender, the Appellant stated that information regarding the work would be submitted, but that an application for an exemption from Building Regulation No. 177/1992 (*Byggingareglugerð*, hereinafter the "Building Regulation") would be required regarding the roof elements. The Appellant maintains that Byrgi ehf. accepted the tender and used it when submitting its own tender to *Ríkiskaup*. Byrgi ehf. submitted the lowest tender for the contract, but in the subsequent negotiations the building committee requested the use of roof elements produced in Iceland. A works contract was concluded, wherein section 3 reads: "The contractor's main tender is the basis for the contract and it is agreed that roof elements will be produced in the country". The Appellant submits that this condition of the works contract precluded use of the imported roof elements, resulting in his losing the works contract.

3 By a letter of 9 June 1995 to the Ministry of Finance, the Appellant objected to the above-mentioned section of the works contract. The Appellant submitted that section 3 was contrary to Act No. 65/1993 relating to the procedures for the award of contracts, rules regarding public procurement and works within the European Economic Area, as well as the Government's policy regarding awards of public work contracts.

4 The Defendants point out that it was noted in the description of the works to be carried out that drawings included in the contractual documents did not show the fully-designed structural systems of the roof, and that the contractor was supposed to submit to the purchaser of the work the final drawings and ensure necessary approvals from the public building authorities of the structural system and technical solutions. The building committee's letter of 13 September 1995 states that the reason for the agreement that the roof elements should be produced or assembled in Iceland is that the work may be kept under review, as the committee imposes strict requirements regarding quality and finish and seeks to avoid unknown solutions which are subject to a special exception from the provisions of the Building Regulation, granted by the public building authorities. Pursuant to the opinion of a consultant, the building committee estimated that this approach would result in a better roof.

giltu lög um framkvæmd útboða nr. 65/1993 og í útboðsskilmálum kom fram að íslenskur staðall, ÍST 30, væri hluti útboðsgagna. Byrgi ehf. bauð í verkið og þar sem útboðsgögn gerðu ráð fyrir að notaðar yrðu þakeiningar til verksins hafði fyrirtækið samband við áfrýjanda, sem flytur inn þakeiningar frá Noregi, og falaðist eftir tilboði í þann verkþátt. Hinn 2. febrúar 1995 gerði áfrýjandi Byrgi ehf. tilboð í þakeiningarnar og uppsetningu þeirra. Var í tilboðinu vísað til viðeigandi liða í verklýsingu útboðsins. Samtals bauðst áfrýjandi til að vinna verkið fyrir 30.642.770 krónur. Fram var tekið í tilboði hans að allar upplýsingar varðandi verkið yrðu lagðar fram, en sækja yrði um undanþágu frá byggingarreglugerð nr. 177/1992 vegna þakeininganna. Áfrýjandi segir Byrgi ehf. hafa tekið þessu tilboði og notað það við gerð síns tilboðs til Ríkiskaupa. Byrgi ehf. varð lægstbjóðandi í verkið, en í samningaviðræðum sem fram fóru var af hálfu byggingarnefndar skólans farið fram á að notaðar yrðu þakeiningar, sem settar yrðu saman hér á landi. Verksamningur var síðan gerður og segir þar í 3. gr.: *"Til grundvallar er lagt aðaltilboð verktaka og við það miðað að þakeiningar verði smíðaðar hérlendis."* Áfrýjandi telur að vegna þessa skilyrðis verksamningsins hafi hinar innfluttu þakeiningar hans ekki komið til greina og hann því orðið af verkinu.

3 Með bréfi 9. júní 1995 mótmælti áfrýjandi því við fjármálaráðuneytið að þetta ákvæði hefði verið sett í verksamninginn. Taldi hann að með því væru brotin lög um framkvæmd útboða nr. 65/1993, reglur um opinber innkaup og framkvæmdir á Evrópska efnahagssvæðinu og einnig bryti það í bága við útboðsstefnu ríkisins.

4 Stefndu benda á að tekið hafi verið fram í verklýsingu að teikningar í útboðsgögnum hafi ekki verið af fullhönnuðum burðarvirkjum í þaki og hafi verktaki átt að leggja fram endanlegar teikningar til verkkaupa og afla nauðsynlegra samþykkta byggingaryfirvalda á burðarþoli og tæknilegum lausnum. Segir í bréfi byggingarnefndarinnar 13. september 1995 að ástæða þess að samið var um smíði eða samsetningu hérlendis hafi verið sú að með því hafi mátt fylgjast með þessari framkvæmd, enda geri nefndin strangar kröfur um gæði og frágang og vilji forðast lausnir er hún þekki ekki og háðar séu sérstakri undanþágu byggingaryfirvalda frá ákvæðum bygingarreglugerðar. Nefndin telji sig að höfðu samráði við ráðgjafa fá betra þak með þessum hætti.

5 The Appellant sued Byrgi ehf. in damages, claiming compensation for expenses relating to the preparation of the tender and for lost profit. Héraðsdómur Reykjaness (District Court of Reykjanes) rendered its judgment on 9 December 1996, concluding that section 3 of the works contract was contrary to Articles 4 and 11 of the Agreement on the European Economic Area (hereinafter variously "EEA" and "EEA Agreement"). The Court found that the unlawful provision in the works contract had, in effect, resulted in the rejection of the Appellant as a sub-contractor for the work. The rejection of the Appellant did not follow from objective reasons. The Appellant's claim for costs relating to the preparation of the tender was upheld. The claim for lost profit was rejected on the grounds that a binding contract had not been concluded between the Appellant and Byrgi ehf. according to IST 30, section 34.8.0.

6 On 19 June 1997, the Appellant brought a claim against the Defendants before Héraðsdómur Reykjavíkur (Reykjavík City Court) for compensation for lost profit. The City Court found in favour of the Defendants on the grounds that no works contract had been concluded between the Appellant and Byrgi ehf., and even less so between the Appellant and the Defendants. In its negotiations with Byrgi ehf., the building committee had rejected the Appellant as a sub-contractor and based itself on the roof elements being produced in the country. In the contractual documents it was not stated that the roof had to be made in Iceland, and both options were available according to the contractual documents, in other words, the roof could be made in Iceland or abroad. The Defendants' obligation to approve the material and the performance of the work proposed by the Appellant had not been substantiated and, in addition, the Appellant's solution was subject to a special approval by the public building authorities. Further, it was not considered substantiated that section 3 of the works contract between the Defendants and Byrgi ehf. infringed the EEA Agreement nor that there was such a relationship between the Appellant and the Defendants that it could be a basis for the Defendants having to pay compensation to the Appellant.

7 Fagtún ehf. appealed the decision of Reykjavík City Court to the Supreme Court of Iceland on the grounds that the conclusion of the City Court that section 3 of the works contract does not infringe provisions of the EEA Agreement was incorrect.

8 It is not in dispute that the tender procedure prior to the conclusion of the contract was carried out in accordance with the requirements laid down in Council Directive 93/37/EEC of June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), referred to in point 2 of Annex XVI to the EEA Agreement, as amended by Decision of the EEA Joint Committee No 7/94 (hereinafter the "Directive").

5 Áfrýjandi höfðaði skaðabótamál á hendur Byrgi ehf. og krafðist bóta vegna kostnaðar við gerð tilboðsins og vegna tapaðs arðs. Héraðsdómur Reykjaness kvað upp dóm í því máli 9. desember 1996 og komst að þeirri niðurstöðu að umrætt ákvæði verksamningsins bryti í bága við 4. gr. og 11. gr. Samningsins um Evrópska efnahagssvæðið (hér eftir "EES-samningurinn"). Áfrýjanda hafi í raun verið hafnað sem undirverktaka að umræddu verki vegna ólögmæts ákvæðis í verksamningi Byrgis ehf. og stefnda, en ekki af málefnalegum ástæðum. Hann þótti því eiga rétt á að fá bættan kostnað við tilboðsgerðina. Hins vegar var kröfu hans um efndabætur hafnað þar sem ekki var talið að komist hefði á bindandi samningur milli áfrýjanda og stefnda samkvæmt ÍST 30, grein 34.8.0.

6 Áfrýjandi þingfesti síðan skaðabótamál á hendur stefndu fyrir Héraðsdómi Reykjavíkur 19. júní 1997 til greiðslu bóta vegna tapaðs arðs af verkinu. Í héraðsdómi voru stefndu sýknaðir af þessum kröfum áfrýjanda með þeim rökum að ekki hefði komist á verksamningur milli áfrýjanda og Byrgis ehf. og þaðan af síður milli áfrýjanda og stefndu. Stefnda byggingarnefnd Borgarholtsskóla hafi í samningum við Byrgi ehf. hafnað áfrýjanda sem undirverktaka og miðað við að þakeiningar yrðu smíðaðar hérlendis. Í útboðsgögnum hafi hins vegar ekki verið minnst á það að þak yrði að vera smíðað á Íslandi og hafi hvort tveggja getað komið til greina, samkvæmt útboðsgögnum, þ.e að þak yrði smíðað á Íslandi eða erlendis. Ekki hafi verið sýnt fram á skyldu stefndu til að samþykkja það efni og þá útfærslu, sem áfrýjandi bauð upp á, auk þess sem sú lausn hafi verið háð sérstöku samþykki byggingaryfirvalda. Þá þótti ekki sannað að ákvæði 3. gr. verksamnings stefndu og Byrgis ehf. bryti í bága við ákvæði EES-samningsins eða að þau tengsl hefðu verið á milli áfrýjanda og stefndu sem gætu orðið grundvöllur bótagreiðslna stefndu.

7 Fagtún ehf. áfrýjaði dómi Héraðsdóms Reykjavíkur til Hæstaréttar Íslands og byggði á því að niðurstaða héraðsdóms um það að ákvæði 3. gr. verksamningsins bryti ekki gegn EES-samningnum væri röng.

8 Óumdeilt er að útboðið fyrir samningsgerðina fór fram samkvæmt þeim kröfum sem gerðar eru í tilskipun ráðsins 93/37/EBE frá 14. júní 1993 um samræmingu reglna um útboð og gerð opinberra verksamninga (Stjórnartíðindi EB1993 L 199, bls. 54).[1] sem vísað er til í lið 2 í XVI. viðauka við EES-samninginn, eins og honum var breytt með ákvörðun Sameiginlegu EES-nefndarinnar nr. 7/94 (hér eftir "tilskipun 93/37/EBE").

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[1] Íslensk útgáfa í EES viðbæti við Stjórnartíðindi EB, Sérstök útgáfa, bók 5, bls. 121.

9 The questions referred by the national court concern the interpretation of Articles 4 and 11 EEA. The parties have, however, also submitted pleadings on the interpretation of Article 13 EEA. The Court will deal with this provision as well.

Legal background

1. EEA law

10 Article 4 EEA reads:

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

11 Article 11 EEA reads:

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

12 Article 13 EEA reads:

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

2. National law

13 Act No. 65/1993 relating to the procedures for the award of contracts applies when an award of a contract is used as a means to conclude contracts between two or more entities for works, goods or services. Its application is not limited to contracts made by public parties.

14 Act No. 63/1970 relating to the procedures for the award of public works contracts (*Lög um skipan opinberra framkvæmda*) applies to construction or modification work which is partially or wholly financed by the Government, provided that the Government's cost is at least 1 000 000 Icelandic crowns.

15 The Building Regulation laid down in section 7.5.11 rules for roofs and roof structures. That section reads:

> "7.5.11.1 Roofs shall be designed and constructed in such a way that damaging humidity condensation does not occur in the roof structure or on its inner surface.

9 Spurningar þær sem dómstóllinn hefur leitað svara við lúta að skýringu á 4. og 11. gr. EES-samningsins. Aðilar málsins hafa einnig borið fram röksemdir sem lúta að túlkun 13. gr. EES-samningsins og mun dómstóllinn einnig fjalla um það ákvæði.

Löggjöf

1. Reglur EES-samningsins

10 4. gr. EES-samningsins hljóðar svo:

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

11 11. gr. EES-samningsins hljóðar svo:

> "Magntakmarkanir á innflutningi, svo og allar ráðstafanir sem hafa samsvarandi áhrif, eru bannaðar milli samningsaðila."

12 13. gr. EES-samningsins hljóðar svo:

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

2. Íslensk löggjöf

13 Lög nr. 65/1993 um framkvæmd útboða gilda þegar útboði er beitt til þess að koma á viðskiptum milli tveggja eða fleiri aðila um verk, vöru eða þjónustu. Gildissvið laganna er ekki bundið við samninga sem gerðir eru af opinberum aðilum.

14 Lög nr. 63/1970 um skipan opinberra framkvæmda gilda um gerð eða breytingu mannvirkis, sem kostuð er af ríkissjóði að nokkru eða öllu leyti, enda nemi kostnaður ríkissjóðs a.m.k. 1 milljón króna.

15 Grein 7.5.11. í byggingarreglugerð nr. 177/1992 hafði að geyma reglur um þök og þakvirki. Greinin hljóðar svo:

> "7.5.11.1. Þök skulu þannig hönnuð og byggð að ekki komi til skaðlegrar rakaþéttingar í þakvirkinu eða á innra byrði þess.

7.5.11.2. In roofs made of wood or wood materials, ventilation openings shall be inserted and placed so that ventilation is even above the upper surface of the roof insulation. Ventilation shall be described in special designs and by calculations, if necessary.

7.5.11.3 ... "

Questions

16 The following questions were referred to the EFTA Court:

1 *Does Article 4 of the EEA Agreement prohibit the inclusion in a works contract of a provision to the effect that roof elements are to be produced in Iceland?*

2 *Does Article 11 of the EEA Agreement prohibit such a provision?*

17 The Court takes note of the observations made by the parties to the case to the effect that the Icelandic term "*smíðaðar*" could be reflected in English by the term "crafted" or "constructed". The Court however also notes the distinction between the terms "*settar saman*", i.e. "assembled" and "*smíðaðar*", i.e. "crafted", "constructed" or "produced". Taking due account of these observations, the Court will in the following refer to the roof elements as being "produced" in Iceland.

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

Findings of the Court

The second question

19 In its second question, which the Court finds should be dealt with first, the national court asks whether Article 11 EEA prohibits a provision in a works contract to the effect that roof elements are to be produced in Iceland.

Applicability of Article 11 EEA

20 The *Defendants* argue that measures can only be held to be contrary to Article 11 EEA if they are taken by an authority exercising its public power, they are binding in nature and they have certain legal effects. The building committee did not exercise any public power during the contractual negotiations. Consequently, this case does not concern a provision of a legislative act, an administrative rule,

7.5.11.2. Á þökum úr timbri eða trjákenndum efnum skal komið fyrir útloftunarraufum, þannig staðsettum að jöfn útloftun sé yfir efra byrði þakeinangrunar. Gera skal grein fyrir útloftun á séruppdráttum og einnig með útreikningum ef þurfa þykir.

7.5.11.3. ..."

Álitaefni

16 Eftirfarandi spurningar voru bornar undir EFTA-dómstólinn:

1. *Stendur 4. gr. EES-samningsins því í vegi að sett verði í verksamning ákvæði um að við það verði miðað að þakeiningar verði smíðaðar á Íslandi?*

2. *Stendur 11. gr. EES-samningsins í vegi ákvæði af þessu tagi?*

17 Dómstóllinn hefur tekið til athugunar athugasemdir aðila málsins þess efnis að þýða ætti hugtakið "smíðaðar" á ensku sem "crafted" eða "constructed". Dómstóllinn tekur þó fram, að munur er á hugtökunum "settar saman", sem þýtt er sem "assembled", og "smíðaðar", sem þýtt er sem "crafted", "constructed" eða "produced". Dómstóllinn hefur tekið mið af athugasemdum aðilanna en mun hér eftir nota hugtakið "produced" um hugtakið "smíðaðar".

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 að því leyti sem forsendur álitsins krefjast.

Álit dómsins

Síðari spurningin

19 Með síðari spurningunni, sem dómstóllinn telur að leysa eigi úr á undan hinni fyrri, ber Hæstiréttur Íslands upp það álitaefni hvort 11. gr. EES-samningsins standi í vegi ákvæði í verksamningi um að við það verði miðað að þakeiningar verði smíðaðar á Íslandi.

Á 11. gr. EES-samningsins við í málinu ?

20 *Stefndu* halda því fram að ráðstafanir geti því aðeins brotið gegn 11. gr. EES-samningsins að þær séu gerðar af stjórnvaldi við meðferð opinbers valds og að þær séu bindandi og hafi tiltekin réttaráhrif. Byggingarnefndin fór ekki með opinbert vald meðan á samningaviðræðunum stóð. Því snýst málið hvorki um

a recommendation or any other decision published or enacted by a public authority in a unilateral manner. Section 3 of the works contract was freely negotiated by the parties. In the view of the Defendants then, what is at issue is a contract of private law between private parties that is not subject to Article 11 EEA.

21 Against this standpoint, the *Appellant* states that the award of the contract was a matter of public law because the works were subject to Act No. 63/1970 on awards of public works contracts and the Directive, and they were financed by the State and the municipalities. Furthermore, the address of the building committee was at the Ministry of Education and the individuals composing the building committee were high-ranking officials of the Ministries of Education and Finance and the City of Reykjavík General Council. The Appellant points out that Article 30 EC (now after modification Article 28 EC) is applicable even though a private undertaking is acting on behalf of a government.

22 The *Court* notes that it follows from the case law of the Court of Justice of the European Communities ("ECJ") that provisions contained in public works contract specifications may be caught by the prohibition in Article 30 EC (now after modification Article 28 EC), which corresponds to Article 11 EEA, see the judgments of the ECJ in Case 45/87 *Commission* v *Ireland* [1988] ECR 4929, and Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353.

23 In the present case, it is quite clear that the building committee acted on behalf of the Government and thus must be considered a public contracting authority. The committee itself was established by a contract between the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær. Its members were appointed by the Ministry of Education, the City of Reykjavík and the Municipality of Mosfellsbær. They were, in fact, essentially chosen from the ranks of these public entities. The funding of the committee is wholly provided by public means and, according to information received from the Defendants, the owners of the school building are the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær. These links between the State and the building committee bring the procurement activities of the building committee into the public law sphere.

24 Consequently, the Court finds that Article 11 EEA is, in principle, applicable to a clause such as the one at issue in the main proceedings.

Interpretation of Article 11 EEA

25 The *Appellant* states that the inclusion of a provision according to which roof elements are to be produced in Iceland is considered to have an effect equivalent to a quantitative restriction when applied to imports of roof elements from another Contracting Party. No evaluation was made to determine whether the roof elements offered by the Appellant and originating in Norway would meet the standards laid down in the Building Regulation or qualify for an exemption

ákvæði laga, stjórnvaldsfyrirmæli, tilmæli eða ákvörðun af öðru tagi sem stjórnvald hefur einhliða birt eða ákveðið. Efni 3. gr. verksamningsins er niðurstaða aðilanna í frjálsum samningi. Stefndu telja því að um sé að ræða samning, einkaréttarlegs eðlis, milli einkaaðila, sem falli ekki undir ákvæði 11. gr. EES-samningsins.

21 Þar á móti heldur *áfrýjandi* því fram að útboðið hafi átt undir opinberan rétt, þar sem lög nr. 63/1970 um skipan opinberra framkvæmda hafi átt við um verkið sem og tilskipun 93/37/EBE og þar sem verkið hafi verið fjármagnað af ríkinu og sveitarfélögunum. Þá hafi heimilisfang byggingarnefndarinnar verið hjá menntamálaráðuneytinu og þeir sem sæti áttu í byggingarnefndinni verið háttsettir embættismenn menntamálaráðuneytis og fjármálaráðuneytis, sem og borgarlögmaður. Áfrýjandi bendir á að 30. gr. Stofnsáttmála Evrópubandalagsins (hér eftir "Stofnsáttmála EB") (eftir breytingu 28. gr. Stofnsáttmála EB) eigi við þótt einkafyrirtæki komi fram fyrir hönd ríkisstjórnar.

22 *Dómstóllinn* telur að það leiði af fordæmum dómstóls Evrópubandalaganna ("dómstóls EB") að ákvæði í skilmálum opinbers verksamnings geti fallið undir bannið í 30. gr. Stofnsáttmála EB (eftir breytingu 28. gr. Stofnsáttmála EB) sem svarar til 11. gr. EES-samningsins, sjá dóma dómstóls EB í máli 45/87 *Framkvæmdastjórnin* gegn *Írlandi* [1988] ECR 4929[2] og í máli C-243/89 *Framkvæmdastjórnin* gegn *Danmörku* [1993] ECR I-3353.

23 Það er ljóst að í máli þessu kom byggingarnefndin fram fyrir hönd ríkisstjórnarinnar og verður því að teljast opinbert samningsyfirvald. Nefndinni var komið á með samningi milli ríkisstjórnar Íslands, Reykjavíkurborgar og Mosfellsbæjar. Þeir sem sæti áttu í nefndinni voru tilnefndir af menntamálaráðuneytinu, Reykjavíkurborg og Mosfellsbæ og voru að mestu valdir úr röðum embættismanna þessarra opinberu aðila. Hið opinbera bar allan kostnað vegna nefndarinnar og samkvæmt upplýsingum frá stefndu eru ríkisstjórn Íslands, Reykjavíkurborg og Mosfellsbær eigendur skólahússins. Þessi tengsl milli ríkisins og byggingarnefndarinnar leiða til þess að verkkaup byggingarnefndarinnar eiga undir opinberan rétt.

24 Því telur dómstóllinn að 11. gr. EES-samningsins verði beitt um ákvæði eins og það sem um er fjallað í aðalmálinu.

Skýring 11. gr. EES-samningsins

25 *Áfrýjandi* heldur því fram að samningsákvæði um að þakeiningar skuli smíðaðar á Íslandi sé talið hafa samsvarandi áhrif og magntakmarkanir á innflutningi, þegar ákvæðinu er beitt um innflutning á þakeiningum frá öðru aðildarríki EES-samningsins. Ekkert mat hafi verið lagt á það hvort þær þakeiningar sem áfrýjandi bauð og voru upprunnar í Noregi fullnægðu þeim kröfum sem byggingarreglugerð gerir, eða hvort undanþága frá ákvæðum reglugerðarinnar

[2] European Court Reports, þ.e. dómasafn dómstóls EB

from the provisions of that regulation. Moreover, the Icelandic building authorities have granted exemptions for the use of the roof elements at issue here on two occasions prior to the tender for Borgarholtsskóli and on at least one occasion since that tender for other, similar projects.

26 Against this argument, the *Defendants* contend that the parties simply decided to use quality roof elements which were in conformity with the Building Regulation. This did not restrict in any way the freedom of the Appellant to import roof elements into Iceland. The parties only intended to ensure a certain quality of the work and that the work could be carried out in conformity with Icelandic legislation. The solution offered by the Appellant comprised the use of unventilated roof elements and fulfilled neither of those conditions. The Building Regulation stated in substance that only ventilated roof elements are allowed to be used in buildings. The Defendants maintain that such roof elements are the only ones proven to provide sufficient protection under Icelandic weather conditions, although exemptions from the Building Regulation have, on a few occasions, been granted by the competent authorities.

27 The Defendants point out that a new Building Regulation No. 441/1998 (*Byggingarreglugerð*) came into force in July 1998. That regulation still requires that roof elements made of wood or wooden material are to be ventilated unless an equally good solution is provided for.

28 According to the *Government of Norway*, the *EFTA Surveillance Authority* and the *Commission of the European Communities*, Article 11 EEA covers all measures concerning production that may restrict imports between EEA Contracting Parties. The effect of a provision in a works contract requiring that roof elements be produced in Iceland may be to preclude the use of imported roof elements. Therefore, it discriminates against foreign production.

29 The *Court* notes that Article 11 EEA corresponds to Article 30 EC (now after modification Article 28 EC). According to the case law of the ECJ, this provision prohibits, as measures having an equivalent effect to quantitative restrictions on imports, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see judgment in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837). The EFTA Court has adopted the same view with regard to Article 11 EEA (Cases E-5/96 *Ullensaker kommune and Others* v *Nille* [1997] EFTA Court Report 30; E-6/96 *Tore Wilhelmsen AS* v *Oslo kommune* [1997] EFTA Court Report 53).

30 The present case concerns the issue of whether a provision in a public works contract requiring that roof elements be produced in Iceland is compatible with Article 11 EEA. It is clear that the effect of such a provision is to preclude the use of imported roof elements for the work in question. The clause thus constitutes a restriction on trade within the meaning of the case law cited above and, consequently infringes Article 11 EEA.

gæti náð til þeirra. Þá hafi íslensk byggingaryfirvöld veitt undanþágur og heimilað notkun þeirra þakeininga sem hér um ræðir fyrir sambærileg verkefni. Hafi undanþágur verið veittar í tvígang áður en útboðið vegna Borgarholtsskóla fór fram og a.m.k. einu sinni eftir útboðið.

26 Gegn þessu halda *stefndu* því fram að aðilarnir hafi aðeins ákveðið að nota þakeiningar í háum gæðaflokki sem væru í samræmi við ákvæði byggingarreglugerðar. Slíkt hafi ekki á nokkurn hátt takmarkað frelsi áfrýjanda til að flytja þakeiningar til Íslands. Ætlun aðilanna hafi aðeins verið að tryggja ákveðin gæði verksins og það að verkið mætti vinna í samræmi við íslensk lög. Lausn áfrýjandans hafi falið í sér notkun óloftaðra þakeininga og uppfyllt hvorugt framangreindra skilyrða. Samkvæmt efni byggingarreglugerðarinnar hafi aðeins mátt nota loftaðar þakeiningar í byggingum. Stefndu halda því fram að loftaðar þakeiningar séu þær einu sem sannað sé að veiti nægilega vörn við íslensk veðurskilyrði þótt undanþágur frá ákvæðum byggingarreglugerðarinnar hafi nokkrum sinnum verið veittar af þar til bærum yfirvöldum.

27 Stefndu vekja athygli á að ný byggingarreglugerð, nr. 441/1998, gekk í gildi í júlí 1998. Þar er þess enn krafist að þakeiningar úr timbri eða trjákenndum efnum séu loftaðar, nema önnur jafngóð lausn sé tryggð.

28 *Ríkisstjórn Noregs*, *Eftirlitsstofnun EFTA* og *framkvæmdastjórnin* telja að 11. gr. EES-samningsins taki til allra ráðstafana sem lúta að framleiðslu, sem geta takmarkað innflutning milli samningsaðila EES-samningsins. Áhrif ákvæðis í verksamningi þar sem þess er krafist að þakeiningar verði smíðaðar á Íslandi geta verið þau að koma í veg fyrir notkun innfluttra þakeininga. Það felur því í sér mismunun gagnvart erlendri framleiðslu.

29 *Dómstóllinn* tekur fram að 11. gr. EES-samningsins svarar til 30. gr. Stofnsáttmála EB (eftir breytingu 28. gr. Stofnsáttmála EB). Samkvæmt fordæmum dómstóls EB bannar ákvæðið allar reglur um viðskipti settar af aðildarríkjum sem eru til þess fallnar að hindra viðskipti innan bandalagsins, beint eða óbeint, hugsanlega eða raunverulega. Eru þessar reglur taldar hafa samsvarandi áhrif og magntakmarkanir á innflutningi (sjá dóm í máli 8/74 *Procureur du Roi* gegn *Dassonville* [1974] ECR 837). EFTA-dómstóllinn hefur skýrt 11. gr. EES-samningsins með sama hætti (mál E-5/96 *Ullensaker kommune o.fl.* gegn *Nille* [1997] EFTA Court Report[3] 30; E-6/96 *Tore Wilhelmsen AS* gegn *Oslo kommune* [1997] EFTA Court Report 53).

30 Mál þetta lýtur að því hvort ákvæði í opinberum verksamningi sem mælir fyrir um að þakeiningar verði smíðaðar á Íslandi sé samrýmanlegt 11. gr. EES-samningsins. Það er ljóst að slíkt ákvæði hefur þau áhrif að koma í veg fyrir að innfluttar þakeiningar verði notaðar við umrætt verk. Ákvæðið felur því í sér takmarkanir á viðskiptum í skilningi dómafordæma þeirra sem fyrr er vísað til og brýtur því gegn ákvæðum 11. gr. EES-samningsins.

[3] Report of the EFTA Court, þ.e. Skýrsla EFTA-dómstólsins.

31 In the case at hand the contested clause was not part of the specifications that were the basis for the tender procedure, as was the situation in the cited judgments of the ECJ. The contested clause was inserted into the final contract at the contract stage after the bids in the tender had been received and considered, at the contracting authority's request. This can, however, not lead to a different assessment with regard to the applicability of Article 11 EEA, as the post-tender negotiations cannot be separated from the procedure itself. The contract was concluded after a tender procedure under the Directive had been carried out. The contract is so closely linked to the preceding procedure that the principles underlying the Directive and the provisions of Article 11 EEA must apply to it.

32 A provision in a works contract requiring that roof elements be produced in Iceland is contrary to Article 11 EEA. By including the clause: "The contractor's main tender is the basis for the contract and it is agreed that roof elements will be produced in the country", the Defendants excluded all products made abroad. This amounts to clear discrimination in favour of national production.

Justification under Article 13 EEA

33 In the opinion of the *Defendants*, section 3 of the works contract can be justified under Article 13 EEA. Particular reference is made in that Article to the protection of health and life of humans. The Defendants argue that extraordinary geographical conditions, especially weather conditions, may justify a contractor and a purchaser of work stipulating in their contract that roof elements must be produced in the country, so that a purchaser may monitor construction and take the relevant measures to ensure conformity with domestic legislation.

34 The *Government of Norway* submits that neither Article 13 EEA nor the principle set out in Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (hereinafter "*Cassis de Dijon*") is applicable in this case.

35 According to the *EFTA Surveillance Authority*, the clause in question is overtly discriminatory. It cannot be justified by reference to the mandatory requirements recognized by the ECJ in *Cassis de Dijon* and subsequent case law nor under Article 13 EEA.

36 In the opinion of the *Commission of the European Communities*, a justification under Article 13 EEA or on other grounds based on the need to keep the work under review and to impose strict requirements regarding quality and finish is not possible.

37 The *Court* notes that the arguments of the Defendants concerning a possible justification under Article 13 EEA cannot be upheld. If a Contracting Party claims to need protection from dangerous imported products, it will have to satisfy the Court that its actions are genuinely motivated by health concerns, that they are apt to achieve the desired objective and that there are no other means of achieving protection that are less restrictive of trade. In the case at hand, the

31 Í þessu máli var hið umdeilda ákvæði ekki í þeim skilmálum sem lágu til grundvallar útboðinu, en svo var í þeim dómum dómstóls EB sem áður er vísað til. Hið umdeilda ákvæði var sett inn í endanlegan samning að kröfu samningsyfirvalds, á því stigi samningsgerðar er tilboð höfðu borist og þau höfðu verið athuguð. Þetta getur þó ekki leitt til annarrar niðurstöðu að því er lýtur að beitingu 11. gr. EES-samningsins, þar sem samningaumleitanir eftir útboð verða ekki greindar frá útboðinu sjálfu. Gengið var frá samningum í kjölfar útboðs samkvæmt tilskipun 93/37/EBE. Samningurinn er svo tengdur undanfarandi útboði að meginreglur þær sem liggja til grundvallar tilskipuninni og ákvæði 11. gr. EES-samningsins hljóta að taka til hans.

32 Ákvæði í verksamningi um að við það verði miðað að þakeiningar verði smíðaðar á Íslandi brýtur gegn 11. gr. EES-samningsins. Með því að setja í samninginn eftirfarandi ákvæði: “Til grundvallar er lagt aðaltilboð verktaka og við það miðað að þakeiningar verði smíðaðar hérlendis” útilokuðu stefndu alla framleiðslu erlendis frá. Þetta felur í sér greinilega mismunun innlendri framleiðslu í hag.

Rök til réttlætingar samkvæmt 13. gr. EES-samningsins

33 *Stefndu* telja að réttlæta megi 3. gr. verksamningsins með vísan til 13. gr. EES-samningsins. Í þeirri grein er sérstaklega vísað til verndar á lífi og heilsu manna. Stefndu byggja á því að sérstæð landfræðileg skilyrði, einkum veðurskilyrði, geti réttlætt að verktaki og verkkaupi miði við það í samningi sínum að þakeiningar verði að smíða innanlands, svo að verkkaupi geti haft eftirlit með smíðinni og geti gripið til viðeigandi ráðstafana til að tryggja að innlendum lögum sé fylgt.

34 *Ríkisstjórn Noregs* heldur því fram að hvorki 13. gr. EES-samningsins né regla sú sem kemur fram í máli 120/78 *Rewe* gegn *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (hér eftir “*Cassis de Dijon*”) eigi við í málinu.

35 *Eftirlitsstofnun EFTA* telur að ákvæðið feli í sér beina mismunun. Það verði hvorki réttlætt með tilvísun til þeirra lögmætu sjónarmiða sem dómstóll EB hefur fallist á í *Cassis de Dijon* og síðari dómum, né samkvæmt 13. gr. EES-samningsins.

36 *Framkvæmdastjórnin* telur að réttlæting samkvæmt 13. gr. EES-samningsins eða á öðrum grunni, sem byggist á því að nauðsynlegt hafi verið að fylgjast með verkinu og gera strangar kröfur um gæði og frágang, sé ekki tæk.

37 *Dómstóllinn* telur ekki unnt að fallast á rök stefndu samkvæmt 13. gr. EES-samningsins. Ef samningsaðili ber því við að vernd gegn hættulegum innfluttum vörum sé nauðsynleg verður viðkomandi ríki að sannfæra dómstólinn um að aðgerðir þess ráðist í raun af sjónarmiðum um heilbrigði, að þær séu til þess fallnar að ná því markmiði sem að er stefnt og að ekki séu aðrar leiðir færar til að ná því markmiði, sem hafi minni áhrif á viðskipti. Í máli þessu hafa stefndu ekki

Defendants have not shown that the use of roof elements built in Norway could lead to a danger for the health and life of humans within the meaning of Article 13 EEA. On the contrary, it is undisputed that the authorities in Iceland have granted an exemption for the use of the roof elements in other cases. Therefore, a provision which *a priori* favours certain products by a mere reference to their origin cannot be considered as necessary or proportionate within the meaning of Article 13 EEA.

38 Furthermore, the provision in question leads to overt discrimination and, therefore, cannot be justified by reference to mandatory requirements within the meaning of the case law of the ECJ (*Cassis de Dijon*) on Article 30 EC (now after modification Article 28 EC).

The first question

39 In its first question, the national court seeks to ascertain whether Article 4 EEA prohibits the inclusion in a works contract of a provision to the effect that the roof elements are to be produced in Iceland.

40 The *Appellant* contends that Article 4 EEA may be applied independently of other articles prohibiting discrimination in the areas covered by the four freedoms. The *EFTA Surveillance Authority* concurs with this view as regards the free movement of goods.

41 The *Defendants*, the *Government of Norway* and the *Commission of the European Communities* are of the opinion that Article 4 EEA does not apply in a case covered by Article 11 EEA.

42 Article 4 EEA provides, as a general principle that, within the scope of application of the Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. It follows both from the wording of the provision and from the case law of the ECJ concerning the corresponding provision in Article 12 EC (ex Article 6 EC) that Article 4 EEA applies independently only to situations governed by EEA law in regard to which the EEA Agreement lays down no specific rules prohibiting discrimination, see e.g. the judgment of the ECJ in Case C-379/92 *Peralta* [1994] ECR I-3453. Since the *Court* has found the contested clause to be contrary to Article 11 EEA, it is not necessary to examine whether it is contrary to Article 4 EEA.

Costs

43 The costs incurred by the Government of Norway, the EFTA Surveillance Authority and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the

sýnt fram á að notkun þakeininga sem smíðaðar eru í Noregi geti verið hættuleg lífi og heilsu manna í skilningi 13. gr. EES-samningsins. Það er þvert á móti óumdeilt að stjórnvöld á Íslandi hafa veitt undanþágur og leyft notkun þakeininganna í öðrum tilvikum. Því er ákvæði sem fyrirfram dregur taum tiltekinna vara, með einni saman skírskotun til uppruna þeirra, hvorki nauðsynlegt né hóflegt samkvæmt 13. gr. EES-samningsins.

38 Þá leiðir hið umdeilda ákvæði til beinnar mismununar og verður því ekki réttlætt með vísan til viðurkenndra lögmætra sjónarmiða í skilningi fordæma dómstóls EB um 30. gr. Stofnsáttmála EB (eftir breytingu 28. gr. Stofnsáttmála EB) (*Cassis de Dijon*).

Fyrri spurningin

39 Með fyrri spurningunni leitar Hæstiréttur Íslands svara við því hvort 4. gr. EES-samningsins standi í vegi fyrir því að sett verði í verksamning ákvæði um að við það verði miðað að þakeiningar verði smíðaðar á Íslandi.

40 *Áfrýjandi* heldur því fram að 4. gr. EES-samningsins megi beita sjálfstætt og án tengsla við önnur ákvæði sem banna mismunun á þeim sviðum sem fjórfrelsið nær til. *Eftirlitsstofnun EFTA* er sömu skoðunar, að því er lýtur að frjálsum vöruflutningum.

41 *Stefndu*, *ríkisstjórn Noregs* og *framkvæmdastjórnin* telja að 4. gr. verði ekki beitt í máli sem 11. gr. tekur til.

42 Ákvæði 4. gr. EES-samningsins mælir fyrir um þá meginreglu að hvers konar mismunun á grundvelli ríkisfangs sé bönnuð á gildissviði samningsins nema annað leiði af einstökum ákvæðum hans. Það leiðir bæði af orðalagi ákvæðisins og af fordæmum dómstóls EB um samsvarandi ákvæði 12. gr. Stofnsáttmála EB (áður 6. gr. Stofnsáttmála EB) að 4. gr. EES-samningsins verður aðeins beitt sjálfstætt um þau tilvik sem falla undir gildissvið samningsins sem önnur sértækari ákvæði samningsins er banna mismunun taka ekki til, sjá t.d. dóm dómstóls EB í máli C- 379/92 *Peralta* [1994] ECR I-3453). Þar sem dómstóllinn hefur komist að þeirri niðurstöðu að hið umdeilda ákvæði brjóti gegn 11. gr. EES-samningsins er ekki nauðsynlegt að taka til skoðunar hvort það brýtur gegn 4. gr. EES-samningsins.

Málskostnaður

43 Ríkisstjórn Noregs, Eftirlitsstofnun EFTA og Framkvæmdastjórn Evrópubandalaganna, sem hafa skilað greinargerðum til dómstólsins, skulu bera sinn málskostnað. Að því er lýtur að aðilum málsins verður að líta á málsmeðferð fyrir EFTA-dómstólnum sem þátt í meðferð málsins fyrir Hæstarétti Íslands og

proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by Hæstiréttur Íslands by the request of 26 June 1998, hereby gives the following Advisory Opinion:

> **A provision in a public works contract that has been inserted after the tender procedure at the contracting authority's request and which states that roof elements required for the works are to be produced in Iceland constitutes a measure having effect equivalent to a quantitative restriction prohibited by Article 11 EEA. Such a measure cannot be justified on grounds of protection of the health and life of humans under Article 13 EEA.**

Bjørn Haug　　Thór Vilhjálmsson　　Carl Baudenbacher

Delivered in open court in Luxembourg on 12 May 1999.

Gunnar Selvik
Registrar

Bjørn Haug
President

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 Hæstiréttur Íslands beindi til dómstólsins með beiðni frá 26. júní 1998

Ákvæði í opinberum verksamningi sem tekið er upp í samning eftir að útboð hefur farið fram að kröfu samningsyfirvalds og er þess efnis að þakeiningar sem nota þarf til verksins verði smíðaðar á Íslandi er ráðstöfun sem hefur samsvarandi áhrif og magntakmarkanir á innflutningi sem 11. gr. EES-samningsins leggur bann við. Slík ráðstöfun verður ekki réttlætt með vísan til verndar á lífi og heilsu manna samkvæmt 13. gr. EES-samningsins.

Bjørn Haug | Þór Vilhjálmsson | Carl Baudenbacher

Kveðið upp í heyranda hljóði í Lúxemborg 12. maí 1999.

Gunnar Selvik
dómritari

Bjørn Haug
forseti

REPORT FOR THE HEARING
in Case E-5/98

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 Hæstiréttur Íslands (Supreme Court of Iceland) in a case on appeal between

Fagtún efh.

and

Byggingarnefnd Borgarholtsskóla, the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær

on the interpretation of Articles 4 and 11 of the EEA Agreement.

I. Introduction

1. By an order dated 26 June 1998, registered at the EFTA Court on the same day, the Supreme Court of Iceland made a request for an Advisory Opinion in a case on appeal between Fagtún efh. (a private limited-liability company) (hereinafter the "Appellant") and Byggingarnefnd Borgarholtsskóla (the building committee of Borgarholt school, hereinafter referred to individually as the "building committee") the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær (hereinafter collectively the "Defendants").

II. Facts and procedure

2. In January 1995, an invitation to submit tenders for the award of a public contract for construction work for the school Borgarholtsskóli was sent out. The contracting authorities were the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær, and tenders were to be submitted to the State Trading Centre (*Ríkiskaup*). The building committee was the purchaser of the work and was responsible for contacts with tenderers. Act No. 65/1993 relating to the procedures for the award of contracts (*Lög um framkvæmd útboða*) was applicable to the award of the contract in question and, in the contract terms, an Icelandic standard (IST 30) was referred to as a part of the contractual documents. Byrgi ehf., a private limited-liability company, submitted a tender. As the use of roof elements was prescribed in the contractual documents, the company contacted the Appellant, which imports roof elements from Norway, asking for a tender regarding that particular part of the work. On 2 February 1995, the Appellant submitted a tender to Byrgi ehf. comprising the roof elements and their installation. The tender referred to the relevant points in the description of the work to be carried out contained in the contract notice. The Appellant's tender was for a total of 30 642 770 Icelandic crowns. In the tender, the Appellant stated that information regarding the work would be submitted, but that an application for an exemption from Building Regulation No. 177/1992 (*Byggingareglugerð*, hereinafter the "Building Regulation") would be required regarding the

SKÝRSLA FRAMSÖGUMANNS
í máli E-5/98

BEIÐNI um ráðgefandi álit EFTA-dómstólsins, samkvæmt 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls, frá Hæstarétti Íslands í áfrýjunarmálinu

Fagtún ehf.

gegn

Byggingarnefnd Borgarholtsskóla, íslenska ríkinu, Reykjavíkurborg og Mosfellsbær

varðandi túlkun 4. og 11. gr. EES-samningsins.

I. Inngangur

1. Með beiðni dagsettri 26. júní 1998, sem skráð var hjá dómstólnum sama dag, óskaði Hæstiréttur Íslands eftir ráðgefandi áliti í áfrýjunarmáli milli Fagtúns ehf. (hér eftir "áfrýjandi") og Byggingarnefnd Borgarholtsskóla (hér eftir "byggingarnefndin"), íslenska ríkinu, Reykjavíkurborg og Mosfellsbæ (hér eftir "stefndu").

