REPORT of the EFTA Court 2013

Book 2

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REPORT of the EFTA Court 2013

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EFTA COURT'S
SPRING CONFERENCE

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EFTA COURT

Case E-15/12

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CASE E-15/12

Jan Anfinn Wahl

v

the Icelandic State

(Article 3 EEA – Article 7 EEA – Form and method of implementation of directives – Directive 2004/38/EC – Free movement of EEA nationals – Restrictions on right of entry – Procedural safeguards)

Summary of the Judgment

1. There are three main points at which a directive gains effect under the EEA Agreement. The first arises where a decision of the EEA Joint Committee has entered into force and becomes binding pursuant to Article 104 EEA and the directive must be implemented. This must have taken place at the latest on the implementation date in the EU or when the Joint Committee Decision enters into force, whichever is later. Any later date constitutes an infringement of the EEA Agreement. The second is where a directive is implemented pursuant to Article 7 EEA, in which case it shall prevail over national provisions regardless of the form and method of implementation. The third is where a decision of the EEA Joint Committee becomes provisionally applicable pursuant to Article 103 EEA, unless a Contracting Party notifies that such a provisional application cannot take place.

2. The implementation of a directive does not necessarily require legislative action in each EEA State, as the existence of statutory provisions and general principles of law may render the implementation by specific legislation superfluous. The implementation of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient provided it actually ensures the full application of the directive.

MÁL E-15/12

Jan Anfinn Wahl

gegn

íslenska ríkinu

(3. gr. EES-samningsins – 7. gr. EES-samningsins – Form og aðferð innleiðingar tilskipunar – Tilskipun 2004/38/EB – Frjáls för ríkisborgara EES-landa – Takmarkanir á rétti til inngöngu – Réttarfarsreglur)

Samantekt

1. Samkvæmt EES-samningnum hafa þrjú meginatriði þýðingu í þágu þess að tilskipun öðlist gildi. Í fyrsta lagi er það svo að þegar ákvörðun sameiginlegu EES-nefndarinnar hefur tekið gildi og verður bindandi samkvæmt 104. gr. EES-samningsins, þá verður að innleiða tilskipunina. Þetta verður að hafa átt sér stað eigi síðar en á innleiðingardegi tilskipunarinnar í Evrópusambandinu eða þegar ákvörðun sameiginlegu EES-nefndarinnar tekur gildi, hvort heldur sem á sér stað síðar. Ef tilskipunin hefur ekki verið innleidd að liðnu þessu tímamarki er um brot á EES-samningnum að ræða. Í öðru lagi þarf að huga að innleiðingu tilskipunar á grundvelli 7. gr. EES-samningsins, en í slíkum tilvikum skal tilskipunin ganga framar landslögum, óháð formi og aðferð við innleiðinguna. Í þriðja lagi koma til athugunar tilvik þar sem ákvörðun sameiginlegu EES-nefndarinnar öðlast gildi til bráðabirgða á grundvelli 103. gr. EES-samningsins, en að öðrum kosti þarf aðildarríki að tilkynna um að slík gildistaka geti ekki átt sér stað.

2. Innleiðing tilskipunar gerir ekki endilega kröfu um setningu laga í hverju og einu EES-ríki, þar sem fyrirliggjandi lagaákvæði og meginreglur laga kunna að leiða til þess að ástæðulaust sé að grípa til sérstakrar lagasetningar. Innleiðing tilskipunar í landsrétt krefst þess ekki endilega að einstök ákvæði hennar séu leidd í lög eftir orðanna hljóðan. Innleiðing tilskipunar með almennari hætti kann að vera fullnægjandi, að því gefnu að tryggt sé að tilskipuninni verði þannig beitt að fullu.

3. Provisions of directives must be implemented with unquestionable binding force and the specificity, precision, and clarity necessary to satisfy the requirements of legal certainty. EEA States must ensure full application of directives not only in fact but also in law. It is essential that the legal situation resulting from national implementing measures be sufficiently precise and clear and that individuals be made fully aware of their rights so that, where appropriate, they may rely on them before the national courts. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of an EEA/EFTA State's obligations under the EEA Agreement.

4. Article 3 EEA requires the EEA States to take all measures necessary, regardless of the form and method of implementation, to ensure that a directive which has been implemented and satisfies the conditions set out above prevails over conflicting national law and to guarantee the application and effectiveness of the directive. It is inherent in the objectives of the EEA Agreement that national courts are bound to interpret national law in conformity with EEA law. They must apply the methods of interpretation recognised by national law in order to achieve the result sought by the relevant EEA rule. EEA States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.

5. The right of free movement of nationals of EEA States is not unconditional. Limitations and conditions stem, for example, from Article 27(1) of the Directive. Under Article 27(1) of the Directive EEA States may restrict the freedom of movement of nationals of EEA States and their family members on grounds of public policy, public security or public health. However, those grounds cannot be invoked to serve economic ends.

6. It follows from Article 27(2) of the Directive that, in order to be justified, measures taken on grounds of public policy or public security must be based exclusively on the personal conduct of the individual concerned. Justifications that are

3. Ákvæði innleiddra tilskipana verða að hafa ótvíræð bindandi áhrif og vera innleidd með nægilega skýrum og glöggum hætti til þess að skilyrði meginreglunnar um réttarvissu séu uppfyllt. EES-ríkjum ber að koma á nákvæmri löggjöf á því sviði sem um ræðir til að tryggja að unnt sé að framfylgja tilskipunum ekki einungis að forminu til heldur einnig að lögum. Enn fremur er mikilvægt að sú lagaumgjörð sem leiðir af innleiðingu sé nægilega nákvæm og skýr til að einstaklingar geti öðlast vitneskju um rétt sinn, eftir því sem við á, og að þeir geti byggt á þeim rétti fyrir dómstólum. Stjórnsýsluframkvæmd ein og sér, sem stjórnvöld geta eðli málsins samkvæmt breytt eftir hentugleika og er ekki kynnt opinberlega, uppfyllir ekki þær kröfur sem gerðar eru til EES/EFTA-ríkja á grundvelli EES-samningsins.

4. Það er áskilið samkvæmt 3. gr. EES-samningsins að EES/EFTA-ríki skuli gera allar viðeigandi ráðstafanir, óháð því formi eða aðferð sem beitt hefur verið við innleiðingu, til að tryggja að tilskipun, sem hefur verið innleidd og uppfyllir þau skilyrði sem getið hefur verið um hér að framan, hafi forgang gagnvart ósamrýmanlegum reglum landsréttar og tryggja skilvirka framkvæmd hennar. Það felst í markmiðum EES-samningsins að landsdómstólum beri að túlka landslög í samræmi við EES-rétt. Af því leiðir að dómstólar verða að beita þeim túlkunarreglum sem viðurkenndar eru að landsrétti í því skyni að ná þeim áhrifum sem stefnt er að með hlutaðeigandi reglum EES-réttarins. Aðildarríkjum er ekki heimilt að beita reglum sem eru til þess fallnar að stefna því í voða að markmiðum tilskipunar verði náð og draga þannig úr skilvirkni hennar.

5. Réttur EES-borgara til frjálsrar farar er ekki skilyrðislaus, heldur getur hann sætt takmörkunum og skilyrðum sem felast í samningnum og þeim aðgerðum sem gripið er til í því skyni að framfylgja honum. Þessar takmarkanir og skilyrði verða einkum leidd af 1. mgr. 27. gr. tilskipunarinnar, sem kveður á um að EES-ríkjum sé heimilt að takmarka réttinn til frjálsrar farar EES-borgara og fjölskyldumeðlima þeirra á grundvelli allsherjarreglu, almannaöryggis eða lýðheilsu. Á hinn bóginn má samkvæmt sama ákvæði ekki bera þessar aðstæður fyrir sig í efnahagslegum tilgangi.

6. Það leiðir af 2. mgr. 27. gr. tilskipunarinnar að ráðstafanir á grundvelli allsherjarreglu eða almannaöryggis skulu alfarið byggja á framferði hlutaðeigandi

isolated from the particulars of the case in question or that rely on considerations of general prevention cannot be accepted. Moreover, a measure which restricts the right of free movement may be justified only if it respects the principle of proportionality.

7. Present association with an organisation associated with organised crime can only be taken into account in so far as the circumstances of the membership are evidence of personal conduct constituting a genuine, present and sufficiently serious threat to one of the fundamental interests of society. In the present case, it appears from the reference that the personal conduct of the Plaintiff is not limited to mere membership in a particular organisation associated with organised crime.

8. A criminal sanction can be relevant in demonstrating whether conduct is of a sufficiently serious nature to justify restrictions on the entry of nationals of other EEA States where the individual in question is convicted of that crime and that particular conviction is part of the assessment on which the national authorities base their decision. However, derogations from the free movement of persons must be interpreted restrictively, with the result that a previous conviction can justify denying entry only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy and/or public security.

9. An EEA State cannot be obliged to declare the organisation in question and membership therein unlawful before it can deny a member of that organisation who is a national of another EEA State leave to enter its territory pursuant to Article 27 of the Directive, if recourse to such a declaration is not thought appropriate in the circumstances. An outright prohibition could drive that organisation underground, thus making it difficult for the authorities to monitor its conduct. However, given the limitations of the EEA State's margin of appreciation, the competent authorities of that EEA State must have clearly defined their standpoint as regards the activities of the particular organisation in question and, considering the activities to be a threat to public policy and/or public security, they must have taken administrative measures to counteract these activities.

einstaklings, til þess að unnt sé að réttlæta þær. Réttlætingarástæður sem eru óháðar efnisatriðum þess máls sem um ræðir eða eru reistar á almennum forvarnarforsendum eru ekki tækar. Þá verða ráðstafanir sem takmarka ferðafrelsi einungis réttlættar að því gefnu að meðalhófs sé gætt.

7. Það er einungis unnt að líta til núverandi tengsla við samtök sem tengjast skipulagðri glæpastarfsemi að því marki sem aðstæður tengdar aðild sýna fram á persónubundið framferði einstaklings sem felur í sér raunverulega, yfirvofandi og nægilega alvarlega ógn við einhverja af grundvallarhagsmunum samfélagsins. Í því máli sem hér um ræðir verður ráðið af beiðni Hæstaréttar að persónubundin háttsemi stefnanda hafi ekki einskorðast við aðild að tilteknum samtökum sem tengjast skipulagðri glæpastarfsemi.

8. Refsikennd viðurlög geta haft þýðingu við að sýna fram á að tiltekin háttsemi sé nægilega alvarlegs eðlis til að réttlæta takmarkanir á rétti ríkisborgara annarra EES-ríkja til landgöngu, að því gefnu að hlutaðeigandi einstaklingur hafi verið fundinn sekur um slíkan glæp og að sú sakfelling hafi verið hluti af því mati stjórnvalda sem þau reistu ákvörðun sína á. Á hinn bóginn verður að túlka frávik frá ferðafrelsi einstaklinga með þrengjandi hætti, þannig að fyrri sakfelling geti einungis leitt til synjunar um landgöngu í tilvikum þar sem þær aðstæður, sem voru tilefni sakfellingar, gefa tilefni til að ætla að persónulegt framferði einstaklings feli í sér yfirvofandi ógn við allsherjarreglu og almannaöryggi.

9. EES-ríki er ekki skylt að lýsa samtök og aðild að þeim ólögmæta í því skyni að synja ríkisborgara annars EES-ríkis, sem á aðild að slíkum samtökum, um landgöngu á grundvelli 27. gr. tilskipunarinnar, að því gefnu að slík yfirlýsing teljist ekki viðeigandi í ljósi aðstæðna. Í mörgum tilvikum gæti slíkt opinbert bann leitt til þess að samtök færu huldu höfði, sem aftur gæti hamlað eftirliti stjórnvalda með þeim. Að teknu tilliti til þeirra takmarkana sem gera verður á svigrúmi EES-ríkja til mats, verða lögbær stjórnvöld EES-ríkis á hinn bóginn að hafa skilgreint afstöðu sína til starfsemi þeirra samtaka sem um ræðir með skýrum hætti og að hafa gripið til stjórnvaldsathafna í því skyni að vinna gegn starfseminni, í þeim tilvikum þegar hún hefur verið álitin ógn við allsherjarreglu og/eða almannaöryggi.

JUDGMENT OF THE COURT

22 July 2013 *

(Article 3 EEA – Article 7 EEA – Form and method of implementation of directives – Directive 2004/38/EC – Free movement of EEA nationals – Restrictions on right of entry – Procedural safeguards)

In Case E-15/12,

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 (the Supreme Court of Iceland), in the case between

Jan Anfinn Wahl

and

the Icelandic State

concerning the interpretation of Article 27 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,

THE COURT,

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

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

– Jan Anfinn Wahl ("the Plaintiff"), represented by Oddgeir Einarsson, Supreme Court Attorney;

– the Icelandic State ("the Defendant" or "Iceland"), represented by Óskar Thorarensen, Supreme Court Attorney, Office of the Attorney General (Civil Affairs), acting as Agent;

* Language of the request: Icelandic.

DÓMUR DÓMSTÓLSINS

22. júlí 2013 *

(3. gr. EES-samningsins – 7. gr. EES-samningsins – Form og aðferð innleiðingar tilskipunar – Tilskipun 2004/38/EB – Frjáls för ríkisborgara EES-landa – Takmarkanir á rétti til inngöngu – Réttarfarsreglur)

Mál E-15/12,

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

Jan Anfinn Wahl

gegn

íslenska ríkinu

varðandi túlkun á 27. gr. tilskipunar Evrópuþingsins og ráðsins 2004/38/EB frá 29. apríl 2004 um rétt borgara Sambandsins og aðstandenda þeirra til frjálsrar farar og dvalar á yfirráðasvæði aðildarríkjanna

DÓMSTÓLLINN,

skipaður dómurunum Carl Baudenbacher, forseta og framsögumanni, Per Christiansen og Páli Hreinssyni,

dómritari: Gunnar Selvik,

hefur, með tilliti til skriflegra greinargerða frá:

– Stefnanda, Jan Anfinn Wahl, í fyrirsvari er Oddgeir Einarsson, hæstaréttarlögmaður.

– Stefnda, íslenska ríkinu, í fyrirsvari sem umboðsmaður er Óskar Thorarensen, hæstaréttarlögmaður, hjá embætti ríkislögmanns.

* Beiðni um ráðgefandi álit á íslensku.

– the Norwegian Government ("Norway"), represented by Pål Wennerås, Advocate, Office of the Attorney General (Civil Affairs), and Janne Tysnes Kaasin, Senior Advisor, Ministry of Foreign Affairs, acting as Agents;

– the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, Auður Ýr Steinarsdóttir and Catherine Howdle, Officers, Department of Legal & Executive Affairs, acting as Agents;

– the European Commission ("the Commission"), represented by Christina Tufvesson and Michael Wilderspin, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiff, represented by Oddgeir Einarsson; the Defendant, represented by Óskar Thorarensen; the Norwegian Government, represented by Pål Wennerås; ESA, represented by Xavier Lewis and Auður Ýr Steinarsdóttir; and the Commission, represented by Michael Wilderspin, at the hearing on 23 May 2013,

gives the following

JUDGMENT

I LEGAL BACKGROUND

EEA law

1 Article 7 EEA reads as follows:

Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:

(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;

(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.

– Ríkisstjórn Noregs, í fyrirsvari sem umboðsmenn eru Pål Wennerås, lögmaður á skrifstofu ríkislögmanns, og Janne Tysnes Kaasin, ráðgjafi hjá utanríkisráðuneytinu.

– Eftirlitsstofnun EFTA („ESA“), í fyrirsvari sem umboðsmenn eru Xavier Lewis, framkvæmdastjóri lögfræði- og framkvæmdasviðs, Auður Ýr Steinarsdóttir og Catherine Howdle, lögfræðingar á lögfræði- og framkvæmdasviði.

– Framkvæmdastjórn Evrópusambandsins („framkvæmdastjórnin“), í fyrirsvari sem umboðsmenn eru Christina Tufvesson og Michael Wilderspin, lögfræðilegir ráðgjafar

með tilliti til skýrslu framsögumanns,

og munnlegs málflutnings lögmanns stefnanda, Oddgeirs Einarssonar, umboðsmanns stefnda, Óskars Thorarensen, umboðsmanns ríkisstjórnar Noregs, Pål Wennerås, fulltrúa ESA, Xavier Lewis og Auðar Ýrar Steinarsdóttur, og fulltrúa framkvæmdastjórnarinnar, Michael Wilderspin, sem fram fór 23. maí 2013,

kveðið upp svofelldan

DÓM

I LÖGGJÖF

EES-réttur

1 Í 7. gr. EES-samningsins segir:

Gerðir sem vísað er til eða er að finna í viðaukum við samning þennan, eða ákvörðunum sameiginlegu EES-nefndarinnar, binda samningsaðila og eru þær eða verða teknar upp í landsrétt sem hér segir:

(a) gerð sem samsvarar reglugerð EBE skal sem slík tekin upp í landsrétt samningsaðila;

(b) gerð sem samsvarar tilskipun EBE skal veita yfirvöldum samningsaðila val um form og aðferð við framkvæmdina.

2 In the fourth recital in the preamble to the EEA Agreement, the Contracting Parties express their consideration for

... the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties;

3 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC ("the Directive") *(OJ 2004 L 158, p. 77)* was incorporated into Annex V to the EEA Agreement at point 1 and Annex VIII at point 3 by Decision of the EEA Joint Committee No 158/2007 ("the Decision") (OJ 2008 L 124, p. 20, and EEA Supplement No 26, 8.5.2008, p. 17). The Decision entered into force on 1 March 2009.

4 Article 5 of the Directive as adapted for the purposes of the EEA Agreement reads as follows:

Right of entry

1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant nationals of EC Member States and EFTA States leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on nationals of EC Member States and EFTA States.

...

2 Í 4.-lið aðfararorða EES-samningsins segir að samningsaðilar muni hafa hugfast:

... það markmið að mynda öflugt og einsleitt Evrópskt efnahagssvæði er grundvallist á sameiginlegum reglum og sömu samkeppnisskilyrðum, tryggri framkvæmd, meðal annars fyrir dómstólum, og jafnrétti, gagnkvæmni og heildarjafnvægi hagsbóta, réttinda og skyldna samningsaðila;

3 Tilskipun Evrópuþingsins og ráðsins 2004/38/EB frá 29. apríl 2004 um rétt borgara Sambandsins og aðstandenda þeirra til frjálsrar farar og dvalar á yfirráðasvæði aðildarríkjanna, um breytingu á reglugerð (EBE) nr. 1612/68 og niðurfellingu tilskipana 64/221/EBE, 68/360/EBE, 72/194/EBE, 73/148/EBE, 75/34/EBE, 75/35/EBE, 90/364/EBE, 90/365/EBE og 93/96/EBE (tilskipunin) (Stjtíð. ESB 2004 L 158, bls. 77) var tekin upp í 1.-lið V. viðauka og 3.-lið VII. viðauka EES-samningsins samkvæmt ákvörðun sameiginlegu EES-nefndarinnar nr. 158/2007 („ákvörðunin“) (Stjtíð. ESB 2008 L 124, bls. 20, og EES-viðbæti nr. 26, 8.5.2008, bls. 17). Ákvörðunin gekk í gildi 1. mars 2009.

4 Í 5. gr. tilskipunarinnar, eins og hún var tekin upp í EES-samninginn, segir:

Réttur til komu

1. Með fyrirvara um ákvæði um ferðaskilríki, sem gilda um landamærastjórn í ríkjunum, skulu aðildarríkin veita borgurum Sambandsins, sem eru handhafar gilds kennivottorðs eða vegabréfs, og aðstandendum, sem eru ekki ríkisborgarar aðildarríkis en eru handhafar gilds vegabréfs, leyfi til að koma inn á yfirráðasvæði sitt.

Óheimilt er að krefjast komuáritunar eða jafngildra formsatriða af borgurum Sambandsins.

...

5 Article 27 of the Directive as adapted for the purposes of the EEA Agreement reads as follows:

General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of nationals of EC Member States and EFTA States and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

6 Article 31 of the Directive reads as follows:

Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

where the expulsion decision is based on a previous judicial decision; or

where the persons concerned have had previous access to judicial review; or

5 Í 27. gr. tilskipunarinnar eins og hún var tekin upp í EES-samninginn segir:

Almennar meginreglur

1. Með fyrirvara um ákvæði þessa kafla er aðildarríkjunum heimilt að takmarka frjálsa för og dvöl borgara Sambandsins og aðstandenda þeirra, óháð ríkisfangi, á grundvelli allsherjarreglu, almannaöryggis eða lýðheilsu. Ekki má bera þessar aðstæður fyrir sig í efnahagslegum tilgangi.

2. Ráðstafanir, sem gerðar eru með skírskotun til allsherjarreglu eða almannaöryggis, skulu vera í samræmi við meðalhófsregluna og alfarið byggjast á framferði hlutaðeigandi einstaklings. Fyrri refsilagabrot nægja ekki ein og sér til þess að slíkum ráðstöfunum sé beitt.

Framferði hlutaðeigandi einstaklings þarf að teljast raunveruleg, yfirvofandi og nægilega alvarleg ógnun við einhverja af grundvallarhagsmunum samfélagsins. Rök sem varða ekki atriði málsins eða sem byggja á almennum forvarnarforsendum skulu ekki tekin gild.

6 Í 31. gr. tilskipunarinnar segir:

Réttarfarsreglur

1. Viðkomandi einstaklingar skulu eiga kost á að skjóta máli sínu til dómstóla (e. judicial redress procedures) og, þar sem við á, stjórnsýsluyfirvalds (e. administrative redress procedures) í gistiaðildarríkinu til að óska endurskoðunar á hvers konar ákvörðun sem tekin hefur verið í máli þeirra á grundvelli allsherjarreglu, almannaöryggis eða lýðheilsu.

2. Ef beiðni um málsskot til eða endurskoðun dómstóla á ákvörðun um brottvísun fylgir beiðni um að fresta framkvæmd ákvörðunarinnar getur brottvísun frá yfirráðasvæðinu ekki átt sér stað fyrr en ákvörðun hefur verið tekin um frestunarbeiðnina, nema:

ákvörðunin um brottvísun sé byggð á fyrri dómsniðurstöðu eða

viðkomandi einstaklingar hafi áður fengið endurskoðun dómstóls eða

where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

7 Article 37 of the Directive reads as follows:

The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.

8 The preamble to the Decision reads as follows:

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as 'the Agreement', and in particular Article 98 thereof,

Whereas:

(1) Annex V to the Agreement was amended by Decision of the EEA Joint Committee No 43/2005 of 11 March 2005.

(2) Annex VIII to the Agreement was amended by Decision of the EEA Joint Committee No 43/2005 of 11 March 2005.

(3) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the

ákvörðunin um brottvísun sé byggð á brýnum ástæðum um almannaöryggi skv. 3. mgr. 28. gr.

3. Málskotsleiðirnar skulu fela í sér rannsókn á lögmæti ákvörðunarinnar og einnig á þeim staðreyndum og aðstæðum sem fyrirhuguð ráðstöfun er byggð á. Með þeim skal gengið úr skugga um að meðalhófs hafi verið gætt við töku ákvörðunarinnar, einkum í ljósi kröfunnar sem mælt er fyrir um í 28. gr.

4. Aðildarríki geta meinað viðkomandi einstaklingi aðgang að yfirráðasvæði sínu meðan á málsmeðferð vegna málskots stendur en þau mega ekki koma í veg fyrir að einstaklingur geti haldið uppi vörnum í eigin persónu nema slíkt geti valdið verulegum erfiðleikum varðandi allsherjarreglu eða almannaöryggi eða í þeim tilvikum þegar málsskotið eða endurskoðun dómstóls varðar bann við því að koma inn á yfirráðasvæðið.

7 Í 37. gr. tilskipunarinnar segir:

Ákvæði þessarar tilskipunar skulu ekki hafa áhrif á lög eða stjórnsýslufyrirmæli sem aðildarríki setja og eru hagstæðari þeim einstaklingum sem þessi tilskipun tekur til.

8 Í formálaorðum ákvörðunarinnar segir:

SAMEIGINLEGA EES-NEFNDIN HEFUR TEKIÐ NEÐANGREINDA ÁKVÖRÐUN,

með hliðsjón af samningnum um Evrópska efnahagssvæðið, með áorðnum breytingum samkvæmt bókun um breytingu á samningnum um Evrópska efnahagssvæðið, er nefnist hér á eftir „samningurinn“, einkum 98. gr.,

og að teknu tilliti til eftirfarandi:

(1) V. viðauka við samninginn var breytt með ákvörðun sameiginlegu EES-nefndarinnar nr. 43/2005 frá 11. mars 2005.

(2) VIII. viðauka við samninginn var breytt með ákvörðun sameiginlegu EES-nefndarinnar nr. 43/2005 frá 11. mars 2005.

(3) Fella ber inn í samninginn tilskipun Evrópuþingsins og ráðsins 2004/38/EB frá 29. apríl 2004 um rétt borgara Sambandsins og aðstandenda þeirra til frjálsra flutninga og búsetu á yfirráðasvæði

territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, as corrected by OJ L 229, 29.6.2004, p. 35, OJ L 30, 3.2.2005, p. 27 and OJ L 197, 28.7.2005, p. 34, is to be incorporated into the Agreement.

...

(8) The concept of 'Union Citizenship' is not included in the Agreement.

(9) Immigration policy is not part of the Agreement.

...

9 Article 1 of the Decision reads as follows:

Annex VIII to the Agreement shall be amended as follows:

(1) ...

The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:

(a) ...

(b) ...

(c) The words 'Union citizen(s)' shall be replaced by the words 'national(s) of EC Member States and EFTA States'.

...

10 The Joint Declaration by the Contracting Parties to the Decision reads as follows:

The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.

aðildarríkjanna, um breytingu á reglugerð (EBE) nr. 1612/68 og um niðurfellingu tilskipana 64/221/EBE, 68/360/EBE, 72/194/EBE, 73/148/EBE, 75/34/EBE, 75/35/EBE, 90/364/EBE, 90/365/EBE og 93/96/EBE ásamt leiðréttingum á henni sem birtar hafa verið í Stjtíð. ESB L 229, 29.6.2004, bls. 35, Stjtíð. ESB L 30, 3.2.2005, bls. 27, og Stjtíð. ESB L 197, 28.7.2005, bls. 34.

...

(8) Hugtakið „ríkisfang í Sambandinu“ kemur ekki fyrir í samningnum.

(9) Samningurinn hefur ekki að geyma ákvæði um stefnu í málum innflytjenda.

...

9 Í 1. gr. ákvörðunarinnar segir:

VIII. viðauki við samninginn breytist sem hér segir

(1) ...

Ákvæði tilskipunarinnar skulu, að því er samning þennan varðar, aðlöguð sem hér segir:

(a) ...

(b) ...

(c) Í stað hugtaksins „borgarar Sambandsins“ komi hugtakið „borgarar aðildarríkja EB og EFTA-ríkjanna“.

...

10 Í sameiginlegri yfirlýsingu samningsaðila vegna ákvörðunarinnar segir:

„Hugtakið ríkisfang í Sambandinu, sem kom fyrst fyrir í Maastrichtsáttmálanum (nú 17. gr. EB-sáttmálans og áfram), á sér enga hliðstæðu í EES-samningnum. Tilskipun 2004/38/EB er felld inn í EES-samninginn með fyrirvara um mat á því með hvaða hætti löggjöf Evrópusambandsins og dómaframkvæmd Evrópudómstólsins í tengslum við hugtakið ríkisfang í Sambandinu hefur áhrif á Evrópska efnahagssvæðið í framtíðinni. Í EES-samningnum eru engin ákvæði um stjórnmálaleg réttindi ríkisborgara EES-ríkjanna.

The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement.

National law[*]

11 Article 22 of the Foreign Nationals Act No 96/2002 reads as follows:

A commissioner of police shall decide on denial of entry as provided for in Article 18, the first paragraph, subparagraphs (a) – (i). The Directorate of Immigration shall take other decisions in accordance with this Article. Police shall prepare the cases to be decided on by the Directorate of Immigration. If the police consider that the conditions for denial of entry or expulsion are fulfilled, they shall send the case file to the Directorate of Immigration for its decision.

12 Article 41 of the Foreign Nationals Act, which implements Article 27 of the Directive, reads as follows:

An EEA or EFTA foreign national may be refused the right to enter Iceland on arrival in the country or for up to seven days after arrival if:

a. ...

b. ...

c. he conducts himself in a way referred to in the first paragraph of Article 42, or

[*] Translations of national provisions are unofficial and based on those contained in the documents of the case.

Samningsaðilar eru sammála um að EES-samningurinn taki ekki til stefnu í málum innflytjenda. Búseturéttur ríkisborgara landa utan Evrópska efnahagssvæðisins fellur ekki undir samninginn, að frátöldum réttindum sem veitt eru samkvæmt tilskipuninni þeim ríkisborgurum landa utan Evrópska efnahagssvæðisins sem eru aðstandendur ríkisborgara EES-lands sem neytir réttar til frjálsrar farar samkvæmt EES-samningnum, enda leiðir slík réttindi af rétti ríkisborgara EES-landanna til frjálsrar farar. EFTA-ríkin viðurkenna að mikilvægt er fyrir þá ríkisborgara EES-landanna, sem neyta réttar til frjálsrar farar, að aðstandendur þeirra, eins og þeir eru skilgreindir í tilskipuninni, sem eru ríkisborgarar landa utan Evrópska efnahagssvæðisins, njóti einnig tiltekinna afleiddra réttinda á borð við þau sem kveðið er á um í 2. mgr. 12. gr., 2. mgr. 13. gr. og 18. gr. Gerður er fyrirvari um ákvæði 118. gr. EES-samningsins og síðari breytingar á sjálfstæðum réttindum ríkisborgara landa utan EES sem falla ekki undir EES-samninginn.“

Landsréttur

11 Í 22. gr. laga um útlendinga nr. 96/2002 segir:

Lögreglustjóri tekur ákvörðun um frávísun skv. a–i-lið 1. mgr. 18. gr. Útlendingastofnun tekur aðrar ákvarðanir samkvæmt kafla þessum. Lögregla undirbýr mál sem Útlendingastofnun tekur ákvörðun um.

Nú telur lögregla skilyrði vera til að vísa útlendingi frá landi eða úr landi og sendir hún þá Útlendingastofnun gögn málsins til ákvörðunar.

12 Í 41. gr. laga um útlendinga, sem innleiddi 27. gr. tilskipunarinnar, segir:

Heimilt er að vísa EES- eða EFTA-útlendingi frá landi við komu til landsins eða allt að sjö sólarhringum eftir komu ef:

a. ...

b. ...

c. um er að ræða háttsemi sem greinir í 1. mgr. 42. gr., eða

d. this is necessary in view of the security of the state, urgent national interests or public health.

A police commissioner shall take the decision on refusal of entry under items a and b of the first paragraph; the Directorate of Immigration shall take decisions under items c and d. It shall be sufficient that the processing of the case begin[s] before the end of the seven-day period.

If the processing of a case under the first paragraph does not begin within seven days, the EEA or EFTA foreign national may be expelled from Iceland by a decision of the Directorate of Immigration in accordance with items b, c and d within three months of his arrival in Iceland.

13 Article 42 of the Foreign Nationals Act provides as follows:

(1) An EEA or EFTA foreign national, or a member of his family, may be expelled from Iceland if this is necessary in view of public order or public safety.

(2) Expulsion under the first paragraph of this Article may be effected if the foreign national exhibits conduct, or may be considered likely to engage in conduct, that involves a substantial and sufficiently serious threat to the fundamental attitudes of society. If the foreign national has been sentenced to punishment or special measures have been decided, then an expulsion on these grounds may only be effected if the conduct involved may indicate that the foreign national will again commit a criminal action.

14 The Directive was further implemented by Article 87 of Icelandic Regulation No 53/2003, which reads as follows:

An EEA or EFTA foreigner may be denied entry or expelled if necessary with a view to public order and public safety, cf. Article 42, the first paragraph (c), and Article 43, the first paragraph, of the Foreign Nationals Act.

Denial of entry or expulsion as provided for in the first paragraph is, for example, allowed if a foreigner:

a. is dependent upon drugs of abuse or other illicit substances, and has become thus dependent before his first permit to stay was issued, or

d. það er nauðsynlegt vegna öryggis ríkisins, krefjandi þjóðarhagsmuna eða almannaheilbrigðis.

Lögreglustjóri tekur ákvörðun um frávísun skv. a- og b-lið 1. mgr., en Útlendingastofnun skv. c- og d-lið. Nægilegt er að meðferð máls hefjist innan sjö sólarhringa frestsins.

Ef meðferð máls skv. 1. mgr. hefur ekki hafist innan sjö sólarhringa má vísa EES- eða EFTA-útlendingi frá landi með ákvörðun Útlendingastofnunar samkvæmt ákvæðum b-, c- og d-liðar innan þriggja mánaða frá komu til landsins.

13 Í 42. gr. laga um útlendinga segir:

(1) Heimilt er að vísa EES- eða EFTA-útlendingi, eða aðstandanda hans, úr landi ef það er nauðsynlegt með skírskotun til allsherjarreglu eða almannaöryggis.

(2) Brottvísun skv. 1. mgr. má framkvæma ef útlendingurinn sýnir af sér eða ætla má að um sé að ræða persónubundna háttsemi sem felur í sér raunverulega og nægilega alvarlega ógn gagnvart grundvallarþjóðfélagssjónarmiðum. Ef útlendingurinn hefur verið dæmdur til refsingar eða sérstakar ráðstafanir ákvarðaðar má brottvísun af þessari ástæðu því aðeins fara fram að um sé að ræða háttsemi sem getur gefið til kynna að útlendingurinn muni fremja refsivert brot á ný.

14 Efni tilskipunarinnar var nánar útfært með 87. gr. reglugerðar nr. 53/2003 um útlendinga. Þar segir:

Heimilt er að vísa EES- eða EFTA-útlendingi frá landi eða úr landi ef það er nauðsynlegt með skírskotun til allsherjarreglu og almannaöryggis, sbr. c-lið 1. mgr. 42. gr. [nú c-lið 1. mgr. 41. gr.] og 1. mgr. 43. gr. [nú 1. mgr. 42. gr.] útlendingalaga.

Frávísun eða brottvísun skv. 1. mgr. er m.a. heimil ef útlendingurinn:

a. er háður fíkniefnum eða öðrum eiturlyfjum og hefur orðið það áður en honum er veitt fyrsta dvalarleyfi, eða

b. suffers from a serious psychiatric disturbance, or a psychiatric disturbance characterised by agitation, delirium, hallucinations or thought disorders, provided this condition developed before his first permit to stay was issued.

A decision on denial of entry or expulsion by reference to public order or public safety shall be exclusively based on the personal conduct of the foreigner in question, and may only be carried out if measures are allowed with respect to Icelandic nationals in comparable situations.

15 Article 175a of the General Penal Code No 19/1940, as inserted by Article 5 of Act No 149/2009, provides as follows:

Any person who connives with another person on the commission of an act which is punishable by at least 4 years' imprisonment, the commission of which is part of the activities of a criminal organisation, shall be imprisoned for up to 4 years unless a heavier punishment for his offence is prescribed in other provisions of this Act or in other statutes.

'Criminal organisation' here refers to an association of three or more persons, the principle objective of which is, for motives of gain, directly or indirectly, deliberately to commit a criminal act that is punishable by at least 4 years' imprisonment, or a substantial part of the activities of which involves the commission of such an act.

16 Article 10 of the Administrative Procedure Act No 37/1993 reads as follows:

An authority shall ensure that a case is sufficiently investigated before a decision hereon is reached.

17 Article 12 of the Administrative Procedure Act provides as follows:

A public authority shall reach an adverse decision only when the lawful purpose sought cannot be attained by any less stringent means. Care should then be taken not to go further than necessary.

18 According to Article 3 of Act No 2/1993, "[s]tatutes and regulations shall be interpreted, in so far as appropriate, to accord with the EEA Agreement and the rules based thereon".

b. er haldinn alvarlegum geðrænum truflunum eða geðrænum truflunum sem einkennast af uppnámi, óráði, ofskynjunum eða hugsanabrenglun, enda hafi slíkt ástand hans hafist áður en honum er veitt fyrsta dvalarleyfi.

Ákvörðun um frávísun eða brottvísun með skírskotun til allsherjarreglu eða almannaöryggis skal eingöngu byggð á framferði hlutaðeigandi útlendings og má því aðeins framkvæma að heimilt sé að grípa til úrræða gagnvart íslenskum ríkisborgara við sambærilegar aðstæður.

15 Í 175. gr. a. almennra hegningarlaga nr. 19/1940, eins og henni var breytt með 5. gr. laga nr. 149/2009, segir:

Sá er sammælist við annan mann um að fremja verknað sem varðar að minnsta kosti 4 ára fangelsi og framkvæmd hans er liður í starfsemi skipulagðra brotasamtaka skal sæta fangelsi allt að 4 árum, nema brot hans varði þyngri refsingu samkvæmt öðrum ákvæðum laga þessara eða öðrum lögum.

Með skipulögðum brotasamtökum er átt við félagsskap þriggja eða fleiri manna sem hefur það að meginmarkmiði, beint eða óbeint í ávinningsskyni, að fremja með skipulegum hætti refsiverðan verknað sem varðar að minnsta kosti 4 ára fangelsi, eða þegar verulegur þáttur í starfseminni felst í því að fremja slíkan verknað.

16 Í 10 gr. stjórnsýslulaga nr. 37/1993 segir:

Stjórnvald skal sjá til þess að mál sé nægjanlega upplýst áður en ákvörðun er tekin í því.

17 Í 12. gr. stjórnsýslulaga segir:

Stjórnvald skal því aðeins taka íþyngjandi ákvörðun þegar lögmætu markmiði, sem að er stefnt, verður ekki náð með öðru og vægara móti. Skal þess þá gætt að ekki sé farið strangar í sakirnar en nauðsyn ber til.

18 Samkvæmt 3. gr. stjórnsýslulaga nr. 2/1993 skal skýra ,,lög og reglur, að svo miklu leyti sem við á, til samræmis við EES-samninginn og þær reglur sem á honum byggja."

II FACTS AND PROCEDURE

19 By a letter of 5 December 2012, registered at the Court on 17 December 2012, the Supreme Court of Iceland made a request under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") in a case pending before it between Jan Anfinn Wahl and the Icelandic State.

20 On 5 February 2010, the Plaintiff, a Norwegian national, having arrived in Iceland by air, was stopped by a customs officer and his luggage was searched. Items marked with the name of the motorcycle club Hells Angels were found.

21 The Plaintiff was held at the airport while he was asked to provide statements about his background and the purpose of his visit to Iceland. He stated that he was a member of the Hells Angels motorcycle club in Drammen, Norway, and that he held a clean criminal record. The Plaintiff indicated that the purpose of his visit was to go sightseeing and engage in social contact with befriended members of an Icelandic motorcycle club – Fáfnir (subsequently renamed MC Iceland). He also said that he had a return flight to Oslo booked for 8 February 2010. He was subsequently denied entry to Iceland by a decision of the Directorate of Immigration which was served to him on the same day. The police informed him that he could exercise his right to be heard. It appears that a paper was enclosed, initialled by the Plaintiff and two policemen, in which it was stated that nationals of EEA States could be denied entry into Iceland on grounds of public policy and public security.

22 The Plaintiff filed an administrative appeal against the decision of the Directorate of Immigration with the Ministry of the Interior. He stated, *inter alia*, that he was a 36-year old university student from Norway and a member of a motorcycle club with lawful objectives. The motorcycle club he belonged to had never broken the law, neither in Iceland nor in his home country, and pursued lawful purposes.

II MÁLAVEXTIR OG MEÐFERÐ MÁLSINS

19 Með bréfi dagsettu 5. desember 2012, sem skráð var í málaskrá dómstólsins 17. desember sama ár, óskaði Hæstiréttur Íslands eftir ráðgefandi áliti samkvæmt 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls í máli sem rekið er fyrir dómstólnum, milli Jan Anfinn Wahl og íslenska ríkisins.

20 Hinn 5. febrúar 2010 kom stefnandi með flugi til Íslands. Hann var stöðvaður af tollvörðum og leitað í farangri hans. Þar fundust hlutir sem merktir voru vélhjólasamtökum Vítisengla.

21 Stefnanda var haldið á flugvellinum á meðan hann var beðinn um að gera grein fyrir fortíð sinni og ástæðu heimsóknar hans til Íslands. Hann kvaðst vera meðlimur í vélhjólasamtökum Vítisengla í Drammen í Noregi og upplýsti að hann hefði engan sakaferil. Stefnandi sagðist hafa í hyggju að skoða land og þjóð og heilsa upp á vini sína í íslenska vélhjólaklúbbnum Fáfni (sem síðar varð MC Iceland). Hann sagðist einnig eiga bókað flug til Oslóar 8. febrúar 2010. Í kjölfarið var honum vísað frá landi samkvæmt ákvörðun Útlendingastofnunar, sem honum var birt samdægurs. Lögreglan gerði honum grein fyrir því að hann gæti neytt andmælaréttar. Á blaði, sem virðist hafa fylgt ákvörðuninni og áritað er með fangamarki stefnanda og tveggja lögreglumanna, kemur fram að borgara í EES-ríkis megi neita um inngöngu í Ísland ef það er nauðsynlegt með tilliti til allsherjarreglu eða almannaöryggis.

22 Stefnandi kærði ákvörðun Útlendingastofnunar til innanríkis-ráðuneytis. Í kærunni segir meðal annars að hann sé 36 ára háskólanemi frá Noregi og skráður félagi í vélhjólafélag með lögmætan tilgang. Vélhjólafélögin sem hann tilheyri hafi aldrei gerst brotleg við lög, hvorki á Íslandi né í heimalandi hans og starfi í samræmi við lög.

23 The Plaintiff and the Directorate of Immigration submitted observations to the Ministry of the Interior. The Directorate of Immigration revealed that it had received a request from the Commissioner of Suðurnes Police on the day of the Plaintiff's arrival requesting a decision on a denial of entry to the country pursuant to item (c) of the first paragraph of Article 41 of the Foreign Nationals Act No 96/2002. The request was accompanied by copies of two police reports, a photocopy of the Plaintiff's passport, photographs of the Plaintiff's luggage and an "Open danger assessment by the Intelligence Department of the Office of the National Commissioner of Police regarding the arrival of a member of Hells Angels in Iceland, dated 5 February 2010" ("the danger assessment").

24 This assessment stated, *inter alia*, that it had been produced in connection with the arrival of a Norwegian member of the motorcycle club Hells Angels in Iceland. In all likelihood, it was stated that the arrival of the Plaintiff was connected to the planned entry of the said Icelandic motorcycle club into the Hells Angels. The admission process had been directed from Norway and was in its final stage. Following completion of that entry, the Icelandic group would acquire the status of a full and independent charter within Hells Angels. The assessment further stated that everywhere that this association had established itself, an increase in organised crime had followed.

25 MC Iceland acquired full membership of the Hells Angels MC on 4 March 2011. The proposal by the Norwegian charter of Hells Angels was accepted in February 2011 at the "European Officers Meeting" in Manchester, England.

26 On 16 June 2010, the Ministry of the Interior gave reasons for the decision at issue and rejected the appeal. It stated that the decision had been taken on grounds of item (c) of the first paragraph of Article 41 of the Foreign Nationals Act No 96/2002, as amended by Act No 86/2008. The Ministry considered that this provision in conjunction with the first paragraph of Article 42, laying down the circumstances in which it is permissible to refuse EEA or EFTA foreign nationals entry into Iceland, was the

23 Stefnandi og Útlendingastofnun skiluðu greinargerðum til innanríkisráðuneytisins. Í greinargerð Útlendingastofnunar er upplýst að stofnunin hafi samdægurs og stefnandi kom til landsins fengið beiðni frá lögreglustjóranum á Suðurnesjum um að stofnunin tæki ákvörðun um hvort beita ætti c-lið 1. mgr. 41. gr. laga nr. 96/2002 í því skyni að vísa stefnanda frá landinu. Með þeirri beiðni fylgdu tvö afrit af lögregluskýrslum, ljósrit af vegabréfi stefnanda, ljósmyndir af farangri hans og ,,opið hættumat greiningardeildar ríkislögreglustjórans vegna komu félaga Vítisengla til Íslands dags. 5. febrúar 2010“ („hættumatið“).

24 Í hættumatinu kom meðal annars fram að það hafi verið framkvæmt í tengslum við komu norskra meðlima vélhjólafélagsins Vítisengla til Íslands. Talið var að koma stefnanda tengdist að öllum líkindum fyrirhugaðri inngöngu fyrrgreinds íslensks vélhjólafélags í samtök Vítisengla, að inngönguferlinu hafi verið stýrt frá Noregi og að því væri nánast lokið. Við inngönguna myndi íslenski hópurinn fá stöðu fullgildrar og sjálfstæðrar deildar innan Vítisengla. Þá segir í hættumatinu að alls staðar þar sem samtökin hafi náð að skjóta rótum hafi aukin skipulögð glæpastarfsemi fylgt í kjölfarið.

25 MC Iceland fékk fulla aðild að samtökum Vítisengla 4. mars 2011. Tillaga Noregsdeildar samtakanna var samþykkt í febrúar 2011, á fundi evrópskra foringja Vítisengla í Manchester á Englandi.

26 Hinn 16. júní 2010 kvað innanríkisráðuneytið upp úrskurð í málinu og hafnaði kærunni. Í rökstuðningi segir að hin kærða ákvörðun hafi verið byggð á c-lið 1. mgr. 41. gr. laga nr. 96/2002 eins og ákvæðinu hafi verið breytt með lögum nr. 86/2008. Ráðuneytið taldi að það ákvæði, ásamt 1. mgr. 42. gr. sömu laga, þar sem kveðið er á um í hvaða tilvikum heimilt sé að vísa frá landinu útlendingum sem séu ríkisborgarar aðildarríkja EES eða EFTA, hafi verið réttur

correct legal basis for the decision. That legislation was based on Iceland's obligations under the EEA Agreement and Directive 2004/38.

27 The Ministry of the Interior stated that under the EEA Agreement and Directive 2004/38 it is permissible to refuse an EEA national entry into Iceland if he is a member of a society or association that threatens public policy or public security and that it is not necessary for the society or organisation to be prohibited. It explained that its assessment had taken due account of the case law of the Court of Justice of the European Union ("ECJ") and was supported further by a communication from the European Commission to the European Parliament and Council of Ministers of the European Union of 2 July 2009.

28 The Ministry also argued that, when interpreting and applying rules on public order, the authorities have discretion to define their own needs in further detail and to define when circumstances require a restriction on freedom of movement in order to protect such interests. It stressed all the same that this assessment had to be based on relevant considerations and take account of Iceland's obligations under the EEA Agreement.

29 The Ministry indicated that "organised criminal associations of motorcyclists" such as Hells Angels were viewed as a growing threat to the community and that the national police commissioners of the Nordic countries had formulated a policy to fight such activities. Since 2002, the National Commissioner of the Icelandic Police had instructed local police commissioners to implement this policy as a result of which foreign members of Hells Angels had been repeatedly denied entry on arrival to Iceland by reference to public policy and public security.

30 The Ministry concurred with the view that, in light of the activities and the nature of Hells Angels, individuals belonging to that association constituted a real threat to public order and public security in Iceland. The arrival of members of the association in Iceland was intended to open the way for full membership of MC Iceland. In the view of the Ministry, such membership would

lagalegur grundvöllur ákvörðunarinnar. Grundvöllur laganna væru skuldbindingar Íslands samkvæmt EES-samningnum og tilskipun 2004/38.

27 Innanríkisráðuneytið kvað heimilt samkvæmt EES-samningnum og tilskipun 2004/38, að vísa ríkisborgara EES-ríkis frá landi ef viðkomandi væri meðlimur í félagi eða samtökum sem ógna allsherjarreglu eða almannaöryggi og ekki væri nauðsynlegt að félagið eða samtökin væru bönnuð. Ráðuneytið útskýrði að í mati þess væri tekið tillit til dómaframkvæmdar Evrópudómstólsins og stuðst við orðsendingu framkvæmdastjórnar Evrópusambandsins til Evrópuþingsins og ráðherraráðs Evrópusambandsins frá 2. júlí 2009.

28 Ráðuneytið hélt því einnig fram að við túlkun og beitingu ákvæða um allsherjarreglu hefðu stjórnvöld svigrúm til að skilgreina nánar eigin þarfir og hvenær aðstæður væru slíkar að nauðsynlegt væri að takmarka frjálsa för til verndar slíkum hagsmunum. Matið yrði þó ávallt að byggja á málefnalegum grundvelli auk þess að taka mið af skuldbindingum Íslands samkvæmt EES-samningnum.