II. Málavextir og meðferð málsins

2. Í janúar 1995 voru boðnar út framkvæmdir við byggingu Borgarholtsskóla í Reykjavík. Útboðið var á vegum íslenska ríkisins, Reykjavíkurborgar og Mosfellsbæjar og skyldi tilboðum skilað til Ríkiskaupa. Verkkaupi var byggingarnefnd skólans og kom hún fram gagnvart bjóðendum. Um útboð þetta giltu lög um framkvæmd útboða nr. 65/1993 og í útboðsskilmálum kom fram að íslenskur staðall, ÍST 30, væri hluti útboðsgagna. Byrgi ehf. bauð í verkið og þar sem útboðsgögn gerðu ráð fyrir, að notaðar yrðu þakeiningar til verksins hafði fyrirtækið samband við áfrýjanda, sem flytur inn þakeiningar frá Noregi, og falaðist eftir tilboði í þann verkþátt. Með bréfi 2. febrúar 1995 gerði áfrýjandi Byrgi ehf. tilboð í þakeiningarnar og uppsetningu þeirra. Var í tilboðinu vísað til viðeigandi liða í verklýsingu útboðsins. Samtals bauðst áfrýjandi til að vinna verkið fyrir 30.642.770 krónur. Fram var tekið í tilboði hans að allar upplýsingar varðandi verkið yrðu lagðar fram, en sækja yrði um undanþágu frá byggingarreglugerð vegna þakeininganna. Áfrýjandi segir Byrgi ehf. hafa tekið þessu tilboði og

roof elements. The Appellant maintains that Byrgi ehf. accepted the tender and used it when submitting its own tender to *Ríkiskaup*. Byrgi ehf. submitted the lowest tender for the contract, but in the subsequent negotiations the building committee requested the use of roof elements assembled in Iceland. A works contract was concluded, wherein section 3 reads: "The contractor's main tender is the basis for the contract and it is agreed that roof elements will be produced in the country". The Appellant submits that this condition of the works contract precluded use of the imported roof elements, resulting in his losing the works contract.

3. By a letter of 9 June 1995 to the Ministry of Finance, the Appellant objected to the above-mentioned section of the works contract. The Appellant submitted that section 3 was contrary to Act No. 65/1993 relating to the procedures for the award of contracts, rules regarding public procurement and works within the European Economic Area, as well as the Government's policy regarding awards of public work contracts.

4. The Defendants point out that it was noted in the description of the works to be carried out that drawings included in the contractual documents did not show the fully-designed structural systems of the roof, and that the contractor was supposed to submit to the purchaser of the work the final drawings and ensure necessary approvals from the public building authorities of the structural system and technical solutions. The building committee's letter of 13 September 1995 states that the reason for the agreement that the roof elements should be produced or assembled in Iceland is so the work may be kept under review, as the committee imposes strict requirements regarding quality and finish and seeks to avoid unknown solutions which are subject to a special exception from the provisions of the Building Regulation, granted by the public building authorities. Pursuant to the opinion of a consultant, the building committee estimated that this approach would result in a better roof.

5. The Appellant sued Byrgi ehf. in damages, claiming compensation for expenses relating to the preparation of the tender and for lost profit. Héraðsdómur Reykjaness (District Court of Reykjanes) rendered its judgment on 9 December 1996, concluding that section 3 of the works contract was contrary to Articles 4 and 11 of the Agreement on the European Economic Area (hereinafter variously "EEA" and "EEA Agreement"). The Court found that the unlawful provision in the works contract had, in effect, resulted in the rejection of the Appellant as a sub-contractor for the work. The rejection of the Appellant did not follow from objective reasons. The Appellant's claim for costs relating to the preparation of the tender was upheld. The claim for lost profit was rejected on the grounds that a binding contract had not been concluded between the Appellant and Byrgi ehf. according to IST 30, section 34.8.0.

6. On 19 June 1997, the Appellant brought a claim against the Defendants before Héraðsdómur Reykjavíkur (Reykjavík City Court) for compensation for lost profit. The City Court found in favour of the Defendants on the grounds that no works contract had been concluded between the Appellant and Byrgi ehf., and even less so between the Appellant and the Defendants. In its negotiations with Byrgi ehf., the building committee had rejected the Appellant as a sub-contractor and based itself on the roof elements being produced in the country. In the contractual documents it was not stated that the roof had to be produced in Iceland, and both options were available according to the contractual documents, in other words, the roof could be produced in Iceland or abroad. The Defendants' obligation to approve the material and the performance of the work proposed by the Appellant had not been substantiated and, in addition, the Appellant's solution was subject to a special approval by the public building authorities. Further, it was not considered substantiated that section 3 of the works contract between the Defendants and Byrgi ehf. infringed the EEA Agreement nor that there was such a relationship between the Appellant and the Defendants that it could be a basis for the Defendants' having to pay compensation to the Appellant.

notað það við gerð síns tilboðs til Ríkiskaupa. Byrgi ehf. varð lægstbjóðandi í verkið, en í samningaviðræðum sem fram fóru var af hálfu byggingarnefndar skólans farið fram á að notaðar yrðu þakeiningar, sem settar yrðu saman hér á landi. Verksamningur var síðan gerður og segir þar í 3. gr.: *"Til grundvallar er lagt aðaltilboð verktaka og við það miðað að þakeiningar verði smíðaðar hérlendis."* Áfrýjandi telur að vegna þessa skilyrðis verksamningsins hafi hinar innfluttu þakeiningar hans ekki komið til greina og hann því orðið af verkinu.

3. Með bréfi 9. júní 1995 mótmælti áfrýjandi því við fjármálaráðuneytið að þetta ákvæði hefði verið sett í verksamninginn. Taldi hann að með því væru brotin lög um framkvæmd útboða nr. 65/1993, reglur um opinber innkaup og framkvæmdir á Evrópska efnahagssvæðinu og einnig bryti það í bága við útboðsstefnu ríkisins.

4. Stefndu benda á að tekið hafi verið fram í verklýsingu að teikningar í útboðsgögnum hafi ekki verið af fullhönnuðum burðarvirkjum í þaki og hafi verktaki átt að leggja fram endanlegar teikningar til verkkaupa og afla nauðsynlegra samþykkta byggingaryfirvalda á burðarþoli og tæknilegum lausnum. Segir í bréfi byggingarnefndarinnar 13. september 1995 að ástæða þess að samið var um smíði eða samsetningu hérlendis hafi verið sú að með því hafi mátt fylgjast með þessari framkvæmd, enda vilji nefndin gera strangar kröfur um gæði og frágang og forðast lausnir er hún þekki ekki og háðar séu sérstakri undanþágu byggingaryfirvalda frá ákvæðum bygingarreglugerðar. Nefndin telji sig að höfðu samráði við ráðgjafa fá betra þak með þessum hætti.

5. Áfrýjandi höfðaði skaðabótamál á hendur Byrgi ehf. og krafðist bóta vegna kostnaðar við gerð tilboðsins og vegna tapaðs arðs. Héraðsdómur Reykjaness kvað upp dóm í því máli 9. desember 1996 og komst að þeirri niðurstöðu að umrætt ákvæði verksamningsins bryti í bága við 4. gr. og 11. gr. EES-samningsins. Áfrýjanda hafi í raun verið hafnað sem undirverktaka að umræddu verki vegna ólögmæts ákvæðis í verksamningi Byrgis ehf. og stefnda, en ekki af málefnalegum ástæðum. Hann þótti því eiga rétt á að fá bættan kostnað við tilboðsgerðina. Hins vegar var kröfu hans um efndabætur hafnað þar sem ekki var talið að komist hefði á bindandi samningur milli áfrýjanda og stefnda samkvæmt ÍST 30, grein 34.8.0.

6. Áfrýjandi þingfesti síðan skaðabótamál á hendur stefndu fyrir Héraðsdómi Reykjavíkur 19. júní 1997 til greiðslu bóta vegna tapaðs arðs af verkinu. Í héraðsdómi voru stefndu sýknaðir af þessum kröfum áfrýjanda með þeim rökum að ekki hefði komist á verksamningur milli áfrýjanda og Byrgis ehf. og þaðan af síður milli áfrýjanda og stefndu. Stefnda byggingarnefnd Borgarholtsskóla hafi í samningum við Byrgi ehf. hafnað áfrýjanda sem undirverktaka og miðað við að þakeiningar yrðu smíðaðar hérlendis. Í útboðsgögnum hafi hins vegar ekki verið minnst á það að þak yrði að vera smíðað hér á landi og hafi hvort tveggja getað komið til greina, samkvæmt útboðsgögnum, þ.e að þak yrði smíðað hérlendis eða erlendis. Ekki hafi verið sýnt fram á skyldu stefndu til að samþykkja það efni og þá útfærslu, sem áfrýjandi bauð upp á, auk þess sem sú lausn hafi verið háð sérstöku samþykki byggingaryfirvalda. Þá þótti ekki sannað að ákvæði 3. gr. verksamnings stefndu og Byrgis ehf. bryti í bága við ákvæði EES-samningsins eða að þau tengsl hefðu verið á milli áfrýjanda og stefndu sem gætu orðið grundvöllur bótagreiðslna stefndu.

7. Fagtún ehf. appealed the decision of Reykjavík City Court to the Supreme Court of Iceland on the grounds that the conclusion of the City Court that section 3 of the works contract does not infringe provisions of the EEA Agreement was incorrect.

8. The national court, considering that it was necessary for it to deliver judgment, decided to stay the proceedings and ask the EFTA Court to give an Advisory Opinion on the interpretation of the relevant parts of the EEA Agreement.

III. Questions

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

> "1 **Does Article 4 of the EEA Agreement prohibit the inclusion in a works contract of a provision to the effect that roof elements are to be produced in Iceland?**
>
> 2 **Does Article 11 of the EEA Agreement prohibit such a provision?"**

IV. Legal background

EEA law

10. The questions submitted by the national court concern the interpretation of Articles 4 and 11 EEA.

11. Article 4 EEA reads:

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

12. Article 11 EEA reads:

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

Icelandic law

13. Act No. 65/1993 relating to the procedures for the award of contracts applies when an award of a contract is used as a means to conclude contracts between two or more entities for works, goods or services.

14. Act No. 63/1970 relating to the procedures for the award of public works contracts (*Lög um skipan opinberra framkvæmda*) applies to construction or modification work which is partially or wholly financed by the Government, provided that the Government's cost is at least 1 000 000 Icelandic crowns.

7. Fagtún ehf. áfrýjaði dómi Héraðsdóms Reykjavíkur til Hæstaréttar Íslands og byggði á því að niðurstaða héraðsdóms um það að ákvæði 3. gr. verksamningsins bryti ekki gegn EES-samningnum væri röng.

8. Hæstiréttur Íslands taldi túlkun á ákvæðum EES-samningsins nauðsynlega áður en niðurstaða fengist, í málinu. Hæstiréttur frestaði því meðferð málsins og óskaði eftir ráðgefandi áliti EFTA-dómstólsins um túlkun á viðeigandi hlutum EES-samninsins.

III. Álitaefni

9. Eftirfarandi spurningar voru bornar undir EFTA-dómstólinn:

"1 Stendur 4. gr. EES-samningsins því í vegi að sett verði í verksamning ákvæði um að við það verði miðað að þakeiningar verði smíðaðar á Íslandi?

2 Stendur 11. gr. EES-samningsins í vegi ákvæði af þessu tagi?"

IV. Löggjöf

EES-réttur

10. Spurningar þær sem dómstóllinn hefur leitað svara við lúta að skýringu á 4. og 11. gr. EES-samningsins.

11. 4. gr. EES-samningsins hljóðar svo:

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

12. 11. gr. EES-samningsins hljóðar svo:

> "Magntakmarkanir á innflutningi, svo og allar ráðstafanir sem hafa samsvarandi áhrif, eru bannaðar milli samningsaðila."

Íslensk löggjöf

13. Lög nr. 65/1993 um framkvæmd útboða gilda þegar útboði er beitt til þess að koma á viðskiptum milli tveggja eða fleiri aðila um verk, vöru eða þjónustu.

14. Lög nr. 63/1970 um skipan opinberra framkvæmda gilda um gerð eða breytingu mannvirkis, sem kostuð er af ríkissjóði að nokkru eða öllu leyti, enda nemi kostnaður ríkissjóðs a.m.k. 1 milljón króna.

15. The Building Regulation lays down in section 7.5.11 rules for roofs and roof structures. That section reads:

> "7.5.11.1 Roofs shall be designed and constructed in such a way that damaging humidity condensation does not occur in the roof structure or on its inner surface.
> 7.5.11.2. In roofs made of wood or wood materials, ventilation openings shall be inserted and placed so that ventilation is even above the upper surface of the roof insulation. Ventilation shall be described in special designs and by calculations, if necessary.
> 7.5.11.3 ... "

V. Written Observations

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

- the Appellant, Fagtún ehf., represented by Counsel Jakob R. Möller;
- the Defendants, Byggingarnefnd Borgarholtsskóla, the Government of Iceland, the City of Reykjavík and the Municipality of Mosfellsbær, represented by Counsel Árni Vilhjálmsson, Attorney at Law, Adalsteinsson & Partners, assisted by Mr. Óttar Pálsson;
- the Government of Norway, represented by Jan Bugge-Mahrt, Royal Ministry of Foreign Affairs, acting as Agent;
- the EFTA Surveillance Authority, represented by Helga Óttarsdóttir and Bjarnveig Eiríksdóttir, Officers, Legal & Executive Affairs, acting as Agents;
- the Commission of the European Communities, represented by Michel Nolin, member of its Legal Service, and Michael Shotter, a national official seconded to the Commission under an arrangement for the exchange of officials, acting as Agents.

The first question

The Appellant

17. Referring to the case law of the Court of Justice of the European Communities (hereinafter the " ECJ"),[1] the Appellant is of the opinion that Article 4 EEA may be applied independently of other articles prohibiting discrimination in the areas covered by the four freedoms.

18. Contrary to the General and Specific Conditions for the Work, Tender Documents No. 6, Annex 1, 3.5.3 page 31, under which the roof was to be made of elements that might or might not be imported, the building committee was insisting that the elements might be of any nationality, provided that that nationality was Icelandic. By inserting a clause stating that the "...roof elements will be made in this country" into section 3 of the contract, the building committee behaved illegally.

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[1] Case 293/83 *Françoise Gravier* v *City of Liège* [1985] ECR 593; Case 59/85 *State of the Netherlands* v *Ann Florence Reed* [1986] ECR 1283; Joined Cases C-92/92 and C-326/92 *Phil Collins* v *Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul* v *EMI Electrola GmbH* [1993] ECR I-5145.

15. Grein 7.5.11. í byggingarreglugerð nr. 177/1992 geymir reglur um þök og þakvirki. Greinin hljóðar svo:

> "7.5.11.1. Þök skulu þannig hönnuð og byggð að ekki komi til skaðlegrar rakaþéttingar í þakvirkinu eða á innra byrði þess.
> 7.5.11.2. Á þökum úr timbri eða trjákenndum efnum skal komið fyrir útloftunarraufum, þannig staðsettum að jöfn útloftun sé yfir efra byrði þakeinangrunar. Gera skal grein fyrir útloftun á séruppdráttum og einnig með útreikningum ef þurfa þykir.
> 7.5.11.3. ..."

V. Greinargerðir

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

- Áfrýjanda, Fagtúni ehf. Í fyrirsvari er Jakob R. Möller hrl.;

- Stefndu, Byggingarnefnd Borgarholtsskóla, ríkisstjórn Íslands, Reykjavíkurborg og Mosfellsbæ. Í fyrirsvari er Árni Vilhjálmsson hrl. og honum til aðstoðar er Óttar Pálsson;

- Ríkisstjórn Noregs. Í fyrirsvari sem umboðsmaður er Jan Bugge-Mahrt, Konunglega utanríkisráðuneytinu;

- Eftirlitsstofnun EFTA. Í fyrirsvari sem umboðsmenn eru Helga Óttarsdóttir og Bjarnveig Eiríksdóttir, lögfræðingar í lagadeild;

- Framkvæmdastjórn Evrópubandalaganna (hér eftir "Framkvæmdastjórnin"). Í fyrirsvari sem umboðsmenn eru Michel Nolin, lögfræðingur í lagadeild, og Michael Shotter, sérfræðingur frá aðildarríki sem starfar fyrir framkvæmdastjórnina samkvæmt sérstöku samkomulagi um skipti á embættismönnum;

Fyrri spurningin

Áfrýjandi

17. Áfrýjandi telur að beita megi 4. gr. EES-samningsins sjálfstætt og án tengsla við önnur ákvæði sem banna mismunun á þeim sviðum sem fjórfrelsið nær til. Þessu til stuðnings vísar áfrýjandi til fordæma dómstóls Evrópubandalaganna (hér eftir dómstóll EB)[1].

18. Í andstöðu við hina almennu og sértæku verklýsingu, sbr. útboðsgögn nr. 6, viðauki 1, 3.5.3., bls. 31, þar sem fram kom að þak skyldi vera gert úr einingum sem gætu hvort sem er verið innlendar eða innfluttar, krafðist byggingarnefndin þess að einingarnar gætu verið hvaðan sem væri, að því tilskildu að þær væru íslenskar. Með því að bæta orðunum "...þakeiningar verði

[1] Mál nr. 293/83 *Françoise Gravier* gegn *City of Liège* [1985] ECR 593 [European Court Reports, þ.e. dómasafn dómstóls EB]; Mál nr. 59/85 *State of the Netherlands* gegn *Ann Florence Reed* [1986] ECR 1283; Sameinuð mál nr. C-92/92 og C-326/92 *Phil Collins* gegn *Imtrat Handelsgesellschaft mbH og Patricia Im- und Export Verwaltungsgesellschaft mbH og Leif Emanuel Kraul* gegn *EMI Electrola GmbH* [1993] ECR I-5145.

19. The Appellant proposes the following answer to the first question:

> *"Article 4 of the EEA Agreement prohibits* inter alia *the inclusion in a works contract of a provision to the effect that roof elements are to be produced in Iceland, to such extent as the inclusion of such a provision discriminates against products made in the country of another Contracting Party."*

The Defendants

20. The Defendants are of the opinion that Article 4 EEA is mainly an instrument which can be used when interpreting more specific provisions of the EEA Agreement or secondary legislation. As regards the free movement of goods, Article 11 EEA has given effect to the general rule of Article 4 EEA. Whereas the measure in question can only be held to be contrary to the Agreement if it is not in conformity with the more specific article, the Defendants submit that it has no actual meaning for the EFTA Court to examine whether Article 4 has been breached.

The Government of Norway

21. The Government of Norway states that Article 4 of the EEA Agreement prohibits all discrimination on grounds of nationality within the scope of application of the Agreement. It is forbidden to subject nationals of other EEA States to more stringent rules than a country's own nationals.

22. In the view of the Norwegian Government, contractual provisions laid down by national authorities entailing that a production process shall wholly or partly be carried out in a specific EEA State give rise to discrimination and undermine the competitiveness of suppliers established in other EEA States.

23. According to the case law of the ECJ[2], the need to ensure that a product satisfies given specifications cannot justify this discriminatory treatment.

24. Furthermore, the prohibition on discrimination in Article 4 EEA is not applicable in so far as it is otherwise provided for in special provisions of the EEA Agreement.

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

> *"Article 4 of the EEA Agreement prohibits contractual conditions laid down by the national authorities requiring that roof elements shall be produced in Iceland, unless otherwise provided in special provisions set out in the Agreement."*

The EFTA Surveillance Authority

26. The EFTA Surveillance Authority refers to the case law of the ECJ.[3] It then points out that the application of Article 4 is to be "without prejudice to any special provisions contained [in the Agreement]".

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[2] Case 287/81 *Anklagemyndigheden* v *Jack Noble Kerr* [1982] ECR 4053; *inter alia* Joined Cases 124/76 and 20/77 *SA Moulins & Huileries de Pont-à-Mousson* v *Office National Interprofessionnel des Céréales et Société Coopérative "Providence agricole de la Champagne"* v *Office National Interprofessionnel des céréales* [1977] 1795.

smíðaðar hérlendis" inn í 3. gr. samningsins gerði byggingarnefndin sig seka um ólögmæta háttsemi.

19. Áfrýjandi leggur til að fyrri spurningunni verði svarað svo:

"4. gr. EES-samningsins stendur í vegi fyrir því, m.a., að ákvæði um að við það verði miðað að þakeiningar verði smíðaðar á Íslandi sé bætt inn í verksaming, að svo miklu leyti sem það leiðir til mismununar gagnvart vörum sem framleiddar eru í ríkjum annarra samningsaðila."

Stefndu

20. Stefndu álíta að 4. gr. EES-samningsins hafi einkum þýðingu sem skýringargagn við túlkun sértækari ákvæða EES-samningsins eða afleiddrar löggjafar. Á sviði frjálsra vöruflutninga kemur hin almenna regla 4. gr. EES-samningsins fram í 11. gr. hans. Stefndu byggja á því að það hafi ekki raunhæfa þýðingu að EFTA-dómstóllinn taki afstöðu til þess hvort brotið hafi verið gegn 4. gr. samningsins, þar sem sú aðgerð sem um er fjallað verði aðeins talin brjóta gegn ákvæðum EES-samningsins ef hún er í ósamræmi við sértækara ákvæðið.

Ríkisstjórn Noregs

21. Ríkisstjórn Noregs heldur því fram að 4. gr. EES-samningsins banni hvers konar mismunun á grundvelli ríkisfangs á gildissviði samningsins. Það er bannað að beita strangari reglum um þegna annarra aðildarríkja EES-samningsins en eiga við um þegna viðkomandi ríkis.

22. Norska ríkisstjórnin telur að ákvæði samnings sem ákveðin eru af stjórnvöldum ríkis og fela í sér að framleiðsla skuli fara fram, að hluta eða öllu leyti, í tilteknu aðildarríki EES-samningsins feli í sér mismunun og veiki samkeppnisstöðu birgja í öðrum EES-ríkjum.

23. Samkvæmt dómum dómstóls EB[2] getur þörf á að tryggja það að framleiðsluvara fullnægi tilteknum kröfum ekki réttlætt slíka mismunun.

24. Þá verður að líta til þess að bann 4. gr. EES-samningsins við mismunun á ekki við að svo miklu leyti sem sérstök ákvæði samningsins taka til tilviksins.

25. Ríkisstjórn Noregs leggur til að fyrri spurningunni verði svarað svo:

"Ákvæði 4. gr. EES-samnigsins bannar að stjórnvöld setji samningsskilyrði þar sem þess er krafist að þakeiningar séu smíðaðar á Íslandi, nema annað leiði af einstökum ákvæðum samningsins."

Eftirlitsstofnun EFTA

26. Eftirlitsstofnun EFTA vísar til fordæma dómstóls EB[3]. Þá bendir Eftirlitsstofnunin á að 4. gr. eigi við "nema annað leiði af einstökum ákvæðum [samningsins]".

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2 Mál nr. 287/81 *Anklagemyndigheden* gegn *Jack Noble Kerr* [1982] ECR 4053; M.a. sameinuð mál nr. 124/76 og 20/77 *SA Moulins & Huileries de Pont-à-Mousson* gegn *Office National Interprofessionnel des Céréales* og *Société Coopérative "Providence agricole de la Champagne"* gegn *Office National Interprofessionnel des céréales* [1977] 1795.

27. Article 6 of the Treaty Establishing the European Community (hereinafter "EC") forbids not only discrimination by reason of nationality, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. National measures giving rise to indirect discrimination based on nationality are only held to be incompatible with Article 6 EC if they are incapable of being justified by objective circumstances.[4]

28. Although the aim of ensuring compliance with national legislation is legitimate as such, the Defendants have failed to prove that the requirement to produce the roof elements in Iceland is necessary in order to ensure compliance with national legislation. It has not been demonstrated that this aim cannot be ensured by less restrictive means, such as sufficient supervision or reference to international standards.

29. The EFTA Surveillance Authority submits that a provision in a works contract stipulating that roof elements needed for the work have to be produced in Iceland constitutes discrimination based on nationality contrary to Article 4 EEA.

The Commission of the European Communities

30. The Commission of the European Communities, referring to Article 6 EC and related case law,[5] states that Article 4 EEA applies only to situations for which the Agreement lays down no specific rules prohibiting discrimination. Article 11 EEA should thus be seen as a specific rule of the EEA Agreement implementing the general principle prohibiting discrimination on grounds of nationality. Therefore, only the second question posed by the national court need be examined here.

The second question

The Appellant

31. The Appellant states that the inclusion of a provision according to which roof elements are to be produced in Iceland is considered to have an effect equivalent to a quantitative restriction when applied to imports of roof elements from another Contracting Party. In this connection, the Appellant makes reference to the case law of the ECJ.[6]

32. Concerning the argument of the Defendants that they acted as a private party, the Appellant points out that the award of the contract was a matter of public law because the works were subject to Icelandic Act No. 63/1970 on awards of public works contracts and Directive 93/36 EEC. Furthermore, the works were financed by the State and the municipalities, the address of the building committee was at the Ministry of Education and the individuals composing the building committee were high-ranking officials of the Ministries of Education

3 Case 305/87 *Commission* v *Hellenic Republic* [1989] ECR 1461; Case C-10/90 *Maria Masgio* v *Bundesknappschaft* [1991] ECR I-1119.

4 Case C-398/92 *Mund & Fester* v *Hatrex Internationaal Transport* [1994] ECR I-467; Case C-29/95 *Pastoors and Others* [1997] ECR I-285.

5 Case C-379/92 *Criminal proceedings against Matteo Peralta* [1994] I-3453.

6 Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837 (hereinafter "*Dassonville*"); Case 120/78 *Rewe-Centrale AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (hereinafter "*Cassis de Dijon*"); Case 45/87 *Commission* v *Ireland* [1988] ECR 4929.

27. Ákvæði 6. gr. Stofnsáttmála Evrópubandalagsins (hér eftir Stofnsáttmála EB) bannar ekki aðeins mismunun á grundvelli ríkisfangs, en tekur til hvers konar óbeinnar mismununar sem fyrir tilstilli annarra aðgreinandi atriða leiðir í raun til sömu niðurstöðu. Innlendar ráðstafanir sem leiða til óbeinnar mismununar, á grundvelli ríkisfangs, eru þó því aðeins í ósamræmi við 6. gr. Stofnsáttmála EB að þær verði ekki réttlættar með hlutlægum sjónarmiðum[4].

28. Þótt það sé í sjálfu sér lögmætt markmið að tryggja það að farið sé að innlendri löggjöf hafa stefndu ekki sýnt fram á að það að krafan um smíði þakeininga á Íslandi sé nauðsynleg til að ná því markmiði. Ekki hefur verið sýnt fram á að markmiðinu yrði ekki náð með aðferðum sem væru síður íþyngjandi, s.s. með fullnægjandi eftirliti eða vísan til alþjóðlegra staðla.

29. Eftirlitsstofnun EFTA heldur því fram að ákvæði í verksamningi sem mælir fyrir um að þakeiningar sem notaðar eru til verksins verði að vera smíðaðar á Íslandi feli í sér mismunun á grundvelli ríkisfangs sem brjóti gegn 4. gr. EES-samningsins.

Framkvæmdastjórn Evrópubandalaganna

30. Framkvæmdastjórnin telur að 4. gr. EES-samningsins taki aðeins til aðstæðna sem önnur sértækari ákvæði EES-samningsins sem banna mismunun taka ekki til. Í þessu efni vísar framkvæmdastjórnin til 6. gr. Stofnsáttmála EB og dómaframkvæmdar sem tengist þeirri grein.[5] Líta verður á ákvæði 11. gr. EES-samningsins sem sértækt ákvæði hans sem orðar hina almennu meginreglu um bann við mismunun á grundvelli ríkisfangs. Af þeim sökum þarf eingöngu að fjalla um síðari spurninguna sem dómstóllinn hefur óskað ráðgefandi álits um.

Síðari spurningin

Áfrýjandi

31. Áfrýjandi heldur því fram að líta beri á það að setja í samning ákvæði um að þakeiningar skuli vera smíðaðar á Íslandi þannig að það hafi samsvarandi áhrif og magntakmarkanir á innflutningi, þegar ákvæðið á við um innflutning á þakeiningum frá öðru aðildarríki EES-samningsins. Áfrýjandi vísar í þessu sambandi til fordæma dómstóls EB.[6]

32. Að því er lýtur að þeim röksemdum stefndu að þeir hafi komið fram sem einkaaðili, bendir áfrýjandi á að útboðið hafi átt undir opinberan rétt þar sem lög nr. 63/1970 um skipan opinberra framkvæmda áttu við, sem og tilskipun 93/36/EBE. Þá var verkið kostað af ríkinu og sveitarfélögunum, heimilisfang byggingarnefndarinnar var hjá menntamálaráðuneytinu og þeir sem sæti áttu í byggingarnefndinni voru háttsettir embættismenn menntamálaráðuneytis og

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3 Mál nr. 305/87 *Framkvæmdastjórnin* gegn *Grikklandi* [1989] ECR 1461; Mál nr. C-10/90 *Maria Masgio* gegn *Bundesknappschaft* [1991] ECR I-1119.

4 Mál nr. C-398/92 *Mund & Fester* gegn *Hatrex Internationaal Transport* [1994] ECR I-467; Mál nr. C-29/95 *Pastoors o.fl.* [1997] ECR I-285.

5 Mál nr. C-379/92 *Criminal proceedings against Matteo Peralta* [1994] I-3453.

6 Mál nr. 8/74 *Procureur du Roi* gegn *Dassonville* [1974] ECR 837 (hér eftir "*Dassonville*"); Mál nr. 120/78 *Rewe-Centrale AG* gegn *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (hér eftir "*Cassis de Dijon*"); Mál nr. 45/87 *Framkvæmdastjórnin* gegn *Írlandi* [1988] ECR 4929.

and Finance and the City of Reykjavík General Council. Referring to the case law of the ECJ,[7] the Appellant points out that Article 30 EC is applicable even though a private undertaking is acting on behalf of a government.

33. The clause "The contractor's main tender is the basis for the contract and it is agreed that roof elements will be made in this country" in section 3 of the contract is a measure having equivalent effect to a quantitative restriction on imports and is thus a breach of Article 11 EEA.

34. According to this term of the contract, all products that were not made in Iceland were excluded. Consequently, no subjective evaluation was made to determine whether the roof elements offered by the Appellant and originating in Norway would meet the standards laid down in the Building Regulation or qualify for an exemption from the provisions of that regulation.

35. The Appellant argues that it is not disputed that the roof elements comply with Norwegian legislation. It is thus contrary to the principle of mutual recognition to base a decision on the fact that production has taken place in Norway.

36. Furthermore, the Icelandic building authorities have granted exemptions for the use of the roof elements at issue here on two occasions prior to the tender for Borgarholtsskóli and on at least one occasion since that tender for other, similar projects.

37. An administrative practice, such as granting an exemption from the provisions of the Building Regulation, can constitute a measure prohibited under Article 11 EEA, if that practice does not show a certain degree of consistency and generality.

38. Furthermore, contracts which are concluded after a tender cannot be structured as to favour domestic producers. The principle that public procurement decisions should be taken without preference to domestic tender offers is clearly evident in the case law of the ECJ.[8]

39. Reference is made to Article 19(3) of Council Directive 93/37/EEC, according to which a Contracting Party cannot refuse a product offered in a public procurement procedure on the basis that it is produced under another Contracting Party's technical standards, such as building regulations.

40. The Appellant proposes the following answer to the second question:

> *"Article 11 of the EEA Agreement prohibits specifically quantitative restrictions on imports and all measures having equivalent effect between the Contracting Parties. The inclusion of a provision that roof elements are to be produced in Iceland is considered to have such equivalent effect when applied to imports of roof elements from another Contracting Party."*

The Defendants

41. The Defendants argue that measures can only be held to be contrary to Article 11 EEA if they are taken by an authority exercising its public power,[9] if they are binding in nature and if they have certain legal effects.[10]

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[7] Case 249/81 *Commission* v *Ireland* [1982] ECR 4005.

[8] Case 45/87 *Commission* v *Ireland* [1988] ECR 4929.

[9] Case 311/85 *VZW Vereniging van Vlaamse Reisbureaus* v *VZW Soziale Dienst van de Plaatselijke en Geweselijke Overheidsdiensten* [1987] 3801.

fjármálaráðuneytis, sem og borgarlögmaður. Áfrýjandi vísar til fordæma dómstóls EB[7] og bendir á að 30. gr. Stofnsáttmála EB eigi við þótt einkafyrirtæki komi fram fyrir hönd ríkisstjórnar.

33. Ákvæðið "Til grundvallar er lagt aðaltilboð verktaka og við það miðað að þakeiningar verði smíðaðar hérlendis" í 3. gr. samningsins er ráðstöfun sem hefur samsvarandi áhrif og magntakmarkanir á innflutningi og brýtur því gegn 11. gr. EES-samningsins.

34. Þetta ákvæði samningsins útilokaði allar vörur sem ekki voru framleiddar á Íslandi. Því fór ekki fram sértækt mat til að ákvarða hvort þær þakeiningar sem áfrýjandi bauð, og voru upprunnar í Noregi, fullnægðu þeim kröfum sem byggingarreglugerð gerir, eða hvort undanþága frá ákvæðum reglugerðarinnar gæti náð til þeirra.

35. Áfrýjandi staðhæfir að ekki sé vefengt að þakeiningarnar séu í samræmi við ákvæði norskra laga. Það fer því gegn meginreglunni um gagnkvæma viðurkenningu að byggja ákvörðun á þeirri staðreynd að vara er framleidd í Noregi.

36. Þá hafa íslensk byggingaryfirvöld veitt undanþágur fyrir þær þakeiningar sem hér um ræðir fyrir sambærileg verkefni. Voru undanþágur veittar í tvígang áður en útboðið vegna Borgarholtsskóla fór fram og a.m.k. einu sinni eftir útboðið.

37. Stjórnsýsluframkvæmd eins og veiting undanþága frá ákvæðum byggingarreglugerðar, getur falið í sér ráðstöfun sem bönnuð er samkvæmt 11. gr. EES-samningsins, ef framkvæmdin einkennist ekki í vissum mæli af því að vera almenn og sjálfri sér samkvæm.

38. Einnig ber til þess að líta að ekki má laga samninga sem gerðir eru eftir útboð að hagsmunum innlendra framleiðenda. Meginreglan um að ákvarðanir um opinber innkaup skuli teknar án þess að innlendum tilboðum sé hyglað er greinileg í framkvæmd dómstóls EB[8].

39. Vísað er til 3. mgr. 19. gr. í tilskipun ráðsins 93/37/EBE, þar sem segir að samningsaðila EES-samningsins sé óheimilt að hafna vöru sem boðin er eftir opinbert útboð á þeim forsendum að hún sé framleidd samkvæmt tækniforskriftum annars samningsaðila, þ. á m. byggingarreglugerðum.

40. Áfrýjandi leggur til eftirfarandi svar við síðari spurningunni:

> *"Ákvæði 11. gr. EES-samningsins bannar sérstaklega á milli samningsaðila magntakmarkanir á innflutningi, svo og allar ráðstafanir sem hafa samsvarandi áhrif. Það að setja í samning ákvæði um að þakeiningar skuli vera smíðaðar á Íslandi er álitið hafa slík samsvarandi áhrif þegar ákvæðið á við um innflutning þakeininga frá ríki annars samningsaðila."*

Stefndu

41. Stefndu halda því fram að ráðstafanir geti því aðeins brotið gegn 11. gr. EES-samningsins að þær séu gerðar af stjórnvaldi við meðferð opinbers valds[9] og að þær séu bindandi og hafi tiltekin réttaráhrif.[10]

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[7] Mál nr. 249/81 *Framkvæmdastjórnin* gegn *Írlandi* [1982] ECR 4005.

[8] Mál nr. 45/87 *Framkvæmdastjórnin* gegn *Írlandi* [1988] ECR 4929.

[9] Mál nr. 311/85 *VZW Vereniging van Vlaamse Reisbureaus* gegn *VZW Soziale Dienst van de Plaatselijke en Geweselijke Overheidsdiensten* [1987] 3801.

42. The building committee did not exercise any public power during the contract negotiations. Consequently, this case does not concern a provision of a legislative act, an administrative rule, a recommendation or any other decision published or enacted by a public authority in a unilateral manner.

43. If the EFTA Court should come to the conclusion that the Defendants have acted contrary to Article 11 EEA, it would be giving that Article a broader scope than Article 30 EC. Such an interpretation would be contrary to the primary objective of the EEA Agreement because the EFTA Court has limited powers to interpret the EEA Agreement in such a dynamic way as would be the case if a provision of a works contract like the one in issue were caught by Article 11 EEA.

44. In the present case, the parties simply decided to use quality roof elements which were in conformity with the Building Regulation. This did not restrict in any way the freedom of the Appellant to import roof elements into Iceland.

45. Should the EFTA Court come to the conclusion that Article 11 EEA is applicable, section 3 of the works contract cannot be regarded as constituting a discriminatory measure on grounds of nationality because, by negotiating *inter alia* section 3 of the works contract, the parties only intended to ensure a certain quality of work and that the work could be carried out in conformity with Icelandic legislation. The solution offered by the Appellant comprised the use of unventilated roof elements and fulfilled neither of those conditions.

46. According to the Building Regulation, only ventilated roof elements are allowed to be used in buildings. Ventilated roof elements provide sufficient protection under Icelandic weather conditions. Exemptions from the Building Regulation have, on a few occasions, been granted by the competent authorities.

47. The Defendants mention that, since July 1998, a new building regulation has come into force which still requires that roof elements made of wood or wooden material are to be ventilated. Other kinds of material may be used only if an "equally good solution" is provided for.

48. Furthermore, section 3 of the works contract should not be read as excluding imported roof elements. The English translation of section 3 in the works contract is inaccurate where it reads "produced in the country". It should have read "constructed in the country" or even "assembled in the country". The latter term is used in the English version of the request for an advisory opinion. The translation also appears to be imprecise where it says "it is agreed". An interpretation closer to the meaning of the Icelandic words "við það miðað" would be "assumed" which is not as unconditional as the English translation indicates. In fact, no actual distinction is made between imported and domestic goods, since the import of foreign material for construction or assembly in the country is not excluded.

49. In any event, section 3 of the works contract can be justified under Article 13 EEA. Particular reference is made in that Article to the protection of health and life of humans. The Defendants argue that extraordinary geographical conditions, especially weather conditions, may justify a contractor and a purchaser of work agreeing in their contract that roof elements must be constructed in the country, so that a purchaser may monitor the construction and take the relevant measures to ensure conformity with domestic legislation.

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10 *Dassonville*; Case 249/81 *Commission* v *Ireland* [1982] ECR 4005; Case 21/84 *Commission* v *French Republic* [1985] 1355.

42. Byggingarnefndin fór ekki með opinbert vald meðan á samningaviðræðunum stóð. Því snýst málið hvorki um ákvæði laga, stjórnvaldsfyrirmæli, tilmæli eða ákvörðun af öðru tagi sem stjórnvald hefur einhliða birt eða ákveðið.

43. Ef EFTA-dómstóllinn kemst að þeirri niðurstöðu að stefndu hafi brotið gegn 11. gr. EES-samningsins felur sú niðurstaða í sér að inntak greinarinnar er rýmra en ákvæði 30. gr. Stofnsáttmála EB. Slík túlkun væri andstæð meginmarkmiði EES-samningsins, þar sem EFTA-dómstóllinn hefur takmörkuð völd til að túlka EES-samninginn með svo framsæknum hætti og raunin væri, ef ákvæði verksamnings eins og þess sem um er fjallað hér væru talin falla undir 11. gr. samningsins.

44. Í þessu máli ákváðu aðilarnir einfaldlega að nota góðar þakeiningar sem voru í samræmi við ákvæði byggingarreglugerðar. Þetta takmarkaði ekki á nokkurn hátt frelsi áfrýjanda til að flytja þakeiningar til Íslands.

45. Ef EFTA-dómstóllinn kemst að þeirri niðurstöðu að 11. gr. EES-samningsins eigi við, verður ekki litið svo á að 3. gr. verksamningsins feli í sér ráðstöfun sem mismunar á grundvelli ríkisfangs, þar sem ætlun aðilanna, m.a. með 3. gr. verksamningsins, var aðeins að tryggja ákveðin gæði verksins og það að verkið mætti vinna í samræmi við íslensk lög. Lausn áfrýjandans fól í sér notkun óloftaðra þakeininga og uppfyllti hvorugt framangreindra skilyrða.

46. Samkvæmt byggingarreglugerð má aðeins nota loftaðar þakeiningar í byggingum. Loftaðar þakeiningar veita nægilega vörn í íslenskum veðurskilyrðum. Undanþágur frá ákvæðum byggingarreglugerðarinnar hafa í nokkrum tilvikum verið veittar af þar til bærum yfirvöldum.

47. Stefndu vekja athygli á að ný byggingarreglugerð gekk í gildi í júlí 1998 og er þess enn krafist að þakeiningar úr timbri eða trjákenndum efnum séu loftaðar. Önnur efni má eingöngu nota ef slíkt býður upp á "jafngóða lausn".

48. Þá telja stefndu að 3. gr. verksamningsins eigi ekki að lesa þannig að hún útiloki innfluttar þakeiningar. Þýðing á 3. gr. verksamningsins á ensku er ónákvæm þar sem segir "produced in the country. [Aths. Í íslenskum texta segir "smíðaðar hérlendis"]. Hér ætti að standa "constructed in the country" eða jafnvel "assembled in the country". Síðargreinda hugtakið er notað í enskri þýðingu á beiðni um ráðgefandi álit. Þýðingin virðist einnig vera ónákvæm þar sem segir "it is agreed". Þýðing sem væri nær merkingu íslensku orðanna "við það miðað" væri "assumed", sem er ekki eins skilyrðislaust og enska þýðingin gefur til kynna. Í raun er enginn munur gerður á innfluttum og innlendum vörum, þar sem innflutningur á erlendu efni til smíða eða samsetningar innanlands er ekki útilokaður.

49. Hvað sem öðru líður má réttlæta 3. gr. verksamningsins með vísan til 13. gr. EES-samningsins. Í þeirri grein er sérstaklega vísað til verndar á lífi og heilsu manna. Stefndu byggja á því að hin sérstæðu landfræðilegu skilyrði, einkum veðurskilyrði, geti réttlætt að verksali og verkkaupi miði við það í samningi sínum að þakeiningar verði að smíða innanlands, svo að verkkaupi geti haft eftirlit með smíðinni og geti gripið til viðeigandi ráðstafana til að tryggja að innlendum lögum sé fylgt.

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[10] *Dassonville*; Mál 249/81 *Framkvæmdastjórnin* gegn *Írlandi* [1982] ECR 4005; Mál 21/84 *Framkvæmdastjórnin* gegn *Frakklandi* [1985] 1355.

50. The Defendants propose answering the second question as follows:

> *"Neither Article 4 nor Article 11 of the EEA Agreement prohibit the inclusion in a works contract of a provision to the effect that roof elements are to be constructed in the country whereas the works contract is only binding in the contractual relationship of the two parties of which neither is acting within public powers".*

The Government of Norway

51. According to the Norwegian Government, Article 11 EEA affects all measures concerning the production that may restrict imports between EEA States, and thereby could prevent the EEA market from functioning as a market without borders.

52. Referring to the *Storebælt*[11] judgment of the ECJ, the Norwegian Government argues that non-discrimination towards suppliers is a fundamental principle of all public procurement. Contractual conditions which require the use of materials produced in a specific country are contrary to Article 11 EEA. Such conditions involve an import barrier and are thus not in keeping with the principle of free movement of goods and services.

53. Concerning the issue of possible justification, it is stated that neither Article 13 EEA nor the *Cassis de Dijon* principle are applicable in this case.

54. The Norwegian Government proposes answering the second question as follows:

> *"Article 11 of the EEA Agreement must be understood to mean that requirements regarding a product's producer country are to be regarded as barriers to import and in violation of Article 11 EEA."*

The EFTA Surveillance Authority

55. Referring to case law,[12] the EFTA Surveillance Authority states that the effect of a provision in a works contract requiring that roof elements be produced in Iceland is to preclude the use of imported roof elements.

56. Due to the overtly discriminatory character of the provision, it cannot be justified by reference to the mandatory requirements recognized by the ECJ in *Cassis de Dijon* and subsequent case law. A provision which *a priori* favours certain products by a mere reference to their origin cannot be justified under Article 13 EEA.

57. The EFTA Surveillance Authority proposes the following answer to the questions:

> *"A provision in a works contract to the effect that roof elements needed for the works are to be produced in Iceland is contrary to Articles 4 and 11 of the EEA Agreement."*

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11 Case C-243/89 *Commission* v *Kingdom of Denmark* [1993] I-3353.

12 *Dassonville*; Case 45/87 *Commission* v *Ireland* [1988] ECR 4929; Case C-243/89 *Commission* v *Kingdom of Denmark* [1993] I-3353; Case E-5/96 *Ullensaker kommune and Others* v *Nille AS* [1997] EFTA Ct. Rep. 32; Case E-6/96 *Tore Wilhelmsen AS* v *Oslo kommune* [1997] EFTA Ct. Rep. 56.

50. Stefndu leggja til eftirfarandi svar við síðari spurningunni:

"Hvorki 4. gr. né 11. gr. EES-samningsins standa því í vegi að sett verði í verksamning ákvæði um að við það verði miðað að þakeiningar verði smíðaðar innanlands, þar sem verksamningurinn er aðeins bindandi fyrir aðila samningsins og hvorugur fer þá með opinbert vald."

Ríkisstjórn Noregs

51. Ríkisstjórn Noregs heldur því fram að 11. gr. EES-samningsins lúti að öllum ráðstöfunum sem varða framleiðslu sem geta takmarkað innflutning milli EES-ríkja og þannig hindrað það að EES-markaðurinn virki eins og markaður án landamæra.

52. Með vísan til Stórabeltisdóms[11] dómstóls EB heldur ríkisstjórn Noregs því fram að reglan um bann við mismunun milli birgja sé meginregla í öllum opinberum innkaupum. Samningsskilyrði sem krefjast þess að efni framleitt í tilteknu landi sé notað eru andstæð ákvæðum 11. gr. EES-samningsins. Slík skilyrði fela í sér innflutningshindrun og eru því í ósamræmi við meginregluna um frjálst flæði vöru og þjónustu.

53. Að því er lýtur að mögulegum réttlætingarástæðum er því haldið fram að hvorki 13. gr. EES-samningsins né "*Cassis de Dijon*" meginreglan eigi við í þessu máli.

54. Ríkisstjórn Noregs telur að svara eigi síðari spurningunni svo:

"Skýra verður 11. gr. EES-samningsins svo að líta verði á kröfur um framleiðsluland vöru sem innflutingshindrun og brot á 11. gr. EES-samningsins."

Eftirlitsstofnun EFTA

55. Með vísan til dómaframkvæmdar[12] telur Eftirlitsstofnun EFTA að áhrif ákvæðis í verksamningi þar sem þess er krafist að þakeiningar séu smíðaðar á Íslandi séu þau að útiloka notkun innfluttra þakeininga.

56. Þar sem um er að ræða ákvæði sem felur í sér beina mismunun verður það ekki réttlætt með vísan til þeirra lögmætu sjónarmiða sem dómstóll EB hefur viðurkennt í *Cassis de Dijon* og síðari dómum. Ákvæði sem fyrirfram (*a priori*) tekur tilteknar vörur fram yfir aðrar með vísan til uppruna þeirra verður ekki réttlætt með vísan til 13. gr. EES-samningsins.

57. Eftirlitsstofnun EFTA leggur til eftirfarandi svar við spurningunum:

"Ákvæði í verksamningi sem gerir ráð fyrir því að þakeiningar sem þarf til verksins skuli smíðaðar á Íslandi brýtur gegn ákvæðum 4. gr. og 11. gr. EES-samningsins."

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[11] Mál nr. C-243/89 *Framkvæmdastjórnin* gegn *Danmörku* [1993] I-3353.

[12] *Dassonville*; Mál nr. 45/87 *Framkvæmdastjórnin* gegn *Írlandi* [1988] ECR 4929; Mál nr. C-243/89 *Framkvæmdastjórnin* gegn *Danmörku* [1993] I-3353; Mál nr. E-5/96 *Ullensaker kommune o.fl.* gegn *Nille AS* [1997] EFTA Ct. Rep. 32; [Report of the EFTA Court, þ.e. Skýrsla EFTA-dómstólsins]; Mál nr. E-6/96 *Tore Wilhelmsen AS* gegn *Oslo kommune* [1997] EFTA Ct. Rep. 56.

The Commission of the European Communities

58. The Commission of the European Communities refers to the case law of the ECJ[13] and considers that the clause contained in section 3 of the works contract should be found incompatible with Article 11 EEA because it amounts to clear discrimination in favour of national production.

59. It makes no difference that the original contract documents on which the tenders were based were not explicit that roof elements should be produced in Iceland and that this specification only arose as part of the negotiating process with Byrgi ehf. The decisive point is that discrimination results from the inclusion in the final contract, at the request of the building committee, of terms that are incompatible with Article 11 EEA. The post-tender negotiations cannot be separated from the tender procedure. This would be contrary to the principle of the equal treatment of tenderers.

60. A justification under Article 13 EEA or on other grounds based on the need to keep the work under review and to impose strict requirements regarding quality and finish is not possible.

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

> *"Articles 4 and 11 of the EEA Agreement prohibit the inclusion in a public works contract of a provision to the effect that roof elements are to be produced in Iceland."*

Carl Baudenbacher
Judge-Rapporteur

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13 See footnote 12 and Case C-21/88 *Du Pont de Nemours Italiana SpA* v *Unità sanitaria locale No 2 di Carrara* [1990] I-889.

Framkvæmdastjórn Evrópubandalaganna

58. Framkvæmdastjórnin vísar til fordæma dómstóls EB[13] og lítur svo á að lýsa ætti ákvæði 3. gr. verksamningsins ósamrýmanlegt 11. gr. EES-samningsins þar sem það felur í sér greinilega mismunun innlendri framleiðslu í hag.

59. Það breytir engu þar um að í upphaflegu útboðsgögnunum, sem tilboðin byggðust á, var þess ekki ljóslega getið að þakeiningar skyldu vera smíðaðar á Íslandi, og að þessi krafa kom fyrst upp í samningaviðræðum við Byrgi ehf. Það sem úrslitum ræður er að ákvæði sem er ósamrýmanlegt 11. gr. EES-samningsins og var sett inn í endanlegan samning að ósk byggingarnefndarinnar leiðir til mismununar. Ekki er unnt að aðskilja samningaumleitanir eftir að útboð hefur farið fram frá útboðinu sjálfu. Slíkt væri í andstöðu við meginregluna um jafnræði bjóðenda.

60. Réttlæting samkvæmt 13. gr. EES-samningsins eða á öðrum grunni, sem byggist á því að nauðsynlegt hafi verið að fylgjast með verkinu og gera strangar kröfur um gæði og frágang, er ekki tæk.

61. Framkvæmdastjórnin leggur til að síðari spurningunni verði svarað svo:

"Ákvæði 4. og 11. gr. EES-samningsins banna að í opinberan verksamning sé sett ákvæði um að við það verði miðað að þakeiningar verði smíðaðar á Íslandi."

Carl Baudenbacher
framsögumaður

13 Sjá neðanmálsgrein 12 og mál nr. C-21/88 *Du Pont de Nemours Italiana SpA* gegn *Unità sanitaria locale No 2 di Carrara* [1990] I-889.

Case E-6/98

Government of Norway
v
EFTA Surveillance Authority

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – General measures – Effect on trade – Aid schemes)

Judgment of the Court, 20 May 1999 76
Report for the Hearing 101

Summary of the Judgment

1. As a general rule, a tax system of an EEA/EFTA State is not covered by the EEA Agreement. In certain cases, however, such a system may have consequences that would bring it within the scope of application of Article 61(1) EEA.

2. The system of regionally differentiated social security contributions must be seen as favouring certain undertakings within the meaning of Article 61(1) EEA, unless it can be shown that the selective effect of the measures is justified by the nature or general scheme of the system itself. Any direct or indirect discrimination which is to be considered justified must derive from the inherent logic of the general system and result from objective conditions within that general system. These criteria are not satisfied in the present case, where differentiation is based on regional criteria alone.

3. When examining the compatibility with the EEA Agreement of aid granted in accordance with an existing aid scheme, a decision on the matter will relate to the scheme itself and not to individual aids granted under the scheme. In such a case, the EFTA Surveillance Authority may confine itself to examining the characteristics of the scheme in question in order to determine whether, by reason of the high amounts or percentages of aid, or the nature or the terms of the aid, it gives an

appreciable advantage to recipients in relation to their competitors and is likely to benefit undertakings engaged in trade between Contracting Parties.

4. When State aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid. For that purpose, it is not necessary for the beneficiary undertaking itself to export its products. Where a Member State grants aid to an undertaking, domestic production may, for that reason, be maintained or increased, with the result that undertakings established in other Member States have less chances of exporting their products to the market in that Member State.

5. To fulfil the requirements of Article 16 of the Surveillance and Court Agreement, a decision by the EFTA Surveillance Authority must set out, in a concise but clear and relevant manner, the principal issues of law and fact upon which it is based and which are necessary in order that the reasoning which led the EFTA Surveillance Authority to its decision may be understood.

6. The Decision can not be annulled for lack of reasoning covering factors other than those warranting the granting of regional transport aid. It is the obligation of the EFTA Surveillance Authority, in considering a revised system of regional aid, to consider all aspects of the matter.

7. The application is accordingly dismissed, and the Government of Norway is ordered to bear the costs of the EFTA Surveillance Authority.

JUDGMENT OF THE COURT
20 May 1999

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – General measures – Effect on trade – Aid schemes)

In Case E-6/98

The Government of Norway, represented by Messrs. Ingvald Falch, Office of the Attorney General (Civil Affairs) and Jan Bugge-Mahrt, Assistant Director General, Royal Ministry of Foreign Affairs, acting as Agents, P.O. Box 8012 Dep., Oslo, Norway

applicant,

v

EFTA Surveillance Authority, represented by Mr Håkan Berglin, Director, Legal and Executive Affairs Department, acting as Agent, 74 rue de Trèves, Brussels, Belgium,

defendant,

APPLICATION for annulment of Decision No. 165/98/COL of 2 July 1998 of the EFTA Surveillance Authority with regard to State aid in the form of regionally differentiated social security taxation (Norway) (Aid No. 95-010),

THE COURT

Composed of: Bjørn Haug, President, Carl Baudenbacher and Thór Vilhjálmsson (Judge-Rapporteur), Judges,

Registrar: Gunnar Selvik,

having regard to the written observations of the parties and the written observations of the Commission of the European Communities, represented by Mr James Flett of its Legal Service, acting as Agent,

having regard to the revised Report for the Hearing,

after hearing oral argument from the parties and the oral observations of the Commission of the European Communities at the hearing on 3 March 1999,

gives the following

Judgment

Procedure before the EFTA Surveillance Authority

1 Under the National Insurance Act of 28 February 1997 (*Folketrygdloven*), replacing a former act of 17 June 1966, all persons residing or working in Norway are subject to a compulsory insurance scheme under which employees and employers pay social security contributions. The scheme covers benefits such as pensions, rehabilitation, medical care, wage compensation and unemployment benefits. Social security contribution rates are decided annually by the Norwegian parliament as part of the fiscal budget. Both revenues and expenditure items are fully integrated into the fiscal budget.

2 The contributions levied on employers are calculated on the basis of the individual employee's gross salary income. A system of regionally differentiated contribution rates ranging from 0 to 14.1% is in place, with the contribution rate depending on the zone where the employee has his or her registered permanent residence. The system of regionally differentiated contribution rates was introduced in 1975 and various adjustments have been made since then. The geographical scope of the zones was last revised in 1988. Since 1 January 1995, the applicable contribution rates have been the following:

Zone 1: Central municipalities in southern Norway	14.1 per cent
Zone 2: Rural districts in southern Norway	10.6 per cent
Zone 3: Coastal area mid-Norway	6.4 per cent
Zone 4: Northern Norway (except zone 5)	5.1 per cent
Zone 5: Spitzbergen/Finnmark/Northern part of Troms	0 per cent

3 The system applies to salaries paid to employees both in the private and the public sector except for the central government, which pays the maximum rate regardless of the residence of the employees. It applies to foreign employees residing in Norway if they are covered by the national social security system.

4 Concluding, after initial examination, that the scheme of regionally differentiated social security contributions in Norway involved State aid within the meaning of Article 61(1) of the Agreement on the European Economic Area (hereinafter variously the "EEA Agreement" and "EEA") and that a general exemption was not warranted, the EFTA Surveillance Authority, in a letter dated 14 May 1997, proposed appropriate measures to Norway, in accordance with Article 1(1) of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter "Protocol 3" and the "Surveillance and Court Agreement", respectively). In examining the matter, the EFTA Surveillance Authority commissioned a study by an independent consultant on the economic effects of the scheme.[1]

5 The Government of Norway responded that it could not concur with the EFTA Surveillance Authority's proposal for appropriate measures, *inter alia* because the rules in question were part of the general taxation system and thus fell outside the scope of Article 61(1) EEA. The Government of Norway commissioned separate studies regarding certain aspects of the system, such as the effects on wage formation[2] and on the relationship between additional transport costs and the lower social security contributions in tax zones 2-5 for individual export and import competing enterprises in the manufacturing and mining industries, excluding producers of steel and shipbuilding activities.

6 Having followed the procedure provided for in Article 1(2) of Protocol 3, on 2 July 1998, the EFTA Surveillance Authority rendered Decision No. 165/98/COL with regard to State aid in the form of regionally differentiated social security taxation (Norway) (Aid No. 95-010) (hereinafter the "Decision"). The EFTA

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1 Arild Hervik (Norwegian School of Management): "Benefits from reduced pay-roll taxes in Norway" 1996.

2 Dr. oecon Nils Martin Stølen (Statistics Norway) "Effects on wages from changes in pay-roll taxes in Norway. The Government of Norway referred to further studies regarding the same issues, *i.e.* Frode Johansen and Tor Jakob Klette (Statistics Norway) "Wage and Employment Effects of Payroll Taxes and Investment Subsidies" 1997.

Surveillance Authority found that the system provided, through the State budget, a benefit to certain enterprises and must be regarded as constituting State aid. It further found that the lower rates were not justified by the nature and general scheme of the system. The EFTA Surveillance Authority also concluded that the aid involved distorted or threatened to distort competition within the European Economic Area. It further examined whether the exceptions in Article 61(3)(a) and (c) EEA were applicable and found that no areas in Norway qualified for regional aid on the basis of Article 61(3)(a) EEA. With regard to Article 61(3)(c) EEA, however, it found that certain areas would qualify for regional transport aid. The EFTA Surveillance Authority further concluded, on the basis of its investigation, that manufacturing enterprises located in zones 2-5, excluding producers of steel and shipbuilding activities, were not overcompensated for additional transport costs by the financial benefits associated with the lower social security contribution rates in the same regions.

7 The EFTA Surveillance Authority then examined conditions related to certain activities according to its State Aid Guidelines (see paragraph 15 below) and found that, in principle, enterprises with no alternative location, *i.e.* production and distribution of electricity, extraction of petroleum and natural gas and mining and quarrying, did not qualify for regional transport aid. The same applied to industries covered by specific sectoral rules assessed in the Decision.

8 With regard to the service sector and other non-manufacturing activities, the EFTA Surveillance Authority found that measures to reduce social charges directed at those sectors often had great potential in terms of job creation and their effects on competition were normally weak. Thus, the EFTA Surveillance Authority normally could adopt a positive stance on such measures, in particular regarding local services. The EFTA Surveillance Authority found that approximately 65% of the estimated benefits were distributed among sectors where exposure to trade could be assumed to be relatively limited or in sectors to which Article 61 EEA does not fully apply, namely the public sector, construction activities, wholesale/retail trade, restaurants and hotels and other community and personal services. In light of the foregoing and of the *de minimis* rule in Chapter 12 of its State Aid Guidelines, the EFTA Surveillance Authority found that with regard to service activities and non-manufacturing activities, in so far as they fall within the scope of Article 61(1) EEA, the lower rates were justified as aid for regional development on the basis of Article 61(3)(c) EEA, as long as the lower rates were limited to an area which was authorized by the EFTA Surveillance Authority for indirect compensation for additional transport costs. However, it found that this did not apply to financial services, transport and telecommunications, except for branch offices that only provide local services.

9 The final part of the Decision reads:

"4. Conclusion

The system of regionally differentiated social security contributions involves State aid in the meaning of Article 61(1) of the EEA Agreement. Parts of this aid may on certain conditions be exempted according to Article 61(3), while other parts cannot be exempted. Norway must undertake the necessary measures to ensure that the identified infringements of Article 61(1) are brought to an end.

HAS ADOPTED THIS DECISION:

1. The system of regional differentiation of employers' social security contributions in Norway is incompatible with the EEA Agreement in so far as,

a) it applies to activities not referred to in point b) below, unless it is confined to areas which have been notified to the Authority and found eligible for regional transport aid,

b) it allows for the following kind of enterprises to benefit from the lower social security contribution rates applied in zones 2-5,

- enterprises engaged in Production and distribution of electricity (NACE[3] 40.1)
- enterprises engaged in Extraction of crude petroleum and gas (NACE 11.10)
- enterprises engaged in Service activities incidental to oil and gas extraction excluding surveying (NACE 11.20)
- enterprises engaged in Mining of metal ores (NACE 13)
- enterprises engaged in activities related to the extraction of the industrial minerals Nefeline syenite (HS[4] 2529.3000) and Olivine (HS 2517.49100)
- enterprises covered by the act referred to in point 1b of Annex XV to the EEA Agreement (Council Directive 90/684/EEC on aid to shipbuilding)
- enterprises engaged in production of ECSC steel,
- enterprises with more than 50 employees engaged in Freight transport by road (NACE 60.24)
- enterprises engaged in the Telecommunications (NACE 64.20) sector

[3] Note by the Court: General Industrial Classification of Economic Activities Within the European Communities.

[4] Note by the Court: Harmonized Commodity Description and Coding System.

- enterprises having branch offices established abroad or otherwise being engaged in cross-border activities related to the following sectors, namely, Financial intermediation (NACE 65), Insurance and pension funding (NACE 66), and Services auxiliary to financial intermediation (NACE 67), with the exception of branch offices only providing local services.

2. For the system of regionally differentiated social security contributions from employers to be adapted in such a way that it would become compatible with the rules on regional transport aid as reflected in the Authority's State Aid Guidelines and allow the Authority to carry out its surveillance functions in accordance with Article 1 of Protocol 3 to the Surveillance and Court Agreement, in addition to the adjustments required by points 1 (a) and (b) of this decision, the following conditions would have to be complied with:

a) The applicability of the system would have to be limited in time, not going beyond 31 December 2003. Before that time, a request for extension may be submitted for examination by the Authority.

b) The Norwegian Government would be required to submit detailed annual reports on the aid scheme in accordance with the format indicated in Annex III of the State Aid Guidelines. As foreseen in Chapter 32 of the State Aid Guidelines, those reports would have to cover two financial years and be submitted to the Authority not later than six months after the end of the financial year. The first report is to be submitted before 1 July 2000.

c) In accordance with the rules on regional transport aid, the detailed annual reports would have to show, in addition to information required according to point (b), the operation of an aid-per-kilometre ratio, or of an aid-per-kilometre and an aid-per-unit ratio.

d) The detailed annual reports would also have to contain, in addition to information required according to points (a) and (c), the estimated amounts of indirect compensation for additional transport costs in the form of lower social security contributions received by enterprises in the sectors covered by special notification requirements (motor vehicle industry, synthetic fibre industry and non-ECSC steel industry).

e) For production covered by the specific sectoral rules related to synthetic fibres, motor vehicles and non-ECSC steel, the Norwegian Government would have to notify the Authority of any recipients of aid benefiting from the lower social security contribution rates in zones 2-5.

f) The Norwegian authorities would have to introduce specific rules to ensure that overcompensation due to the cumulation of regional transport aid from different sources will not occur.

3. Norway shall take the necessary measures to ensure that the aid which the Authority has found incompatible with the functioning of EEA Agreement is not awarded after 31 December 1998 and, where applicable, that the conditions in point 2 of this decision are complied with. It shall inform the Authority forthwith of the measures taken.

4. This decision is addressed to Norway. The Norwegian Government shall be informed by means of a letter containing a copy of this decision."

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

Legal background

11 The rules on State aid are contained in Chapter 2 of the main part of the EEA Agreement, as well as in Annex XV and Protocols 26 and 27 to the Agreement. Article 61 EEA is identical in substance to Article 92 of the Treaty establishing the European Community (hereinafter variously the "EC Treaty" and "EC", now after modification Article 87 EC), prohibiting State aid which distorts or threatens to distort competition, with exceptions as provided for in the second and third paragraphs. The Article reads:

> "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."

12 According to Article 62(1) EEA, all existing systems of State aid as well as any plans to grant or alter State aid shall be subject to constant review as to their compatibility with Article 61 EEA. Article 62(1) EEA corresponds to Article 88(1) EC (ex Article 93(1) EC) and stipulates further that the EFTA Surveillance Authority shall carry out this review according to Protocol 26 to the EEA Agreement. That Protocol provides that:

> "The EFTA Surveillance Authority shall, in an agreement between the EFTA States, be entrusted with equivalent powers and similar functions to those of the EC Commission, at the time of the signature of the Agreement, for the application of the competition rules applicable to State aid of the Treaty establishing the European Economic Community, enabling the EFTA Surveillance Authority to give effect to the principles expressed in Articles 1(2) (e), 49 and 61 to 63 of the Agreement. The EFTA Surveillance Authority shall also have such powers to give effect to the competition rules applicable to State aid relating to products falling under the Treaty establishing the European Coal and Steel Community as referred to in Protocol 14."

13 Finally, Article 63 EEA refers to Annex XV to the EEA Agreement for specific provisions on State aid. Apart from four acts referred to in that Annex, which at the time of the Decision were Commission Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, as amended; Commission Decision No. 2496/96/ECSC establishing Community rules for State aid to the steel industry; Council Directive 90/684/EEC on aid to shipbuilding, as amended; and Council Regulation (EC) No. 3094/95 on aid to shipbuilding, as amended, Annex XV lists non-binding acts, the principles and rules of which the Commission of the European Communities and the EFTA

Surveillance Authority shall take due account of in the application of Articles 61 to 63 EEA and the provisions of Annex XV.

14 Such non-binding acts include letters and communications from the Commission of the European Communities to Member States, Community frameworks and Council resolutions relating to matters such as prior notification of State aid plans, aid of minor importance, State guarantees, regional aid, general aid schemes and cumulation of aid, adopted by the Commission of the European Communities up to 31 July 1991. According to a decision of the EEA Joint Committee (Decision No. 7/94), acts adopted by the Commission of the European Communities after that date are not to be integrated into Annex XV. Rather, corresponding acts are to be adopted by the EFTA Surveillance Authority under Articles 5(2)(b) and 24 of the Surveillance and Court Agreement and published. The EFTA Surveillance Authority is to adopt the corresponding acts after consultation with the Commission of the European Communities in order to maintain equal conditions of competition throughout the European Economic Area. Both the Commission of the European Communities and the EFTA Surveillance Authority are to take due account of these acts in cases where they are competent under the EEA Agreement.

15 The EFTA Surveillance Authority has, as mentioned in paragraph 7, adopted corresponding acts in a consolidated document "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)", adopted and issued by the EFTA Surveillance Authority on 19 January 1994,[5] as subsequently amended on several occasions (hereinafter "the Guidelines"). In the introduction to the Guidelines, the EFTA Surveillance Authority refers to the emphasis of the Contracting Parties on the relevance of the basic principle of homogeneity for the field of State aid and the need for uniform State aid control throughout the territory covered by the EEA Agreement. Reference is also made to the aim to ensure uniform implementation, application and interpretation of Articles 61 and 62 EEA, as contemplated in Protocol 27 to the EEA Agreement.

[5] OJ 1994 L 231, p. 1, 03.09.94; EEA Supplement 03.09.94 No. 32, p. 1

16 At the time of the Decision, Section 28.2 of the Guidelines laid down rules for the application of Article 61(3)(c) EEA regarding *inter alia* criteria for transport aid:

"I. **28.2. METHOD FOR THE APPLICATION OF ARTICLE 61(3)(C) TO NATIONAL REGIONAL AID**

(...)

28.2.3.* First stage of analysis with regard to regions with a very low population density**

28.2.3.1. Population density threshold

(1) In order to take account of special regional development problems arising out of demography, regions corresponding to NUTS[6] Level III regions with a population density of less than 12.5 per square kilometre may also be considered eligible for regional aid under the exemption set out in Article 61(3)(c).

(2) The introduction of this threshold for the interpretation and application of Article 61(3)(c) of the EEA Agreement with regard to regional aid may be based on the grounds set out below:

(3) The Joint Declaration on Article 61(3)(c) of the EEA Agreement acknowledges the fact that the indicators used in the first stage of the method do not properly reflect the regional problems specific to certain Contracting Parties, particularly the Nordic countries (Norway, Sweden, Finland and Iceland). In these countries there are important aspects of the regional situation which the indicators are supposed to describe and which fall outside the scope of the method of analysis of eligibility as described in Section 28.2.2. of these guidelines.

(4) These shortcomings are in a large part due to a number of special features shared by the Nordic countries: they derive from geography - the remote northern location of some areas, harsh weather conditions and very long distances inside the national borders of the country concerned - and from the very low population density in some parts. These are specific factors which are not reflected in the statistical indicators used in Section 28.2.2.

(5) A test of eligibility must therefore be used which reflects these problems. Such a test should be of general application, i.e. potentially applicable to any country. It should also be integrated into the method for the application of Article 61(3)(c) of the EEA Agreement in order not to disrupt the method of assessing regional aid. If it is to be an objective test

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[6] Note by the Court: Nomenclature of Statistical Territorial Units.

which is valid erga omnes, it must be an alternative to the unemployment and GDP tests used in the first stage of the method. This would mean that any region corresponding to NUTS Level III region presenting the required level of unemployment or GDP or satisfying the new test could be accepted as qualifying for regional aid in the appropriate circumstances and subject to approval by the EFTA Surveillance Authority.

(6) On those grounds, it could be held that a population density threshold of less than 12.5 per km^2 reflects the addressed regional problems in an appropriate manner. All regions corresponding to NUTS Level III regions with a population density below that figure may then qualify for the exemption for regional aid laid down in Article 61(3)(c) of the EEA Agreement, subject to assessment and decision by the EFTA Surveillance Authority.

28.2.3.2. Criteria for transport aid

(1) The population density test may provide a satisfactory response to the problem of underpopulation in certain regions, but it does not address another regional handicap specific to the Nordic countries, namely the extra costs to firms caused by very long distances and harsh weather conditions. These factors affect regional development in two ways: they may induce firms in such regions to relocate to less remote areas which hold out better prospects for economic activity and they might dissuade firms from locating in such outlying areas.

(2) The EFTA Surveillance Authority could therefore decide to authorise aid to firms aimed at providing partial compensation for the additional cost of transport, on a limited basis and at its discretion, in order to safeguard the common interest. Such compensation must however comply with the following conditions:

- Aid may be given only to firms located in areas qualifying for regional aid on the basis of the population density test.
- Aid must serve only to compensate for the additional cost of transport. The EFTA State concerned will have to show that compensation is needed on objective grounds. There must never be overcompensation. Account will have to be taken here of other schemes of assistance to transport, notably under Articles 49 and 51 of the EEA Agreement.
- Aid may be given only in respect of the extra cost of transport of goods inside the national borders of the country concerned. It must not be allowed to become export aid.
- Aid must be objectively quantifiable in advance, on the basis of an aid-per-kilometre ratio or on the basis of an aid-per-kilometre and an aid-per-unit-weight ratio, and there must be an annual report

drawn up which, among other things, shows the operation of the ratio or ratios.

- The estimate of additional cost must be based on the most economical form of transport and the shortest route between the place of production or processing and commercial outlets.
- No aid may be given towards the transport or transmission of the products of enterprises without an alternative location (products of the extractive industries, hydroelectric power stations, etc.).
- Transport aid given to firms in industries which the EFTA Surveillance Authority considers sensitive (motor vehicles, textiles, synthetic fibres, ECSC products and non-ECSC steel) are subject to the sectoral rules for the industry concerned and must in particular respect the specific notification obligations stipulated in the relevant chapters of these guidelines or in the Act referred to in point 1a of Annex XV to the EEA Agreement.[1]
- Agricultural products within the scope of Annex II to the EC Treaty, and falling within the scope of the EEA Agreement are not covered by this measure.[2]
- Any plans to put into effect new schemes or to amend existing schemes of assistance to transport should contain a limitation in time and should never be more favourable than existing schemes in the relevant EFTA State.

(3) The EFTA Surveillance Authority aims at reviewing the existing schemes of assistance to transport on the basis of these criteria within three years from the entry into force of the EEA Agreement.

* 28.2.3. inserted as new section by EFTA Surveillance Authority Decision of 20 July 1994.

** This section corresponds to the Commission Notice on changes to the method for the application of Article 92(3)(c) of the EC Treaty to regional aid, adopted by the European Commission on 1 June 1994.

1 Commission Decision 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (1991 OJ L 362, p. 57, 31.12.91).

2 The corresponding condition in the Commission Notice referred to in footnote 1 reads as follows: "les produits agricoles relevant de l'Annexe II du Traité CE, autres que les produits de la pêche, ne sont pas couverts par les present dispositions". The different condition in the present State Aid Guidelines is due to the fact that the EFTA Surveillance Authority lacks competence in respect of State aid in the fisheries sector."

17 The functions and powers of the EFTA Surveillance Authority are laid down in the Surveillance and Court Agreement and in Protocol 3 to that Agreement. Article 1 of Protocol 3 sets out the procedures for examination of new and existing aid, which are identical in substance to those set out in Article 93 EC (now after modification Article 88 EC).

18 In accordance with Article 62(2) EEA, the Commission of the European Communities and the EFTA Surveillance Authority shall co-operate with view to ensuring a uniform surveillance in the field of State aid, as further laid down in Protocol 27 to the EEA Agreement. The other issues mentioned include exchange of information and views on general policy and of information regarding all decisions taken by each of the surveillance bodies.

Procedure before the EFTA Court and forms of order sought by the parties

19 By an application of 2 September 1998, lodged at the Court Registry on the same day, the Government of Norway (hereinafter variously the "Government of Norway" and the "Applicant") brought an action under Article 36 of the Surveillance and Court Agreement for annulment of the Decision.

20 On 16 November 1998, pursuant to Article 40 of the Surveillance and Court Agreement, the Applicant applied for suspension of the application of the Decision until the Court had delivered its judgment in the main case. The Court heard the representatives of the Applicant and the EFTA Surveillance Authority on 10 December 1998 and on the following day ordered the suspension of the application of the Decision until delivery of judgment.

21 Before opening the oral proceedings, the Court, by a letter of 12 February 1999, requested supplementary information from the Commission of the European Communities. This information was received at the Court Registry on 26 February 1999 along with comments from the Commission.

22 The Applicant claims that the EFTA Court should:

- annul the Decision of the EFTA Surveillance Authority of 2 July 1998 (Dec. No. 165/98/COL), and
- order the EFTA Surveillance Authority to bear the Applicant's costs.

23 The EFTA Surveillance Authority contends that the EFTA Court should:

- dismiss the application as unfounded, and
- order the Applicant to pay the costs.

Alleged infringement of Article 61 EEA

A general measure

Pleas in law

24 The *Applicant* submits, principally, that the system is a part of the general tax system in Norway and is sufficiently general in nature as not to involve State aid favouring certain undertakings within the meaning of Article 61(1) EEA.

25 The Applicant maintains that various selective elements are inherent in any tax system which, by nature and/or by policy, necessarily create different effects not only between different undertakings or persons, but also between different sectors of the economy and different regions of a State. It cannot be the intention that the notion of aid in Article 61(1) EEA and Article 87(1) EC (ex Article 92(1) EC) include all tax measures where it is possible to identify an effect which differs from one enterprise to another.

26 The Applicant has further stresses that, as the EEA Agreement does not contain any provisions concerning harmonization of tax schemes, it is for each State to design and apply a tax scheme according to its own choices of policy. In the preparations prior to ratification of the Agreement, the Government of Norway expressed its views as to the compatibility of the system with the EEA Agreement and its intention to continue its application.

27 With regard to the selectivity criterion, the Applicant maintains that a regional element is not sufficient in order to establish that aid favours certain undertakings. The Applicant submits that the EFTA Surveillance Authority erred in finding that the selectivity criterion is fulfilled when the effect of a measure is to favour enterprises located in certain regions, as opposed to a majority of enterprises in other regions which are not able to benefit from the measure.

28 The Applicant submits that the decisive factor is not the effects on certain undertakings, but rather the general nature of the criterion applied. The Applicant emphasizes that the scheme is neutral as to the type of industry, company size, occupation and form of ownership and location of the enterprise. The Applicant further stresses that the scheme is different from that under consideration in Case

173/73 *Italy* v *Commission* [1974] ECR 709, as the Norwegian scheme comprises all sectors of the economy and is not aimed at or designed to favour only those industries or undertakings exposed to intra-EEA trade.

29 The Applicant also states that the EFTA Surveillance Authority has, erroneously, failed to include employment policy considerations as part of its assessment. The Norwegian scheme divides the work force into five categories which correspond to five tax rates. The objective is to strengthen employment and settlement in outlying districts. In the view of the Applicant, the scheme contributes to these objectives by granting employees resident in zones 2 to 5 an advantage on the labour market. The system has a redistribution effect favouring these categories of workers by granting firms employing them an advantage through the system. The objectives pursued through the scheme, *i.e.* maintaining settlement patterns, income equalization and employment equalization throughout the country must be viewed as *legitimate aims* capable of justifying the fact that the effect of the scheme may differ from one undertaking to another. This is so because of the special problems Norway faces, *inter alia* on the labour market, because of its geographical location, long distances, climate, population and settlement patterns.

30 Finally, the Applicant pleads that, in a broader context, the Court is called upon to draw the line between the responsibilities and competence of, on the one hand, the Contracting Parties and, on the other hand, the institutions set up under the EEA Agreement. Article 61 EEA is broadly formulated and there is no case law on a system as general in nature as the Norwegian one. The interests and responsibilities have to be considered in a broad context and the Court should not, as the EFTA Surveillance Authority has done, extend the scope of the State aid concept. As a social and economic system, the Norwegian scheme is purposeful, effective and proportionate when assessed in relation to its objectives. It is also easy to apply and administer and it does not constitute any danger as regards the objectives of the EEA Agreement.

31 The *EFTA Surveillance Authority* and the *Commission of the European Communities* submit that, in principle, geographical or regional selectivity is capable of constituting State aid within the meaning of Article 61(1) EEA and should not be treated differently from sectoral selectivity. The EFTA Surveillance Authority maintains that a measure which grants a benefit to all undertakings in a certain region, but not to undertakings located outside that region, *per se* amounts to a favouring of certain undertakings within the meaning of Article 61(1) EEA. The Commission of the European Communities submits that, even if the point has not been specifically ruled on by the ECJ, the case law strongly implies that regional selectivity is, in principle, caught by Article 87(1) EC (ex Article 92(1) EC). Further, the Commission refers to established Commission practice, under

which State aid involving regional selectivity has been found to be incompatible with the common market.

32 The EFTA Surveillance Authority, supported by the Commission of the European Communities, submits that a measure which implies a distinct derogation from the general system with regard to the very element of that system that serves to characterize it as being general in nature cannot be considered justified on the basis of the nature or general scheme of the system itself. In the case at hand, a derogation providing for regional differentiation of the rates cannot be considered justified on the basis of the nature or general scheme of the system as the distortive effects on competition lie in the very derogation, rather than being an incidental result of it.

Findings of the Court

33 The matter before the Court is to determine whether the reduced rates applicable to some employers in Norway regarding contributions to a social security scheme constitute State aid within the meaning of Article 61(1) EEA. The Court must also rule on whether the selectivity criterion inherent in the notion of aid is fulfilled or whether, as argued by the Applicant, the system must be seen as a general tax measure falling outside the scope of Article 61(1) EEA because of the objective criteria on which it is based, its open and non-discriminatory nature and automatic application, and the legitimate policy considerations on which it is based.

34 The *Court* notes first that, as a general rule, a tax system of an EEA/EFTA State is not covered by the EEA Agreement. In certain cases, however, such a system may have consequences that would bring it within the scope of application of Article 61(1) EEA. It is established case law of the ECJ that the fiscal nature of a measure does not shield it from the application of Article 92 EC (now after modification Article 87 EC). Nor does Article 92 EC (now after modification Article 87 EC) distinguish between the measures of State intervention by reference to their causes and aims but rather defines them in relation to their effects (see Case 173/73 *Italy* v *Commission*, cited above, at paragraph 13). In referring to "any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever", Article 61(1) EEA is directed at all aid financed from public resources. Such measures which favour certain undertakings or the production of certain goods may thus fall within the scope of Article 61(1) EEA.

35 A primary criterion for the generality of a system is that it applies to all undertakings within the territory of a given Contracting Party. Aid programmes may concern a whole sector of the economy or may have a regional scope and be intended to encourage undertakings to invest in a particular area.

36 Article 61(1) EEA does not make any distinction between different kinds of aid and does not provide that any one kind automatically falls within its ambit (see Case 248/84 *Germany* v *Commission* [1987] ECR 4013, at paragraph 18). Each case must be assessed on the basis of the benefits granted and the effects of the measure. However, the Court finds merits in the arguments of the Commission of the European Communities to the effect that the structure of Article 61 EEA supports the conclusion that regional aid is, in principle, caught by Article 61 EEA, as it distinguishes between the issue of whether a measure constitutes aid under Article 61(1) EEA and the possibilities for exemptions found in Article 61(3)(a) and (c) EEA.

37 It is not in dispute that the differentiated contribution system at issue was designed to benefit certain regions. Although the advantageous contribution rates are formally open to all undertakings, the Court finds that the system does in fact confer direct competitive advantages on undertakings in the favoured regions compared to undertakings located elsewhere, due to the high correlation between the zone of location of an undertaking and the place of residence of its workforce.

38 The Court thus finds that the system of regionally differentiated social security contributions must be seen as favouring certain undertakings within the meaning of Article 61(1) EEA, unless it can be shown that the selective effect of the measures is justified by the nature or general scheme of the system itself. Any direct or indirect discrimination which is to be considered justified must derive from the inherent logic of the general system and result from objective conditions within that general system. In the opinion of the Court, these criteria are not satisfied in the present case, where differentiation is based on regional criteria alone.

39 For the assessment under Article 61(1) EEA, it is not decisive whether or not the system is based on certain legitimate policy considerations. On the contrary, the arguments presented by the Applicant on this point rather strengthen the conclusion that the system is aimed at favouring certain undertakings. The policy considerations mentioned by the Applicant, seen in the light of the special geographic and harsh weather conditions of the Nordic countries, may instead be taken into account by the EFTA Surveillance Authority in its assessment under Article 61(3) EEA.

40 With regard to the pleadings of the Applicant on the demarcation of the powers of the institutions set up under the EEA Agreement, the Court observes the following: the provisions of the EEA Agreement shall be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities (hereinafter "ECJ") given prior to the date of signature of the EEA Agreement, cf. Article 6 EEA; rulings given subsequent to the date of signature of the EEA

Agreement shall be duly taken account of by the EFTA Surveillance Authority and this Court in the interpretation and application of the Agreement, cf. Article 3(2) of the Surveillance and Court Agreement.

41 The Court notes, however, that the case law of the ECJ does not provide a clear answer regarding the issue of general measures that fall outside the prohibition in Article 92 EC (now after modification Article 87 EC, corresponding to Article 61 EEA) with regard to a system of the scope and nature of the one at issue in the present case. Furthermore, Commission notices and communications, as well as Commission decisions in particular cases, are not binding on the EFTA Court.

42 While such sources may be relevant for the application of Article 61(1) EEA by the EFTA Surveillance Authority, and while the EFTA Surveillance Authority has wide discretion in matters involving economic and social assessment, such as is called for in particular pursuant to Article 61(3) EEA, it is the task of the Court to review the EFTA Surveillance Authority's conclusions regarding the interpretation of Article 61(1) EEA with regard to what constitutes aid (see *e.g.* Case 310/85 *Deufil* v *Commission* [1987] ECR 901, at paragraphs 7 and 8).

43 The Government of Norway has, by its membership in the European Economic Area, accepted to adhere to the framework established under the EEA Agreement. The Government has also agreed to amendments to these rules at later stages. The Court finds that the EFTA Surveillance Authority has not, in its Decision now under scrutiny, acted beyond its competence or wrongly applied the rules on State aid. It follows from the foregoing that the Norwegian social security contribution scheme constitutes State aid within the meaning of Article 61 EEA. The first part of the first submission of the Applicant must therefore be dismissed as unfounded.

Effects on trade

Pleas in law

44 The second and subsidiary part of the first submission of the Applicant is to the effect that, since the EFTA Surveillance Authority has failed to identify the aid which affects trade between Contracting Parties, and thus failed to decide which parts of the system infringe Article 61(1) EEA, the entire Decision must be annulled. The Applicant submits that the EFTA Surveillance Authority erred in finding the system *as such* to be in breach of Article 61 EEA, as the Article provides that State aid is incompatible with the EEA Agreement only in so far as it affects trade between Contracting Parties.

45 The *Applicant* argues, first, that the EFTA Surveillance Authority incorrectly interpreted and applied the condition "in so far as it affects trade between Contracting Parties" in Article 61(1) EEA. In particular, the Applicant maintains that, to establish a breach of Article 61(1) EEA, it must be shown that the undertakings, products or sectors benefiting from the aid are competing in intra-EEA trade. Where different kinds of undertakings in various sectors benefit from an aid scheme, the fact that certain recipients compete in intra-EEA trade does not, in the view of the Applicant, make the entire scheme as such incompatible with the EEA Agreement.

46 The Applicant further argues that the conclusion of the Decision includes various activities which have no effects on trade and therefore fall outside the scope of Article 61(1) EEA, and that the EFTA Surveillance Authority has exceeded its powers under Article 62 EEA and Article 1 of Protocol 3 in declaring that the Government of Norway must notify such aid, and that the aid will only be legal when it has been found eligible for regional transport aid by the EFTA Surveillance Authority.