29 Ráðuneytið benti á að litið væri á „skipulögð glæpasamtök vélhjólamanna“ líkt og Vítisengla sem vaxandi ógn við samfélagið og að ríkislögreglustjórar Norðurlandanna hefðu mótað þá skýru stefnu að berjast gegn slíkri starfsemi. Frá árinu 2002 hafi ríkislögreglustjóri lagt fyrir lögreglustjóra að framfylgja þeirri stefnu. Í samræmi við það hafi félögum í Vítisenglum ítrekað verið synjað um landgöngu við komu sína til Íslands með vísan til allsherjarreglu og almannaöryggis.

30 Ráðuneytið tók undir þá afstöðu að í ljósi eðlis og starfsemi Vítisengla væru einstaklingar sem tilheyra samtökunum raunverulega ógn við allsherjarreglu og almannaöryggi á Íslandi. Koma meðlima samtakanna til landsins væri til þess fallin að greiða fyrir fullri aðild MC Iceland að samtökunum. Að mati

strengthen the influence of the association in Iceland and the spread of organised crime.

31 The Ministry considered that it had been sufficiently demonstrated that the Plaintiff's visit was connected to the membership of MC Iceland in the association of Hells Angels. His membership demonstrated that he had aligned himself with the association's aims, intentions and those activities of the association which were regarded as threatening to public order and public security. Thus, according to the Ministry, it was as a result of the Plaintiff's own personal conduct that he had been expelled from Iceland on 5 February 2010. His arrival in Iceland constituted a serious and real threat to the community's fundamental interest in ensuring public policy and public security.

32 The Plaintiff's action before the district court, claiming compensation for non-pecuniary damage and compensation for financial loss, was rejected, with the denial of entry considered to comply with the requirements of administrative law.

33 The Plaintiff then lodged an appeal with the Supreme Court now seeking compensation simply for alleged false imprisonment and the resulting damage to his reputation. His claim was based on the view that the Directorate of Immigration's decision was unlawful. The Plaintiff contends that the danger assessment contained unsubstantiated allegations and pertained to the organisation as a whole, whereas his personal conduct was lawful and extended only to membership of the organisation and owning its uniform. Furthermore, he alleged that the basis for the assertions of the Directorate was never investigated by the Ministry.

34 The Defendant stated that the visits by foreign members were intended to further the full membership of the local motorcycle club in the association, which would strengthen its influence and contribute to organised crime. In its view, it had been sufficiently demonstrated that the visit of the Plaintiff was connected to the intended membership of the club in this association. Furthermore, as a result of his membership, the Plaintiff

ráðuneytisins myndi slík aðild styrkja ítök samtakanna hér á landi og útbreiðslu skipulagðrar brotastarfsemi.

31 Ráðuneytið taldi að nægilega hafi verið sýnt fram á að heimsókn stefnanda tengdist fullri aðild MC Iceland að samtökum Vítisengla. Aðild stefnanda að samtökunum sýndi að hann hafi samsamað sig markmiðum þeirra, fyrirætlan og þeirri starfsemi samtakanna sem talin væri ógna allsherjarreglu og almannaöryggi. Það var því, að mati ráðuneytisins, persónubundin háttsemi hans sjálfs sem hafi verið ástæða þess að honum hafi verið vísað frá landinu 5. febrúar 2010. Koma hans hingað til lands hafi falið í sér alvarlega og raunverulega ógn við þá grundvallarhagsmuni samfélagsins að vernda allsherjarreglu og almannaöryggi.

32 Kröfu stefnanda fyrir héraðsdómi um miskabætur og skaðabætur vegna fjártjóns var hafnað og héraðsdómur taldi enga stjórnsýslulega annmarka hafa verið á ákvörðun Útlendingastofnunar og úrskurði innanríkisráðuneytisins um að vísa honum frá landi.

33 Stefnandi áfrýjaði dóminum til Hæstaréttar og gerir einungis kröfu um miskabætur vegna frelsissviptingar að ósekju og álitshnekkis sem hann varð fyrir vegna hennar. Byggir hann kröfu sína á því að ákvörðun Útlendingastofnunar hafi verið ólögmæt. Stefnandi telur hættumat ríkislögreglustjóra hafa að geyma órökstuddar fullyrðingar um alla meðlimi vélhjólasamtakanna en sjálfur hafi hann ekkert til saka unnið, annað en að vera félagi í samtökunum og að eiga einkennisklæðnað þeirra. Hann heldur því jafnframt fram að innanríkisráðuneytið hafi ekki kannað grundvöll staðhæfinga sem komi fram í mati ríkislögreglustjóra.

34 Stefndi heldur því fram að koma erlendra meðlima samtakanna hafi verið til þess fallin að greiða fyrir fullri aðild innlends vélhjólafélags að samtökunum. Slík aðild myndi styrkja ítök samtakanna og útbreiðslu skipulagðrar brotastarfsemi. Að mati stefnda verður að telja að nægilega hafi verið sýnt fram á að heimsókn stefnanda tengdist fullri aðild félagsins að samtökunum. Enn fremur, að aðild hans að samtökunum sýni

had demonstrated his alignment with the association's aims, intentions and activities. The latter were considered to constitute a threat to public policy and public security. It was this personal conduct which led to the denial of entry, the conditions of the relevant national provision having been met. In addition to the assessment, a police report was part of the basis for the decision. However, further details could not be divulged.

35 Membership of a motorcycle club such as Hells Angels is not unlawful as such, and the activities of such associations have not been prohibited in Iceland. At the same time, Article 175a of the General Penal Code makes it a punishable offence to connive with another person in the commission of certain acts which form part of the activities of a criminal association.

36 As the Supreme Court considered the Icelandic provisions on refusal of entry inconsistent in that, on the one hand, they permit authorities to deny entry if this proves necessary in view of public policy or public security concerns, but, at the same time, prescribe that EEA and EFTA nationals can only be denied entry if it is possible to take measures against an Icelandic citizen under comparable circumstances, it decided to stay the proceedings to request an Advisory Opinion from the Court on the interpretation of certain rules of EEA law on which the relevant national provisions are based.

37 At an oral hearing on 5 November 2012, the Supreme Court requested legal counsel of each party to indicate their views on whether there was reason to seek an Advisory Opinion from the Court. Neither party objected to the application.

38 On 17 December 2012, the Supreme Court of Iceland decided to make a request under Article 34 SCA and posed the following questions:

1. Do Member States which are parties to the Agreement on the European Economic Area have, with regard to Article 7 of the Agreement, the choice of form and method of implementation when making the provisions of Directive 2004/38/EC of the European

að hann hafi samsamað sig markmiðum þeirra, fyrirætlan og starfsemi, sem talin væru ógna allsherjarreglu og almannaöryggi. Þessi persónubundna háttsemi hans sjálfs hafi því verið ástæða þess að honum hafi verið vísað frá landinu, þar sem hann uppfyllti skilyrði viðeigandi ákvæða landslaga. Auk þess mats lá skýrsla lögreglu til grundvallar ákvörðuninni. Ekki væri þó hægt að greina nánar frá innihaldi hennar.

35 Þátttaka í vélhjólasamtökum á borð við Vítisengla er ekki ólögmæt sem slík og starfsemi slíkra samtaka hefur ekki verið bönnuð á Íslandi. Á hinn bóginn liggur refsing við því að sammælast við annan mann um að fremja verknað sem er liður í starfsemi skipulagðra brotasamtaka, samkvæmt 175. gr. a almennra hegningarlaga.

36 Hæstiréttur telur ósamræmi vera á milli íslenskra lagaákvæða um skilyrði þess að mönnum verði vísað frá landi, að því leyti að annars vegar heimili þau yfirvöldum að meina þeim landgöngu á grundvelli allsherjarreglu og almannaöryggis og hins vegar kveði þau á um að aðeins megi vísa EES- og EFTA-ríkisborgurum frá landi ef heimilt sé að grípa til þess gagnvart íslenskum ríkisborgara við sambærilegar aðstæður. Hæstiréttur ákvað því að leita ráðgefandi álits EFTA-dómstólsins um skýringu á tilteknum reglum EES-réttar sem ákvæði landsréttar taka mið af.

37 Við flutning málsins fyrir Hæstarétti 5. nóvember 2012 beindi rétturinn því til lögmanna aðila að þeir tjáðu sig um, hvort tilefni væri til þess að leita ráðgefandi álits EFTA-dómstólsins. Hvorugur aðilinn mælti því í mót að það yrði gert.

38 Hinn 17. desember 2012 ákvað Hæstiréttur Íslands að leita ráðgefandi álits dómstólsins og beindi eftirfarandi spurningum til hans:

1. Hafa ríki sem aðild eiga að samningnum um Evrópska efnahagssvæðið í ljósi 7. gr. samningsins val um form og aðferð við

Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States part of their internal legal order?

2. Should paragraph 1 of Article 27 of Directive 2004/38/EC be interpreted as meaning that the mere fact, by itself, that the competent authorities in an EEA Member State consider, on the basis of a danger assessment, that an organisation to which the individual in question belongs is connected with organised crime and the assessment is based on the view that, where such organisations have managed to establish themselves, increased and organised crime has followed is sufficient to consider a citizen of the Union to constitute a threat to public policy and public security in the state in question?

3. For answering the second question, is it of significance whether the Member State has outlawed the organisation of which the individual in question is a member and membership of such organisation is prohibited in the state?

4. Is it sufficient grounds for considering public policy and public security to be threatened in the sense of paragraph 1 of Article 27 of Directive 2004/38/EC that a EEA Member State, party to the Agreement on the European Economic Area, has in its legislation defined as punishable, conduct that consists of conniving with another person on the commission of an act, the commission of which is part of the activities of a criminal organisation, or is such legislation considered as general prevention in the sense of paragraph 2 of Article 27 of the Directive? This question is based on the fact that 'organised crime' in the sense of domestic law refers to an association of three or more persons, the principle objective of which is, for motives of gain, directly or indirectly, deliberately to commit a criminal act, or when a substantial part of the activities involves the commission of such an act.

5. Should paragraph 2 of Article 27 of Directive 2004/38/EC be understood meaning that a premise for the application of measures under paragraph 1 of Article 27 of the Directive against a specific individual is that the Member State must adduce a probability that the individual in question intends to indulge in activities comprising a certain action or actions, or refraining from a certain action or actions,

að taka upp í landsrétt ákvæði tilskipunar Evrópuþingsins og Ráðsins 2004/38/EB um rétt borgara Sambandsins og aðstandenda þeirra til frjálsrar farar og dvalar á yfirráðasvæði aðildarríkjanna?

2. Ber að skýra ákvæði 1. mgr. 27. gr. tilskipunar 2004/38/EB svo að sú staðreynd, ein og sér, nægi til að telja borgara Sambandsins ógna allsherjarreglu og almannaöryggi í ríki sem aðild á að samningnum um Evrópska efnahagssvæðið, ef þar til bær yfirvöld í viðkomandi ríki telja, á grundvelli hættumats, að samtök, sem viðkomandi einstaklingur á aðild að, tengist skipulagðri brotastarfsemi og matið er byggt á því að þar sem slík samtök hafi náð að skjóta rótum hafi aukin og skipulögð brotastarfsemi fylgt í kjölfarið?

3. Skiptir máli þegar annarri spurningunni er svarað hvort aðildarríkið hefur lýst samtök þau sem viðkomandi einstaklingur á aðild að ólögleg og bann hvílir í ríkinu við aðild að slíkum samtökum?

4. Nægir það til að telja allsherjarreglu og almannaöryggi ógnað í skilningi 1. mgr. 27. gr. tilskipunar 2004/38/EB, að ríki sem aðild á að samningnum um Evrópska efnahagssvæðið hefur í löggjöf lýst refsiverða háttsemi sem felst í því að sammælast við annan mann um að fremja verknað og framkvæmd verknaðarins er liður í starfsemi skipulagðra brotasamtaka, eða teldist slík lagasetning almenn forvarnarforsenda í skilningi 2. mgr. 27. gr. tilskipunarinnar? Er í spurningunni lagt til grundvallar að með skipulagðri brotastarfsemi í skilningi landsréttar sé átt við félagsskap þriggja eða fleiri manna sem hefur það að meginmarkmiði, beint eða óbeint í ávinningsskyni, að fremja með skipulögðum hætti refsiverðan verknað, eða þegar verulegur þáttur í starfseminni felst í því að fremja slíkan verknað.

5. Ber að skilja 2. mgr. 27. gr. tilskipunar 2004/38/EB svo, að það sé forsenda fyrir beitingu úrræða samkvæmt 1. mgr. 27. gr. tilskipunarinnar gagnvart tilteknum einstaklingi, að aðildarríkið þurfi að leiða að því líkur að ásetningur viðkomandi einstaklings standi til þess að viðhafa háttsemi sem felst í tiltekinni eða tilteknum

in order for the individual's conduct to be considered as representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society?

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

III ANSWERS OF THE COURT

The first question

40 By its first question, the referring court seeks to establish whether EEA/EFTA States have, with regard to Article 7 EEA, the choice of form and method of implementation when making the act corresponding to Directive 2004/38/EC part of their internal legal order.

Observations submitted to the Court

41 In the Plaintiff's view, it follows from Article 7 EEA that EEA/EFTA States have the choice of form and method of implementation when transposing a directive. However, the discretion afforded to the EEA States is limited by Article 27 of the Directive. It follows from this provision that legislation based on the discretion of the EEA State must favour the Plaintiff.

42 The Defendant submits that Article 7 EEA leaves the choice of form and method of implementation to the Contracting Parties – whether through primary law or administrative measures – without prejudice to the duty of national courts to interpret national law in conformity with EEA law and in light of the purpose of the EEA rules in accordance with Article 3 EEA.

43 The Norwegian Government contends that it results from Article 7 EEA that the Contracting Parties have the choice of form and method of implementation. It follows from case law that it is not always necessary to formally enact the requirements of a

aðgerðum eða aðgerðarleysi svo framferði einstaklingsins teljist, raunveruleg, yfirvofandi og nægilega alvarleg ógnun við einhverja af grundvallarreglum samfélagsins?

39 Vísað er til skýrslu framsögumanns um frekari lýsingu löggjafar, málsatvika, meðferðar málsins og skriflegra greinargerða sem dómstólnum bárust, sem verða ekki nefnd eða rakin nema að því leyti sem forsendur dómsins krefjast.

III SPURNINGARNAR SEM BEINT VAR TIL DÓMSTÓLSINS

Fyrsta spurningin

40 Með fyrstu spurningunni spyr Hæstiréttur hvort ríki, sem aðild eiga að EES-samningnum, hafi í ljósi 7. gr. samningsins val um form og aðferð við að taka upp í landsrétt ákvæði tilskipunar 2004/38/EB.

Athugasemdir sem lagðar voru fyrir dómstólinn

41 Stefnandi heldur því fram að það leiði af 7. gr. EES-samningsins að aðildarríki hafi val um form og aðferð við að taka upp í landsrétt ákvæði tilskipunarinnar. Á hinn bóginn séu þessari heimild settar skorður í 37. gr. tilskipunarinnar. Það leiði af ákvæðinu að löggjöf, sem byggist á sjálfræði aðildarríkisins, verði að vera stefnanda í hag.

42 Stefndi vísar til þess að 7. gr. EES-samningsins veiti aðildarríkjum val um form og aðferð við innleiðingu – hvort heldur sem er með setningu laga eða stjórnvaldsfyrirmæla – án þess að takmarka skyldu dómstóla til að túlka landsrétt til samræmis við reglur EES-réttar og í ljósi markmiðs þeirra reglna samkvæmt 3. gr. EES-samningsins.

43 Ríkisstjórn Noregs telur að samkvæmt 7. gr. EES-samningsins eigi aðildarríki val um form og aðferð við innleiðingu. Af dómaframkvæmd verði ráðið að ekki sé ávallt nauðsynlegt að

directive in a specific and express legal provision in light of the general legal context and the interpretation given to national provisions by the national court.

44 ESA submits that, pursuant to Article 7 EEA, the authorities of the Contracting Parties have the choice of form and method of implementation when making the provisions of Directive 2004/38/EC part of their internal legal order. In doing so, they must take account of the principle of effectiveness and must ensure that the objectives pursued by the Directive are fulfilled.

45 The Commission contends that it is apparent from Article 7 EEA that EEA/EFTA States have the choice of form and method of implementation when transposing a directive, subject to their obligation to ensure that national law faithfully enacts the terms of the directive and that provision is made in national law to ensure that, in the event of conflict between implemented EEA rules and other statutory provisions, the EEA rules prevail.

Findings of the Court

46 At the outset, it is recalled that there are three main points at which a directive gains effect under the EEA Agreement (see Case E-11/12 *Koch and Others*, judgment of 13 June 2013, not yet reported, paragraph 118). The first arises where a decision of the EEA Joint Committee has entered into force and becomes binding pursuant to Article 104 EEA and the directive must be implemented (see Case E-2/12 *HOB-vín III* [2012] EFTA Ct. Rep. 1092, paragraph 128). This must have taken place at the latest on the implementation date in the EU or when the Joint Committee Decision enters into force, whichever is later. Any later date constitutes an infringement of the EEA Agreement (see Case E-6/06 *ESA* v *Liechtenstein* [2007] EFTA Ct. Rep. 238, paragraph 19).

47 The second is where a directive is implemented pursuant to Article 7 EEA, in which case it shall prevail over national provisions regardless of the form and method of implementation (see *Koch and Others*, cited above, paragraph 119, and case law cited).

innleiða með formlegum hætti skilyrði tilskipunar í sérstakri lagagrein í ljósi almenns lagalegs samhengis og þess hvernig landsdómstólar hafa túlkað einstök ákvæði landsréttar.

44 ESA byggir á því að samkvæmt 7. gr. EES-samningsins hafi aðildarríki val um form og aðferð við að innleiða tilskipun 2004/38/EB í landsrétt. Við innleiðinguna verði þau að taka tillit til meginreglunnar um skilvirkni og verði að tryggja að markmið tilskipunarinnar séu uppfyllt.

45 Framkvæmdastjórnin telur að af 7. gr. EES-samningsins verði ljóslega ráðið að aðildarríki eigi val um form og aðferð við innleiðingu tilskipunar, að því gefnu að tryggt sé að tilskipunin hafi verið innleidd á réttan hátt í landsrétt og að tryggt sé að EES-réttur gangi framar landsrétti, stangist reglur EES-réttar og landsréttar á.

Álit dómstólsins

46 Í upphafi er rétt að minna á að samkvæmt EES-samningnum hafa þrjú meginatriði þýðingu í þágu þess að tilskipun öðlist gildi (sjá, mál E-11/12 *Koch o.fl.*, dómur 13. júní 2013, óbirtur dómur, 118. mgr.). Í fyrsta lagi er það svo að þegar ákvörðun sameiginlegu EES-nefndarinnar hefur tekið gildi og verður bindandi samkvæmt 104. gr. EES-samningsins, þá verður að innleiða tilskipunina (sjá, mál E-2/12 *HOB-vín III* [2012] EFTA Ct. Rep. 1092, 128. mgr.). Þetta verður að hafa átt sér stað eigi síðar en á innleiðingardegi tilskipunarinnar í Sambandinu eða þegar ákvörðun sameiginlegu EES-nefndarinnar tekur gildi, hvort heldur sem á sér stað síðar. Ef tilskipunin hefur ekki verið innleidd að liðnu þessu tímamarki er um brot á EES-samningnum að ræða (sjá, mál E-6/06 *ESA* gegn *Liechtenstein* [2007] EFTA Ct. Rep. 238, 19. mgr.).

47 Í öðru lagi þarf að huga að innleiðingu tilskipunar á grundvelli 7. gr. EES-samningsins, en í slíkum tilvikum skal tilskipunin ganga framar landslögum, óháð formi og aðferð við innleiðinguna (sbr. áður tilvitnað mál *Koch o.fl.*, 119. mgr., og tilvitnaða dómaframkvæmd).

48 The third is where a decision of the EEA Joint Committee becomes provisionally applicable pursuant to Article 103 EEA, unless a Contracting Party notifies that such a provisional application cannot take place (see Case E-17/11 *Aresbank* [2012] EFTA Ct. Rep. 916, paragraphs 76 and 77, and *Koch and Others*, cited above, paragraph 120).

49 As regards the second point, the implementation of a directive, it follows from Article 7 EEA that an act corresponding to an EU directive referred to in the Annexes to the EEA Agreement or in decisions of the EEA Joint Committee shall be binding, as to the result to be achieved, upon the Contracting Parties and be made part of their internal legal order leaving the authorities of the Contracting Parties the choice of form and method of implementation. The Court notes that the implementation of a directive does not necessarily require legislative action in each EEA State, as the existence of statutory provisions and general principles of law may render the implementation by specific legislation superfluous (compare, *mutatis mutandis*, Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23).

50 Accordingly, the implementation of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient provided it actually ensures the full application of the directive (compare Case C-427/07 *Commission* v *Ireland* [2009] ECR I-6277, paragraph 54 and case law cited).

51 However, provisions of directives must be implemented with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty (compare, *mutatis mutandis*, Case C-159/99 *Commission* v *Italy* [2001] ECR I-4007, paragraph 32). EEA States must ensure full application of directives not only in fact but also in law.

48 Í þriðja lagi koma til athugunar tilvik þar sem ákvörðun sameiginlegu EES-nefndarinnar hlýtur gildi til bráðabirgða á grundvelli 103. gr. EES-samningsins, en að öðrum kosti þarf aðildarríki að tilkynna um að slík gildistaka geti ekki átt sér stað (sjá, mál E-17/11 *Aresbank* [2012] EFTA Ct. Rep. 916, 76. mgr. og 77. mgr. og áður tilvitnað mál *Koch o.fl.*, 20.mgr.).

49 Hvað annað atriðið um innleiðingu tilskipunar varðar, leiðir það af 7. gr. EES-samningsins að lög sem svara til tilskipunar Evrópusambandsins, sem vísað er til í viðauka við EES-samninginn eða í ákvörðun sameiginlegu EES-nefndarinnar, skulu vera bindandi fyrir aðildarríki um þau áhrif sem stefnt er að, og verða hluti landsréttar þó þannig að yfirvöldum aðildarríkja sé eftirlátið val um form og aðferð við innleiðingu. Dómstóllinn bendir í því sambandi á að innleiðing tilskipunar geri ekki endilega kröfu um setningu laga í hverju og einu EES-ríki, þar sem fyrirliggjandi lagaákvæði og meginreglur laga kunna að leiða til þess að ástæðulaust sé að grípa til sérstakrar lagasetningar (sbr., að breyttu breytanda, mál 29/84 *Framkvæmdastjórnin* gegn Þýskalandi [1985] ECR 1661, 23. mgr.).

50 Með hliðsjón af því sem á undan er rakið krefst innleiðing tilskipunar í landsrétt þess ekki endilega að einstök ákvæði hennar séu leidd í lög eftir orðanna hljóðan. Innleiðing tilskipunar með almennari hætti kann að vera fullnægjandi, að því gefnu að tryggt sé að tilskipuninni verði þannig beitt að fullu (sbr. mál C-427/07 *Framkvæmdastjórnin* gegn Írlandi [2009] ECR I-6277, 54. mgr. og tilvitnuð dómaframkvæmd).

51 Ákvæði innleiddra tilskipana verða hins vegar að hafa ótvíræð bindandi áhrif og vera innleidd með nægilega skýrum og glöggum hætti til þess að skilyrði meginreglunnar um réttarvissu séu uppfyllt (sbr. að breyttu breytanda, mál C-159/99 *Framkvæmdastjórnin* gegn *Ítalíu* [2001] ECR I-4007, 32. mgr.). EES-ríkjum ber að koma á nákvæmri löggjöf á því sviði sem um ræðir til að tryggja að unnt sé að framfylgja tilskipunum ekki einungis að forminu til heldur einnig að lögum.

52 It is essential that the legal situation resulting from national implementing measures be sufficiently precise and clear and that individuals be made fully aware of their rights so that, where appropriate, they may rely on them before the national courts. The latter condition is of particular importance where the directive in question is intended to confer rights on nationals of other EEA States, as is the case here, as those nationals may not be aware of provisions and principles of national law (compare, *mutatis mutandis*, Case C-478/99 *Commission* v *Sweden* [2002] ECR I-4147, paragraph 18 and case law cited).

53 In that regard, it must also be borne in mind that it is clear from case law with regard to the implementation of directives that mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of an EEA/EFTA State's obligations under the EEA Agreement (see, in particular, Case C-259/01 *Commission* v *France* [2002] ECR I-11093, paragraph 17, and case law cited).

54 Moreover, Article 3 EEA requires the EEA States to take all measures necessary, regardless of the form and method of implementation, to ensure that a directive which has been implemented and satisfies the conditions set out above prevails over conflicting national law and to guarantee the application and effectiveness of the directive. The Court has consistently held that it is inherent in the objectives of the EEA Agreement that national courts are bound to interpret national law in conformity with EEA law. Consequently, they must apply the methods of interpretation recognised by national law in order to achieve the result sought by the relevant EEA rule (see, to that effect, Cases E-1/07 *Criminal Proceedings against A* [2007] EFTA Ct. Rep. 246, paragraphs 38 and 39, E-13/11 *Granville* [2012] EFTA Ct. Rep. 400, paragraph 52, and Case E-18/11 *Irish Bank Resolution Corporation* v *Kaupthing Bank* [2012] EFTA Ct. Rep. 592, paragraphs 123 and 124). The Court recalls that the EEA States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and,

52 Enn fremur er mikilvægt að sú lagaumgjörð sem leiðir af innleiðingu sé nægilega nákvæm og skýr til að einstaklingar geti öðlast vitneskju um rétt sinn, eftir því sem við á, og að þeir geti byggt á þeim rétti fyrir dómstólum. Hið síðara skilyrði hefur ríka þýðingu í tilvikum þar sem viðkomandi tilskipun er ætlað að veita borgurum annarra aðildarríkja réttindi, eins og raunin er í þessu máli (sbr., að breyttu breytanda, mál C-478/99 *Framkvæmdastjórnin* gegn *Svíþjóð* [2002] ECR I-4147, 18. mgr. og tilvitnaða dómaframkvæmd).

53 Í því samhengi verður einnig að hafa í huga að af dómaframkvæmd um innleiðingu tilskipana verður ljóslega ráðið að stjórnsýsluframkvæmd ein og sér, sem stjórnvöld geta í eðli sínu breytt eftir hentugleika og er ekki kynnt opinberlega, uppfyllir ekki þær kröfur sem gerðar eru til EES/EFTA-ríkja á grundvelli EES-samningsins (sjá einkum, mál C-259/01 *Framkvæmdastjórnin* gegn *Frakklandi* [2002] ECR I-11093, 17. mgr., og tilvitnaða dómaframkvæmd).

54 Enn fremur áskilur 3. gr. EES-samningsins að EES/EFTA-ríki skuli gera allar viðeigandi ráðstafanir, óháð því formi eða aðferð sem beitt hefur verið við innleiðingu, og tryggja að tilskipun, sem hefur verið innleidd og uppfyllir þau skilyrði sem getið hefur verið um hér að framan, hafi forgang gagnvart ósamrýmanlegum reglum landsréttar og að tryggja skilvirka framkvæmd hennar. Dómstóllinn hefur ítrekað slegið því föstu að í markmiðum EES-samningsins sé fólgið að landsdómstólum beri að túlka landslög í samræmi við EES-rétt. Af því leiðir að dómstólar verða að beita þeim túlkunarreglum sem viðurkenndar eru að landsrétti í því skyni að ná þeim áhrifum sem stefnt er að með hlutaðeigandi reglum EES-réttarins (sjá, hvað það varðar, mál E-1/07 *Ákæruvaldið gegn A* [2007] EFTA Ct. Rep. 246, 38. mgr. og 39. mgr., E-13/11 *Granville* [2012], EFTA Ct. Rep. 403, 52. mgr., mál E-13/11 *Granville* [2012] EFTA Ct. Rep. 400, 52. mgr. og mál E-18/11 *Irish Bank Resolution Corporation* [2012] EFTA Ct. Rep. 592, 123. mgr. og 124. mgr.). Dómstóllinn vísar til þess að aðildarríkjum sé óheimilt að beita reglum sem eru til þess fallnar að stefna því í voða að markmiðum tilskipunar verði náð

therefore, deprive it of its effectiveness (see, *mutatis mutandis*, to that effect, Case E-4/11 *Clauder* [2011] EFTA Ct. Rep. 216, paragraph 46).

55 Finally, it must be added that it is inherent in the general objective of the EEA Agreement of establishing a dynamic and homogeneous market, in the ensuing emphasis on the judicial defence and enforcement of the rights of individuals, as well as in the public international law principle of effectiveness, that, when interpreting national law, national courts will consider any relevant element of EEA law, whether implemented or not (Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraph 28).

56 The answer to the first question must therefore be that, under Article 7 EEA, an EEA/EFTA State has the choice of form and method when implementing an act corresponding to Directive 2004/38/EC into its legal order. Depending on the legal context, the implementation of a directive does not necessarily require legislative action, as long as it is implemented with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty.

The second question

57 By its second question, the referring court essentially seeks to establish whether it is sufficient to base a decision under Article 27 of the Directive not to grant an individual who is a national of an EEA State leave to enter its territory on grounds of public policy and/or public security only on a danger assessment that concludes that the organisation to which the individual belongs is connected with organised crime and that where such organisations have managed to establish themselves, increased and organised crime has followed.

Observations submitted to the Court

58 The Plaintiff considers that entry can only be denied under Article 27 of the Directive if the person concerned has engaged in conduct that is considered a threat to public policy and public security within the meaning of Article 27(2). Membership of an

og draga þannig úr skilvirkni hennar (sjá um sambærilegt atriði, að breyttu breytanda, mál E-4/11 *Clauder* [2011] EFTA Ct. Rep. 216, 46. mgr.).

55 Að endingu er rétt að minna á að með EES-samningnum var komið á fót öflugum og einsleitum markaði þar sem lögð er áhersla á þá réttarvernd sem dómstólar veita auk meginreglu þjóðaréttar um skilvirkni. Í almennum markmiðum EES-samningsins felst að við túlkun landsréttar hvílir það á herðum landsdómstóla að fjalla um alla þá þætti EES-réttar sem þýðingu kunna að hafa hverju sinni, hvort heldur sem EES-réttur hefur verið tekinn upp í landsrétt eða ekki (mál E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, 28. mgr.).

56 Fyrstu spurningunni verður því að svara á þann veg að samkvæmt 7. gr. EES-samningsins hefur samningsríki val um form og aðferð við að taka upp í landsrétt lög sem svara til tilskipunar 2004/38/EB. Ákvæði tilskipunarinnar verða á hinn bóginn að hafa ótvíræð bindandi áhrif og vera innleidd með nægilega skýrum og glöggum hætti til þess að skilyrði meginreglunnar um réttarvissu séu uppfyllt.

Önnur spurningin

57 Með annarri spurningunni leitast Hæstiréttur við að skera úr um hvort nægilegt sé að byggja ákvörðun samkvæmt 27. gr. tilskipunarinnar, um að synja einstaklingi, sem er ríkisborgari annars EES-ríkis, um landgöngu með vísan til allsherjarreglu og/eða almannaöryggis á grundvelli hættumats, eins og sér, þar sem ályktað er um að samtök sem einstaklingurinn á aðild að tengist skipulagðri glæpastarfsemi og að matið sé byggt á því að þar sem slík samtök hafi náð að skjóta rótum hafi aukin og skipulögð brotastarfsemi fylgt í kjölfarið.

Athugasemdir sem lagðar voru fyrir dómstólinn

58 Stefnandi telur að á grundvelli 27. gr. tilskipunarinnar sé aðeins unnt að synja um landgöngu, ef hlutaðeigandi einstaklingur hefur viðhaft framferði sem telst ógn við allsherjarreglu eða almannaöryggi í merkingu 2. mgr. 27. gr. tilskipunarinnar. Aðild

organisation, regardless of its characteristics, can never by itself lead to a member of such organisation being considered a threat to public policy and public security if a general rule or practice taking action against all individuals who are members of such an organisation is in effect without examining the personal conduct of the individual in question.

59 In order for membership in an organisation to be considered personal conduct within the meaning of Article 27 of the Directive, a certain level of participation going beyond simple membership must be present. Only members in positions of leadership and active participants in the activities considered to constitute a threat to public policy and public security can be regarded as being associated with the organisation.

60 The Plaintiff refers to the ECJ's judgment in *Van Duyn* (Case 41/74 *Van Duyn* [1974] ECR 1337) to support the view that membership of an organisation, regardless of the position authorities have towards it and regardless of the manner of participation of an individual in its activities, can never lead to an individual being considered a threat to public security and public policy unless administrative measures have been taken against the organisation and the standpoint of the government regarding this organisation has been defined. It must, at the very least, be foreseeable to a person entering the country that he could be denied entry to the country on the grounds of his membership of an organisation.

61 The Plaintiff contends that the criterion of a connection of an organisation to organised crime is too broad and elastic to serve as the basis for a refusal of entry. In addition, the correlation between the establishment of an organisation and an increase in organised crime does not imply a causal link between the two, as the latter can be the result of unrelated factors.

62 The Defendant refers to case law regarding the interpretation of Directive 64/221/EEC which must apply in the present case by parity of reasoning. The ECJ's judgment in *Van Duyn*, cited above, paragraph 18, establishes the area of discretion that States enjoy

að samtökum, óháð eðli þeirra, geti aldrei ein og sér leitt til þess að einstaklingur verði álitinn ógn við allsherjarreglu eða almannaöryggi, ef almenn regla eða framkvæmd gildir um aðgerðir gegn öllum þeim einstaklingum sem aðild eiga að samtökunum, án þess að persónulegt framferði hlutaðeigandi einstaklings sé metið sérstaklega.

59 Stefnandi byggir á að til þess að aðild að samtökum verði talin persónulegt framferði í merkingu 27. gr. tilskipunarinnar, verði meðlimurinn að vera virkur í starfi félagsins. Aðeins þeir sem eru stjórnendur eða virkir í starfseminni geti talist ógn við allsherjarreglu og almannaöryggi.

60 Stefnandi vísar til dóms Evrópudómstólsins í máli *Van Duyn* (mál 41/74 *Van Duyn* [1974] ECR 1337) til stuðnings þeirri málsástæðu, að hvað sem líði afstöðu stjórnvalda til félags eða með hvaða hætti einstaklingur tekur þátt í starfsemi þess, geti aðild að því aldrei leitt til þess að einstaklingur verði talinn ógn við allsherjarreglu eða almannaöryggi nema stjórnvöld hafi gripið til aðgerða gagnvart félaginu og skilgreint afstöðu sína til þess. Að lágmarki verði að gera þær kröfur að einstaklingur, sem hyggst ferðast til landsins, geti séð fyrir að honum kunni að verða synjað um landgöngu á grundvelli aðildar hans að félagi.

61 Að mati stefnanda eru viðmið um tengsl samtaka við skipulagða glæpastarfsemi of víðtæk og óljós til að unnt sé að líta til þeirra þegar synjað er um landgöngu. Þá sé fylgni á milli stofnsetningar samtaka og aukinnar skipulagðrar glæpastarfsemi ekki slík að það bendi til orsakasambands þar á milli, enda geti slík aukning átt sér aðrar og óskyldar orsakir.

62 Stefndi vísar til dómaframkvæmdar við mat á hvernig túlka beri tilskipun 64/221/EB, og telur þá dómaframkvæmd jafnframt eiga við um mál, enda eigi sömu undirstöðurök við. Dómur Evrópudómstólsins í áður tilvitnuðu máli *Van Duyn*, 18. mgr., staðfesti það svigrúm sem dómstólar hafi játað Evrópusambandsríkjum við ákvörðun um hvort grípa eigi til aðgerða á grundvelli allsherjarreglu og almannaöryggis, til dæmis vegna samtaka sem talin eru skaðleg fyrir þjóðfélagið.

in determining the circumstances that justify recourse to public policy and public security, for example regarding the nature of an organisation considered to be socially harmful. EEA law does not impose on the Contracting Parties a uniform scale of values as regards the assessment of conduct which may be considered contrary to public policy, and they retain the freedom to determine the requirements of public policy and public security in accordance with their national needs subject to the requirements of EEA law. According to Article 27(2) of the Directive, this requirement is fulfilled by the existence of a genuine, present and sufficiently serious threat to one of the fundamental interests of society.

63 The Defendant submits that the authorities of the Nordic countries have formulated a clear strategy of fighting organised crime by motorcycle gangs and that the national commissioners of police are working jointly towards this goal. National efforts have included a policy of preventing outlaw motorcycle gangs from establishing a foothold in order to carry out crime. The Icelandic authorities established that cooperation existed between the Icelandic motorcycle club and the Hells Angels organisation. Various task forces were created to gather intelligence on these activities and to combat the activities of these groupings.

64 The Defendant considers that, in assessing the threat to public policy and public security posed by groups associated with organised crime, the same criteria must be relevant as those communicated by the Commission in relation to individual cases, that is, the nature of the offence and the damage or harm caused. Consequently, a measure refusing entry to a declared member of a certain organisation in circumstances such as those of the present case may fall within the concepts of public policy and public security.

65 The Defendant contends that when organisations pose a threat to the social order, active membership in such a group suffices to establish personal conduct representing a sufficiently serious threat to the social order, and thus fulfilling the requirement of posing, in addition to the social perturbation of the social order which any infringement of the law involves, a genuine and sufficiently serious threat to a fundamental interest of society.

EES-réttur leggi ekki þær skyldur á herðar aðildarríkjum að fylgja fastmótuðum reglum við mat á því hvað fari gegn allsherjarreglu og þeim sé frjálst að ákveða til hvaða skilyrða beri að líta við mat á allsherjarreglu og almannaöryggi, svo framarlega sem þau séu í samræmi við EES-rétt. Samkvæmt 2. mgr. 27. gr. tilskipunarinnar er þessu skilyrði fullnægt með því að til staðar sé raunveruleg, yfirvofandi og nægilega alvarleg ógn við einhverja af grundvallarhagsmunum samfélagsins.

63 Stefndi tekur það fram að norræn stjórnvöld hafi sett sér skýra stefnu um hvernig sporna eigi við skipulögðum glæpum vélhjólasamtaka og að lögregluyfirvöld ríkjanna vinni saman að þessu marki. Aðgerðir stjórnvalda í þessum ríkjum hafi falist í því að berjast gegn því að vélhjólasamtök af þessu tagi skjóti rótum í því augnamiði að stunda brotastarfsemi. Í því samhengi verður að vekja athygli á að íslensk stjórnvöld hafi sýnt fram á samvinnu á milli íslenskra vélhjólaklúbba og Vítisengla. Þá hafi margir starfshópar verið stofnaðir til að safna upplýsingum um þessa starfsemi og að berjast gegn henni.

64 Stefndi telur að við mat á ógn við allsherjarreglu og almannaöryggi sem stafar af hópi sem tengist skipulagðri glæpastarfsemi verði að leggja til grundvallar sömu viðmið og framkvæmdastjórnin hefur lagt til að beita beri í sérhverju máli, sem eru eðli brotsins og skaðinn eða tjónið sem það hefur í för með sér. Þar af leiðandi geti aðgerðir sem fela í sér að synja meðlimum samtaka, á borð við þau sem um ræðir í málinu, um landgöngu fallið innan marka allsherjarreglu og almannaöryggis.

65 Stefndi telur að þegar samtök feli í sér ógn við sjálfa samfélagsgerðina geti virk aðild að slíkum samtökum nægt til að unnt sé að slá því föstu að framferði einstaklings feli í sér nægilega alvarlega ógnun við samfélagsgerðina. Þar með uppfylli aðild að slíkum samtökum, auk þeirrar röskunar sem sérhvert lögbrot felur í sér á hagsmunum samfélagsins, einnig skilyrðið um að teljast raunveruleg og nægilega alvarleg ógnun við grundvallarhagsmuni samfélagsins.

66 The Norwegian Government considers that the ECJ's judgment in *Van Duyn* is of particular significance for the interpretation of the relevant provisions, which, although decided on the interpretation of Article 3 of Council Directive 64/221/EEC, must apply to Article 27 of Directive 2004/38 by parity of reasoning. Consequently, according to the Norwegian Government, which refers to *Van Duyn*, cited above, paragraph 17, it is clear that the "present association, which reflects participation in the activities of the body or of the organisation as well as identification with its aims and its designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct" within the meaning of Article 3 of Directive 64/221 and, by parity of reasoning, of Article 27(2) of Directive 2004/38.

67 ESA takes the view that the concept of public security includes both internal and external security, whereas public policy is generally interpreted as covering the prevention of the disturbance of social order. In addition, it considers EEA States to enjoy a certain margin of appreciation in determining the requirements of public policy and public security.

68 ESA considers that, in the case before the national court, the decision was taken by the Directorate of Immigration on the basis of information provided by police including an open danger assessment on the date of entry. This action was part of an established and consistent practice of the National Commissioner of Icelandic Police; hence, the denial was not a random act. ESA observes that the organisation in question is considered by authorities in other States to constitute a criminal organisation. At the time the assessment was established, information was obtained showing that the club whose members the individual concerned planned to meet was intending to accede to said organisation. The threat the Icelandic authorities were dealing with at the time was not motorcycle gangs or the Hells Angels in general. Instead, the threat was that MC Iceland would become a full charter member of the Hells Angels. The general practice in accession procedures was for the acceding association to adopt the practices of the one to which it acceded, and to which the

66 Ríkisstjórn Noregs telur að dómur Evrópudómstólsins í máli *Van Duyn* hafi sérstaka þýðingu við túlkun á þeim ákvæðum sem eiga við, þótt þar reyni á túlkun 3. gr. tilskipunar Ráðsins 64/221/EB, og að beita verði þeim sjónarmiðum sem þar hafi verið lögð til grundvallar við túlkun 27. gr. tilskipunar 2004/38, enda liggi sömu undirstöðurök að baki þessum ákvæðum. Þar af leiðandi sé ljóst samkvæmt ríkisstjórn Noregs, sem vísar til 17. mgr. áður tilvitnaðs máls *Van Duyn*, að „aðild að félagi, sem endurspegli þátttöku í starfsemi þess og samsömun með markmiðum þess og áætlunum, sé til marks um sjálfviljuga athöfn einstaklings og þar með þáttur í persónulegu framferði hans“ í merkingu 3. gr. tilskipunar 64/221 og, samkvæmt sömu undirstöðurökum, 2. mgr. 27. gr. tilskipunar 2004/38.

67 ESA er þeirrar skoðunar að hugtakið almannaöryggi feli hvoru tveggja í sér innra og ytra öryggi, en allsherjarregla verði almennt túlkuð á þann veg að hún taki til þess að varna truflun á þjóðskipulagi. Auk þess telur ESA að játa verði EES-ríkjum ákveðið svigrúm við að afmarka skilyrði allsherjarreglu og almannaöryggis.

68 ESA telur að í málinu fyrir landsdómstólnum hafi ákvörðun Útlendingastofnunar verið tekin á grundvelli þeirra upplýsinga sem lögreglan lagði fram, þ. á m. opins áhættumats sem miðaði við komudag stefnanda. Þessi ákvörðun hafi verið í samræmi við fastmótaða framkvæmd ríkislögreglustjóra. ESA bendir á að stjórnvöld annarra ríkja telji viðkomandi samtök vera skipulögð glæpasamtök. Á þeim tíma sem matið var gert lágu fyrir upplýsingar um að vélhjólaklúbburinn, sem þeir einstaklingar sem stefnandi ætlaði að hitta voru félagar í, hafði í hyggju að gerast aðili að viðkomandi samtökum. Sú ógn sem íslensk stjórnvöld stóðu frammi fyrir voru ekki vélhjólasamtök eða Vítisenglar almennt, heldur var ógnin sú að MC Iceland yrði fullgildur meðlimur Vítisengla. Í inngönguferli á borð við það sem vélhjólaklúbburinn tók þátt í sé framkvæmdin almennt sú að það félag sem gengur í samtökin sem stefnandi var aðili að tekur upp hætti síðastnefndu samtakanna, með þeim afleiðingum að skipulögð glæpastarfsemi eykst. ESA byggir á því að í ljósi þess

individual concerned belonged, likely to lead to an increase in organised crime. ESA contends, therefore, that, in light of the said margin of appreciation, Iceland was entitled to consider that the public policy and public security requirements were fulfilled.

69 The Commission notes that the Plaintiff has been denied entry and was not expelled. As stated in recital 23 in the preamble to the Directive, expulsion is limited by the principle of proportionality and account must be taken of the degree of integration. Conversely, and notwithstanding the wording of Article 27 of the Directive, if a person is not integrated in the host State, the authorities of that State have a wider margin of appreciation to refuse entry than in the case of expulsion.

70 The Commission notes that the Icelandic authorities appear to regard organised motorcycle gangs as a considerable threat and have consistently taken measures against this phenomenon without banning membership as such. There appears to be a regular practice of denying entry to foreign members of the Hells Angels motorcycle clubs. The Commission submits that, a priori, there appear to be adequate grounds to allow the national authorities to deny entry to a person in the position of the Plaintiff.

71 In the Commission's view, the prohibition on taking measures of a general preventive nature does not preclude the authorities of an EEA State from acting pre-emptively to stop a threat from materialising, if they do this on reasonable grounds and in accordance with the principle of proportionality. In this context, the Commission notes that the arrival of the applicant in Iceland was thought to be linked to the preparation for full membership of the association, which would instigate the spread of organised crime.

72 The Commission asserts that, in comparison with the situation in *Van Duyn*, in which the applicant was only intending to carry out low-level tasks for the Church of Scientology, which was not associated with organised crime albeit considered undesirable, in the present case, the Plaintiff is thought to play a leading role in the activities of an association presumed to be connected to organised crime. There is no evidence that the Plaintiff was

matssvigrúms EES-ríkjanna sem áður er vitnað til hafi Ísland haft réttmæta ástæðu til að ætla að skilyrði er snúa að allsherjarreglu og almannaöryggi væru uppfyllt.

69 Framkvæmdastjórnin bendir á að stefnanda hafi verið synjað um landgöngu og að honum hafi ekki verið vísað frá landi. Samkvæmt 23. lið formálaorða tilskipunarinnar verði að gæta meðalhófs við slíka aðgerð og hafa hliðsjón af því að hvaða marki einstaklingur hefur aðlagast samfélaginu. Á hinn bóginn hafa stjórnvöld í gistiaðildarríki, þrátt fyrir orðalag 27. gr. tilskipunarinnar, mun víðtækara svigrúm til mats við að synja einstaklingi um landgöngu en þegar þau vísa honum brott úr landi, ef einstaklingur hefur ekki aðlagast samfélagi ríkisins.

70 Framkvæmdastjórnin tiltekur að svo virðist sem íslensk stjórnvöld álíti að veruleg ógn stafi af skipulögðum vélhjólasamtökum og að þau hafi gripið til samræmdra aðgerða gegn þeim, án þess þó að banna aðildina sem slíka. Reglulega virðist koma til þess að erlendum félögum vélhjólasamtaka Vítisengla sé synjað um landgöngu. Framkvæmdastjórnin telur að fyrirfram megi ætla að nægilegur grundvöllur sé fyrir hendi til þess að stjórnvöld geti meinað einstaklingi á borð við stefnanda landgöngu.

71 Að áliti framkvæmdastjórnarinnar geta takmarkanir á heimildum ríkja um að byggja á almennum forvarnarforsendum þó ekki komið í veg fyrir að stjórnvöld EES-ríkis grípi til forvirkra aðgerða til að koma í veg fyrir að ógn verði að veruleika, ef stjórnvaldið gerir það á grundvelli málefnalegra sjónarmiða og að gættu meðalhófi. Í þessu samhengi tekur framkvæmdastjórnin fram að koma stefnanda til Íslands var talin tengjast undirbúningi að fullgildri aðild hlutaðeigandi samtaka, sem myndi leiða til þess að skipulögð glæpastarfsemi ykist.

72 Framkvæmdastjórnin vísar til samanburðar til máls *Van Duyn*, en stefnanda í því máli hafi aðeins verið ætlað að sinna lítilvægum störfum fyrir Vísindakirkjuna, sem hafi ekki tengst skipulagðri glæpastarfsemi, þrátt fyrir að starfsemi kirkjunnar væri álitin óæskileg. Í þessu máli hafi stefnandi á hinn bóginn verið talinn gegna forystuhlutverki í starfi samtaka sem talin eru tengjast

coming to Iceland to commit crime on that particular day. However, the link here is more indirect. The Plaintiff was coming to Iceland in order to assist with the systemic organisation of organised crime.

Preliminary remarks concerning the Joint Declaration by the Contracting Parties to Joint Committee Decision No 158/2007

73 At the outset, it is noted that it is for the EEA Joint Committee to incorporate new Union legislation in the EEA by adopting amendments to the Annexes and Protocols to the EEA Agreement (see Case E-3/97 *Jæger* [1998] EFTA Ct. Rep. 1, paragraph 30).

74 The Directive was incorporated into the EEA Agreement by the adoption of Joint Committee Decision No 158/2007 ("the Decision"). According to the Decision, the concept of 'Union Citizenship' and immigration policy are not included in the Agreement. That is further stipulated in the accompanying Joint Declaration by the Contracting Parties ("the Declaration").

75 However, these exclusions have no material impact on the present case. Nevertheless, the impact of the exclusions must be assessed on a case-by-case basis and may vary accordingly.

76 In this regard, it must be noted that, as is apparent from Article 1(a) and recital 3 in its preamble, the Directive aims in particular to strengthen the right of free movement and residence of EEA nationals (see *Clauder*, cited above, paragraph 34). To this end, it lays down the conditions governing the exercise of the right of free movement and residence within the territory of the EEA.

77 The impact of the exclusion of the concept of citizenship has to be determined, in particular, in cases concerning Article 24 of the Directive which essentially deals with the equal treatment of family members who are not nationals of a Member State and who have the right of residence or permanent residence. At the oral hearing, the Norwegian Government submitted in this respect that, since the concept

skipulagðri glæpastarfsemi. Engin sönnunargögn liggja fyrir um að stefnandi hafi komið til Ísland til að fremja glæp þennan tiltekna dag. Tengslin hér á milli eru fremur óbein. Stefnandi kom til Íslands til að aðstoða kerfisbundið við ráðagerðir um skipulagðra glæpastarfsemi.

Almennar athugasemdir dómstólsins varðandi sameiginlega yfirlýsingu aðildarríkja vegna ákvörðunar sameiginlegu EES-nefndarinnar nr. 158/2007

73 Rétt er að taka fram að það er í verkahring sameiginlegu EES-nefndarinnar að fella inn í landsrétt nýja löggjöf Evrópusambandsins á EES-svæðinu með því að samþykkja breytingar á viðaukum og bókunum við EES-samninginn (sjá, mál E-3/97 *Jæger* [1998] EFTA Ct. Rep. 1, 30. mgr.).

74 Tilskipunin var felld inn í EES-rétt með ákvörðun sameiginlegu EES-nefndarinnar nr. 158/2007 („ákvörðunin“). Samkvæmt ákvörðuninni voru hugtökin „ríkisborgararéttur Sambandsins“ og innflytjendastefna ekki hluti EES-samningsins. Í sérstakri yfirlýsingu aðildarríkjanna er fylgdi ákvörðuninni var enn fremur kveðið á um þetta („yfirlýsingin“).

75 Þessir fyrirvarar hafa þó engin efnisleg áhrif í málinu. Á hinn bóginn verður að meta áhrif yfirlýsingarinnar og ákvörðunarinnar í hverju máli fyrir sig. Áhrif yfirlýsingarinnar kunna þannig að vera ólík eftir atvikum.

76 Í þessu samhengi er rétt að taka fram að tilskipuninni er sérstaklega beint að því að styrkja ferðafrelsi EES-borgara, líkt og leiðir af a-lið 1. gr. og 3. lið formálaorða hennar (sjá áður tilvitnað mál, *Clauder*, 34. mgr.). Í þessu skyni er í tilskipuninni kveðið á um skilyrði þess að nýta réttinn til frjálsrar fara og búsetu á EES-svæðinu.

77 Taka verður afstöðu til hvaða áhrif sú staðreynd hefur að ríkisborgararéttur Evrópusambandsins er undanskilinn EES-rétti, einkum í málum er varða 24. gr. tilskipunarinnar þar sem tekist er á um jafnan rétt þeirra fjölskyldumeðlima sem eru ekki ríkisborgarar Evrópusambandsins og hinna sem hafa búseturétt eða rétt til fastrar búsetu. Við munnlegan flutning

of citizenship is not part of the EEA Agreement, a series of complex and controversial questions has to be answered in such cases. ESA and the Commission reserved their position on the interpretation of the exclusions stipulated in the Decision and the Declaration.

Findings of the Court

78 Article 5 of the Directive establishes, *inter alia*, that EEA States shall grant EEA nationals leave to enter their territory with a valid identity card or passport without prejudice to the provisions on travel documents applicable to national border controls.

79 A situation such as that of the applicant in the main proceedings, who seeks to travel from the EEA State of which he is a national to another EEA State, is covered by the right of nationals of EEA States to move and reside freely in the EEA.

80 Nevertheless, the right of free movement of nationals of EEA States is not unconditional but may be subject to the limitations and conditions imposed by the Agreement and by the measures adopted to give it effect (see, *mutatis mutandis*, to that effect, Cases C-356/98 *Kaba* [2000] ECR I-2623, paragraph 30, C-466/00 *Kaba* [2003] ECR I-2219, paragraph 46, and C-398/06 *Commission* v *Netherlands* [2008] ECR I-56, paragraph 27).

81 Those limitations and conditions stem, in particular, from Article 27(1) of the Directive, which provides that EEA States may restrict the freedom of movement of nationals of EEA States and their family members on grounds of public policy, public security or public health. However, those grounds cannot, according to the same provision, be invoked to serve economic ends.

82 Therefore, for a decision such as that at issue in the main proceedings to be permitted under EEA law, it must be shown, *inter alia*, that the measure was taken on the grounds listed in Article 27(1) of the Directive.

málsins kvað ríkisstjórn Noregs að þar sem ríkisborgararéttur væri ekki hluti EES-samningsins þyrfti að svara fjöldamörgum flóknum og áleitnum spurningum í því samhengi. ESA og framkvæmdastjórnin létu ekki uppi afstöðu sína til þess hvernig túlka bæri þá fyrirvara er ákvörðunin og yfirlýsingin hafa að geyma í þessu samhengi.

Álit dómstólsins

78 Í 5. gr. tilskipunarinnar er því meðal annars slegið föstu að EES-ríki skuli gegn framvísun gilds kennivottorðs eða vegabréfs veita EES-borgurum leyfi til að koma inn á yfirráðasvæði þeirra, með fyrirvara um ákvæði um ferðaskilríki sem gilda um landamæraeftirlit í ríkjunum.

79 Aðstaða á borð við þá er varðar stefnanda í málinu, sem leitast við að ferðast frá því EES-ríki þar sem hann er ríkisborgari til annars EES-ríkis, heyrir undir rétt EES-borgara til frjálsrar farar á EES-svæðinu.

80 Engu að síður er réttur EES-borgara til frjálsrar farar ekki skilyrðislaus, heldur getur hann sætt takmörkunum og skilyrðum sem felast í samningnum og þeim aðgerðum sem gripið er til í því skyni að framfylgja honum (sjá um sambærilegt atriði, að breyttu breytanda, mál C-356/98 *Kaba* [2000] ECR I-2623, 30. mgr.; mál C-466/00 *Kaba* [2003] ECR I-2219, 46. mgr; og mál C-398/06 *Framkvæmdastjórnin* gegn *Hollandi* [2008] ECR I-56, 27. mgr.).

81 Þessar takmarkanir og skilyrði verða einkum leiddar af 1. mgr. 27. gr. tilskipunarinnar, sem kveður á um að EES-ríkjum sé heimilt að takmarka réttinn til frjálsrar farar EES-borgara og fjölskyldumeðlima þeirra á grundvelli allsherjarreglu, almannaöryggis eða lýðheilsu. Á hinn bóginn má samkvæmt sama ákvæði ekki bera þessar aðstæður fyrir sig í efnahagslegum tilgangi.

82 Af þeim sökum verður meðal annars að sýna fram á að þær aðgerðir sem gripið er til hafi verið reistar á þeim ástæðum sem greinir í 1. mgr. 27. gr. tilskipunarinnar, til þess að ákvörðun á borð við þá sem um ræðir í málinu sé heimil að EES-rétti.

83 While EEA States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one EEA State to another and from one era to another, the fact still remains that, in the EEA context and particularly as regards justification for a derogation from the fundamental principle of free movement of persons, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each EEA State without any control by the EEA institutions (compare, to that effect, Cases 36/75 *Rutili* [1975] ECR 1219, paragraphs 26 and 27; 30/77 *Bouchereau* [1977] ECR 1999, paragraphs 33 and 34; C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 17; and C-36/02 *Omega* [2004] ECR I-9609, paragraphs 30 and 31).

84 It follows from Article 27(2) of the Directive that, in order to be justified, measures taken on grounds of public policy or public security must be based exclusively on the personal conduct of the individual concerned. Justifications that are isolated from the particulars of the case in question or that rely on considerations of general prevention cannot be accepted.

85 Article 27(2) of the Directive requires such personal conduct of the individual in question to represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society (compare, *mutatis mutandis*, *Rutili*, paragraph 28, and *Bouchereau*, paragraph 35, both cited above, and Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 66).

86 Moreover, according to Article 27(2) of the Directive, a measure which restricts the right of free movement may be justified only if it respects the principle of proportionality (compare Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Others* [1993] ECR I-4309, paragraph 15, Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 91, and Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 43).

87 It is for the national court to determine on a case-by-case basis whether, on the basis of the relevant matters of fact and of law,

83 Þótt EES-ríkjum sé að meginstefnu til frjálst að ákvarða skilyrði allsherjarreglu og almannaöryggis til samræmis við þarfir þeirra, sem kunna að vera ólíkar frá einu ríki til annars og frá einum tíma til annars, verður ströngum mælikvarða eftir sem áður beitt á slík skilyrði til samræmis við EES-rétt, einkum að því er varðar réttlætingu frávika frá grundvallarreglum um ferðafrelsi einstaklinga, þannig að gildissvið þeirra verði ekki einhliða ákveðið af EES-ríkjum óháð afskiptum stofnana EES-samningsins (sjá, um sambærilegt atriði, mál 36/75 *Rutili* [1975] ECR 1219, 26. mgr. og 27. mgr.; mál 30/77 *Bouchereau* [1977] ECR 1999, 33. mgr. og 34. mgr.; mál C-54/99 *Église de scientologie* [2000] ECR I-1335, 17. mgr.; og mál C-36/02 *Omega* [2004] ECR I-9609, 30. mgr. og 31. mgr.).

84 Af 2. mgr. 27. gr. tilskipunarinnar leiðir að ráðstafanir á grundvelli allsherjarreglu eða almannaöryggis skulu alfarið byggja á framferði hlutaðeigandi einstaklings, til þess að unnt sé að réttlæta þær. Réttlætingarástæður sem eru óháðar efnisatriðum þess máls sem um ræðir eða eru reistar á almennum forvarnarforsendum eru ekki tækar. Enn fremur verður að árétta að fyrri sakfellingar vegna glæpsamlegrar háttsemi geta einar og sér ekki talist tilefni til slíkra ráðstafana.

85 Ákvæði 2. mgr. 27. gr. tilskipunarinnar áskilur að framferði hlutaðeigandi einstaklings feli í sér raunverulega og nægilega alvarlega ógn við einhverja af grundvallarhagsmunum samfélagsins (sbr., að breyttu breytanda, áður tilvitnuð mál, *Rutili*, 28. mgr. og *Bouchereau*, 35. mgr. og sameinuð mál C-482/01 og C-493/01 *Orfanopoulos og Oliveri* [2004] ECR I-5257, 66. mgr.).

86 Þá verða ráðstafanir sem takmarka ferðafrelsi einungis réttlættar að því gefnu að meðalhófs sé gætt, sbr. 2. mgr. 27. gr. tilskipunarinnar (sbr. sameinuð mál C-259/91, C-331/91 og C-332/91 *Allué o.fl.* [1993] ECR I-4309, 15. mgr., mál C-413/99 *Baumbast og R* [2002] ECR I-7091, 91. mgr., og mál C-100/00 *Oteiza Olazabal* [2002] ECR I-10981, 43. mgr.).

87 Það er á hendi landsdómstóla að meta hvort þessi skilyrði séu fyrir hendi, á grundvelli þeirra staðreynda og málatilbúnaðar

those requirements are met and, if not, to draw the necessary conclusions in order to ensure the effectiveness of the Directive (see, by analogy, *Koch and Others*, cited above, paragraph 121, and case law cited). When making such an assessment, the national court will also have to determine whether that restriction on the right to entry is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it.

88 However, the Court may, where appropriate, provide clarification designed to give the national court guidance in its interpretation. As regards a situation such as that in the main proceedings – where it appears from the reference that the applicant was at the material time a member of an organisation associated with organised crime – it is clear from case law that present association, which reflects participation in the activities of the body of the organisation as well as identification with its aims and its designs, may be considered a voluntary act of the person concerned and, consequently, as part of the applicant's personal conduct within the meaning of Article 27(2) of the Directive (compare *Van Duyn*, cited above, paragraph 17).

89 For the sake of order, it is noted that present association with an organisation associated with organised crime can only be taken into account in so far as the circumstances of the membership are evidence of personal conduct constituting a genuine, present and sufficiently serious threat to one of the fundamental interests of society (see, to that effect, *Bouchereau*, cited above, paragraph 28).

90 In the present case, however, it appears from the reference that the personal conduct of the Plaintiff is not limited to mere membership in a particular organisation associated with organised crime. The national authorities based their decision mainly on the danger assessment of the National Commissioner of Police concerning the Plaintiff's presumed role in the final accession stage of a national motorcycle club becoming a new charter in an international organisation associated with organised crime. In this assessment, the Plaintiff's visit was linked to the said process which would subsequently ferment the spread of

aðila sem liggja fyrir í einstökum málum og þýðingu hafa í því samhengi, og - ef svo er ekki - að draga þá nauðsynlegar ályktanir í því skyni að tryggja skilvirkni tilskipunarinnar (sjá til hliðsjónar áður tilvitnað mál, *Koch o.fl.*, 121. mgr. og tilvitnaða dómaframkvæmd). Við það tilefni verða dómstólar einnig að meta hvort takmarkanir á ferðafrelsi séu hæfilegar í því augnamiði að tryggja þau markmið sem að var stefnt og hvort takmarkanirnar gangi lengra en þörf krefur til að ná þeim.

88 Dómstóllinn getur á hinn bóginn, eftir því sem við á, veitt skýringar sem geta verið landsdómstólum til leiðbeiningar við úrlausnir þeirra. Af beiðni Hæstaréttar verður ráðið að stefnandi hafi, á þeim tíma sem atvik málsins áttu sér stað, verið aðili að samtökum sem höfðu tengsl við skipulagða glæpastarfsemi. Af dómaframkvæmd leiðir að í slíkum tilvikum kunni núverandi tengsl, sem endurspegla þátttöku í starfsemi meginhluta samtaka auk samsömunar við markmið þeirra og fyrirætlanir, að vera álitin frjáls athöfn af hálfu þess einstaklings sem um ræðir og þar af leiðandi þáttur í framferði hans í merkingu 2. mgr. 27. gr. tilskipunarinnar (sbr. áður tilvitnað mál *Van Duyn*, 17. mgr.) .

89 Til að öllu sé til haga haldið er rétt að taka fram að einungis er unnt að líta til núverandi tengsla við samtök sem tengjast skipulagðri glæpastarfsemi að því marki sem aðstæður tengdar aðild sýna fram á persónubundið framferði einstaklings sem felur í sér raunverulega, yfirvofandi og nægilega alvarlega ógn við einhverja af grundvallarhagsmunum samfélagsins (sjá, um sams konar atriði, áður tilvitnað mál, *Bouchereau*, 28. mgr.).

90 Í því máli sem hér um ræðir verður á hinn bóginn ráðið af beiðni Hæstaréttar að persónubundin háttsemi stefnanda hafi ekki einskorðast við aðild að tilteknum samtökum sem tengjast skipulagðri glæpastarfsemi. Stjórnvöld reistu ákvörðun sína á svonefndu hættumati, sem varðaði ætlað hlutverk stefnanda á lokastigum þess að innlendur vélhjólaklúbbur hlyti formlega inngöngu í alþjóðleg samtök sem tengsl hefðu við skipulagða glæpastarfsemi. Enn fremur hefur því verið haldið fram að heimsókn stefnanda hafi að öllum líkindum staðið í tengslum við áðurgreint ferli, sem myndi síðar stuðla að því að auka

organised crime in Iceland. The assessment was also based on the fact that the process in general had been directed from the applicant's home State. It furthermore appears from the reference that the information and evidence was gathered and/or compiled specifically on the Plaintiff's planned entry into Iceland.

91 Consequently, the Plaintiff's conduct appears to constitute a genuine, present and sufficiently serious threat to one of the fundamental interests of society. Nevertheless, it is for the court in the main proceedings to make the necessary findings in the individual case, on the basis of the matters of fact and law as well as the evidence adduced to it, whether the restriction on the Plaintiff's right to be granted leave to enter Iceland is justified.

92 The answer to the second question must therefore be that it is sufficient for an EEA State to base a decision under Article 27 of the Directive not to grant an individual who is a national of another EEA State leave to enter its territory on grounds of public policy and/or public security only upon a danger assessment, which assesses the role of the individual in the accession of a new charter to an organisation of which the individual is a member and which concludes that the organisation is associated with organised crime and that where such an organisation has managed to establish itself, organised crime has increased. It is further required that the assessment is based exclusively on the personal conduct of the individual concerned. Moreover, this personal conduct must represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society, and the restriction on the right to entry must be proportionate. In the light of the relevant matters of fact and law, it is for the national court to determine whether those requirements are met.

The third question

93 By its third question, the referring court essentially seeks to establish whether it is of significance that the EEA State denying leave to enter its territory pursuant to Article 27 of the Directive

skipulagða glæpastarfsemi á Íslandi. Matið var einnig reist á þeirri staðreynd að ferlinu hafði verið stýrt frá heimaaðildarríki stefnanda. Af beiðninni virðist loks sem áðurgreindra upplýsinga og sönnunargagna hafi verið aflað og/eða þau tekin saman sérstaklega í tilefni af heimsókn stefnanda til Íslands.

91 Af því leiðir að almennt virðist mega ætla að háttsemi stefnanda feli í sér raunverulega, yfirvofandi og nægilega mikla ógn við einhverja af grundvallarhagsmunum samfélagsins. Engu að síður er það Hæstaréttar að leggja mat á lögmæti takmarkana á rétti stefnanda til að sækja Ísland heim á grundvelli staðreynda málsins, málatilbúnaðar aðila og þeirra gagna sem liggja fyrir í málinu.

92 Svar við annarri spurningunni verður samkvæmt framansögðu á þá leið að samkvæmt 27. gr. tilskipunarinnar hefur EES-ríki heimild til að synja ríkisborgara annars EES-ríkis um landgöngu með skírskotun til allsherjarreglu og/eða almannaöryggis á grundvelli hættumats eins og sér, sem hefur að geyma mat á því hvert hlutverk viðkomandi einstaklings er við inngönguferli að samtökum sem einstaklingurinn er aðili að og þar sem ályktað er að þau samtök, sem einstaklingurinn tilheyrir, hafi tengsl við skipulagða glæpastarfsemi og að sýnt sé að þar sem slík samtök hafi skotið rótum hafi aukin og skipulögð glæpastarfsemi fylgt í kjölfarið. Slíkt hættumat verður þá einungis reist á framferði hlutaðeigandi einstaklings, sem verður að fela í sér raunverulega, yfirvofandi og nægilega alvarlega ógn við einhverja af grundvallarhagsmunum samfélagsins en þannig að gætt sé meðalhófs við takmarkanir ferðafrelsis. Það er á valdi landsdómstóla að leggja mat á hvort skilyrðin séu uppfyllt með hliðsjón af þeim staðreyndum og málatilbúnaði aðila sem þýðingu hafa hverju sinni.

Þriðja spurningin

93 Með þriðju spurningunni spyr Hæstiréttur í reynd hvort það hafi þýðingu við ákvörðun um að synja um landgöngu á grundvelli 27. gr. tilskipunarinnar hvort aðildarríki hafi lýst þau samtök, sem

has outlawed the particular organisation of which the individual in question is a member and membership in such organisation is prohibited in that State.

Observations submitted to the Court

94 The Plaintiff submits that, in order to invoke Article 27 of the Directive, Iceland needs to declare both the operations and the membership of an organisation illegal. If not, an individual cannot be considered a threat to public policy and public security. According to the Plaintiff, the finding in *Van Duyn* on this point was based on international law which precluded a State from refusing the right of entry or residence to its own nationals. He asserts that, according to recent case law, it is not permissible to discriminate between nationals and EEA citizens who carry out the same conduct and, thus, the reasoning in *Van Duyn* on this point can no longer be considered relevant. The Plaintiff also relies on the ECJ's finding in Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 61, that "conduct which a Member State accepts on the part of its own nationals cannot be regarded as constituting a genuine threat to public order".

95 The Defendant submits that, in order to restrict the right to free movement, it is not necessary that an organisation, of which a member is refused entry, is prohibited by national law or otherwise, as long as the State has taken some administrative measures to counteract the activities of that organisation. This is a consequence of the area of discretion that EEA States enjoy in having recourse to public policy, which presupposes only a clear definition of the authorities' standpoint regarding an organisation the activities of which are considered socially harmful. The criterion is not whether the same measure was adopted in respect of its own nationals, as no authority exists to expel a national, but whether repressive measures or other genuine and effective measures intended to combat the conduct were taken.

96 The Norwegian Government submits that EEA States are not required to outlaw the activities of an organisation in order to restrict the movement of its members, provided that they have

viðkomandi einstaklingur á aðild að, ólögleg og hvort í ríkinu liggi bann við aðild að slíkum samtökum.

Athugasemdir sem lagðar voru fyrir dómstólinn

94 Stefnandi heldur því fram að svo hægt sé að beita 27. gr. tilskipunarinnar þurfi Ísland að hafa lýst starfsemi og aðild að samtökum ólögmæta. Ef svo er ekki, sé ótækt að leggja til grundvallar að einstaklingur feli í sér ógn við allsherjarreglu og almannaöryggi. Samkvæmt stefnanda byggja niðurstöður í *Van Duyn* á alþjóðalögum sem leggja bann við því að ríki synji eigin ríkisborgurum um landgöngu eða búsetu. Stefnandi byggir á því að samkvæmt nýlegum dómafordæmum sé óheimilt að mismuna ríkisborgurum EES-ríkja á grundvelli athafna þeirra. Leiði það til þess að *Van Duyn* málið hafi ekki lengur þýðingu. Stefnandi byggir einnig á forsendum dóms Evrópudómstólsins í máli C-268/99 *Jany o.fl.* [2001] ECR I-8615, 61. mgr., þar sem segir að „athæfi sem aðildarríki leyfa eigin ríkisborgurum geti ekki talist vera raunveruleg ógn við allsherjarreglu“.

95 Stefndi heldur því fram að ekki sé nauðsynlegt að samtök séu ólögmæt samkvæmt landsrétti til þess að unnt sé að takmarka ferðafrelsi einstaklings vegna aðildar hans að þeim og meina honum landgöngu, svo framarlega sem ríkið hefur gripið til einhverra stjórnvaldsaðgerða til að koma böndum á starfsemi samtakanna. Þetta leiði af því svigrúmi sem EES-ríkjum er veitt á þessu sviði og því að einungis sé gerð krafa um að stjórnvöld EES-ríkis hafi afmarkað og skilgreint viðhorf sín gagnvart félagasamtökum sem talin eru skaðleg fyrir samfélagið. Af hálfu stefnda er því haldið fram að ekki sé byggt á því viðmiði hvort stjórnvöld hafi gripið til sams konar aðgerða gagnvart eigin ríkisborgurum, enda sé þeim óheimilt að vísa eigin ríkisborgurum frá landi. Þess í stað beri að líta til þess hvort gripið hafi verið til aðgerða til að draga úr starfseminni, eða annarra raunhæfra og virkra aðgerða til að berjast gegn henni.

96 Ríkisstjórn Noregs telur að aðildarríkjum sé ekki skylt að banna starfsemi samtaka til þess að takmarka ferðafrelsi meðlima þeirra, að því gefnu að gripið hafi verið til stjórnvaldsaðgerða

taken administrative measures to counteract these activities. A refusal of entry to a citizen of another EEA State is not precluded simply because similar restrictions are not placed on nationals.

97 ESA submits that national authorities are not obliged to outlaw the activities of an organisation as long as administrative measures have been taken to counteract its activities. This follows from the margin of appreciation national authorities enjoy in the choice of measures taken to counteract the activities of criminal organisations. ESA contends that national authorities are best placed to determine the most effective measures and also to assess their potentially damaging effects.

98 Furthermore, ESA notes that, due to the fact that there were no Hells Angels in Iceland at the time, MC Iceland needed a foreign, in this case a Norwegian, organisation to second them and propose them for membership in order to become a Hells Angels organisation. Therefore, the measures of the Icelandic authorities could only target foreigners. ESA argues that there would be a serious loophole in the arsenal of the law enforcement authorities if the authorities of a State could not take such measures against foreigners who intended to propose membership to an international organisation such as the Hells Angels.

99 The Commission contends that EEA law does not require EEA States to outlaw an organisation before it may restrict the free movement of its members that are citizens of other EEA States and before the public policy proviso can be invoked. However, the authorities of that State must take effective measures against that organisation and the threat it and its members represent. It also stresses the ECJ's finding in *Van Duyn* that a State is not precluded from refusing, on grounds of public policy, an individual's entry to the territory of the State and to taking up residence and working there simply because the host State does not place such a restriction on its own nationals. The Commission adds, however, that recourse to the public policy exception may not be used to permit covert discrimination.

til að vinna gegn starfseminni. Ekki sé útilokað að synja EES-ríkisborgara um landgöngu þótt sams konar takmörkunum verði ekki beitt gegn eigin ríkisborgurum.

97 ESA telur að stjórnvöldum sé ekki skylt að úthýsa starfsemi samtaka svo fremi sem ráðist hafi verið í stjórnvaldsaðgerðir í því skyni að vinna gegn starfseminni. Þetta leiði af því svigrúmi sem stjórnvöldum sé játað við ákvörðun um til hvaða aðgerða verði gripið í áðurgreindum tilgangi. ESA heldur því fram að stjórnvöld séu bestri aðstöðu til að ákveða hvaða aðgerðir séu skilvirkastar og leggja mat á hugsanlega skaðsemi þeirra.

98 ESA tiltekur enn fremur að þar sem Vítisenglar hafi ekki haft ítök á Íslandi er atvik málsins gerðust, hafi MC Iceland þurft á erlendum, í þessu tilviki norskum, samtökum að halda til að veita þeim fulltingi sitt og leggja fram tillögu um aðild vélhjólaklúbbsins MC Iceland, til þess að hann gæti gerst aðili að samtökum Vítisengla. Af þeim sökum hefðu aðgerðir íslenskra stjórnvalda einungis getað beinst að erlendum aðilum. ESA heldur því fram að það gæti haft alvarlegar afleiðingar í för með sér fyrir löggæsluyfirvöld ef ríkjum væri óheimilt að beita aðgerðum á borð við þessar gegn útlendingum sem hyggjast stuðla að aðild innlendra aðila að alþjóðlegum samtökum á borð við Vítisengla.

99 Framkvæmdastjórnin heldur því fram að EES-réttur áskilji ekki að EES-ríki banni samtök áður en þau takmarka ferðafrelsi félaga slíkra samtaka, sem eru ríkisborgarar annarra EES-ríkja, og áður en unnt er að skírskota til allsherjarreglu. Á hinn bóginn verði stjórnvöld viðkomandi ríkis að grípa til skilvirkra aðgerða gegn viðkomandi samtökum og þeirri ógn sem stafar af þeim og meðlimum þeirra. Framkvæmdastjórnin leggur einnig áherslu á forsendur í dómi Evrópudómstólsins í máli *Van Duyn*, þar sem tiltekið er að ríki sé frjálst að synja um landgöngu, búsetu og atvinnu í ríkinu með skírskotun til allsherjarreglu þótt viðkomandi ríki beiti ekki eigin ríkisborgara sams konar takmörkunum. Þá vísar framkvæmdastjórnin til þess að ekki megi grípa til undantekninga á grundvelli allsherrjarreglu í því skyni að heimila óbeina mismunun.

Findings of the Court

100 Given its margin of appreciation to define the requirements for public policy and public security in accordance with its national needs (see paragraph 83 of this judgment), an EEA State cannot be obliged to declare the organisation in question and membership therein unlawful before it can deny a member of that organisation who is a national of another EEA State leave to enter its territory pursuant to Article 27 of the Directive, if recourse to such a declaration is not thought appropriate in the circumstances. In many circumstances, an outright prohibition could drive that organisation underground, thus making it difficult for the authorities to monitor its conduct.

101 However, given the limitations of said margin of appreciation, the competent authorities of an EEA State must have clearly defined their standpoint as regards the activities of the particular organisation in question and, considering the activities to be a threat to public policy and/or public security, they must have taken administrative measures to counteract these activities (compare *Van Duyn*, cited above, paragraph 17).

102 It is a matter for the national court to determine whether those requirements are met in the present case. However, it would appear to be common ground that the motorcycle organisation in question is viewed as a threat by the competent national authorities in the Nordic countries in general. Accordingly, a policy to resist the activities of such organisations was formulated by the national authorities of the Nordic countries. Moreover, it appears from the reference that since 2002 the head of the national Police of Iceland has instructed local police commissioners to implement this policy. In other words, the national authorities have been taking measures over a considerable period to prevent the national motorcycle club in question from becoming a charter of the Hells Angels, *inter alia*, by repeatedly denying foreign members of Hells Angels entry on arrival to Iceland by reference to public policy and public security.

Álit dómstólsins

100 Að virtu svigrúmi EES-ríkja til mats (sjá, 83. mgr. dómsins), verða þau ekki skylduð til að lýsa þau samtök sem um ræðir eða aðild að þeim ólögmæt áður en þau geta synjað aðila að samtökunum, sem er ríkisborgari annars EES-ríkis, um landgöngu á grundvelli 27. gr. tilskipunarinnar, að því gefnu að slík aðgerð teljist viðeigandi í ljósi aðstæðna. Í mörgum tilvikum gæti slíkt opinbert bann leitt til þess að samtök færu huldu höfði, sem aftur gæti hamlað eftirliti stjórnvalda með þeim.

101 Að teknu tilliti til þeirra takmarkana sem gera verður á áðurgreindu svigrúmi til mats, verða lögbær stjórnvöld EES-ríkis á hinn bóginn að hafa skilgreint afstöðu sína til starfsemi þeirra samtaka sem um ræðir með skýrum hætti og að hafa gripið til stjórnvaldsathafna í því skyni að vinna gegn starfseminni, í þeim tilvikum þegar hún hefur verið álitin ógn við allsherjarreglu og/eða almannaöryggi (sbr. áður tilvitnað mál *Van Duyn*, 17. mgr.).

102 Það er á hendi landsdómstóla að ákveða hvort þessi skilyrði séu uppfyllt í því máli sem hér um ræðir. Á hinn bóginn virðist almenn samstaða vera um það að þau vélhjólasamtök sem málið varðar séu almennt álitin ógn af hálfu lögbærra stjórnvalda á Norðurlöndunum. Í samræmi við það hlutuðust stjórnvöld á Norðurlöndunum til um gerð stefnu í því skyni að bregðast við slíkri starfsemi. Enn fremur má ráða af beiðni Hæstaréttar að ríkislögreglustjóri á Íslandi hafi allt frá árinu 2002 gefið lögreglustjórum á landinu öllu fyrirmæli um að taka upp áðurgreinda stefnu. Íslensk stjórnvöld hafi með öðrum orðum gert ráðstafanir til þess um langt skeið að koma í veg fyrir að innlendir vélhjólaklúbbar yrðu fullgildir meðlimir Vítisengla, meðal annars með því að synja erlendum meðlimum Vítisengla ítrekað um landgöngu með skírskotun til allsherjarreglu og almannaöryggis.

103 The third question also raises the issue whether measures against nationals of the host State in a similar position to the individual in question are also required in order not to preclude recourse to the public policy and public security exceptions under Article 27 of the Directive.

104 The reservations contained in Article 27 of the Directive permit EEA States to adopt, with respect to the nationals of other EEA States and on the grounds specified in those provisions, in particular grounds justified by the requirements of public policy, measures which they cannot apply to their own nationals, inasmuch as they have no authority to expel the latter from the national territory or to deny them access thereto. Although that difference of treatment, which bears upon the nature of the measures available, must therefore be allowed, it must be emphasized that the national authority of an EEA State empowered to adopt such measures must not base the exercise of its powers on assessments of certain conduct which would have the effect of applying an arbitrary distinction to the detriment of nationals of other EEA States (compare, *mutatis mutandis*, Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, paragraphs 7 to 9).

105 For the sake of order it is also recalled that the reservations contained in Article 27 of the Directive do not entitle EEA States to restrict the right of EEA nationals to move and reside freely on the basis of conduct unless such conduct on the part of its own nationals gives rise to repressive or other genuine and effective measures (compare, *mutatis mutandis*, *Adoui and Cornuaille*, cited above, paragraphs 7 to 9, and Joined Cases C-65/95 and C-111/95 *Shingara and Radiom* [1997] ECR I-3343, paragraph 28).

106 In the present case, however, the threat the national authorities were facing was the final stage in the process of a national motorcycle club acceding to become a full charter member of an international motorcycle club associated with organised crime. Moreover, based on the authorities' assessment, it was considered very likely that accession would lead to an increase in serious crime.

103 Þriðja spurningin vekur einnig upp álitaefni um hvort enn fremur sé áskilið að grípa þurfi til aðgerða gegn ríkisborgurum aðildarríkis, sem eru í sambærilegri aðstöðu og stefnandi, til að undantekningar 27. gr. tilskipunarinnar á grundvelli allsherjarreglu og almannaöryggis geti átt við.

104 Fyrirvarar í 27. gr. tilskipunarinnar heimila EES-ríkjum að grípa til aðgerða gagnvart ríkisborgurum annarra EES-ríkja en sinna eigin á grundvelli þeirra ástæðna sem greinir í ákvæðinu, en þetta eru einkum aðgerðir sem réttlættar eru í þágu allsherjarreglu. Þetta eru aðgerðir sem EES-ríki geta ekki beitt gagnvart eigin ríkisborgurum, enda er þeim óheimilt að vísa þeim frá landi eða synja þeim landgöngu. Heimila verður þann greinarmun sem gerður er þarna á, sem aftur markast af eðli þeirra ráðstafana sem um ræðir. Á hinn bóginn verður að leggja áherslu á að lögbær stjórnvöld EES-ríkis fari með þessar valdheimildir sínar á þann veg að ekki sé í reynd um að ræða geðþóttaákvarðanir byggðar á mati á háttsemi, sem feli í sér mismunun á kostnað ríkisborgara annarra EES-ríkja (sbr., að breyttu breytanda, sameinuð mál 115/81 og 116/81 *Adoui og Cornuaille* [1982] ECR 1665, 7. mgr. til 9. mgr.).

105 Til að öllu sé til haga haldið verður að árétta að þau skilyrði sem greinir í 27. gr. tilskipunarinnar veita EES-ríkjum ekki rétt til að takmarka ferðafrelsi EES-borgara á grundvelli háttsemi þeirra, nema slík háttsemi af hálfu þeirra eigin borgara gefi tilefni til þvingunarráðstafana eða annarra raunverulegra og skilvirkra aðgerða af hálfu viðkomandi ríkis (sbr., að breyttu breytanda, áður tilvitnað mál *Adoui og Cornuaille*, 7. mgr. til 9. mgr., og sameinuð mál C-65/95 og C-111/95 *Shingara og Radiom* [1997] ECR I-3343, 28. mgr.).

106 Eins og atvikum málsins er háttað, þá stóðu stjórnvöld frammi fyrir þeirri hættu að innlendur vélhjólaklúbbur væri á lokastigum inngönguferlis í alþjóðleg vélhjólasamtök, sem tengsl hefðu við skipulagða glæpastarfsemi. Þá var enn fremur talið að aðild þessi myndi leiða til að alvarlegum afbrotum fjölgaði og var sú afstaða reist á sérstöku mati stjórnvalda.

107 Furthermore, it appears from the reference that the national motorcycle club needed the support of an established charter of Hells Angels in order to become a full charter itself and, for that reason, the measures in question could only target foreigners. Since there was no such charter in Iceland, the support of a foreign member was a prerequisite. Thus, *prima facie*, it appears that in the particular situation of the present case only a foreigner could represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

108 The answer to the third question must therefore be that an EEA State cannot be obliged to declare an organisation and membership therein unlawful before it can deny a member of that organisation who is a national of another EEA State leave to enter its territory pursuant to Article 27 of the Directive if recourse to such a declaration is not thought appropriate in the circumstances. However, the EEA State must have clearly defined its standpoint as regards the activities of that organisation and, considering the activities to be a threat to public policy and/or public security, it must have taken administrative measures to counteract those activities.

The fourth question

109 By its fourth question, the referring court essentially seeks to establish whether for the purposes of considering public policy and/or public security threatened within the meaning of Article 27(1) of the Directive it suffices under EEA law that, in its legislation, an EEA State has defined as punishable, conduct that consists of conniving with another person in the commission of an act, the commission of which is part of the activities of a criminal organisation, or whether such legislation must be considered general prevention within the meaning of Article 27(2) of the Directive.

Observations submitted to the Court

110 The Plaintiff submits that the provision of the Icelandic Penal Code was enacted to fulfil Iceland's obligation to implement the

107 Þá verður ráðið af beiðni Hæstaréttar að hinn innlendi vélhjólaklúbbur hafi þarfnast stuðnings af hálfu staðfestrar deildar innan samtaka Vítisengla til þess að geta sjálfur orðið fullgildur aðili að samtökunum. Þar sem engra slíkra félagsdeilda naut við á Íslandi, var þegar af þeirri ástæðu ljóst að stuðningur af hálfu erlends aðila var forsenda fyrir inngöngu í hin alþjóðlegu samtök Vítisengla. Fljótt á litið gat því aðeins erlendur aðili verið til þess fallinn að fela í sér raunverulega, yfirvofandi og nægilega alvarlega ógn við einhverja af grundvallarhagsmunum samfélagsins. Af þessum sökum lá fyrir að aðgerðir stjórnvalda gátu einungis beinst að erlendum aðilum.

108 Svarið við þriðju spurningunni verður því á þá leið að EES-ríki er ekki skylt að lýsa samtök og aðild að þeim ólögmæta í því skyni að synja ríkisborgara annars EES-ríkis um landgöngu á grundvelli 27. gr. tilskipunarinnar, að því gefnu að slík aðgerð teljist viðeigandi í ljósi aðstæðna. EES-ríki verða á hinn bóginn að hafa afmarkað afstöðu sína til starfsemi þeirra samtaka sem um ræðir með skýrum hætti og að hafa gripið til stjórnvaldsathafna í því skyni að vinna gegn starfseminni, í þeim tilvikum þegar hún hefur verið álitin ógn við allsherjarreglu og/eða almannaöryggi.

Fjórða spurningin

109 Með fjórðu spurningunni spyr Hæstiréttur í reynd hvort það nægi, til að telja allsherjarreglu og/eða almannaöryggi ógnað í merkingu 1. mgr. 27. gr. tilskipunarinnar, að EES-ríki hafi í löggjöf lýst refsiverða háttsemi sem felst í því að sammælast við annan mann um að fremja verknað og framkvæmd verknaðarins er liður í starfsemi skipulagðra brotasamtaka, eða hvort slík lagasetning teljist almenn forvarnarforsenda í merkingu 2. mgr. 27. gr. tilskipunarinnar.

Athugasemdir sem lagðar voru fyrir dómstólinn

110 Stefnandi bendir á að ákvæði íslenskra hegningarlaga hafi verið sett til að uppfylla skyldur Íslands um að

United Nations Convention against Transnational Organized Crime of 2000 and is not connected to rules of national law on the refusal of entry on grounds of public policy and public security. Consequently, it is not foreseeable to an individual concerned that he could be denied entry into the State on the grounds of his membership of an organisation. The Plaintiff notes that the provision does not make it illegal to establish a criminal organisation, but increases the mandatory sentence. As the provision does not pertain to the conduct of the Plaintiff, it cannot be relevant in deciding whether the requirements of Article 27 of the Directive have been fulfilled. According to the Plaintiff, for a provision to justify a restriction on the right to free movement, it would have to refer to particular organisations. As it is, the content of the provision constitutes simply general prevention within the meaning of Article 27. As case law has established, expulsion or refusal of entry cannot be justified on grounds of general prevention.

111 The Defendant submits that, as follows from its answers to the second and third questions, for the purposes of imposing a restriction on free movement it is not relevant whether the conduct against which measures are taken on grounds of public policy and public security is criminalised. However, the enactment of criminal sanctions against particular conduct can be relevant in assessing whether conduct is of a sufficiently serious nature to justify restrictions on the entry of nationals of other EEA States.

112 ESA notes that the Icelandic authorities did not base their decision to deny entry on the provision of national law specified in the question. Nonetheless, a national provision such as that at issue can constitute proof of an established practice to counteract organised crime. ESA submits, however, that a general reference to provisions of national law defining organised crime as punishable cannot, as such, constitute sufficient grounds for denying entry. In accordance with Article 27(2) of the Directive, national authorities are obliged to undertake a specific assessment as to whether the personal conduct of the individual concerned can be considered to represent a threat.

innleiða samning Sameinuðu þjóðanna gegn fjölþjóðlegri, skipulagðri brotastarfsemi frá árinu 2000 og séu ekki tengd reglum landsréttar um að takmarka landgöngu á grundvelli allsherjarreglu og almannaöryggis. Einstaklingur geti því ekki séð fyrir að honum kunni að verða meinuð landganga á grundvelli aðildar að samtökum. Stefnandi tekur fram að ákvæðið geri það ekki ólögmætt að koma á fót skipulagðri glæpastarfsemi, heldur feli það einungis í sér refsihækkunarástæðu. Þar sem ákvæðið taki ekki til framferðis stefnanda sé ekki hægt að horfa til þess við mat á hvort skilyrði 27. gr. tilskipunarinnar séu uppfyllt. Samkvæmt stefnanda verði ákvæðið að vísa til tiltekinna samtaka svo heimilt sé að takmarka rétt einstaklings til frjálsrar farar. Eins og orðalagi ákvæðisins sé nú háttað feli það aðeins í sér almennar takmarkanir innan marka 27. gr. tilskipunarinnar. Dómafordæmi styðji að ekki sé hægt að synja einstaklingi um landgöngu eða vísa honum úr landi á grundvelli almennra forvarnarforsendna.

111 Að mati stefnda leiðir það af svörum hans við spurningum tvö og þrjú að það hafi ekki þýðingu við mat á réttmæti skerðingar á ferðafrelsi sem byggir á allsherjarreglu og almannaöryggi hvort háttsemin sem hún beinist að sé lýst refsiverð. Á hinn bóginn geti sú staðreynd að athöfn sé gerð refsiverð haft áhrif við mat þess hvort af henni stafi nægileg ógn til að heimilt sé að synja EES-ríkisborgara landgöngu í öðru EES-ríki.

112 ESA bendir á að íslensk stjórnvöld hafi ekki byggt ákvörðun sína um að synja stefnanda um landgöngu á þeim ákvæðum sem vísað er til í spurningunni. Samt sem áður geti þau ákvæði landsréttar sem hér um ræðir falið í sér sönnun um viðtekna framkvæmd við að vinna gegn skipulagðri glæpastarfsemi. ESA telur þó að almenn tilvísun til ákvæða landsréttar, sem kveði á um að skipulögð glæpastarfsemi sé refsiverð, geti ekki talist nægilegur grundvöllur synjunar um landgöngu. Samkvæmt 2. mgr. 27. gr. tilskipunarinnar sé yfirvöldum aðildarríkis skylt að meta sérstaklega hvort framferði hlutaðeigandi einstaklings feli í sér ógn.

113 The Commission underlines the role of the procedural safeguards contained in the Directive, in particular Article 31. This guarantee of judicial redress procedures provides for the possibility of review before a court within the procedural autonomy of the State concerned, subject to compliance with the principles of equivalence and effectiveness. It is for the national court to determine whether the administrative authorities have discharged the burden of showing that sufficient evidence exists to entitle them to come to the conclusion that the applicant was likely to engage in such activities. It must also determine whether the decision taken complies with the principle of proportionality in that it must be appropriate for securing the attainment of the objective which it pursues and must not go beyond what is necessary to achieve it.

Findings of the Court

114 At the outset, the Court notes that the national authorities did not base their decision to deny entry on the provision specified in the fourth question.

115 Pursuant to Article 27(2) of the Directive, "measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned" and "justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted". Moreover, "previous criminal convictions shall not in themselves constitute grounds for the taking of such measures".

116 As departures from the rules concerning the free movement of persons constitute exceptions which must be strictly construed, the concept of "personal conduct" expresses the requirement that a decision denying leave to enter the territory may only be made for breaches of public policy and public security which might be committed by the individual affected.

117 A criminal sanction, such as the one in question, can be relevant in demonstrating whether conduct is of a sufficiently serious nature to justify restrictions on the entry of nationals of other

113 Framkvæmdastjórnin leggur áherslu á málsmeðferðarreglur tilskipunarinnar í þágu réttaröryggis, einkum 31. gr. hennar. Er það álit framkvæmdastjórnarinnar að réttur manna til að fá úrlausn um réttindi sín fyrir dómstólum samkvæmt ákvæðinu feli í sér tryggingu fyrir endurskoðun ákvörðunar í samræmi við réttarfarsreglur aðildarríkisins, að gættu samræmi við grundvallarreglur EES-réttar um jafnræði við málsmeðferð og skilvirka framkvæmd EES-réttar. Það sé undir landsdómstólnum komið að taka afstöðu til þess hvort stjórnvöldum hafi tekist að færa fullnægjandi sönnur á að þau hafi haft nægileg gögn til að ætla að stefnandi væri líklegur til að taka þátt í þeim athöfnum sem af er látið. Einnig verði að taka til skoðunar hvort ákvörðunin sé í samræmi við meðalhófsregluna, það er að ákvörðunin sé til þess fallin að ná því markmiði sem að er stefnt og að hún fari ekki út fyrir þau mörk sem eru nauðsynleg til að ná því marki.

Álit dómstólsins

114 Áður en lengra er haldið telur dómstóllinn rétt að taka fram að íslensk stjórnvöld hafa ekki reist ákvörðun sína um að synja um landgöngu á grundvelli þeirra ákvæða sem fjórða spurningin lýtur að.

115 Samkvæmt 2. mgr. 27. gr. tilskipunarinnar skulu „ráðstafanir, sem gerðar eru með skírskotun til allsherjarreglu eða almannaöryggis, [...] vera í samræmi við meðalhófsregluna og alfarið byggjast á framferði hlutaðeigandi einstaklings“ og „rök sem varða ekki atriði málsins eða sem byggja á almennum forvarnarforsendum skulu ekki tekin gild“. Enn fremur er þar mælt fyrir um að „fyrri refsilagabrot nægja ekki ein og sér til þess að slíkum ráðstöfunum sé beitt“.

116 Þar sem frávik frá reglum um réttinn til frjálsrar farar fólks fela í sér undantekningar sem túlka verður þröngt, felur hugtakið „framferði einstaklings“ í sér kröfu um að ákvörðun um að synja um landgöngu verði einungis tekin með skírskotun til brots á allsherjarreglu og almannaöryggis sem hlutaðeigandi einstaklingur kynni að fremja.

117 Refsikennd viðurlög á borð við þau sem um ræðir geta haft þýðingu við að sýna fram á að tiltekin háttsemi sé nægilega

EEA States where the individual in question is convicted of that crime and that particular conviction is part of the assessment on which the national authorities base their decision. However, the derogations from the free movement of persons must be interpreted restrictively, with the result that a previous conviction can justify denying entry only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy and/or public security (compare, to that effect, Case C-348/96 *Calfa* [1999] ECR I-11, paragraphs 22 to 24). It is clear that this has to be assessed by the national court on a case-by-case basis.

118 The Court therefore concludes that in order to invoke a public policy and/or public security threat under Article 27(1) of the Directive it does not suffice that an EEA State has defined as punishable, conduct that consists of conniving with another person in the commission of an act, the commission of which is part of the activities of a criminal organisation.

The fifth question

119 By its fifth question, the referring court essentially seeks to establish whether Article 27(2) of the Directive should be understood as meaning that a premise for the application of measures under Article 27(1) of the Directive against a specific individual is that national authorities of an EEA State must adduce a probability that the individual in question intends to indulge in certain activities in order for the individual's conduct to be considered a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

Observations submitted to the Court

120 The Plaintiff asserts that the burden of proof in relation to Article 27 lies with the EEA States. According to the ECJ's judgment in *Bouchereau*, cited above, in particular paragraph 35, recourse to the concept of public policy and public security presupposes conduct that poses a genuine, imminent and sufficiently serious

alvarlegs eðlis til að réttlæta takmarkanir á rétti ríkisborgara annarra EES-ríkja til landgöngu, að því gefnu að hlutaðeigandi einstaklingur hafi verið fundinn sekur um slíkan glæp og að sú sakfelling hafi verið hluti af því mati stjórnvalda sem þau reistu ákvörðun sína á. Á hinn bóginn verður að túlka frávik frá ferðafrelsi einstaklinga þrengjandi, þannig að fyrri sakfelling geti einungis leitt til synjunar um landgöngu í tilvikum þar sem þær aðstæður, sem voru tilefni sakfellingar, gefa tilefni til að ætla að persónulegt framferði einstaklings feli í sér yfirvofandi ógn við allsherjarreglu og almannaöryggi (sjá, um sams konar atriði,, mál C-348/96 *Calfa* [1999] ECR I-11, 22. mgr. til 24. mgr.). Ljóst er að það er á valdi landsdómstóla að meta þetta í hverju máli fyrir sig.