47 The *EFTA Surveillance Authority* states that the examination of the compatibility of an aid scheme with the EEA Agreement relates to the scheme itself and not to any individual aid granted under the scheme. For the scheme to be approved, it must be compatible with the Agreement in all respects and, if it leaves room for the granting of aid incompatible with the Agreement, it cannot be considered compatible unless altered so as to eliminate the possibility of granting such aid. Further, monitoring of State aid under the EEA Agreement depends on co-operation with the State concerned, and the justification and information necessary in order for a scheme to be approved in part or subject to conditions will, first of all, have to be provided by the State.

48 The EFTA Surveillance Authority submits that the contention of the Applicant to the effect that the EFTA Surveillance Authority misapplied Article 61(1) EEA by finding the system as such incompatible with the EEA Agreement, regardless of the situation of undertakings not operating in intra-EEA competition, and that it exceeded its powers by subjecting the benefits enjoyed by such undertakings to notification or other obligations, is based on a misconception of the scope and implications of the Decision.

49 First, the effect of the Decision is that, after 31 December 1998, a benefit under the system can no longer be considered existing aid within the meaning of Article 61(1) EEA. While this means, in principle, that any benefit granted under the system after that date will be illegal unless notified and authorized, this applies only to benefits constituting aid within the meaning of Article 61(1) EEA. Thus, the finding does not alter the situation prevailing prior to the Decision in respect of

benefits falling outside the scope of the Agreement. Secondly, as regards the necessary adjustments to the system required by the EFTA Surveillance Authority, they are not obligations imposed on Norway, but only indications as to what would be required in case Norway, in order to comply with the Decision, were to opt for retaining the system rather than replacing or abolishing it. If benefits under the altered system did not affect or threaten to affect trade but nevertheless were subject to the reporting condition or other conditions, this would not be a result of the Decision of the EFTA Surveillance Authority but of the fact that the system submitted for approval included both aid and benefits not constituting aid.

50 The *Commission of the European Communities* submits that the EFTA Surveillance Authority has the power to conduct the analysis under Article 61(1) EEA by reference to a scheme (regime or system) expressed in the abstract, rather than by reference to specific undertakings. The Commission of the European Communities further supports the submissions of the EFTA Surveillance Authority to the effect that such a scheme should not be approved unless the terms of the scheme are sufficiently precise so as to make it impossible in law for aid to be granted that would not be consistent with the State aid rules. In the view of the Commission of the European Communities, it is up to the Government of Norway to differentiate between those beneficiaries of the system it considers caught by Article 61(1) EEA and those it does not, so that the Government is estopped from pleading its own failure in defence of the scheme as a whole.

51 With regard to the arguments of the Applicant concerning the effect on trade between the Contracting Parties, the Commission of the European Communities submits that is not necessary, in order for there to be an effect on trade between Contracting Parties, that the product or service in question is actually exported from or imported to the State concerned. It is sufficient if there are undertakings in other States that are in competition with the undertakings receiving the aid. In such a case, the aid strengthens the position of the recipient vis-à-vis its competitor in the other State and potentially reduces the possibilities for the competitor to enter the market of the aid recipient. Such aid is capable of affecting trade between Contracting Parties.

52 Lastly, the Commission of the European Communities argues that, even if it would have enhanced the clarity of the operative part of the Decision to mention expressly that *State aid involved in* the system of regional differentiation was incompatible with the Agreement, instead of only referring to the system as such, this is not a ground of annulment *inter alia* as the conclusion as to the incompatibility of the system as such is correct and as it is implied in the Decision that it is only *State aid* involved in the system which is incompatible with Article 61(1) EEA.

Findings of the Court

53 The *Court* notes at the outset that the Decision was taken in the context of the EFTA Surveillance Authority's examination of existing aid pursuant to Article 1(1) of Protocol 3. According to that Article, 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.

54 If, after giving notice to the parties concerned to submit their comments, the EFTA Surveillance Authority finds that aid is not compatible with the functioning of the EEA Agreement, it shall decide that the EFTA State concerned shall abolish or alter such aid within a period of time to be determined by the EFTA Surveillance Authority.

55 In the present case, where a decision was taken subsequent to the procedure described in Articles 1(1) and 1(2) of Protocol 3, the EFTA Surveillance Authority was correct in basing its assessment on the characteristics of the aid scheme as such.

56 First, it was the scheme of regionally differentiated social security contributions that was under consideration, a scheme which itself did not determine its application with reference to certain sectors, industries or activities. As pointed out by the Commission of the European Communities, the final decision, following a procedure pursuant to Article 1 of Protocol 3, must necessarily relate to the same matters as the opening decision. Secondly, as submitted by the EFTA Surveillance Authority, an assessment on an undertaking-by-undertaking basis, or even on a sector-by-sector basis, as proposed by the Applicant, was not feasible in view of the scope of the system and the factor on which the eligibility for the lower rates was based. Thirdly, in its Decision, the EFTA Surveillance Authority explicitly stated that its conclusions only related to benefits which constitute aid within the meaning of Article 61(1) EEA.

57 As regards the argument of the Applicant to the effect that competition of some undertakings in intra-EEA trade does not make the entire scheme incompatible with the EEA Agreement, the Court finds that the submissions of the EFTA Surveillance Authority must be upheld. Thus, when examining the compatibility with the EEA Agreement of aid granted in accordance with an existing aid scheme, a decision on the matter will relate to the scheme itself and not to individual aids granted under the scheme. In such a case, the EFTA Surveillance Authority may confine itself to examining the characteristics of the scheme in question in order to determine whether, by reason of the high amounts or

percentages of aid, or the nature or the terms of the aid, it gives an appreciable advantage to recipients in relation to their competitors and is likely to benefit undertakings engaged in trade between Contracting Parties, see Case 248/84, *Germany* v *Commission*, cited above, at paragraph 18.

58 In assessing the effects on trade, the EFTA Surveillance Authority took account of the fact that the lower rates in zones 2-5 apply to all undertakings employing persons residing in those zones, including undertakings exposed to intra-EEA competition, *inter alia* undertakings engaged in export activities and domestic undertakings facing competition from foreign EEA producers of goods and services. The EFTA Surveillance Authority found that undertakings benefiting from the lower rates were in competition with producers in zone 1 or producers in other EEA States, *e.g.* producers of aluminium, ferro alloys, steel, as well as shipyards. It also stated that the aid strengthened the position of such undertakings relative to other undertakings competing within the European Economic Area and thus affected trade. The EFTA Surveillance Authority also concluded that the fact that the lower rates also applied to economic activities sheltered from international competition did not eliminate the effect on trade, but it explicitly raised no objections to such activities.

59 According to established case law of the ECJ, when State aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid. For that purpose, it is not necessary for the beneficiary undertaking itself to export its products. Where a Member State grants aid to an undertaking, domestic production may, for that reason, be maintained or increased, with the result that undertakings established in other Member States have less chances of exporting their products to the market in that Member State (see Joined Cases C-278/92 C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, at paragraph 40; Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, at paragraph 11; and Case 102/87 *France* v *Commission* [1988] ECR 4067, at paragraph 19). This case law is relevant in interpreting Article 61 EEA.

60 The Court further notes that, in its Decision, the EFTA Surveillance Authority went on to examine possibilities of exemptions pursuant to Articles 61(3)(a) and (c) EEA and found that certain areas and certain activities would qualify for regional transport aid under the latter provision. In this analysis, the EFTA Surveillance Authority took into account sectoral considerations and conditions related to certain activities as well as the issue of effect on intra-EEA trade and *de minimis* considerations. The Court notes that the Applicant has not specifically contested the assessments or conclusions reached by the EFTA Surveillance Authority in this part of its Decision.

61 It follows from the foregoing that the arguments of the Applicant must be rejected. It also follows that the second line of arguments advanced by the Applicant under the second submission, *viz.* that the EFTA Surveillance Authority exceeded its powers in its pronouncement on aid falling outside Article 61(1) EEA, is unfounded. As both the EFTA Surveillance Authority and the Commission of the European Communities have submitted, the Decision has only declaratory effect with regard to the aid scheme as such. Further, it is based on Article 61 EEA, which stipulates that aid which distorts 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 the Agreement.

62 The operative part of the Decision must be read not only in the context of the State aid rules contained in the Agreement, but also in the context of the Decision as a whole and its background. The Court therefore finds that the scope of the Decision and the obligations of the Government of Norway pursuant to the Decision are sufficiently clear, and that the EFTA Surveillance Authority did not exceed its powers in determining the matter.

63 The first submission of the Applicant must therefore be dismissed as unfounded.

Statement of reasons

Pleas in law

64 The *Applicant* submits that the EFTA Surveillance Authority has failed to provide an adequate statement of reasons with regard to the issues referred to under the first submission.

65 The Applicant argues in particular that the EFTA Surveillance Authority has not explained why the neutral parameter (residence of the employee) applied and the policy considerations pursued by the Government of Norway are of "no relevance".

66 The Applicant also submits that the failure by the EFTA Surveillance Authority to explain why aid to undertakings that are clearly not affected by intra-EEA competition falls within the scope of Article 61(1) EEA constitutes a breach of the EFTA Surveillance Authority's obligation to set out the "principal issues of law". Further, the Applicant claims that the failure to draw the line as to which undertakings operate under conditions of intra-EEA trade and which fall outside the scope of Article 61(1) EEA is an infringement of the EFTA Surveillance Authority's obligation to give clear decisions.

67 The *EFTA Surveillance Authority* submits that the reasoning fully satisfies the requirements laid down by Article 16 of the Surveillance and Court Agreement and further clarified through case law, and that the pleadings of the Applicant are partly based on a misunderstanding of the scope of the Decision. The Commission of the European Communities submits that the reasoning of the Decision satisfies all the relevant requirements.

Findings of the Court

68 The *Court* has in Case E-2/94, *Scottish Salmon Growers* [1994-1995] EFTA Court Report 59, held that to fulfil the requirements of Article 16 of the Surveillance and Court Agreement, a decision by the EFTA Surveillance Authority must set out, in a concise but clear and relevant manner, the principal issues of law and fact upon which it is based and which are necessary in order that the reasoning which led the EFTA Surveillance Authority to its decision may be understood.

69 The Court finds that the EFTA Surveillance Authority has, in a sufficiently clear manner, accounted for the facts and legal issues relevant to the case.

70 However, the Court notes that the EFTA Surveillance Authority cannot be seen to have fully considered the effect of harsh weather conditions or other circumstances which may justify an improvement of the employment situation by lowering the costs of labour in the affected areas. The Court does not find that there are sufficient grounds for annulling the Decision for lack of reasoning covering factors other than those warranting the granting of regional transport aid, but emphasizes that it is the obligation of the EFTA Surveillance Authority, in considering a revised system of regional aid, to consider all aspects of the matter.

Costs

71 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. Since the Applicant has been unsuccessful, it must be ordered to pay the costs of the EFTA Surveillance Authority. The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

On those grounds,

THE COURT

hereby

1. **Dismisses the application;**

2. **Orders the Government of Norway to bear the costs of the EFTA Surveillance Authority.**

Bjørn Haug | Carl Baudenbacher | Thór Vilhjálmsson

Delivered in open court in Luxembourg on 20 May 1999

Gunnar Selvik
Registrar

Bjørn Haug
President

REPORT FOR THE HEARING
in Case E-6/98

- 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 by the Government of Norway for annulment of the Decision of 2 July 1998 of the EFTA Surveillance Authority in the case between

The Government of Norway

and

EFTA Surveillance Authority

I. Facts and procedure

1. Under the National Insurance Act of 28 February 1997 (*Folketrygdloven*), replacing a former act of 17 June 1966, all persons residing or working in Norway are subject to a compulsory insurance scheme under which employees and employers pay social security contributions, calculated in relation to gross salaries. The scheme covers benefits such as pensions, rehabilitation, medical care, wage compensation and unemployment benefits. Social security contribution rates are decided annually by the Norwegian parliament as part of the fiscal budget. Both revenues and expenditure items are fully integrated into the fiscal budget.

2. The contributions levied on employers are calculated on the basis of the individual employee's gross salary income. A system of regionally differentiated tax rates ranging from 0 to 14.1% is in place, with the tax rate depending on the tax zone where the employee has his or her registered permanent residence. The system of regionally differentiated tax rates was introduced in 1975 and various adjustments have been made since then. The geographical scope of the tax zones was last revised in 1988. Since 1 January 1995, the applicable tax rates have been the following:

Zone 1: Central municipalities in southern Norway	14.1 per cent
Zone 2: Rural districts in southern Norway	10.6 per cent
Zone 3: Coastal area mid-Norway	6.4 per cent
Zone 4: Northern Norway (except zone 5)	5.1 per cent
Zone 5: Spitzbergen/Finnmark/Northern part of Troms	0 per cent

* Amendments to paragraphs 32, 34 and 59.

3. The system applies to all employees both in the private and the public sector except for the central government, which pays the maximum rate regardless of the residence of the employees. It applies to foreign employees residing in Norway if they are covered by the national social security system. The Norwegian authorities further describe the system as being automatically applied on the basis of objective criteria, unlimited in time, and neutral with respect to type of industry, company size, economic activity, form of ownership and the location of the enterprise.

4. In letters dated 16 June and 30 August 1995, the EFTA Surveillance Authority asked the Norwegian Government to submit full details on the existing scheme for social security taxation in Norway, in particular on the system of regionally differentiated social security contributions paid by employers, with a view to examining the compatibility of the system with Article 61 of the Agreement on the European Economic Area (hereinafter variously the "EEA Agreement" and "EEA").

5. The Norwegian Government responded in letters of 5 and 19 September 1995. In the period up to March 1997, the EFTA Surveillance Authority and the Norwegian authorities held a number of informal meetings aimed at elucidating the nature of the Norwegian scheme for social security taxation.

6. Concluding that the scheme of regionally differentiated social security contributions in Norway involved State aid within the meaning of Article 61(1) EEA and that a general exemption was not warranted, the EFTA Surveillance Authority, in a letter dated 14 May 1997, proposed appropriate measures to Norway, in accordance with Article 1(1) of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter the "Surveillance and Court Agreement").

7. By a letter of 11 July 1997, the Norwegian Government responded that they could not concur with the EFTA Surveillance Authority's proposal for appropriate measures, *inter alia* because the rules in question were part of the general taxation system and thus fell outside the scope of Article 61(1) EEA.

8. The EFTA Surveillance Authority's decision to open the procedure provided for in Article 1(2) of Protocol 3 to the Surveillance and Court Agreement was taken on 19 November 1998 and published on 5 February 1998.[1] The European Commission was informed, in accordance with Protocol 27 to the EEA Agreement, by means of a copy of the decision. Comments were received from the Commission on 5 March 1998 and observations from Norway concerning the letter of the Commission on 20 April 1998.

9. On 2 July 1998, the EFTA Surveillance Authority rendered its decision (hereinafter the "Decision") in accordance with Article 1(2) of Protocol 3 to the Surveillance and Court Agreement

10. The EFTA Surveillance Authority referred to its finding that if the Norwegian authorities, after having received the EFTA Surveillance Authority's proposal for appropriate measures, notified an area to be designated for regional transport aid, the whole of the counties of Finnmark, Troms, Nordland and Sogn og Fjordane, and the parts of Nord-Trøndelag, which were part of tax zones 2 to 4, might be considered eligible for regional transport aid. However, the EFTA Surveillance Authority was not convinced by the information before it that regional transport aid was justified for all municipalities presently

[1] 1998 OJ C 38, p. 6, 5.2.98 and the EEA Supplement thereto.

covered by tax zone 2 in the counties of Rogaland, Hordaland, Møre og Romsdal and Hedmark.

11. The EFTA Surveillance Authority had further examined the information supplied by Norway concerning indirect compensation for additional transport costs obtained by the system of lower tax rates in zones 2 to 5, and accepted that data presented by Norway showed that manufacturing enterprises located in these zones faced significant additional transport costs which were not overcompensated by the financial benefits associated with the lower social security contribution rates in those regions. A general reduction in the existing level of indirect compensation for additional transport costs was therefore not proposed by the EFTA Surveillance Authority. As for future schemes, the EFTA Surveillance Authority stressed that these would have to be limited in time and not be more favourable than existing schemes.

12. Finally, the EFTA Surveillance Authority considered the conditions related to certain sectors, where specific sectoral rules on State aid apply,[2] enterprises with no alternative location[3] and the service sector and came to the conclusion that many of these activities would have to be subject to the tax rate applied in tax zone 1 for all employees.

13. The operative part of the Decision reads:

> "1. The system of regional differentiation of employers' social security contributions in Norway is incompatible with the EEA Agreement in so far as,
>
> a) it applies to activities not referred to in point b) below, unless it is confined to areas which have been notified to the Authority and found eligible for regional transport aid,
>
> b) it allows for the following kind of enterprises to benefit from the lower social security contribution rates applied in zones 2-5,
>
> - enterprises engaged in Production and distribution of electricity (NACE 40.1)
> - enterprises engaged in Extraction of crude petroleum and gas (NACE 11.10)
> - enterprises engaged in Service activities incidental to oil and gas extraction excluding surveying (NACE 11.20)
> - enterprises engaged in Mining of metal ores (NACE 13)
> - enterprises engaged in activities related to the extraction of the industrial minerals Nefeline syenite (HS 2529.3000) and Olivine (HS 2517.49100)
> - enterprises covered by the act referred to in point 1b of Annex XV to the EEA Agreement (Council Directive 90/684/EEC on aid to shipbuilding)
> - enterprises engaged in production of ECSC steel,
> - enterprises with more than 50 employees engaged in Freight transport by road (NACE 60.24)
> - enterprises engaged in the Telecommunications (NACE 64.20) sector
> - enterprises having branch offices established abroad or otherwise being engaged in cross-border activities related to the following sectors, namely, Financial intermediation (NACE 65), Insurance and pension funding (NACE 66), and Services auxiliary to financial intermediation (NACE 67), with the exception of branch offices only providing local services.
>
> 2. For the system of regionally differentiated social security contributions from employers to be adapted in such a way that it would become compatible with the rules on regional transport aid as reflected in the Authority's State Aid Guidelines and

[2] Shipbuilding, ECSC steel industry, non-ECSC steel industry, textiles industry, synthetic fibres industry and motor vehicle industry.

[3] Such as extractive industries and hydroelectric power stations.

allow the Authority to carry out its surveillance functions in accordance with Article 1 of Protocol 3 to the Surveillance and Court Agreement, in addition to the adjustments required by points 1 (a) and (b) of this decision, the following conditions would have to be complied with:

a) The applicability of the system would have to be limited in time, not going beyond 31 December 2003. Before that time, a request for extension may be submitted for examination by the Authority.

b) The Norwegian Government would be required to submit detailed annual reports on the aid scheme in accordance with the format indicated in Annex III of the State Aid Guidelines. As foreseen in Chapter 32 of the State Aid Guidelines, those reports would have to cover two financial years and be submitted to the Authority not later than six months after the end of the financial year. The first report is to be submitted before 1 July 2000.

c) In accordance with the rules on regional transport aid, the detailed annual reports would have to show, in addition to information required according to point (b), the operation of an aid-per-kilometre ratio, or of an aid-per-kilometre and an aid-per-unit ratio.

d) The detailed annual reports would also have to contain, in addition to information required according to points (a) and (c), the estimated amounts of indirect compensation for additional transport costs in the form of lower social security contributions received by enterprises in the sectors covered by special notification requirements (motor vehicle industry, synthetic fibre industry and non-ECSC steel industry).

e) For production covered by the specific sectoral rules related to synthetic fibres, motor vehicles and non-ECSC steel, the Norwegian Government would have to notify the Authority of any recipients of aid benefiting from the lower social security contribution rates in zones 2-5.

f) The Norwegian authorities would have to introduce specific rules to ensure that overcompensation due to the cumulation of regional transport aid from different sources will not occur.

3. Norway shall take the necessary measures to ensure that the aid which the Authority has found incompatible with the functioning of EEA Agreement is not awarded after 31 December 1998 and, where applicable, that the conditions in point 2 of this decision are complied with. It shall inform the Authority forthwith of the measures taken.

4. This decision is addressed to Norway. The Norwegian Government shall be informed by means of a letter containing a copy of this decision."

14. By an application of 2 September 1998, lodged at the Court Registry on the same day, the Government of Norway (hereinafter the "Applicant") brought an action under Article 36 of the Surveillance and Court Agreement for annulment of the above-mentioned Decision. The application is based on the grounds of infringements of the EEA Agreement, *i.e.* error in the application of Article 61(1) EEA, and infringement of a procedural requirement, *i.e.* that the EFTA Surveillance Authority has not provided adequate statements of reasons as required by Article 16 of the Surveillance and Court Agreement.

15. The Defence of the EFTA Surveillance Authority, dated 28 October 1998, was received at the Court Registry on 29 October 1998. A Reply from the Applicant was received on 1 December 1998. A Rejoinder from the EFTA Surveillance Authority was received on 21 January 1999.

16. On 16 November 1998, the Applicant applied for suspension of the application of the Decision until the Court had delivered its judgment in the main case, pursuant to Article 40 of the Surveillance and Court Agreement. In its observations received on 25 November 1998, the EFTA Surveillance Authority stated that a suspension was not permitted under the relevant rules. The Court heard the representatives of the Applicant and the EFTA Surveillance Authority on 10 December 1998 and on the following day ordered the suspension of the application of the Decision until delivery of judgment.

II. Form of order sought by the parties

17. The Applicant claims that the EFTA Court should:

- annul the Decision of the EFTA Surveillance Authority of 2 July 1997 (Dec. No. 165/98/COL), and
- order the EFTA Surveillance Authority to bear the Applicant's costs.

18. The EFTA Surveillance Authority contends that the EFTA Court should:

- dismiss the application as unfounded, and
- order the Applicant to pay the costs.

III. Legal background

The EEA Agreement

19. 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 Guidelines of the EFTA Surveillance Authority

20. On 19 January 1994, the EFTA Surveillance Authority adopted "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".[4] At the time of the Decision, Section 28.2. laid down rules for the application of Article 61(3) (c) EEA regarding *inter alia* criteria for transport aid.

IV. 28.2. METHOD FOR THE APPLICATION OF ARTICLE 61(3)(C) TO NATIONAL REGIONAL AID

(...)

28.2.3.* First stage of analysis with regard to regions with a very low population density**

28.2.3.1. Population density threshold

(1) In order to take account of special regional development problems arising out of demography, regions corresponding to NUTS Level III regions with a population density of less than 12.5 per square kilometre may also be considered eligible for regional aid under the exemption set out in Article 61(3)(c).

(2) The introduction of this threshold for the interpretation and application of Article 61(3)(c) of the EEA Agreement with regard to regional aid may be based on the grounds set out below:

(3) The Joint Declaration on Article 61(3)(c) of the EEA Agreement acknowledges the fact that the indicators used in the first stage of the method do not properly reflect the regional problems specific to certain Contracting Parties, particularly the Nordic countries (Norway, Sweden, Finland and Iceland). In these countries there are important aspects of the regional situation which the indicators are supposed to describe and which fall outside the scope of the method of analysis of eligibility as described in Section 28.2.2. of these guidelines.

(4) These shortcomings are in a large part due to a number of special features shared by the Nordic countries: they derive from geography - the remote northern location of some areas, harsh weather conditions and very long distances inside the national borders of the country concerned - and from the very low population density in some parts. These are specific factors which are not reflected in the statistical indicators used in Section 28.2.2.

(5) A test of eligibility must therefore be used which reflects these problems. Such a test should be of general application, i.e. potentially applicable to any country. It should also be integrated into the method for the application of Article 61(3)(c) of the EEA Agreement in order not to disrupt the method of assessing regional aid. If it is to be an objective test which is valid erga omnes, it must be an alternative to the unemployment and GDP tests used in the first stage of the method. This would mean

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[4] 1994 OJ L 231, p. 1, 19.1.94. Amendments were made to Chapter 28 on 20 July 1994, 1994 OJ L 240, p. 33, 20.7.94 (EEA Supplement 15 September 1994 No. 34, p. 29). Chapter 28 was repealed by a decision of 4 November 1998.

that any region corresponding to NUTS Level III region presenting the required level of unemployment or GDP or satisfying the new test could be accepted as qualifying for regional aid in the appropriate circumstances and subject to approval by the EFTA Surveillance Authority.

(6) On those grounds, it could be held that a population density threshold of less than 12.5 per km^2 reflects the addressed regional problems in an appropriate manner. All regions corresponding to NUTS Level III regions with a population density below that figure may then qualify for the exemption for regional aid laid down in Article 61(3)(c) of the EEA Agreement, subject to assessment and decision by the EFTA Surveillance Authority.

28.2.3.2. Criteria for transport aid

(1) The population density test may provide a satisfactory response to the problem of underpopulation in certain regions, but it does not address another regional handicap specific to the Nordic countries, namely the extra costs to firms caused by very long distances and harsh weather conditions. These factors affect regional development in two ways: they may induce firms in such regions to relocate to less remote areas which hold out better prospects for economic activity and they might dissuade firms from locating in such outlying areas.

(2) The EFTA Surveillance Authority could therefore decide to authorise aid to firms aimed at providing partial compensation for the additional cost of transport, on a limited basis and at its discretion, in order to safeguard the common interest. Such compensation must however comply with the following conditions:

- Aid may be given only to firms located in areas qualifying for regional aid on the basis of the population density test.
- Aid must serve only to compensate for the additional cost of transport. The EFTA State concerned will have to show that compensation is needed on objective grounds. There must never be overcompensation. Account will have to be taken here of other schemes of assistance to transport, notably under Articles 49 and 51 of the EEA Agreement.
- Aid may be given only in respect of the extra cost of transport of goods inside the national borders of the country concerned. It must not be allowed to become export aid.
- Aid must be objectively quantifiable in advance, on the basis of an aid-per-kilometre ratio or on the basis of an aid-per-kilometre and an aid-per-unit-weight ratio, and there must be an annual report drawn up which, among other things, shows the operation of the ratio or ratios.
- The estimate of additional cost must be based on the most economical form of transport and the shortest route between the place of production or processing and commercial outlets.
- No aid may be given towards the transport or transmission of the products of enterprises without an alternative location (products of the extractive industries, hydroelectric power stations, etc.).
- Transport aid given to firms in industries which the EFTA Surveillance Authority considers sensitive (motor vehicles, textiles, synthetic fibres, ECSC products and non-ECSC steel) are subject to the sectoral rules for the industry concerned and must in particular respect the specific notification obligations stipulated in the relevant chapters of these guidelines or in the Act referred to in point 1a of Annex XV to the EEA Agreement.[1]
- Agricultural products within the scope of Annex II to the EC Treaty, and falling within the scope of the EEA Agreement are not covered by this measure.[2]
- Any plans to put into effect new schemes or to amend existing schemes of assistance to transport should contain a limitation in time and should never be more favourable than existing schemes in the relevant EFTA State.

(3) The EFTA Surveillance Authority aims at reviewing the existing schemes of assistance to transport on the basis of these criteria within three years from the entry into force of the EEA Agreement.

* 28.2.3. inserted as new section by EFTA Surveillance Authority Decision of 20 July 1994.

** This section corresponds to the Commission Notice on changes to the method for the application of Article 92(3)(c) of the EC Treaty to regional aid, adopted by the European Commission on 1 June 1994.

1 Commission Decision 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (1991 OJ L 362, p. 57, 31.12.91).

2 The corresponding condition in the Commission Notice referred to in footnote 1 reads as follows: "les produits agricoles relevant de l'Annexe II du Traité CE, autres que les produits de la pêche, ne sont pas couverts par les present dispositions". The different condition in the present State Aid Guidelines is due to the fact that the EFTA Surveillance Authority lacks competence in respect of State aid in the fisheries sector.

IV. Written Observations

21. 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 James M. Flett, member of its Legal Service, acting as Agent.

V. Submissions of the Parties

22. The Applicant bases its application for annulment on the ground that the EFTA Surveillance Authority erroneously applied the Agreement. The Applicant claims, principally, that the system is a part of the general tax system in Norway and is sufficiently general in nature so as not to involve State aid favouring certain undertakings within the meaning of Article 61(1) EEA. Subsidiarily, the Applicant claims that, as the EFTA Surveillance Authority failed to decide which parts of the system "affect trade between Contracting Parties" and thus infringe Article 61(1) EEA, the entire Decision must be annulled.

23. Secondly, the Applicant submits that the EFTA Surveillance Authority has not provided adequate statements of reasons according to Article 16 of the Surveillance and Court Agreement on the two points identified in the first submission.

The first submission – infringement of Article 61 EEA

a) A general measure

The Applicant

24. The Applicant submits that the involvement of some sort of *tangible and gratuitous benefit or advantage* for someone is a fundamental and crucial element in the notion of aid.[5]

5 Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595, para. 22 and Case 61/79 *Amministrazione delle finanze dello Stato* v *Denkavit Italiana* [1980] ECR 1205, para. 31.

Taxation, however, is not usually considered to be a benefit for private parties, nor are exemptions from tax burdens or tax concessions, unless they are considered in comparison with other persons. According to the Applicant, in cases of tax advantages, the notion of aid itself involves a criterion of discrimination or selectivity, capable of distinguishing these cases from other State aid cases.

25. The Applicant maintains that various selective elements are inherent in any tax system which, by nature and/or by policy, necessarily create different effects not only between different undertakings or persons, but also between different sectors of the economy and different regions of a State. It cannot be the intention that the notion of aid in Article 61(1) EEA and Article 92(1) of the Treaty Establishing the European Community (hereinafter variously the "EC Treaty" and "EC") include all tax measures where it is possible to identify an effect which differs from one enterprise to another. The question must rather be *what criteria a given form of selectivity may or may not be based on.*

26. The case law of the Court of Justice of the European Communities (hereinafter the "ECJ") has established that, when a selective element of a taxation system is identified, a *justification test* is applied to determine whether or not that particular selective measure constitutes State aid.[6] The Applicant submits that this test should be viewed similarly to justification tests under other provisions of the EC Treaty, which prohibit discrimination.[7]

27. The case law of the ECJ shows that tax exemptions granted on an individual basis to certain undertakings or to certain sectors are prohibited, especially when the measure in question is oriented towards one or more export sectors.[8] The Applicant maintains that a regional element is neither necessary nor sufficient in order to establish "aid...favouring certain undertakings". Cases where regional differentiation are seen as a basis for selectivity all involve schemes which are targeted to specific sectors or individual enterprises.[9] However, a given differentiation is permitted when it is general and based on objective criteria.[10] The legal status of cases that are not covered by either of these categories is uncertain and relevant case law sparse.

28. The Applicant submits that the EFTA Surveillance Authority has failed to apply the justification test properly, as shown by its consideration *that the selectivity criterion is fulfilled* inter alia *when the effect of the measure is to favour enterprises located in certain regions as opposed to a majority of enterprises in other regions which are not able to benefit from the measure.* The Applicant questions whether a measure that applies to all enterprises in a particular geographical area of the State is covered by Article 61(1) EEA at all. In any event, the justification test applies, as it does when selectivity is based on sectors.

29. The Applicant maintains that the decisive factor is not the effects on different undertakings, but rather the general nature of the criterion applied, as shown in the EC Commission decision in *Maribel Quater*, where a reduction in social security contributions

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6 Case 173/73 *Italy* v *Commission* [1974] ECR 709; Joined Cases C-72 and C-73/91 *Sloman Neptun* v *Bodo Ziesemer* [1993] ECR I-887.

7 For example Articles 4, 10, 13, 14, 16, 27, 36, 40 and 69(1) EEA.

8 See Case 173/73 *Italy* v *Commission*, see footnote 6.

9 See Joined Cases 6 and 11/69 *Commission* v *France* [1969] ECR 523; Case 70/72 *Commission* v *Germany* [1973] ECR 813; Case 248/84 *Germany* v *Commission* [1987] ECR 4013; Case 310/85 *Deufil* v *Commission* [1987] ECR 901 and Commission decision in the *Mezzogiorno* case, see footnote 17.

10 See Case 173/73 *Italy* v *Commission* and Joined Cases C-72 and C-73/91 *Sloman Neptune*, see footnote 6.

for all companies employing manual workers was found to be a general measure and not aid because of its general nature and automatic application.[11] The conclusion of the Commission is in line with its *Notice on monitoring of State aid and reduction of labour costs* of 18 June 1996[12] and the *Working paper on the differences between State aid and general measures* from 1995, of DG IV of the EC Commission.[13]

30. The Norwegian scheme is neutral with respect to the type of industry, company size, occupation and form of ownership as well as to the location of the enterprises. The Norwegian scheme is thus, in the view of the Applicant, similar to the scheme under consideration in the *Maribel Quater* case, *i.e. a general measure and not aid because of its general nature and automatic application and the fact that it does not discriminate* a priori *between sectors.* Unlike the Italian scheme under consideration in the case *Italy* v *Commission,*[14] the Norwegian scheme comprises all sectors of the economy and is by no means aimed at or designed to favour only those industries or undertakings exposed to intra-EEA trade.

31. Further, the Applicant states that the EFTA Surveillance Authority has, erroneously, failed to include employment policy considerations as part of its assessment. The Norwegian scheme divides the work force into five categories which correspond to five tax rates. The objective is to strengthen employment and settlement in outlying districts. In the view of the Applicant, the scheme contributes to these objectives by granting employees resident in zones 2 to 5 an advantage on the labour market. The system has a redistribution effect favouring these categories of workers by granting firms employing them an advantage through the system. The objectives pursued through the scheme, *i.e.* maintaining settlement patterns, income equalization and employment equalization throughout the country must be viewed as *legitimate aims* capable of justifying the fact that the effect of the scheme may differ from one undertaking to another. This is so because of the special problems Norway faces, *inter alia* on the labour market, because of its geographical location, long distances, climate, population and settlement patterns.

The EFTA Surveillance Authority

32. The EFTA Surveillance Authority submits that, in order to be caught by Article 61(1) EEA, a measure must satisfy four conditions: (1) it must in one form or another confer an advantage on the recipient, (2) the advantage must be granted by the State or through State resources, (3) the measure must be selective in that it must favour certain undertakings or the production of certain goods, and (4) the measure must affect competition and trade between EEA States.The EFTA Surveillance Authority claims that all four criteria are fulfilled in the present case.

33. The EFTA Surveillance Authority submits that a distinction must be made between general measures applying equally to all undertakings in the State concerned, on the one hand, and selective measures implying a benefit for some, but not all, undertakings on the other. The language of Article 61(1) EEA and the case law of the ECJ support a broad interpretation of the provision to the effect that any selective measure entailing a benefit for some

[11] See a decision of the EC Commission, *Maribel Quarter*, not published. Annex 13 to Application.

[12] See Annex 1 to the Statement of Reply.

[13] Unofficial document, not published. Annex 15 to Application.

[14] See footnote 6.

undertakings or groups or categories of undertakings should be capable of being considered State aid, irrespectively of how and why the distinction is made. It is settled case law that State aid measures are defined in relation to their effects and not their aims[15] and there are indications that regional selection as such is sufficient to bring a measure within the scope of Article 92(1) EC.[16] The practice of the EC Commission also reflects the view that selective reductions favouring certain firms compared with others in the same Member States do constitute aid, regardless of whether the selectivity is individual, sectoral or regional.[17] Lastly, this view is reflected in the working paper of DG IV, referred to by the Applicant, and in the recent notice of the European Commission of 11 November 1998.[18]

34. The EFTA Surveillance Authority submits that it is not sufficient for a measure to fall outside the scope of Article 92(1) EC / Article 61(1) EEA, that it forms part of a general scheme[19] and pursues similar and legitimate policy objectives as are assigned to that scheme.[20] The EFTA Surveillance Authority submits that the ECJ has never found that a selective measure falls outside the scope of Article 92(1) EC on this ground.

35. While it is necessary to assess on a case-by-case basis whether a measure can be considered justified because of the nature or general scheme of the system to which it belongs, the EFTA Surveillance Authority submits that some general guidelines may be established.[21] Thus, a measure which would only serve to ensure the proper functioning and the effectiveness of a general tax system (*e.g.* rules to avoid double taxation or tax avoidance) would not constitute State aid.[22] On the other hand, a measure which would imply a distinct derogation from the general system with regard to the very element of that system that served to characterize it as being general in nature could not be considered justified on the basis of the nature or general scheme of the system itself. A derogation providing for regional differentiation of the rates could not be considered justified on the basis of the nature or general scheme of the system.

36. The EFTA Surveillance Authority maintains that a measure which grants a benefit to all undertakings in a certain region, but not to undertakings located outside that region, does *per se* amount to a favouring of certain undertakings within the meaning of Article 61(1) EEA. The EFTA Surveillance Authority further submits that an analysis such as that carried out by the Commission in the *Maribel Quater* case, referred to by the Applicant, is not applicable to the case at hand, as it is distinguishable on its merits.

37. The EFTA Surveillance Authority submits that the differentiated contribution system at issue in the present case was designed to benefit certain regions, since the selectivity

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15 See Case 173/73 *Italy* v *Commission* , see footnote 6, at para. 13.

16 See Joined Cases 6 and 11/69 *Commission* v *France*, footnote 9, at page 552; Case C-241/94 *France* v *Commission* [1996] ECR I-4551.

17 See Commission decision of 1 March 1995, *Mezzogiorno*, 1995 OJ L 265, p. 23, 8.11.95, para.10.

18 See footnote 13 *supra* and footnote 21 *infra*

19 See Case 310/85 *Deufil* v *Commission*, footnote 9, paras. 7-8; Case 173/73 *Italy* v *Commission*, footnote 6, at page 272 and para. 13.

20 See Case 173/73 *Italy* v *Commission*, see footnote 6.

21 In its Rejoinder, the EFTA Surveillance Authority has further referred to a new notice of the European Commission of 11 November 1998 on the application of the State aid rules to measures relating to direct business taxation, see Annex 2 to the Applicant's Reply.

22 Reference is made to the DG IV working paper, see footnote 13, at para. 23, and a decision of the Commission, 1996 OJ L 146, p. 42, 20.06.96.

criterion is directly linked to the favoured regions. Although the decisive factor is the place of residence of the employees rather than the location of undertaking, the differentiation confers a direct competitive advantage on undertakings in the favoured regions as compared to undertakings located elsewhere. The advantage, which was indeed the effect envisaged, is evidenced by the high level of correlation between the zone of location of an undertaking and the place of residence of its workforce shown in the Decision.[23] The distortive effects on competition lie in the very nature and design of the differentiation, rather than being an incidental result of it. The measure is therefore a regional aid measure derogating from the general system to which it belongs, and cannot be considered justified.

38. The EFTA Surveillance Authority notes that the Applicant has not questioned its assessment in Section III.3 of the Decision, regarding the extent to which the differentiated contribution system qualifies for the exemptions provided for in Article 61(3)(a) and (c) EEA. These provisions provide a basis for the exemption of aid measures designed to promote policy objectives of the kind referred to by the Applicant and which, in its view, should have been taken into account in determining whether the system constitutes State aid within the meaning of Article 61(1) EEA. The EFTA Surveillance Authority thus submits that the EFTA Surveillance Authority has in fact examined to what extent the system was justified on the basis of the policy objectives underlying it.

The Commission of the European Communities

39. The Commission of the European Communities sets out observations on the scope of the judicial review to be carried out by the Court. In the context of the European Community, the Commission has a wide margin of discretion, the exercise of which involves economic and social assessments made in Community context. When a complex economic appraisal is needed, the Court must confine itself to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment or misuse of powers.[24] The Commission considers that in the present case a complex economic appraisal was needed as regards the applicability of Article 61(1) EEA, in particular given the abstract character of the concept of the "nature or general

23 Reference is made to page 7, table 3, of the Decision.

Table 3 Revenue from employers' social security tax by tax zones NOK million (1994)

		Employees' zones of residence					
		Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Total
Location of employers	Zone 1	33916	750	8	73	0	34747
	Zone 2	322	3209	1	4	0	3537
	Zone 3	4	2	47	0	0	53
	Zone 4	71	11	1	1219	0	1302
	Zone 5	14	2	0	5	0	20
	Not stated	666	48	1	17	0	732
	Total	34993	4022	58	1318	0	40391

Source: Hervik, "Benefits from reduced pay-roll taxes in Norway"

24 See Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723.

scheme of the system". It is for the Applicant to show that the EFTA Surveillance Authority has manifestly failed in its assessment.

40. The Commission of the European Communities submits that, in principle, geographical or regional selectivity is capable of constituting State aid within the meaning of Article 92(1) EC, and should not be treated differently than sectoral selectivity.[25] The Commission submits that the case law of the ECJ strongly implies that regional selectivity is in principle caught by Article 92(1) EC.[26]

41. Like all derogations, an exception based on the nature or general scheme of the system should be interpreted restrictively. Once the requirements of Article 92(1) EC are met, there is a presumption of aid. A Member State seeking to rely on the derogation has the burden of proving that it applies.

42. The Commission doubts that the two elements of the test identified by the Applicant (see paragraphs 26 and 27 above) can be entirely dissociated. If the conclusion is reached that there is sectoral or regional selectivity, then it may be likely that the measure is not justified by the nature or general scheme of the system; favourable treatment indicates that the sector or region in question enjoys an economic advantage by comparison with other sectors or regions. On the other hand, when selectivity flows from a more abstract criteria, the possibility of justifying the measure by reference to the nature or general scheme of the system may warrant further consideration. The effects of the measure have to be determined, as does the issue of whether it leads to sectoral or regional advantages. Here the stated objectives do not carry decisive weight.

43. The Commission supports its view by an analysis of cases referred to by the Applicant, stressing in particular that two different cases should not be confused: on the one hand, export selectivity where, by definition, there is an effect on trade between Member States and, on the other, sectoral selectivity together with the presence of an effect on trade between Member States.[27]

44. While the scheme under consideration refers to the more abstract criterion of the place of residence of the employee, this criterion has been found to translate into or correlate with regional selectivity in about 90% of cases. Thus, the Commission disagrees with the assertion that the criterion selected by the State is neutral and objective viewed from the position of the competing enterprises. Neither does the Commission agree with the statement that the Norwegian measure is targeted at certain categories of employees as, in fact, the measure has its principal effects in relation to undertakings located in certain regions.

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[25] The Commission refers to Articles 92(3) (a) and (c) EC, on sectoral and geographical selectivity respectively, the Articles suggesting that in both cases selectivity may be caught by Article 92(1); further the Commission refers to its own policy on assessment of regional aid and to paragraph 5 of the Commission's Notice on monitoring of State aid and reduction of labour costs (See footnote 12). The Commission further draws attention to Joined Cases C-400/97 to C-402/97 *Administracion del Estado and Juntas Generales de Guipuzcoa, de Alava y de Vizcaya* (pending).

[26] Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, para. 3; Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, para. 17; Case 248/84 *Germany* v *Commission*, see footnote 9. See also Case 70/72 *Germany* v *Commission*, see footnote 9; Joined Cases 6 and 11/69 *Commission* v *France*, see footnote 9 and Case 310/85 *Deufil* v *Commission*, see footnote 9.

[27] The Commission analyses Joined Cases 6 and 11/69 *Commission* v *France* , see footnote 9; Case 173/73 *Italy* v *Commission*, see footnote 6; Case 203/82 *Commission* v *Italy* [1983] ECR 2525; Joined Cases C-72 and C-73/91 *Sloman Neptun*, see footnote 6, and the decision in *Maribel Quater*, see footnote 11.