118 Dómstóllinn telur því að sú staðreynd að EES-ríki hafi lýst refsiverða háttsemi, sem felst í því að sammælast við annan mann um að fremja verknað og framkvæmd verknaðarins er liður í starfsemi skipulagðra brotasamtaka, sé ekki nægileg til að telja allsherjarreglu og/eða almannaöryggi ógnað í merkingu 1. mgr. 27. gr. tilskipunarinnar.

Fimmta spurningin

119 Með fimmtu spurningunni spyr Hæstiréttur í reynd hvort skilja beri 2. mgr. 27. gr. tilskipunarinnar á þann veg, að það sé forsenda fyrir beitingu úrræða samkvæmt 1. mgr. 27. gr. tilskipunarinnar gagnvart tilteknum einstaklingi, að aðildarríkið þurfi að leiða að því líkur að ásetningur viðkomandi einstaklings standi til þess að viðhafa háttsemi sem felst í tiltekinni eða tilteknum aðgerðum eða aðgerðarleysi svo framferði einstaklingsins geti talist raunveruleg, yfirvofandi og nægilega alvarleg ógn við einhverja af grundvallarhagsmunum samfélagsins.

Athugasemdir sem lagðar voru fyrir dómstólinn

120 Stefnandi byggir á að sönnunarbyrði á grundvelli 27. gr. tilskipunarinnar liggi hjá EES-ríkjunum. Samkvæmt dómi Evrópudómstólsins í áður tilvitnuðu máli *Bouchereau*, einkum 35. mgr. dómsins, hafi hugtökin allsherjarregla og almannaöryggi

threat affecting one of the fundamental interests of society. It is for the national court to determine whether the administrative authorities have discharged the burden of proof in this regard.

121 The Defendant submits that, pursuant to the provisions of the Directive, citizens of the Union, even long-term residents, may be expelled on the basis of a criminal conviction for a particular criminal activity. It follows from the ECJ's judgments in *Orfanopoulos and Oliveri*, cited above, and Case C-50/06 *Commission* v *Netherlands* [2007] ECR I-4383 that only expulsion which is an automatic consequence of an imposed prison sentence without any individual assessment infringes the requirements of Article 27 of the Directive.

122 Restrictions on free movement can be imposed if an individual assessment has been undertaken. The Defendant argues that a general assessment, based on past conduct and predictions of future conduct, is sufficient to establish a threat resulting from individual conduct. Therefore, in order to take restrictive measures on grounds of public policy and public security, there is no requirement on the public authorities to demonstrate the probability that the individual in question intends to indulge in certain activities.

123 ESA contends that in order to demonstrate that personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, it suffices that the individual in question is a member of an organisation that is assumed to practise activities that are considered harmful to society, as the person in question has by his participation identified with the aims of the organisation in question. That an individual has a clean criminal record does not preclude the national authorities from concluding that he represents a threat.

124 The Commission underlines the role of the procedural safeguards contained in the Directive, in particular Article 31. This guarantee of judicial redress procedures provides for the possibility of review before a court within the procedural autonomy of the State concerned, subject to compliance with the principles of

verið skilin svo að framferði einstaklings þurfi að fela í sér raunhæfa, yfirvofandi og nægilega aðsteðjandi ógn við einhverja af grundvallarhagsmunum samfélagsins. Það sé undir landsdómstólum komið að meta hvort stjórnvöld hafi fært fram nægar sönnur fyrir máli sínu.

121 Stefndi heldur því fram að samkvæmt ákvæðum tilskipunarinnar sé heimilt að vísa EES-ríkisborgara úr landi, jafnvel eftir langa búsetu, á grundvelli dóms vegna refsiverðrar háttsemi. Af dómi Evrópudómstólsins í áður tilvitnuðu máli *Orfanapoulos og Oliveri*, og máli C-50/06 *Framkvæmdastjórnin* gegn *Hollandi* [2007] ECR I-4383, leiði að aðeins sjálfkrafa brottvísun úr landi vegna dæmdrar fangelsisvistar, án einstaklingsbundins mats, felur sér brot gegn 27. gr. tilskipunarinnar.

122 Stefndi telur að heimilt sé að takmarka frjálsa för ef einstaklingsbundið mat hefur farið fram. Stefndi telur að almennt mat, sem byggir á fyrri háttsemi og forspá um háttsemi í framtíðinni, sé nægilegt til að staðfesta hvort ógn stafi af háttsemi einstaklinga. Í því samhengi verði ekki lögð sú skylda á stjórnvöld að sýna fram á líkindi þess að einstaklingur ætli sér að taka þátt í ákveðnum athöfnum til að þau geti takmarkað frelsi hans á grundvelli allsherjarreglu og almannaöryggis.

123 ESA telur að til að sýnt sé fram á að framferði einstaklings feli í sér raunverulega, yfirvofandi og nægilega alvarlega ógn við einhverja af grundvallarhagsmunum samfélagsins, sé nóg að viðkomandi einstaklingur eigi aðild að samtökum sem talin eru stunda starfsemi sem fara gegn hagsmunum samfélagsins, þar sem hann hafi þá með aðild sinni samsamað sig markmiðum þeirra samtaka sem um ræðir. Í því samhengi girði sú staðreynd að einstaklingur hafi hreina sakaskrá ekki fyrir að stjórnvöld aðildarríkis álykti sem svo að af honum steðji ógn.

124 Framkvæmdastjórnin leggur áherslu á málsmeðferðarreglur tilskipunarinnar í þágu réttaröryggis, einkum 31. gr. hennar. Er það álit framkvæmdastjórnarinnar að réttur manna til að fá úrlausn um réttindi sín fyrir dómstólum samkvæmt ákvæðinu feli í sér tryggingu fyrir endurskoðun ákvörðunar í samræmi

equivalence and effectiveness. It is a matter for the national court to determine whether the administrative authorities have discharged the burden of showing that sufficient evidence exists to entitle them to come to the conclusion that the applicant was likely to engage in activities considered to represent a genuine, present and sufficiently serious threat. The national court must also determine whether the decision taken complies with the principle of proportionality in that it must be appropriate for securing the attainment of the objective which it pursues and must not go beyond what is necessary to achieve it.

Findings of the Court

125 In order to restrict rights of an EEA national under Article 27 of the Directive, the national authorities are required to demonstrate the existence of a genuine and sufficiently serious threat to one of the fundamental interests of society (compare *Rutili*, paragraph 28; *Bouchereau*, paragraph 35; *Orfanopoulos and Oliveri*, paragraph 66, and *Commission* v *Germany*, paragraph 35, all cited above).

126 As has been rightly emphasised by the Commission, Article 31 of the Directive obliges the EEA States to lay down, in domestic law, the measures necessary to enable EEA nationals and members of their families to have access to judicial and, where appropriate, administrative redress procedures to appeal against or seek review of any decision restricting their right to move and reside freely in the EEA States on the grounds of public policy, public security or public health (compare, to this effect, Case C-249/11 *Byankov*, judgment of 4 October 2012, not yet reported, paragraph 53).

127 In accordance with Article 31(3) of the Directive, the redress procedures must include an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based (compare, to that effect, Case C-300/11 *ZZ*, judgment of 4 June 2013, not yet reported, paragraph 47).

við réttarfarsreglur aðildarríkisins, að gættu samræmi við grundvallarreglur EES-réttar um jafnræði við málsmeðferð og skilvirka framkvæmd EES-réttar. Það sé undir landsdómstólum komið að taka afstöðu til þess hvort stjórnvöldum hafi tekist að færa fullnægjandi sönnur á að þau hafi haft nægileg gögn til að ætla að stefnandi væri líklegur til að taka þátt athöfnum sem taldar væru fela í sér raunverulega, yfirvofandi og nægilega alvarlega ógn. Einnig verður að taka til skoðunar hvort ákvörðunin sé í samræmi við meðalhófsregluna, það er að ákvörðunin sé viðeigandi í því skyni að tryggt sé að markmiðum hennar sé náð og að hún gangi ekki lengra en þörf krefur til að ná því marki.

Álit dómstólsins

125 Í því skyni að takmarka réttindi EES-borgara á grundvelli 27. gr. tilskipunarinnar þurfa stjórnvöld að sýna fram á að til staðar sé raunverulega og nægilega alvarleg ógn við einhverja af grundvallarhagsmunum samfélagsins (sbr. áður tilvitnuð mál *Rutili*, 28. mgr.; *Bouchereau*, 35. mgr.; *Orfanopoulos og Oliveri*, 66. mgr.; og *Framkvæmdastjórnin* gegn *Þýskalandi*, 35. mgr.).

126 Framkvæmdastjórnin hefur réttilega lagt áherslu á að 31. gr. tilskipunarinnar áskilur að aðildarríki mæli fyrir um málskotsleiðir að lögum til að gera EES-borgurum og fjölskyldumeðlimum þeirra kleift að leita úrlausnar dómstóla og, eftir því sem við á, úrræði til að óska endurskoðunar æðri stjórnvalda á hvers konar ákvörðun sem tekin hefur verið í máli þeirra á grundvelli allsherjarreglu, almannaöryggis eða lýðheilsu og takmarkar rétt þeirra til frjálsrar farar í aðildarríkjum EES-samningsins (sbr., um sambærilegt atriði, mál C-249/11 *Byankov*, dómur 4. október 2012, óbirtur dómur, 53. mgr.).

127 Samkvæmt 3. mgr. 31. gr. tilskipunarinnar skulu þessi úrræði fela í sér athugun á því hvort ákvörðun samræmist lögum og einnig á þeim atvikum og aðstæðum sem fyrirhuguð ráðstöfun er byggð á (sbr., um sams konar atriði, mál C-300/11 *ZZ*, dómur 4. júní 2013, óbirtur dómur, 47. mgr.).

128 In the context of the judicial review of the legality of the decision taken under Article 27 of the Directive, it is incumbent upon the EEA States to lay down rules enabling the court entrusted with such review to examine both all the grounds and the related evidence on the basis of which the decision was taken (compare, to that effect, *ZZ*, cited above, paragraph 59).

129 Thus, subject to compliance with the principles of equivalence and effectiveness (see *Koch and Others*, cited above, paragraph 118), it is a matter for the national court to determine whether the administrative authorities have discharged the burden of showing that there is sufficient evidence to conclude that the individual in question engages or is likely to engage in personal conduct, such as actual membership in a motorcycle club associated with organised crime, that represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

130 The Court therefore holds that the national administrative authorities must ensure that there is sufficient evidence to conclude under Article 27(2) of the Directive that the individual concerned was likely to engage in personal conduct that represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It is for the national court to determine, in compliance with the principles of equivalence and effectiveness, whether this is the case.

IV COSTS

131 The costs incurred by the Norwegian Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before Hæstiréttur Íslands, any decision on costs for the parties to those proceedings is a matter for that court.

128 Hvað endurskoðun dómstóla á lögmæti ákvörðunar samkvæmt 27. gr. tilskipunarinnar varðar, þá hvílir sú skylda á EES-ríkjum að kveða á um reglur sem gera lögbærum dómstól það kleift að framkvæma slíka endurskoðun, það er að rannsaka allar þær ástæður og þau sönnunargögn sem liggja til grundvallar ákvörðun (sbr., um sambærilegt atriði, áður tilvitnað mál *ZZ*, 59. mgr.).

129 Það er því á forræði landsdómstóla, með fyrirvara um að gætt sé meginreglna um jafnræði við málsmeðferð og skilvirkni (sjá áður tilvitnað mál, *Koch o.fl.*, 118. mgr.), að ákveða hvort stjórnvöld hafi leitt að því líkur að tiltekinn einstaklingur viðhafi eða sé líklegur til að viðhafa háttsemi sem telst raunveruleg, yfirvofandi og nægilega alvarleg ógnun við einhverja af grundvallarhagsmunum samfélagsins. Slík háttsemi gæti falið í sér eiginlega aðild að vélhjólaklúbbi sem hefði tengsl við skipulagða glæpastarfsemi.

130 Dómstóllinn telur því að innlend stjórnvöld verði að tryggja að nægileg sönnunargögn standi til þess að sýnt sé að tiltekinn einstaklingur hafi verið líklegur til að viðhafa háttsemi sem telst raunveruleg, yfirvofandi og nægilega alvarleg ógnun við einhverja af grundvallarhagsmunum samfélagsins í merkingu 2. mgr. 27. gr. tilskipunarinnar.

VI MÁLSKOSTNAÐUR

131 Ríkisstjórn Noregs, ESA og framkvæmdastjórnin, sem skilað hafa greinargerðum til EFTA-dómstólsins, skulu bera sinn málskostnað hver fyrir sitt leyti. Þar sem um er að ræða mál sem er hluti af málarekstri fyrir Hæstarétti Íslands kemur það í hlut þess dómstóls að kveða á um kostnað málsaðila.

On those grounds,

THE COURT

in answer to the questions referred to it by Hæstiréttur Íslands hereby gives the following Advisory Opinion:

1. **Under Article 7 EEA, an EEA/EFTA State has the choice of form and method when implementing an act corresponding to Directive 2004/38/EC into its legal order. Depending on the legal context, the implementation of a directive does not necessarily require legislative action, as long as it is implemented with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty.**

2. **It is sufficient for an EEA State to base a decision under Article 27 of the Directive not to grant an individual who is a national of another EEA State leave to enter its territory on grounds of public policy and/or public security only upon a danger assessment, which assesses the role of the individual in the accession of a new charter to an organisation of which the individual is a member and which concludes that the organisation is associated with organised crime and that where such an organisation has managed to establish itself, organised crime has increased. It is further required that the assessment is based exclusively on the personal conduct of the individual concerned. Moreover, this personal conduct must represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society, and the restriction on the right to entry must be proportionate. In the light of the relevant matters of fact and law, it is for the national court to determine whether those requirements are met.**

3. **An EEA State cannot be obliged to declare an organisation and membership therein unlawful before it can deny a member of that organisation who is a national of another EEA State leave to enter its territory pursuant to Article 27 of the Directive if recourse to such a declaration is not thought appropriate in the circumstances. However, the EEA State must have clearly defined its standpoint as regards the activities of that organisation and, considering the activities to be a threat to public policy and/or public security, it must have taken administrative measures to counteract those activities.**

Með vísan til framangreindra forsenda lætur,

DÓMSTÓLLINN

uppi svohljóðandi ráðgefandi álit um spurningar þær sem Hæstiréttur Íslands beindi til dómstólsins:

1. **Samkvæmt 7. gr. EES-samningsins hefur samningsríki val um form og aðferð við að taka upp í landsrétt gerð sem svarar til tilskipunar 2004/38/EB. Innleiðing tilskipunar gerir ekki endilega kröfu um setningu laga, en það ræðst af þeim reglum sem fyrir eru í landsrétti. Ákvæði tilskipunarinnar verða á hinn bóginn að hafa ótvíræð bindandi áhrif og vera innleidd með nægilega skýrum og glöggum hætti til þess að skilyrði meginreglunnar um réttarvissu séu uppfyllt**

2. **Samkvæmt 27. gr. tilskipunarinnar hefur EES-ríki heimild til að synja ríkisborgara annars EES-ríkis um landgöngu með skírskotun til allsherjarreglu og/eða almannaöryggis á grundvelli hættumats eins og sér, sem hefur að geyma mat á því hvert hlutverk viðkomandi einstaklings er við inngönguferli að samtökum sem einstaklingurinn er aðili að og þar sem ályktað er að þau samtök, sem einstaklingurinn tilheyrir, hafi tengsl við skipulagða glæpastarfsemi og að sýnt sé að þar sem slík samtök hafi skotið rótum hafi aukin og skipulögð glæpastarfsemi fylgt í kjölfarið. Slíkt hættumat verður einungis reist á framferði hlutaðeigandi einstaklings, sem verður þá að fela í sér raunverulega, yfirvofandi og nægilega alvarlega ógn við einhverja af grundvallarhagsmunum samfélagsins en þannig að gætt sé meðalhófs við takmarkanir ferðafrelsis. Það er á valdi landsdómstóla að leggja mat á hvort þessi skilyrði séu uppfyllt með hliðsjón af þeim staðreyndum og málatilbúnaði aðila sem þýðingu hafa hverju sinni.**

3. **EES-ríki er ekki skylt að lýsa samtök eða aðild að þeim ólögmæta í því skyni að synja ríkisborgara annars EES-ríkis um landgöngu á grundvelli 27. gr. tilskipunarinnar, að því gefnu að slík aðgerð teljist viðeigandi í ljósi aðstæðna. EES-ríki verða á hinn bóginn að hafa afmarkað afstöðu sína til starfsemi þeirra samtaka sem um ræðir með skýrum hætti og að hafa gripið til stjórnvaldsathafna í því skyni að vinna gegn starfseminni, í þeim tilvikum þegar hún hefur verið álitin ógn við allsherjarreglu og/eða almannaöryggi.**

4. **In order to invoke a public policy and/or public security threat under Article 27(1) of the Directive it does not suffice that an EEA State has defined as punishable, conduct that consists of conniving with another person in the commission of an act, the commission of which is part of the activities of a criminal organisation.**

5. **The national administrative authorities must ensure that there is sufficient evidence to conclude under Article 27(2) of the Directive that the individual concerned was likely to engage in personal conduct that represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It is for the national court to determine, in compliance with the principles of equivalence and effectiveness, whether this is the case.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 22 July 2013.

Michael-James Clifton — Acting Registrar

Carl Baudenbacher — President

4. **Sú staðreynd að EES-ríki hafi lýst refsiverða háttsemi, sem felst í því að sammælast við annan mann um að fremja verknað og framkvæmd verknaðarins er liður í starfsemi skipulagðra brotasamtaka, er ekki nægileg til að telja allsherjarreglu og/eða almannaöryggi ógnað í merkingu 1. mgr. 27. gr. tilskipunarinnar.**

5. **Innlend stjórnvöld verða að tryggja að nægileg sönnunargögn standi til þess að sýnt sé að tiltekinn einstaklingur hafi verið líklegur til að viðhafa háttsemi sem telst raunveruleg, yfirvofandi og nægilega alvarleg ógn við einhverja af grundvallarhagsmunum samfélagsins. Það er á forræði landsdómstóla, með fyrirvara um að gætt sé meginreglna um jafnræði við málsmeðferð og skilvirkni, að skera úr um hvort svo sé.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Kveðið upp í heyranda hljóði í Lúxemborg 22. júlí 2013.

Michael-James Clifton — Settur dómritari

Carl Baudenbacher — Forseti

REPORT FOR THE HEARING

in Case E-15/12

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 (the Supreme Court of Iceland), in the case between

Jan Anfinn Wahl

and

the Icelandic State

concerning the interpretation of Article 27 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

I INTRODUCTION

1. By a letter of 5 December 2012, registered at the EFTA Court on 17 December 2012, the Hæstiréttur *Íslands* (the Supreme Court of Iceland) made a request for an Advisory Opinion in a case pending before it between Jan Anfinn Wahl (hereinafter "Plaintiff") and the Icelandic State (hereinafter "Defendant").

2. The Plaintiff, a Norwegian national and member of the association *Hell's Angels*, was denied entry into Iceland. The subsequent administrative appeal of the Plaintiff was rejected on the grounds that, in light of the alleged activities of the said association and its links to organised crime, individuals belonging to that association were considered to constitute a real threat to public policy and public security in Iceland. The public policy in question consisted in preventing the members of the association from coming to Iceland.

3. This case raises the question whether under EEA law national authorities are lawfully able to consider that a citizen of an EEA State constitutes a threat to public policy or public security

SKÝRSLA FRAMSÖGUMANNS

í máli E-15/12

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

Jan Anfinn Wahl

gegn

íslenska ríkinu

varðandi túlkun á 27. gr. tilskipunar Evrópuþingsins og ráðsins 2004/38/EB frá 29. apríl 2004 um rétt borgara Sambandsins og aðstandenda þeirra til frjálsrar farar og dvalar á yfirráðasvæði aðildarríkjanna.

I INNGANGUR

1. Með bréfi dagsettu 5. desember 2012, sem skráð var í málaskrá dómstólsins 17. desember sama ár, óskaði Hæstiréttur Íslands eftir ráðgefandi áliti í máli sem rekið er fyrir dómstólnum, milli Jan Anfinn Wahl, (stefnandi), og íslenska ríkisins, (stefndi).

2. Stefnandi, norskur ríkisborgari og meðlimur í vélhjólasamtökum Vítisengla (e. „Hell's Angels"), var vísað frá Íslandi. Stjórnsýslukæru stefnanda sem fylgdi í kjölfarið var hafnað á grundvelli þess að einstaklingar sem tilheyrðu samtökunum væru taldir raunveruleg ógn við allsherjarreglu og almannaöryggi vegna meintra athafna samtakanna og tengsla þeirra við skipulagða glæpastarfsemi. Sú vernd allsherjarreglu sem um væri að ræða væri fólgin í því að meina félögum í Vítisenglum landgöngu á Íslandi.

3. Í máli þessu reynir á hvort stjórnvöldum í EES-ríki sé samkvæmt reglum EES-réttar heimilt að telja ríkisborgara aðildarríkis ógn við allsherjarreglu eða almannaöryggi einungis á grundvelli þeirrar

by the mere fact of being a member of an organisation that is considered to maintain links to criminal activities, but membership of which is not outlawed by the State in question. Furthermore, the question is raised whether a provision of criminal law defining as punishable the act of conniving with another person in the commission of an act, the commission of which is part of the activities of a criminal organisation, represents a fundamental interest of society or whether such provision is to be considered a measure of general prevention. In addition, the question is raised whether the EEA State is required to adduce a certain probability that the individual against whom the measure is taken intends to partake in certain actions such that his conduct may be considered to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

4. The dispute before the national court arose because of uncertainties concerning the interpretation of the relevant provisions of national law and the limitations on the discretionary powers of national authorities resulting from the EEA Agreement.

II LEGAL BACKGROUND

EEA law

5. Article 7 EEA reads as follows:

Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:

a. an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;

b. an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.

staðreyndar að viðkomandi sé meðlimur í samtökum sem talin eru hafa tengsl við skipulagða glæpastarfsemi, þótt samtökin séu sem slík ekki bönnuð í umræddu aðildarríki. Jafnframt er borin fram sú spurning, hvort ákvæði hegningarlaga sem lýsi þá háttsemi refsiverða að sammælast við annan mann um að fremja verknað og framkvæmd verknaðarins er liður í starfsemi skipulagðra brotasamtaka, teljist grundvallarregla samfélagsins, eða hvort líta beri á slíkt ákvæði sem almenna forvarnarforsendu. Þar að auki vaknar sú spurning, hvort EES-ríki þurfi að leiða líkur að því að ásetningur viðkomandi einstaklings standi til þess að viðhafa háttsemi sem felst í tilteknum aðgerðum þannig að framferði einstaklingsins teljist, raunveruleg, yfirvofandi og nægilega alvarleg ógnun við einhverja af grundvallarhagsmunum samfélagsins.

4. Ágreiningur aðila í málinu fyrir landsdómstólnum snýr að óvissu um túlkun viðeigandi ákvæða landsréttar og takmarkanir á matskenndum heimildum yfirvalda, sem leiða af EES-samningnum.

II LÖGGJÖF

EES-réttur

5. Í 7. gr. EES-samningsins segir:

Gerðir sem vísað er til eða er að finna í viðaukum við samning þennan, eða ákvörðunum sameiginlegu EES-nefndarinnar, binda samningsaðila og eru þær eða verða teknar upp í landsrétt sem hér segir:

a. gerð sem samsvarar reglugerð EBE skal sem slík tekin upp í landsrétt samningsaðila;

b. gerð sem samsvarar tilskipun EBE skal veita yfirvöldum samningsaðila val um form og aðferð við framkvæmdina.

Directive 2004/38/EC[1]

6. Directive 2004/38/EC was incorporated into Annex V to the EEA Agreement at point 1 and Annex VIII at point 3.[2]

7. Article 27 of the Directive reads as follows:

General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

8. Article 31 of the Directive reads as follows:

Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision

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1 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158, p. 157 (corrected in OJ 2004 L 229, p. 35).

2 Inserted by Decision of the EEA Joint Committee No 158/2007 (OJ 2008 L 124, p. 20, and EEA Supplement No 26, 8.5.2008, p. 17). Entered into force on 1 March 2009.

Tilskipun 2004/38/EB[1]

6. Tilskipun 2004/38/EB var tekin upp í 1.-lið V. viðauka og 3.-lið VII. viðauka EES-samningsins.[2]

7. Í 27. gr. tilskipunarinnar segir:

Almennar meginreglur

1. Með fyrirvara um ákvæði þessa kafla er aðildarríkjunum heimilt að takmarka frjálsa för og dvöl borgara Sambandsins og aðstandenda þeirra, óháð ríkisfangi, á grundvelli allsherjarreglu, almannaöryggis eða lýðheilsu. Ekki má bera þessar aðstæður fyrir sig í efnahagslegum tilgangi.

2. Ráðstafanir, sem gerðar eru með skírskotun til allsherjarreglu eða almannaöryggis, skulu vera í samræmi við meðalhófsregluna og alfarið byggjast á framferði hlutaðeigandi einstaklings. Fyrri refsilagabrot nægja ekki ein og sér til þess að slíkum ráðstöfunum sé beitt.

Framferði hlutaðeigandi einstaklings þarf að teljast raunveruleg, yfirvofandi og nægilega alvarleg ógnun við einhverja af grundvallarhagsmunum samfélagsins. Rök sem varða ekki atriði málsins eða sem byggja á almennum forvarnarforsendum skulu ekki tekin gild.

8. Í 31. gr. tilskipunarinnar segir:

Réttarfarsreglur

1. Viðkomandi einstaklingar skulu eiga kost á að skjóta máli sínu til dómstóla (e. judicial redress procedures) og, þar sem við á, stjórnsýsluyfirvalds (e. administrative redress procedures) í gistiaðildarríkinu til að óska endurskoðunar á hvers konar ákvörðun

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1 Tilskipun Evrópuþingsins og ráðsins 2004/38/EB frá 29. apríl 2004 um rétt borgara Sambandsins og aðstandenda þeirra til frjálsrar farar og dvalar á yfirráðasvæði aðildarríkjanna, um breytingu á reglugerð (EBE) nr. 1612/68 og niðurfellingu tilskipana 64/221/EBE, 68/360/EBE, 72/194/EBE, 73/148/EBE, 75/34/EBE, 75/35/EBE, 90/364/EBE, 90/365/EBE og 93/96/EBE, Stjtíð. ESB 2004 L 158, bls. 157 (leiðrétt í Stjtíð. ESB 2004 L 229, bls. 35)

2 Viðbót samkvæmt ákvörðun sameiginlegu EES-nefndarinnar nr. 158/2007 (Stjtíð. ESB 2008 L 124, bls. 20, og EES-viðbæti nr. 26, 8.5.2008, bls. 17). Gekk í gildi 1. mars 2009.

taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

– *where the expulsion decision is based on a previous judicial decision; or*

– *where the persons concerned have had previous access to judicial review; or*

– *where the expulsion decision is based on imperative grounds of public security under Article 28(3).*

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

9. Article 37 of the Directive reads as follows:

The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.

Decision of the EEA Joint Committee No 158/2007[3]

10. Recital 8 in the preamble to the Decision reads as follows:

The concept of "Union Citizenship" is not included in the Agreement.

[3] Ibid.

sem tekin hefur verið í máli þeirra á grundvelli allsherjarreglu, almannaöryggis eða lýðheilsu.

2. Ef beiðni um málsskot til eða endurskoðun dómstóla á ákvörðun um brottvísun fylgir beiðni um að fresta framkvæmd ákvörðunarinnar getur brottvísun frá yfirráðasvæðinu ekki átt sér stað fyrr en ákvörðun hefur verið tekin um frestunarbeiðnina, nema:

– *ákvörðunin um brottvísun sé byggð á fyrri dómsniðurstöðu eða*
– *viðkomandi einstaklingar hafi áður fengið endurskoðun dómstóls eða*
– *ákvörðunin um brottvísun sé byggð á brýnum ástæðum um almannaöryggi skv. 3. mgr. 28. gr.*

3. Málskotsleiðirnar skulu fela í sér rannsókn á lögmæti ákvörðunarinnar og einnig á þeim staðreyndum og aðstæðum sem fyrirhuguð ráðstöfun er byggð á. Með þeim skal gengið úr skugga um að meðalhófs hafi verið gætt við töku ákvörðunarinnar, einkum í ljósi kröfunnar sem mælt er fyrir um í 28. gr.

4. Aðildarríki geta meinað viðkomandi einstaklingi aðgang að yfirráðasvæði sínu meðan á málsmeðferð vegna málskots stendur en þau mega ekki koma í veg fyrir að einstaklingur geti haldið uppi vörnum í eigin persónu nema slíkt geti valdið verulegum erfiðleikum varðandi allsherjarreglu eða almannaöryggi eða í þeim tilvikum þegar málsskotið eða endurskoðun dómstóls varðar bann við því að koma inn á yfirráðasvæðið.

9. Í 37. gr. tilskipunarinnar segir:

Ákvæði þessarar tilskipunar skulu ekki hafa áhrif á lög eða stjórnsýslufyrirmæli sem aðildarríki setja og eru hagstæðari þeim einstaklingum sem þessi tilskipun tekur til.

Ákvörðun sameiginlegu EES-nefndarinnar nr. 158/2007[3]

10. Í 8.-lið formálsorða ákvörðunarinnar segir:

Hugtakið „ríkisfang í Sambandinu“ kemur ekki fyrir í samningnum.

[3] Sama.

11. Article 1 of the Decision reads as follows:

Annex VIII to the Agreement shall be amended as follows:

1) ....

...

The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:

a. ...

b. ...

c. The words "Union citizen(s)" shall be replaced by the words "national(s) of EC Member States and EFTA States".

12. Joint Declaration by the Contracting Parties to Decision of the EEA Joint Committee No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the Agreement reads as follows:

The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.

National law[4]

13. Article 22 of the Foreign Nationals Act No 96/2002 reads as follows:

A commissioner of police shall decide on denial of entry as provided for in Article 18, the first paragraph, subparagraphs (a) – (i). The Immigration Office shall take other decisions in accordance with this Article. Police shall prepare the cases to be decided on by the Immigration Office. If the police consider that the conditions for denial of entry or expulsion are fulfilled, they shall send the case file to the Immigration Office for its decision.

[4] Translations of national provisions are unofficial and based on those contained in the documents of the case.

11. Í 1. gr. ákvörðunarinnar segir:

VIII. viðauki við samninginn breytist sem hér segir:

1) ...

...

Ákvæði tilskipunarinnar skulu, að því er samning þennan varðar, aðlöguð sem hér segir:

a. ...

b. ...

c. Í stað hugtaksins „borgarar Sambandsins“ komi hugtakið „borgarar aðildarríkja EB og EFTA-ríkjanna“

12. Í sameiginlegri yfirlýsingu samningsaðila vegna ákvörðunar nr. 158/2007 um að fella tilskipun Evrópuþingsins og ráðsins 2004/38/EB inn í samninginn segir:

Hugtakið ríkisfang í Sambandinu, sem kom fyrst fyrir í Maastrichtsáttmálanum (nú 17. gr. EB-sáttmálans og áfram), á sér enga hliðstæðu í EES-samningnum. Tilskipun 2004/38/EB er felld inn í EES-samninginn með fyrirvara um mat á því með hvaða hætti löggjöf Evrópusambandsins og dómaframkvæmd Evrópu-dómstólsins í tengslum við hugtakið ríkisfang í Sambandinu hefur áhrif á Evrópska efnahagssvæðið í framtíðinni. Í EES-samningnum eru engin ákvæði um stjórnmálaleg réttindi ríkisborgara EES-ríkjanna.

Landsréttur[4]

13. Í 22. gr. laga um útlendinga nr. 96/2002 segir:

Lögreglustjóri tekur ákvörðun um frávísun skv. a–i-lið 1. mgr. 18. gr. Útlendingastofnun tekur aðrar ákvarðanir samkvæmt kafla þessum. Lögregla undirbýr mál sem Útlendingastofnun tekur ákvörðun um. Nú telur lögregla skilyrði vera til að vísa útlendingi frá landi eða úr landi og sendir hún þá Útlendingastofnun gögn málsins til ákvörðunar.

[4] Þýðingar á ákvæðum landsréttar yfir á ensku eru ekki opinberar og byggðar á þeim þýðingum sem fram koma í gögnum málsins.

14. Article 41 of the Foreign Nationals Act, which implements Article 27 of the Directive, reads as follows:

An EEA or EFTA foreign national may be refused the right to enter Iceland on arrival in the country or for up to seven days after arrival if:

a. ...

b. ...

c. he conducts himself in a way referred to in the first paragraph of Article 42, or

d. this is necessary in view of the security of the state, urgent national interests or public health.

A police commissioner shall take the decision on refusal of entry under items a and b of the first paragraph; the Directorate of Immigration shall take decisions under items c and d. It shall be sufficient that the processing of the case begin[s] before the end of the seven-day period.

If the processing of a case under the first paragraph does not begin within seven days, the EEA or EFTA foreign national may be expelled from Iceland by a decision of the Directorate of Immigration in accordance with items b, c and d within three months of his arrival in Iceland.

15. Article 42 of the Foreign Nationals Act provides as follows:

(1) An EEA or EFTA foreign national, or a member of his family, may be expelled from Iceland if this is necessary in view of public order or public safety.

(2) Expulsion under the first paragraph of this Article may be effected if the foreign national exhibits conduct, or may be considered likely to engage in conduct, that involves a substantial and sufficiently serious threat to the fundamental attitudes of society. If the foreign national has been sentenced to punishment or special measures have been decided, then an expulsion on these grounds may only be effected if the conduct involved may indicate that the foreign national will again commit a criminal action.

14. Í 41. gr. laga um útlendinga, sem innleiddi 27. gr. tilskipunarinnar, segir:

Heimilt er að vísa EES- eða EFTA-útlendingi frá landi við komu til landsins eða allt að sjö sólarhringum eftir komu ef:

a. ...

b. ...

c. *um er að ræða háttsemi sem greinir í 1. mgr. 42. gr., eða*

d. það er nauðsynlegt vegna öryggis ríkisins, krefjandi þjóðarhagsmuna eða almannaheilbrigðis.

Lögreglustjóri tekur ákvörðun um frávísun skv. a- og b-lið 1. mgr., en Útlendingastofnun skv. c- og d-lið. Nægilegt er að meðferð máls hefjist innan sjö sólarhringa frestsins.

Ef meðferð máls skv. 1. mgr. hefur ekki hafist innan sjö sólarhringa má vísa EES- eða EFTA-útlendingi frá landi með ákvörðun Útlendingastofnunar samkvæmt ákvæðum b-, c- og d-liðar innan þriggja mánaða frá komu til landsins.

15. Í 42. gr. laga um útlendinga segir:

(1) *Heimilt er að vísa EES- eða EFTA-útlendingi, eða aðstandanda hans, úr landi ef það er nauðsynlegt með skírskotun til allsherjarreglu eða almannaöryggis.*

(2) *Brottvísun skv. 1. mgr. má framkvæma ef útlendingurinn sýnir af sér eða ætla má að um sé að ræða persónubundna háttsemi sem felur í sér raunverulega og nægilega alvarlega ógn gagnvart grundvallarþjóðfélagssjónarmiðum. Ef útlendingurinn hefur verið dæmdur til refsingar eða sérstakar ráðstafanir* ákvarðaðar má brottvísun af þessari ástæðu því aðeins fara fram að um sé að ræða háttsemi sem getur gefið til kynna að útlendingurinn muni fremja refsivert brot á ný.

16. The Directive was further implemented by Article 87 of Regulation No 53/2003, which reads as follows:

An EEA or EFTA foreigner may be denied entry or expelled if necessary with a view to public order and public safety, cf. Section 42, the first paragraph (c), and Section 43, the first paragraph, of the Foreign Nationals Act.

Denial of entry or expulsion as provided for in the first paragraph is, for example, allowed if a foreigner:

a. is dependent upon drugs of abuse or other illicit substances, and has become thus dependent before his first permit to stay was issued, or

b. suffers from a serious psychiatric disturbance, or a psychiatric disturbance characterised by agitation, delirium, hallucinations or thought disorders, provided this condition developed before his first permit to stay was issued.

A decision on denial of entry or expulsion by reference to public order or public safety shall be exclusively based on the personal conduct of the foreigner in question, and may only be carried out if measures are allowed with respect to Icelandic nationals in comparable situations.

17. Article 175 a of the General Penal Code No 19/1940 as inserted by Article 5 of Act No 149/2009, provides as follows:

Any person who connives with another person on the commission of an act which is punishable by at least 4 years' imprisonment, the commission of which is part of the activities of a criminal organisation, shall be imprisoned for up to 4 years unless a heavier punishment for his offence is prescribed in other provisions of this Act or in other statutes.

'Criminal organisation' here refers to an association of three or more persons, the principle objective of which is, for motives of gain, directly or indirectly, deliberately to commit a criminal act that is punishable by at least 4 years' imprisonment, or a substantial part of the activities of which involves the commission of such an act.

16. Efni tilskipunarinnar var nánar útfært með 87. gr. reglugerðar nr. 53/2003. Þar segir:

Heimilt er að vísa EES- eða EFTA-útlendingi frá landi eða úr landi ef það er nauðsynlegt með skírskotun til allsherjarreglu og almannaöryggis, sbr. c-lið 1. mgr. 42. gr. og 1. mgr. 43. gr. útlendingalaga.

Frávísun eða brottvísun skv. 1. mgr. er m.a. heimil ef útlendingurinn:

a. er háður fíkniefnum eða öðrum eiturlyfjum og hefur orðið það áður en honum er veitt fyrsta dvalarleyfi, eða

b. er haldinn alvarlegum geðrænum truflunum eða geðrænum truflunum sem einkennast af uppnámi, óráði, ofskynjunum eða hugsanabrenglun, enda hafi slíkt ástand hans hafist áður en honum er veitt fyrsta dvalarleyfi.

Ákvörðun um frávísun eða brottvísun með skírskotun til allsherjarreglu eða almannaöryggis skal eingöngu byggð á framferði hlutaðeigandi útlendings og má því aðeins framkvæma að heimilt sé að grípa til úrræða gagnvart íslenskum ríkisborgara við sambærilegar aðstæður.

17. Í 175. gr. a. almennra hegningarlaga nr. 19/1940, eins og henni var breytt með 5. gr. laga nr. 149/2009, segir:

Sá er sammælist við annan mann um að fremja verknað sem varðar að minnsta kosti 4 ára fangelsi og framkvæmd hans er liður í starfsemi skipulagðra brotasamtaka skal sæta fangelsi allt að 4 árum, nema brot hans varði þyngri refsingu samkvæmt öðrum ákvæðum laga þessara eða öðrum lögum.

Með skipulögðum brotasamtökum er átt við félagsskap þriggja eða fleiri manna sem hefur það að meginmarkmiði, beint eða óbeint í ávinningsskyni, að fremja með skipulegum hætti refsiverðan verknað sem varðar að minnsta kosti 4 ára fangelsi, eða þegar verulegur þáttur í starfseminni felst í því að fremja slíkan verknað.

18. Article 10 of the Administrative Procedure Act No 37/1993 reads as follows:

An authority shall ensure that a case is sufficiently investigated before a decision hereon is reached.

19. Article 12 of the Administrative Procedure Act provides as follows:

A public authority shall reach an adverse decision only when the lawful purpose sought cannot be attained by any less stringent means. Care should then be taken not to go further than necessary.

III FACTS AND PROCEDURE

20. By a letter of 5 December 2012, registered at the EFTA Court on 17 December 2012, the Supreme Court of Iceland made a request for an Advisory Opinion in a case pending before it between Jan Anfinn Wahl and the Icelandic State.

21. On 5 February 2010, the Plaintiff, having arrived in Iceland by air, was stopped by a customs officer and his luggage was searched. Items marked with the name of the motorcycle club *Hell's Angels* were found.

22. The Plaintiff was held at the airport while he was asked to provide statements about his background and the purpose of his visit to Iceland. He stated that he was a member of the Hell's Angels motorcycle club in Drammen, Norway, and held a clean criminal record. He indicated that the purpose of his visit was to go sightseeing and engage in social contact with befriended members of an Icelandic motorcycle club – Fáfnir (subsequently renamed MC Iceland). He also said that he had a return flight to Oslo booked for 8 February 2010. He was subsequently denied entry to Iceland by a decision of the Directorate of Immigration which was served to him on the same day. It appears that a paper had been enclosed, initialled by the Plaintiff and two policemen, in which it was stated that nationals of EEA States could be denied entry into Iceland on grounds of public policy and public security.

23. The Plaintiff filed an administrative appeal against this decision of the Directorate of Immigration with the Ministry of the Interior.

18. Í 10 gr. stjórnsýslulaga nr. 37/1993 segir:

Stjórnvald skal sjá til þess að mál sé nægjanlega upplýst áður en ákvörðun er tekin í því.

19. Í 12. gr. stjórnsýslulaga segir:

Stjórnvald skal því aðeins taka íþyngjandi ákvörðun þegar lögmætu markmiði, sem að er stefnt, verður ekki náð með öðru og vægara móti. Skal þess þá gætt að ekki sé farið strangar í sakirnar en nauðsyn ber til.

III MÁLAVEXTIR OG MEÐFERÐ MÁLSINS

20. Með bréfi dagsettu 5. desember 2012, sem skráð var í málaskrá dómstólsins 17. desember sama ár, óskaði Hæstiréttur Íslands eftir ráðgefandi áliti í máli sem rekið er fyrir dómstólnum, milli Jan Anfinn Wahl og íslenska ríkisins.

21. 5. febrúar 2010 kom stefnandi með flugi til Íslands. Hann var stöðvaður af tollvörðum og leitað í farangri hans. Þar fundust hlutir sem merktir voru vélhjólasamtökum Vítisengla.

22. Stefnanda var haldið á flugvellinum á meðan hann var beðinn um að gera grein fyrir fortíð sinni og ástæðu heimsóknar hans til Íslands. Hann kvaðst vera meðlimur í vélhjólasamtökum Vítisengla í Drammen í Noregi. Hann upplýsti að hann hefði engan sakaferil. Hann sagðist hafa í hyggju að skoða land og þjóð og heilsa upp á vini sína í íslenska vélhjólaklúbbnum Fáfni (sem síðar varð MC Iceland). Hann sagðist einnig eiga bókað flug til Oslóar 8. febrúar 2010. Í kjölfarið var honum vísað frá landi samkvæmt ákvörðun Útlendingastofnunar, sem honum var birt samdægurs. Á blaði, sem virðist hafa fylgt ákvörðuninni og áritað er með fangamarki stefnanda og tveggja lögreglumanna, kemur fram að borgara í EES-ríkis megi neita um inngöngu í Ísland sé það nauðsynlegt með tilliti til [allsherjarreglu] eða almannaöryggis.

23. Stefnandi kærði ákvörðun Útlendingastofnunar til innanríkisráðuneytis. Í kærunni segir meðal annars að hann sé

He stated, *inter alia*, that he was a 36-year old university student from Norway and a member of a motorcycle club with lawful objectives. The motorcycle clubs he belonged to had never broken the law, neither in Iceland nor in his home country, and pursued lawful purposes.

24. The Plaintiff and the Directorate of Immigration submitted observations to the Ministry of the Interior. The Directorate of Immigration revealed that it received a request by the Commissioner of Suðurnes Police on the day of the Plaintiff's arrival requesting a decision on a denial of entry to the country pursuant to item (c) of the first paragraph of Article 41 of the Foreign Nationals Act No 96/2002. The request was accompanied by an "Open danger assessment by the Intelligence Department of the Office of the National Commissioner of Police regarding the arrival of a member of *Hell's Angels* in Iceland, dated 5 February 2010." This assessment stated that it was likely that the arrival of the Plaintiff was connected to the planned entry of the said Icelandic motorcycle club into the *Hell's Angels*. The admission process had been directed from Norway. Following completion of that entry, the Icelandic group would acquire the status of a full and independent division within *Hell's Angels*. The assessment further stated that everywhere that this association had established itself, an increase in organised crime had followed.

25. MC Iceland acquired full membership of the *Hell's Angels* MC on 4 March 2011. The proposal by the Norwegian chapter of *Hell's Angels* was accepted in February 2011 at the "European Officers Meeting" in Manchester, England.

26. On 16 June 2010, the Ministry of the Interior gave reasons for the decision at issue in this case and rejected the appeal. It stated that the decision had been taken on grounds of item (c) of the first paragraph of Article 41 of the Foreign Nationals Act No 96/2002, as amended by the Act No 86/2008. The Ministry considered that this provision in conjunction with the first paragraph of Article 42, laying down the circumstances in which it is permissible to refuse EEA or EFTA foreign nationals entry into Iceland, were the correct legal basis for the decision.

36 ára háskólanemi frá Noregi og skráður félagi í vélhjólafélag með lögmætan tilgang. Vélhjólafélögin sem hann tilheyri hafi aldrei gerst brotleg við lög, hvorki á Íslandi né í heimalandi hans og starfi í samræmi við lög.

24. Stefnandi og Útlendingastofnun skiluðu greinargerðum til innanríkisráðuneytisins. Í greinargerð Útlendingastofnunar er upplýst að stofnunin hafi samdægurs og stefnandi kom til landsins móttekið beiðni frá lögreglustjóranum á Suðurnesjum um að stofnunin tæki ákvörðun um hvort beita ætti c. lið 1. mgr. 41. gr. laga nr. 96/2002 í því skyni að vísa stefnanda frá landinu. Með þeirri beiðni hafi fylgt ,,Opið hættumat greiningardeildar ríkislögreglustjórans vegna komu félaga Vítisengla til Íslands dags. 5. febrúar 2010.“ Í hættumatinu kom fram að líklegt væri að koma stefnanda tengdist fyrirhugaðri inngöngu fyrrgreinds íslensks vélhjólafélags í samtök Vítisengla, að inngönguferlinu hafi verið stýrt frá Noregi og að við inngönguna myndi íslenski hópurinn fá stöðu fullgildrar og sjálfstæðrar deildar innan Vítisengla. Þá segir í hættumatinu að alls staðar þar sem samtökin hafi náð að skjóta rótum hafi aukin skipulögð glæpastarfsemi fylgt í kjölfarið.

25. MC Iceland fékk fulla aðild að samtökum Vítisengla 4. mars 2011. Tillaga Noregsdeildar samtakanna var samþykkt í febrúar 2011, á fundi evrópskra foringja Vítisengla í Manchester á Englandi.

26. 16. júní 2010 kvað innanríkisráðuneytið upp úrskurð í málinu og hafnaði kærunni. Í rökstuðningi segir að hin kærða ákvörðun hafi verið byggð á c. lið 1. mgr. 41. gr. laga nr. 96/2002 eins og ákvæðinu hafi verið breytt með lögum nr. 86/2008. Ráðuneytið taldi að það ákvæði, ásamt 1. mgr. 42. gr. sömu laga, þar sem kveðið er á um í hvaða tilvikum heimilt sé að vísa frá landinu útlendingum sem séu ríkisborgarar aðildarríkja EES eða EFTA, hafi verið réttur lagalegur grundvöllur ákvörðunarinnar. Grundvöllur laganna

That legislation was based on Iceland's obligations under the EEA Agreement and Directive 2004/38.

27. The Ministry of the Interior stated that under the EEA Agreement and Directive 2004/38 it is permissible to refuse an EEA national entry into Iceland if he is a member of a society or association which threatens public policy or public security and that it is not necessary for the society or organisation to be prohibited. It explained that its assessment had taken due account of the case law of the Court of Justice of the European Union and was supported further by a communication from the European Commission to the European Parliament and Council of Ministers of the European Union of 2 July 2009.

28. The Ministry also argued that, when interpreting and applying rules on public order, the authorities have discretion to define their own needs in further detail and to define when circumstances are such as to require a restriction of the freedom of movement in order to protect such interests. It stressed all the same that this assessment had to be based on relevant considerations and take account of Iceland's obligations under the EEA Agreement.

29. The Ministry indicated that "organised criminal associations" such as *Hell's Angels* were viewed as a growing threat to the community and that the national police commissioners of the Nordic countries had formulated a policy to fight such activities. Since 2002 the National Commissioner of the Icelandic Police had instructed local police commissioners to implement this policy as a result of which foreign members of *Hell's Angels* had been repeatedly denied entry on arrival to Iceland by reference to public policy and public security.

30. The Ministry concurred with the view that, in light of the activities and the nature of *Hell's Angels*, individuals belonging to that association constituted a real threat to public order and public security in Iceland. The arrival of members of the association in Iceland was intended to open the way for full membership of MC Iceland. In the view of the Ministry, such membership would

væru skuldbindingar Íslands samkvæmt EES-samningnum og tilskipun 2004/38.