45. The Commission agrees with the EFTA Surveillance Authority on the regional selectivity effect and that lower rates cannot be justified by the nature or general scheme of the system. The Commission submits that the Applicant has not demonstrated that the EFTA Surveillance Authority manifestly erred in its appreciation of the facts.

b) Effects on trade between Contracting Parties

The Applicant

46. If the Court finds that the EFTA Surveillance Authority correctly found that the criterion of selectivity was fulfilled, the Applicant submits that the Decision must be annulled, as it does not define which parts of the system affect trade between the Contracting Parties.

47. The Applicant submits that, to establish a breach of Article 61(1) EEA, it is necessary to show that the aided undertakings or products are competing in intra-EEA trade with other undertakings or products.[28] More specifically, trade must be affected to some extent, cf. the *de minimis* rule, according to which Article 92(1) EC is inapplicable if there is a lack of noticeable effect on trade, set at ECU 100 000 per firm over a period of three years.[29] Secondly, the assessment must be on an undertaking-by-undertaking or at least sector-by-sector basis. Where many undertakings in various sectors benefit from an aid scheme, the fact that certain recipients compete in intra-EEA trade does not make the entire scheme incompatible with the Agreement.[30]

48. The Applicant maintains that it is undisputed that many undertakings benefiting from lower social security contribution rates in zones 2 to 5 cannot have the potential to affect intra-EEA trade and that the EFTA Surveillance Authority accepts the fact that lower rates apply to a range of economic activities sheltered from international competition. However, the EFTA Surveillance Authority finds the entire system as such incompatible with the Agreement. As Article 61(1) EEA only prohibits State aid "in so far as" trade between the Contracting Parties is affected, the EFTA Surveillance Authority has misapplied Article 61(1) EEA and the Decision must be annulled in its entirety.

49. The Applicant submits that it is clearly necessary to draw the line as to the scope of Article 61(1) EEA applied to the Norwegian scheme, and submits that it is for the EFTA Surveillance Authority and not for the Court to make that assessment under Article 5(2)(a) of the Surveillance and Court Agreement.

The EFTA Surveillance Authority

50. The EFTA Surveillance Authority points out that State aid may take the form of a specific measure or an aid scheme. The EFTA Surveillance Authority's examination of the

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[28] See Case 197/73 *Italy* v *Commission*, see footnote 6; Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671.

[29] See Chapter 12 of the State Aid Guidelines, adopted by the EFTA Surveillance Authority, cf. amendments of 15 May 1996, which establishes the same *de minimis* rule for the EEA.

[30] See Case 173/73 *Italy* v *Commission*, see footnote 3, at para. 19; Case 310/85 *Deufil* v *Commission*, see footnote 9, at paras. 11-12;Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, at paras. 52-53.

compatibility with the EEA Agreement of an aid scheme relate to the scheme itself and not to any individual aid granted under the scheme. For the scheme to be approved, it has to be compatible with the Agreement in all respects and, if it leaves room for the granting of aid incompatible with the Agreement, it cannot be considered compatible unless altered so as to eliminate the possibility of granting such aid. Further, partial approval is possible if the scheme contains criteria on which separation between the compatible and incompatible parts can be made, and aid schemes can be approved subject to conditions.

51. Monitoring of State aid under the EEA Agreement depends on co-operation with the State concerned, and the justification and information necessary in order for the scheme to be approved in part or subject to conditions will first of all have to be provided by the State.

52. With regard to determining whether an aid scheme affects competition and trade between EEA States, the assessment will normally have to be made in the abstract on the basis of the characteristics of the scheme as such, rather than on the basis of the actual situation of any potential recipient, which would include *inter alia* an analysis of the market.[31]

53. A decision declaring an existing aid scheme incompatible with the EEA Agreement is constitutive and brings into force, as of the date set for compliance, the implied prohibition in Article 61(1) EEA. Such a decision does not affect grants of aid already made under the scheme, nor does it imply any formal determination of the compatibility with the Agreement of any further grants under the scheme. However, after the date set for compliance, the aid will not constitute existing aid but rather new aid and will fall under the procedure laid down in Article 61(3) EEA. Accordingly, aid granted without prior authorization will, provided that the aid falls within the scope of Article 61(1) EEA, be illegal.

54. The EFTA Surveillance Authority submits that the contention of the Applicant to the effect that the EFTA Surveillance Authority misapplied Article 61(1) EEA by finding the system as such incompatible with the EEA Agreement, regardless of the situation of undertakings not operating in intra-EEA competition, and that it exceeded its powers by subjecting the benefits enjoyed by such undertakings to notification or other obligations, is based on a misconception of the scope and implications of the Decision.

55. First, the only effect of the Decision is that, after 31 December 1998, a benefit under the system can no longer be considered existing aid within the meaning of Article 61(1) EEA. While this means in principle that any benefit granted under the system after the set date will be illegal unless notified and authorized, this applies only to benefits constituting aid within the meaning of Article 61(1) EEA. Thus, in respect of benefits falling outside the scope of the Agreement, the finding in no way alters the situation prevailing prior to the Decision. Secondly, as regards the necessary adjustments to the system required by the EFTA Surveillance Authority, they are not obligations imposed on Norway, but only indications as to what would be required in case Norway, in order to comply with the Decision, were to opt for retaining the system rather than replacing or abolishing it. If benefits under the altered system did not affect or threaten to affect trade, but nevertheless were subject to the reporting condition or other conditions, this would not be a result of the Decision of the EFTA Surveillance Authority but of the fact that the system submitted for approval included both aid and benefits not constituting aid.

[31] Case C-248/84, *Germany* v *Commission*, see footnote 9, at para. 18.

The Commission of the European Communities

56. The Commission submits that the existence of an economic activity is a prerequisite for the application of Article 61(1) EEA. Once an economic activity has been identified, there is a strong presumption that the aid distorts competition, representing as it does the intervention of the State in the operation of the market. Thus the Commission contests the view that "undertakings sheltered from all competition" necessarily fall outside the scope of Article 61(1) EEA. An undertaking which is sheltered from competition as a result of measures taken by the State might nevertheless be engaged in economic activity, and as such will be subject to the discipline of Article 61(1) EEA. To what extent the scheme involves aid to certain beneficiaries that are not engaged in economic activity is in any event immaterial, as the scheme in question involves, in the Commission's submission, in very large measure, undertakings engaged in economic activity and aid that would distort competition.

57. The EFTA Surveillance Authority has the power to conduct the analysis under Article 61(1) EEA by reference to a scheme (regime or system) expressed in the abstract, rather than by reference to specific undertakings. This is confirmed by Article 62(1) EEA, the practice of the Commission and the case law of the ECJ.[32] In such an analysis, the EFTA Surveillance Authority should not approve a scheme unless the terms of the scheme are sufficiently precise so as to make it impossible in law for an aid to be granted under the scheme that would not be consistent with the State aid rules.

58. As to the Applicant's assertion that the EFTA Surveillance Authority should have approved the scheme in so far as it relates to aid to beneficiaries which does not distort or threaten to distort competition, the Commission observes *inter alia* the wide margin of discretion the EFTA Surveillance Authority is allowed in deciding the terms on which it is prepared to authorize a scheme. In the light of the wide concept of economic activity, the Commission further submits that it is likely that the group of such beneficiaries would be small.

59. It is, however, up to the Applicant to come forward with concrete suggestions about how to differentiate in practice between those beneficiaries under the scheme it considers caught by Article 61(1) EEA and those it considers not caught, if the Government wishes to pursue the line proposed by it. The Commission submits that the Applicant is estopped from pleading its own failure to so differentiate the aid in defence of the scheme as a whole. The Commission considers that the Applicant has no legal interest in annulment of the contested decision, because the contested decision, correctly interpreted, does not preclude the Applicant from continuing to grant assistance to certain beneficiaries in circumstances where there is no distortion of competition (or no effect on trade between contracting parties), and thus no aid within the meaning of Article 61(1) of the Agreement.

60. As regards the Applicant's arguments in relation to effect on trade between the Contracting Parties, the Commission submits that the Applicant does not accurately state the law. It is not necessary, in order for there to be an effect on trade between Contracting Parties, that the product or service in question is actually exported from or imported to the State concerned. It is sufficient if there are undertakings in other States that are in competition with the undertakings receiving the aid. In such a case, the aid strengthens the position of the recipient vis-à-vis its competitor in the other State and potentially reduces the possibilities for the competitor to enter the market of the aid recipient. Such aid is capable of affecting trade between Contracting Parties.

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32 Case C-47/91 *Italy* v *Commission* ("*Italgrani*") [1994] ECR I-4635, at para. 21; Case 248/84 *Germany* v *Commission*, see footnote 9, at para. 18.

The second submission - failure to state reasons

The Applicant

61. The Applicant refers to Article 16 of the Surveillance and Court Agreement and the *Scottish Salmon Growers* case[33] and submits that the EFTA Surveillance Authority has failed to adequately explain, first, why the system in question is not sufficiently general and, secondly, why aid to undertakings sheltered from international competition is incompatible with the Agreement.

62. As regards the first point, the Applicant notes in particular that the EFTA Surveillance Authority has not explained why the neutral parameter applied (residence of the employee) and the policy considerations pursued by the Norwegian Government are of "no relevance".

63. As regards the second point, the Applicant submits that it constitutes a breach of the EFTA Surveillance Authority's obligation to set out the "principal issues of law" that the EFTA Surveillance Authority does not explain why aid to undertakings that are clearly not affected by intra-EEA competition falls within the scope of Article 61(1) EEA.

64. The EFTA Surveillance Authority further does not fulfil its obligation to set out the "principal issues of...fact" in relation to alleged distortion of competition. The EFTA Surveillance Authority must, in the submission of the Applicant, provide information on the existence of channels of trade in the sector concerned, the relevant market situation, the beneficiary's share of the market and its export to other Contracting Parties.[34] The Applicant maintains that these questions are only briefly touched on by the EFTA Surveillance Authority, and only in so far as concerns a very few of the undertakings covered by the scheme.

65. The failure to draw the line as to which undertakings operate under conditions of intra-EEA trade and which fall outside the scope of Article 61(1) EEA is an infringement of the EFTA Surveillance Authority's obligation to give clear decisions.[35]

The EFTA Surveillance Authority

66. The EFTA Surveillance Authority submits that the reasons stated in the Decision were sufficient for the purposes of Article 16 of the Surveillance and Court Agreement. All relevant issues were adequately addressed, the EFTA Surveillance Authority's findings explicitly spelled out and the circumstances relied upon in making the findings clearly identified. This applies to the EFTA Surveillance Authority's reasoning with regard to the general nature of the system and the relevance of the policy considerations pursued by the Norwegian Government.

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[33] Case E-2/92 *Scottish Salmon Growers Association* v *ESA* [1994-95] EFTA Court Rep. 59, at para. 25.

[34] See Joined Cases 296 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809.

[35] See *inter alia* Case 70/72 *Commission* v *Germany*, see footnote 9.

67. The Applicant's second point, that the EFTA Surveillance Authority did not explain why undertakings that clearly were not affected by intra-EEA competition fell within the scope of Article 61 EEA, reflects, in the submission of the EFTA Surveillance Authority, a misconception on the part of the Applicant. The reasons for the EFTA Surveillance Authority's finding that the differentiated contribution system affected trade are, in the EFTA Surveillance Authority's view, clearly sufficient for the purpose of Article 16 of the Surveillance and Court Agreement.

68. Third, the EFTA Surveillance Authority submits that, with regard to setting out the principal issues of fact, a different assessment is involved in cases concerning an aid system and an aid measure for the benefit of an identified recipient, such as the situation was in the case referred to by the Applicant.[36] In any case, the EFTA Surveillance Authority argues, the circumstances set out in the Decision were clearly sufficient both to meet the requirements indicated in *Leeuwarder* and for the purposes of Article 16 of the Surveillance and Court Agreement.

The Commission of the European Communities

69. The Commission submits that the Decision more than satisfies the requirements established by the case law with regard to the statement of reasons.[37] On the specific issues raised by the Applicant, the complaint that the Decision "does not explain why the neutral parameter applied is of no relevance" and that the Decision "does not explain why the policy considerations pursued by Norway are of no relevance", the Commission submits that the necessary statements of fact and law are present, as well as the logical statements connecting them. As regards the reasoning concerning the effects on trade between Contracting Parties of the scheme as a whole, the Commission submits that the Applicant itself refers to the relevant part of the Decision, which more than satisfies the requirements of the case law.

70. The Commission notes that the Applicant seeks to introduce arguments that do not relate to the reasoning of the Decision, but in reality relate to the assessment by the EFTA Surveillance Authority of the facts. These two pleas should not be confused.[38]

Thór Vilhjálmsson
Judge-Rapporteur

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[36] Joined Cases 296 and 318/82 *Netherlands and Leeuwarder Papierenwarenfabriek* v *Commission*, see footnote 34.

[37] Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, at para. 86; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] I-1719, at para. 63.

[38] See Case C-367/95 P *Commission* v *Sytraval and Brink's France*, see footnote 37.

Case E-1/99

Storebrand Skadeforsikring AS
v
Veronika Finanger

(Request for an Advisory Opinion from Norges Høyesterett (Supreme Court of Norway))

(Motor Vehicle Insurance Directives – driving under the influence of alcohol – compensation for passengers)

Advisory Opinion of the Court, 17 November 1999 121
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Summary of the Advisory Opinion

1. The Motor Vehicle Insurance Directives have established the principle of compulsory third-party insurance in return for a single premium throughout the European Economic Area. In view of the aim of ensuring protection, which is stated in the Motor Vehicle Insurance Directives, Article 3(1) of the First Motor Vehicle Insurance Directive, as developed and amended by the Second and Third Motor Vehicle Insurance Directives, must be interpreted as meaning that compulsory motor vehicle insurance must enable third-party victims of accidents caused by motor vehicles to be compensated for all actual loss incurred up to the amounts fixed in Article 1(2) of the Second Motor Vehicle Insurance Directive.

2. The three Motor Vehicle Insurance Directives, taken as a whole, provide for limits on the extent to which insurers may rely on contractual clauses or national statutory provisions on liability for compensation to exclude certain situations from insurance coverage altogether.

Sak E-1/99

Storebrand Skadeforsikring AS
mot
Veronika Finanger

(Anmodning om en rådgivende uttalelse fra Norges Høyesterett)

(Motorvognforsikringsdirektivene - kjøring under alkoholpåvirkning - erstatning for passasjerer)

Rådgivende uttalelse fra Domstolen, 17 november 1999 121
Rettsmøterapport 133

Sammendrag av den rådgivende uttalelsen

1. Motorvognforsikringsdirektivene har etablert prinsippet om obligatorisk forsikring overfor tredjeparter i bytte mot en enkelt premie, over hele Det europeiske økonomiske samarbeidsområde. I lys av målsetningen om å sikre beskyttelse, som påpekes i motorvognforsikringsdirektivene, må artikkel 3 nr 1 i første motorvognforsikringsdirektiv, som utviklet og endret ved annet og tredje motorvognforsikringsdirektiv, forstås slik at den obligatoriske motorvognforsikringen må gi skadelidte tredjeparter i ulykker forårsaket av motorvogner, dekning for hele det påførte tap opp til beløpene som er fastsatt i artikkel 1 nr 2 i annet motorvognforsikringsdirektiv.

2. De tre direktivene, sett i sammenheng, setter grenser for i hvilken utstrekning forsikrere kan påberope kontraktsbestemmelser eller nasjonale lovbestemmelser om erstatningsansvar for helt å utelukke visse tilfeller fra forsikringsdekning.

3. Article 2 Second Motor Vehicle Insurance Directive is an exception to a general rule and so must be interpreted narrowly.

4. A reduction of compensation due to contributory negligence is possible in exceptional circumstances. However, the principles set out in the Motor Vehicle Insurance Directives must be respected. A finding that a passenger who passively rode in a car driven by an intoxicated driver is to be denied compensation, or that compensation is to be reduced in a way which is disproportionate to the contribution to the injury by the injured party, is incompatible with the Directives.

3. Artikkel 2 er et unntak fra en generell regel, og må derfor tolkes snevert.

4. En reduksjon av erstatningen på grunn av medvirkning, er mulig i unntakstilfelle. Men de prinsipper som er slått fast i motorvognforsikrings-direktivene må respekteres. Dersom en passasjer som passivt sitter på i en bil som føres av en beruset fører, nektes erstatning eller får erstatningen redusert på en måte som er uforholdsmessig i forhold til den skadelidtes medvirkning til skaden, er det uforenlig med direktivene.

ADVISORY OPINION OF THE COURT
17 November 1999*

(Motor Vehicle Insurance Directives – driving under the influence of alcohol – compensation for passengers)

In Case E-1/99

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 Norges Høyesterett (Supreme Court of Norway) for an Advisory Opinion in the case pending before it between

Storebrand Skadeforsikring AS

and

Veronika Finanger

on the interpretation of the Agreement on the European Economic Area (hereinafter the "EEA Agreement"), with particular reference to the following Acts referred to in Annex IX to the EEA Agreement:

- the Act referred to in point 8 of Annex IX (Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, hereinafter the "First Motor Vehicle Insurance Directive");

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

RÅDGIVENDE UTTALELSE FRA DOMSTOLEN
17 november 1999*

(Motorvognforsikringsdirektivene - kjøring under alkoholpåvirkning - erstatning for passasjerer)

I sak E-1/99

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

Storebrand Skadeforsikring AS

og

Veronika Finanger

om tolkningen av Avtale om Det europeiske økonomiske samarbeidsområde (heretter "EØS-avtalen") med særlig henvisning til følgende rettsakter som det er henvist til i Vedlegg IX til EØS-avtalen:

– rettsakten som det er henvist til i punkt 8 av Vedlegg IX (Rådsdirektiv 72/166/EØF av 24 april 1972 om tilnærming av medlemsstatenes lovgivning om ansvarsforsikring for motorvogn og kontroll med at forsikringsplikten overholdes, heretter "første motorvognforsikrings-direktiv");

* Språket i anmodningen om en rådgivende uttalelse: Norsk.

- the Act referred to in point 9 of Annex IX (Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, hereinafter the "Second Motor Vehicle Insurance Directive");

- the Act referred to in point 10 of Annex IX (Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, hereinafter the "Third Motor Vehicle Insurance Directive");

  (hereinafter collectively the "Directives" or the "Motor Vehicle Insurance Directives").

THE COURT,

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

Registrar: Gunnar Selvik

after considering the written observations submitted on behalf of:

- the Appellant, Storebrand Skadeforsikring AS, represented by Counsel Emil Bryhn and Tron Gundersen (hereinafter the "appellant");

- the Respondent, Veronika Finanger, represented by Counsel Erik Johnsrud (hereinafter the "respondent");

- the Government of Iceland, represented by Einar Gunnarsson, Legal Officer, External Trade Department, Ministry of Foreign Affairs, acting as Agent, assisted by Björn Friðfinnsson, Permanent Secretary, Ministry of Justice;

- the Government of Liechtenstein, represented by Christoph Büchel, Director of the EEA Coordination Unit, and Beatrice Hilti, Officer of the EEA Coordination Unit, acting as Agents;

- the Government of Norway, represented by Stephan L. Jervell, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent;

- rettsakten som det er henvist til i punkt 9 av Vedlegg IX (Annet Rådsdirektiv 84/5/EØF av 30 desember 1983 om tilnærming av medlemsstatenes lovgivning om ansvarsforsikring for motorvogn, heretter "annet motorvognforsikringsdirektiv");

- rettsakten som det er henvist til i punkt 10 av Vedlegg IX (Tredje Rådsdirektiv 90/232/EØF av 14 mai 1990 om tilnærming av medlemsstatenes lovgivning om ansvarsforsikring for motorvogn, heretter "tredje motorvognforsikringsdirektiv");

(heretter i fellesskap "direktivene" eller "motorvognforsikrings-direktivene").

DOMSTOLEN,

sammensatt av: President Bjørn Haug og dommerne Thór Vilhjálmsson og Carl Baudenbacher (saksforberedende dommer)

Justissekretær: Gunnar Selvik

etter å ha vurdert de skriftlige saksfremstillinger inngitt av:

- Den ankende part, Storebrand Skadeforsikring AS, representert ved advokatene Emil Bryhn og Tron Gundersen (heretter "den ankende part");

- Ankemotparten, Veronika Finanger, representert ved advokat Erik Johnsrud (heretter "ankemotparten");

- Den islandske regjering, representert ved Einar Gunnarsson, saksbehandler, Avdeling for utenrikshandel, Utenriksdepartementet, som partsrepresentant, assistert av Björn Friðfinnsson, departementsråd, Justisdepartementet;

- Den Liechtensteinske regjering, representert ved Christoph Büchel, direktør ved enheten for EØS koordinering, og Beatrice Hilti, saksbehandler ved enheten for EØS koordinering, som partsrepresentanter;

- Den norske regjering, representert ved Stephan L Jervell, advokat, regjeringsadvokatens kontor, som partsrepresentant;

- the EFTA Surveillance Authority, represented by Peter Dyrberg, Director, Legal & Executive Affairs Department, and Helga Óttarsdóttir, Officer, Legal & Executive Affairs Department, acting as Agents;
- the Commission of the European Communities, represented by John Forman and Christina Tufvesson, both Legal Advisers of the Legal Service of the Commission of the European Communities, acting as Agents;

having regard to the Report for the Hearing,

after hearing the oral observations of the appellant, the respondent, the Government of Iceland, the Government of Norway, the EFTA Surveillance Authority and the Commission of the European Communities at the hearing on 30 September 1999,

gives the following

Advisory Opinion

Facts and procedure

1 By a reference dated 23 June 1999, registered at the Court on 28 June 1999, Norges Høyesterett (Supreme Court of Norway), made a Request for an Advisory Opinion in a case brought before it by the appellant against the respondent.

2 On 11 November 1995 in Nord-Trøndelag, Norway, the respondent was injured in a traffic accident. She was a passenger in a car which drove off the road. The cause of the accident was the reduced driving ability of the driver, due to the driver being under the influence of alcohol. As a result of the accident, the respondent was left 60 per cent medically disabled and 100 per cent occupationally disabled. The third-party motor vehicle liability insurance was with the appellant.

3 The respondent sued the appellant, claiming compensation for the personal injuries she suffered in the accident. The basis for the claim was the Norwegian Act of 3 February 1961 relating to compensation for injury caused by a motor vehicle (the Automobile Liability Act - *bilansvarsloven*). According to section 15 of that Act, the owner of a motor vehicle subject to registration shall insure it "[f]or cover of insurance claims pursuant to chapter II." Under section 4 in chapter II, the main rule is that, when a motor vehicle causes injury, the injured party is entitled to compensation from the insurance company with which the vehicle is insured, regardless of whether anyone is to blame for the injury.

- EFTAs overvåkningsorgan, representert ved Peter Dyrberg, direktør, avdeling for juridiske saker og eksekutivsaker, og Helga Óttarsdóttir, saksbehandler, avdeling for juridiske saker og eksekutivsaker, som partsrepresentanter;

- Kommisjonen for De europeiske fellesskap, representert ved John Forman og Christina Tufvesson, begge juridiske rådgivere ved Kommisjonens rettsavdeling, som partsrepresentanter.

med henvisning til rettsmøterapporten,

og etter å ha hørt de muntlige innleggene fra den ankende part, ankemotparten, Den islandske regjering, Den norske regjering, EFTAs overvåkningsorgan og Kommisjonen for De europeiske fellesskap under høringen den 30 september 1999,

gir slik

Rådgivende uttalelse

Fakta og prosedyre

1 Ved beslutning datert 23 juni 1999, mottatt ved Domstolen den 28 juni 1999, har Norges Høyesterett anmodet om en rådgivende uttalelse i en sak innbrakt for denne av den ankende part mot ankemotparten.

2 Den 11 november 1995 i Nord Trøndelag ble ankemotparten skadet i en trafikkulykke. Hun var passasjer i en bil som kjørte av veien. Årsaken til ulykken var at sjåførens kjøreferdigheter var svekket på grunn av førerens alkoholpåvirkning. Som følge av ulykken ble ankemotparten 60% medisinsk invalid og 100% ervervsufør. Trafikkforsikringen var hos den ankende part.

3 Ankemotparten har saksøkt den ankende part med krav om erstatning for den personskade som hun ble påført ved ulykken. Grunnlaget for kravet er lov av 3 februar 1961 om ansvar for skade som motorvogner gjer ("bilansvarsloven"). Etter lovens § 15 skal eier av registreringspliktig motorvogn forsikre denne "for all skade som går inn under kapitel II". Etter kapittel II § 4 er hovedregelen at når en motorvogn gjør skade, har skadelidte krav på erstatning hos det forsikringsselskapet som motorvognen er forsikret i, uavhengig av om noen er skyld i skaden.

4 The appellant rejected the claim of the respondent. The legal basis for refusing to pay compensation to the respondent was section 7, third paragraph, litra b of the Automobile Liability Act, which states *inter alia* that the injured party may not obtain compensation if he or she knew or must have known that the driver of the vehicle was under the influence of alcohol.

5 In a judgment of 21 September 1998, Frostating lagmannsrett (Frostating Court of Appeal) concluded that the accident occurred due to the driver's being under the influence of alcohol and that the respondent knew that the driver was under the influence of alcohol.

6 The appellate court noted that the main rule in section 7, third paragraph, litra b of the Automobile Liability Act is that the injured party is not entitled to compensation in those cases which fall within the scope of the provision. The court concluded, however, that section 7, third paragraph, litra b was contrary to EEA law. The provision was set aside pursuant to section 2 of Act No. 109 of 27 November 1992 relating to Implementation in Norwegian Law of the Main Agreement on the European Economic Area (EEA) etc. (the EEA Act – *EØS-loven*). Pursuant to section 7, first paragraph of the Automobile Liability Act, Frostating lagmannsrett reduced the compensation to be paid to the respondent by 30 per cent as a consequence of her having mentally contributed to the drive and her knowing that driving in a car under the prevailing conditions would entail a considerable safety risk. The appellant appealed the judgment to Høyesterett.

7 Høyesterett decided to submit a Request for an Advisory Opinion to the EFTA Court on the following question:

> *Is it incompatible with EEA law for a passenger who sustains injury by voluntarily driving in a motor vehicle not to be entitled to compensation unless there are special grounds for being so, if the passenger knew or must have known that the driver of the motor vehicle was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury?*

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

4 Den ankende part avviste ankemotpartens krav. Det rettslige grunnlaget for å nekte ankemotparten erstatning var bilansvarsloven § 7 tredje ledd bokstav b, som blant annet sier at den skadelidte ikke kan få erstatning dersom han eller hun visste eller måtte vite at motorvognens fører var påvirket av alkohol.

5 Ved dom av 21 September 1998, kom Frostating lagmannsrett til at ulykken inntraff på grunn av førerens alkoholpåvirkning, og at ankemotparten visste at føreren var påvirket av alkohol.

6 Lagmannsretten viste til at hovedregelen i bilansvarsloven § 7 tredje ledd bokstav b er at skadelidte ikke har krav på erstatning i de tilfellene som går inn under bestemmelsen. Lagmannsretten kom imidlertid til at bilansvarsloven § 7 tredje ledd bokstav b var i strid med EØS-retten. Bestemmelsen ble satt til side i henhold til § 2 i lov av 27 november 1992 nr 109 om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS) m.v. (EØS-loven). Med hjemmel i bilansvarsloven § 7 første ledd reduserte lagmannsretten ankemotpartens krav på erstatning med 30% som følge av at hun psykisk hadde medvirket til kjøreturen, og at hun hadde vært klar over at bilkjøring under de rådende forhold ville innebære en betydelig sikkerhetsmessig risiko. Den ankende part anket dommen til Høyesterett.

7 Høyesterett besluttet å fremme en anmodning om en rådgivende uttalelse til EFTA-domstolen med følgende spørsmål:

> *Er det uforenlig med EØS-retten at en passasjer som påføres skade ved frivillig kjøring i motorvogn, ikke har krav på erstatning med mindre særlige grunner foreligger, dersom passasjeren visste eller måtte vite at motorvognens fører var påvirket av alkohol på ulykkestidspunktet og det var årsakssammenheng mellom alkoholpåvirkningen og skaden?*

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

Legal background

1. EEA law

9 The question referred by Høyesterett concerns the interpretation of various articles of the First, Second and Third Motor Vehicle Insurance Directives.

10 Article 3(1) and 3(2) of the First Motor Vehicle Insurance Directive read as follows:

> "1. Each Member State shall, subject to Article 4, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures.
>
> 2. Each Member State shall take all appropriate measures to ensure that the contract of insurance also covers:
> - according to the law in force in other Member States, any loss or injury which is caused in the territory of those States (...)."

11 Article 1(1) and 1(2) of the Second Motor Vehicle Insurance Directive read as follows:

> "1. The insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover compulsorily both damage to property and personal injuries.
>
> 2. Without prejudice to any higher guarantees which Member States may lay down, each Member State shall require that the amounts for which such insurance is compulsory are at least:
> - in the case of personal injury, 350 000 ECU where there is only one victim (...)".

12 Article 2 of the Second Motor Vehicle Insurance Directive reads as follows:

> "1. Each Member State shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3(1) of Directive 72/166/EEC, which excludes from insurance the use or driving of vehicles by:
> - persons who do not have express or implied authorization thereto, or
> - persons who do not hold a licence permitting them to drive the vehicle concerned, or
> - persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned,

Rettslig bakgrunn

1. EØS-retten

9 Spørsmålet som er forelagt av Høyesterett gjelder tolkningen av forskjellige artikler i første, annet og tredje motorvognforsikringsdirektiv.

10 Første motorvognforsikringsdirektiv artikkel 3 nr 1 og nr 2 lyder som følger:

> "1. Med forbehold for anvendelsen av artikkel 4 skal hver medlemsstat treffe alle hensiktsmessige tiltak for å sikre at erstatningsansvar for kjøretøyer som er hjemmehørende på dens territorium, er dekket av en forsikring. Hvilke skader som dekkes, samt forsikringsvilkårene bestemmes innen rammen av disse tiltakene.
>
> 2. Hver medlemsstat skal treffe alle hensiktsmessige tiltak for å sikre at forsikringsavtalen også dekker:
> – skader som er voldt på andre medlemsstaters territorium, i samsvar med disse staters lovgivning, (...)."

11 Annet motorvognforsikringsdirektiv artikkel 1 nr 1 og nr 2 lyder som følger:

> "1. Forsikringen nevnt i artikkel 3 nr. 1 i direktiv 72/166/EØF skal dekke både tingskade og personskade.
>
> 2. Hver medlemsstat skal, med forbehold for høyere garantibeløp som medlemsstatene eventuelt selv fastsetter, kreve at den lovpliktige ansvarsforsikring minst skal dekke:
> – for personskade, 350 000 ECU dersom det er bare en skadelidt (...)."

12 Annet motorvognforsikringsdirektiv artikkel 2 lyder som følger:

> "1. Hver medlemsstat skal treffe de nødvendige tiltak for å sikre at enhver lovbestemmelse eller klausul nevnt i en forsikringspolise utstedt i samsvar med artikkel 3 nr. 1 i direktiv 72/166/EØF, som bestemmer at forsikringen ikke dekker følgende personers bruk av eller kjøring med et kjøretøy:
> – personer som ikke uttrykkelig eller stilltiende har tillatelse til det, eller
> – personer som ikke har førerkort for vedkommende kjøretøy, eller
> – personer som ikke etterkommer de lovbestemte krav til kjøretøyets tekniske og sikkerhetsmessige stand,

shall, for the purposes of Article 3(1) of Directive 72/166/EEC, be deemed to be void in respect of claims by third parties who have been victims of an accident.

However the provision or clause referred to in the first indent may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen.
Member States shall have the option - in the case of accidents occurring on their territory - of not applying the provision in the first subparagraph if and in so far as the victim may obtain compensation for the damage suffered from a social security body.

2. In the case of vehicles stolen or obtained by violence, Member States
may lay down that the body specified in Article 1(4) will pay compensation instead of the insurer under the conditions set out in paragraph 1 of this Article; where the vehicle is normally based in another Member State, that body can make no claim against any body in that Member State.
(...)."

13 Article 1, first paragraph of the Third Motor Vehicle Insurance Directive reads as follows:

"Without prejudice to the second subparagraph of Article 2(1) of Directive 84/5/EEC, the insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle (...)."

2. National law

14 Section 7 of the Norwegian Automobile Liability Act, contained in Chapter II of the Act with the caption "compensation for which the insurance company is responsible", reads as follows:

"§ 7 (when the injured party has contributed to the injury)

If the injured party has intentionally or negligently contributed to the injury, the court may reduce the compensation or set it aside entirely, except in cases when the injured party has exhibited only slight negligence. In the decision, regard shall be had to the conduct demonstrated by both sides and the circumstances generally.

If a motor vehicle causes injury while immobile and the injury did not occur in connection with the stopping or starting of the vehicle, the court may reduce the compensation or set it aside entirely, even if the injured party has exhibited only slight negligence.

The injured party may not obtain compensation, unless there are special grounds for doing so, if he voluntarily drove or allowed himself to be driven in the motor vehicle which caused the injury even though he

ved gjennomføringen av artikkel 3 nr. 1 i direktiv 72/166/EØF ikke skal komme til anvendelse med hensyn til krav fra tredjepersoner som er skadelidte i en ulykke.

Bestemmelsen eller klausulen nevnt i første strekpunkt kan likevel gjøres gjeldende overfor personer som frivillig har tatt plass i kjøretøyet som forårsaket skaden, dersom assurandøren kan bevise at de visste at kjøretøyet var stjålet.
Når det dreier seg om ulykker inntruffet på deres territorium, kan medlemsstatene unnlate å anvende bestemmelsen i første ledd dersom og i den utstrekning skadelidte kan oppnå erstatning for sin skade fra et organ for sosial trygghet.

2. Når det dreier seg om kjøretøyer som er stjålet eller tilegnet ved makt, kan medlemsstatene bestemme at institusjonen nevnt i artikkel 1 nr. 4 skal betale erstatning i stedet for assurandøren på de vilkår som er fastsatt i nr. 1 i denne artikkel. Dersom kjøretøyet er hjemmehørende i en annen medlemsstat, vil denne institusjon ikke ha noen regressmulighet overfor noen institusjon i denne medlemsstat (...). "

13 Tredje motorvognforsikringsdirektiv artikkel 1 første ledd lyder som følger:

"Med forbehold for artikkel 2 nr. 1 annet ledd i direktiv 84/5/EØF skal forsikringen nevnt i artikkel 3 nr. 1 i direktiv 72/166/EØF dekke ansvar for personskader som skyldes bruk av et kjøretøy, for alle passasjerer bortsett fra føreren (...). "

2. Nasjonal rett

14 Bilansvarslovens § 7, som står i lovens kapittel II med tittelen "[s]kadebot som trafikktrygdaren skal svara", lyder som følger:

"§ 7 (Når skadelidaren har medverka til skaden)

Har skadelidaren medverka til skaden med vilje eller i aktløyse, kan retten minka skadebotkravet eller lata det falla heilt bort, så nær som når skadelidaren kan leggjast berre lite til last. Avgjerda skal retta seg etter åtferda på kvar side og tilhøva elles.

Gjer ei motorvogn skade medan ho står still og skaden ikkje vert gjord medan vogna vert sett i gang eller stogga, kan retten minka skadebotkravet eller lata det falla heilt bort, jamvel når skadelidaren kan leggjast berre lite til last.

Skadelidaren kan ikkje få skadebot utan at særlege grunnar er for det, dersom han av fri vilje køyrde eller let seg køyre i den vogna som gjorde skaden endå han

a) knew that the vehicle had been taken from its lawful owner by a criminal act, or

b) knew or must have known that the driver of the vehicle was under the influence of alcohol or another intoxicant or narcotic (cf. section 22, first paragraph of the Road Traffic Act). The specific rule enunciated herein does not apply, however, if it must be assumed that the injury would have occurred even if the driver of the vehicle had not been under the influence as aforementioned.

An injured driver of the motor vehicle which caused the injury may not obtain compensation, unless there are special grounds for doing so, if he knew or must have known that the vehicle was being used in connection with a criminal act."

Arguments of the parties

15 The *appellant*, supported by the *Government of Iceland* and the *Government of Norway*, is of the opinion that a distinction must be drawn between conditions for liability and insurance cover. The Directives do not impose requirements as to the content of national law governing liability, but rather are to be construed as regulating insurance cover when conditions for compensation are present. Therefore, they relate only to insurance cover, not to liability. The Directives concern only situations in which the right to compensation is already established under a Contracting Party's national law. This follows especially from the headings and the wording of the Directives in several places.

16 The appellant argues that, accordingly, the consideration of protection of victims goes no further than to ensure that a person who has a claim against a person who has caused injury gets that claim satisfied. The Directives' objective of protection does not go so far as to confer a claim on a victim of a motor vehicle accident against a person who has caused injury and/or his insurance company.

17 With respect to the objective of the Directives, *viz*, facilitation of the free movement of persons within the European Economic Area, the appellant argues that the fact that the conditions for liability for compensation may vary between Member States is not a hindrance to the free movement of persons, since only a small group of passengers is affected.

18 The appellant, the Government of Iceland and the Government of Norway propose to answer the question of Høyesterett in the negative.

19 The *Government of Liechtenstein* argues that the exclusion of insurance liability as set out in the Directives is exhaustive. Therefore it is incompatible with EEA law to provide for a passenger who sustains injury by voluntary driving in a motor vehicle not to be entitled to compensation, unless there are special grounds for being so, if the passenger knew or must have known that the driver was under the influence of alcohol at the time of the accident.

a) visste at vogna var fråvend rette innehavaren med brotsverk, eller

b) visste eller måtte vita at vognføraren var påverka av alkohol eller andre rusande eller døyvande råder (jf vegtrafikklova § 22 første leden). Særregelen her gjeld likevel ikkje i den mon ein må leggja til grunn at skaden ville ha skjedd jamvel om vognføraren ikkje hadde vore påverka som nemnd.

Skadeliden vognførar som køyrde den vogna som gjorde skaden, kan ikkje få skadebot utan at særlege grunnar er for det dersom han visste eller måtte vita at vogna vart nytta i samband med eit brotsverk."

Partenes anførsler

15 *Den ankende part*, støttet av *Den islandske regjering* og *Den norske regjering*, hevder at det må trekkes et skille mellom vilkår for erstatningsansvar og forsikringsdekning. Direktivene stiller ikke krav til innholdet av nasjonal erstatningsrett, men må forstås slik at de regulerer forsikringsdekningen når vilkårene for erstatningsansvar foreligger. Derfor relaterer de seg bare til forsikringsdekning, og ikke til erstatningsansvar. Direktivene omfatter bare situasjoner hvor retten til erstatning allerede er etablert i en avtaleparts nasjonale rett. Dette fremgår særlig av direktivenes overskrifter og ordlyd på flere steder.

16 Den ankende part hevder at målsetningen om å beskytte skadelidte følgelig ikke rekker lenger enn til å sikre at den som har et krav mot en skadevolder får dette innfridd. Direktivenes beskyttelsesmålsetning rekker ikke så langt som til at den som rammes av en motorvognulykke, får et krav mot skadevolder og/eller hans forsikringsselskap.

17 Når det gjelder formålet med direktivene, som er å lette den frie bevegeligheten av personer innenfor Det europeiske økonomiske samarbeidsområde, fremholder den ankende part at det faktum at vilkårene for erstatningsansvar vil kunne variere mellom medlemsstatene, ikke er til hinder for den frie bevegelighet av personer, siden bare en liten gruppe passasjerer berøres.

18 Den ankende part, Den islandske regjering og Den norske regjering foreslår å besvare spørsmålet fra Høyesterett benektende.

19 *Den liechtensteinske regjering* hevder at den utelukkelsen av forsikringsansvar som er oppregnet i direktivene er uttømmende. Det er derfor uforenlig med EØS-retten å foreskrive at en passasjer som lider skade etter frivillig å ha kjørt i et motorkjøretøy ikke har rett til erstatning, med mindre særlige grunner foreligger, dersom passasjeren visste eller måtte vite at føreren var påvirket av alkohol på ulykkestidspunktet.

20 The *respondent* is of a different opinion and refers in particular to the wording of Article 3(1) of the First Motor Vehicle Insurance Directive and to Article 1, first paragraph of the Third Motor Vehicle Insurance Directive. An ordinary linguistic understanding of these provisions supports the proposition that the Directives impose requirements for national legislation on insurance cover of liability for compensation. This, in the view of the respondent, is also in line with the goal of ensuring a high level of consumer protection as referred to in the twelfth and thirteenth recitals of the preamble to the Third Motor Vehicle Insurance Directive.

21 In the view of the *EFTA Surveillance Authority*, the scope of the Motor Vehicle Insurance Directives cannot vary according to the classification of the rules concerning liability and insurance in the Contracting Parties' national legal systems. In particular, the EFTA Surveillance Authority argues that the qualification of a rule under national law cannot preclude an examination as to whether it is compatible with the Directives. Therefore, Article 3(1) of the First Motor Vehicle Insurance Directive, seen in the light of Article 1 of the Third Motor Vehicle Insurance Directive and Article 2(1) of the Second Motor Vehicle Insurance Directive, must be interpreted so as to preclude a national rule according to which there is no obligation for the insurer to pay compensation if the passenger knew or must have known that the driver was under the influence of alcohol at the time of the accident.

22 The *Commission of the European Communities* refers to the Directives and argues that it follows from their whole rationale that compensation to the victims of car accidents should be guaranteed in all cases of accidents. The Court of Justice of the European Communities ("ECJ") has confirmed this interpretation in Case C-129/94 *Ruiz Bernáldez* [1996] ECR I-1829. The Commission concludes that the Directives preclude a national statutory provision according to which there is no obligation for the insurer to pay compensation to a passenger who sustains injuries unless there are special grounds for doing so, if the passenger knew or should have known that the driver of the vehicle was under the influence of alcohol at the time of the accident.

23 The respondent, the EFTA Surveillance Authority and the Commission of the European Communities propose to answer the question of Høyesterett in the affirmative.

Findings of the Court

24 The *Court* notes that the main argument of the *appellant*, the *Government of Iceland* and the *Government of Norway* is that the Motor Vehicle Insurance Directives do not deal with rules relating to personal liability but only with insurance. That argument may appear to find support in the titles of the Directives and the wording of the provisions, in particular in the First Motor

20 *Ankemotparten* har en annen oppfatning, og henviser særlig til ordlyden i første motorvognforsikringsdirektiv artikkel 3 nr 1, og til tredje motorvognforsikringsdirektiv artikkel 1 første ledd. En alminnelig språklig forståelse av disse bestemmelsene underbygger standpunktet om at direktivene stiller krav til nasjonal lovgivning om forsikringsdekning av erstatningsansvar. Dette er, etter ankemotpartens syn, også i tråd med målet om å sikre et høyt forbrukerbeskyttelsesnivå, som det henvises til i tolvte og trettende ledd av fortalen til tredje motorvognforsikringsdirektiv.

21 Etter *EFTAs overvåkningsorgans* oppfatning, kan ikke direktivenes virkeområde bero på klassifiseringen av reglene om erstatningsansvar og forsikring i avtalepartenes nasjonale rettssystemer. Særlig hevder EFTAs overvåkningsorgan at klassifiseringen av en regel i nasjonal rett ikke kan forhindre en undersøkelse av hvorvidt den er forenlig med motorvognforsikringsdirektivene. Derfor må første motorvognforsikringsdirektiv artikkel 3 nr 1, sett i lys av tredje motorvognforsikringsdirektiv artikkel 1 og annet motorvognforsikringsdirektiv artikkel 2 nr 1 tolkes slik at de utelukker en nasjonal regel som fritar forsikreren fra å betale erstatning hvis passasjeren visste eller måtte vite at føreren var under påvirkning av alkohol på ulykkestidspunktet.

22 *Kommisjonen for De europeiske fellesskap* henviser til direktivene og hevder at det følger av hele deres begrunnelse at erstatning til ofrene for bilulykker skal være garantert i alle ulykkestilfeller. Domstolen for De europeiske fellesskaper ("EF-domstolen") har bekreftet denne tolkningen i sak C-129/94 *Ruiz Bernáldez* [1996] ECR I-1829. Kommisjonen konkluderer med at direktivene utelukker en nasjonal lovbestemmelse som fritar forsikreren fra å betale erstatning til en passasjer som lider skade, med mindre særlige grunner foreligger, hvis passasjeren visste eller måtte vite at motorvognens fører var påvirket av alkohol på ulykkestidspunktet.

23 Ankemotparten, EFTAs overvåkningsorgan og Kommisjonen for De europeiske fellesskap foreslår å besvare spørsmålet fra Høyesterett bekreftende.

Domstolens bemerkninger

24 *Domstolen* bemerker at hovedargumentet fra *den ankende part, Den islandske regjering* og *Den norske regjering,* er at direktivene ikke omhandler erstatnings-ansvar, men bare forsikring. Dette argumentet kan synes å finne støtte i motorvognforsikringsdirektivenes overskrifter og formuleringen av

Vehicle Insurance Directive. However, further analysis of the texts, including the preambles to the Directives, is required.

25 The overall purpose of the Motor Vehicle Insurance Directives is to facilitate the free movement of goods and persons and to safeguard the interests of persons who may be the victims of accidents caused by motor vehicles (first and second recitals of the preamble to the First Motor Vehicle Insurance Directive). In particular, the goal of the Motor Vehicle Insurance Directives is to ensure the free movement of motor vehicles and of persons travelling in those vehicles (third recital of the preamble to the First Motor Vehicle Insurance Directive). To that end, the Motor Vehicle Insurance Directives aim at ensuring that "the national law of each Member State should (...) provide for the compulsory insurance of vehicles against civil liability, the insurance to be valid throughout Community territory" (eighth recital of the preamble to the First Motor Vehicle Insurance Directive).

26 The purpose of the Second Motor Vehicle Insurance Directive is to further reduce disparities between the laws of the Member States in the field of motor vehicle insurance since, as is stated in the third recital of the Second Motor Vehicle Insurance Directive "these disparities have a direct effect upon the establishment and the operation of the common market". Consequently, the Second Motor Vehicle Insurance Directive establishes, as already stated, *inter alia* minimum amounts for which insurance is compulsory (Article 1). The fifth recital of the preamble to the Second Motor Vehicle Insurance Directive emphasizes that these amounts must "guarantee victims adequate compensation irrespective of the Member State in which the accident occurred".

27 Lastly, the Third Motor Vehicle Insurance Directive aims at eliminating "any uncertainty concerning the application of the first indent of Article 3(2) of Directive 72/166/EC" (sixth recital of the preamble), according to which Member States shall take all appropriate measures to ensure that the contract of insurance also covers any loss or injury which is caused in the territory of those States. Thus, "a high level of consumer protection should be taken as a basis" (thirteenth recital of the preamble) and liability shall be covered "for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle" (Article 1).

28 The Court concludes from the foregoing that the Motor Vehicle Insurance Directives have established the principle of compulsory third-party insurance in return for a single premium throughout the European Economic Area. In view of the aim of ensuring protection, which is stated repeatedly in the Motor Vehicle Insurance Directives, Article 3(1) of the First Motor Vehicle Insurance Directive, as developed and amended by the Second and Third Motor Vehicle Insurance Directives, must be interpreted as meaning that compulsory motor vehicle insurance must enable third-party victims of accidents caused by motor vehicles to be compensated for all actual loss incurred up to the amounts fixed in Article 1(2) of the Second Motor Vehicle Insurance Directive, see also Case C-129/94

bestemmelsene, særlig i første direktiv. Imidlertid er det nødvendig med en grundigere analyse av tekstene, herunder også direktivenes fortaler.

25 Det generelle formålet med motorvognforsikringsdirektivene er å lette den frie bevegeligheten av varer og personer, og å ivareta interessene til personer som kan bli ofre ved ulykker forårsaket av motorkjøretøyer (første og annet ledd i fortalen til første motorvognforsikringsdirektiv). Særlig er målet med motorvognforsikringsdirektivene å sikre fri bevegelighet av motorkjøretøyer og personer som reiser med disse kjøretøyene (tredje ledd i fortalen til første motorvognforsikringsdirektiv). For å realisere dette formålet tar motorvognforsikringsdirektivene sikte på å sikre at "(a)lle medlemsstater skal (...) i sin nasjonale lovgivning sørge for at alle motorvogner skal ha lovpliktig ansvarsforsikring som dekker hele Fellesskapets territorium" (åttende ledd i fortalen til første direktiv).

26 Formålet med annet motorvognforsikringsdirektiv er å ytterligere redusere ulikhetene mellom de forskjellige medlemsstatenes regler på området for motorvognforsikring siden, som det slås fast i tredje ledd av fortalen til annet motorvognforsikringsdirektiv, "(d)isse ulikhetene har direkte innvirkning på det felles markeds opprettelse og funksjon." Annet motorvognforsikringsdirektiv fastsetter derfor blant annet, som allerede påpekt, beløp som den obligatoriske forsikringen minst skal dekke (artikkel 1). Det femte ledd i fortalen til annet motorvognforsikringsdirektiv vektlegger at disse beløpene må "dekke beløp inntil en slik størrelse at skadelidte i ethvert tilfelle er garantert erstatning uansett i hvilken medlemsstat skaden inntreffer".

27 Til slutt søker tredje motorvognforsikringsdirektiv å eliminere "enhver tvil med hensyn til anvendelsen av artikkel 3 nr 2 første strekpunkt i direktiv 72/166/EØF" (sjette ledd i fortalen), som pålegger medlemsstatene å treffe alle hensiktsmessige tiltak for å sikre at forsikringsavtalen også dekker skader som er voldt på andre medlemsstaters territorium. Derved "tas utgangspunkt i forbrukervern på et høyt nivå" (trettende punkt i fortalen), og ansvar skal dekkes for "personskader som skyldes bruk av et kjøretøy, for alle passasjerer bortsett fra føreren" (artikkel 1).

28 Domstolen slutter fra det foregående at motorvognforsikringsdirektivene har etablert prinsippet om obligatorisk forsikring overfor tredjeparter i bytte mot en enkelt premie, over hele Det europeiske økonomiske samarbeidsområde. I lys av målsetningen om å sikre beskyttelse, som gjentatte ganger påpekes i motorvognforsikringsdirektivene, må artikkel 3 nr 1 i første motorvognforsikringsdirektiv, som utviklet og endret ved annet og tredje motorvognforsikringsdirektiv, forstås slik at den obligatoriske motorvognforsikringen må gi skadelidte tredjeparter i ulykker forårsaket av motorvogner, dekning for hele det påførte tap opp til beløpene som er fastsatt i artikkel 1 nr 2 i annet motorvognforsikringsdirektiv, se også sak C-129/94 *Ruiz Bernáldez* [1996]

Ruiz Bernáldez [1996] ECR I-1829. That judgment states at paragraph 24 that "a compulsory insurance contract may not provide that in certain cases, in particular where the driver of the vehicle was intoxicated, the insurer is not obliged to pay compensation for the damage to property and personal injuries caused to third parties by the insured vehicle. (...)".

29 Even if the main text of the First Motor Vehicle Insurance Directive focuses on insurance coverage, that Motor Vehicle Insurance Directive has been supplemented by the Second and Third Motor Vehicle Insurance Directives in such a way that the three Motor Vehicle Insurance Directives, taken as a whole, provide for limits on the extent to which insurers may rely on contractual clauses or national statutory provisions on liability for compensation to exclude certain situations from insurance coverage altogether. Consequently, the distinction between provisions on personal liability and insurance cover is not decisive in the case at hand. The arguments submitted by the appellant, the Government of Norway and the Government of Iceland on this point must, therefore, be rejected.

30 The appellant, supported by the Government of Norway, has argued subsidiarily that the restrictive effects on the free movement of goods and persons are too uncertain and indirect, such that the national rule in question must be deemed incapable of hindering the free movement of goods and persons. The Government of Norway has referred to case law of the ECJ concerning Article 30 of the EC Treaty (now, after amendment, Article 28 EC), in particular Case C-379/92 *Peralta* [1994] ECR I-3453, and Case C-93/92 *CMC Motorradcenter* [1993] ECR I-5009; and to case law of the EFTA Court concerning Article 11 of the EEA Agreement: Case E-5/96 *Ullensaker kommune and others* v *Nille AS* [1997] EFTA Court Report 30.

31 With respect to this argument, the Court merely notes that it is stated in the third recital of the preamble to the Second Motor Vehicle Insurance Directive that major disparities in the extent of the obligation of insurance cover do, in fact, affect in a relevant way the establishment and operation of the common market. Furthermore, the objective of ensuring the free movement of goods and persons is not the only one pursued by the Directives and, consequently, the possible limited effects with regard to this objective are not decisive.

32 With regard to the goal of ensuring that the victims of motor vehicle accidents receive comparable treatment irrespectively of where in the European Economic Area the accident occurs, the Court notes that in most of the Contracting Parties a passenger is fully covered by insurance even if the driver is intoxicated. This means that, in those States, passengers who become victims of motor vehicle accidents caused by intoxicated drivers obtain treatment which is significantly more favourable than the respondent would obtain under the Norwegian provision in question in the case at hand. This disparity may jeopardize the aim of the Motor Vehicle Insurance Directives and lead to a distortion of competition between motor vehicle insurers in different Contracting Parties that is not

ECR I-1829. Denne dommen slår i premiss 24 (dansk versjon) fast at "en lovpligtig forsikring (...) ikke må indeholde bestemmelse om, at forsikringsselskabet i visse tilfælde, og navnlig såfremt føreren af køretøyet var spirituspåvirket, ikke er forpliktet til at erstatte den person- og tingsskade, det forsikrede køretøy forvolder tredjemand (...)."

29 Selv om hovedteksten i første motorvognforsikringsdirektiv fokuserer på forsikringsdekning, har dette direktivet blitt supplert av annet og tredje direktiv på en slik måte at de tre direktivene, sett i sammenheng, setter grenser for i hvilken utstrekning forsikrere kan påberope kontraktsbestemmelser eller nasjonale lovbestemmelser om erstatningsansvar for helt å utelukke visse tilfeller fra forsikringsdekning. Følgelig er sondringen mellom bestemmelser om erstatningsansvar og forsikringsdekning ikke avgjørende i den foreliggende sak. De argumenter som er fremsatt av den ankende part, Den norske regjering og Den islandske regjering på dette punkt, må derfor avvises.

30 Den ankende part, støttet av Den norske regjering, har subsidiært anført at de restriktive virkninger på den frie bevegelighet av varer og personer er for usikre og indirekte, slik at den nasjonale regelen som saken står om må anses å være uegnet til å hindre den frie bevegelighet av varer og personer. Den norske regjering har henvist til rettspraksis fra EF-domstolen om EF-traktatens artikkel 30 (nå, etter endringen, artikkel 28 EF), særlig sak C-379/92 *Peralta* [1994] ECR I-3453, sak C-93/92 *CMC Motorradcenter* [1993] ECR I-5009; og til rettspraksis fra EFTA domstolen om EØS-avtalens artikkel 11; sak E-5/96 *Ullensaker kommune med flere mot Nille AS* [1997] EFTA Court Report 30.

31 Til dette argumentet bemerker Domstolen bare at det er fastslått i det tredje ledd av fortalen til annet motorvognforsikringsdirektiv at store ulikheter i omfanget av plikten til forsikringsdekning faktisk påvirker det indre markeds opprettelse og funksjon på en relevant måte. Videre er formålet å sikre fri bevegelighet av varer og personer ikke det eneste direktivene ivaretar, og følgelig er de mulige begrensede virkninger med hensyn til dette formålet ikke avgjørende.

32 Med hensyn til målet om å sikre at ofre i motorvognulykker får en sammenlignbar behandling uavhengig av hvor i Det europeiske økonomiske samarbeidsområde ulykken inntreffer, bemerker Domstolen at i de fleste av de deltagende stater er en passasjer fullt ut dekket av forsikringen, selv om føreren er beruset. Dette betyr at passasjerer som blir ofre i motorvognulykker forårsaket av berusede førere får en betydelig mer fordelaktig behandling i disse statene enn hva ankemotparten ville få i henhold til den norske bestemmelsen som saken gjelder. Denne ulikheten kan underminere motorvognforsikringsdirektivenes formål, og lede til en konkurransevridning mellom motorvognforsikrere i de ulike avtalestater, som ikke er forenlig med

compatible with the aim of establishing a homogeneous European Economic Area.

33 The appellant, supported by the Government of Iceland and the Government of Norway, points out that Article 2 of the Second Motor Vehicle Insurance Directive contains an exception to the principle of compulsory insurance cover for passengers and argues that the provision should not be interpreted as being exhaustive. In the view of the Court, it is sufficient to state that Article 2 is an exception to a general rule and so must be interpreted narrowly (see Case E-5/96 *Ullensaker kommune and others* v *Nille AS* [1997] EFTA Court Report 30, at paragraph 33). Any other conclusion would jeopardize the overall goal of the Motor Vehicle Insurance Directives, *viz*, to ensure that all passengers are, as a rule, covered.

34 Submissions have been made about the possibility of reducing compensation as a consequence of contributory negligence. The Court limits itself to stating that a reduction of compensation due to contributory negligence must be possible in exceptional circumstances. However, the principles set out in the Motor Vehicle Insurance Directives must be respected. A finding that a passenger who passively rode in a car driven by an intoxicated driver is to be denied compensation or that compensation is to be reduced in a way which is disproportionate to the contribution to the injury by the injured party would be incompatible with the Directives.

35 The Court notes that no provisions of EEA law other than those discussed need to be examined before the question put by Høyesterett can be answered.

36 The answer to the question referred must therefore be that it is incompatible with EEA law (Council Directive 72/166/EEC of 24 April 1972, Second Council Directive 84/5/EEC of 30 December 1983, and Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles) for a passenger who sustains injury by voluntarily driving in a motor vehicle not to be entitled to compensation unless there are special grounds for being so, if the passenger knew or must have known that the driver of the motor vehicle was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury.

Costs

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

målet om et ensartet europeisk økonomisk samarbeidsområde.

33 Den ankende part, støttet av Den islandske regjering og Den norske regjering, peker på at artikkel 2 i annet motorvognforsikringsdirektiv inneholder et unntak fra prinsippet om obligatorisk forsikringsdekning for passasjerer, og hevder at bestemmelsen ikke kan forstås som uttømmende. Etter Domstolens oppfatning er det tilstrekkelig å slå fast at artikkel 2 er et unntak fra en generell regel, og derfor må tolkes snevert (se sak sak E-5/96 *Ullensaker kommune med flere mot Nille AS* [1997] EFTA Court Report 30, i premiss 33). Enhver annen konklusjon ville underminere den generelle målsetning med motorvognforsikringsdirektivene, å sikre at alle passasjerer som hovedregel er dekket.

34 Det har blitt fremsatt anførsler om muligheten for å redusere forsikringsutbetalingen som følge av medvirkning. Domstolen begrenser seg til å slå fast at en reduksjon av erstatningen på grunn av medvirkning, må være mulig i unntakstilfelle. Men de prinsipper som er slått fast i motorvognforsikringsdirektivene må respekteres. Dersom en passasjer som passivt sitter på i en bil som føres av en beruset fører, nektes erstatning eller får erstatningen redusert på en måte som er uforholdsmessig i forhold til den skadelidtes medvirkning til skaden, må det anses å være uforenlig med direktivene.

35 Domstolen bemerker at ingen andre EØS-rettslige bestemmelser enn de som er drøftet ovenfor, trenger å undersøkes før spørsmålet stilt av Høyesterett kan besvares.

36 Svaret på spørsmålet som er forelagt må derfor bli at det er uforenlig med EØS-retten (rådsdirektiv 72/166/EØF av 24 april 1972, annet rådsdirektiv 84/5/EØF av 30 desember 1983, og tredje rådsdirektiv 90/232/EØF av 14 mai 1990 om tilnærming av medlemsstatenes lovgivning om ansvarsforsikring for motorvogn) at en passasjer som påføres skade ved frivillig kjøring i motorvogn, ikke har krav på erstatning med mindre særlige grunner foreligger, dersom passasjeren visste eller måtte vite at motorvognens fører var påvirket av alkohol på ulykkestidspunktet og det var årsakssammenheng mellom alkoholpåvirkningen og skaden.

Saksomkostninger

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

On those grounds,

THE COURT,

in answer to the question referred to it by Norges Høyesterett by the reference of 23 June 1999, hereby gives the following Advisory Opinion:

It is incompatible with EEA law (Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles) for a passenger who sustains injury by voluntarily driving in a motor vehicle not to be entitled to compensation unless there are special grounds for being so, if the passenger knew or must have known that the driver of the motor vehicle was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury.

Bjørn Haug | Thór Vilhjálmsson | Carl Baudenbacher

Delivered in open court in Luxembourg on 17 November 1999

Gunnar Selvik
Registrar

Bjørn Haug
President

På dette grunnlag avgir

DOMSTOLEN,

som svar på spørsmålet som er forelagt av Norges Høyesterett ved beslutning av 23 juni 1999, følgende rådgivende uttalelse:

Det er uforenlig med EØS-retten (rådsdirektiv 72/166/EØF av 24 april 1972 om tilnærming av medlemsstatenes lovgivning om ansvarsforsikring for motorvogn og kontroll med at forsikringsplikten overholdes, annet rådsdirektiv 84/5/EØF av 30 desember 1983 om tilnærming av medlemsstatenes lovgivning om ansvarsforsikring for motorvogn og tredje rådsdirektiv 90/232/EØF av 14 mai 1990 om tilnærming av medlemsstatenes lovgivning om ansvarsforsikring for motorvogn) at en passasjer som påføres skade ved frivillig kjøring i motorvogn, ikke har krav på erstatning med mindre særlige grunner foreligger, dersom passasjeren visste eller måtte vite at motorvognens fører var påvirket av alkohol på ulykkestidspunktet og det var årsakssammenheng mellom alkoholpåvirkningen og skaden.

Bjørn Haug Thór Vilhjálmsson Carl Baudenbacher

Avsagt i åpen rett i Luxembourg den 17 november 1999.

Gunnar Selvik
Justissekretær

Bjørn Haug
President

REPORT FOR THE HEARING
in Case E-1/99

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 Norges Høyesterett (Supreme Court of Norway) for an Advisory Opinion in the case pending before it between

Storebrand Skadeforsikring AS

and

Veronika Finanger

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

- the Act referred to in point 8 of Annex IX (Council Directive 72/166/EEC of 24 April 1972, on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, hereinafter the "First Motor Insurance Directive");

- the Act referred to in point 9 of Annex IX (Second Council Directive 84/5/EEC of 30 December 1983, on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, hereinafter the "Second Motor Insurance Directive");

- the Act referred to in point 10 of Annex IX (Third Council Directive 90/232/EEC of 14 May 1990, on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, hereinafter the "Third Motor Insurance Directive");

(hereinafter collectively the "Directives" or the "Motor Insurance Directives").

RETTSMØTERAPPORT
i sak E-1/99

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

Storebrand Skadeforsikring AS

og

Veronika Finanger

om tolkningen av Avtale om Det europeiske økonomiske samarbeidsområde (heretter "EØS-avtalen") med særlig henvisning til følgende rettsakter som det er henvist til i Vedlegg IX til EØS-avtalen:

- rettsakten som det er henvist til i punkt 8 av Vedlegg IX (Rådsdirektiv 72/166/EØF av 24 april 1972 om tilnærming av medlemsstatenes lovgivning om ansvarsforsikring for motorvogn og kontroll med at forsikringsplikten overholdes, heretter "første motorvognforsikringsdirektiv".)
- rettsakten som det er henvist til i punkt 9 av Vedlegg IX (Annet Rådsdirektiv 84/5/EØF av 30 desember 1983 om tilnærming av medlemsstatenes lovgivning om ansvarsforsikring for motorvogn, heretter "andre motorvognforsikringsdirektiv".)
- rettsakten som det er henvist til i punkt 10 av Vedlegg IX (Tredje Rådsdirektiv 90/232/EØF av 14 mai 1990 om tilnærming av medlemsstatenes lovgivning om ansvarsforsikring for motorvogn, heretter "tredje motorvognforsikringsdirektiv".)

(heretter i fellesskap "direktivene" eller "motorvognforsikringsdirektivene").

I. Introduction

1 By a reference dated 23 June 1999, registered at the Court on 28 June 1999, Norges Høyesterett (Supreme Court of Norway), made a Request for an Advisory Opinion in a case brought before it by Storebrand Skadeforsikring AS (hereinafter "appellant") against Veronika Finanger (hereinafter "respondent").

2 The case before the Høyesterett concerns the issue of whether the Motor Insurance Directives impose requirements as to the formulation of national law relating to compensation. This includes whether the Directives preclude a legal rule to the effect that injuries sustained by a passenger due to the driver's being under the influence of alcohol shall not trigger liability for compensation when the passenger knew or must have known that the driver was under the influence of alcohol.

II. Legal background

3 The question referred by the national court concerns the interpretation of various Articles of the First, Second and Third Motor Insurance Directives.

4 Article 3(1) of the First Motor Insurance Directive reads as follows:

> *"Each Member State shall (...) take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures."*

5 Article 1(1) of the Second Motor Insurance Directive reads as follows:

> *"The insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover compulsorily both damage to property and personal injuries."*

6 Article 2 of the Second Motor Insurance Directive reads as follows:

> *"1. Each Member State shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3 (1) of Directive 72/166/EEC, which excludes from insurance the use or driving of vehicles by:*
> *- persons who do not have express or implied authorization thereto, or*
> *- persons who do not hold a licence permitting them to drive the vehicle concerned, or*
> *- persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned,*
> *shall, for the purposes of Article 3 (1) of Directive 72/166/EEC, be deemed to be void in respect of claims by third parties who have been victims of an accident.*
> *However the provision or clause referred to in the first indent may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen.*
> *Member States shall have the option - in the case of accidents occurring on their territory - of not applying the provision in the first subparagraph if and in so far as the victim may obtain compensation for the damage suffered from a social security body.*
> *2. In the case of vehicles stolen or obtained by violence, Member States may lay down that the body specified in Article 1 (4) will pay compensation instead of the insurer under the conditions set out in paragraph 1 of this Article; where the vehicle is normally based in another Member State, that body can make no claim against any body in that Member State (....)."*

I. Innledning

1 Ved en beslutning datert 23 Juni 1999, mottatt ved Domstolen 28 Juni 1999, har Norges Høyesterett anmodet om en rådgivende uttalelse i en sak innbrakt for denne av Storebrand Skadeforsikring AS (heretter "den ankende part") mot Veronika Finanger (heretter "ankemotparten").

2 Saken ved Høyesterett gjelder spørsmålet om motorvognforsikringsdirektivene stiller krav til utformingen av nasjonal erstatningsrett. Herunder også hvorvidt direktivene utelukker en regel om at skader påført en passasjer på grunn av at bilføreren var alkoholpåvirket, ikke utløser erstatningsansvar, da passasjeren visste eller måtte vite at føreren var alkoholpåvirket.

II. Rettslig bakgrunn

3 Spørsmålet fra den nasjonale domstolen gjelder tolkningen av forskjellige artikler i første, andre og tredje motorvognforsikringsdirektiv.

4 Første motorvognforsikringsdirektiv artikkel 3 nr 1 lyder som følger:

> *"Med forbehold for anvendelsen av artikkel 4 skal hver medlemsstat treffe alle hensiktsmessige tiltak for å sikre at erstatningsansvar for kjøretøyer som er hjemmehørende på dens territorium, er dekket av en forsikring. Hvilke skader som dekkes, samt forsikringsvilkårene bestemmes innen rammen av disse tiltakene. "*

5 Andre motorvognforsikringsdirektiv artikkel 1 nr 1 lyder som følger:

> *"Forsikringen nevnt i artikkel 3 nr. 1 i direktiv 72/166/EØF skal dekke både tingskade og personskade. "*

6 Andre motorvognforsikringsdirektiv artikkel 2 lyder som følger:

> *"1. Hver medlemsstat skal treffe de nødvendige tiltak for å sikre at enhver lovbestemmelse eller klausul nevnt i en forsikringspolise utstedt i samsvar med artikkel 3 nr. 1 i direktiv 72/166/EØF, som bestemmer at forsikringen ikke dekker følgende personers bruk av eller kjøring med et kjøretøy:*
> - *personer som ikke uttrykkelig eller stilltiende har tillatelse til det, eller*
> - *personer som ikke har førerkort for vedkommende kjøretøy, eller*
> - *personer som ikke etterkommer de lovbestemte krav til kjøretøyets tekniske og sikkerhetsmessige stand,*
>
> *ved gjennomføringen av artikkel 3 nr. 1 i direktiv 72/166/EØF ikke skal komme til anvendelse med hensyn til krav fra tredjepersoner som er skadelidte i en ulykke.*
> *Bestemmelsen eller klausulen nevnt i første strekpunkt kan likevel gjøres gjeldende overfor personer som frivillig har tatt plass i kjøretøyet som forårsaket skaden, dersom assurandøren kan bevise at de visste at kjøretøyet var stjålet.*
> *Når det dreier seg om ulykker inntruffet på deres territorium, kan medlemsstatene unnlate å anvende bestemmelsen i første ledd dersom og i den utstrekning skadelidte kan oppnå erstatning for sin skade fra et organ for sosial trygghet.*
> *2. Når det dreier seg om kjøretøyer som er stjålet eller tilegnet ved makt, kan medlemsstatene bestemme at institusjonen nevnt i artikkel 1 nr. 4 skal betale erstatning i stedet for assurandøren på de vilkår som er fastsatt i nr. 1 i denne artikkel. Dersom kjøretøyet er hjemmehørende i en annen medlemsstat, vil denne institusjon ikke ha noen regressmulighet overfor noen institusjon i denne medlemsstat. "*

7 Article 1(1) of the Third Motor Insurance Directive reads as follows:

> *"Without prejudice to the second subparagraph of Article 2 (1) of Directive 84/5/EEC, the insurance referred to in Article 3 (1) of Directive 72/166/EEC shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle (...)."*

III. Facts and procedure

8 On 11 November 1995 in Nord Trøndelag, Veronika Finanger was injured in a traffic accident. She was a passenger in a car which drove off the road. The cause of the accident was the reduced driving ability of the driver, due to the influence of alcohol. As a result of the accident, Finanger was left 60 per cent medically disabled and 100 per cent disabled. The third-party motor vehicle liability insurance of the motor vehicle which caused the injury was with Storebrand.

9 Veronika Finanger has sued Storebrand, claiming compensation for the personal injuries she suffered in the accident. The basis for the claim is the Norwegian Act of 3 February 1961 relating to compensation for injury caused by a motor vehicle (the Automobile Liability Act - *bilansvarsloven*). According to section 15 of that Act, the owner of a motor vehicle subject to registration shall insure it "[f]or cover of insurance claims pursuant to chapter II." Under section 4 in chapter II, the main rule is that, when a motor vehicle causes injury, the injured party is entitled to compensation from the insurance company with which the vehicle is insured, regardless of whether anyone is to blame for the injury.

10 Storebrand rejected Finanger's claim. The legal basis for refusing to pay compensation to Finanger was section 7, third paragraph, litra b of the Automobile Liability Act.

11 Section 7 (Contributory action of the injured party) reads as follows.

> *"If the injured party has intentionally or negligently contributed to the injury, the court may reduce the compensation or set it aside entirely, except in cases when the injured party has exhibited only slight negligence. In the decision, regard shall be had to the conduct demonstrated by both sides and the circumstances generally.*
>
> *If a motor vehicle causes injury while immobile and the injury did not occur in connection with the stopping or starting of the vehicle, the court may reduce the compensation or set it aside entirely, even if the injured party has exhibited only slight negligence.*
>
> *The injured party may not obtain compensation, unless there are special grounds for doing so, if he voluntarily drove or allowed himself to be driven in the motor vehicle which caused the injury even though he*
>
> *a) knew that the vehicle had been taken from its lawful owner by a criminal act, or*
>
> *b) knew or must have known that the driver of the vehicle was under the influence of alcohol or another intoxicant or narcotic (cf. section 22, first paragraph of the Road Traffic Act). The specific rule enunciated herein does not apply, however, if it must be assumed that the injury would have occurred even if the driver of the vehicle had not been under the influence as aforementioned.*
> *An injured driver of the motor vehicle which caused the injury may not obtain compensation, unless there are special grounds for doing so, if he knew or must have known that the vehicle was being used in connection with a criminal act."*

7 Tredje motorvognforsikringsdirektiv artikkel 1 første ledd lyder som følger:

> *"Med forbehold for artikkel 2 nr. 1 annet ledd i direktiv 84/5/EØF skal forsikringen nevnt i artikkel 3 nr. 1 i direktiv 72/166/EØF dekke ansvar for personskader som skyldes bruk av et kjøretøy, for alle passasjerer bortsett fra føreren. "*

III. Fakta og prosedyre

8 Den 11 november 1995 i Nord Trøndelag ble Veronika Finanger skadet i en trafikkulykke. Hun var passasjer i en bil som kjørte av veien. Årsaken til ulykken var at sjåførens kjøreferdigheter var svekket på grunn av alkoholpåvirkning. Som følge av ulykken ble Finanger 60% medisinsk invalid og 100% ervervsufør. Den skadevoldende motorvognen var trafikkforsikret i Storebrand.

9 Veronika Finanger har saksøkt Storebrand med krav om erstatning for den personskade som hun ble påført ved ulykken. Grunnlaget for kravet er den norske bilansvarsloven av 3 februar 1961. Etter lovens § 15 skal eier av registreringspliktig motorvogn forsikre denne "for all skade som går inn under kapitel II". Etter kapitel II § 4 er hovedregelen at når en motorvogn gjør skade, har skadelidte krav på erstatning hos det forsikringsselskapet som motorvognen er forsikret i, uavhengig av om noen er skyld i skaden.

10 Storebrand avviste Finangers krav. Det rettslige grunnlaget for å nekte Finanger erstatning var bilansvarsloven § 7 tredje ledd bokstav b:

11 § 7 (når skadelidaren har medverka til skaden) lyder som følger:

> *"Har skadelidaren medverka til skaden med vilje eller i aktløyse, kan retten minka skadebotkravet eller lata det falla heilt bort, så nær som når skadelidaren kan leggjast berre lite til last. Avgjerda skal retta seg etter åtferda på kvar side og tilhøva elles.*
>
> *Gjer ei motorvogn skade medan ho står still og skaden ikkje vert gjord medan vogna vert sett i gang eller stogga, kan retten minka skadebotkravet eller lata det falla heilt bort, jamvel når skadelidaren kan leggjast berre lite til last.*
>
> *Skadelidaren kan ikkje få skadebot utan at særlege grunnar er for det, dersom han av fri vilje køyrde eller let seg køyre i den vogna som gjorde skaden endå han*
>
> *a) visste at vogna var fråvend rette innehavaren med brotsverk, eller*
>
> *b) visste eller måtte vita at vognføraren var påverka av alkohol eller andre rusande eller døyvande råder (jf vegtrafikklova § 22 første leden). Særregelen her gjeld likevel ikkje i den mon ein må leggja til grunn at skaden ville ha skjedd jamvel om vognføraren ikkje hadde vore påverka som nemnd. "*

12 The Automobile Liability Act was enacted on 3 February 1961. The rule in section 7, third paragraph, litra b has been subsequently amended twice, by Act No. 81 of 21 June 1985 and Act No. 113 of 27 November 1992, respectively. The last legislative amendment was carried out in order to adapt the Act to the EEA Agreement.

13 In the preparatory works for the Automobile Liability Act,[1] the reasons for the provisions are stated as follows:

> *"As agreed during the Nordic ministerial meetings, the ministry has expanded the rule to also include an injured party who allowed himself to be driven in the vehicle, even though he knew or must have known that the driver of the vehicle was under the influence of intoxicants or narcotics. A rule of this nature was considered by the committee, but found to be superfluous (see committee recommendation pages 63-64). However, the ministries find it proper to include in the act an explicit provision that regulates clearly the relationship under the stricter, specific rule in the last paragraph and not under the more liberal main rule on contributory negligence by the injured party."*

14 In connection with the legislative amendment in 1985,[2] the provision was amended somewhat. From the preparatory works for the amending act, it appears that the legislator wished to keep the provision, which at that time was contained in section 7, third paragraph, litra c, for preventive reasons.[3] The following is from the discussion in the Storting (Parliament) justice committee:

> *"2. Section 7, third paragraph, Automobile Liability Act.*
> *Section 7, third paragraph, litra c provides that passengers in a car who know or ought to know that the driver is under the influence of alcohol, etc., normally may not obtain compensation. The rule has been criticized because it puts injured parties in a weak position. In particular, it has been stated that it is unreasonable for the specific rule to be applied regardless of whether there is a causal link between the condition of the driver and whether or not the injury is sustained.*
>
> *In light of the criticism, the ministry is of the view that a certain softening-up of the provision is in order. The ministry proposes that the specific rule in section 7, third paragraph, litra c should not be applied when there is no causal link between the condition of the driver and the injury (...)."*[4]

15 When the Act was amended in 1992 in connection with the implementation of the EEA Agreement in Norwegian law, the legislator assumed that the Motor Insurance Directives imposed certain substantive requirements on the rules on compensation in the Automobile Liability Act. The legislator assumed, however, that the rule in section 7, third paragraph, litra b was not contrary to EEA law. The following is from the preparatory works:

> *"The current third paragraph, litra c concerns limitation on the entitlement of the driver and passengers to compensation when the driver was under the influence of alcohol or other substances. It follows from litra c, second sentence that the specific rule does not apply in so far as it must be assumed that the injury would have occurred even if the driver of the vehicle had not been under the influence. This means that there is a requirement of causal link between the injury and the driver's being under the influence. For compensation to be set aside, it is*

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1 Proposition to the Odelsting No. 24 1959-60, page 29.

2 Proposition to the Odelsting No. 75 1983-1984, page 47.

3 Cf. Proposition to the Odelsting No. 75 1983-84, page 46.

4 Cf. Recommendation to the Odelsting No. 92 1984-85, page 8.

12 Bilansvarsloven ble vedtatt 3 februar 1961. Regelen i § 7 tredje ledd bokstav b er senere endret to ganger, henholdsvis ved lov av 21 juni 1985 nr 81 og 27 november 1992 nr 113. Den siste lovendringen ble gjort for å tilpasse loven til EØS-avtalen.

13 I forarbeidene til bilansvarsloven[1] er bestemmelsen begrunnet slik:

> *"Som det ble enighet om under de nordiske departementforhandlinger har departementet utvidd regelen til også å omfatte skadelidte som lot seg kjøre i vognen, enda han visste eller måtte forstå at vognføreren var påvirket av et rus- eller bedøvelsesmiddel. En slik regel var overveid i komiteen, men funnet overflødig (se komiteinnstillingen s. 63-64). Departementene finner det imidlertid riktig å oppta i loven en uttrykkelig bestemmelse som klart regulerer forholdet etter den strengere særregel i siste ledd, ikke etter den mer liberale hovedregel om skadelidtes medvirkning."*

14 I forbindelse med lovendringen i 1985[2] ble bestemmelsen endret noe. Det fremgår av forarbeidene til endringsloven at lovgiver ønsket å beholde bestemmelsen, som den gang fremgikk av § 7 tredje ledd bokstav c, av preventive grunner.[3] Fra behandlingen i Stortingets justiskomité siteres følgende:[4]

> *"2. Bilansvarslova § 7 tredje ledd.*
> *Bal § 7 tredje ledd bokstav c bestemmer at passasjerer i bil som vet eller bør vite at føreren er påvirket av alkohol m.v., normalt ikke kan få erstatning. Regelen har vært kritisert fordi den stiller skadelidte i en svak stilling. Det har særlig vært anført at det er urimelig at særregelen får anvendelse uansett om det foreligger årsakssammenheng mellom førerens tilstand og skaden eller ikke.*
>
> *På bakgrunn av kritikken mener departementet at en viss oppmyking av bestemmelsen er på sin plass. Departementet foreslår at særregelen i bal § 7 tredje ledd bokstav c ikke skal få anvendelse når det mangler årsakssammenheng mellom førerens tilstand og skaden..... "*

15 Da loven ble endret i 1992, i forbindelse med gjennomføringen av EØS-avtalen i norsk rett, antok lovgiver at motorvognforsikringsdirektivene stilte visse materielle krav til erstatningsreglene i bilansvarsloven. Imidlertid antok lovgiver at regelen i bilansvarslovens § 7 tredje ledd, bokstav b, ikke var i strid med EØS-retten. Fra forarbeidene siteres:

> *"Nåværende tredje ledd bokstav c gjelder innskrenkning i fører og passasjerers rett til erstatning når føreren var påvirket av alkohol eller andre stoffer. Det følger av bokstav c annet punktum at særregelen ikke gjelder i den utstrekning det må legges til grunn at skaden ville ha skjedd selv om vognføreren ikke hadde vært påvirket. Dette innebærer at det foreligger krav om årsakssammenheng mellom skaden og det at føreren er påvirket. For bortfall av erstatning er det dessuten et vilkår at*

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[1] Odelstingsproposisjon (Ot. prp.) nr. 24 1959-60, s. 29.

[2] Ot. prp. nr. 75 1983-84, s. 47.

[3] Ot. prp. nr. 75 1983-84, s. 46.

[4] Innstilling til Odelstinget (Innst. O) nr. 92 1984-85, s. 8.

furthermore a condition that the injured party knew or must have known that the driver was under the influence. Thus, the rule in the third paragraph, litra c cannot be said to go further than being a rule on contributory negligence which, admittedly, is stricter than the general rule on contributory negligence in the first paragraph. The ministry assumes, therefore, that the EEA rules do not prevent the rule from being maintained, see the draft of the third paragraph, litra b."[5]

16 In a judgment of 21 September 1998, Frostating lagmannsrett concluded that the accident occurred due to the driver's being under the influence of alcohol and that Finanger knew that the driver was under the influence of alcohol.

17 The appellate court noted that the main rule in section 7, third paragraph, litra b of the Automobile Liability Act is that the injured party is not entitled to compensation in those cases which fall within the scope of the provision. The court concluded, however, that section 7, third paragraph, litra b was contrary to EEA law. The provision was set aside pursuant to section 2 of the EEA Act.[6] Pursuant to section 7, first paragraph of the Automobile Liability Act, Frostating lagmannsrett reduced the compensation of the injured party by 30 per cent as a consequence of her having mentally contributed to the drive and her knowing that driving in a car under the prevailing conditions would entail a considerable safety risk. Storebrand appealed the judgment to the Høyesterett.

18 Against this background, the Høyesterett decided to submit a Request for an Advisory Opinion to the EFTA Court.

IV. Question

19 The following question was referred to the EFTA Court:

Is it incompatible with EEA law for a passenger who sustains injury by voluntarily driving in a motor vehicle not to be entitled to compensation unless there are special grounds for being so, if the passenger knew or must have known that the driver of the motor vehicle was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury?

V. Written observations

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

- the appellant, Storebrand Skadeforsikring AS, represented by Counsel Emil Bryhn and Tron Gundersen;
- the respondent, Veronika Finanger, represented by Counsel Erik Johnsrud;

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5 Proposition to the Odelsting 1991-92 No. 72, page 77.

6 Act No. 109 of 27 November 1992 relating to Implementation in Norwegian Law of the Main Agreement on the European Economic Area (EEA) etc. (the EEA Act – *EØS-loven*).

skadelidte visste eller måtte vite at føreren var påvirket. Dermed kan ikke regelen i tredje ledd bokstav c sies å gå lenger enn til å være en medvirkningsregel, som riktignok er strengere enn den alminnelige medvirkningsregelen i første ledd. Departementet antar etter dette at EØS-reglene ikke er til hinder for at regelen opprettholdes, se utkastet til tredje ledd bokstav b. "[5]

16 Ved dom av 21 September 1998, kom Frostating lagmannsrett til at ulykken inntraff på grunn av førerens alkoholpåvirkning, og at Finanger visste at føreren var påvirket av alkohol.

17 Lagmannsretten viste til at hovedregelen i bilansvarsloven § 7 tredje ledd bokstav b er at skadelidte ikke har krav på erstatning i de tilfellene som går inn under bestemmelsen. Lagmannsretten kom imidlertid til at bilansvarsloven § 7 tredje ledd bokstav b var i strid med EØS-retten. Bestemmelsen ble satt til side i henhold til den norske EØS-loven § 2.[6] Med hjemmel i bilansvarsloven § 7 første ledd reduserte lagmannsretten skadelidtes krav på erstatning med 30% som følge av at hun psykisk hadde medvirket til kjøreturen, og at hun hadde vært klar over at bilkjøring under de rådende forhold ville innebære en betydelig sikkerhetsmessig risiko. Storebrand anket denne dommen til Høyesterett.

18 På denne bakgrunn besluttet Høyesterett å fremme en anmodning om en rådgivende uttalelse til EFTA-domstolen.

IV. Spørsmål

19 Følgende spørsmål ble forelagt EFTA-domstolen:

Er det uforenlig med EØS-retten at en passasjer som påføres skade ved frivillig kjøring i motorvogn, ikke har krav på erstatning med mindre særlige grunner foreligger, dersom passasjeren visste eller måtte vite at motorvognens fører var påvirket av alkohol på ulykkestidspunktet og det var årsakssammenheng mellom alkoholpåvirkningen og skaden?

V. Skriftlige saksfremstillinger

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

- den ankende part, Storebrand Skadeforsikring AS, representert ved advokatene Emil Bryhn og advokat Tron Gundersen;
- ankemotparten, Veronika Finanger, representert ved advokat Erik Johnsrud;

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5 Ot. prp. nr. 72 1991-92, s. 77.

6 EØS-loven av 27. november 1992 nr. 109.

- the Government of Iceland, represented by Einar Gunnarsson, Legal Officer, External Trade Department, Ministry of Foreign Affairs, acting as Agent, assisted by Björn Friðfinnsson, Permanent Secretary, Ministry of Justice;
- the Government of the Principality of Liechtenstein, represented by Christoph Büchel, Director of the EEA Coordination Unit, and Beatrice Hilti, Officer of the EEA Coordination Unit, acting as Agents;
- the Government of the Kingdom of Norway, represented by Stephan L. Jervell, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent;
- the EFTA Surveillance Authority, represented by Peter Dyrberg, Director, Legal & Executive Affairs Department, and Helga Óttarsdóttir, Officer, Legal & Executive Affairs Department, acting as Agents;
- the Commission of the European Communities, represented by John Forman and Christina Tufvesson, both legal advisers of the European Commission, acting as Agents.