27. Innanríkisráðuneytið kvað heimilt samkvæmt EES-samningnum og tilskipun 2004/38, að vísa ríkisborgara EES-ríkis frá landi ef viðkomandi væri meðlimur í félagi eða samtökum sem ógna allsherjarreglu eða almannaöryggi og ekki væri nauðsynlegt að félagið eða samtökin væru bönnuð. Ráðuneytið útskýrði að í mati þess væri tekið tillit til dómaframkvæmdar Evrópudómstólsins og stuðst við orðsendingu framkvæmdastjórnar Evrópusambandsins til Evrópuþingsins og ráðherraráðs Evrópusambandsins frá 2. júlí 2009.

28. Ráðuneytið hélt því einnig fram að við túlkun og beitingu ákvæða um allsherjarreglu hefðu stjórnvöld svigrúm til að skilgreina nánar eigin þarfir og hvenær aðstæður væru slíkar að nauðsynlegt væri að takmarka frjálsa för til verndar slíkum hagsmunum. Matið yrði þó ávallt að byggja á málefnalegum grundvelli auk þess að taka mið af skuldbindingum Íslands samkvæmt EES-samningnum.

29. Ráðuneytið benti á að litið væri á „skipulögð glæpasamtök vélhjólamanna“ líkt og Vítisengla sem vaxandi ógn við samfélagið og að ríkislögreglustjórar Norðurlandanna hefðu mótað þá skýru stefnu að berjast gegn slíkri starfsemi. Frá árinu 2002 hafi ríkislögreglustjóri lagt fyrir lögreglustjóra að framfylgja þeirri stefnu. Í samræmi við það hafi félögum í Vítisenglum ítrekað verið synjað um landgöngu við komu sína til Íslands með vísan til allsherjarreglu og almannaöryggis.

30. Ráðuneytið tók undir þá afstöðu að í ljósi eðlis og starfsemi Vítisengla væru einstaklingar sem tilheyra samtökunum raunveruleg ógn við allsherjarreglu og almannaöryggi á Íslandi. Koma meðlima samtakanna til landsins væri til þess fallin að greiða fyrir fullri aðild MC Iceland að samtökunum. Að mati

strengthen the influence of the association in Iceland and the spread of organised crime.

31. The Ministry considered that it had been sufficiently demonstrated that the Plaintiff's visit was connected to the membership of MC Iceland in the association of *Hell's Angels*. His membership demonstrated that he had aligned himself with the association's aims, intentions and those activities of the association which were regarded as threatening to public order and public security. Thus, according to the Ministry, it was as a result of the Plaintiff's own personal conduct that he had been expelled from Iceland on 5 February 2010. His arrival in Iceland constituted a serious and real threat to the community's fundamental interest in ensuring public policy and public security.

32. The Plaintiff's action before the district court, claiming compensation for non-financial damage and compensation for financial loss, was rejected, with the denial of entry considered to comply with the requirements of administrative law.

33. The Plaintiff then lodged an appeal with the Supreme Court now seeking compensation simply for alleged false imprisonment and the resulting damage to his reputation. The Plaintiff bases his claim on the view that the Directorate of Immigration's decision was unlawful. He contends that the danger assessment contained unsubstantiated allegations and pertained to the organisation as a whole, whereas his personal conduct was lawful and extended only to membership of the organisation and owning its uniform. Furthermore, he alleged that the basis for the assertions of the Directorate was never investigated by the Ministry.

34. The Defendant stated that the visits by foreign members were intended to further the full membership of the local motorcycle club in the association, which would strengthen its influence and contribute to organised crime. In its view, it had been sufficiently demonstrated that the visit of the Plaintiff was connected to the intended membership of the club in this association. Furthermore, as a result of his membership, the Plaintiff had demonstrated his alignment with the association's aims,

ráðuneytisins myndi slík aðild styrkja ítök samtakanna hér á landi og útbreiðslu skipulagðrar brotastarfsemi.

31. Ráðuneytið taldi að nægilega hafi verið sýnt fram á að heimsókn stefnanda tengdist fullri aðild MC Iceland að samtökum Vítisengla. Aðild stefnanda að samtökunum sýndi að hann hafi samsamað sig markmiðum þeirra, fyrirætlan og þeirri starfsemi samtakanna sem talin væri ógna allsherjarreglu og almannaöryggi. Það var því, að mati ráðuneytisins, persónubundin háttsemi hans sjálfs sem hafi verið ástæða þess að honum hafi verið vísað frá landinu 5. febrúar 2010. Koma hans hingað til lands hafi falið í sér alvarlega og raunverulega ógn við þá grundvallarhagsmuni samfélagsins að vernda allsherjarreglu og almannaöryggi.

32. Kröfu stefnanda fyrir héraðsdómi um miskabætur og skaðabætur vegna fjártjóns var hafnað og héraðsdómur taldi enga stjórnsýslulega annmarka hafa verið á ákvörðun Útlendingastofnunar og úrskurði innanríkisráðuneytisins um að vísa honum frá landi.

33. Stefnandi skaut málinu til Hæstaréttar og gerir einungis kröfu um miskabætur vegna frelsissviptingar að ósekju og álitshnekkis sem hann varð fyrir vegna hennar. Byggir stefnandi kröfu sína á því að ákvörðun Útlendingastofnunar hafi verið ólögmæt. Hann telur hættumat ríkislögreglustjóra hafa að geyma órökstuddar fullyrðingar um alla meðlimi vélhjólasamtakanna en sjálfur hafi hann ekkert til saka unnið, annað en að vera félagi í samtökunum og að eiga einkennisklæðnað þeirra. Hann heldur því jafnframt fram að innanríkisráðuneytið hafi ekki kannað grundvöll staðhæfinga sem komi fram í mati ríkislögreglustjóra.

34. Stefndi heldur því fram að koma erlendra meðlima samtakanna hafi verið til þess fallin að greiða fyrir fullri aðild innlends vélhjólafélags að samtökunum. Slík aðild myndi styrkja ítök samtakanna og útbreiðslu skipulagðrar brotastarfsemi. Að mati stefnda verður að telja að nægilega hafi verið sýnt fram á að heimsókn stefnanda tengdist fullri aðild félagsins að samtökunum. Enn fremur, að aðild hans að samtökunum sýni að hann hafi samsamað sig markmiðum

intentions and activities. The latter were considered to constitute a threat to public policy and public security. It was this personal conduct which led to the denial of entry, the conditions of the relevant national provision having been met. In addition to the assessment, a police report was part of the basis for the decision. However, further details could not be divulged.

35. Membership of a motorcycle club such as *Hell's Angels* is not unlawful as such, and the activities of such associations have not been prohibited in Iceland. At the same time, Article 175 a of the General Penal Code makes it a punishable offence to connive with another person in the commission of certain acts which form part of the activities of a criminal association.

36. As the Supreme Court considers the Icelandic provisions for a refusal of entry inconsistent in that, on the one hand, they permit authorities to deny entry if this proves necessary in view of public policy or public security concerns, but, at the same time, prescribe that EEA and EFTA nationals can only be denied entry if it is possible to take measures against an Icelandic citizen under comparable circumstances, it decided to stay the proceedings to make a reference to the EFTA Court under Article 34 SCA on the interpretation of certain rules of EEA law on which the relevant national provisions are based.

37. At the oral hearing on 5 November 2012, the Supreme Court requested legal counsel of each party to indicate their views on whether there was reason to make a reference to the EFTA Court. Neither party objected to the application.

IV QUESTIONS REFERRED

38. The Supreme Court of Iceland decided to make a reference to the Court on 17 December 2012 and posed the following questions:

    1. *Do Member States which are parties to the Agreement on the European Economic Area have, with regard to Article 7 of the Agreement, the choice of form and method of implementation*

þeirra, fyrirætlan og starfsemi, sem talin væru ógna allsherjarreglu og almannaöryggi. Þessi persónubundna háttsemi hans sjálfs hafi því verið ástæða þess að honum hafi verið vísað frá landinu, þar sem hann uppfyllti skilyrði viðeigandi ákvæða landslaga. Auk þess mats lá skýrsla lögreglu til grundvallar ákvörðuninni. Ekki væri þó hægt að greina nánar frá innihaldi hennar.

35. Þátttaka í vélhjólasamtökum á borð við Vítisengla er ekki ólögmæt sem slík og starfsemi slíkra samtaka hefur ekki verið bönnuð á Íslandi. Á hinn bóginn liggur refsing við því að sammælast við annan mann um að fremja verknað sem er liður í starfsemi skipulagðra brotasamtaka, samkvæmt 175. gr. a almennra hegningarlaga.

36. Hæstiréttur telur ósamræmi vera á milli íslenskra lagaákvæða um skilyrði þess að mönnum verði vísað frá landi, að því leyti að annars vegar heimili þau yfirvöldum að meina þeim landgöngu á grundvelli allsherjarreglu og almannaöryggis og hins vegar kveði þau á um að aðeins megi vísa EES- og EFTA-ríkisborgurum frá landi ef heimilt sé að grípa til þess gagnvart íslenskum ríkisborgara við sambærilegar aðstæður. Hæstiréttur ákvað því að leita ráðgefandi álits EFTA-dómstólsins um skýringu á tilteknum reglum EES-réttar sem ákvæði landsréttar taka mið af.

37. Við flutning málsins fyrir Hæstarétti 5. nóvember 2012 beindi rétturinn því til lögmanna aðila að þeir tjáðu sig um, hvort tilefni væri til þess að leita ráðgefandi álits EFTA-dómstólsins. Hvorugur aðilinn mælti því í mót að það yrði gert.

IV SPURNINGARNAR SEM BEINT VAR TIL DÓMSTÓLSINS

38. 17. desember 2012 ákvað Hæstiréttur Íslands að leita ráðgefandi álits dómstólsins og beindi eftirfarandi spurningum til hans:

    1. *Hafa ríki sem aðild eiga að samningnum um Evrópska efnahagssvæðið í ljósi 7. gr. samningsins val um form og aðferð við að taka upp í landsrétt ákvæði tilskipunar Evrópuþingsins*

when making the provisions of Directive 2004/38/EC of the European Parliament and of the Council, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, part of their internal legal order?

2. *Should paragraph 1 of Article 27 of Directive 2004/38/EC be interpreted as meaning that the mere fact, by itself, that the competent authorities in an EEA Member State consider, on the basis of a danger assessment, that an organisation to which the individual in question belongs, is connected with organised crime and the assessment is based on the view that where such organisations have managed to establish themselves, increased and organised crime has followed, is sufficient to consider a citizen of the Union to constitute a threat to public policy and public security in the state in question?*

3. *For answering the second question, is it of significance whether the Member State has outlawed the organisation of which the individual in question is a member and membership of such organisation is prohibited in the state?*

4. *Is it sufficient grounds for considering public policy and public security to be threatened in the sense of paragraph 1 of Article 27 of Directive 2004/38/EC that a EEA Member State, party to the Agreement on the European Economic Area, has in its legislation defined as punishable, conduct that consists of conniving with another person on the commission of an act, the commission of which is part of the activities of a criminal organisation, or is such legislation considered as general prevention in the sense of paragraph 2 of Article 27 of the Directive? This question is based on the fact that 'organised crime' in the sense of domestic law refers to an association of three or more persons, the principle objective of which is, for motives of gain, directly or indirectly, deliberately to commit a criminal act, or when a substantial part of the activities involves the commission of such an act.*

og Ráðsins 2004/38/EB um rétt borgara Sambandsins og aðstandenda þeirra til frjálsrar farar og dvalar á yfirráðasvæði aðildarríkjanna?

2. *Ber að skýra ákvæði 1. mgr. 27. gr. tilskipunar 2004/38/EB svo að sú staðreynd, ein og sér, nægi til að telja borgara Sambandsins ógna allsherjarreglu og almannaöryggi í ríki sem aðild á að samningnum um Evrópska efnahagssvæðið, ef þar til bær yfirvöld í viðkomandi ríki telja, á grundvelli hættumats, að samtök, sem viðkomandi einstaklingur á aðild að, tengist skipulagðri brotastarfsemi og matið er byggt á því að þar sem slík samtök hafi náð að skjóta rótum hafi aukin og skipulögð brotastarfsemi fylgt í kjölfarið?*

3. *Skiptir máli þegar annarri spurningunni er svarað hvort aðildarríkið hefur lýst samtök þau sem viðkomandi einstaklingur á aðild að ólögleg og bann hvílir í ríkinu við aðild að slíkum samtökum?*

4. *Nægir það til að telja allsherjarreglu og almannaöryggi ógnað í skilningi 1. mgr. 27. gr. tilskipunar 2004/38/EB, að ríki sem aðild á að samningnum um Evrópska efnahagssvæðið hefur í löggjöf lýst refsiverða háttsemi sem felst í því að sammælast við annan mann um að fremja verknað og framkvæmd verknaðarins er liður í starfsemi skipulagðra brotasamtaka, eða teldist slík lagasetning almenn forvarnarforsenda í skilningi 2. mgr. 27. gr. tilskipunarinnar? Er í spurningunni lagt til grundvallar að með skipulagðri brotastarfsemi í skilningi landsréttar sé átt við félagsskap þriggja eða fleiri manna sem hefur það að meginmarkmiði, beint eða óbeint í ávinningsskyni, að fremja með skipulögðum hætti refsiverðan verknað, eða þegar verulegur þáttur í starfseminni felst í því að fremja slíkan verknað.*

5. *Should paragraph 2 of Article 27 of Directive 2004/38/EC be understood meaning that a premise for the application of measures under paragraph 1 of Article 27 of the Directive against a specific individual is that the Member State must adduce a probability that the individual in question intends to indulge in activities comprising a certain action or actions, or refraining from a certain action or actions, in order for the individual's conduct to be considered as representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society?*

V WRITTEN OBSERVATIONS

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

- the Plaintiff, represented by Oddgeir Einarsson, Supreme Court Attorney;
- the Defendant, represented by Óskar Thorarensen, Supreme Court Attorney, Office of the Attorney General, acting as Agent;
- the Norwegian Government, represented by Pål Wennerås, advocate, the Attorney General of Civil Affairs, and Janne Tysnes Kaasin, senior advisor, Ministry of Foreign Affairs, acting as Agents;
- the EFTA Surveillance Authority (hereinafter "ESA"), represented by Xavier Lewis, Director, and Auður Ýr Steinarsdóttir and Catherine Howdle, Officers, of the Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (hereinafter "Commission"), represented by Christina Tufvesson and Michael Wilderspin, Legal Advisers, acting as Agents.

5. *Ber að skilja 2. mgr. 27. gr. tilskipunar 2004/38/EB svo, að það sé forsenda fyrir beitingu úrræða samkvæmt 1. mgr. 27. gr. tilskipunarinnar gagnvart tilteknum einstaklingi, að aðildarríkið þurfi að leiða að því líkur að ásetningur viðkomandi einstaklings standi til þess að viðhafa háttsemi sem felst í tiltekinni eða tilteknum aðgerðum eða aðgerðarleysi svo framferði einstaklingsins teljist, raunveruleg, yfirvofandi og nægilega alvarleg ógnun við einhverja af [grundvallarhagsmunum] samfélagsins?*

V SKRIFLEGAR GREINARGERÐIR

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

- Stefnanda, í fyrirsvari er Oddgeir Einarsson, hæstaréttarlögmaður.
- Stefnda, í fyrirsvari er Óskar Thorarensen, hæstaréttarlögmaður, hjá embætti Ríkislögmanns.
- Ríkisstjórn Noregs, í fyrirsvari sem umboðsmenn eru Pål Wennerås, lögmaður á skrifstofu ríkislögmanns, og Janne Tysnes Kaasin, ráðgjafi hjá utanríkisráðuneytinu.
- Eftirlitsstofnun EFTA (ESA), í fyrirsvari sem umboðsmenn eru Xavier Lewis, framkvæmdastjóri lögfræði- og framkvæmdasviðs, Auður Ýr Steinarsdóttir og Catherine Howdle, lögfræðingar á lögfræði- og framkvæmdasviði.
- Framkvæmdastjórn Evrópusambandsins, í fyrirsvari sem umboðsmenn eru Christina Tufvesson og Michael Wilderspin, lögfræðilegir ráðgjafar.

VI SUMMARY OF THE ARGUMENTS SUBMITTED

The Plaintiff

40. The Plaintiff considers that the provisions regarding the exceptions to the right of free movement in the EEA must be interpreted narrowly, as the right constitutes an important pillar of the EU and the EEA. Therefore, parties to the EEA cannot decide unilaterally on the interpretation of the exceptions provided on grounds of public security and public policy. The Plaintiff refers to the case law of the Court of Justice of the European Union (hereinafter "ECJ") stating that "particularly restrictive interpretation of the derogations from that freedom is required by virtue of a person's status as a citizen of the Union."[5] The Plaintiff refers to recital 22 in the preamble to the Directive which states that "[t]he Treaty allows restrictions to be placed on the right of free movement and residence on grounds of public policy, public security or public health. In order to ensure a tighter definition of the circumstances and procedural safeguards subject to which Union citizens and their family members may be denied leave to enter or may be expelled, this Directive should replace Council Directive 64/221/EEC ... ." The Plaintiff contends that the provisions of the Directive reduce the authority of EEA States to limit free movement and the discretion they have in interpreting the possibilities for such limitations.

The first question

41. The Plaintiff submits that it follows from Article 7 EEA that Contracting Parties have the choice of form and method of implementation when transposing a directive. However, this implementation authority is limited by Article 37 of the Directive. It follows from this provision that legislation based on the discretion of the Member State must be in favour of the Plaintiff. Furthermore, when several possibilities of interpretation exist, this provision entails that the one most favourable to the persons covered by the Directive must be chosen.

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5 Reference is made to Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257.

VI SAMANTEKT YFIR MÁLSÁSTÆÐUR OG RÖK AÐILA

Stefnandi

40. Stefnandi telur að túlka beri þröngt ákvæði sem kveða á um undanþágur frá frjálsu flæði innan EES þar sem um mikilvæga stoð í ESB og EES-rétti er að ræða. Af þeim sökum geti aðilar að EES-samningnum ekki ákveðið einhliða hvernig túlka beri undanþágur sem grundvallast á allsherjarreglu og almannaöryggi. Stefnandi vísar til dómaframkvæmdar Evrópudómstólsins, en þar segir „að túlka beri allar undantekningar frá því frelsi sem einstaklingur hefur í skjóli sambandsborgararéttar sérstaklega þröngt“[5] Stefnandi vísar í þessu sambandi til 22. liðar formálsorða tilskipunarinnar en þar segir orðrétt að „samkvæmt sáttmálanum [megi] takmarka réttinn til frjálsrar farar og dvalar á grundvelli allsherjarreglu, almannaöryggis eða lýðheilsu. Til að tryggja nákvæmari skilgreiningu á aðstæðum og réttarfarsreglum sem heimila að synja megi borgurum Evrópusambandsins og aðstandendum þeirra um leyfi til komu inn í land eða vísa þeim brott skal þessi tilskipun koma í stað tilskipunar ráðsins 64/221/EBE ... .“ Stefnandi byggir á að ákvæði tilskipunarinnar dragi úr heimildum EES-ríkjanna til að takmarka frjálst flæði og svigrúmi þeirra við að túlka slíkar takmarkanir.

Fyrsta spurningin

41. Stefnandi heldur því fram að það leiði af 7. gr. EES-samningsins að samningsaðilar hafi val um form og leiðir við að taka upp í landsrétt ákvæði tilskipunarinnar. Hins vegar séu þessari heimild settar skorður í 37. gr. tilskipunarinnar. Það leiðir af ákvæðinu að löggjöf sem byggist á sjálfræði aðildarríkisins verði að vera stefnanda í hag. Jafnframt beri þegar mismunandi túlkun kemur til greina að velja þá leið sem er hagstæðust einstaklingnum sem fellur undir tilskipunina.

[5] Vísað er til sameinaðra mála C-482/01 til C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257.

42. The Plaintiff submits, therefore, that the first question should be answered as follows:

Contracting Parties have, with regard to Article 7 EEA, the choice of form and method of implementation when making the provisions of Directive 2004/38/EC part of their internal legal order. However, provisions of the Directive shall not affect any laws, regulations or administrative provisions laid down by a State which would be more favourable to the persons covered by the Directive. Therefore, legislation based on the discretion of the State must be in favour of the Plaintiff. In addition, the Directive shall be interpreted in favour of the persons covered by it.

The second question

43. The Plaintiff considers that entry can only be denied under Article 27 of the Directive if the person concerned has engaged in conduct that is considered to be a threat to public policy and public security within the meaning of Article 27(2). Consequently, this excludes other rules or practices enacted by authorities on the denial of entry.[6] The Plaintiff contends that the membership of an organisation, regardless of its characteristics, can never by itself lead to a member of such organisation being considered a threat to public policy and public security if a general rule or practice taking action against all individuals who are members of such an organisation is in effect without examining the personal conduct of the individual in question.

44. The Plaintiff submits that, in order for membership in an organisation to be considered personal conduct within the meaning of Article 27 of the Directive, a certain level of participation going beyond simple membership must be present. Only members in positions of leadership and active participants in the activities considered to constitute a threat to public policy and public security can be regarded as being associated with the organisation. The Plaintiff argues that it is not permissible to conclude without individual assessment on a case-by-case basis

6 Reference is made to Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097, paragraph 59.

42. Stefnandi telur að svar dómstólsins við fyrstu spurningunni eigi að vera:

Samningsríkin hafa að teknu tilliti til 7. gr. EES-samningsins val um form og aðferð við hvernig þau taka ákvæði tilskipunar 2004/38/EB upp í landsrétt. Hins vegar skulu ákvæði tilskipunarinnar ekki hafa áhrif á lög, reglur eða stjórnsýslufyrirmæli sem aðildarríkin setja og eru hagstæðari þeim einstaklingum sem tilskipunin tekur til. Þar af leiðandi verður löggjöf sem byggir á sjálfræði ríkisins að vera stefnanda hagstæð. Auk þess skal tilskipunin túlkuð einstaklingunum sem falla undir hana í hag.

Önnur spurningin

43. Stefnandi telur að aðeins sé heimilt að synja um landgöngu samkvæmt 27. gr. tilskipunarinnar ef viðkomandi einstaklingur hefur viðhaft framferði sem talist getur verið ógn við allsherjarreglu og almannaöryggi samkvæmt 2. mgr. 27. gr. Þar af leiðandi sé stjórnvöldum óheimilt að beita öðrum reglum eða vísa til stjórnsýslurammkvæmdar þegar þau synja um landgöngu.[6] Stefnandi telur að aðild að samtökum, án tillits til eðlis þeirra, geti aldrei ein og sér leitt til þess að einstaklingur verði talin ógn við allsherjarreglu og almannaöryggi, ef almenn regla eða framkvæmd gildir um aðgerðir gegn öllum einstaklingum sem aðild eiga að samtökunum án þess að persónulegt framferði einstaklingsins sem í hlut á sé metið sérstaklega.

44. Stefnandi byggir á að til þess að aðild að samtökum verði talin persónulegt framferði í skilningi 27. gr. tilskipunarinnar verði meðlimurinn að vera virkur í starfi félagsins. Aðeins þeir sem eru stjórnendur eða virkir í starfseminni geti talist ógn við allsherjarreglu og almannaöryggi. Stefnandi byggir á að fara verði fram einstaklingsbundið mat í hverju máli svo hægt sé að

[6] Vísað er til máls C-503/03 *Framkvæmdastjórnin* gegn *Spáni* [2006] ECR I-1097, 59. mgr.

whether members identify with the characteristics or activities in question. In this regard, the Plaintiff refers to the Norwegian implementation of the Directive, which he contends does not provide for a denial of entry based solely on membership of an organisation believed to be engaging in criminal activities.

45. The Plaintiff refers to the judgment in *Van Duyn*[7] to support the view that membership of an organisation, regardless of the position authorities have towards it and regardless of the manner of participation of an individual in its activities, can never lead to an individual being considered a threat to public security and public policy unless administrative measures have been taken against the organisation and the standpoint of the government regarding this organisation defined. The Plaintiff submits that it must be, at the very least, foreseeable to a person entering the country that he could be denied entry to the country on the grounds of his membership of an organisation. This could entail public announcements and the enactment of specific rules. In addition, the Plaintiff contends that the conditions for considering membership in an organisation a threat to public policy and security have become more restrictive since the judgment in *Van Duyn* was handed down.

46. Furthermore, the Plaintiff submits, in the alternative, that if membership in an organisation were considered to demonstrate a threat posed by an individual to public policy and security, the national authorities must discharge the burden of showing that an organisation is in fact connected to organised crime. They must demonstrate that where such organisations have managed to establish themselves crime has increased. The mere fact that national authorities assume this on the basis of a danger assessment, cannot, as such, suffice. Were the question to be answered in the affirmative, the right to free movement would be deprived of its effectiveness as restrictions could be justified by mere assertions, lacking foundation or materially wrong, without the possibility for the parties concerned to comment.

[7] Reference is made to Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337.

meta hvort meðlimur í samtökum tengist stefnu og starfsemi þeirra. Með vísan til hvernig tilskipunin var tekin upp í norskum rétti, telur stefnandi að hún heimili ekki að landgöngu sé hafnað einvörðungu á þeim forsendum að einstaklingur sé aðili að samtökum sem talin eru stunda skipulagða glæpastarfsemi.

45. Stefnandi vísar til dóms Evrópudómstólsins í hinu svonefnda *Van Duyn*[7] máli til stuðnings þeirri málsástæðu að hvað sem líði afstöðu stjórnvalda til félags eða með hvaða hætti einstaklingur tekur þátt í starfsemi þess, geti aðild að því aldrei leitt til þess að einstaklingur verði talin ógn við allsherjarreglu og almannaöryggi nema stjórnvöld hafi gripið til aðgerða gagnvart félaginu og skilgreint afstöðu sína til þess. Stefnandi telur að einstaklingur sem hyggst ferðast til landsins verði að geta séð fyrir hvort honum verður meinuð landganga á grundvelli aðildar að félagi, til dæmis á grundvelli opinberra yfirlýsinga eða settra reglna. Auk þess byggir stefnandi á að skilyrðin við mat á hvort aðild að samtökum sé talin ógn við allsherjarreglu og almannaöryggi hafi orðið strangari eftir að dómur gekk í *Van Duyn* málinu.

46. Jafnframt telur stefnandi að stjórnvöld verði að sýna fram á að samtök séu í raun tengd skipulagðri glæpastarfsemi til þess að þau geti talist ógn við allsherjarreglu og almannaöryggi. Stjórnvöld verði að sýna fram á að glæpum hafi fjölgað eftir að samtökin voru stofnuð. Stefnandi telur stjórnvöld ekki geta gengið út frá þessu á grundvelli almenns áhættumats. Verði spurningunni svarað játandi muni það draga úr virkni réttarins til frjálsrar farar, þar sem stjórnvöld geti þá réttlætt takmarkanir á grundvelli fullyrðinga, sem ýmist er ekki nægileg stoð fyrir eða eru efnislega rangar, án þess að málsaðili fái hreyft við athugasemdum.

[7] Vísað er til máls 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337.

47. The Plaintiff contends that the criterion of a connection of an organisation to organised crime is too broad and elastic such as to serve as the basis for a refusal of entry. In addition, the correlation between the establishment of an organisation and an increase in organised crime does not imply a causal link between the two, as the latter can be the result of unrelated factors. Even if a causal link were to be established, this would not suffice by itself to conclude that an individual's membership in such organisation constitutes a contributing factor. The Plaintiff submits that this would only be the case if the member contributed to the establishment, for example by having a role in its organisation.

48. The Plaintiff submits that the second question must be answered as follows:

Article 27(1) of Directive 2004/38/EC cannot be interpreted as meaning that the mere fact, by itself, that the competent authorities in an EEA State consider, on the basis of a danger assessment, that an organisation to which the individual in question belongs, is connected with organised crime and the assessment is based on the view that where such organisations have managed to establish themselves, increased and organised crime has followed, is sufficient to consider that a citizen of another EEA State constitutes a threat to public policy and public security in the state in question.

The third question

49. The Plaintiff submits that the finding in *Van Duyn* on this point was based on international law which precluded a State from refusing the right of entry or residence to its own nationals. He asserts that, according to recent case law, it is not permissible to discriminate between nationals and EEA citizens who carry out the same conduct and, thus, the reasoning in *Van Duyn* on this point can no longer be considered relevant. Therefore, in accordance with the provisions of Council Directive 64/221/EEC, entry could not – and by parity of reasoning, cannot – be denied or an individual expelled if equivalent conduct on the part of citizens of that state is not subject to repressive measures or other genuine

47. Að mati stefnanda eru viðmið um tengsl samtaka við skipulagða glæpastarfsemi of víðtæk og óljós til að hægt sé að líta til þeirra þegar landgöngu er hafnað. Þá sé ótækt að tengja stofnun samtaka við að skipulögð glæpastarfsemi aukist, þar sem slík aukning geti átt sér allt aðrar ástæður. Jafnvel þótt sýnt væri fram á orsakatengsl, væri ekki þar með sagt að aðild einstaklings að slíkum samtökum hefði áhrif þar á. Telur stefnandi að svo geti aðeins verið þegar meðlimurinn kemur að stofnuninni, til dæmis ef honum er fengið tiltekið hlutverk í samtökunum.

48. Stefnandi telur að svar dómstólsins við annarri spurningunni eigi að vera:

Ákvæði 1. mgr. 27. gr. tilskipunar 2004/38/EB er ekki hægt að túlka á þá leið að sú staðreynd að þar til bær yfirvöld í viðkomandi ríki telji, á grundvelli hættumats, að samtök, sem viðkomandi einstaklingur á aðild að, tengist skipulagðri brotastarfsemi og matið er byggt á því að þar sem slík samtök hafi náð að skjóta rótum hafi aukin og skipulögð brotastarfsemi fylgt í kjölfarið, geti leitt til þess að borgari annars EES-ríkis sé talinn ógn við allsherjarreglu og almannaöryggi í viðkomandi ríki.

Þriðja spurningin

49. Stefnandi vísar til þess að í þeim hluta *Van Duyn* málsins sem varðar þessa spurningu hafi það verið niðurstaða dómstólsins að alþjóðalög legðu bann við að ríki synjuðu eigin ríkisborgurum um landgöngu. Stefnandi byggir á að samkvæmt nýlegum dómafordæmum sé óheimilt að mismuna ríkisborgurum EES-ríkja á grundvelli athafna þeirra. Leiðir það til þess að *Van Duyn* málið getur ekki lengur átt við þessa spurningu. Í samræmi við tilskipun ráðsins nr. 64/221/EBE um samræmingu á sérstökum ráðstöfunum er varða flutninga og búsetu erlendra ríkisborgara og réttlættar eru með skírskotun til allsherjarreglu, almannaöryggis og almannaheilbrigðis sé þar af leiðandi ekki hægt að synja eða vísa ríkisborgara annars EES-ríkis úr landi ef sams konar aðgerðum er ekki

and effective measures intended to combat such conduct.[8] The Plaintiff submits that "conduct which a Member State accepts on the part of its own nationals cannot be regarded as constituting a genuine threat to public order".[9] Furthermore, it has been established that the government of an EEA State cannot hinder the movement of a party within its territory on the grounds of his political opinion if nationals of that EEA State are not hindered in moving within the country.[10] The Plaintiff contends therefore that, in order to invoke Article 27 of the Directive, Iceland would need to declare the operations of an organisation as well as membership thereof illegal. If no such action is taken, an individual cannot be considered a threat to public policy and public security. The Plaintiff submits further, in the alternative, that should a *prohibition* of an organisation in the Member State not be required and, hence the third question answered in the negative, it remains the case that the second question must be answered in the negative, as *some* action against individuals residing in the EEA State concerned and in a comparable position to the Plaintiff must be taken.

50. The Plaintiff proposes that the third question be answered as follows:

It is of significance whether the EEA State has outlawed the organisation of which the individual in question is a member and membership of such an organisation is prohibited.

The fourth question

51. The Plaintiff submits that the provision of the Icelandic Penal Code was enacted to fulfil Iceland's obligation to implement the United Nations Convention against Transnational Organized Crime of 2000 and is not connected to rules of national law on the refusal of entry on grounds of public policy and public security. Consequently, it is not foreseeable to an individual concerned that he could be

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8 Reference is made to Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* v *Belgium* [1982] ECR 1665, paragraph 9.

9 Reference is made to Case C-268/99 *Jany and Others* v *Staatssecretaris van Justitie* [2001] ECR I-8615, paragraph 61.

10 Reference is made to Case 36/75 *Roland Rutili* v *Ministre de l'intérieur* [1975] ECR 1219, paragraph 53.

beint gegn ríkisborgurum viðkomandi aðildarríkis.[8] Stefnandi telur að „athæfi sem aðildarríki leyfa eigin ríkisborgurum geti ekki talist vera raunveruleg ógn við allherjarreglu“.[9] Jafnframt er stjórnvöldum EES-ríkja ekki heimilt að takmarka ferðafrelsi ríkisborgara annarra EES-ríkja á grundvelli stjórnmálaskoðana þeirra ef sambærilegt bann hefur ekki verið lagt á ríkisborgara viðkomandi aðildarríkis.[10] Stefnandi heldur því fram að svo hægt sé að beita 27. gr. tilskipunarinnar beri Íslandi að kveða á um að starfsemi og aðild að samtökunum sé ólögmæt. Ef ekki er gripið til slíkra aðgerða er ekki hægt að leggja til grundvallar að einstaklingur feli í sér ógn við allsherjarreglu og almannaöryggi. Stefnandi byggir einnig á til vara að ef ekki er talið nauðsynlegt að banna samtökin í aðildarríki og þriðju spurningu verði þar með svarað neitandi standi eftir að annarri spurningu verði að svara neitandi þar sem grípa verði til aðgerða gegn einstaklingi búsettum í viðkomandi ríki sem er í sams konar stöðu og stefnandi.

50. Stefnandi telur að svar dómstólsins við þriðju spurningunni eigi að vera:

Það hefur áhrif hvort EES-ríki hafi bannað starfsemina sem viðkomandi einstaklingur er aðili að og að bann hefur verið lagt við aðild að samtökunum.

Fjórða spurningin

51. Stefnandi bendir á að ákvæði íslenskra hegningarlaga hafi verið sett til að uppfylla skyldur Íslands um að innleiða samning Sameinuðu þjóðanna gegn fjölþjóðlegri, skipulagðri brotastarfsemi frá 2000 og eru ekki tengd reglum landsréttar um að takmarka landgöngu á grundvelli allsherjarreglu og almannaöryggis. Einstaklingur geti því ekki séð fyrir að honum kunni að verða

8 Vísað er til sameinaðra mála 115/81 til 116/81 *Adoui and Cornuaille* v *Belgium* [1982] ECR 1665, 9. mgr.
9 Vísað er til máls C-268/99 *Jany and Others* v *Staatssecretaris van Justitie* [2001] ECR I-8615, 61. mgr.
10 Vísað er til máls 36/75 *Roland Rutili* v *Ministre de l'intérieur* [1975] ECR 1219, 53. mgr.

denied entry into the State on the grounds of his membership of an organisation. The Plaintiff notes that the provision does not make it illegal to establish a criminal organisation, but increases the mandatory sentence. As the provision does not pertain to the conduct of the Plaintiff, it cannot be relevant in deciding whether the requirements of Article 27 of the Directive have been fulfilled. According to the Plaintiff, for a provision to justify a restriction on the right to free movement it would have to refer to particular organisations. As it is, the content of the provision constitutes simply general prevention within the meaning of Article 27. As case law has established, expulsion or refusal of entry cannot be justified on grounds of general prevention.[11]

52. The Plaintiff proposes that the fourth question be answered as follows:

It is not sufficient grounds for considering public policy and public security to be threatened in the sense of Article 27(1) of Directive 2004/38/EC that an EEA State has in its legislation defined as punishable, conduct that consists of conniving with another person on the commission of an act, the commission of which is part of the activities of a criminal organisation, based on the fact that "organised crime" in the sense of domestic law refers to an association of three or more persons, the principle objective of which is, for motives of gain, directly or indirectly, deliberately to commit a criminal act, or when a substantial part of the activities involves the commission of such an act. Such legislation is considered as general prevention in the sense of Article 27(2) of the Directive.

The fifth question

53. The Plaintiff asserts that the burden of proof in relation to Article 27 lies with the EEA States. According to case law, a recourse to the concept of public policy and public security presupposes conduct that poses a genuine, imminent and sufficiently serious

[11] Reference is made to Case 67/74 *Bonsignore* v *Stadt* Köln [1975] ECR 297, paragraph 7, and *Commission* v *Spain*, cited above, paragraph 59.

meinuð landganga á grundvelli aðildar að samtökum. Stefnandi tekur fram að ákvæðið geri það ekki ólögmætt að koma á fót skipulagðri glæpastarfsemi heldur feli það einungis í sér refsihækkunarástæðu. Þar sem ákvæðið taki ekki til framferðis stefnanda sé ekki hægt að horfa til þess við mat á hvort skilyrði 27. gr. tilskipunarinnar séu uppfyllt. Samkvæmt stefnanda verður ákvæðið að vísa til tiltekinna samtaka svo heimilt sé að takmarka rétt einstaklings til frjálsra ferða. Eins og orðalagi þess er nú háttað feli ákvæðið aðeins í sér almennar takmarkanir innan marka 27. gr. tilskipunarinnar. Dómafordæmi styðja að ekki sé hægt að hafna einstaklingi landgöngu eða vísa honum úr landi á grundvelli almennra forvarnarforsendna.[11]

52. Stefnandi telur að svar dómstólsins við fjórðu spurningunni eigi að vera:

Þótt EES-ríki hafi í löggjöf skilgreint það refisverða athöfn að sammælast við annan mann að framkvæma verknað sem hluta af glæpasamtökum er það ekki nægilegur grundvöllur til að telja að allsherjarreglu og almannaöryggi sé ógnað í skilningi 1. mgr. 27. gr. tilskipunar 2004/38/EB. Með skipulögðum glæpum samkvæmt landsrétti er átt við samtök þriggja eða fleiri einstaklinga sem hafa það beint eða óbeint að meginmarkmiði að fremja glæpi eða þegar stór hluti af starfi samtakanna felst í að fremja glæpi. Slík löggjöf er talin vera almenn forvarnarforsenda samkvæmt 2. mgr. 27. gr. tilskipunarinnar.

Fimmta spurningin

53. Stefnandi byggir á að sönnunarbyrði á grundvelli 27. gr. tilskipunarinnar liggi hjá EES-ríkjunum. Samkvæmt dómaframkvæmd hafi hugtökin allsherjarregla og almannaöryggi verið metin svo að framferði einstaklings þurfi að fela í sér raunhæfa, yfirvofandi og nægilega aðsteðjandi ógn við einhverja

[11] Vísað er til máls 67/74 *Bonsignore* v *Stadt Köln* [1975] ECR 297, 7. mgr., og áður tilvitnað máls *Framkvæmdastjórnin* gegn *Spáni*, 59. mgr.

threat affecting one of the fundamental interests of society.[12] It is for the national courts to determine whether the administrative authorities have discharged the burden of proof in this regard.

54. The Plaintiff proposes that the fifth question be answered as follows:

Article 27(2) of Directive 2004/38/EC should be understood meaning that a premise for the application of measures under Article 27(1) of the Directive against a specific individual is that the EEA State must adduce a probability that the individual in question intends to indulge in activities comprising a certain action or actions, or refraining from a certain action or actions, in order for the individual's conduct to be considered as representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

The Defendant

The first question

55. The Defendant submits that Article 7 EEA leaves the choice of form and method of implementation to the Contracting Parties – whether through primary law or administrative measures – without prejudice to the duty of national courts to interpret national law in conformity with EEA law and in light of the purpose of the EEA rules in accordance with Article 3 EEA.

The second question

56. The Defendant refers to case law regarding the interpretation of Directive 64/221/EEC[13] which must apply in the present case by parity of reasoning. This establishes the area of discretion that the States enjoy in determining the circumstances that justify recourse to public policy and public security, for example regarding the nature of an organisation considered to be socially

[12] Reference is made to Case 30/77 *Regina* v *Bouchereau* [1977] ECR 1999, in particular paragraph 35.

[13] Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ, English Special Edition 1963-1964, p. 117.

af grundvallarhagsmunum samfélagsins.[12] Það sé undir landsdómstóli komið að meta hvort stjórnvöld hafi fært fram nægar sönnur fyrir máli sínu.

54. Stefndi telur að svar dómstólsins við fimmtu spurningunni eigi að vera:

Skilja ber 2. mgr. 27. gr. tilskipunar 2004/38/EB á þann veg *að það sé forsenda fyrir beitingu úrræða samkvæmt 1. mgr. 27. gr. tilskipunarinnar gagnvart tilteknum einstaklingi, að aðildarríkið leiði að því líkur* að ásetningur viðkomandi einstaklings standi *til þess að viðhafa háttsemi sem felst í tiltekinni eða tilteknum athöfnum eða athafnaleysi til þess* að *framferði einstaklings teljist raunveruleg, yfirvofandi og nægilega alvarleg ógnun við einhverja af grundvallarhagsmunum samfélagsins.*

Stefndi

Fyrsta spurningin

55. Stefndi vísar til þess að 7. gr. EES-samningsins veiti aðilum hans val um form og aðferð við innleiðingu – hvort sem það er með almennri löggjöf eða reglugerð – án þess að takmarka rétt dómstóla til að túlka landsrétt í samræmi við EES-rétt og markmiða EES samkvæmt 3. gr. EES-samningsins.

Önnur spurningin

56. Stefndi vísar til dómaframkvæmdar við mat á hvernig túlka beri tilskipun 64/221/EB[13] en sú dómaframkvæmd eigi jafnframt við um mál þetta. Meta verði svigrúm ríkisins við mat á hvort grípa eigi til aðgerða á grundvelli allsherjarreglu og almannaöryggis, til dæmis vegna samtaka sem talin eru skaðleg fyrir þjóðfélagið, á grundvelli þessarar

12 Vísað er til máls 30/77 *Regina* v *Bouchereau* [1977] ECR 1999, sérstaklega 35. mgr.
13 Tilskipun ráðsins nr. 64/221/EBE frá 25. febrúar 1964 um samræmingu á sérstökum ráðstöfunum er varða flutninga og búsetu erlendra ríkisborgara og réttlættar eru með skírskotun til allsherjarreglu, almannaöryggis og almannaheilbrigðis, sbr. enska sérútgáfu tilskipunarinnar sem birt var í Stjórnartíðindum ESB, 1963-1964, bls. 117.

harmful.[14] EEA law does not impose on the Contracting Parties a uniform scale of values as regards the assessment of conduct which may be considered contrary to public policy,[15] and they retain the freedom to determine the requirements of public policy and public security in accordance with their national needs subject to the requirements of EEA law.[16] According to Article 27(2) of the Directive, this requirement is fulfilled by the existence of a genuine, present and sufficiently serious threat to one of the fundamental interests of society.[17] The Defendant asserts that support for this discretion can be found in the latitude granted to States in the broader context of the fundamental freedoms in determining the requirements for the justifications of public policy and public security.[18] EEA States retain considerable latitude in determining that the conduct in question justifies the application of a restriction despite relevant case law requiring a strict interpretation of derogations from the fundamental freedoms.

57. The Defendant submits further that the concepts of public policy and public security overlap. Criminal activity, including crimes related to drug dependency and organised drug dealing as well as sexual abuse of minors posing a serious threat to fundamental interests of society, may directly threaten the calm and physical security of the population, thus justifying expulsion decisions against long-term residents from other EEA States taken on *imperative* grounds of public security in accordance with Article 28(3) of the Directive.[19] Consequently, according to Iceland, there can be no doubt that it falls within its discretion to determine that the activities of organised motorcycle gangs

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14 Reference is made to *Van Duyn*, cited above, paragraph 18.

15 Reference is made to *Jany and Others*, cited above, paragraph 60.

16 Reference is made to Case C-33/07 *Jipa* [2008] ECR I-5157, paragraph 23, and Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609, paragraph 31.

17 Reference is made to *Jipa*, cited above, paragraph 23, and *Orfanopoulos and Oliveri*, cited above, paragraph 66.

18 Reference is made to Case C-54/99 Église *de scientologie* [2000] ECR I-1335, paragraph 17, and Case C-394/97 *Criminal Proceedings against Sami Heinonen* [1999] ECR I-3599, paragraph 43.

19 Reference is made to Case C-145/09 *Land Baden-Württemberg* v *Panagiotis Tsakouridis* [2010] ECR I-11979, paragraphs 46-47, Case C-348/96 *Criminal Proceedings against Donatella Calfa* [1999] ECR I-11, paragraph 22, and Case C-348/09 *P.I.* v *Oberbürgermeisterin der Stadt Remscheid*, judgment of 22 May 2012, not yet reported.

dómaframkvæmdar.[14] EES-réttur leggi ekki niður fastmótaðar reglur sem aðilar samningsins verða að fylgja við mat á hvað fer gegn allsherjarreglu[15] og samningsaðilum er frjálst að ákveða hvaða skilyrða ber að líta til við mat á allsherjarreglu og almannaöryggi, svo framarlega sem þau séu í samræmi við EES-rétt.[16] Samkvæmt 2. mgr. 27. gr. tilskipunarinnar sé þetta skilyrði uppfyllt þegar um er að ræða raunverulega, yfirvofandi og nægilega alvarlega ógnun við einhverja af grundvallarhagsmunum samfélagsins.[17] Stefndi heldur því fram að þessi túlkun hans sæki stoð í það svigrúm sem dómstólar hafi játað EES-ríkjum í tengslum við fjórfrelsið og þeim skilyrðum sem þeim hafa verið sett þegar þau hafa beitt fyrir sig réttlætingarástæðum á borð við allsherjarreglu og almannaöryggi.[18] EES-ríkin hafi umtalsvert svigrúm við mat á hvort aðgerð réttlæti að takmörkunum sé beitt jafnvel þótt dómaframkvæmd setji ströng skilyrði við því að vikið sé frá grundvallaréttindum fjórfrelsisins.

57. Stefndi heldur því einnig fram að hugtökin allsherjarregla og almannaöryggi séu samtengd. Bent er á að glæpastarfsemi, þar með taldir glæpir tengdir eiturlyfjaneytendum, skipulögð sala eiturlyfja og kynferðisbrot gegn einstaklingum undir lögaldri feli í sér nægilega alvarlega ógn gegn grundvallarhagsmunum samfélagsins, geti ógnað öryggi samfélagsins með beinum hætti og þar með réttlætt ákvörðun um brottvísun einstaklings sem hefur dvalið lengi í EES-ríki á grundvelli brýnna ástæðna sem varða almannaöryggi samkvæmt 3. mgr. 28. gr. tilskipunarinnar.[19] Þar af leiðandi getur að mati íslenska ríkisins ekki verið neinn vafi á að það falli innan heimilda þess að ákveða að starfsemi skipulagðra glæpasamtaka vélhjólamanna sé ógn við íbúa ríkisins,

14 Vísað er til áður tilvitnaðs máls *Van Duyn*, 18. mgr.
15 Vísað er til áður tilvitnaðs máls *Jany and Others*, 60. mgr.
16 Vísað er til máls C-33/07 *Jipa* [2008] ECR I-5157, 23. mgr. og máls C-36/02 *Omega Spielhallen* [2004] ECR I-9609, 31. mgr.
17 Vísað er til áður tilvitnaðra mála *Jipa*, 23. mgr., og *Orfanopoulos and Oliveri*, 66. mgr.
18 Vísað er til máls C-54/99 Église de scientologie [2000] ECR I-1335, 17. mgr., og máls C-394/97 *Criminal Proceedings against Sami Heinonen* [1999] ECR I-3599, 43. mgr.
19 Vísað er til máls C-145/09 *Land Baden-Württemberg* v *Panagiotis Tsakouridis* [2010] ECR I-11979, 46.-47. mgr., máls C-348/96 *Criminal Proceedings against Donatella Calfa* [1999] ECR I-11, 22. mgr., og máls C-348/09 *P.I.* v *Oberbürgermeisterin der Stadt Remscheid*, dómur frá 22. maí 2012, enn óbirtur.

threaten its population, both in terms of its physical security and calm, and, thus, constitute a threat to a fundamental interest of society. These activities can therefore justify recourse to restrictive measures taken on grounds of public policy and public security.

58. The Defendant notes that in the national proceedings it submitted documents including a Europol report according to which the *Hell's Angels* organisation is considered to be a criminal organisation involved in organised crime activities and that it was focussed on expanding to new territories. The Defendant submits that the authorities of the Nordic countries have formulated a clear strategy of fighting organised crime by motorcycle gangs and that the national commissioners of police work jointly towards this goal. National efforts have included a policy of preventing outlaw motorcycle gangs from establishing a foothold in order to carry out crime. In that regard, it observes that the Icelandic authorities had established that cooperation existed between the Icelandic motorcycle club and the *Hell's Angels* organisation. Various task forces were created to gather intelligence on these activities and to combat the activities of these groupings.

59. The Defendant submits that the increased coordination undertaken by the European Union in combating crimes associated with outlaw motorcycle gangs affects the definition of the concepts of public policy and public security.[20] Due to the reliance of such organisations on cross-border infrastructures and relationships in establishing themselves, those links pose an increased risk to the general population and incite fear and upset.

60. The Defendant considers that, in assessing the threat to public policy and public security posed by groups associated with organised crime, the same criteria must be relevant as those communicated by the Commission in relation to individual

[20] Reference is made to *Tsakouridis*, cited above, paragraphs 46-47, and Case C-137/09 *Marc Michel Josemans* v *Burgemeester van Maastricht* [2010] ECR I-13019.

bæði hvað varðar persónulegt öryggi þeirra og réttinn til að njóta almennrar friðsældar. Slík starfsemi teljist þar með vera ógnun við grundvallarhagsmuni samfélagsins og því sé réttlætanlegt að gripið sé til aðgerða til þess að takmarka hana á grundvelli allsherjarreglu og almannaöryggis.

58. Stefndi tekur það fram að fyrir landsdómstóli hafi verið lögð fram skjöl, meðal annars skýrsla frá Europol, þar sem fram hafi komið að Vítisenglar teldust til glæpasamtaka sem hefðu með höndum skipulagða brotastarfsemi og legðu áherslu á að hasla sér völl á nýjum svæðum. Stefndi tekur fram að norræn stjórnvöld hafi sett skýra stefnu um hvernig sporna eigi við skipulögðum glæpum vélhjólasamtaka og að lögregluyfirvöld ríkjanna vinni saman að þessu marki. Aðgerðir stjórnvalda í þessum ríkjum hafi falist í að berjast gegn því að vélhjólaklúbbar af þessu tagi skjóti rótum til þess að stunda afbrot. Í því samhengi verður að vekja athygli á að íslensk stjórnvöld hafa upplýsingar um samvinnu á milli íslenskra vélhjólaklúbba og Vítisengla. Margir starfshópar hafa verið stofnaðir til að safna upplýsingum um þessa starfsemi og að berjast gegn henni.

59. Stefnandi heldur því fram að aukin samvinna að undirlagi Evrópusambandsins í að berjast gegn glæpum tengdum vélhjólaklúbbum hafi áhrif á hvernig skilgreina beri hugtökin allsherjarreglu og almannaöryggi.[20] Þegar horft er til þess hversu mjög félög af þessu tagi reiða sig á samstarf á milli landa og tengsl sín við sambærileg félög annars staðar til að hefja starfsemi í landi, þá feli innbyrðis tengsl þeirra í sér vaxandi ógnun við almenning, auk þess sem þau skapi ótta og óróa í samfélaginu.

60. Stefndi telur að þegar ógnun við allsherjarreglu og almannaöryggi sem stafar af hópi sem tengist skipulagðri glæpastarfsemi sé metin verði að leggja til grundvallar sömu viðmið og framkvæmdastjórnin hefur lagt til að beita beri í

[20] Vísað er til áður tilvitnaðs máls *Tsakouridis*, 46.-47. mgr., og máls C-137/09 *Marc Michel Josemans* v *Burgemeester van Maastricht* [2010] ECR I-13019.

cases,[21] that is, the nature of the offence and the damage or harm caused. Consequently, in its view, a measure to refuse entry to a declared member of a certain organisation in circumstances such as those of the present case may fall within the concepts of public policy and public security.

61. The Defendant contends that when organisations pose a threat to the social order, case law allows the active membership of such group to suffice in order to establish personal conduct representing a sufficiently serious threat to the social order,[22] and thus fulfilling the requirement of posing, in addition to the social perturbation of the social order which any infringement of the law involves, a genuine and sufficiently serious threat to a fundamental interest of society.[23] In the case referred, the decision of the competent authority was based not only on the Plaintiff's active membership of the organisation but also on an individual assessment that the visit was connected to the accession by the local association to the organisation in question.

62. The Defendant submits that the answer to the second question should be as follows:

Article 27, paragraph 1, of Directive 2004/38/EC should be interpreted as meaning that the Contracting Parties can take measures to restrict the freedom of movement of citizens of EEA States on grounds of public policy and public security based on considerations of protecting the population from harm resulting from criminal activity and organised crime. The Contracting Parties have discretion to determine their policy relating to combating criminal activity and organised crime, subject to the substantive and procedural requirements of the Directive. It is for the referring court to assess, given the circumstances and facts before it, whether the

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21 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States, COM 2009 313 final ("the 2009 Guidelines"), point 3.2.

22 Reference is made to *Van Duyn*, cited above, paragraph 17.

23 Reference is made to *Orfanopoulos and Oliveri*, cited above, and Case C-349/06 *Murat Polat* v *Stadt Rüsselsheim* [2007] ECR I-8167, paragraphs 34-36.

sérhverju máli[21] – sem eru eðli brotsins og skaðinn eða tjónið sem það hefur í för með sér. Þar af leiðandi geti aðgerðir sem fela í sér að meina aðila að samtökum eins og í þessu máli landgöngu fallið innan marka allsherjarreglu og almannaöryggis.

61. Af hálfu stefnda er því haldið fram að þegar samtök feli í sér ógnun við sjálfa samfélagsgerðina, þá leiði það af dómaframkvæmd að virk aðild að slíkum samtökum nægi til þess að unnt sé að slá því föstu að framferði einstaklings feli sér nægilega alvarlega ógnun við samfélagsgerðina.[22] Þar með uppfylli aðildin að slíkum samtökum, auk þeirrar röskunar sem sérhvert lögbrot felur í sér á hagsmunum samfélagsins, einnig skilyrðið um að teljast raunverulega og nægilega alvarleg ógnun við grundvallarhagsmuni samfélagsins.[23] Í þessu máli hafi ákvörðun stjórnvalda ekki aðeins verið byggð á virkri þátttöku stefnanda í samtökunum heldur einnig á einstaklingsmiðuðu mati um að heimsóknin hafi tengst inngöngu innlends félags í umrædd samtök.

62. Stefndi telur að svar dómstólsins við annarri spurningunni eigi að vera:

Skýra ber 1. mgr. 27. gr. tilskipunar 2004/38/EB á þann veg *að EES-ríki geti gripið til aðgerða til að takmarka ferðafrelsi ríkisborgara EES-ríkis á grundvelli allsherjarreglu og almannaöryggis til að vernda almenning frá þeirri hættu sem steðjar af glæpastarfsemi og skipulagðri glæpastarfsemi. EES-ríki hefur svigrúm til að meta hvaða stefnu ber að taka í baráttunni við glæpi og skipulagða glæpastarfsemi, að virtum form- og efnisreglum tilskipunarinnar.* Það er í verkahring landsdómstóls *að meta á grundvelli fyrirliggjandi málsatvika hvort af einstaklingnum stafi raunveruleg, yfirvofandi*

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21 Leiðbeinandi tilmæli framkvæmdastjórnar Evrópusambandsins til Evrópuþingsins og ráðs Evrópusambandsins um betri innleiðingu og beitingu tilskipunar 2004/38/EBE um rétt borgara Sambandsins og aðstandenda þeirra til frjálsrar farar og dvalar á yfirráðasvæði aðildarríkjanna (COM 2009 313 final ("2009 tilmælin"), liður 3.2.

22 Vísað er til áður tilvitnaðs máls *Van Duyn*, 17. mgr.

23 Vísað er til áður tilvitnaðs máls *Orfanopoulos and Oliveri* og máls C-349/06 *Murat Polat* v *Stadt Rüsselsheim* [2007] ECR I-8167, 34.-36. mgr.

individual's conduct poses a genuine, present, and sufficiently serious threat to a fundamental interest of society. In this assessment, it is sufficient that the individual is an active member of the organisation identified by the authorities to pose a genuine threat to public policy and public security.

The third question

63. The Defendant submits that, in order to restrict the right to free movement, it is not necessary that an organisation, of which a member is refused entry, is prohibited by national law or otherwise, as long as the State has taken some administrative measures to counteract the activities of that organisation.[24] This is a consequence of the area of discretion that EEA States enjoy in having recourse to public policy, which presupposes only a clear definition of the authorities' standpoint regarding an organisation the activities of which are considered to be socially harmful.[25] The Defendant contends that the criterion is not whether the same measure was adopted in respect of its own nationals, as no authority exists to expel a national,[26] but whether repressive measures or other genuine and effective measures intended to combat the conduct were taken.[27] As Union citizenship does not form part of the EEA Agreement, this requirement must apply in the present case. Consequently, according to the Defendant, consideration must be given to the fact that the authorities have sought to combat the conduct associated with membership of the organisation and that this is an established strategy providing for coercive measures where justified. Measures pursuant to criminal or administrative law may include the limitation or prohibition of gatherings of the association.

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24 Reference is made to the 2009 Guidelines, point 3.3.

25 Reference is made to *Van Duyn*, cited above, paragraph 19.

26 Reference is made to Case C-434/09 *Shirley McCarthy* v *Secretary of State for the Home Department* [2011] ECR I-3375, paragraph 29 and the case law cited.

27 Reference is made to *Adoui and Cornuaille*, cited above, paragraph 7; *Jani and Others*, cited above, paragraph 61; *Polat*, cited above, paragraphs 37-38; and Case C-100/01 *Ministre de l'Intérieur* v *Olazabal* [2002] ECR I-10981, paragraph 40.

og nægilega alvarlega ógn *við grundvallarhagsmuni samfélagsins. Við þetta mat er nægilegt* að ein*staklingurinn sé virkur meðlimur í samtökum sem stjórnvöld telja að raunveruleg ógn stafi af við allsherjarreglu og almannaöryggi.*

Þriðja spurningin

63. Stefndi heldur því fram að ekki sé nauðsynlegt að samtök séu ólögmæt samkvæmt landsrétti til þess að unnt sé að takmarka ferðafrelsi einstaklings vegna aðildar hans að þeim og meina honum landgöngu, svo framarlega sem ríkið hefur gripið til einhverra stjórnvaldsaðgerða til að koma böndum á starfsemi samtakanna.[24] Þetta leiði af því svigrúmi sem EES-ríkjum er veitt á þessu sviði og því að einungis sé gert ráð fyrir að viðhorf stjórnvalda EES-ríkis séu afmörkuð gagnvart félagasamtökum sem talin eru skaðleg fyrir samfélagið.[25] Af hálfu stefnda er því haldið fram að ekki sé byggt á því viðmiði hvort stjórnvöld hafi gripið til sams konar aðgerða gagnvart eigin ríkisborgurum, enda sé þeim óheimilt að vísa eigin ríkisborgurum frá landi. [26] Þess í stað beri að líta til þess hvort gripið hafi verið til aðgerða til að draga úr starfseminni, eða annarra raunhæfra og virkra aðgerða til að berjast gegn henni.[27] Þar sem sambandsborgararéttur sé ekki hluti af EES-samningnum verði að leggja þetta skilyrði til grundvallar í þessu máli. Af þeim sökum telur stefndi að líta verði til þess hvort stjórnvöld hafi leitast við að sporna gegn háttsemi sem tengist aðild að samtökunum og að um sé að ræða fastmótaða opinbera stefnu þar sem gripið er til þvingunarráðstafana þegar þær eiga rétt á sér. Aðgerðir á grundvelli refsiréttar eða stjórnsýsluréttar geti falið í sér takmarkanir eða bann við fundum samtakanna.

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24 Vísað er til liðar 3.3. í tilmælunum frá 2009.

25 Vísað er til áður tilvitnaðs máls *Van Duyn*, 19. mgr.

26 Vísað er til máls C-434/09 *Shirley McCarthy* v *Secretary of State for the Home Department* [2011] ECR I-3375, 29. mgr. og dómafordæma sem þar er vísað til.

27 Vísað er til áður tilvitnaðs máls *Adoui and Cornuaille*, 7. mgr.; áður tilvitnaðs máls *Jani and Others*, 61. mgr.; áður tilvitnaðs máls *Polat*, 37.-38. mgr.; og máls C-100/01 *Ministre de l'Intérieur* v *Olazabal* [2002] ECR I-10981, 40. mgr.

64. The Defendant submits that the answer to the third question should be as follows:

It is of no significance whether the EEA State has outlawed the organisation of which the individual in question is a member and/or membership of such an organisation is prohibited in the state.

The fourth question

65. The Defendant submits that, as follows from its answers to the second and third questions, for the purposes of imposing a restriction on free movement it is not relevant whether the conduct against which measures are taken on grounds of public policy and public security is criminalised. However, the enactment of criminal sanctions against particular conduct can be relevant in assessing whether conduct is of a sufficiently serious nature to justify restrictions on the entry of nationals of other EEA States. The Defendant submits that the criminalisation of conduct in accordance with international obligations is not primarily effected for purposes of general prevention and refers to its response to the fifth question.

The fifth question

66. The Defendant refers to the ECJ's judgment in *Van Duyn*[28] in support of its contention that active membership in an organisation suffices to establish personal conduct for the purposes of Article 27(2) of the Directive. The present association with an organisation reflects participation in its activities as well as identification with its aims and designs and may thus be considered a voluntary act of the person concerned, and, consequently, as part of his personal conduct. In the present case, the specific risk was posed by the impending accession of the Icelandic motorcycle club to the organisation in question.

67. The Defendant submits that, pursuant to the provisions of Directive 2004/38, citizens of the Union, even long-term residents, may be expelled on the basis of a criminal conviction for a particular

[28] Reference is made to *Van Duyn*, cited above, paragraph 17.

64. Stefnandi telur að svar dómstólsins við þriðju spurningunni eigi að vera:

Það hefur engin áhrif hvort EES-ríki hefur lýst samtök þau sem viðkomandi einstaklingur er aðili að ólögleg og/eða að bann hvíli í ríkinu við aðild að slíkum samtökum.

Fjórða spurningin

65. Að mati stefnda leiðir það af svörum hans við spurningum tvö og þrjú að það hefur ekki þýðingu við mat á réttmæti skerðingar á ferðafrelsi sem byggir á allsherjarreglu og almannaöryggi hvort háttsemin sem hún beinist að sé sem slík lýst refsiverð. Hins vegar geti refsiverð athöfn haft áhrif þegar metið er hvort af henni stafar nægileg ógn til að heimilt sé að hafna ríkisborgara EES-ríkis um landgöngu í öðru EES-ríki. Stefndi byggir á að þó svo að athöfn sé lýst refsiverð í samræmi við alþjóðlegar skuldbindingar þá sé ekki þar með sagt að slík aðgerð feli fyrst og fremst í sér almenna forvarnarforsendu, sbr. svar stefnda við fimmtu spurningu.

Fimmta spurningin

66. Stefndi vísar til dóms Evrópudómstólsins *Van Duyn*[28] til stuðnings því að virk þátttaka í samtökum sé nægjanleg svo um persónulegt framferði sé að ræða í skilningi 2. mgr. 27. gr. tilskipunarinnar. Aðild að samtökum endurspegli þátttöku í starfsemi þeirra og að auki samsömun við markmið þeirra og fyrirætlanir. Líta megi á slíka aðild sem sjálfviljuga ákvörðun einstaklings og þar af leiðandi sem hluta af persónulegri háttsemi hans. Í þessu máli hafi sú áhætta sem um var að ræða verið fólgin í yfirvofandi aðild íslensks vélhjólaklúbbs að tilteknum samtökum.

67. Stefndi heldur því fram að samkvæmt ákvæðum tilskipunar 2004/38 sé heimilt að vísa ríkisborgara EES-ríkis, jafnvel eftir langa búsetu, úr landi á grundvelli dóms vegna refsiverðar

[28] Vísað er til áður tilvitnaðs máls *Van Duyn*, 17. mgr.

criminal activity. Only expulsion which is an automatic consequence of an imposed prison sentence without any individual assessment infringes the requirements of Article 27 of the Directive.[29] Consequently, restrictions on free movement can be imposed if an individual assessment has been undertaken. This assessment may be based on the likelihood or propensity of certain conduct, for example of re-offending.[30] The Defendant submits that a general assessment, based on past conduct and predictions of future conduct, is sufficient to establish a threat resulting from individual conduct. In the case of active membership of an organisation, that involvement in the organisation establishes the personal conduct. As a consequence, any further assessment of personal conduct, which is for the national court, has to reflect the danger posed by the organisation. In that connection, therefore, in order to take restrictive measures on grounds of public policy and public security, there is no requirement on the public authorities to demonstrate the probability that the individual in question intends to indulge in certain activities.

68. The Defendant submits that, although the Directive does not allow measures taken for the purpose of deterring other foreign nationals from committing the same criminal offence as the person in question,[31] this does not preclude measures adopted to stem the activities of a particular group and with a particular aim, as these measures are specific in nature.

69. The Defendant contends that a refusal of entry – not entailing a ban on returning at a later time – may be in conformity with the principle of proportionality[32], anchored also in general administrative law, if the harm to societal interests posed is grave.

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29 Reference is made to *Orfanopoulos and Oliveri*, cited above, and Case C-50/06 *Commission* v *Netherlands* [2007] ECR I-4383.

30 Reference is made to the 2009 Guidelines.

31 Reference is made to *Bonsignore*, cited above, and *Orfanopoulos and Oliveri*, cited above, paragraph 68.

32 Reference is made to *Jipa*, cited above, paragraph 29.

háttsemi. Aðeins sjálfkrafa brottvísun úr landi vegna dæmdrar fangelsisvistar, án einstaklingsbundins mats, feli í sér brot gegn 27. gr. tilskipunarinnar.[29] Þar af leiðandi sé heimilt að takmarka frjálsa för ef einstaklingsbundið mat hefur farið fram. Þetta mat getur byggst á hversu líklegt að einstaklingur muni sýna af sér tiltekna háttsemi og hvort hann hafi tilhneigingu til þess, t.d. ef hætta er á að hann brjóti aftur af sér.[30] Stefnandi telur að almennt mat sem byggir á fyrri háttsemi og forspá um háttsemi í framtíðinni sé nægilegt til að staðfest sé hvort ógn stafi af háttsemi einstaklings. Þegar um virka aðild að samtökum sé að ræða þá sýni slík þátttaka fram á persónulega háttsemi. Af því leiðir að allt frekara mat á persónulegri háttsemi, sem er í verkahring landsdómstóls að meta, verður að taka tillit til þeirrar hættu sem stafar af samtökunum. Í þessu sambandi verði því ekki lögð sú skylda á stjórnvöld að sýna fram á líkindi þess að einstaklingur ætli sér að taka þátt í ákveðnum athöfnum til þess að þau geti takmarkað frelsi hans á grundvelli allsherjarreglu og almannaöryggis.

68. Stefndi byggir á að jafnvel þó að tilskipunin heimili ekki aðgerðir sem hafa það að markmiði að fæla erlenda ríkisborgara frá því að fremja sömu glæpi og viðkomandi einstaklingur,[31] þá girði hún ekki fyrir aðgerðir sem stefna að því að draga úr starfsemi ákveðins hóps og hafa afmarkað markmið þar sem þessar aðgerðir eru sérstakar í eðli sínu.

69. Stefndi heldur því fram að höfnun um landgöngu – sem felur ekki í sér bann við síðari endurkomu - geti verið í samræmi við meðalhóf,[32] sem á sér stoð í almennum reglum stjórnsýsluréttar, ef hætta er á að hagsmunir samfélagsins bíði alvarlegt tjón.

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29 Vísað er til áður tilvitnaðs máls *Orfanopoulos and Oliveri*, og mál C-50/06 *Framkvæmdastjórnin* gegn *Hollandi* [2007] ECR I-4383.
30 Vísað er til tilmæla framkvæmdastjórnarinnar frá 2009.
31 Vísað er til áður tilvitnaðra mála *Bonsignore* og *Orfanopoulos and Oliveri*, 68. mgr.
32 Vísað er til áður tilvitnaðs máls *Jipa*, 29. mgr.

The Government of Norway

The first question

70. The Norwegian Government submits that it results from Article 7 EEA that the Contracting Parties have the choice of form and method of implementation. It follows from case law that it is not always necessary to formally enact the requirements of a directive in a specific and express legal provision in light of the general legal context and the interpretation given to national provisions by the national court.[33]

The second to fifth question

71. The Norwegian Government submits that the remaining questions can be answered together. In essence, these questions seek guidance as to the conditions under which EEA States may restrict the freedom of movement of citizens of EEA States on grounds of public policy and public security in accordance with Article 27 of the Directive.

72. According to the Norwegian Government, it is apparent from the wording of Article 27 of the Directive that "public policy" and "public security" are two distinct and alternative grounds capable of justifying restrictions, a distinction which has legal implications as regards the form they may take.[34] As the definition of public security includes the internal and external security of a Member State,[35] it can be affected by various factors, including threats to the functioning of institutions and essential public services and the survival of the population.[36] The

[33] Reference is made to Case C-233/00 *Commission v France* [2003] ECR I-6625, paragraphs 76 and 84, Case C-300/95 *Commission* v *United Kingdom* [1997] ECR I-2649, paragraph 37, and Case C-452/01 *Ospelt* [2003] ECR I-9743, paragraph 53.

[34] Reference is made to *Tsakouridis*, cited above.

[35] Reference is made to Case C-273/97 *Sirdar* [1999] ECR I-7403, paragraph 17; Case C-285/98 *Kreil* [2000] ECR I-69, paragraph 17; Case C-423/98 *Albore* [2000] ECR I-5965, paragraph 18; and Case C-186/01 *Dory* [2003] ECR I-2479, paragraph 32.

[36] Reference is made to Case 72/83 *Campus Oil and Others* [1984] ECR 2727, paragraphs 34-35; Case C-70/94 *Werner* [1995] ECR I-3189, paragraph 27; *Albore*, cited above, paragraph 22; and Case C-398/98 *Commission* v *Greece* [2001] ECR I-7915, paragraph 29.

Ríkisstjórn Noregs

Fyrsta spurningin

70. Ríkisstjórn Noregs telur að samkvæmt 7. gr. EES-samningsins sé samningsaðila heimilt að velja form og aðferð við innleiðingu. Það leiði af dómaframkvæmd að það sé ekki alltaf nauðsynlegt að innleiða með formlegum hætti skilyrði tilskipunar í sérstakri lagagrein í ljósi almenns lagalegs samhengis og hvernig dómstóll EES-ríkis hefur túlkað ákvæði landsréttar.[33]

Önnur til fimmta spurningin

71. Ríkisstjórn Noregs heldur því fram að eftirstandandi spurningum sé hægt að svara saman. Með spurningunum sé í grundvallaratriðum leitað eftir leiðsögn um hver séu skilyrði þess að EES-ríki geti takmarkað ferðafrelsi ríkisborgara EES-ríkis á grundvelli allsherjarreglu og almannaöryggis í samræmi við 27. gr. tilskipunarinnar.

72. Samkvæmt ríkisstjórn Noregs er það ljóst af orðalagi 27. gr. tilskipunarinnar að „allsherjarregla“ og „almannaöryggi“ séu ólík og aðskilin hugtök sem réttlætt geti takmarkanir. Það geti hins vegar haft mismunandi réttarlegar afleiðingar til hvors þeirra er vísað þegar réttlæta á takmörkun á ferðafrelsi.[34] Þar sem hugtakið almannaöryggi felur í sér öryggi aðildarríkisins gagnvart hættum jafnt innan frá sem utan[35] geti ýmsir þættir haft þýðingu í því sambandi, þar á meðal ógnir við virkni stofnana og nauðsynlega almannaþjónustu, svo og líf og tilvist almennings.[36] Hugtakið almannaöryggi geti þar af leiðandi falið

[33] Vísað er til máls C-233/00 *Framkvæmdastjórnin* gegn *Frakklandi* [2003] ECR I-6625, 76. og 84. mgr., máls C-300/95 *Framkvæmdastjórnin* gegn *Bretlandi* [1997] ECR I-2649, 37. mgr., og máls C-452/01 *Ospelt* [2003] ECR I-9743, 53. mgr.

[34] Vísað er til áður tilvitnaðs máls *Tsakouridis*.

[35] Vísað er til máls C-273/97 *Sirdar* [1999] ECR I-7403, 17. mgr.; máls C-285/98 *Kreil* [2000] ECR I-69, 17. mgr.; máls C-423/98 *Albore* [2000] ECR I-5965, 18. mgr.; og máls C-186/01 *Dory* [2003] ECR I-2479, 32. mgr.

[36] Vísað er til máls 72/83 *Campus Oil and Others* [1984] ECR 2727, 34.-35. mgr.; máls C-70/94 *Werner* [1995] ECR I-3189, 27. mgr.; áður tilvitnaðs máls *Albore*, 22. mgr.; og máls C-398/98 *Framkvæmdastjórnin* gegn *Grikklandi* [2001] ECR I-7915, 29. mgr.

concept of public security therefore includes the fight against organised crime, for example, in connection with dealing in narcotics as part of an organised group.[37]

73. The Norwegian Government contends that the concept of "public policy" pertains more generally to any "genuine and sufficiently serious threat to a fundamental interest of society".[38] Although the scope of this concept must be interpreted strictly and cannot be determined unilaterally by the EEA States without being subject to control by the EEA institutions,[39] it is established case law that the "specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty."[40] The Norwegian Government refers to the various legitimate aims that can constitute "fundamental interests of society",[41] including the fight against crime,[42] and which are therefore capable of justifying various kinds of restrictions including restrictions on association with organisations the activities of which are deemed to be contrary to the public good.[43]

74. The Norwegian Government considers the judgment in *Van Duyn* of particular relevance for the interpretation of the relevant provisions, which, although decided on the interpretation of Article 3 of Council Directive 64/221/EEC, must apply to Article 27 of Directive 2004/38 by parity of reasoning.[44]

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37 Reference is made to *Tsakouridis*, cited above, paragraphs 45-47.

38 Reference is made to *Bouchereau*, cited above, paragraph 35.

39 Reference is made to *Van Duyn*, cited above, paragraph 18.

40 Reference is made to *Omega*, cited above, paragraph 31.

41 Reference is made to *Omega*, cited above, paragraphs 32-35; *Église de scientologie*, cited above, paragraphs 4 and 17-20; Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323, paragraphs 50-53; Case E-12/10 *ESA* v *Iceland* [2011] EFTA Ct. Rep. 117, paragraph 59; Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13963, paragraphs 88-89; *Van Duyn*, cited above, paragraphs 18-23; and *Josemans*, cited above, paragraphs 62 and 65-66.

42 Reference is made to *Bouchereau*, cited above, paragraphs 27-29.

43 Reference is made to *Van Duyn*; *Église de scientologie*; *Omega*; and *Josemans*, all cited above.

44 Reference is made to Case C-434/10 *Aladzhov*, judgment of 17 November 2011, not yet reported, paragraph 32, Case C-430/10 *Gaydarov*, judgment of 17 November 2011, not yet reported, paragraph 31; and *McCarthy*, cited above, paragraph 29.

í sér baráttu gegn skipulögðum glæpum, til dæmis í sambandi við verslun með fíkniefni sem skipulögð samtök standa fyrir.[37]

73. Ríkisstjórn Noregs byggir á að hugtakið „allsherjarregla“ lúti að „raunverulegri og aðsteðjandi ógn við grundvallarhagsmuni samfélagsins“.[38] Þótt hugtakið beri að túlka þröngt og EES-ríki geti ekki lagt mat á það einhliða án aðkomu stofnana EES,[39] sé það viðurkennd dómaframkvæmd að „þær tilteknu aðstæður sem réttlætt geta tilvísun til allsherjarreglu kunni vera breytilegar frá einu landi til annars og eftir því hvaða tímabil er um að ræða. Stjórnvöld í aðildarríki verði þess vegna að hafa svigrúm til mats innan marka sáttmálans.“[40] Ríkisstjórn Noregs vísar til margvíslegra markmiða löggjafans sem talist geta til „grundvallarhagsmuna samfélagsins“,[41] þar með talið baráttunnar gegn glæpum[42] sem réttlætir ýmsar takmarkanir, þar á meðal á aðild að samtökum sem talin eru skaðleg almannahagsmunum.[43]

74. Ríkisstjórn Noregs telur dóminn í máli *Van Duyn* sérlega mikilvægan hvað varðar túlkun á þeim ákvæðum sem um ræðir í málinu. Þótt þar sé fjallað um túlkun á 3. gr. tilskipunar ráðsins 64/221/EBE, eigi sömu lagasjónarmið og liggja að baki 27. gr. tilskipunar 2004/38 við.[44] Þar af leiðandi liggur það skýrt fyrir að mati norskra stjórnvalda að

37 Vísað er til áður tilvitnaðs máls *Tsakouridis*, 45.-47. mgr.
38 Vísað er til áður tilvitnaðs máls *Bouchereau*, 35. mgr.
39 Vísað er til áður tilvitnaðs máls *Van Duyn*, 18. mgr.
40 Vísað er til áður tilvitnaðs máls *Omega*, 31. mgr.
41 Vísað er til áður tilvitnaðs máls *Omega*, 32.-35. mgr.; áður tilvitnað máls *Église de scientologie*, 4. mgr. og 17.-20. mgr.; máls C-319/06 *Framkvæmdastjórnin* gegn *Lúxemborg* [2008] ECR I-4323, 50.-53. mgr.; máls E-12/10 *ESA* v *Iceland* [2011] EFTA Ct. Rep. 117, 59. mgr.; máls C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13963, 88.-89. mgr.; áður tilvitnaðs máls *Van Duyn*, 18.-23. mgr.; og áður tilvitnað máls *Josemans*, 62. mgr. og 65.-66. mgr.
42 Vísað er til áður tilvitnaðs máls *Bouchereau*, 27.-29. mgr.
43 Vísað er til áður tilvitnaðra mála *Van Duyn*; *Église de scientologie*; *Omega*; og *Josemans*.
44 Vísað er til máls C-434/10 *Aladzhov*, dómur frá 17. nóvember 2011, enn óbirtur, 32. mgr., máls C-430/10 *Gaydarov*, dómur frá 17. nóvember 2011, enn óbirtur, 31. mgr.; og áður tilvitnaðs máls *McCarthy*, 29. mgr.

Consequently, according to the Norwegian Government, it is clear that the "present association, which reflects participation in the activities of the body or of the organisation as well as identification with its aims and its designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct"[45] within the meaning of Article 3 of Directive 64/221 and, by parity of reasoning, of Article 27(2) of Directive 2004/38. Second, Member States are not required to outlaw the activities of an organisation in order to restrict the movement of its members, provided that they have taken administrative measures to counteract these activities.[46] Third, a refusal of entry to a citizen of another EEA State is not precluded simply because similar restrictions were not placed on nationals.[47]

75. The Norwegian Government submits that the answer to questions two to five should be as follows:

Article 27 of the Directive is to be interpreted as meaning that an EEA State, in imposing restrictions on the freedom of movement of citizens of EEA States justified on grounds of public policy and public security, is entitled to take into account, as a matter of personal conduct of the individual concerned, the fact that the individual is associated with some body or organization the activities of which the State considers socially harmful but which are not unlawful in that State, even though the State does not place a similar restriction upon its own nationals"

The EFTA Surveillance Authority

The first question

76. ESA submits that, pursuant to Article 7 EEA, Contracting Parties have the choice of form and method of implementation when making the provisions of Directive 2004/38/EC part of their

45 Reference is made to *Van Duyn*, cited above, paragraph 17.
46 Ibid., paragraph 19.
47 Reference is made to *Van Duyn*, cited above, paragraph 23, and *Polat*, cited above, paragraph 38.

aðild að félagi, sem endurspegli þátttöku í starfsemi þess og samsömun með markmiðum þess og áætlunum, sé til marks um sjálfviljuga athöfn einstaklings og þar með þáttur í persónulegu framferði hans"[45] í skilningi tilskipunar 64/221, og samkvæmt sömu grundvallarökum og 2. mgr. 27. gr. tilskipunar 2004/38/EB byggist á. Í öðru lagi sé EES-ríkjum ekki skylt að banna starfsemi samtaka til að takmarka ferðir meðlima, svo framarlega sem stjórnvöld hafi gripið til aðgerða gegn starfseminni. [46] Í þriðja lagi sé ekki óheimilt að synja ríkisborgara annars EES-ríkis landgöngu á þeirri forsendu að sömu aðgerðum hefur ekki verið beitt gegn ríkisborgum ríkisins sem hafnaði landgöngu. [47]

75. Ríkisstjórn Noregs telur að svar dómstólsins við annarri til fimmtu spurningu eigi að vera:

Túlka ber 27. gr. tilskipunarinnar á þá leið að EES-ríki sé heimilt að líta til persónulegs framferðis einstaklings sem í hlut á við mat á því hvort takmarka eigi frjálsa för ríkisborgara EES-ríkis á grundvelli allsherjarreglu og almannaöryggis, og þá nánar tiltekið þess hvort einstaklingurinn sé tengdur við einhvers konar félagslega heild eða samtök sem ríkið telur fela í sér ógn við samfélagið jafnvel þó þau séu ekki ólögmæt. Gildir það þrátt fyrir að ríkið hafi ekki beitt sams konar takmörkunum gagnvart innlendum ríkisborgurum.

Eftirlitsstofnun EFTA

Fyrsta spurningin

76. ESA byggir á því að samkvæmt 7. gr. EES-samningsins hafi EES-ríkin val um form og aðferð við að innleiða tilskipun nr.

45 Vísað er til máls *Van Duyn*, 17. mgr.
46 Sami 19. mgr.
47 Vísað er til áður tilvitnaðs máls *Van Duyn*, 23. mgr., og áður tilvitnaðs máls *Polat*, 38. mgr.

internal legal order. In doing so, they must take account of the principle of effectiveness and must ensure that the objectives pursued by the directive are fulfilled.[48]

The second question

77. ESA refers to Commission Guidelines[49] and to case law[50] in support of its view that the concept of public security includes both internal and external security, whereas public policy is generally interpreted as covering the prevention of the disturbance of social order, and, in addition, that EEA States enjoy a certain margin of appreciation in determining the requirements of public policy and public security. It notes further that the denial of entry giving rise to the case before the national court was based on item (c) of the first paragraph of Article 41 in conjunction with Article 42 of the Foreign Nationals Act, which allows for this restriction if it is considered necessary in view of public order or safety and if the individual concerned exhibits conduct or is likely to engage in conduct that involves a substantial and sufficiently serious threat to the fundamental attitudes of society. ESA submits that as "present association, which reflects participation in the activities of the organisation as well as identification with its aims and designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct",[51] membership of an organisation assumed to practise activities considered harmful to society may be taken into account when determining the personal conduct of the person involved.

78. ESA considers that, in the case before the national court, the decision was taken by the Immigration Office on the basis of information provided by police including an open danger

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48 Reference is made to Case E-1/07 *Criminal Proceedings against A* [2007] EFTA Ct. Rep. 246, paragraphs 37-39, and Case C-104/10 *Patrick Kelley* v *National University of Ireland*, judgment of 21 July 2011, not yet reported, paragraph 35.

49 Reference is made to the 2009 Guidelines, p. 10.

50 Reference is made to *Van Duyn*, cited above, paragraph 18; *Bouchereau*, cited above, paragraph 34; *Olazabal*, cited above, paragraph 44; and the Opinion of Advocate General Bot in *Tsakouridis*, cited above, points 69-70.

51 Reference is made to *Van Duyn*, cited above, paragraph 17.

2004/38/EB í landsrétt. Við innleiðinguna verði þau að taka tillit til meginreglunnar um skilvirkni og verða að tryggja að markmið tilskipunarinnar séu uppfyllt. [48]

Önnur spurningin

77. ESA vísar til leiðbeininga framkvæmdastjórnarinnar[49] og dómaframkvæmdar[50] til stuðnings afstöðu sinni um að almannaöryggi skírskoti bæði til innri og ytra öryggis, en að allsherjarregla sé almennt túlkuð á þann veg að hún vísi til sjónarmiða um að koma í veg fyrir röskun á samfélagsskipaninni. Enn fremur njóti EES-ríkin ákveðins svigrúms við mat á skilyrðum allsherjarreglu og almannaöryggis. Auk þess beri að taka fram að bannið við landgöngu sem á reynir byggðist á c-lið 1. mgr. 41. gr., sbr. 42. gr. útlendingalaga nr. 96/2002, sem heimilar takmarkanir ef þær eru taldar nauðsynlegar með skírskotun til allsherjarreglu eða almannaöryggis og ef einstaklingarnir sem um ræðir stunda eða eru taldir stunda athæfi sem felur í sér raunhæfa og verulega ógnun við grundvallarhagsmuni samfélagsins. ESA byggir á að þar sem telja megi „aðild að félagi, sem endurspegli þátttöku í starfsemi þess og samsömun með markmiðum þess og áætlunum, til marks um sjálfviljuga athöfn einstaklings og þar með til framferðis“,[51] sé unnt að líta til aðildar einstaklings að samtökum sem talin eru stunda starfsemi sem metin er ógn við samfélagið við mat á framferði hans sjálfs.

78. ESA telur að í málinu fyrir landsdómstólunum hafi ákvörðun Útlendingastofnunar verið tekin á grundvelli þeirra upplýsinga sem lögreglan lagði fram, þar með talið opið áhættumat sem miðaði við komudag stefnanda. Þessi ákvörðun hafi verið í samræmi við fastmótaða framkvæmd Ríkislögreglustjóra. ESA bendi á að stjórnvöld annarra ríkja telji viðkomandi samtök

[48] Vísað er til máls E-1/07 *Criminal Proceedings against A* [2007] EFTA Ct. Rep. 246, paragraphs 37-39, og máls C-104/10 *Patrick Kelley* v *National University of Ireland*, dómur frá 21. júlí 2011, enn óbirtur, 35. mgr.

[49] Vísað er til leiðbeinandi tilmæla framkvæmdastjórnarinnar frá 2009, bls. 10.

[50] Vísað er til áður tilvitnaðs máls *Van Duyn*, 18. mgr.; áður tilvitnaðs máls *Bouchereau*, 34. mgr.; áður tilvitnaðs máls *Olazabal*, 44. mgr.; og álits Bots lögsögumanns í máli *Tsakouridis*, sem vitnað er til að ofan, liða 69-70.

[51] Vísað er til áður tilvitnaðs máls *Van Duyn*, 17. mgr.

assessment of the date of entry. This action was part of an established and consistent practice of the National Commissioner of Icelandic Police. ESA observes that the organisation in question is considered by authorities in other States to constitute a criminal organisation. At the time the assessment was established, information was obtained showing that the club whose members the individual concerned intended to meet was intending to accede to the said organisation. Moreover, the general practice in accession procedures was that the acceding association would adopt the practices of the one to which it acceded, and to which the individual concerned belonged, likely to lead to an increase in organised crime. ESA contends, therefore, that, in light of the said margin of appreciation, Iceland was entitled to consider that the public policy and public security requirements were fulfilled.

79. ESA submits that the answer to the second question should be as follows:

Paragraph 1 of Article 27 of Directive 2004/38/EC can be interpreted as meaning that the mere fact, by itself, that the competent authorities in an EEA State consider, on the basis of a danger assessment, that an organisation to which the individual in question belongs, is connected with organised crime and the assessment is based on the view that where such organisations have managed to establish themselves, increased and organised crime has followed, is sufficient to consider a citizen another EEA State to constitute a threat to public order and public security in the State in question.

The third question

80. ESA submits that it follows from case law that, in order to restrict the freedom of movement of EEA nationals pursuant to Article 27 of the Directive, national authorities are not obliged to outlaw the activities of an organisation as long as administrative measures have been taken to counteract its activities.[52] This follows from the margin of appreciation that national authorities enjoy in the choice of measures taken to counteract the activities

[52] Reference is made to *Van Duyn*, cited above, paragraph 19, and the 2009 Guidelines, pp. 11-12.

vera skipulögð glæpasamtök. Á þeim tíma sem matið var gert lágu fyrir upplýsingar um að vélhjólaklúbburinn, sem þeir einstaklingar sem stefnandi ætlaði að hitta voru félagar í, hafði í hyggju að gerast aðili að viðkomandi samtökum. Í inngönguferli á borð við það sem vélhjólaklúbburinn tók þátt í sé framkvæmdin almennt sú að það félag sem gengur í samtökin sem stefnandi var aðili að taki upp hætti síðastnefndu samtakanna, með þeim afleiðingum að skipulögð glæpastarfsemi aukist. ESA byggir því á að í ljósi þess matssvigrúms EES-ríkjanna sem áður er vitnað til hafi Ísland haft réttmæta ástæðu til að ætla að skilyrðin um allsherjarreglu og almannaöryggi væru uppfyllt.

79. ESA telur að svar dómstólsins við annarri spurningunni eigi að vera:

Skýra ber 1. mgr. 27. gr. tilskipunar 2004/38/EB á þann veg að ef lögbær yfirvöld í EES-ríki telja, á grundvelli hættumats, að samtök sem einstaklingur á aðild að séu tengd skipulagðri glæpastarfsemi og að það mat er byggt á því að afbrotatíðni og skipulögð glæpastarfsemi hafi aukist þar sem slík samtök hafa náð að skjóta rótum, þá sé það atriði nægilegt til þess að ríkisborgari EES-ríkis verði talin ógn við allsherjarreglu og almannaöryggi í því ríki sem um ræðir.

Þriðja spurningin

80. ESA byggir á því að samkvæmt dómafordæmum sé heimilt að takmarka frjálsa för EES-borgara samkvæmt 27. gr. tilskipunarinnar jafnvel þótt umrætt ríki hafi ekki bannað starfsemi samtakanna, svo framarlega sem stjórnvöld hafa gripið til aðgerða til að vinna gegn starfseminni.[52] Þetta leiðir af því svigrúmi sem stjórnvöld hafa við val á aðgerðum sem þau geta gripið til við að vinna gegn starfsemi skipulagðra glæpasamtaka. ESA telur að stjórnvöld aðildarríkja séu best í stakk búin til að

[52] Vísað er til áður tilvitnaðs máls *Van Duyn* og 19. mgr., og leiðbeininganna frá 2009, sbr. bls. 11-12.

of criminal organisations. ESA contends that national authorities are best-placed to determine the most effective measures and also to assess their potentially damaging effects. Furthermore, to restrict the freedom of movement of citizens of other EEA States without placing similar restrictions on nationals does not infringe the Directive as this reflects international law practice which precludes States from refusing their own nationals the right of entry or residence.[53]

81. ESA submits that the answer to the third question should be that:

It is not of significance whether the EEA State has outlawed the organisation of which the individual in question is a member or if the membership of such an organisation is prohibited in the state.

The fourth question

82. ESA notes that the Icelandic authorities did not base their decision to deny entry on the provision of national law specified in the question. None the less, a national provision such as that at issue can constitute proof of an established practice to counteract organised crime. ESA submits, however, that a general reference to provisions of national law defining organised crime as punishable cannot, as such, constitute sufficient grounds for denying entry. In accordance with Article 27(2) of the Directive, national authorities are obliged to undertake a specific assessment as to whether the personal conduct of the individual concerned can be considered to represent a threat.

83. ESA submits that the answer to the fourth question should be as follows:

The fact that an EEA State has in its legislation defined as punishable, conduct that consists of conniving with another person on the commission of an act, the commission of which is part of the activities of a criminal organisation, cannot be considered as sufficient grounds for considering public order and public security to be threatened in the sense of paragraph 1 of Article 27 of Directive 2004/38/EC.

[53] Reference is made to *Van Duyn*, cited above, paragraphs 20-23, and *Olazabal*, cited above, paragraphs 40-42.

meta hvaða aðgerðir skila mestum árangri og einnig að meta neikvæð áhrif þeirra. Þá fari það ekki gegn tilskipuninni þótt stjórnvöld takmarki rétt ríkisborgara annarra EES-ríkja til frjálsrar farar þótt þau takmarki ekki rétt sinna eigin ríkisborgara þar sem samkvæmt alþjóðalögum sé ríki óheimilt að banna sínum eigin ríkisborgunum landgöngu eða búsetu.[53]

81. ESA telur að svar dómstólsins við þriðju spurningunni eigi að vera:

Það skiptir ekki máli hvort EES-ríki hafi lýst samtök þau sem viðkomandi einstaklingur á aðild að ólögleg og hvort aðild að slíkum samtökum sé bönnuð í ríkinu.

Fjórða spurningin

82. ESA tekur það fram að íslensk stjórnvöld byggðu ekki ákvörðun sína um að hafna landgöngu á þeim ákvæðum landsréttar sem vísað er til í spurningunni. Samt sem áður geti þau ákvæði landsréttar sem hér eru til umræðu falið í sér sönnun um viðtekna framkvæmd um aðgerðir gegn skipulagðri glæpastarfsemi. ESA telur þó að almenn tilvísun til ákvæða landsréttar sem kveður á um að skipulögð glæpastarfsemi sé refsiverð geti ekki talist vera nægilegur grundvöllur til að hafna landgöngu. Samkvæmt 2. mgr. 27. gr. tilskipunarinnar sé yfirvöldum aðildarríkis skylt að meta sérstaklega hvort framferði einstaklingsins sem um ræðir feli í sér ógn.

83. ESA telur að svar dómstólsins við fjórðu spurningunni eigi að vera:

Sú staðreynd að EES-ríki hafi í löggjöf lýst refsiverða háttsemi sem felst í því að sammælast við annan mann um að fremja verknað og framkvæmd verknaðarins er liður í starfsemi skipulagðra brotasamtaka getur ekki talist vera nægilegur grundvöllur þess að allsherjarreglu og almannaöryggi teljist ógnað í skilningi 1. mgr. 27. gr. tilskipunar 2004/38/EB.

[53] Vísað er til áður tilvitnaðs máls *Van Duyn*, 20.-23. mgr., og áður tilvitnaðs máls *Olazabal*, 40.-42. mgr.

The fifth question

84. ESA contends that in order to demonstrate that personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, it suffices that the individual in question is a member of an organisation that is assumed to practise activities that are considered to be harmful to society, as the person in question has by his participation identified with the aims of the organisation in question.[54] In this respect, the fact that an individual has a clean criminal record does not preclude the national authorities from concluding that he represents a threat.

85. ESA submits that the answer to the fifth question should be as follows:

In order to consider an individual's conduct to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society in accordance with paragraph 2 of Article 27 of Directive 2004/38/EC, EEA States may take into consideration facts such as that the individual is a member of an organisation that is connected with organised crime.

The Commission

The first question

86. The Commission submits that it is apparent from Article 7 EEA that Contracting Parties have the choice of form and method of implementation when transposing a directive, subject to their obligation to ensure that national law faithfully enacts the terms of the directive and that provision is made in national law to ensure that, in the event of conflict between implemented EEA rules and other statutory provisions, the EEA rules prevail.[55]

[54] Reference is made to *Van Duyn*, cited above, paragraph 17.
[55] Reference is made to Protocol 35 on the implementation of EEA rules.

Fimmta spurningin

84. ESA telur að til að sýnt sé fram á að einstaklingsbundið framferði feli í sér raunverulega, yfirvofandi og nægilega alvarlega ógn við einhverja af grundvallarhagsmunum samfélagsins sé nóg að viðkomandi einstaklingur eigi aðild að samtökum sem talin eru stunda starfsemi sem fer gegn hagsmunum samfélagsins, þar hann hefur þá með aðild sinni samsamað sig markmiðum samtakanna sem um ræðir.[54] Í þessu samhengi girði sú staðreynd að einstaklingur hafi hreina sakaskrá ekki fyrir að stjórnvöld aðildarríkis álykti sem svo að af honum steðji ógn.

85. ESA telur að svar dómstólsins við fimmtu spurningunni eigi að vera:

Við mat á því hvort framferði einstaklings teljist raunveruleg, yfirvofandi og nægilega alvarleg ógn við einhverja af grundvallarhagsmunum samfélagsins samkvæmt 2. mgr. 27. gr. tilskipunar 2004/38/EB getur EES-ríkið litið til staðreynda á borð við að einstaklingurinn sé aðili að samtökum sem tengjast skipulagðri glæpastarfsemi.

Framkvæmdastjórnin

Fyrsta spurningin

86. Framkvæmdastjórnin byggir á að það sé ljóst af 7. gr. EES-samningsins að samningsaðilar hafa val um form og aðferð við innleiðingu tilskipunar, að því gefnu að tryggt sé tilskipunin hafi verið innleidd á réttan hátt í landsrétt og tryggt að ef landsréttur og EES-réttur fari ekki saman gangi EES-réttur fyrir.[55]

[54] Vísað er til áður tilvitnaðs máls *Van Duyn*, 17. mgr.
[55] Vísað er til bókunar 35 við EES-samninginn um innleiðingu EES-reglna.

The second to fifth question

87. The Commission submits that the remaining questions can be answered together. In essence, these questions seek guidance on the interpretation of Article 27(1) and (2) of the Directive. Guidance is especially sought on the question whether mere membership of an organisation associated with organised crime which in itself is regarded as representing a threat to public policy/and or public security in the host State can justify the denial of entry to a citizen of another EEA State even if the host State has not prohibited membership of the organisation in question.

88. The Commission refers to its 2009 Communication[56] in which it took an official position on the matter raised in the present case.