The appellant

21 The appellant pleads following two lines of argument which depend on the nature of the national rule in question. Firstly, if the question from the Høyesterett concerns a rule on liability for compensation, the issue arises as to whether EEA law imposes positive requirements as to the formulation of national conditions for liability for compensation. If so, the appellant submits that the Directives do not impose requirements as to the content of national law governing compensation, but rather are to be construed as regulating insurance cover when conditions for compensation are present. Secondly, if the question from the Høyesterett concerns a rule on limitation on a passenger's claim for insurance cover – and/or that the EFTA Court concludes that the Directives impose requirements as to national conditions for compensation – the question arises as to whether such a rule is in conformity with EEA law.[7] If so, the appellant submits that the second subparagraph of Article 2(1) of the Second Motor Insurance Directive cannot be construed as precluding an injured passenger's being refused compensation, unless special grounds are present, when the person knew or must have known that the driver was under the influence of alcohol and that the injury was caused by the driver's being under the influence of alcohol.

22 Concerning the question whether the Motor Insurance Directives impose requirements on national conditions for liability for compensation, the appellant is of the view that a distinction must be drawn between conditions for liability for compensation and insurance cover of liability.

23 The Directives impose requirements for motor vehicle insurance in the Member States. However, the Directives do not impose requirements on national law with respect to which events trigger entitlement to compensation for the injured party.

24 Reference is made to the headings[8] and the wording of the Directives in several places[9] which show that it is insurance cover which is encompassed by the Directives, not conditions for compensation. Furthermore, the preparatory work for the Second Motor Insurance Directive and

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7 The issue of whether the national provision in question is a rule on a condition for liability and/or a limitation on insurance cover is viewed as an open question under Norwegian law.

8 Reference is made to the headings of the First, Second and Third Motor Insurance Directives.

9 See in particular Articles 1, 3(1) and 3(2) of the First Motor Insurance Directive; Articles 1 and 2 of the Third Motor Insurance Directive; Article 2 of the Second Motor Insurance Directive and paragraph 13, second sentence of the preamble to the First Motor Insurance Directive.

- Avdeling for utenrikshandel, Utenriksdepartementet, som partsrepresentant, assistert av Björn Friðfinnsson, departementsråd, Justisdepartementet;
- regjeringen i Fyrstedømmet Liechtenstein, representert ved Christoph Büchel, direktør ved enhet for EØS koordinering, og Beatrice Hilti, saksbehandler ved enhet for EØS koordinering, som partsrepresentanter;
- Den norske regjering, representert ved Stephan L Jervell, advokat, Regjeringsadvokatens kontor, som partsrepresentant;
- EFTAs overvåkningsorgan, representert ved Peter Dyrberg, direktør, avdeling for juridiske saker og eksekutivsaker, og Helga Ottarsdótir, saksbehandler, avdeling for juridiske saker og eksekutivsaker, som partsrepresentanter;
- Kommisjonen for De europeiske Fellesskaper, representert ved John Forman og Christina Tufvesson, begge juridiske rådgivere ved Kommisjonen, som partsrepresentanter.

Den ankende part

21 Den ankende part argumenterer langs to linjer avhengig av arten av den nasjonale bestemmelsen saken står om. For det første, hvis spørsmålet fra Høyesterett angår en regel om erstatningsansvar, oppstår spørsmålet om EØS-retten stiller positive krav til utformingen av nasjonale vilkår for erstatningsansvar. I så fall anfører den ankende part at direktivene ikke stiller krav til innholdet av nasjonal erstatningsrett, men må forstås slik at de regulerer forsikringsdekningen når vilkår for erstatningsansvar foreligger. For det andre, dersom spørsmålet fra Høyesterett gjelder en regel om begrensning i en passasjers krav på forsikringsdekning - og/eller EFTA-domstolen kommer til at direktivene stiller krav til nasjonale vilkår for erstatning - oppstår spørsmålet om en slik regel er i overensstemmelse med EØS-retten.[7] I så tilfelle hevder den ankende part at andre motorvognforsikringsdirektiv artikkel 2 nr 1 annet ledd ikke kan forstås som et hinder for at en skadelidt nektes erstatning, med mindre særlige grunner foreligger, når han visste eller måtte vite at bilføreren var under påvirkning av alkohol og at skaden oppsto som følge av bilførerens alkoholpåvirkning.

22 Vedrørende spørsmålet om motorvognforsikringsdirektivene stiller krav til nasjonale regler om vilkår for erstatningsansvar, hevder den ankende part at det må trekkes et skille mellom vilkår for erstatningsansvar og forsikringsdekningen av et slikt ansvar.

23 Direktivene stiller krav om motorvognforsikring i medlemsstatene, men de stiller ikke krav til hvilke begivenheter som etter nasjonal erstatningsrett utløser krav på erstatning til den skadelidte.

24 Det vises til direktivenes overskrifter og ordlyd,[8] som på flere steder[9] viser at det er forsikringsdekningen direktivene tar sikte på å regulere, og ikke vilkår for erstatningsansvar. Videre vises det til forarbeidene til andre motorvognforsikringsdirektiv, og definisjonen av

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[7] Spørsmålet om den nasjonale regelen som saken står om er en regel om vilkår for ansvar og/eller en regel om begrensning i forsikringsdekningen, betraktes som et åpent spørsmål etter norsk rett.

[8] Det henvises til overskriftene i første, andre og tredje motorvognforsikringsdirektiv.

[9] Se særlig første motorvognforskiringsdirektiv artiklene 1, 3 nr. 1 og 3 nr. 2, tredje motorvognforsikringsdirektiv artiklene 1 og 2, andre motorvognforsikringsdirektiv artikkel 2 og trettende ledd, annen setning av fortalen til første motorvognforsikringsdirektiv.

the definition of a "claim" in an agreement[10] concluded between the national insurers' bureaux are mentioned.[11] Lastly, the Proposal for a Fourth Motor Insurance Directive confirms that the Directives deal with the issue of cover and not conditions for liability.[12]

25 In the view of the appellant, the Second Motor Insurance Directive does not entail any substantive change in the scope of application of the Directives. The Directives still impose requirements as to insurance cover, not national conditions for liability for compensation.

26 Concerning the first objective of the Directives, the "free movement of persons within the Community", the appellant argues that the fact that the conditions for liability for compensation may vary between Member States is not a hindrance to the free movement of persons. The appellant submits that only a very small proportion of the passengers who travel in the EEA become involved in driving under the influence of alcohol. Consequently, a national rule on lapse of entitlement to compensation for this marginal group of passengers will not come into conflict with the object of the Treaty establishing the European Community (the "EC Treaty") and the EEA Agreement's objective of free movement of persons.

27 On the contrary, it may be argued that a national rule on lapse of compensation for passengers who become involved in incidents of driving under the influence of alcohol can be favourable to the market because it leads to motor travel being safer.

28 The appellant emphasizes that the consideration of protection goes no further than to ensure that a person who has a claim against a person who has caused injury gets that claim satisfied. Accordingly, the Directives' object of protection does not go so far as to confer a claim on a victim of a motor vehicle accident against a person who has caused injury and/or his insurance company. In the view of the appellant, these arguments are supported by the case law of the Court of Justice of the European Communities ("ECJ")[13] and legal theory.[14]

29 However, one statement in the *Bernáldez* judgment[15] may indicate that the ECJ is of the view that the Directives are significant not only for the issue of cover but also for the issue of liability. Concerning these issues, the appellant refers to the legal opinion of Finn Arnesen, who has assessed the significance of the above-mentioned statements in the *Bernáldez* case in relation to the scope of application of the Directives.

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10 The legal basis for this agreement is Article 2(2) of the First Motor Insurance Directive.

11 COM(88) 644.

12 OJ 1997 C 343, p. 11.

13 Case 129/94 *Criminal proceedings against Rafael Ruiz Bernáldez* [1996] ECR I-1829 (hereinafter "*Bernáldez*").

14 Legal opinion of Dr. juris Finn Arnesen (Annex 2 to the written observations of the appellant); L. Kramer, *EEC Consumer Law*, Brussels 1986; Robert Merkin and Angus Rodger, *EC Insurance Law*, London 1997; Walter van Gerven et al., *Tort Law*, *Scope of protection*, Oxford 1998; Christian von Bar, *The Common European Law of Torts*, Oxford 1998.

15 The relevant passages are found in paragraphs 18 to 20 of the reasons.

"erstatningskrav" i en avtale[10] inngått mellom nasjonale forsikringsorganisasjoner.[11] Til sist henvises det til at Kommisjonens forslag til et fjerde motorvognforsikringsdirektiv bekrefter at direktivene omhandler forsikringsdekningen, og ikke det erstatningsrettslige ansvarsforhold.[12]

25 Etter den ankende parts syn innebærer ikke andre motorvognforsikringsdirektiv noen realitetsendring i direktivenes virkeområde. Direktivene stiller fortsatt krav til forsikringsdekning, og ikke til nasjonale vilkår for erstatningsansvar.

26 Når det gjelder hovedsiktemålet med direktivenes, "fri bevegelighet av personer mellom medlemslandene", fremholder den ankende part at det faktum at vilkårene for erstatningsansvar vil kunne variere mellom medlemsstatene, ikke er til hinder for den frie bevegelighet av personer. Den ankende part anfører at bare en svært liten andel av de passasjerer som ferdes i EØS-området involverer seg i promillekjøring. Følgelig vil en nasjonal regel om bortfall av erstatningskrav for denne marginale gruppe passasjerer ikke komme i konflikt med Traktaten til opprettelse av De Europeiske Økonomiske Fellesskaps formål, og heller ikke målsetningen om fri bevegelighet av personer i EØS-avtalen.

27 Tvert i mot kan det hevdes at en nasjonal regel om bortfall av erstatning for passasjerer som involverer seg i promillekjøring kan virke gunstig for markedet, fordi det fører til tryggere motorisert ferdsel.

28 Den ankende part understreker at beskyttelseshensynet ikke rekker lengre enn til å sikre at den som har et krav mot skadevolder får dette innfridd. Direktivenes beskyttelsesmålsetning rekker følgelig ikke så langt som til å sikre at den som rammes av en motorvognulykke får et krav mot skadevolder og/eller hans forsikringsselskap. Etter den ankende parts syn har disse argumentene støtte i rettspraksis fra Domstolen for de Europeiske Fellesskap ("EF-domstolen"),[13] og i juridisk teori.[14]

29 En uttalelse i *Bernáldez*-dommen[15] kan kanskje trekke i retning av at EF-domstolen mener at direktivene har betydning, ikke bare for dekningsspørsmålet, men også for ansvarsspørsmålet. Vedrørende disse spørsmålene henviser den ankende part til den juridiske betenkning av Finn Arnesen, hvor betydningen av de nevnte uttalelser i *Bernáldez*-saken vurderes i forhold til direktivenes virkeområde.

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10 Det rettslige grunnlaget for denne avtalen er første motorvognforsikringsdirektiv artikkel 2 nr. 2.

11 COM(88) 644.

12 EFT 1997 C 343, s. 11.

13 Sak C-129/94 *Straffesak* mot *Rafael Ruiz Bernáldez* [1996] Sml. I-1829 (heretter "*Bernáldez*").

14 Juridisk betenkning av dr. juris Finn Arnesen (Vedlegg 2 til det skriftlige innlegg fra den ankende part); L. Kramer, *EEC Consumer Law*, Brussel 1986; Robert Merkin og Angus Rodger, *EC Insurance Law*, London 1997; Walter van Gerven et al., *Tort Law*, *Scope of protection*, Oxford 1998; Christian von Bar, *The Common European Law of Torts*, Oxford 1998.

15 De relevante avsnittene er premissenes punkt 18 til 20.

30 In addition, the appellant points out that the judgment in the *Bernáldez* case says nothing about whether the injured party was a passenger and/or negligently contributed to the occurrence of the injury. The injured party appears to have been an outside third party who had not negligently contributed to the occurrence of the injury. Consequently, the judgment should be accorded little weight. The Directives cannot have the same protection with respect to an injured party who has caused his own personal injury either intentionally or through gross negligence. Reference is made here to the opinion of Advocate General Lenz in the *Bernáldez* case.[16]

31 In its second line of argument, the appellant considers that it will become necessary for the EFTA Court to examine EEA law, if one assumes that the rule about which the Høyesterett is asking concerns a limitation or limitations on the passenger's insurance cover.

32 The relevant Directive provision is Article 2 of the Second Motor Insurance Directive which gives, in three indents, limitations on insurance cover which may not be invoked against third parties who are injured in an accident. The first indent, for example, prohibits statutory provisions or contract provisions which exempt from cover: "persons who do not have express or implied authorization ..." for using or driving the vehicle. The provision is grounded in consideration for the injured party in that, as a rule, it does not matter, for the purposes of the injured party's claim against the insurance company of the motor vehicle, whether the person who used the vehicle was authorized to drive or not. This rule does not apply, however, if the injured party has voluntarily entered the vehicle which caused the injury and it can be proven that the injured party knew that the vehicle was stolen.[17]

33 The reason for the rule's not applying must be partly that the injured party, by being a passenger in a stolen car, has also accepted an increased risk of injury, partly preventive considerations, and partly considerations of reasonableness.

34 The appellant submits that the Second Motor Insurance Directive does not explicitly regulate the situation in which the driver is under the influence of alcohol. However, the provision cannot be interpreted exhaustively because the presentation of the rules in Article 2(1) is quite casuistic.

35 Another important argument against interpreting Article 2(1) of the Second Motor Insurance Directive exhaustively is to be found in the fourth subparagraph of Article 1(4) of the same Directive. That provision allows for a rule under which compensation/insurance cover will not be paid for injuries caused by an uninsured vehicle to a passenger who voluntarily entered the uninsured vehicle. This shows that the Community legislator could not have intended to give an exhaustive list of prohibitions on limitations on insurance cover. The background for the provision is also considered to be that the injured party, by being a passenger, has accepted the risk of loss if injury occurs.

36 The considerations which support limitations on the obligation to cover in the event of theft and driving in uninsured vehicles apply with equal force in the event of driving under the influence of alcohol. The point is the passenger's negligent contribution to his own injury when he knows or must understand that the driver is under the influence of alcohol. The appellant is of the view that, in most cases, it will be more dangerous to ride with a driver under the influence of alcohol than in a stolen car. Car theft and driving under the influence of alcohol are both criminal offences. Accordingly, there is no reason why the passengers of a person who drives under the influence of alcohol should be placed in a better position than those of a thief.

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16 Case C-129/94 [1996] ECR I-1847 paragraph 46.

17 Cf. second subparagraph of Article 2(1) of the Second Motor Insurance Directive.

30 I tillegg peker den ankende part på at avgjørelsen i *Bernáldez*-saken ikke sier noe om hvorvidt den skadelidte var passasjer og/eller medvirker til skadeforvoldelsen. Den skadelidte synes å ha vært en utenforstående tredjemann som ikke hadde medvirket til skadeforvoldelsen. Dommen bør derfor tillegges liten vekt. Direktivene kan ikke ha den samme beskyttelse i forhold til skadelidte som selv enten forsettlig eller ved grov uaktsomhet har forårsaket sin egen personskade. Det vises her til Generaladvokat Lenz sitt forslag til avgjørelse i *Bernáldez*-saken.[16]

31 I sitt andre resonnement hevder den ankende part at det blir nødvendig for EFTA-domstolen å undersøke EØS-retten under forutsetning av at den regel Høyesterett spør om gjelder begrensning(er) i passasjerens forsikringsdekning.

32 Den relevante direktivbestemmelsen er andre motorvognforsikringsdirektiv artikkel 2, som i tre strekpunkter angir begrensninger i forsikringsdekningen som ikke kan gjøres gjeldende overfor tredjepersoner som er skadelidte i en ulykke. For eksempel setter bestemmelsen i første strekpunkt forbud mot lovbestemmelser eller avtaleklausuler som unntar fra dekning "personer som ikke uttrykkelig eller stilltiende har tillatelse til" bruk av eller kjøring med kjøretøyet. Bestemmelsen er begrunnet i hensynet til skadelidte, ved at det i utgangspunktet er uten betydning for den skadelidtes krav mot kjøretøyets forsikringsselskap om den som benyttet kjøretøyet var berettiget til å kjøre eller ikke. Regelen gjelder likevel ikke dersom skadelidte frivillig har tatt plass i det skadevoldende kjøretøyet, og det kan bevises at den skadelidte visste at kjøretøyet var stjålet.[17]

33 Bakgrunnen for at utgangspunktet forlates må dels være at skadelidte ved å være passasjer i en stjålet bil også har akseptert økt risiko for skade, dels preventive hensyn og dels rimelighetshensyn.

34 Den ankende part hevder at andre motorvognforsikringsdirektiv ikke uttrykkelig regulerer situasjonen hvor føreren er alkoholpåvirket. Bestemmelsen kan imidlertid ikke forstås som uttømmende, siden regelen i artikkel 2 nr 1 er svært kasuistisk i sin utforming.

35 Et annet viktig argument mot å tolke andre motorvognforsikringsdirektiv artikkel 2 nr 1 uttømmende, finner man i samme direktivs artikkel 1 nr 4 fjerde ledd. Denne bestemmelsen åpner for en regel om at det ikke skal betales erstatning/forsikringsdekning for skader voldt av et uforsikret kjøretøy til passasjer som frivillig har tatt plass i det uforsikrede kjøretøyet. Dette viser at regelgiveren ikke kan ha ment å gi en uttømmende opplisting av forbud mot begrensninger i forsikringsdekningene. Bakgrunnen for denne bestemmelsen antas også å være at skadelidte ved å være passasjer har akseptert risiko for tap dersom skade inntreffer.

36 De hensyn som taler for å begrense dekningsplikten i tyveritilfellene og ved å kjøre i uforsikret kjøretøy, gjør seg i like stor grad gjeldende ved promillekjøring. Poenget er passasjerens medvirkning til sin egen skade når han vet eller må forstå at sjåføren er alkoholpåvirket. Den ankende part hevder at det i de fleste tilfeller vil være enda farligere å sitte på med en promillekjører i forhold til en stjålet bil. Både biltyveri og promillekjøring er straffbart. Det er derfor ingen grunn til at promillekjørerens passasjer skal stilles bedre enn tyvens.

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16 Sak C - 129/94 [1996] ECR I-1847 premiss 46.

17 Jf. andre motorvognforsikringsdirektiv artikkel 2 nr. 1 andre ledd.

37 Injuries caused by driving under the influence of alcohol constitute a significant societal problem. To reduce driving under the influence of alcohol, violations are criminal offences in all EEA/EU countries.[18]

38 The appellant states that driving under the influence of alcohol occurs in many cases precisely because third parties ignore the increased risk of injury and voluntarily go along for the ride. In this way, the passenger will be a negligent, contributing factor to the driving's taking place.

39 Concerning the viewpoint on the "acceptance of risk", the appellant submits that the national welfare schemes and/or social schemes must compensate the injured party's need for money for daily living and/or medical treatment, on a par with other persons who are injured in situations other than car accidents. There is not much reason to let the insurance companies, and thereby in reality the premium payers, bear the economic risk.

40 In the view of the appellant, Article 2 of the Second Motor Insurance Directive aims at provisions which exclude claims for insurance cover under those conditions which are positively listed in the three indents. The provision in the case at hand is of another character because it is not absolute. On the contrary, it allows for compensation/insurance cover to nonetheless be awarded if "special grounds" are present. In real terms, the provision is not much different from normal legal rules existing in most countries on reduction of the injured party's claim due to negligent contribution to the injury/acceptance of risk. The rule in question is different from the national rule in the *Bernáldez* case, which was a rule on absolute exclusion from insurance cover in the case of property damage.

41 The appellant proposes that the question be answered as follows:

> *"It is compatible with EEA law for a passenger who sustains injury by voluntarily driving in a motor vehicle not to be entitled to compensation unless there are special grounds for being so, if the passenger knew or must have known that the driver of the motor vehicle was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury."*

The respondent

42 The respondent presents a principal and a subsidiary submission. Principally, the respondent submits that national rules which provide a basis for reduction of a claim for compensation for passengers who sustain injuries from motor vehicles are contrary to EEA law, except for rules which allow a reduction of the claim for compensation in cases where the motor vehicle has been stolen and the insurance company can prove that the injured party knew this.

43 If the EFTA Court comes to the conclusion that the Directives do not regulate compensation rules but only the insurance cover, the respondent submits subsidiarily that section 7, third paragraph, litra b of the Automobile Liability Act must be construed as a rule which makes an exception to the insurance cover. Since EEA law only contains one exception to the insurance cover - i.e. cases of theft - section 7, third paragraph, litra b is contrary to EEA law.

44 Concerning its principal submission, the respondent makes reference to the wording of Article 3(1) of the First Motor Insurance Directive and to Article 1(1) of the Third Motor Insurance Directive. From an ordinary linguistic understanding of these provisions, it follows that the

[18] Although the legal limit for what constitutes driving under the influence may vary.

37 Skader forårsaket ved promillekjøring representerer et betydelig samfunnsproblem. For å motvirke promillekjøring er overtredelse gjort straffbart i alle EØS-land.[18]

38 Den ankende part ser det slik at promillekjøring i mange tilfeller skjer nettopp fordi tredjemenn ignorerer den økede risiko for skade, og frivillig deltar i kjøringen. På denne måten vil passasjeren være en medvirkende faktor til at kjøringen finner sted.

39 Vedrørende synspunktet "aksept av risiko" hevder den ankende part at nasjonalstatenes trygdesystemer og/eller sosiale ordninger bør kompensere den skadelidtes behov for penger til daglig livsopphold og/eller medisinsk behandling, på lik linje med andre personer som blir skadet i andre situasjoner enn bilulykker. Det er liten grunn til å la forsikringsselskapene, og dermed i realiteten premiebetalerne, bære den økonomiske risikoen.

40 Etter den ankende parts syn retter andre motorvognforsikringsdirektiv artikkel 2 seg mot bestemmelser som utelukker krav på forsikringsdekning som er positivt oppregnet i de tre strekpunktene. Bestemmelsen i den foreliggende saken er av en annen karakter fordi den ikke er absolutt. Tvert i mot åpner den for at erstatning/forsikringsdekning likevel kan tilstås dersom "særlege grunnar" foreligger. Reelt sett skiller bestemmelsen seg lite ut fra vanlige rettsregler som de fleste land har, om reduksjon av skadelidtes krav på grunn av medvirkning til skaden/aksept av risiko. Den aktuelle bestemmelsen er annerledes enn den nasjonale bestemmelsen i *Bernáldez*-saken, som var en regel om absolutt unntak fra forsikringsdekning for tingsskade.

41 Den ankende part foreslår spørsmålet besvart slik:

> *"Det er forenlig med EØS-retten at en passasjer som påføres skade ved frivillig kjøring i motorvogn ikke har krav på erstatning med mindre særlige grunner foreligger, dersom passasjeren visste eller måtte vite at motorvognens fører var påvirket av alkohol på ulykkestidspunktet, og det er årsakssammenheng mellom ulykken og skaden."*

Ankemotparten

42 Ankemotparten gjør gjeldende en prinsipal og en subsidiær anførsel. Prinsipalt anfører ankemotparten at nasjonale regler som gir grunnlag for avkortning av erstatningskravet til passasjerer som påføres skade av motorvogn, er i strid med EØS-avtalen, unntatt regler som tillater avkortning av erstatningskravet i de tilfeller hvor motorvognen var stjålet, og forsikringsselskapet kan bevise at den skadelidte visste dette.

43 Dersom EFTA-domstolen konkluderer med at direktivene ikke regulerer erstatningsregler, men bare forsikringsdekningen, anføres det subsidiært at bilansvarslovens §7 tredje ledd bokstav b må forstås som en regel som gjør unntak fra forsikringsdekningen. Siden EØS-retten bare har ett unntak fra forsikringsdekningen - i tyveritilfellene - er bilansvarslovens § 7 tredje ledd bokstav b i strid med EØS-avtalen.

44 Vedrørende den prinsipale anførselen henviser ankemotparten til ordlyden i første motorvognforsikringsdirektiv artikkel 3 nr 1, og til tredje motorvognforsikringsdirektiv artikkel 1 nr 1. Det følger av en alminnelig språklig forståelse av disse bestemmelsene at direktivene

[18] Selv om grensen for hva som regnes som kjøring i alkoholpåvirket tilstand varierer landene i mellom.

Directives impose requirements for national legislation on insurance cover of liability for compensation. However, the formulation is unfortunate and the content of the provision is unclear. Therefore, what the Directives mean by rules on insurance cover of liability for compensation must be understood in the light of statements in the preparatory works for the Third Motor Insurance Directive[19] and object- and coherence-related considerations.

45 The respondent refers to the statements of the Commission[20] which must be understood in the sense that the Directives impose requirements for national rules on an insurance scheme under which the insurance company with which the motor vehicle is insured becomes directly liable towards injured parties other than the driver.

46 Furthermore, the respondent states that EEA law places considerable emphasis on ensuring citizens in an EEA State a high level of consumer protection.[21] The concept of consumer must be interpreted very broadly in EEA law, so that it also includes a high level of protection for third parties[22] who sustain injuries from motor vehicles.[23]

47 The case law of the ECJ is also in line with the guidance set out in the preambles to the Directives.[24] It is submitted that one of the most important objects of the Directives is to ensure injured passengers equal treatment regardless of in which Member State the accident occurs.

48 The respondent argues that, in the *Bernáldez* ruling, the ECJ wished to prevent an interpretation which would allow the Member States to limit compensation for people who sustain injury in traffic accidents to specified types of injury. The ECJ also attempted to prevent injured passengers from being treated differently depending on in which Member State the accident occurred.

49 Concerning the question of whether the Directives are to be interpreted exhaustively, the respondent submits that the wording in Article 1(1) of the Third Motor Insurance Directive provides explicit support for an exhaustive interpretation of the Directives. The provision states that the injured party is to be compensated by the insurance company under the motor vehicle insurance and that the Directive only accepts an exception set out in the second subparagraph of Article 2(1) of the Second Motor Insurance Directive. The reservation regarding Article 2(1) of the Second Motor Insurance Directive, read together with the word "shall" in the Article 1(1) of the Third Motor Insurance Directive, must be construed in the sense that the Directives only accept one exception to the rule on full compensation from the insurance company, i.e., in cases where the motor vehicle was stolen and the insurance company can prove that the injured party knew this.[25]

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19 In Directive Proposal (see footnote 11) the Commission has stated the following of crucial interest: "The proposal states in its Article 1 that all passengers, other than the driver and passengers who have knowingly and willingly entered a stolen vehicle, must be afforded the protection of the third party insurance cover."

20 See footnote 11.

21 Twelfth recital of the preamble to the EEA Agreement.

22 Passengers, pedestrians, etc.

23 Twelfth and thirteenth recitals in the preamble to the Third Motor Insurance Directive. The Directives' object of a high level of consumer protection is further evidenced by the third to fifth recitals in the preamble to the Third Motor Insurance Directive.

24 See footnote 13, paragraph 13.

25 See also footnote 13.

stiller krav til nasjonal lovgivning om forsikringsdekning av erstatningsansvar. Imidlertid er formuleringen uheldig, og innholdet i bestemmelsen er uklart. Hva direktivene mener med regler om forsikringsdekning av erstatningsansvar må derfor forstås i lys av uttalelser i forarbeidene til tredje motorvognforsikringsdirektiv,[19] i tillegg til formåls- og sammenhengsbetraktninger.

45 Ankemotparten refererer til uttalelser fra Kommisjonen,[20] som må forstås slik at direktivene stiller krav til nasjonale regler om en forsikringsordning som innebærer at det forsikringsselskap som motorvognen er forsikret i blir direkte ansvarlig overfor andre skadelidte enn føreren.

46 Dessuten hevder ankemotparten at EØS-retten legger betydelig vekt på å sikre borgerne i en EØS-stat et høyt forbrukervern.[21] Forbrukerbegrepet må tolkes svært vidt i EØS-retten, slik at det også omfatter et høyt beskyttelsesvern for tredjemenn[22] som blir skadet av motorvogner.[23]

47 EF-domstolens rettspraksis er også i tråd med føringene i fortalen til direktivene.[24] Det anføres at et av de viktigste formålene med direktivene er å sikre skadelidte passasjerer lik behandling uavhengig av i hvilken medlemsstat ulykken inntreffer.

48 Ankemotparten hevder at EF-domstolen i *Bernáldez*-dommen ønsket å hindre en fortolkning som ville tillate medlemsstatene å begrense erstatningen for personer som lider skade ved ferdselsuhell, til bestemte former for skade. EF-domstolen har også søkt å hindre at skadelidte passasjerer blir behandlet forskjellig alt etter i hvilken medlemsstat uhellet har funnet sted.

49 I spørsmålet om direktivene skal tolkes uttømmende, hevder ankemotparten at ordlyden i tredje motorvognforsikringsdirektiv artikkel 1 første ledd gir uttrykkelig støtte for at direktivet skal tolkes uttømmende. Bestemmelsen slår fast at skadelidte skal ha erstatning fra forsikringsselskapet under motorvognforsikringen, og at direktivet bare tillater det unntak som er omtalt i andre motorvognforsikringsdirektiv artikkel 2 nr 1 annet ledd. Forbeholdet for andre motorvognforsikringsdirektiv artikkel 2 nr 1, sammenholdt med ordet "skal" i tredje motorvognforsikringsdirektiv artikkel 1 første ledd, må forstås slik at direktivene bare aksepterer ett unntak fra regelen om full erstatning fra forsikringsselskapet, det vil si i de tilfeller hvor motorvognen var stjålet og forsikringsselskapet kan bevise at skadelidte visste dette.[25]

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[19] I forslag til direktiv (se fotnote 11) har Kommisjonen uttalt følgende av vesentlig interesse: "Forslaget slår i dets artikkel 1 fast at alle passasjerer utenom føreren, som med viten og vilje har satt seg i et stjålet kjøretøy, må tilstås beskyttelse av tredjeparters forsikringsdekning."

[20] Se fotnote 11.

[21] Se tolvte ledd i EØS-avtalens fortale.

[22] Passasjerer, gatetrafikanter, osv.

[23] Se tolvte og trettende ledd av fortalen til tredje motorvognforsikringsdirektiv. Direktivenes formål om et høyt forbrukerbeskyttelsesnivå vises dessuten av tredje til femte ledd av fortalen til tredje motorvognforsikringsdirektiv.

[24] Se henvisningen i fotnote 13; premiss 13.

[25] Se også fotnote 13.

50 This is also in line with the *Bernáldez* ruling, in particular in the light of the questions asked by the national court in that case. Therefore, the *Bernáldez* ruling cannot be understood in any other way than that the Directives must be interpreted exhaustively.

51 Lastly, the respondent submits that it is common in EEA law for directives with a social object to be accorded considerable weight in questions of whether the Directives are to be interpreted exhaustively in favour of consumers.[26]

52 Concerning its subsidiary submission, the respondent argues that it must be determined where the line is to be drawn between, on the one hand, compensation rules which are not regulated by the Directives and, on the other hand, rules on insurance cover which are regulated by the Directives. A common feature of these rules is that they both affect the final liability for compensation the insurance company must bear under motor vehicle insurance.

53 The respondent is of the view that there is guidance to be found in the words "[civil] liability for compensation". It must be considered that the Directives, with the words "[civil] liability for compensation", presumably also attempt to set out parameters for a concept of contributory negligence within the meaning contemplated by the Directives.

54 The respondent is of the view that the object of having equal treatment of passengers and a high level of protection will only be implemented in the manner contemplated by the Directives if the line between the contributory negligence rules and rules which make an exception to the area of cover of the insurance is determined by a common, EEA law concept of contributory negligence.

55 Thus, the question becomes what the Directives presumably mean by contributory negligence. This issue has been canvassed by the ECJ.[27] The respondent is of the view that, in determining the more specific content of the contributory negligence concept, one can seek guidance in the Member States' compensation law on settlement of claims following traffic accidents.[28]

56 The respondent argues that the following three characterizing criteria may be set up for a rule on contributory negligence: (1) The injured party has, as a starting proposition, a claim against the person causing the injury for unreduced cover of his injury (full compensation). (2) For there to be a basis for reduction, the injured party must have negligently contributed to the injury, i.e., the injured party should have acted differently, thereby preventing the injury from occurring or being as extensive as it was. Requirements are imposed for a qualified causal link between the injured party's conduct and the injury. More or less passive behaviour on the part of the injured party in relation to the event causing the injury is not sufficient. (3) If the injured party has negligently contributed to the injury, a concrete, rough assessment may be used for the purposes of a reduction, i.e. the compensation amount may possibly be reduced or, in the case of more gross forms of contributory negligence, be set aside. Key elements in this reduction assessment are a comparison between the influence or the concrete causal factors on the part of, on the one hand, the person causing the injury and, on the other, of the injured party, in relation to the injury.

57 Statutory rules which do not contain these criteria must, in the view of the respondent, be considered as rules which make exceptions to the area of cover of the insurance and thus "insurance cover of [civil] liability for compensation", as the expression is used in the Directives.

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[26] See ruling in Case E-9/97 *Sveinbjörnsdóttir* v *Government of Iceland* [1998] EFTA Court Report 95.

[27] Case 283/81 *CILFIT* v *Ministry of Health* [1982] ECR 3415.

[28] Reference is made to Norwegian legal literature.

50 Dette er også i tråd med *Bernáldez*-dommen, særlig sett i lys av de spørsmål som ble stilt av den nasjonale domstolen i denne saken. På denne bakgrunn kan ikke *Bernáldez*-dommen forstås på noen annen måte enn at direktivene må tolkes uttømmende.

51 Avslutningsvis fremhever ankemotparten at det er vanlig i EØS-retten at direktiver med sosialt formål skal tillegges betydelig vekt ved spørsmål om direktivene skal tolkes uttømmende til gunst for forbrukeren.[26]

52 Under sin subsidiære anførsel hevder ankemotparten at det må fastslås hvor grensen går mellom på den ene siden erstatningsregler som ikke reguleres av direktivene, og på den annen side regler om forsikringsdekning som reguleres av direktivene. Et felles trekk ved disse reglene er at de begge har betydning for det endelige erstatningsansvaret som forsikringsselskapet må bære under motorvognforsikringen.

53 Ankemotparten hevder at det kan finnes veiledning i uttrykket "erstatningsansvar". Det må antas at direktivene med uttrykket "erstatningsansvar" forutsetningsvis også tar sikte på å trekke opp rammene for et medvirkningsbegrep i direktivenes forstand.

54 Ankemotparten hevder at formålet med likebehandling og et høyt beskyttelsesnivå bare blir gjennomført som tilsiktet av direktivene dersom grensen mellom medvirkningsregler og regler som gjør unntak fra forsikringens dekningsområde, bestemmes av et felles EØS-rettslig medvirkningsbegrep.

55 Etter dette blir spørsmålet hva direktivene antas å mene med medvirkning. Dette spørsmålet har blitt belyst av EF-domstolen.[27] Ankemotparten hevder at man ved fastleggelsen av det nærmere innholdet i medvirkningsbegrepet kan søke veiledning i medlemsstatenes erstatningsrett vedrørende skadeoppgjør etter trafikkulykker.[28]

56 Ankemotparten hevder at man kan oppstille følgende tre karakteristiske kjennetegn ved en medvirkningsregel: (1) Skadelidte har i utgangspunktet krav mot skadevolderen på uavkortet dekning av sin skade (full erstatning). (2) For at det skal være grunnlag for avkortning, må skadelidte ha medvirket til skaden, det vil si at skadelidte burde ha handlet annerledes, og dermed hindret at skaden skjedde eller fikk det omfang den gjorde. Det stilles krav til kvalifisert årsakssammenheng mellom skadelidtes adferd og skaden. Mer eller mindre passiv opptreden fra skadelidtes side i relasjon til den skadevoldende begivenhet er ikke tilstrekkelig. (3) Dersom skadelidte har medvirket, kan det ved en konkret og skjønnsmessig vurdering eventuelt skje en avkortning, det vil si at erstatningssummen eventuelt kan reduseres, eller ved grovere former for medvirkning falle bort. Sentrale momenter i denne avkortningsvurderingen er en sammenligning mellom den innvirkning eller de konkrete årsaksforhold som skadevolderen og skadelidte hver for seg representerte i forhold til skaden.

57 Lovregler som ikke inneholder disse kjennetegnene må etter ankemotpartens syn betraktes som regler som gjør unntak fra forsikringens dekningsområde, og dermed regler om "forsikringsdekning av erstatningsansvar", slik det uttrykkes i direktivene.

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[26] Se uttalelsen i Sak E-9/97 *Sveinbjörnsdóttir* v *Government of Iceland* [1998] EFTA Court Report 95.

[27] Sak 283/81 *CILFIT* v *Ministry of Health* [1982] Sml. 3415.

[28] Det henvises til norsk rettslig litteratur.

58 Firstly, such legal rules lack a reduction function. The reason for this is that the general rule is one of exclusion. Exceptions may only be made if special grounds to do so are present. This exception has been interpreted and applied very strictly by the Høyesterett and is of little practical interest. Consequently, the respondent is of the view that the exception can in no way lead to the rule's being characterized as a reduction rule.

59 Secondly, the respondent submits that the rule applies to a situation in which the injured party's conduct does not bear a direct causal link to the event causing the injury. The contributory negligence criterion in general provisions on contributory negligence must relate solely to the event causing the injury. This means that if the car, for example, drives off the road because the driver is under the influence of alcohol, the passenger has not negligently contributed to the actual act of driving off the road, unless he has actively taken hold of the wheel or the like. It cannot be sufficient that the passenger has voluntarily allowed himself to be driven by a driver under the influence of alcohol.

60 Lastly, the respondent submits that the rule means that there is nothing to reduce. Furthermore, the object of the rule is not to regulate the apportionment of fault between the injured party and the person causing the injury, but to express society's disapproval of driving under the influence of alcohol.[29]

61 The Høyesterett has concluded that a reduction can be made in a claim for compensation of the surviving relatives under section 7, third paragraph, litra b of the Automobile Liability Act because the rule is not an ordinary compensation rule, but must be seen as a rule on loss of insurance cover.[30]

62 Against this background, the respondent is of the view that national rules such as the one in question must be characterized as an exception to the area of cover of the insurance.

63 In any event, the respondent submits that the line between insurance rules and compensation rules is determined by whether a reduction or exclusionary rule under national law can also be invoked by the person causing the injury. This is supported by an ordinary linguistic understanding of what is meant by "[civil] liability for compensation". According to an ordinary linguistic understanding, rules which regulate only the insurance company's liability and not the personal liability of the person causing the injury are considered to be compensation rules.

64 The above is illustrated with a reference to the two-track system in Norwegian law. In Norwegianlaw, it is clear that the person causing the injury cannot invoke section 7, third paragraph, litra b of the Automobile Liability Act to exclude the injured party's claim for compensation against him. It is the general contributory negligence provision in section 5-1 of Act No. 26 of 13 June 1969 relating to compensation in certain circumstances (the Compensation Act *-skadeserstatningsloven*) which regulates the contributory negligence of the injured party. Consequently, there can be a divergence between the insurance company's liability and the liability of the person causing the injury. This may lead to both practical and economic disadvantages for the injured party, particularly when the person causing the injury is not capable of being sued.

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29 The above is followed up by the Supreme Court of Norway in its judgment in Rt. 1997, page 149.

30 See footnote 29.

58 For det første mangler slike regler avkortningsfunksjonen, fordi hovedregelen her er utelukkelse. Unntak gjøres bare hvis det foreligger særlige grunner. Dette unntaket har vært tolket og praktisert svært strengt av Høyesterett, og er av liten praktisk interesse. Følgelig hevder ankemotparten at unntaket ikke på noen måte kan karakteriseres som en avkortningsregel.

59 For det andre anfører ankemotparten at regelen gjelder en situasjon hvor skadelidtes adferd ikke står i direkte årsakssammenheng med den skadevoldende begivenhet. Medvirkningskriteriet i alminnelige medvirkningsbestemmelser må utelukkende relateres til den skadevoldende begivenhet. Dette innebærer for eksempel at dersom bilen kjører av veien fordi føreren er under påvirkning av alkohol, har passasjeren ikke medvirket til selve utforkjøringen, med mindre han aktivt har tatt hånd om rattet el. Det kan ikke være tilstrekkelig at passasjeren frivillig har latt seg kjøre av en alkoholpåvirket sjåfør.

60 Endelig gjør ankemotparten gjeldende at regelen innebærer at det ikke er noe å avkorte. Dessuten er ikke formålet med regelen å regulere skyldfordeling mellom skadelidte og skadevolderen, men å gi uttrykk for samfunnets misbilligelse av kjøring i påvirket tilstand.[29]

61 Høyesterett har konkludert med at avkortning kan skje i et krav om erstatning til de etterlatte etter bilansvarslovens § 7 tredje ledd bokstav b, fordi regelen ikke er en vanlig erstatningsregel, men må forstås som en regel om bortfall av forsikringsdekning.[30]

62 På denne bakgrunn hevder ankemotparten at nasjonale regler lik den saken står om må karakteriseres som unntak fra forsikringens dekningsområde.

63 Under enhver omstendighet hevder ankemotparten at grensen mellom forsikringsregler og erstatningsregler bestemmes av om avkortnings- eller utestengningsregelen etter nasjonal rett også kan gjøres gjeldende av den personlige skadevolderen. Dette har støtte i en alminnelig språklig forståelse av hva som menes med "forsikringsdekning av erstatningsansvar". Etter en alminnelig språklig forståelse kan ikke regler som utelukkende regulerer forsikringsselskapets ansvar, og ikke skadevolderens personlige ansvar, anses å være en erstatningsregel.

64 Det ovennevnte kan illustreres med en henvisning til det tosporete systemet som gjelder i norsk rett. Etter norsk rett er det klart at den personlige skadevolderen ikke kan påberope bilansvarslovens § 7 tredje ledd bokstav b, for å utestenge skadelidtes erstatningskrav mot ham. Det er den alminnelige medvirkningsbestemmelsen i § 5-1 i lov av 13 juni 1969 nr 26 om skadeserstatning, som regulerer skadelidtes medvirkning. Følgelig kan det bli sprik mellom forsikringsselskapets ansvar og ansvaret til den personlige skadevolderen. Dette vil kunne medføre både praktiske og økonomiske ulemper for skadelidte, ikke minst der skadevolderen ikke er søkegod.

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29 Dette er fulgt opp av Norges Høyesterett i dommen referert i Retstidende. 1997, side 149.

30 Se fotnote 29.

65 Reference is also made in this connection to the ECJ's interpretation in the *Bernáldez* judgment. In that case, it was clear that the person causing the injury was liable for compensation to the injured party under national compensation rules, but under Spanish statutory rules the motor vehicle insurance did not apply when the driver had caused the injury while under the influence of alcohol. The ECJ held that rules like the Spanish one in question were contrary to the Directives.