89. In this context, the Commission notes that the Plaintiff has been denied entry and was not expelled. As regards expulsion, it observes that, as stated in recital 23 in the preamble to the Directive, this is limited by the principle of proportionality and account must be taken of the degree of integration. Conversely, and notwithstanding the wording of Article 27 of the Directive, if a person is not integrated in the host State, the authorities of that State have a wider margin of appreciation to refuse entry than in the case of expulsion.

90. The Commission considers the judgment in *Van Duyn*[57] of utmost importance although it was decided in the context of Directive 64/221. First, it is of relevance that "present association, which reflects participation in the activities of the organisation as well as identification with its aims and designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct"[58] within the meaning of Article 3 of Directive 64/221 and, by parity of reasoning, of Article 27(2) of Directive 2004/38.[59] Second, EEA law does not require EEA States to outlaw an organisation before it may restrict the free

56 Reference is made to the 2009 Guidelines, p. 10 et seq.
57 Reference is made to *Van Duyn*, cited above.
58 Ibid., paragraph 17.
59 Reference is made to the 2009 Guidelines, p. 11.

Önnur til fimmta spurning

87. Framkvæmdastjórnin byggir á því að svara megi þeim spurningum sem eftir standa sameiginlega. Í spurningunum sé leitað eftir leiðsögn um hvernig túlka beri 1. og 2. mgr. 27. gr. tilskipunarinnar. Sérstaklega sé leitað eftir leiðsögn um það atriði hvort aðild að samtökum sem tengd séu skipulagðri glæpastarfsemi og eru sem slík talin ógn við allsherjarreglu og almannaöryggi í gistiaðildarríki geti ein og sér réttlætt að hafna landgöngu ríkisborgara annars EES-ríkis ef gistiaðildarríkið hefur ekki bannað aðild að samtökunum.

88. Framkvæmdastjórnin vísar um þetta atriði til skýrslu sinnar frá 2009[56] þar sem tekin var opinber afstaða til þeirra efnisatriða sem mál þetta lýtur að.

89. Í þessu samhengi tekur framkvæmdastjórnin fram að stefnanda hafi verið meinuð landganga en ekki vísað úr landi. Framkvæmdastjórnin tekur fram að varðandi brottvísun úr landi þurfi samkvæmt 23 lið formálaroða tilskipunarinnar að gæta meðalhófs við slíka aðgerð og hafa hliðsjón af því hversu mikið einstaklingur hefur aðlagast samfélaginu. Á hinn bóginn hafi stjórnvöld í gistiaðildarríki, þrátt fyrir orðalag 27. gr. tilskipunarinnar, mun víðtækara svigrúm til mats við að hafna landgöngu einstaklings en þegar þau vísa honum brott úr landi, ef einstaklingur hefur ekki aðlagast samfélagi gistiaðildarríkis.

90. Framkvæmdastjórnin telur að dómur Evrópudómstólsins í máli *Van Duyn*[57] hafi hér verulega þýðingu, þó svo að málið hafi varðað tilskipun 64/221. Í fyrsta lagi hafi það þýðingu að telja megi aðild að félagi, sem endurspegli þátttöku í starfsemi þess og samsömun með markmiðum þess og áætlunum, til marks um sjálfviljuga athöfn einstaklings og þar með til framferðis hans[58] í skilningi 3. gr. tilskipunar 64/221, og nú, samkvæmt rökréttri ályktun, 2. mgr. 27. gr. tilskipunar 2004/38.[59] Í öðru lagi sé ekki

[56] Vísað er til leiðbeininganna frá 2009, bls. 10 o.áfr.
[57] Vísað er til áður tilvitnaðs máls *Van Duyn*.
[58] Sami, 17. mgr.
[59] Vísað er til leiðbeininganna frá 2009, bls. 10 o.áfr.

movement of its members that are citizens of other EEA States and before the public policy proviso can be invoked. However, the authorities of that State must take effective measures against that organisation and the threat it and its members represent.[60] Third, it stresses the finding in *Van Duyn* that a refusal on grounds of public policy to enter the territory of the host State and to reside and work there is not precluded because the host State did not place such a restriction on its own nationals.[61] The Commission adds, however, that recourse to the public policy exception may not be used to permit covert discrimination.[62]

91. The Commission notes that it appears that the Icelandic authorities regard organised motorcycle gangs as a considerable threat and have consistently taken measures against this phenomenon without banning membership as such. There appears to be a regular practice of denying entry to foreign members of the *Hell's Angels* motorcycle clubs. The Commission submits that, *a priori*, there appear to be adequate grounds to allow the national authorities to deny entry to a person in the position of the Plaintiff.

92. As regards the concern of the Supreme Court that the criminalisation of activities as a member of an organisation involved in organised crime could constitute a reliance on considerations of general prevention, the Commission submits that measures adopted on grounds of public policy cannot be justified on grounds extraneous to the individual case. Departure from the rules concerning free movement must be strictly construed as exceptions, depending solely on the personal conduct of the individual affected.[63] The purpose of deterring other nationals of an EEA State cannot justify a restriction.[64] In the Commission's view, the prohibition on taking measures of a general preventative

60 Reference is made to *Van Duyn*, cited above, paragraph 19, and the 2009 Guidelines, pp. 10-12.
61 Reference is made to *Van Duyn*, cited above, paragraphs 20-23.
62 Reference is made to *Adoui and Cornuaille*, cited above, paragraph 8, *Jany and Others*, cited above, and *Olazabal*, cited above, paragraph 42.
63 Reference is made to *Bonsignore*, cited above, paragraphs 5-7.
64 Reference is made to *Orfanopoulos and Oliveri*, cited above, paragraph 65.

gerð krafa um það í EES-rétti að aðildarríki EES-samningsins þurfi að banna samtök áður en þau geta takmarkað frjálst frjálsa för félaga í slíkum samtökum og borið fyrir sig allsherjarreglu. Hins vegar verða stjórnvöld ríkisins að grípa til aðgerða gegn samtökunum og ógninni sem stafar af þeim og meðlimum þeirra og gera í því sambandi ráðstafanir sem hafa raunhæfa þýðingu.[60] Í þriðja lagi leggur framkvæmdastjórnin áherslu á niðurstöðu Evrópudómstólsins í máli *Van Duyn* að bann við landgöngu inn á yfirráðasvæði EES-ríkis á grundvelli allsherjarreglu, og þar með við því að einstaklingur búi þar og starfi,[61] sé ekki óheimilt þótt umrætt ríki hafi ekki lagt sams konar kvaðir á eigin ríkisborgara.[62]

91. Framkvæmdastjórnin tekur fram að íslensk stjórnvöld álíti að veruleg ógn stafi af skipulögðum vélhjólasamtökum og að þau hafi gripið til samræmdra aðgerða gegn þeim án þess þó að banna aðildina sem slíka. Það virðist koma reglulega fyrir að erlendum félögum vélhjólasamtaka Vítisengla sé synjuð landganga. Framkvæmdastjórinn telur að fyrirfram megi ætla að nægilegur grundvöllur sé fyrir hendi til þess að stjórnvöld geti meinað einstaklingi eins og stefnanda landgöngu.

92. Að því er snertir hugleiðingar Hæstaréttar um hvort það geti talist almenn forvarnarforsenda að ríki hafi lýst refsiverða háttsemi sem felst í því að sammælast við annan mann um að fremja verknað, og framkvæmd verknaðarins er liður í starfsemi skipulagðra glæpasamtaka, þá bendir framkvæmdastjórnin á að ekki sé unnt að réttlæta aðgerðir sem byggjast á allsherjarreglu á grundvelli annarra sjónarmiða en reynir á í fyrirliggjandi máli. Frávik frá reglum um frjálsa för verði að túlka þröngt í ljósi eðlis þeirra sem undantekninga og heimildir til frávika ráðist eingöngu af framferði þess einstaklings sem í hlut á.[63] Að áliti framkvæmdastjórnarinnar geta takmarkanir[64] á heimildum ríkja um að byggja á almennum forvarnarforsendum þó ekki útilokað að stjórnvöldum EES-ríkis

60 Vísað er til áður tilvitnaðs máls *Van Duyn*, 19.mgr. og leiðbeininganna frá 2009, bls. 10-12.
61 Vísað er til áður tilvitnaðs máls *Van Duyn*, 20.-23.
62 Vísað er til áður tilvitnaðra mála *Adoui and Cornuaille*, 8. mgr., *Jany and Others* og *Olazabal*, 42. mgr.
63 Vísað er til áður tilvitnaðs máls *Bonsignore*, 5.-7. mgr.
64 Vísað er til áður tilvitnaðs máls *Orfanopoulos and Oliveri*, 65. mgr.

nature does not exclude the possibility for authorities of an EEA State to act pre-emptively to stop a threat from materialising, if they do so on reasonable grounds and in accordance with the principle of proportionality. In this context, the Commission notes that the arrival of the applicant in Iceland was thought to be linked to the preparation for full membership of the association,which would instigate the spread of organised crime.

93. The Commission asserts that in comparison with the situation in *Van Duyn*,[65] in which the applicant was only intending to carry out low-level tasks for the Church of Scientology, which was not associated with organised crime albeit considered undesirable, in the present case, the Plaintiff is thought to play a leading role in the activities of an association presumed to be connected to organised crime.

94. As regards the question of the Supreme Court on the necessity for EEA States considering restrictions to adduce a probability that the individual intends to engage in activities comprising a certain action or actions to be considered as representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, the Commission underlines the role of the procedural safeguards contained in the Directive, in particular Article 31. It submits that this guarantee of judicial redress procedures provides for the possibility of a review in court within the procedural autonomy of the State concerned, subject to compliance with the principles of equivalence and effectiveness.[66] It is a matter for the national court to determine whether the administrative authorities have discharged the burden of showing that sufficient evidence exists to entitle them to come to the conclusion that the applicant was likely to engage in such activities. It must also determine whether the decision taken complies with the principle of proportionality in that it must be appropriate for securing the attainment of the objective which it pursues and must not go beyond what is necessary to achieve it.[67]

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65 Reference is made to *Van Duyn*, cited above.
66 Reference is made to Case C-286/06 *Impact* [2008] ECR I-2483.
67 Reference is made to *Olazabal*, cited above, paragraphs 43 and 44.

sé heimilt að grípa til forvirkra aðgerða til að koma í veg fyrir að ógn verði að veruleika, ef stjórnvaldið gerir það á grundvelli málefnalegra sjónarmiða og í samræmi við meðalhóf. Í þessu samhengi tekur framkvæmdastjórnin fram að koma stefnanda til Íslands var talin tengjast undirbúningi fyrir fullri aðild að samtökum Vítisengla, sem myndi leiða til þess að skipulögð glæpastarfsemi ykist.

93. Framkvæmdastjórnin vekur athygli á því til samanburðar að í máli *Van Duyn*[65] hafi stefnanda aðeins verið ætlað að sinna lítilvægum störfum fyrir Vísindakirkjuna, sem hafi ekki tengst skipulagðri glæpastarfsemi, þrátt fyrir að starfsemi hennar teldist óæskileg. Í þessu máli sé stefnandi hins vegar talinn gegna forystuhlutverki í starfi samtaka sem talin eru tengjast skipulagðri glæpastarfsemi.

94. Varðandi þá spurningu Hæstaréttar hvort EES-ríki, sem hyggst beita úrræðum til að skerða rétt einstaklings til frjálsrar farar, þurfi að leiða að því líkur að ásetningur viðkomandi einstaklings standi til þess að viðhafa háttsemi sem felst í tiltekinni eða tilteknum aðgerðum eða aðgerðarleysi svo framferði einstaklingsins teljist raunveruleg, yfirvofandi og nægilega alvarleg ógnun við einhverja af grundvallarhagsmunum samfélagsins, leggur framkvæmdastjórnin áherslu á þær málsmeðferðarreglur sem settar eru í tilskipuninni í þágu réttaröryggis, einkum í 31. gr. hennar. Er það álit framkvæmdastjórnarinnar að réttur manna til að fá úrlausn um réttindi sín fyrir dómstólum samkvæmt ákvæðinu feli í sér tryggingu fyrir endurskoðun ákvörðunar í samræmi við réttarfarsreglur aðildarríkisins, að gættu samræmi við grundvallarreglur EES-réttar um jafnræði við málsmeðferð og skilvirka framkvæmd EES-réttar.[66] Það sé undir landsdómstólnum komið að taka afstöðu til þess hvort stjórnvöldum hafi tekist að færa fullnægjandi sönnur að því að þau hafi haft nægileg gögn til að ætla að stefnandi myndi taka þátt í þeim athöfnum sem af er látið. Það verður einnig að skoða hvort ákvörðunin sé í samræmi við meðalhóf, þ.e. að aðgerðin sé til þess fallinn að ná því markmiði sem stefnt er að og hún fari ekki út fyrir þau mörk sem eru nauðsynlegt í því samhengi.[67]

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65 Vísað er til áður tilvitnaðs máls *Van Duyn*.
66 Vísað er til máls C-286/06 *Impact* [2008] ECR I-2483.
67 Vísað er til áður tilvitnaðs máls *Olazabal*, 43. og 44. mgr.

95. The Commission submits that the answer to questions two to five should be as follows:

On a proper construction of Article 27 of Directive 2004/38, membership of an organisation may be taken into account as an element in assessing the personal conduct of the individual where he participates in the organisation's activities and identifies with its aims or designs. Recourse to that provision does not require that EEA States criminalise or ban the activities of that organisation, as long as effective measures to counteract the activities of that organisation are in place. Nevertheless, since that provision precludes the adoption of measures on general preventive grounds, such measures must be based on the actual or likely conduct of the person affected by the measure and cannot be justified merely on grounds of general deterrence unrelated to the circumstances of the case.

Carl Baudenbacher

Judge-Rapporteur

95. Framkvæmdastjórnin telur að svar dómstólsins við annarri til fimmtu spurningunum eigi að vera:

Við túlkun 27. gr. tilskipunar 2004/38 er unnt að líta til aðildar einstaklings að samtökum þegar lagt er mat á framferði hans, ef hann tekur þátt í starfi samtakanna og samsamar sig markmiðum þeirra og fyrirætlunum. Ekki er gerð krafa um að EES-ríki hafi gert aðild að samtökunum refsiverða eða bannað starfsemi þeirra til þess að það geti borið fyrir sig 27. gr., svo framarlega sem gripið hefur verið til aðgerða gagnvart samtökunum með þeim hætti að þær hafi raunhæfa þýðingu. Þar sem ákvæðið girðir fyrir að EES-ríki grípi til aðgerða á grundvelli almennra forvarnarsjónarmiða, verða þær ráðstafanir sem gripið er til að byggjast mati á hegðun þess einstaklings sem þær beinast að eða líklegri hegðun hans. Ekki er hægt að réttlæta ráðstafanir af þessu tagi með vísan til almennra varnaðarsjónarmiða sem ekki eiga stoð í atvikum málsins.

Carl Baudenbacher

Framsögumaður


EFTA COURT

Case E-6/12

EFTA Surveillance Authority
v
Kingdom of Norway

CASE E-6/12

EFTA Surveillance Authority

v

Kingdom of Norway

(Failure by an EEA/EFTA State to fulfil Its obligations - Regulation (EEC) No 1408/71 - Regulation (EEC) No 574/72 - Social security for migrant workers)

Summary of the Judgment

1. The basic rule in allocating competence in respect of social security benefits is laid down in Article 13 of Regulation 1408/71 which, in its first paragraph, establishes that an EEA worker shall be subject to the legislation of a single EEA State and, in its second paragraph, provides that that State shall be the EEA State of employment, even if the worker resides in the territory of another EEA State.

2. Article 73 of the Regulation extends that rule to the enjoyment of family benefits. Family benefits are defined in Article 1(u)(i) of the Regulation as all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4(1)(h) of the Regulation.

3. Article 73 of the Regulation provides that an employed or self-employed person subject to the legislation of an EEA State shall be entitled, in respect of members of his family who are residing in another EEA State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State. The provision is intended to prevent EEA States from making entitlement to and the amount of family benefits dependent on residence of the members of the worker's family in the EEA State providing the benefits, so that EEA workers are not deterred from exercising their right to freedom of movement.

4. That arrangement stems from the objective of the Regulation, as set out in Article 3 thereof, to guarantee all workers who are EEA nationals, and who move within the EEA, equal treatment with regard to different national laws and

the enjoyment of social security benefits irrespective of the place of their employment or residence. Article 73 must be interpreted uniformly in all EEA States regardless of the arrangements made by national law on the acquisition of entitlement to family.

5. The entitlement to family benefits in respect of a child under Article 73 of the Regulation is conditional upon the child coming within the personal scope of the Regulation.

6. Article 1(f)(i) of the Regulation provides rules, for coordination purposes, on how an EEA State must interpret and apply the criterion of "residence" used in national law in the context of the Regulation.

7. Article 1(f)(i) of the Regulation defines the term "member of the family" for the purposes of the Regulation. It provides that a "member of the family" means "any person defined or recognized as a member of the family or designated as a member of the household by the legislation under which benefits are provided...; where, however, the said legislations regard as a member of the family or a member of the household only a person living under the same roof as the employed or self-employed person or student, this condition shall be satisfied if the person in question is mainly dependent on that person".

8. It is clear from the wording of Article 73 read together with Article 1(f)(i) of the Regulation that the purpose of those provisions is to ensure that if the main provider of a family makes use of the right to move freely within the EEA family benefits for dependent family members should not be lost.

9. It is of no importance whether the parents are divorced. Although the Regulation does not expressly cover family situations following a divorce there is nothing to justify the exclusion of such situations from the scope of the Regulation.

JUDGMENT OF THE COURT

11 September 2013

(Failure by an EEA/EFTA State to fulfil its obligations – Regulation (EEC) No 1408/71 – Regulation (EEC) No 574/72 – Social security for migrant workers)

In Case E-6/12,

EFTA Surveillance Authority, represented, first, by Xavier Lewis, Director, and Fiona Cloarec, Officer, and subsequently by Xavier Lewis, Director, and Auður Ýr Steinarsdóttir, Officer, Legal and Executive Affairs, acting as Agents,

applicant,

v

Kingdom of Norway, represented by Marius Emberland, Advokat, Office of the Attorney General (Civil Affairs), and Vegard Emaus, Adviser, Ministry of Foreign Affairs, acting as Agents,

defendant,

APPLICATION for a declaration that, by maintaining in force the administrative practice of not assessing whether a child, living together with another parent outside Norway, is mainly dependent on the parent who is living in Norway and separated from the other parent, the Kingdom of Norway is in breach of Article 1(f)(i), second sentence, in conjunction with Article 76 of the Act referred to at point 1 of Annex VI to the Agreement on the European Economic Area (Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended), as adapted to the EEA Agreement by Protocol 1 thereto,

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties and the written observations of the European Commission (the "Commission"), represented by Johan Enegren and Viktor Kreuschitz, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the EFTA Surveillance Authority ("ESA"), represented by Auður Ýr Steinarsdóttir, the defendant, represented by Marius Emberland, and the Commission, represented by Viktor Kreuschitz, at the hearing on 30 April 2013,

gives the following

JUDGMENT

I INTRODUCTION

1 This case concerns an application brought by ESA against Norway that a Norwegian administrative practice refusing family benefits in certain cases to workers in Norway constitutes an infringement of Article 1(f)(i) in conjunction with Article 76 of Regulation (EEC) No. 1408/71.

2 The practice in question concerns a failure to assess whether a child of a person working in Norway is mainly dependent upon that parent, although the parents are separated and the child lives with the other parent in an EEA State other than Norway.

II LEGAL CONTEXT

EEA law

Regulation No 1408/71

3 At the relevant time, the Act referred to at point 1 of Annex VI to the EEA Agreement was Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended, as adapted to the EEA Agreement by Protocol 1 thereto (OJ, English Special Edition 1971 (II), p. 416) ("the Regulation" or "Regulation No 1408/71").

4 Article 1(f)(i) of the Regulation defines the term "member of the family" as follows:

'member of the family' means any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided ...; where however, the said legislations regard as a member of the family or a member of the household only a person living under the same roof as the employed or self-employed person or student, this condition shall be considered satisfied if the person in question is mainly dependent on that person. ...

5 Article 1(u)(i) of the Regulation defines the term "family benefits" as follows:

'family benefits' means all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4 (1) (h), excluding the special childbirth allowances mentioned in Annex I.

6 Article 4(1) of the Regulation provides:

[Regulation No 1408/71] shall apply to all legislation concerning the following branches of social security:

...

(h) family benefits.

7 Chapter 7 of the Regulation regulates the coordination of family benefits in cross-border cases.

8 Article 73 of the Regulation provides:

An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State, subject to provisions of Annex VI.

9 Article 75 of the Regulation states that:

1. Family benefits shall be provided, in the cases referred to in Article 73, by the competent institutions of the State to the legislation of which the employed or self-employed person is subject and, in the

cases referred to in Article 74, by the competent institution of the State under the legislation of which an unemployed person who was formerly employed or self-employed receives unemployment benefits. They shall be provided in accordance with the provisions administered by such institutions, whether or not the natural or legal person to whom such benefits are payable is residing or staying in the territory of the competent State or in that of another Member State.

2. However, if the family benefits are not used by the person to whom they should be provided for the maintenance of the members of the family, the competent institution shall discharge its legal obligations by providing the said benefits to the natural or legal person actually maintaining the members of the family, at the request of, and through the agency of, the institution of their place of residence or of the designated institution or body appointed for this purpose by the competent authority of the country of their residence.

10 Article 76(1) of the Regulation provides:

Where, during the same period, for the same family member and by reason of carrying on an occupation, family benefits are provided for by the legislation of the Member State in whose territory the members of the family are residing, entitlement to the family benefits due in accordance with the legislation of another Member State, if appropriate under Article 73 or 74, shall be suspended up to the amount provided for in the legislation of the first Member State.

Regulation No 574/72

11 Regulation No 1408/71 is accompanied by an implementing regulation, that is, Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to their families moving within the Community, as amended (OJ, English Special Edition 1972 (I), p. 160) ("Regulation No 574/72").

12 At the relevant time, Regulation No 574/72 was referred to at point 2 of Annex VI to the EEA Agreement.

13 Article 10 of Regulation No 574/72 concerns rules applicable in the case of overlapping of rights to family benefits or family allowances for employed or self-employed persons and provides:

1. (a) Entitlement to benefits or family allowances due under the legislation of a Member State, according to which acquisition of the right to those benefits or allowances is not subject to conditions of insurance, employment or self-employment, shall be suspended when, during the same period and for the same member of the family, benefits are due only in pursuance of the national legislation of another Member State or in application of Articles 73, 74, 77 or 78 of the Regulation, up to the sum of those benefits

(b) However, where a professional or trade activity is carried out in the territory of the first member State:

(i) in the case of benefits due either only under national legislation of another Member State or under Articles 73 or 74 of the Regulation to the person entitled to family benefits or to the person to whom they are to be paid, the right to family benefits due either only under national legislation of that other Member State or under these Articles shall be suspended up to the sum of family benefits provided for by the legislation of the Member State in whose territory the member of the family is residing. The cost of the benefits paid by the Member State in whose territory the member of the family is residing shall be borne by that Member State;

(ii) in the case of benefits due either only under national legislation of another Member State or under articles 77 or 78 of the Regulation, to the person entitled to these benefits or to the person to whom they are payable, the right to these family benefits or family allowances due either only under the national legislation of that other Member State or in application of those Articles shall be suspended; where this is the case, the person concerned shall be entitled to the family benefits or family allowances of the Member State in whose territory the children reside, the cost to be borne by that Member State, and, where appropriate, to benefits other than

the family allowances referred to in Article 77 or Article 78 of the Regulation, the cost to be borne by the competent State as defined by those Articles.

...

3. *Where family benefits are due, over the same period and for the same member of the family, from two Member States pursuant to Articles 73 and/or 74 of the Regulation, the competent institution of the Member State with legislation providing for the highest levels of benefit shall pay the full amount of such benefit and be reimbursed half this sum by the competent institution of the other Member State up to the limit of the amount provided for in the legislation of the latter Member State.*

National law

14 The Norwegian authority responsible for assessing requests for family benefits is the Norwegian Labour and Welfare Service (*Arbeids- og velferdsetaten*, "the NAV").

15 Regulation No 1408/71 and Regulation No 574/72 were made part of the Norwegian legal order by Regulation 1204 of 30 June 2006 on the incorporation of the social security regulations in the EEA Agreement (*Forskrift av 30 juni 2006 nr. 1204 om inkorporasjon av trygdeforordningene i* EØS*-avtalen*, "the Norwegian incorporating regulation"), in force at the relevant time.

16 The second paragraph of Section 1 of the Norwegian incorporating regulation provides:

The provisions in the following laws are to be set aside insofar as it is necessary in relation to [Regulations Nos 1408/71 and 574/72]:

...

– *The Child Benefits Act of 8 March 2002.*

17 The granting of child benefits in Norway is governed by the Child Benefits Act of 8 March 2002 (*lov av 8. mars 2002 nr. 4 om barnetrygd*, the "Child Benefits Act"). Norway has notified the benefits provided under the Child Benefits Act as included under Article 4(1)(h) of the Regulation (OJ 2003 C 127, p. 36).

18 Section 2, paragraph 1, of the Child Benefits Act states that parents who have a child under the age of eighteen years living with them permanently are entitled to child benefits if the child is resident in Norway in accordance with the provisions of Section 4 of that Act. The child benefit is a flat amount unrelated to the parents' income and is not means tested in other ways.

19 Entitlement to child benefits in Norway is enjoyed by a parent living permanently with the child, not the child. The child benefit is paid to the parent.

20 In determining where a child lives and with which parent, for the purpose of disbursing child benefits, reference is made to section 36 of the Children Act of 8 April 1981 (*lov av 8 april 1981 nr. 7 om barn og foreldre (barnelova)*, "the Children Act"). Section 36 reads as follows:

The parents may agree that the child shall live permanently either with one of them or with both of them.

If the parents fail to agree, the court must decide that the child shall live permanently with one of them. When special reasons so indicate, the court may nevertheless decide that the child shall live permanently with both of them.

The administrative practice in question

21 The details of the administrative practice in question have been described as follows by ESA and have been confirmed by the Norwegian Government.

22 When the NAV assesses an application for child benefits pursuant to the Child Benefits Act, it takes the relevant circumstances into account to ensure that the benefit is paid to the parent with whom the child lives permanently.

23 In cases where the parents are married or living together, the relation to the child is assumed. If the parents are not living together, the benefit is paid to the parent with whom the child lives permanently. Where the child shall live permanently is

determined by applying Chapter 5 of the Children Act. The parents may choose with whom the child is to live permanently.

24 The residency requirement ("living with them permanently [and] the child is resident in Norway") of Section 2 of the Child Benefits Act (see paragraph 18 above) is not applied to persons covered by the Regulation. Instead, in cross-border situations, where one parent works in Norway and the Regulation applies, the NAV assesses whether the parent working in Norway has his "regular abode" with his family in the other EEA State during the periods when he is not working in Norway. "Regular abode" does not require the parent working in Norway to spend a specified amount of time with his family outside Norway.

25 If the parent has his regular abode with his family in another EEA State, the NAV considers the requirement of "living permanently together" with the child to be fulfilled. In such a case, the child benefit may be granted. However, if this is not the case, for example, for reasons of separation or divorce, the child benefit will be refused or the grant of child benefits stopped.

III BACKGROUND TO THE DISPUTE AND PRE-LITIGATION PROCEDURE

26 In June 2010, two unresolved cases in the SOLVIT database (the online problem solving network in which EEA States work together to solve, without legal proceedings, problems caused in the application of internal market law by public authorities) were brought to the attention of ESA. The two cases concerned mothers working and residing with their child in Lithuania and in Slovakia, respectively. In both cases, the parents of the child were separated and the father was residing and working in Norway. It appears in the Lithuanian case that the father did not apply for the benefit. In the other case, the benefit was stopped as the mother moved to Slovakia with the child.

27 The mothers were entitled to family benefits in their respective State of residence. They both requested the differential amount between the higher Norwegian benefits to which the father, in Norway, would be entitled under the Norwegian social security

system and the benefits to which they were entitled in their State of residence (the "topping-up" of the first benefit in the State of residence). However, the Norwegian authorities denied both applications.

28 By a letter of 9 July 2010, ESA informed the Norwegian Government that it had opened an own-initiative case regarding the granting of child benefits by the Norwegian authorities in cases where one parent lives and works in Norway and the other parent resides, together with the child, in another EEA State. ESA requested further information from the Norwegian Government on the issue.

29 The Norwegian Government replied on 10 September 2010 and confirmed that a parent who does not have a child living permanently with him is not entitled to child benefits.

30 At a meeting with ESA on 11 November 2010, Norway confirmed that child benefits cannot be granted in circumstances such as those described in paragraph 25 above.

31 On 8 December 2010, ESA issued a letter of formal notice. The Norwegian Government replied by letter of 8 February 2011.

32 On 6 July 2011, ESA delivered a reasoned opinion, maintaining the conclusions it had reached in the letter of formal notice and claiming that the Kingdom of Norway was in breach of Articles 1(f)(i) and 76 of the Regulation. The Norwegian Government replied on 6 October 2011.

33 The case was discussed again at a meeting on 10 and 11 November 2011. Further correspondence took place on 2 December and 21 December 2011. On 28 March 2012, ESA decided to bring the matter before the Court.

IV PROCEDURE AND FORMS OF ORDER SOUGHT

34 By application lodged at the Court on 25 June 2012, ESA brought the present action. ESA requested the Court to declare that:

1. By maintaining in force the administrative practice of not assessing whether a child, living together with another parent outside Norway, is mainly dependent on the parent who is living

in Norway and separated from the other parent, the Kingdom of Norway is in breach of Article 1(f)(i), second sentence, in conjunction with Article 76 of the Act referred to at point 1 of Annex VI to the Agreement on the Economic Area (Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons to self-employed persons and to members of their families moving within the Community, as amended), as adapted to the EEA Agreement by Protocol 1 thereto.

2. The Kingdom of Norway bear the costs of the proceedings.

35 In its defence, lodged at the Court on 29 August 2012, Norway requested the Court to declare that:

1. By maintaining in force the administrative practice of not assessing whether a child, living together with another parent outside Norway, is mainly dependent on the parent who is living in Norway and separated from the other parent, the Kingdom of Norway complies with Article 1(f)(i), second sentence, in conjunction with Article 76 of the Act referred to at point 1 of Annex VI to the Agreement on the European Economic Area (Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended), as adapted to the EEA Agreement by Protocol 1 thereto.

2. The EFTA Surveillance Authority bear the costs of the proceedings.

36 On 5 October 2012, ESA submitted its reply to the defence.

37 On 12 November 2012, Norway submitted its rejoinder. On the same date, the Commission submitted its written observations pursuant to Article 20 of the Statute of the Court.

38 Reference is made to the Report for the Hearing for a more complete account of the facts, the pre-litigation procedure and the legal background as well as the arguments of the parties and the written observations, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

V THE ACTION

Arguments of the parties

39 First, ESA – supported by the Commission – notes that, under Article 4(1)(h) of the Regulation, family benefits are benefits intended to enable one of the parents to be devoted to the raising of a young child. They are designed, more specifically, to remunerate the service of bringing up a child, to meet the other costs of caring for and raising a child and, as the case may be, to mitigate the financial disadvantages entailed in giving up income from an occupational activity. The provision is essential when assessing whether Norway applied the definition of a "member of the family" correctly. According to ESA it is uncontested that the family benefits in the present case fall within this definition.

40 ESA reiterates its position stated in the reasoned opinion of 6 July 2011 and notes that the Norwegian legislation requires the child to be "living permanently with" the parent (or the parent working in Norway to have his "regular abode" with the family in the other EEA State). The correct application of Article 1(f)(i) requires that in cases where the worker in Norway is found not to have his regular abode with his child, the NAV must assess whether the child living together with the other parent outside Norway is "mainly dependent on" the parent working in Norway. However, the Norwegian authorities fail to make such an assessment. This constitutes an infringement of Article 1(f)(i) of the Regulation.

41 Second, ESA argues that, by failing to undertake that assessment, the administrative practice in question also results in the incorrect application of Article 76 and results in a concomitant breach of this provision. In its view, this is clear following the judgment of the Court of Justice of the European Union ("ECJ") in Case C-363/08 *Slanina* [2009] ECR I-11111. ESA adds that the administrative practice in question deters workers from exercising their right to move freely within the EEA and violates the objectives of Articles 73 and 76 of Regulation No 1408/71. It contends that when applying the Regulation to a given case it is irrelevant whether the parents are divorced or not.

42 The Norwegian Government, although confirming that ESA correctly describes the administrative practice in question, contests the application. It stresses that only the parent with whom the child lives permanently will qualify for child benefits pursuant to Section 2 of the Child Benefits Act. The worker must have his regular abode with his child when he is not working in Norway. In general, the NAV does not examine how much time the applicant spends in Norway and how often he visits his family. Only if the NAV has received information indicating that the worker does not have his regular abode with the child during the periods when he is not working in Norway (such as when the parents are separated) will the NAV examine this more closely.

43 The Norwegian Government considers that the Court is called upon to consider the compatibility of the administrative practice in question only when the parent living with the child outside Norway is already entitled to family benefits in the EEA State of residence and, by the application in Norway, seeks to increase the disbursement of public benefits as defined in the SOLVIT cases.

44 First, the Norwegian Government argues that a definitional norm such as the one set out in Article 1(f)(i), second sentence, of the Regulation cannot be infringed per se, since it does not in its own right impose obligations on EEA States and merely defines aspects of the scope of norms that do.

45 Second, even though Article 76 of the Regulation contains obligations for EEA States, the relevant provision in the present case should be Article 73 of the Regulation. Only the latter provision imposes obligations on EEA States.

46 Were the Regulation to be applied as ESA contends, this would mean that in cross-border situations applicants for child benefits would be granted child benefits in Norway without satisfying the conditions established in the Child Benefits Act. Since national law determines the entitlement to child benefits, rights which do not exist at the national level cannot be created by virtue of the Regulation. This is confirmed by the fact that Article 73 of the Regulation only applies to situations where benefits are provided by national law.

47 Third, the central issue is not whether the parent in Norway "lives" there, but whether the parent in Norway "works" there. What is essential to the NAV's assessment is that the parent residing and working in Norway does not live with the other parent and their mutual child even when he or she visits or stays in the other EEA State where the child resides and that the parent working and residing in Norway has consequently not applied for child benefits.

48 The Norwegian Government cannot see how ESA can argue that the NAV's practice deters nationals of the EEA/EFTA States and EU citizens from exercising their right to freedom of movement. A worker from an EEA State is treated in the same way as a Norwegian worker. Thus, migrant workers are not in a disadvantaged position.

49 The Norwegian Government adds that the judgment in *Slanina*, cited above, does not develop the ECJ's case law and contends that the present case should have been closed, just as ESA closed its Case 2573/2002 without further measures after receiving reassurances from the Norwegian Government that a benefit would be granted in cross-border cases when the parent staying away from the child had his regular abode with the child during the period he was not working in Norway.

50 Finally, the Norwegian Government argues that the application should be dismissed because the requirement of dependency does not exist in national law. In no circumstances do the Norwegian authorities disburse child benefits on the basis of a dependency criterion, as this is simply not the requirement in the Child Benefits Act. There is also no basis for ESA's claim that an assessment under the Regulation requires account to be taken of whether a family member is "mainly dependent" on the worker.

51 The Norwegian Government submits further that Article 1(f)(i) of the Regulation is a definitional norm, which cannot clarify the criterion "living permanently with" in the Child Benefits Act. Nor can the provision overrule a national eligibility requirement. Finally, there is nothing in Article 73 of the Regulation to imply

that such an assessment must be made in the light of that provision. That is clear from the case law of the ECJ, which stresses that the Regulation intends simply to coordinate, but not harmonise, child benefits in the EEA.

52 The Commission, in its written observations, supports the application of ESA and adds that the Norwegian administrative practice threatens the effectiveness of Articles 72 to 76a of the Regulation.

53 As regards the criterion of "mainly dependent", the Commission submits that a child is normally mainly dependent on both parents until it has sufficient means to cover its living costs. The situation where the parents live separately does not deprive the parent not living in the same household of parental rights and obligations. When the legislation applied by an EEA State defines as members of the family only the persons who live in the same household, the fact that the member of the family who does not satisfy the household condition is mainly dependent on the claimant could be established either by a decision of the national competent institution that the claimant is obliged to provide maintenance payments, or by documents proving the regular transmission of part of the earnings of the parent concerned or by other appropriate means.

54 Finally, at the oral hearing, the Commission pointed out that the arguments of the Norwegian Government seem to neglect the primacy of EEA law. It is clear that the definition in Article 1(f)(i) of the Regulation must be taken into account when applying and interpreting Article 73 of the Regulation. Further, there is nothing to suggest that ESA argues for an extensive interpretation of the Regulation or the provision of additional rights. Instead, these are family benefits provided in Norway. As to the argument that the definition in Article 1(f)(i) cannot overrule a condition set out in national law, the Commission concludes by stating that, pursuant to the principle of primacy, EU law and EEA law can always overrule national law.

Findings of the Court

Introductory remarks

55 During the pre-litigation procedure, ESA has limited the proceedings to the Norwegian administrative practice relating to the application of Articles 1(f)(i) and 76 of the Regulation for the purposes of family benefits under the Child Benefits Act. It is undisputed that benefits under the Child Benefits Act constitute a "family benefit" within the meaning of Article 4(1)(h) of the Regulation.

56 The parties agree on the facts of the case, the description of the legislation and on the content of the administrative practice of the NAV. They agree, in particular, that, when applying the Child Benefits Act in situations where the Regulation is also applicable, the NAV does not assess whether a child, living together with one parent in an EEA State outside Norway, is mainly dependent on the parent who is living in Norway and who is separated from the other parent.

57 Contrary to the considerations of the Norwegian Government that the assessment of the Court should be limited to situations as those defined by the SOLVIT cases, ESA contends in general terms that the alleged infringement follows from the administrative practice of the NAV when it applies the Regulation. However, ESA has not made any claims that an infringement has taken place concerning the manner in which that regulation was made part of the legal order in Norway.

58 The Court notes that even if the applicable national legislation itself complies with EEA law, a failure to fulfil obligations may arise due to the existence of an administrative practice which infringes EEA law when the practice is, to some degree, of a consistent and general nature (see, for comparison, Cases C-278/03 *Commission* v *Italy* [2005] ECR I-3747, paragraph 13, C-135/05 *Commission* v *Italy* [2007] ECR I-3475, paragraph 21, and C-416/07 *Commission* v *Greece* [2009] ECR I-7883, paragraph 24).

59 The two SOLVIT cases alone, which concern two different situations, would in any event be insufficient to show a practice of a consistent and general nature (see, for comparison, Cases C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 52, C-156/04 *Commission* v *Greece* [2007] ECR I-4129, paragraph 51, C-342/05 *Commission* v *Finland* [2007] ECR I-4713, paragraph 35, and C-489/06 *Commission* v *Greece* [2009] ECR I-1797, paragraphs 50 to 53).

60 However, the Norwegian Government has confirmed the administrative practice in question as a general approach of the NAV in cross-border situations. This is clear from the reply of the Norwegian Government to the letter of formal notice of 8 February 2011, its reply to the reasoned opinion of 6 October 2011 and in particular the letter from the Norwegian authorities to ESA of 21 December 2011.

61 In their letter of 21 December 2011 to ESA, the Norwegian authorities confirmed that Norway would pay the top-up benefit, but not if the parents were divorced and the child did not live permanently with the parent working in Norway.

62 The Norwegian Government has added in the defence that the essential element in the NAV's assessment is that the parent residing and working in Norway does not live with the other parent and their mutual child even when he or she visits or stays in the other EEA State and that the parent working and residing in Norway has consequently not applied for child benefits. If the parents are separated this may indicate that the parent no longer has his regular abode with the child during the periods when he is not working in Norway.

63 Therefore, it must be considered that the administrative practice in question is of a consistent and general nature.

64 As to whether the administrative practice in question constitutes an infringement of the Regulation, the parties appear to disagree as to how the Regulation is to be interpreted and applied. The Government of Norway claims, in particular, that since the Child

Benefit Act does not contain a criterion of dependency, the NAV is not required to make an assessment of that kind under Articles 1(f)(i) and 76 of the Regulation as ESA contends. The Commission, on the other hand, countered this argument at the hearing with the EU principle of primacy and argues that EU law and EEA law can always overrule national law.

65 With a view to determining the applicability of the Regulation in Norway, and taking account of the special features of the functioning of the EEA Agreement (see Cases E-9/97 *Sveinbjörnsdottir* [1998] EFTA Ct. Rep. 95, paragraph 59, E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraph 37, E-2/02 *Bellona* [2003] EFTA Ct. Rep. 52, paragraph 36, E-2/03 *Ákæruvaldið* [2003] EFTA Ct. Rep. 185, paragraph 28, and E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 37), the Court recalls that pursuant to Article 7 EEA, regulations shall, as such, be, or be made, part of the internal legal order of the Contracting Parties.

66 Moreover, it must be recalled that the EEA Agreement requires that incorporated EEA rules shall prevail in cases of possible conflict with other statutory provisions (see, to that effect, Cases E-11/12 *Koch and Others*, judgment of 13 June 2013, not yet reported, paragraph 119, and E-15/12 *Wahl*, judgment of 22 July 2013, not yet reported, paragraph 54).

67 Therefore, the Commission is correct to assume that, in a situation such as in the present case, where the Regulation has been incorporated into national law, it is binding in its entirety and directly applicable and shall prevail over other national provisions (see, to that effect, Cases E-1/07 *Criminal proceedings against A*, cited above, paragraphs 38 and 39, and E-4/07 *Þorkelsson* [2008] EFTA Ct. Rep. 3, paragraph 47).

68 However, as the Norwegian Government correctly observes, this does not mean that, in determining whether the administrative practice infringes the Regulation, the character of the Regulation may be ignored. Even though a regulation which has been incorporated into national law is binding in its entirety and

directly applicable and shall prevail over other national provisions, it cannot carry effects beyond its field of application, as established in EEA law and through the case law of the Court and the ECJ. Thus, the existence of an infringement resulting from the administrative practice must be assessed in light of the relevant provisions of EEA law.

69 According to its preamble, the Regulation was adopted to further the free movement of workers, as laid down in Article 28 EEA. It provides for a system of coordination of social security legislation and is intended to ensure equal treatment under the various national legislations. The overall goal is to prevent migrant workers from being deterred from exercising their right to freedom of movement under the EEA Agreement.

70 To that end, the Regulation establishes, in Title II, a complete and uniform system of choice of law rules. Those rules are intended to prevent the simultaneous application of more than one national social security system to persons covered by the Regulation, and to ensure that those persons are not left without social security because there is no legislation applicable to them (see Cases E-3/04 *Tsomakas and Others* [2004] EFTA Ct. Rep. 95, paragraph 27, E-3/05 *ESA* v *Norway* [2006] EFTA Ct. Rep. 102, paragraph 46, and E-3/12 *Jonsson*, judgment of 20 March 2013, not yet reported, paragraph 54).

71 It must also be kept in mind that, according to established case law, the Regulation provides for coordination of the applicable national law and not harmonisation of the social security legislations of the EEA States (see *Tsomakas and Others*, cited above, paragraph 27, and *Jonsson*, cited above, paragraph 55). This entails, first, that the choice of law rules of the Regulation are binding in the sense that a Contracting Party cannot decide the extent to which its own legislation or that of another State applies (see *Tsomakas and Others*, cited above, paragraph 28).

72 Second, the Regulation does not detract from the power of the EEA States to organise their social security systems. In the absence

of harmonisation at EEA level, it is thus for each EEA State to determine in national legislation the conditions on which social security benefits are granted. However, in such circumstances, the EEA States must nevertheless comply with EEA law when exercising that power (see *Jonsson*, cited above, paragraph 55).

73 It must be recalled that the factual situation described in the pre-litigation procedure and which forms the basis of ESA's claim is the situation where a person working in Norway, who is separated, has his children residing with his former spouse in another EEA State. Also, although not being an essential element in ESA's claim, in the SOLVIT cases mentioned by ESA in its application, the former spouse, who is working, residing in the other EEA State has applied in Norway for a "top-up" of the family benefits he or she is already paid in the other EEA State, invoking a right to family benefits under the Regulation for the children on account of the fact that the other spouse is working in Norway. However, these applications have been turned down by the NAV.

74 The Court will assess ESA's two pleas separately.

Alleged infringement of Article 76 of the Regulation

75 As ESA, the Commission and the Norwegian Government have submitted, family benefits to employed or self-employed persons which fall under Article 76 of the Regulation are family benefits which have been provided pursuant to Article 73 of the Regulation.

76 However, the Government of Norway questions whether Article 76 of the Regulation is the proper legal basis for ESA's claim and argues that Article 73 of the Regulation would have been more appropriate.

77 Article 73 of the Regulation provides – as the Norwegian Government emphasised in its defence and at the hearing – that an employed or self-employed person subject to the legislation of an EEA State shall be entitled, in respect of the members of his family who are residing in another EEA State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State (see *Tsomakas and Others*, cited above, paragraph 47).

78 The purpose of Article 73 is to prevent an EEA State from being able to refuse to grant family benefits on account of the fact that a member of the worker's family resides in an EEA State other than that providing the benefits. Such a refusal could deter EEA workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom (see, for comparison, Cases 228/88 *Bronzino* [1990] ECR 531, paragraph 12, C-321/93 *Imbernon Martínez* [1995] ECR I-2821, paragraph 21, C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraphs 32 and 34, and C-255/99 *Humer* [2002] ECR I-1205, paragraph 40).

79 Where there is an overlap between rights under the legislation of the State of residence of the family members and rights under the legislation of the State of employment, provisions such as Articles 13 and 73 of the Regulation (No 1408/71) must be compared with the "anti-overlap" rules appearing in that Regulation and also in Regulation No 574/72 (Cases C-543/03 *Dodl and Oberhollenzer* [2005] ECR I-5049, paragraph 49, and C-16/09 *Schwemmer* [2010] ECR I-9717, paragraph 43).

80 The first relevant anti-overlap rule, Article 76 of the Regulation, is the subject of the present plea. This provision is intended to resolve cases where entitlement to family benefits under Article 73 of that Regulation overlaps with entitlement to family benefits under the national legislation of the family member's State of residence by reason of carrying on an occupation (see, for comparison, *Slanina*, cited above, paragraph 36).

81 However, benefits which are based on residence do not fall under Article 76 of the Regulation, but under another, second, anti-overlap rule, Article 10 of Regulation No 574/72, since they are provided under the national legislation of the State of residence not by reason of carrying on an occupation (see, for comparison, *Dodl and Oberhollenzer*, paragraphs 54 and 55, and *Schwemmer*, paragraphs 46 and 47, both cited above).

82 The latter provision covers situations where there is an overlap between entitlement under Article 73 of the Regulation and

entitlement to receive family benefits under the national legislation of the State of residence, irrespective of any professional or trade activity (see, for comparison, *Dodl and Oberhollenzer*, cited above, paragraph 54).

83 Article 10 of Regulation No 574/72, as both its heading and its wording demonstrate, is intended only to resolve cases of overlapping rights to family benefits where they are simultaneously due in both the relevant child's EEA State of residence, irrespective of conditions of insurance or employment, and, in application either of the national legislation of another EEA State or of Article 73 of the Regulation (No 1408/71), in the EEA State of employment (see, for comparison, *Schwemmer*, cited above, paragraph 51).

84 It may be added that, according to settled case law, it is irrelevant in the context of Article 10 of Regulation No 574/72 whether the parents are divorced (see, for comparison, Case C-119/91 *McMenamin* [1992] ECR I-6393, paragraph 24, and *Dodl and Oberhollenzer*, cited above, paragraph 58).

85 The main difference in the application of these anti-overlap rules is the potential reversal of the priority of the overlapping benefits. In some cases, the benefit due in the State of employment has priority and is to be "topped up" by the benefit in the State of residence of the family member, if the latter is higher. In other cases, this priority is reversed, and the benefit due in the State of residence of the family member gains priority (see, for a summary on this question, Opinion of Advocate General Geelhoed in *Dodl and Oberhollenzer*, cited above, points 22 to 26).

86 Having regard to the foregoing, it is for ESA to show how the administrative practice has infringed the anti-overlap rule in Article 76 of the Regulation.

87 First, as defined by ESA and as understood by the Norwegian Government in the present proceedings, the State of employment and residence of the worker is Norway. ESA has limited itself to define the EEA State of residence of the family members as any

EEA State other than Norway. Moreover, ESA has not provided any information about the national legislation in these other EEA States.

88 Second, ESA has not expressly invoked Article 10 of Regulation No 574/72 in its application or during the pre-litigation procedure. ESA does not allege any infringement of Article 73 of the Regulation (No 1408/71). ESA only claims that the administrative practice in question infringes the anti-overlap rule in Article 76 of the Regulation.

89 However, having regard to the interest of the EEA/EFTA State concerned to prepare its defence, the Court cannot assess whether the administrative practice in question may infringe Article 73 of the Regulation (No 1408/71) or Article 10 of Regulation No 574/72. That would have widened the subject-matter of the action as delimited in the pre-litigation procedure and the application (see, to that effect, Case E-16/11 *ESA* v *Iceland*, judgment of 28 January 2013, not yet reported, paragraph 223, and, for comparison, Case C-195/04 *Commission* v *Finland* [2007] ECR I-5331, paragraph 18 and case law cited).