66 The respondent proposes that the question be answered as follows:

> *"It is incompatible with EEA law for a passenger who sustains injury by voluntarily driving in a motor vehicle not to be entitled to compensation unless there are special grounds for being so, if the passenger knew or must have known that the driver of the motor vehicle was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury."*

The Government of Iceland

67 The Government of Iceland states that, in Iceland, the rules on compensation for damages and injuries related to car accidents are based on the general principles of the law of torts. It is well established in Icelandic judicial practice that a passenger who knows, or should know, that a driver is under the influence of alcohol has accepted the risk related thereto. This rule is classified as a principle on assumption of risk, and most often leads to the passenger's being excluded from compensation. With the Traffic Act of 1987, the rules on the reduction of compensation were narrowed in scope. It is now provided that compensation for bodily injury will only be reduced in a case where the injured party has contributed to the injury intentionally or through gross negligence. Despite these changes, however, the Supreme Court of Iceland has continued to apply the assumption of risk principle in cases where the passengers of an intoxicated driver have been injured.[31]

68 In substance, the Government of Iceland argues that it does not fall within the ambit of the Motor Insurance Directives to regulate liability for compensation of injuries related to the use of motor vehicles. This view is supported by the placement of the Directives in Annex IX to the EEA Agreement. Regulating the national law of torts would have required a different anchoring in the EEA Agreement.

69 Furthermore, this approach is underlined by the structure and wording of the Motor Insurance Directives. Reference is made to Article 3(1) of the First Motor Insurance Directive, to the preamble to the Second Motor Insurance Directive and to Article 1(1) of the same Directive, which shows that the aim of the Directives is to regulate only the insurance cover and nothing more.

70 Referring to case law of the ECJ,[32] the Government of Iceland argues that there is a distinction in the Directives between the rules governing compensation for civil liability and the insurance thereof.

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[31] Judgment of the Supreme Court of Iceland, Hrd. 1996:3120.

[32] Case 116/83 *Asbl Bureau Belge des Assureurs Automobiles* v *Adriano Fantozzi and SA Les Assurances Populaires* [1984] ECR 2481.

65 Det vises også i denne forbindelse til EF-domstolens tolkning i *Bernáldez*-saken. I denne saken var det på det rene at skadevolder var erstatningsansvarlig overfor skadelidte etter nasjonale erstatningsregler, men etter spanske lovregler kom ikke motorvognforsikringen til anvendelse når føreren hadde voldt skaden under kjøring i alkoholpåvirket tilstand. EF-domstolen uttalte at regler lik den spanske var i strid med direktivene.

66 Ankemotparten foreslår spørsmålet besvart slik:

> *"Det er uforenlig med EØS-retten at en passasjer som påføres skade ved frivillig kjøring i motorvogn, ikke har krav på erstatning med mindre særlige grunner foreligger, dersom passasjeren visste eller måtte vite at motorvognens fører var påvirket av alkohol på ulykkestidspunktet og det var årsakssammenheng mellom alkoholpåvirkningen og skaden."*

Den islandske regjering

67 Den islandske regjering uttaler at på Island er reglene om trafikkskadeerstatning basert på alminnelige erstatningsrettslige prinsipper. Det er fastslått i islandsk rettspraksis at en passasjer som vet eller burde vite at en bilfører er alkoholpåvirket, har akseptert den risiko dette medfører. Denne regelen anses som et prinsipp om aksept av risiko, og leder som oftest til at passasjeren ikke får erstatning. Virkeområdet for reglene om redusert erstatning ble innsnevret ved trafikkloven av 1987. Det er nå slik at erstatning for personskade bare reduseres i tilfeller hvor den skadelidte har medvirket til skaden enten forsettlig eller ved grov uaktsomhet. På tross av disse endringene har likevel Islands Høyesterett fortsatt å anvende prinsippet om aksept av risiko i saker hvor passasjerene til en beruset fører har blitt skadet.[31]

68 Materielt sett hevder Den islandske regjering at det ikke faller innenfor motorvognforsikringsdirektivene å regulere erstatningsansvaret for skader påført ved bruk av motorvogn. Dette synet støttes av plasseringen av direktivene i Vedlegg IX til EØS-avtalen. En regulering av nasjonal erstatningsrett måtte ha blitt gitt en annen forankring i EØS-avtalen.

69 Videre underbygges denne oppfatningen av strukturen og ordlyden i motorvognforsikringsdirektivene. Det henvises til første motorvognforsikringsdirektiv artikkel 3 nr 1, til andre motorvognforsikringsdirektivs fortale, og til samme direktiv artikkel 1 nr 1, som viser at formålet med direktivene er å regulere bare forsikringsdekningen, og ikke noe mer enn det.

70 Under henvisning til rettspraksis fra EF-domstolen[32] argumenterer Den islandske regjering for at direktivene sondrer mellom regler om erstatningsansvar og forsikring av slikt ansvar.

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[31] Dom av Islands Høyesterett, Hrd. 1996:3120.

[32] Sak 116/83 *Asbl Bureau Belge des Assureurs Automobiles* v *Adrieno Fantozzi og SA Les Assuranses Populaires* [1984] Sml. s. 2481.

71 Furthermore, Article 2(1) of the Second Motor Insurance Directive must be interpreted only as precluding statutory and/or contractual provisions excluding the categories of persons specified therein from insurance coverage. Paragraph 2 of Article 2(1) must not be interpreted exhaustively. Rather, it is an example of the cases where national authorities could, despite the rules in paragraph 1, limit the insurance coverage. It must be clear in any event, however, that insurance coverage, here as elsewhere, only comes into question once civil liability has been established. The bottom line is that it is impossible to let insurance cover civil liability that does not exist.

72 The Government of Iceland is of the opinion that the *Bernáldez*[33] ruling deals with insurance cover and is of little, if any, significance for the case at hand.

73 The reference in point 1 in the preamble to the First Motor Insurance Directive to the safeguarding of the interests of persons who may be the victims of accidents caused by motor vehicles can be interpreted as implicitly referring to the non-contribution of the person concerned to an accident. Those who have contributed to their own injuries do not have the same need for the same adequate insurance coverage. The Norwegian provision seems to be partly based on this principle, as well as on the desire of the public authorities to motivate people not to accept a ride with an intoxicated driver.

74 In the opinion of the Government of Iceland, it could even be argued that, in this respect in relation to the accident, the term "third party" is misleading.

75 The Government of Iceland proposes that question be answered as follows:

> *"It is not incompatible with EEA law for national law to preclude a passenger, who sustains injury by voluntarily driving in a motor vehicle, from being entitled to compensation, as long as the preclusion pertains to the basis for liability, but not merely to the insurance."*

The Government of the Principality of Liechtenstein

76 The Government of the Principality of Liechtenstein submits that a distinction must be made between the relation between the insurance and the insured and the relation between the insurance and the victim. The relation between the insurance and the insured is to be understood as the internal relation, which is regulated by law and by an insurance contract. The insurance contract can, in this case, also provide that there will not be any cover in specified cases, meaning an exclusion of cover or an exclusion from the insurance, respectively.

77 This relation clearly distinguishes itself from the relation between insurance and the victim. Except for a certain case listed in the Second Motor Insurance Directive, the victim is always entitled to compensation. This means that the insurance contract cannot provide for an exclusion of liability. This would deprive the victim of any compensation and would therefore be contrary to the aims of the Directives.

78 In the light of the *Bernáldez*[34] judgment of the ECJ, the opinion of Advocate General Lenz[35] in that case and the objectives of the Motor Insurance Directives, the Government of the Principality of Liechtenstein is of the view that the reasons for the exclusion of liability of the Directives are

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33 See footnote 13.

34 See footnote 13.

35 See footnote 16.

71 Videre må andre motorvognforsikringsdirektiv artikkel 2 nr 1 tolkes slik at den bare utelukker lov- og/eller avtalebestemmelser som avskjærer de angitte personkategorier fra forsikringsdekning. Artikkel 2 nr 1 annet ledd må ikke tolkes uttømmende. Snarere må den anses som eksempler på typetilfeller hvor de nasjonale myndigheter, på tross av bestemmelsen i første ledd, kan begrense forsikringsdekningen. Det må imidlertid i alle tilfelle være klart at forsikringsdekning, her som ellers, først kommer på tale når erstatningsansvaret er etablert. Det er umulig å la forsikringen dekke tilfeller hvor det ikke eksisterer et erstatningsansvar.

72 Den islandske regjering hevder at *Bernáldez*-saken[33] angår forsikringsdekningen, og er av liten, om noen, interesse for den foreliggende saken.

73 Henvisningen til beskyttelse av de skadelidtes interesser ved trafikkulykker i første ledd av fortalen til første motorvognforsikringsdirektiv, kan tolkes som en implisitt henvisning til vedkommendes manglende medvirkning. De som har medvirket til sine egne skader, har ikke det samme behov for den samme adekvate forsikringsdekningen. Den norske bestemmelsen synes dels å bygge på dette prinsippet, dels på myndighetenes ønske om å motivere folk til ikke å sitte på med en beruset sjåfør.

74 Etter Den islandske regjerings syn kan det enda til hevdes at uttrykket "tredjepart" i denne henseende er misvisende i sammenheng med ulykken.

75 Den islandske regjering foreslår at spørsmålet besvares slik:

> *"Det er ikke uforenlig med EØS-retten at nasjonal rett utelukker en passasjer som påføres skade ved frivillig kjøring i motorvogn, fra å ha krav på erstatning, så lenge utelukkelsen refererer seg til grunnlaget for ansvar, og ikke bare til forsikringen."*

Fyrstedømmet Liechtensteins regjering

76 Fyrstedømmet Liechtensteins regjering hevder at det må sondres mellom forholdet mellom forsikringen og den forsikrede, og forholdet mellom forsikringen og den skadelidte. Forholdet mellom forsikringen og den forsikrede må forstås som et internt forhold, som reguleres av nasjonal rett og forsikringsavtalen. Forsikringsavtalen kan i denne relasjon forutsette at visse tilfeller ikke dekkes, noe som innebærer en utelukkelse, enten slik at tilfellet ikke kan forsikres i det hele tatt, eller slik at tilfellet er unntatt fra dekning.

77 Dette forholdet skiller seg klart fra forholdet mellom forsikringen og skadelidte. Med unntak for et særlig tilfelle nevnt i andre motorvognforsikringsdirektiv, har skadelidte alltid krav på erstatning. Dette innebærer at forsikringsavtalen ikke kan fastsette ansvarsfritak. Noe slikt ville frata skadelidte all erstatning, og ville derfor være i strid med direktivenes formål.

78 I lys av EF-domstolens avgjørelse og generaladvokat Lenz[34] sitt forslag til avgjørelse i *Bernáldez*-saken,[35] og formålene med motorvognforsikringsdirektivene, hevder Fyrstedømmet Liechtensteins regjering at grunnene for direktivenes ansvarsutelukkelser må tolkes

[33] Se fotnote 13.

[34] Se fotnote 16.

[35] Se fotnote 13.

to be understood as having an exhaustive character. The protection of the victim is one of the central objectives of the Directives and, therefore, there will be liability of the insurance towards the victim in any case.[36]

79 The first subparagraph of Article 2(1) of the Second Motor Insurance Directive is to be considered as a minimum requirement, as a prohibition to enforce any exclusions from the insurance upon injured victims, because protection of the victim is to be given priority.

80 The Government of the Principality of Liechtenstein states that if the Norwegian provision was compatible with EEA law, it would allow a transfer of the risk from the level between the insurance and the insured to the level of the victim. In the view of the Government of the Principality of Liechtenstein, the issue of whether the risk is to be assigned to the insurance or to the insured is a political decision. Thus, it is clear that the risk must be assigned to the insurance if the protection of the victim is to be given priority. This interpretation also finds ground in the aim of the Directives as affirmed by the ECJ in the *Bernáldez* case.

81 However, the question of whether or not the compensation may be limited due to the passenger's failure to demonstrate diligence must be answered by the national law or judge. Although the liability of the insurance is given in any case, this does not mean that the insurance has to pay the full amount of compensation[37] to the victim in any case. In the opinion of the Government of the Principality of Liechtenstein, the compensation may, for example, be limited or reduced if the victim has shown gross negligence.

82 It lies within the discretion of the EEA States to apply the national principles of liability. The Directives do not designate any harmonization in this field so that it is possible to apply the national principles of liability[38] and to reduce the compensation.

83 Consequently, there is a possibility of reducing the compensation in a case where the passenger has shown contributory negligence or violated his duty of diligence. At the same time, however, it is not possible to exclude the claim *a priori* and leave it to the injured party to prove that there were special circumstances that would nevertheless allow for a claim.

84 The Government of the Principality of Liechtenstein proposes that the question be answered as follows:

> *"The reasons for the exclusion of liability of the motor vehicle directives, i.e. Council Directive 72/166/EEC of 24 April 1982 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, the Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and the Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles are to be interpreted as being exhaustive.*
> *Therefore it is incompatible with EEA law for national law to provide for a passenger who sustains injury by voluntarily driving in a motor vehicle not to be entitled to compensation unless there are special grounds for being so, if the passenger knew or must have known that the driver of the motor vehicle was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury.*

[36] With the exception of the case of the stolen vehicle, which is mentioned in the second subparagraph of Article 2(1) of the Second Motor Insurance Directive.

[37] For example, loss of earnings, satisfaction etc.

[38] For example, the principle of fault.

uttømmende. Beskyttelse av skadelidte er en av direktivenes sentrale målsetninger, og det vil derfor i alle tilfeller foreligge ansvar for forsikringsselskapet overfor skadelidte.[36]

79 Andre motorvognforsikringsdirektiv artikkel 2 nr 1 første ledd må anses som et minimumskrav, og dermed som et forbud mot å håndheve andre unntak fra forsikringsdekning mot skadelidte, siden beskyttelsen av skadelidte er prioritert.

80 Fyrstedømmet Liechtensteins regjering slår fast at dersom den norske bestemmelsen var forenlig med EØS-retten ville det føre til en overføring av risikoen fra forholdet mellom forsikreren og forsikringstageren, til skadelidte. Etter Fyrstedømmet Liechtensteins regjerings syn er det et politisk spørsmål om risikoen skal plasseres hos forsikreren eller forsikringstageren. Det er dermed klart at risikoen må bæres av forsikreren dersom beskyttelse av skadelidte skal gis prioritet. Denne tolkningen finner også støtte i direktivenes formål, som bekreftet av EF-domstolen i *Bernáldez*-dommen.

81 Spørsmålet om erstatningen kan reduseres eller ikke på grunn av passasjerens manglende aktsomhet, må imidlertid besvares av nasjonal rett eller dommer. Selv om forsikrerens ansvar i alle tilfelle er gitt, trenger ikke det bety at forsikreren alltid må betale hele erstatningsbeløpet til skadelidte.[37] Etter Fyrstedømmet Liechtensteins regjerings oppfatning kan erstatningen reduseres for eksempel dersom skadelidte har utvist grov uaktsomhet.

82 Det hører under EØS-statenes myndighet å anvende nasjonale erstatningsprinsipper. Direktivene gjennomfører ikke noen harmonisering på dette området, slik at det er mulig å la nasjonale erstatningsprinsipper[38] føre til redusert erstatning.

83 Følgelig eksisterer muligheten til å redusere erstatningsutbetalingen i tilfeller hvor skadelidte har medvirket, eller ikke har utvist tilbørlig aktsomhet. Samtidig er det imidlertid ikke mulig å utelukke et krav i utgangspunktet, og overlate det til skadelidte å bevise at særlige grunner foreligger som likevel gir ham et krav.

84 Fyrstedømmet Liechtensteins regjering foreslår spørsmålet besvart på følgende måte:

> *"Grunnene for ansvarsfritak i motorvognforsikringsdirektivene, dvs. rådsdirektiv 72/166/EØF av 24 april 1982 om tilnærming av medlemsstatenes lovgivning om ansvarsforsikring for motorvogn og kontroll med at forsikringsplikten overholdes, det andre rådsdirektiv 84/5/EØF av 30 desember 1983 om tilnærming av medlemsstatenes lovgivning om ansvarsforsikring for motorvogn, og det tredje rådsdirektiv 90/232/EØF av 14 mai 1990 om tilnærming av*
> *medlemsstatenes lovgivning om ansvarsforsikring for motorvogn må tolkes som uttømmende. Derfor er det uforenlig med EØS-retten at nasjonal rett utelukker krav på erstatning til en passasjer som påføres skade ved frivillig kjøring i motorvogn med mindre særlige grunner foreligger, dersom passasjeren visste eller måtte vite at motorvognens fører var påvirket av alkohol på ulykkestidspunktet, og det var årsakssammenheng mellom alkoholpåvirkningen og skaden.*

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36 Med unntak av tilfellene hvor bilen er stjålet, som nevnt i andre motorvognforsikringsdirektiv artikkel 2 nr. 1 annet ledd.

37 For eksempel inntektstap og annet dekningspliktig tap.

38 For eksempel skyldprinsippet.

However, it remains an issue of national law to apply the national principles of liability as regards the question whether or not the compensation can be limited because of the violation of the duty for diligence of the passenger."

The Government of Norway

85 Referring to the national system set out in the Norwegian Automobile Liability Act, the Government of Norway argues that the provision in question is based on the view that every consideration should clearly be given to all aspects of prevention in the formulation of provisions on liability for compensation in connection with drunken driving. Furthermore, it would be unreasonable to impose additional costs on the owner of the vehicle in regard to insuring persons who choose to ride in a vehicle whose driver is under the influence of alcohol or some other intoxicant.

86 The Government of Norway argues that the placing of the Directives in the EEA Agreement, together with their purpose, indicate that they are not meant to harmonize the substantive liability for road traffic accidents throughout the Community and the EEA. This view was confirmed by the ECJ in the *Bernáldez* ruling in which the ECJ referred to the preambles to the Directives. Therefore, it is not the aim of the Directives that injured parties shall have a comparable position under the law of torts in all Member States.

87 The view that the Directives relate only to insurance cover and not to the substantive regulation of the national laws of torts has been accepted by legal theorists.[39]

88 Furthermore, the wording of the Directives show that the way in which Member States regulate liability for compensation is not affected by the Directives. It follows from Article 3(1) of the First Motor Insurance Directive that it imposes requirements as regards insurance cover, but it does not affect the substance of national law relating to torts and compensation.

89 The wording "any person entitled to compensation in respect of any loss or injury caused by vehicles" in Article 1(2) of the First Motor Insurance Directive entails that, until liability for compensation has been incurred, there is no injured party within the meaning of the Directive. The Directives concern only situations in which the right to compensation is already established. The question in these cases is only whether the liability for compensation is covered by the insurance.

90 Concerning injured third parties, Article 2(1) of the Second Motor Insurance Directive imposes requirements only as to the insurance cover, whereas it is up to the national law to regulate their position under the law of torts.

91 It also follows from the wording of Article 1 of the Third Motor Insurance Directive that it is the insurance cover that is being covered and not the liability for compensation. In this context, reference is also made to the Commission Proposal for a Fourth Motor Insurance Directive.

92 In the opinion of the Government of Norway, the distinction drawn between liability for compensation and insurance cover is also supported by the case law of the ECJ.[40]

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[39] See Robert Merking and Angus Rodger, *EC Insurance Law*, London 1997, p. 56; Christian von Bar, *The Common European Law of Torts*, Oxford 1998, p. 401; Walter van Gerven et al., *Tort Law, Scope of protection*, Oxford 1998, p. 386.

[40] See footnote 13.

Imidlertid er det opp til nasjonal rett å anvende de nasjonale erstatningsrettslige prinsipper i spørsmålet om erstatningen skal begrenses eller ikke fordi passasjeren ikke har utvist tilbørlig aktsomhet."

Den norske regjering

85 Under henvisning til det nasjonale systemet som er etablert i bilansvarsloven, hevder Den norske regjering at den bestemmelsen saken gjelder er basert på det synspunktet at alle aspekter ved prevensjon klart må tas hensyn til ved utformingen av bestemmelser om erstatningsansvar i forbindelse med promillekjøring. Videre ville det være urimelig å pålegge bileiere tilleggskostnader ved å måtte forsikre personer som velger å sitte på i et kjøretøy hvor føreren er påvirket av alkohol eller et annet rusmiddel.

86 Den norske regjering hevder at plasseringen av direktivene i EØS-avtalen, sammenholdt med deres formål, viser at de ikke tar sikte på å harmonisere selve erstatningsansvaret for veitrafikkulykker overalt i Fellesskapet og EØS-området. Dette synet ble bekreftet av EF-domstolen i *Bernáldez*-dommen, hvor EF-domstolen henviste til direktivenes fortaler. Det er derfor ikke direktivenes formål at skadelidte skal ha en sammenlignbar stilling under alle medlemsstatenes erstatningsrett.

87 Det synspunktet at direktivene bare regulerer forsikringsdekningen og ikke selve innholdet i statenes nasjonale erstatningsrett, har også fått tilslutning i juridisk teori.[39]

88 Videre viser direktivenes ordlyd at de ikke berører medlemsstatenes regulering av erstatningsansvaret. Det følger av første motorvognforsikringsdirektiv artikkel 3 nr 1 at direktivet stiller krav til forsikringsdekningen, men det påvirker ikke innholdet i nasjonal erstatningsrett.

89 Formuleringen "enhver person som har rett til erstatning for skade forårsaket av et kjøretøy" i første motorvognforsikringsdirektivs artikkel 1 nr 2 innebærer at inntil erstatningsansvar er oppstått, finnes det ingen skadelidt i direktivets forstand. Direktivene gjelder bare i tilfeller hvor retten til erstatning allerede er etablert. Spørsmålet i disse tilfellene er bare om ansvaret er dekket av forsikring.

90 Når det gjelder skadelidte tredjemenn stiller andre motorvognforsikringsdirektiv artikkel 2 nr 1 bare krav til forsikringsdekningen, mens det er opp til nasjonal rett å regulere deres posisjon etter erstatningsretten.

91 Det følger også av formuleringen av tredje motorvognforsikringsdirektiv artikkel 1, at det er forsikringsdekningen som reguleres, og ikke erstatningsansvaret. I denne sammenhengen henvises det også til Kommisjonens forslag til et fjerde motorvognforsikringsdirektiv.

92 Etter den norske regjerings oppfatning har skillet mellom erstatningsansvar og forsikringsdekning støtte i EF-domstolens rettspraksis.[40]

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39 Se Robert Merking og Angus Rodger, *EC Insurance Law*, London 1997, s. 56; Christian von Bar, *The Common European Law of Torts*, Oxford 1998, s. 401; Walter van Gerven et al., *Tort Law, Scope of protection*, Oxford 1998, s. 386.

40 Se fotnote 13.

93 However, the case at hand must be distinguished from the *Bernáldez* case because that case concerned the exclusion of injuries caused by drunken driving in general from the cover provided by the compulsory liability insurance in cases where the driver had incurred personal liability. The national provision in the case at hand deals with the question of whether the passenger's complicity or acceptance of risk is to preclude him from compensation. Whilst the national provision in the *Bernáldez* case presupposed that there was liability for compensation, it is precisely such liability that is governed by the provision of the Norwegian Automobile Liability Act.

94 The Government of Norway is of the opinion that Art 3(1) in particular of the First Motor Insurance Directive makes it clear that the Member States have broad discretion as regards specific terms and conditions of the statutory insurance scheme.

95 The national provision in question falls within the limits of this discretion because its scope is very limited and several conditions must be fulfilled. The injured party must have voluntarily chosen to ride in the vehicle that caused the injury despite the fact that he knew or must have known that the driver of the vehicle was under the influence of alcohol or some other intoxicant. There must also be a causal link between the injury and the fact that the driver was intoxicated. The provision must be viewed in connection with the general Norwegian rules on denial or reduction of compensation on the basis of acceptance of risk, complicity and contributory actions.

96 In relation to the aim of the Directives of facilitating the free movement of persons in the Community, the Norwegian rules are of marginal significance. In the case of injuries suffered by passengers who knew or must have known that the driver was intoxicated, the protective aim of the Directive is not immediately manifest.

97 The phrase "[civil] liability in respect of the use of vehicles" in Article 3(1) of the First Motor Insurance Directive cannot be understood as referring to national provisions on compensation which were not drawn up with traffic insurance in mind. The national provisions referred to are the ones concerning strict liability.

98 Concerning Article 2(1) of the Second Motor Insurance Directive, the Government of Norway is of the view that this provision does not fully govern all cases where liability for compensation or insurance cover may be limited. If the Directives allow exclusion from compensation of passengers in stolen and uninsured vehicles, then *a fortiori* is there reason to also exclude passengers who ride voluntarily in a vehicle driven by a drunken driver, since the consumption of alcohol affects the driver's ability to drive. There is no such direct link between the criminal act and the risk of injury in the case of riding in a stolen or uninsured vehicle.

99 The Government of Norway argues that a national exception clause such as the one in question that adopts the aim of the Directives to a lesser degree than the Directives' own exception clauses must, at any rate, be compatible with the Directives. The legal position would be untenable if forms of limitation of liability for compensation or insurance cover other than what is stated in the Directives were not allowed.

100 The Government of Norway proposes that the question be answered as follows:

> *"It is not incompatible with EEA law for a passenger who sustains injury by driving (riding) voluntarily in a motor vehicle not be entitled to compensation unless there are special grounds for being so (entitled), if the passenger knew or must have known that the driver of the vehicle was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury."*

93 Den foreliggende sak må imidlertid skilles fra *Bernáldez*-saken, fordi den saken dreide seg om utelukkelse av alle skader forårsaket av promillekjøring fra dekning av den obligatoriske ansvarsforsikringen, i tilfeller hvor føreren hadde pådratt seg personlig ansvar. Den nasjonale bestemmelsen i den foreliggende saken omhandler spørsmålet om hvorvidt passasjerens delaktighet eller aksept av risiko skal utelukke ham fra å få erstatning. Mens den nasjonale bestemmelsen i *Bernáldez*-saken forutsatte at det forelå erstatningsansvar, er det nettopp slikt ansvar som reguleres av bilansvarsloven.

94 Den norske regjeringen hevder at særlig første motorvognforsikringsdirektiv artikkel 3 nr 1 gjør det klart at medlemsstatene har stor frihet med hensyn til spesifikke vilkår og betingelser i den lovfestede forsikringsordning.

95 Den nasjonale bestemmelsen i denne saken ligger innenfor rammene for denne kompetansen fordi dens virkeområde er svært begrenset, og fordi flere vilkår må være oppfylt. Den skadelidte må frivillig ha valgt å sitte på i det skadevoldende kjøretøy, på tross av at han visste eller måtte vite at bilføreren var under påvirkning av alkohol eller annet rusmiddel. Det må også være årsakssammenheng mellom skaden og det forhold at føreren var beruset. Bestemmelsen må ses i sammenheng med de alminnelige norske regler om avskåret eller avkortet erstatning på grunn av aksept av risiko, delaktighet eller medvirkende opptreden.

96 Med hensyn til direktivenes formål å sikre fri bevegelighet av personer innenfor Fellesskapet, har de norske regler marginal betydning. I tilfeller av personskade hos passasjerer som visste eller måtte vite at føreren var beruset, er direktivets beskyttelsesformål ikke umiddelbart slående.

97 Uttrykket "erstatningsansvar for kjøretøyer" i første motorvognforsikringsdirektiv artikkel 3 nr 1 kan ikke forstås slik at det referer til nasjonale bestemmelser om erstatning som ikke ble utformet med trafikkforsikring for øyet. De nasjonale bestemmelsene det henvises til er de som gjelder objektivt ansvar.

98 Når det gjelder andre motorvognforsikringsdirektivs artikkel 2 nr 1, hevder Den norske regjering at denne bestemmelsen ikke fullt ut regulerer alle tilfeller hvor erstatningsansvar eller forsikringsdekning kan begrenses. Dersom direktivene tillater at passasjerer i stjålne og uforsikrede kjøretøyer utelukkes fra dekning, er det desto større grunn til også å utelukke passasjerer som frivillig lar seg kjøre av en alkoholpåvirket fører, siden alkoholinntaket påvirker førerens evne til å kjøre. Det er ingen slik direkte sammenheng mellom den straffbare handling og skaderisikoen i tilfellet med kjøring i et stjålet eller uforsikret kjøretøy.

99 Den norske regjering hevder at en nasjonal unntaksbestemmelse som den saken står om, som i mindre grad enn direktivenes egne unntaksbestemmelser slutter seg til direktivenes formål, alltid må anses å være i tråd med direktivene. Det ville føre til en uholdbar rettslig situasjon dersom andre begrensninger i erstatningsansvar eller forsikringsdekning enn de som nevnes i direktivene var ulovlige.

100 Den norske regjering foreslår at spørsmålet besvares slik:

> *"Det er ikke uforenlig med EØS-retten at en passasjer som påføres skade ved frivillig kjøring i motorvogn ikke har krav på erstatning med mindre særlige grunner foreligger, dersom passasjeren visste eller måtte vite at motorvognens fører var påvirket av alkohol på ulykkestidspunktet og det var årsakssammenheng mellom alkoholpåvirkningen og skaden."*

The EFTA Surveillance Authority

101 With respect to the argument that the national rule in question concerns only liability and therefore falls outside the scope of the Directives, the EFTA Surveillance Authority is of the opinion that the qualification of the rule in question cannot preclude an examination as to whether the rule is compatible with the Directives. Referring to the case law of the ECJ,[41] the EFTA Surveillance Authority states that the applicability of the Directives cannot vary in function from the qualification of the rules made in the different national legal orders.

102 Concerning the interpretation of Article 2(1) of the Second Motor Insurance Directive, which permits exclusion provisions for passengers in stolen cars, the EFTA Surveillance Authority doubts whether an exhaustive interpretation of this provision is proper. The rule concerning insurance cover of all passengers was introduced with the Third Motor Insurance Directive in 1990. Thus, passenger exclusion clauses could be assumed to have been lawful before and thus not barred by any exhaustive enumeration of exclusion clauses made by the Second Motor Insurance Directive, which was adopted just prior to 1984.

103 However, it follows from the *Bernáldez* judgment[42] of the ECJ that the Directive must be interpreted in the light of the aim of ensuring protection for the victims and that this aim leads to a wide interpretation of the provisions of the Directives. Such a wide interpretation may result in the setting-aside of national provisions, even though they are not explicitly envisaged by the Directives, when they run counter to the aim of the Directives. The judgment shows that the victim should not bear the risk for matters which lay with the driver.

104 Therefore, Article 3(1) of the First Motor Insurance Directive, seen in the light of Article 1 of the Third Motor Insurance Directive and Article 2(1) of the Second Motor Insurance Directive, must be interpreted so as to preclude a national rule such as the one in question.

105 However, the *Bernáldez* ruling does not exclude other types of limitations, such as a rule on contributory negligence.

106 The national rule in question goes clearly beyond being a normal rule on contributory negligence and includes other policy considerations. This is confirmed in a ruling of the Høyesterett, in which it is said that the national rule is "first and foremost anchored in considerations of criminal and alcohol policy".[43] Therefore, it will have the effect of hindering the free movement of vehicles in the European Economic Area and the protection of victims of road traffic accidents, by limiting payment of compensation to third-party victims of road traffic accidents to certain types of damage.

107 The EFTA Surveillance Authority proposes that question be answered as follows:

> *"The Motor Insurance Directives and in particular Article 3(1) of Directive 72/166/EEC, seen in the light of Article 1(1) of Directive 90/232/EEC and Article 2(1)of Directive 84/5/EEC, must be interpreted so as to preclude a national rule according to which there is no obligation for the insurer to pay compensation to the passenger who sustains injury, unless there are*

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41 Case C-20/92 *Anthony Hubbard* v *Peter Hamburger* [1993] I-3777 and Case 82/71 *Pubblico Ministero della Repubblica Italiana* v *Società Agricola Industria Latte* (SAIL) [1972] ECR 119.

42 See footnote 13.

43 *Retstidende*, 1997, p. 149.

EFTAs Overvåkningsorgan

101 Med hensyn til argumentet om at den nasjonale regelen det her gjelder bare regulerer erstatningsansvar, og derfor faller utenfor direktivenes virkeområde, hevder EFTAs Overvåkningsorgan at denne klassifiseringen av regelen ikke kan forhindre en undersøkelse av hvorvidt den er forenlig med direktivene. Under henvisning til rettspraksis fra EF-domstolen[41] hevder EFTAs Overvåkningsorgan at direktivenes anvendelse ikke kan variere i funksjon ut fra hvilken klassifisering av reglene som gjøres i de ulike nasjonale rettsordener.

102 Vedrørende tolkningen av andre motorvognforsikningsdirektivets artikkel 2 nr 1, som tillater unntaksbestemmelser for personer i stjålne biler, tviler EFTAs Overvåkningsorgan på om en uttømmende tolkning av denne bestemmelsen er riktig. Regelen om forsikringsdekning av alle passasjerer ble innført ved tredje motorvognforsikringsdirektiv i 1990. Derfor kan det forutsettes at bestemmelser som utelukket passasjerer fra dekningen har vært gyldige tidligere, og ikke utelukket av noen uttømmende oppregning i andre motorvognforsikringsdirektiv, som ble innført like før inngangen til 1984.

103 Imidlertid følger det av EF-domstolens avgjørelse i *Bernáldez*-saken[42] at direktivet må tolkes i lys av formålet med å sikre beskyttelse av skadelidte, og at dette formålet leder til en vid tolkning av direktivenes bestemmelser. En slik vid tolkning kan resultere i at nasjonale bestemmelser settes til side, selv om de ikke eksplisitt nevnes i direktivene, fordi de er i strid med direktivenes formål. Dommen viser at skadelidte ikke skal bære risikoen for forhold knyttet til sjåføren.

104 Derfor må første motorvognforsikringsdirektiv artikkel 3 nr 1, sett i lys av tredje motorvognforsikringsdirektiv artikkel 1 og andre motorvognforsikringsdirektiv artikkel 2 nr 1 tolkes slik at en nasjonal regel som den det her gjelder er utelukket.

105 *Bernáldez*-dommen avskjærer imidlertid ikke andre typer begrensninger, slik som en medvirkningsregel.

106 Den nasjonale regelen går klart videre enn å være en vanlig medvirkningsregel, og inneholder andre politiske vurderinger. Dette er bekreftet i en avgjørelse av Høyesterett, hvor det er uttalt at regelen "søker først og fremst sin forankring i kriminal- og alkoholpolitiske overveielser."[43] Derfor vil den virke som et hinder for den frie bevegelighet av motorvogner i det Europeiske Økonomiske Samarbeidsområde, og for beskyttelsen av skadelidte ved trafikkulykker, ved å begrense erstatningsutbetalingene til tredjepersoner som skades ved trafikkulykker til visse særlige skadetilfeller.

107 EFTAs Overvåkningsorgan foreslår spørsmålet besvart slik:

> *"Motorvognforsikringsdirektivene, og særlig artikkel 3 nr. 1 i direktiv 72/166/EØF, sett i lys av artikkel 1 nr. 1 i direktiv 90/232/EØF og artikkel 2 nr. 1 i direktiv 84/5/EØF, må tolkes slik at de utelukker en nasjonal regel hvoretter forsikreren ikke plikter å betale erstatning til en passasjer som blir skadet, med mindre særlige grunner foreligger, dersom passasjeren*

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41 Sak C-20/92 *Anthony Hubbard* mot *Peter Hamburger* [1993] Sml. I-3777 og sak 82/71 Den *Den italienske Republikks anklagemyndighed* mot *Societa agricola industria* (SAIL) [1972] Sml. 43.

42 Se fotnote 13.

43 *Retstidende* 1997, s. 149.

special grounds for doing so, if the passenger knew or must have known that the driver of the motor vehicle was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury."

The Commission of the European Communities

108 The Commission of the European Communities, referring to the Motor Insurance Directives and their preambles, notes that the Directives established the principle of compulsory cover in return for a single premium in the field of insurance against civil liability resulting from the movement of automotive vehicles. The First Motor Insurance Directive introduces a system of compulsory third-party liability insurance throughout the Community. The basic protection provided for was extended and strengthened by the Second and Third Motor Insurance Directives.

109 Nevertheless, the Motor Insurance Directives do not contain any total harmonization measures concerning the level of compensation granted to victims and they do not abolish all differences between national requirements, except insofar as those differences impede the free movement of persons and vehicles within the Community.

110 Neither the wording of Article 2(1) of the Second Motor Insurance Directive nor the wording of Article 1 of the Third Motor Insurance Directive deals with clauses or provisions concerning the barring of a victim from compensation from the insurance company if the victim knew or should have known that the driver of the motor vehicle that caused the damage was under the influence of alcohol at the time of the accident and there was a causal link between the influence of alcohol and the injury.

111 In the opinion of the Commission, Article 3(1) of the First Motor Insurance Directive, as developed and supplemented by the Second and Third Motor Insurance Directives, should be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and personal injuries sustained by them, to at least the amounts fixed in Article 1(2) of the Second Motor Insurance Directive. Any other interpretation would deprive Article 3 (1) of the First Motor Insurance Directive of its effectiveness and would also be contrary to the purpose of the Directives, which is to ensure comparable treatment of victims irrespective of where the accident occurred.

112 It follows from the whole rationale of the Motor Insurance Directives, which intend to ensure maximum protection to victims of car accidents, that compensation to the victim to the extent of the real and effective damages incurred should be guaranteed in all cases of accidents. It follows from Article 1 of the Third Motor Insurance Directive that these principles apply to all passengers other than the driver.

113 However, Article 3(1) of the First Motor Insurance Directive does not preclude statutory provisions or contractual clauses which allow the insurer to claim against the insured with a view to recovering the sums paid to the victim of a road traffic accident caused by an intoxicated driver.

114 Reference is also made to the seventh recital of the Second Motor Insurance Directive, which states that "it is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurer and the person responsible for the accident". Also in the case of a stolen vehicle, even if compensation is not payable by the insurer, compensation must be provided by the guarantee fund provided for in Article 1(4) of the Second Motor Insurance Directive.

visste eller måtte vite at motorvognens fører var påvirket av alkohol på ulykkestidspunktet, og det var årsakssammenheng mellom alkoholpåvirkningen og skaden."

Kommisjonen for De europeiske fellesskap

108 Kommisjonen for De europeiske fellesskap bemerker, under henvisning til motorvognforsikringsdirektivene og deres fortaler, at direktivene etablerte prinsippet om obligatorisk dekning i bytte mot en enkelt premie på området for forsikring av erstatningsansvar som følge av kjøring med motorvogn. Første motorvognforsikringsdirektiv introduserer et system med obligatorisk ansvarsforsikring overfor tredjemenn innen hele Fellesskapet. Denne grunnleggende beskyttelsen ble utvidet og styrket ved andre og tredje motorvognforsikringsdirektiv.

109 Likevel innebærer ikke motorvognforsikringsdirektivene en fullstendig harmonisering av nivået på forsikringsutbetalinger til skadelidte, og de fjerner ikke alle forskjeller mellom nasjonale vilkår, unntatt så langt forskjellene begrenser den frie bevegelighet av personer og kjøretøyer innenfor Fellesskapet.

110 Hverken ordlyden i andre motorvognforsikringsdirektiv artikkel 2 nr 1, eller i tredje motorvognforsikringsdirektiv artikkel 1 omtaler klausuler eller bestemmelser som dreier seg om å utelukke erstatning til skadelidte fra forsikringsselskapet hvis skadelidte visste eller måtte vite at føreren av det skadevoldende kjøretøy var påvirket av alkohol på ulykkestidspunktet, og at det var årsakssammenheng mellom alkoholpåvirkningen og skaden.

111 Etter Kommisjonens oppfatning bør første motorvognforsikringsdirektiv artikkel 3 nr 1, slik den er utviklet og supplert gjennom andre og tredje motorvognforsikringsdirektiv, tolkes slik at en obligatorisk motorvognforsikring må gi skadelidt tredjeperson ved ulykker forårsaket av kjøretøyer erstatning for all lidt skade på person og eiendeler, til minst de beløpene som er fastsatt i andre motorvognforsikringsdirektiv artikkel 1 nr 2. Enhver annen tolkning ville frata første motorvognforsikringsdirektiv artikkel 3 nr 1 dens effektivitet og ville også stride mot direktivenes formål, som er å sikre sammenlignbar behandling av skadelidte, uavhengig av hvor ulykken skjedde.

112 Det følger av hele begrunnelsen for motorvognforsikringsdirektivene, som tar sikte på å gi maksimal beskyttelse for skadelidte ved bilulykker, at erstatning til skadelidte for hele det lidte tap må være garantert i alle ulykkestilfeller. Det følger av tredje motorvognforsikringsdirektiv artikkel 1 at disse prinsipper gjelder for alle passasjerer utenom føreren.

113 Første motorvognforsikringsdirektiv artikkel 3 nr 1 forhindrer imidlertid ikke lovbestemmelser eller avtalebestemmelser som tillater forsikreren å kreve regress av den forsikrede for utbetalinger til skadelidte for en bilulykke forårsaket av en beruset fører.

114 Det henvises også til det syvende ledd av fortalen til andre motorvognforsikringsdirektiv, som slår fast at "[d]et er i de skadelidtes interesse at virkningene av en klausul om ansvarsfraskrivelse begrenses til forholdet mellom forsikringsgiveren og den person som er ansvarlig for ulykken." Også i tilfeller med stjålet kjøretøy, og selv om forsikreren ikke er pliktig til å betale erstatning, må erstatning tilstås fra garantifondet oppført i andre motorvognforsikringsdirektiv artikkel 1 nr 4.

115 Therefore, the Commission is of the opinion that the possibility of application of exclusion clauses provided for in Article 2 of the Second Motor Insurance Directive must be interpreted restrictively and must be allowed only in the few and specific circumstances provided for in that Article. The Norwegian legislation falls outside the scope of that derogation and should therefore be considered contrary to the Motor Insurance Directives. In the opinion of the Commission, the ECJ has already confirmed this approach in the *Bernáldez* judgment.

116 The Commission proposes that the question be answered as follows:

> *"The Motor Insurance Directives and in particular Article 1 of Directive 90/232/EEC and Article 2(1) of Directive 84/5/EEC, must be interpreted as precluding a national statutory provision according to which, unless there are special grounds for doing so, there is no obligation for the insurer to pay compensation to a passenger who sustains injuries, if the passenger knew or should have known that the driver of the vehicle was under the influence of alcohol at the time of the accident."*

Carl Baudenbacher
Judge-Rapporteur

115 Kommisjonen hevder derfor at muligheten for å anvende utelukkelsesbestemmelser oppført i andre motorvognforsikringsdirektiv artikkel 2 må tolkes restriktivt, slik at avskjæring bare tillates i de få og særlige tilfeller som artikkelen omhandler. Den norske lovbestemmelsen faller utenfor virkeområdet av dette unntaket, og må derfor anses å være i strid med motorvognforsikringsdirektivene. Etter Kommisjonens oppfatning har EF-domstolen allerede bekreftet dette synet i *Bernaldez*-dommen.

116 Kommisjonen foreslår spørsmålet besvart slik:

> *"Motorvognforsikringsdiretivene, og særlig artikkel 1 i direktiv 90/232/EØF og artikkel 2 nr. 1 i direktiv 84/5/EØF, må tolkes slik at de utelukker en nasjonal lovbestemmelse hvoretter forsikreren ikke plikter å betale erstatning til en skadelidt passasjer, med mindre særlige grunner foreligger, dersom passasjeren visste eller måtte vite at motorvognens fører var påvirket av alkohol på ulykkestidspunktet."*

Carl Baudenbacher
Saksforberedende dommer

The EFTA Court was set up under the Agreement on the European Economic Area (the EEA Agreement) of 2 May 1992. The EEA Agreement entered into force on 1 January 1994.

This report contains information on the EFTA Court for the period from 1 January 1999 to 31 December 1999. It has a short section on the Judges and the staff.

The report also includes the full texts of all decisions of the EFTA Court in the period covered as well as the reports prepared by the Judge-Rapporteurs for the hearings of the cases.

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