90 Third, the application does not mention the legal nature of any family benefits outside Norway. It limits itself to summarising the nature of the Child Benefits Act. It is therefore uncertain whether a family benefit due to a worker in the State of employment – that is, according to the application, Norway – would overlap with a family benefit provided by reason of carrying on an occupation or a family benefit payable under the legislation of the other EEA State, according to which acquisition of the right to those benefits or allowances is not subject to conditions of insurance, employment or self-employment. Therefore, the application does not contain sufficient information to determine which overlap rule should apply and which would be infringed as a result of the administrative practice in question.

91 Fourth, ESA has not provided any information or arguments concerning the actual situations of the families concerned in the other EEA States. It is uncertain whether the alleged infringement is limited to family benefits in situations where the other parent

is not engaged in a professional activity or is limited to situations where such an activity is carried out, or both.

92 Therefore, ESA has failed to show that, in a consistent and general manner, the NAV has applied the anti-overlap rules laid down in Article 76 of the Regulation (No 1408/71) in a way that infringes the EEA Agreement or, for that matter, how the NAV applies Article 10 of Regulation No 574/72. In this respect, it must be recalled that the applicability of these two provisions and their application in each individual case depends on various factors such as the State of residence and the State of employment of the parents and their child, the nature of the legislation applicable, the nature of the benefit, the situation of the two parents and their child and whether the parent not working in Norway carries out a professional or trade activity.

93 It follows therefore that ESA's plea alleging that the administrative practice in question infringes Article 76 of the Regulation must be dismissed.

Alleged infringement of Article 1(f)(i) of the Regulation

94 ESA maintains its position set out in its reasoned opinion and argues that the administrative practice also infringes Article 1(f)(i) of the Regulation. In contrast, the Norwegian Government submits that were the Regulation to be applied as ESA suggests this would create new rights under the Regulation beyond its mere coordination of national social security systems. Further, the Court recalls that the Government of Norway has argued that the absence of a national requirement for dependency in relation to the payment of child benefits means that Article 1(f)(i) cannot be applied in Norway.

95 The basic rule in allocating competence in respect of social security benefits is laid down in Article 13 of the Regulation which, in its first paragraph, establishes that an EEA worker shall be subject to the legislation of a single EEA State and, in its second paragraph, provides that that State shall be the EEA State of employment, even if the worker resides in the territory of another EEA State.

96 Article 73 of the Regulation extends that rule to the enjoyment of family benefits. Family benefits are defined in Article 1(u)(i) of the Regulation as all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4(1)(h) of the Regulation. As noted above, at paragraph 55, benefits under the Child Benefits Act constitute a "family benefit" within the meaning of Article 4(1)(h) of the Regulation.

97 Article 73 of the Regulation provides that an employed or self-employed person subject to the legislation of an EEA State shall be entitled, in respect of members of his family who are residing in another EEA State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State. The provision is intended to prevent EEA States from making entitlement to and the amount of family benefits dependent on residence of the members of the worker's family in the EEA State providing the benefits, so that EEA workers are not deterred from exercising their right to freedom of movement (see, *inter alia*, *Humer*, cited above, paragraph 40).

98 That arrangement stems from the objective of the Regulation, as set out in Article 3 thereof, to guarantee all workers who are EEA nationals, and who move within the EEA, equal treatment with regard to different national laws and the enjoyment of social security benefits irrespective of the place of their employment or residence. Article 73 must be interpreted uniformly in all EEA States regardless of the arrangements made by national law on the acquisition of entitlement to family benefits (see Case E-3/05 *ESA* v *Norway*, cited above, paragraph 48).

99 The entitlement to family benefits in respect of a child under Article 73 of the Regulation is conditional upon the child coming within the personal scope of the Regulation (compare *Slanina*, cited above, paragraph 23).

100 Article 1(f)(i) of the Regulation provides rules, for coordination purposes, on how an EEA State must interpret and apply the criterion of "residence" used in national law – such as the Child Benefits Act – in the context of the Regulation.

101 Article 1(f)(i) of the Regulation defines the term "member of the family" for the purposes of the Regulation. It provides that a "member of the family" means "any person defined or recognized as a member of the family or designated as a member of the household by the legislation under which benefits are provided...; where, however, the said legislations regard as a member of the family or a member of the household only a person living under the same roof as the employed or self-employed person or student, this condition shall be satisfied if the person in question is mainly dependent on that person".

102 It is clear from the wording of Article 73 read together with Article 1(f)(i) of the Regulation that the purpose of those provisions is to ensure that if the main provider of a family makes use of the right to move freely within the EEA family benefits for dependent family members should not be lost.

103 It is of no importance whether the parents are divorced. Although the Regulation does not expressly cover family situations following a divorce there is nothing to justify the exclusion of such situations from the scope of the Regulation (see, for comparison, *Humer*, cited above, paragraphs 42 and 43, and *Slanina*, cited above, paragraph 30).

104 The Court recalls that Section 2, paragraph 1, of the Child Benefits Act states that parents who have a child under the age of eighteen years living with them permanently are entitled to child benefits if the child is resident in Norway.

105 Further, for the purpose of providing benefits under the Child Benefits Act to parents who fall under the Regulation with a child living abroad, the NAV verifies instead whether the parents have their regular abode with the child there. However, when applying the rules of the Regulation and the Child Benefits Act, the NAV does not assess whether a child of a person working in Norway is mainly dependent upon that parent, although the parents are separated and the child lives with the other parent in an EEA State other than Norway.

106 However, Article 1(f)(i) of the Regulation requires that where

national legislation regards as a "member of the family" only a person living under the same roof as the employed or self-employed person or student (requiring, for example, "regular abode with the child" or "live[s] permanently with the child"), this condition shall be considered satisfied if the person in question is mainly dependent on that person (see, for comparison, *Slanina*, cited above, paragraph 27).

107 Therefore, when the Regulation is applied, for example, where, in accordance with Article 73 of the Regulation, benefits are provided pursuant to Section 2, paragraph 1, of the Child Benefits Act, the national authorities such as the NAV must respect Article 1(f)(i) of the Regulation when national legislation on family benefits regards as a "member of the family" only a member of the household or a person living under the same roof as the employed or self-employed person or student.

108 The Norwegian Government has put forward essentially two arguments in its defence. First, it contends that national law imposes no requirement of dependency in relation to entitlement to child benefit and that the Regulation cannot create new rights under national law. Second, it argues that Article 1(f)(i) of the Regulation is merely a definitional norm, which is incapable itself of being infringed, and which cannot overrule a national eligibility criterion.

109 These arguments must be rejected. As noted in paragraph 71 above, the choice of law rules of the Regulation are binding in the sense that an EEA State cannot decide the extent to which its own social security legislation or that of another State applies. Moreover, as noted in paragraphs 100 and 101 above, Article 1(f)(i) defines the personal scope of the Regulation with regard to members of the family.

110 Article 1(f)(i) of the Regulation does not create new conditions of entitlement under national social security schemes. Instead, for coordination purposes, it provides rules on how, in cross-border situations, the EEA State must interpret and apply the criterion of member of the family used in national law.

111 Moreover, in the present case, a correct application of Article 1(f)(i) of the Regulation is essential for the correct application of the choice of law rules of the Regulation. It is for the national authorities, taking the wording and purpose of the Regulation into account, to determine whether a member of the family is mainly dependent on a person falling under the Regulation. By not making this assessment, the Norwegian administrative practice renders the choice of law rules in the Regulation ineffective. The administrative practice therefore infringes Article 1(f)(i) of the Regulation. An EEA State cannot avoid the binding force of the choice of law rules in the Regulation by unilaterally removing certain categories of persons – in this case separated parents – from its scope.

112 In that context, it must be recalled that national authorities cannot justify a condition of living together which has the consequence that a person with dependent members of his family resident in another EEA State may not receive child benefits only because he is separated from the other parent. To do so would deprive that aspect of the definition of member of the family in the Regulation of its effectiveness (see, for comparison, to that effect, Case C-212/00 *Stallone* [2001] ECR I-7625, paragraph 22).

113 Therefore, having regard to the findings in paragraph 67 above, the argument of the Norwegian Government that, given the absence of a national requirement for dependency in relation to the entitlement for child benefits, the administrative practice in question does not infringe Article 1(f)(i) of the Regulation must also be rejected in this context.

114 As a consequence, it must be held that, by continuing this administrative practice under the Child Benefits Act, Norway has failed to comply with Article 1(f)(i) of the Regulation. Therefore this plea must be upheld.

VI COSTS

115 Under Article 66(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs.

Since both ESA and Norway have been partially successful, each party should bear its own costs. The costs incurred by the European Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Declares that, by maintaining in force the administrative practice under the Child Benefits Act of not assessing whether a child, living together with another parent outside Norway, is mainly dependent on the parent who is living in Norway and separated from the other parent, the Kingdom of Norway is in breach of Article 1(f)(i), second sentence, of the Act referred to at point 1 of Annex VI to the Agreement on the European Economic Area (Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended), as adapted to the EEA Agreement by Protocol 1 thereto;**

2. **Dismisses the application as to the remainder; and,**

3. **Orders each party to bear its own costs.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 11 September 2013.

Gunnar Selvik — Registrar

Carl Baudenbacher — President

REPORT FOR THE HEARING

in Case E-6/12

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

EFTA Surveillance Authority

and

The Kingdom of Norway

seeking a declaration that, by maintaining in force the administrative practice of not assessing whether a child, living together with another parent outside the Kingdom of Norway ("Norway"), is mainly dependent on the parent who is living in Norway and separated from the other parent, Norway is in breach of Article 1(f)(i), second sentence, in conjunction with Article 76 of the Act referred to at point 1 of Annex VI to the Agreement on the European Economic Area (Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended), as adapted to the EEA Agreement by Protocol 1 thereto.

I INTRODUCTION

1. The EFTA Surveillance Authority ("ESA") contends that, in the assessment of the entitlement for family benefits, the administrative practice of the Norwegian authorities not to assess whether a child, living together with another parent outside Norway, is mainly dependent on the parent who is living in Norway and separated from the other parent constitutes a failure to fulfil obligations under the EEA Agreement, since that practice infringes Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and

to members of their families moving within the Community ("Regulation No 1408/71").[1]

2. Norway contests the action.

II LEGAL BACKGROUND

EEA law

3. Regulation No 1408/71 is incorporated in the EEA Agreement as point 1 of Annex VI.

4. Article 1(f)(i) of Regulation No 1408/71 defines the term "member of the family":

member of the family *means any person defined or recognized as a member of the family or designated as a member of the household by the legislation under which benefits are provided ...; where, however, the said legislations regard as a member of the family or a member of the household only a person living under the same roof as the employed or self-employed person or student, this condition shall be considered satisfied if the person in question is mainly dependent on that person. ...*

5. Article 4(1) of the Regulation provides:

[Regulation No 1408/71] shall apply to all legislation concerning the following branches of social security:

...

(h) family benefits.

6. Chapter 7 of Regulation No 1408/71 regulates the coordination of family benefits in cross-border cases.

7. Article 73 of Regulation No 1408/71 provides:

An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State, subject to the provisions of Annex VI.

[1] OJ, English Special Edition 1971 (II), p. 416.

8. Article 75(1) of the Regulation states that:

Family benefits shall be provided, in the cases referred to in Article 73, by the competent institution of the State to the legislation of which the employed or self-employed person is subject and, in the cases referred to in Article 74, by the competent institution of the State under the legislation of which an unemployed person who was formerly employed or self-employed receives unemployment benefits. They shall be provided in accordance with the provisions administered by such institutions, whether or not the natural or legal person to whom such benefits are payable is residing or staying in the territory of the competent State or in that of another Member State.

9. Article 75(2) of the Regulation provides:

However, if the family benefits are not used by the person to whom they should be provided for the maintenance of the members of the family, the competent institution shall discharge its legal obligations by providing the said benefits to the natural or legal person actually maintaining the members of the family, at the request of, and through the agency of, the institution of their place of residence or of the designated institution or body appointed for this purpose by the competent authority of the country of their residence.

10. Article 76(1) of Regulation No 1408/71 provides:

Where, during the same period, for the same family member and by reason of carrying on an occupation, family benefits are provided for by the legislation of the Member State in whose territory the members of the family are residing, entitlement to the family benefits due in accordance with the legislation of another Member State, if appropriate under Article 73 or 74, shall be suspended up to the amount provided for in the legislation of the first Member State.

National law

11. The granting of child benefits in Norway is governed by the Child Benefits Act of 8 March 2002 (*lov av 8. mars 2002 om barnetrygd*, the "Child Benefits Act"). Norway has notified the benefits

provided for under the Child Benefits Act as being covered by Article 4(1)(h) of Regulation No 1408/71.[2]

12. Section 2, paragraph 1, of the Child Benefits Act states that parents who have a child under the age of eighteen years living with them permanently are entitled to child benefits if the child is resident in Norway in accordance with the provisions of Section 4.

13. In determining, for the purpose of awarding child benefits, where a child lives and with which parent, reference is made to section 36 of the Children Act of 8 April 1981 (*lov av 8 april 1981 om barn og foreldre (barnelova)*, the "Children Act"). Section 36 reads as follows:

The parents may agree that the child shall live permanently either with one of them or with both of them.

If the parents fail to agree, the court must decide that the child shall live permanently with one of them. When special reasons so indicate, the court may nevertheless decide that the child shall live permanently with both of them.

14. The Norwegian authority responsible for assessing requests for family benefits is the Norwegian Labour and Welfare Service (*Arbeids- og velferdestaten*, the "NAV").

15. Since the alleged infringement has occurred as a result of the practice of the NAV, a summary description of this practice is set out below in the arguments of the parties.

III PRE-LITIGATION PROCEDURE

16. In June 2010, two unresolved cases in the SOLVIT database (an online problem solving network in which EEA States work together to solve without legal proceedings problems caused in the application of internal market law by public authorities) were brought to the attention of the ESA. These two cases concerned two mothers who were working and residing with their child in Lithuania, in one case, and in Slovakia, in the other. In both cases, the parents of the child were separated and the father of the child

[2] OJ 2003 C 127, p. 36.

was residing and working in Norway. It appears in the Lithuanian case that the father did not apply for the benefit. In the other case, the benefit was stopped as the mother moved to Slovakia.

17. By a letter of 9 July 2010, ESA informed the Norwegian Government that it had opened an own-initiative case regarding the granting of child benefits by the Norwegian authorities in cases where one parent lives and works in Norway and the other parent resides, together with the child, outside Norway. ESA requested further information from the Norwegian Government on the issue.

18. The Norwegian Government replied on 10 September 2010 and confirmed that a parent who does not have a child living permanently with him or her is not entitled to child benefits.

19. At a meeting with ESA on 11 November 2010, Norway confirmed that child benefits cannot be granted in circumstances such as those described in paragraph 16 above.

20. On 8 December 2010, ESA issued a letter of formal notice. The Norwegian Government replied by letter of 8 February 2011.

21. On 6 July 2011, ESA delivered a reasoned opinion, maintaining the conclusions it had reached in the letter of formal notice. The Norwegian Government replied on 6 October 2011.

22. The case was discussed again at a meeting on 10 and 11 November 2011. Further correspondence took place on 2 December 2011 and 21 December 2011. On 28 March 2012, ESA decided to bring the matter before the EFTA Court.

23. On 18 June 2012, ESA brought the matter before the Court.

IV FORMS OF ORDER SOUGHT BY THE PARTIES

24. ESA requests the Court to declare that:

    (i) By maintaining in force the administrative practice of not assessing whether a child, living together with another parent outside Norway, is mainly dependent on the parent who is living in Norway and separated from the other parent, the Kingdom of Norway is in breach of Article 1(f)(i), second sentence, in conjunction with Article 76 of the Act referred

to at point 1 of Annex VI to the Agreement on the European Economic Area (Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended), as adapted to the EEA Agreement by Protocol 1 thereto.

(ii) Norway bear the costs of the proceedings.

25. Norway contests the application and requests the Court to declare that:

(i) By maintaining in force the administrative practice of not assessing whether a child, living together with another parent outside Norway, is mainly dependent on the parent who is living in Norway and separated from the other parent, the Kingdom of Norway complies with Article 1(f)(i), second sentence, in conjunction with Article 76 of the Act referred to at point 1 of Annex VI to the Agreement on the European Economic Area (Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended), as adapted to the EEA Agreement by Protocol 1 thereto.

(ii) ESA bear the costs of the proceedings.

V WRITTEN PROCEDURE

26. Written arguments have been received from the parties:

– the EFTA Surveillance Authority, represented first by Xavier Lewis, Director, and Fiona M. Cloarec, Officer, Department of Legal & Executive Affairs, acting as Agents, and later by Xavier Lewis, Director, and Auður Ýr Steinarsdóttir, Officer, Department of Legal & Executive Affairs, acting as Agents;

– the Kingdom of Norway, represented by Marius Emberland, Office of the Attorney General (Civil Affairs), and Vegard Emaus, Ministry of Foreign Affairs, acting as Agents.

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

– the European Commission ("Commission"), represented by Johan Enegren and Viktor Kreuschitz, members of the Legal Service, acting as Agents.

VI ARGUMENTS OF THE PARTIES

ESA

28. ESA understands that entitlement to child benefits in Norway is enjoyed by the parent, not the child. In cases where the parents are married or living together, the relationship to the child is assumed. The child benefit is paid to the parents. If the parents are not living together, the benefit is paid to the parent with whom the child lives permanently.

29. ESA infers that where a child shall live permanently is determined in accordance with Chapter 5 of the Children Act. The parents may choose with whom the child is to live permanently. When NAV assesses an application for child benefits, it takes account of the relevant circumstances to ensure that the benefit is paid to the parent with whom the child lives permanently.

30. In cross-border situations, where one parent works in Norway, the NAV assesses whether the parent working in Norway has his "regular abode" with his family in the other EEA State during the periods when he is not working in Norway. ESA understands that the notion of "regular abode" does not require the parent working in Norway to spend a specific amount of time with his family outside Norway.

31. According to the information available to ESA, if the parent has his regular abode with his family in another EEA State, the NAV considers the requirement of "living permanently together" with the child to be fulfilled. In such a case, the benefit may be granted. However, if he does not, for example, for reasons of

separation or divorce, the child benefit will be refused or the case re-assessed and the child benefits stopped.

32. ESA understands that the residency requirement in Section 2 of the Child Benefits Act does not apply to persons covered by Regulation No 1408/71.

33. In June 2010, two unresolved cases in the SOLVIT database were brought to the attention of ESA. The two cases concerned two mothers who were working and residing with their child in Lithuania, in one case, and in Slovakia, in the other. In both cases, the parents of the child were separated and the father of the child was residing and working in Norway.

34. The mothers were entitled to family benefits in their respective countries of residence. They both requested payment of the difference between the amount to which they were entitled in their country of residence and the higher Norwegian child benefits to which the father, in Norway, would be entitled under the Norwegian social security system. ESA understands that the applications for the Norwegian child benefits were made on the basis of provisions governing situations where there is an overlapping right to family benefits, in particular, Article 76 of Regulation No 1408/71.

35. However, both applications for child benefits were refused by the NAV. ESA understands that they were refused on the basis that either the father had never applied for such benefits in Norway, and/or the parents of the child were divorced or not married and could therefore not be considered to be members of one family.

36. ESA contends that the core issue in this case is the interpretation and application – in cases involving persons working in Norway with their family residing in another EEA State – of the criterion under Norwegian law that, for entitlement to child benefits in respect of a child under the age of eighteen, the parent must live permanently together with the child.

37. According to ESA, this practice is contrary to Regulation No 1408/71.

38. ESA asserts that the practice infringes Article 1(f)(i), in conjunction with Article 76, of Regulation No 1408/71. In its view, this assessment is confirmed by case law of the Court of Justice of the European Union ("ECJ").

39. In support of this contention, ESA notes, first, as regards the infringement of Regulation No 1408/71, that, according to case law, for the purposes of Article 4(1)(h) of Regulation No 1408/71, family benefits are benefits intended to enable one of the parents to devote himself or herself to the raising of a young child, and designed, more specifically, to remunerate the service of bringing up a child, to meet the other costs of caring for and raising a child and, as the case may be, to mitigate the financial disadvantages entailed in giving up income from an occupational activity.[3] In its view, this interpretation of family benefits is crucial to the assessment whether Norway applied the concept of "member of the family" correctly.[4] According to ESA, it is uncontested that the child benefits at issue in the present case fall within this case-law definition of family benefits.

40. ESA asserts that the objective of Article 73 of Regulation No 1408/71 is to prevent EEA States from making entitlement to and the amount of family benefits dependent on residence of the members of the workers' family in the EEA State providing the benefit, so that EEA workers are not deterred from exercising their right to freedom of movement.[5]

41. In ESA's view, where as a result of national practice a parent residing with their child in one EEA State is precluded from receiving the higher amount of family benefits payable in accordance with the law of the EEA State of residence of the other parent this puts them in a disadvantaged position and can without a doubt have the effect of deterring such persons from exercising their right to free movement since the total amount of the family benefits payable to the families in question is dependent on their State of residence.

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3 Reference is made to Case C-275/96 *Anne Kuusijärvi* [1998] ECR I-3419, paragraph 60.
4 Reference is made to Case C-363/08 *Slanina* [2009] ECR I-11111.
5 Reference is made to Case C-543/03 *Dodl and Oberhollenzer* [2005] ECR I-5049, paragraphs 45 to 46, and Case C-16/09 *Schwemmer* [2010] ECR I-9717, paragraph 41.

42. ESA submits that the purpose of Article 76 of Regulation No 1408/71 is to resolve cases where entitlement to family benefits under Article 73 of that regulation overlaps with entitlement to family benefits under the national legislation of the family members' State of residence by reason of the carrying on of an occupation.[6] In that connection, ESA continues, the principles underlying Regulation No 1408/71 require that if the amount of the family allowances actually received in the EEA State of residence is less than the amount of allowances provided for by the legislation of another EEA State, the worker is entitled to a supplement to the allowances from the competent institution of the latter State equal to the difference between the two amounts.[7]

43. The Norwegian legislation requires the child to be "living permanently with" the parent (or the parent working in Norway to have his regular abode with the family in the other State). ESA contends that the correct application of Article 1(f)(i) of Regulation No 1408/71 requires that, in cases where the worker in Norway is found not to have his regular abode with his child, the NAV must assess, in the alternative, whether the child living together with the other parent outside Norway is "mainly dependent on" the parent working in Norway.

44. ESA argues that the NAV currently fails to make this assessment of dependency.

45. Consequently, ESA asserts that the administrative practice according to which, in cross-border cases, the NAV assesses whether the parent working in Norway has his regular abode with his family in the other EEA State during the periods when he is not working in Norway without also assessing whether the child is "mainly dependent on" the parent working in Norway infringes Article 1(f)(i), second sentence, in conjunction with Article 76, of Regulation No 1408/71.

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6 Reference is made to *Slanina*, cited above, paragraph 36.

7 Reference is made to Case 24/88 *Georges* [1989] ECR 1905, paragraph 11, and Case 153/84 *Ferraioli* [1986] ECR 1401, paragraph 18.

46. Moreover, ESA contends, this conclusion finds support in the case law of the ECJ.

47. ESA refers, in this regard, first, to *Slanina*, cited above in footnote 4. In its view, this case supports its contention that, in omitting to assess whether a child is "mainly dependent on" a parent working in Norway, the NAV infringes Regulation No 1408/71. According to ESA, in assessing whether the criterion "living permanently together" is satisfied, the NAV must in all cases assess the issue of dependency. A simple assumption in that regard does not suffice.

48. Second, ESA contends that the NAV practice contradicts the very objectives of Articles 73 and 76 of Regulation No 1408/71. Its practice leads to migrant workers being put in a disadvantaged position, as they may be prevented from receiving the correct amount of family benefits to which they are entitled. ESA underlines that, as regards social security allowances, a migrant worker is in a special position that must be distinguished from purely internal situations (where both of the parents fall under the same national social security system). The rights under Regulation No 1408/71 are closely linked to the free movement of workers.[8]

49. Third, ESA asserts that, according to the case law of the ECJ, in applying Regulation No 1408/71, it is irrelevant whether the parents are divorced in a given case.[9]

50. ESA refers to information submitted by the Norwegian Government and claims that the Government confirmed that if a married worker, working in Norway while his spouse and child remained in Germany, were to divorce, the Norwegian authorities would stop paying the difference between the amount of the German and Norwegian child benefits.[10]

51. In the absence of harmonisation at EEA level, ESA acknowledges that it is for the legislation of each EEA State to determine, first,

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8 Reference is made to *Ferraioli*, cited above, paragraph 17.

9 Reference is made to Case C-255/99 *Humer* [2002] ECR I-1205, paragraphs 42 to 43, *Slanina*, cited above, paragraph 30, and *Schwemmer*, cited above, paragraph 37.

10 Reference is made to the meeting between ESA and Norway on 10 and 11 November 2011 and the letter from Norway to ESA of 21 December 2011.

the conditions concerning the right or duty to be insured with a social security scheme and, second, the conditions for entitlement to benefits. However, it observes that the EEA States must nevertheless comply with EEA law when exercising those powers.[11]

52. Finally, ESA stresses that the legislation of the EEA on the co-ordination of national social security legislation, taking account in particular of the underlying objectives, cannot, save in the case of an express exception in conformity with those objectives, be applied in such a way as to deprive a migrant worker or those dependent on him of the enjoyment of benefits granted simply by virtue of the legislation of an EEA State.[12]

Norway

53. Norway denies the alleged infringement and claims that it has complied with its obligations pursuant to Article 28 EEA as detailed in Regulation No 1408/71.

54. Norway claims that Article 1(f)(i) of Regulation No 1408/71 does not in its own right impose obligations on EEA States, it merely defines aspects of the scope of norms that do. Second, Article 76 is not the correct legal basis for the alleged infringement, since the legal obligation in question follows from Article 73 of Regulation No 1408/71. Moreover, the relevant fact is not whether the parent in Norway is "living" in Norway, as suggested by ESA. What is crucial is whether the parent in Norway is "working" in Norway.

55. The Norwegian Government suggests that the issue may be summarised as follows:

Does Norway, by maintaining in force the administrative practice of not assessing whether a child, living together with another parent outside Norway, is mainly dependent on the parent who is living in

[11] Reference is made to Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 18 to 19; Case C-56/01 *Inizan* [2003] ECR I-12403, paragraph 17; C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473, paragraphs 44 to 46; Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, paragraph 100; and Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 92.

[12] Reference is made to *Schwemmer*, cited above, paragraph 58.

Norway and separated from the other parent, comply with Articles 76 read in conjunction with Article 73 of Regulation No 1408/71?

56. Norway states that the benefits in question are granted to the parent with whom the child is living permanently. It is not a benefit belonging to and payable to the child itself. Consequently, the benefits can be distinguished from those at issue in *Humer*, to which ESA refers.[13]

57. Norway affirms that its administrative authorities disburse child benefits in cross-border cases as long as the parent working in Norway has his "regular abode" with the child when in the EEA State in which the child lives.

58. Norway contends that the Court's assessment must be limited to the Norwegian practice exemplified by two cases in the SOLVIT database, to which ESA refers.

59. Norway submits that the cases in question concerned applications for child benefits submitted by one of the parents in instances where (i) the applicant for benefits was working and residing in an EEA State other than Norway, where (ii) the child lived permanently with the applicant in that country and where (iii) the other parent of the child in question was residing and working in Norway and (iv) not (also) living permanently with the child, i.e. not having his or her regular abode in the other EEA State together with the child and the other parent and (v) therefore did not apply himself for child benefit pursuant to the Child Benefits Act.

60. Norway states that, in an intra-Norwegian context and where the parents no longer live together, the NAV will likewise reject applications for child benefit where the applicant does not live permanently with the child in question.

61. In Norway's view, the crucial factor is that the parent residing and working in Norway does not live with the other parent and their mutual child even when he or she visits or stays in the other EEA

[13] Reference is made to *Humer*, cited above.

State and that the parent working and residing in Norway has consequently not applied for child benefits. It stresses that, in reaching its assessment, the Court should take account of those aspects of the dispute at hand.

62. The Norwegian Government underlines that the Court is called upon to consider the compatibility of the Norwegian administrative practice only as regards the situation where the parent living outside Norway seeks to increase the disbursement of public benefits.

63. According to the Norwegian Government, it should be noted that the "living permanently with" requirement does not mean that the worker must stay continuously with the spouse and child in order to be entitled to child benefit. Rather, this requirement entails that the worker must have his regular place of abode with his child during the periods when he is not working in Norway. In general, the NAV does not examine how much time the applicant spends in Norway and how often he visits his family. Only if the NAV has received information indicating that the worker does not have his regular abode with the child during the periods when he is not working in Norway (i.e. in situations where parents have separated), NAV may examine this closer.

64. Norway asserts that, for the purposes of benefit entitlement, the NAV never examines whether a child is mainly dependent on the applicant as this is of no relevance. Instead, every parent who has a child living with him or her permanently is entitled to child benefits, regardless of the parent's financial contribution to the child. Child benefit is not dependent on means. The legislation does not in any instance require an assessment of whether or not the child is (mainly) dependent on the parent.

65. Norway advances legal argument in support of the NAV practice. This can be summarised as follows.

66. First, Norway underlines the fact that Regulation No 1408/71 does not harmonise the legislation of the EEA States. Instead, national legislation determines the entitlement to benefits. Consequently,

it is for the legislative authorities of each EEA State to determine the conditions for both insurance coverage and the entitlement to benefits under a social security scheme. Norway observes that ESA formally concedes as much in its application to the Court. However, it continues, ESA fails to see that this crucial aspect must necessarily have consequences for the assessment whether Norway has infringed its EEA obligations. In Norway's view, ESA simply does not appreciate the ramifications that must follow from this national legislative competence in terms of EEA law.

67. Norway asserts that rights which do not exist at the national level cannot be created by virtue of Regulation No 1408/71. Coordination legislation, such as the Regulation, cannot override national criteria for entitlement as long as those criteria comply with EEA law.[14]

68. Norway observes that the Norwegian Child Benefits Act does not mention "member of the family" as a criterion.

69. In its view, this feature alone strongly suggests that Norwegian practice fully complies with EEA law.

70. Norway contends that an objective of Article 73 of Regulation No 1408/71 is to guarantee to family members of a worker who are residing in another EEA State the grant of the family benefits provided for by the applicable legislation of the State to which the worker is affiliated. In the present case, as exemplified by the SOLVIT cases, the applicants were not granted benefits from Norway as the domestic legal criteria were not satisfied.[15]

71. In Norway's view, it is inconceivable that ESA can argue that the NAV's practice deters EEA citizens from exercising their right to freedom of movement.[16] It contends that the practice of the NAV

[14] Reference is made to Case C-266/95 *Merino García* [1997] ECR I-3279, paragraphs 27 and 29; Case E-3/05 *ESA* v *Norway* [2006] EFTA Ct. Rep. 104, paragraph 49; *Kohll*, cited above, paragraph 18; Joined Cases C-4/95 and C-5/95 *Stöber and Others* [1997] ECR I-511, paragraph 36; and Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 15.

[15] Reference is made to Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraph 32, and *Humer*, cited above, paragraph 39.

[16] Reference is made to Case C-321/93 *Martínez* [1995] ECR I-2821, paragraph 21, and *Hoever and Zachow*, cited above, paragraph 34.

not to assess whether the child living in another EEA State is "mainly dependent" on the parent residing and working in Norway cannot sensibly "deter" such person from exercising their right to freedom of movement. ESA has not demonstrated that the Norwegian legislation or practice has such deterrent effect on the persons in question.

72. The Norwegian Government maintains further that considerations of equal treatment, which is another underlying purpose of Article 73 of Regulation 1408/71, do not support ESA's view but strengthen Norway's submission. It stresses that Article 73 provides that a worker shall be entitled to family benefits in respect of family members "as if they were residing in that State".

73. Norway contends that the reason for not disbursing child benefit in cases such as the SOLVIT cases is not the fact that the child is not living in Norway. Rather, it is the fact that the child does not live permanently with the worker who would otherwise be entitled to apply for benefits. Therefore, Norway continues, a father working in Oslo is in this sense treated similarly whether his child is living next door or in another EEA State. Accordingly, a migrant worker is not put in a disadvantageous position.

74. Norway asserts further that were workers to be entitled family benefits as ESA contends this would result in a greater right to benefits in cross-border situations than in wholly domestic situations. This would result in unequal treatment between workers subject to the same legislation and entail an overreach of the relevant EEA obligations to the detriment of intra-Norwegian cases.

75. Norway observes that in 2005 ESA closed a similar complaint against Norway.[17] Now, in the light of recent developments in case law, in particular the *Slanina* judgment, ESA appears to argue for a different reading of the national provisions.[18] In Norway's view, ESA reads too much into that judgment. It sheds very little light on the central issue in the present case, that is, whether the practices of the NAV constitute an infringement of Articles 73 and

[17] Reference is made to ESA Case 2573/2002.
[18] Reference is made to *Slanina*, cited above, in particular paragraphs 48 and 49.

76 of Regulation No 1408/71, seen in the light of Article 28 EEA. Moreover, Norway observes, in *Slanina*, the national requirements for receiving benefits were satisfied by the person in question and, in any event, *Slanina* has rarely been applied in subsequent case law.

The Commission

76. The Commission supports the application of ESA.

77. The Commission emphasises the need, in the case of separated parents, to distinguish between maintenance payments and family benefits, at issue in the present case.

78. It observes that there is no harmonised definition of "member of the family" for the purposes of Regulation No 1408/71. Article 1(f)(i) of that regulation refers to national (social security) legislation under which benefits are provided. Consequently, it is the legislation applicable to the applicant (normally the parent) which is decisive in determining who is considered a family member. Moreover, were "living under the same roof" requirements for family benefits to be applied literally in a cross-border context, this would disadvantage a migrant worker. This is also the case, the Commission contends, where the parents are divorced.[19]

79. In the Commission's view, it is not the purpose of Article 1(f)(i) of Regulation No 1408/71 to add a new criterion to national legislation. It simply clarifies how a national criterion must be interpreted and applied in a cross-border context.

80. The Commission contends that, according to settled ECJ case law, when Member States lay down legislation regulating the right or the obligation to become affiliated to a social security scheme, they are obliged to comply with the provisions of EU law in force. In particular, such legislation may not have the effect of excluding persons to whom it applies pursuant to Regulation No 1408/71.[20]

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19 Ibid., paragraph 30.

20 Reference is made Case C-347/10 *Salemink*, judgment of 17 January 2012, not yet reported, paragraphs 39 and 40; Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 33; Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraphs 20 and 21; and Case 275/81 *Koks* [1982] ECR 3013, paragraph 10.

81. The Commission shares the view of ESA that the purpose of Regulation No 1408/71 is to make it easier for migrant workers and to prevent Member States from introducing residence requirements which may deter workers from moving freely within the Union.

82. In the Commission's view, it follows from *Slanina* that where the legislation under which benefits are provided only regards persons living under the same roof as the employed or self-employed person as members of the family, this condition shall be considered satisfied if the family member in question is mainly dependent on that person.[21] That is the case, when the parent is required to pay maintenance in respect of the child.[22]

83. The Commission contends that, in a situation such as that described by the Norwegian Government in the present case, the children – or, where applicable, the mothers on behalf of the children – can rely directly on Articles 73 and 74 of Regulation No 1408/71 to claim from the Norwegian authorities, pursuant to Article 76, the difference between the family benefits payable in Norway and those payable in the country of residence in relation to their children living with them in another Member State. The intervention of the workers residing in Norway is not required at all.

84. The Commission contends that, contrary to what is claimed by the Norwegian Government, in *Slanina* the condition of living in the same household was not fulfilled. Moreover, in its view, the interpretation suggested by the Norwegian Government would deprive Articles 72 to 76a of Regulation No 1408/71 of their *effet utile*.

85. In the Commission's view, the concept of "mainly dependent" in Article 1(f)(i) of Regulation No 1408/71, which overrides national requirements of "living under the same roof" or "living in the same household", is an EU-wide notion and must be considered a matter for EU law or, where appropriate, EEA law to interpret. Therefore, it is not for the legislation of the Member State concerned to define in which cases a child can be considered "mainly dependent".

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21 Reference is made to *Slanina*, cited above, paragraph 26 et seq.
22 Ibid., paragraph 27.

86. According to the Commission, when the legislation applied by an institution only defines as members of the family the persons who live in the same household, the fact that the member of the family who does not satisfy the household condition is mainly dependent on the claimant shall be established either by a decision of the national competent institution that the claimant is obliged to provide maintenance payments, or by documents proving the regular transmission of part of the earnings of the parent concerned or by other appropriate means.

87. In the Commission's view, the case law of the ECJ should be understood as not preventing Norway from establishing the parameters for family benefits such as age, number of dependent children, amount to be granted, frequency of payments, etc.[23] However, it does not allow Norway to introduce criteria which are not compatible with Regulation No 1408/71, in particular Articles 72 to 76a.

Páll Hreinsson

Judge Rapporteur

[23] Reference is made to Case C-120/95 *Decker* [1998] ECR I-1831, paragraph 23; *Kohll*, cited above, paragraph 19; *Kits van Heijningen*, cited above, paragraph 20; *Elsen*, cited above, paragraph 33; and Case C-227/03 *van Pommeren-Bourgondiën* [2005] ECR I-6101, paragraph 39.

Joined Cases E-4/12 and E-5/12

Risdal Touring AS
Konkurrenten.no AS
v
EFTA Surveillance Authority

JOINED CASES E-4/12 AND E-5/12

Risdal Touring AS, Konkurrenten.no AS

v

EFTA Surveillance Authority

(Action for annulment of a decision of the EFTA Surveillance Authority – Access todocuments – Admissibility – No need to adjudicate)

Summary of the Order

1. Pursuant to the second paragraph of Article 36 SCA, Any natural or legal person may, under the same conditions as an EFTA State, institute proceedings before the Court against an ESA decision addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former. ESA decisions taken upon the basis of the RAD are justiciable pursuant to the Court's normal power of review laid down in Article 36 SCA in accordance with the principle of effective judicial protection

2. Only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position may be subject of an action of annulment. In order to ascertain whether a measure can be the subject of an action under Article 36 SCA, it is necessary to look to its substance, rather than the form in which it is presented. In addition, it is necessary to look to the intention of those who drafted them, in order to classify those measures. In that regard, it is in principle those measures which definitively determine ESA's position upon the conclusion of an administrative procedure, and which are intended to have legal effects capable of affecting the interests of the complainant, which are open to challenge and not intermediate measures whose purpose is to prepare for the definitive decision, or measures which are mere confirmation of an earlier measure which was not challenged within the prescribed period.

3. As a rule, silence on the part of ESA cannot be placed on the same footing as an implied refusal,

except where that result is expressly provided for by a provision of EEA law. The RAD do not contain an express provision that a failure by ESA to reply within the prescribed time limit is to be considered a negative reply and so entitle an applicant to institute court proceedings pursuant to Article 36 SCA. Nor is it appropriate to apply such a rule as that contained in Article 8 of Regulation No 1049/2001 by analogy.

4. Article 7 RAD provides for a one-step procedure which obliges ESA to process applications for access to documents as quickly as possible in a straightforward manner. However, a failure on behalf of ESA to respond to an access request within the time limit set out in Article 7(1) RAD opens the potential for an action for failure to act pursuant to Article 37 SCA. Therefore, whether contested correspondence can be regarded as a decision, challengeable pursuant to Article 36 SCA, depends solely upon whether it, on its substance, definitively determines ESA's position in the matter.

5. General presumptions based on the nature of certain categories of documents may apply in situations where disclosure would undermine the protection of the purposes of inspections, investigations and audits. Such general presumptions are also applicable in active, ongoing investigations.

6. The interested parties, except for the EEA/EFTA State responsible for granting the aid, do not have a right under the procedure for reviewing State aid to consult the documents on ESA's administrative file. Account must be taken of that fact when interpreting the exception laid down by Article 4(2), third indent, of the RAD. If those interested parties were able to obtain access, on the basis of the RAD, to the documents in ESA's administrative file, the system for the review of State aid would be called into question.

7. ESA was therefore correct to assume that a general presumption that disclosure of documents in the administrative State aid file in principle undermines the protection of the objectives of investigation activities, mentioned in Article 4(2) RAD.

8. The content of ESA's electronic databases, including metadata, is encompassed by the definition of a "document" as expressed in Article 3(a) RAD and subject to the provisions of the RAD. Moreover, if ESA raises a

general presumption, so as to shift the burden of proof onto an applicant, the applicant must first be furnished with sufficient and adequate information, for example an appropriately detailed list of documents, in order to have an opportunity to rebut such a presumption.

9. In addition to the requirement that the measure be a challengeable act, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure. An applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible. Furthermore, the interest in bringing proceedings must continue until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be likely, if successful, to procure an advantage for the party bringing it.

10. From Article 38 SCA it follows that an applicant may nevertheless retain an interest in claiming the annulment of an ESA decision to prevent its alleged unlawfulness recurring in the future. Pursuant to that provision, if an ESA decision has been declared void, ESA is required to take the necessary measures to comply with the judgment of the Court. However, that interest can only exist if the alleged unlawfulness is liable to recur in the future regardless of the circumstances of the case which gave rise to the action brought by the applicant.

ORDER OF THE COURT

7 October 2013

(Action for annulment of a decision of the EFTA Surveillance Authority – Access to documents – Admissibility – No need to adjudicate)

In Joined Cases E-4/12 and E-5/12,

Risdal Touring AS, established in Evje, Norway, (Case E-4/12),

Konkurrenten.no AS, established in Evje, Norway, (Case E-5/12),

represented by Jon Midthjell, advocate,

applicants,

v

EFTA Surveillance Authority, represented by Markus Schneider, Deputy Director, Gjermund Mathisen and Auður Ýr Steinarsdóttir, Officers, Department of Legal & Executive Affairs, acting as Agents,

defendant,

APPLICATION seeking in Case E-4/12 *Risdal Touring* the annulment of the defendant's decision, first notified on 5 April 2012 without stating reasons, and subsequently notified on 4 May 2012, denying public access to the full statement of content and specific documents in ESA Case No 70506, a State aid case, on the basis of the Rules on Access to Documents ("RAD") established by ESA Decision No 407/08/COL on 27 June 2008; and in Case E-5/12 *Konkurrenten* the annulment of the defendant's decision as notified on 5 April 2012 without stating reasons and denying public access to the full statement of content in ESA Case No 60510, a State aid case, on the basis of the RAD established by ESA Decision No 407/08/COL on 27 June 2008.

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the applicants and the defendant,

having regard to the Report for the Hearing,

having heard oral argument of the applicants, represented by Jon Midthjell; the defendant, represented by Markus Schneider, Gjermund Mathisen, and Auður Ýr Steinarsdóttir; at the hearing on 17 April 2013,

gives the following

ORDER

I INTRODUCTION

1 Risdal Touring AS ("Risdal Touring") operates in the tour bus market in Norway and several EU Member States. It is owned by Olto Holding AS ("Olto group") which also owns Konkurrenten.no AS ("Konkurrenten"). Konkurrenten operates in the regional express bus market between the Southern and Central region in Norway.

2 Case E-4/12 concerns an access to document request made by Risdal Touring to the EFTA Surveillance Authority ("ESA" or "the defendant") under Article 2(1) RAD seeking public access to the statement of content in Case No 70506 and to specific documents believed to be included in that file concerning the defendant's handling of the Olto group's State aid complaint. The Olto group's complaint, submitted on 8 September 2011, concerned potentially unlawful aid granted by the City of Oslo to Kollektivtransportproduksjon AS ("KTP") (formerly known as AS Oslo Sporveier ("Oslo Sporveier")). KTP is a company owned and controlled by the City of Oslo, and is a direct competitor of Konkurrenten and Risdal Touring in the express bus and tour bus markets.

3 Risdal Touring seeks the annulment of ESA's decision, as notified on 5 April 2012 without stating reasons, and subsequently notified on 4 May 2012, denying public access to the complete statement of content in ESA Case No 70506 and certain documents believed to be included in that file.

4 Case E-5/12 concerns a request submitted by Konkurrenten to ESA on 21 March 2012 pursuant to Article 2(1) RAD seeking public access to the statement of content in ESA Case No 60510 concerning ESA's handling of the group's State aid complaint submitted on 11 August 2006. The complaint concerned potentially unlawful aid granted by the City of Oslo to KTP. Konkurrenten seeks the annulment of ESA's decision, as notified on 5 April 2012 without stating reasons, which denies public access to the complete statement of content of that file.

5 In its judgment in Case E-14/10 *Konkurrenten.no* v *ESA* [2011] EFTA Ct. Rep. 266, the Court annulled ESA Decision No 254/10/COL of 21 June 2010 (AS Oslo Sporveier and AS Sporveisbussene) to close Case No 60510 on the grant of State aid by the Norwegian authorities to Oslo Sporveier and AS Sporveisbussene ("Sporveisbussene") for the provision of scheduled bus services in Oslo.

6 By its action in Case E-5/12, Konkurrenten seeks access to the complete statement of content of that file such that it may be fully able to identify documents on file that might be relevant to understanding how its complaint was handled until ESA Decision No 254/10/COL was taken in 2010 and how ESA handled the case after that decision was overturned by the Court in 2011.

II LEGAL BACKGROUND

EEA law

7 Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads as follows:

In the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement.

8 Article 14(4) SCA reads as follows:

Members of the EFTA Surveillance Authority, officials and other servants thereof as well as members of committees shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

9 Article 20 of Part II of Protocol 3 SCA reads as follows:

1. Any interested party may submit comments pursuant to Article 6 of this Chapter following an EFTA Surveillance Authority decision to initiate the formal investigation procedure. Any interested party which has submitted such comments and any beneficiary of individual aid shall be sent a copy of the decision taken by the EFTA Surveillance Authority pursuant to Article 7 of this Chapter.

2. Any interested party may inform the EFTA Surveillance Authority of any alleged unlawful aid and any alleged misuse of aid. Where the EFTA Surveillance Authority considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof. Where the EFTA Surveillance Authority takes a decision on a case concerning the subject matter of the information supplied, it shall send a copy of that decision to the interested party.

3. At its request, any interested party shall obtain a copy of any decision pursuant to Articles 4 and 7, Article 10(3) and Article 11 of this Chapter.

10 Article 26 of Part II of Protocol 3 SCA reads as follows:

1. The EFTA Surveillance Authority shall publish in the EEA Section of and the EEA Supplement to the Official Journal of the European Communities a summary notice of the decisions which it takes pursuant to Article 4(2) and (3) and Article 18 in conjunction with Article 19(1) of this Chapter. The summary notice shall state that a copy of the decision may be obtained in the authentic language version or versions.

2. The EFTA Surveillance Authority shall publish in the EEA Section of and the EEA Supplement to the Official Journal of the European Communities the decisions which it takes pursuant to Article 4(4) of this Chapter in their authentic language version. In the Official Journal published in languages other than the authentic language version, the authentic language version will be accompanied by a meaningful summary in the language of that Official Journal.

3. The EFTA Surveillance Authority shall publish in the EEA Section of and the EEA Supplement to the Official Journal of the European Communities the decisions which it takes pursuant to Article 7 of this Chapter.

4. In cases where Article 4(6) or Article 8(2) of this Chapter applies, a short notice shall be published in the EEA Section of and the EEA Supplement to the Official Journal of the European Communities.

5. The EFTA States, acting unanimously, may decide to publish decisions pursuant to the third subparagraph of Article 1(2) in Part I in the EEA Section of and the EEA Supplement to the Official Journal of the European Communities.

Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty

11 Recital 21 of the Regulation reads as follows:

Whereas, in the interests of transparency and legal certainty, it is appropriate to give public information on Commission decisions while,

at the same time, maintaining the principle that decisions in State aid cases are addressed to the Member State concerned; whereas it is therefore appropriate to publish all decisions which might affect the interests of interested parties either in full or in a summary form or to make copies of such decisions available to interested parties, where they have not been published or where they have not been published in full; whereas the Commission, when giving public information on its decisions, should respect the rules on professional secrecy, in accordance with Article 214 of the Treaty;

EFTA Surveillance Authority Decision No 15/04/COL of 18 February 2004 amending for the forty-first time the Procedural and Substantive Rules in the Field of State Aid by introducing a new chapter 9C: Professional secrecy in State aid decisions

12 Point 9C.3.2 on Other confidential information of the Annex of the Decision provides as follows:

...

2. In the field of State Aid, there may, however, be some forms of confidential information, which would not necessarily be present in antitrust and merger procedures, referring specifically to secrets of the State or other confidential information relating to its organisational activity. Generally, in view of the Authority's obligation to state the reasons for its decisions and the transparency requirement, such information can only in very exceptional circumstances be covered by the obligation of professional secrecy. For example, information regarding the organisation and costs of public services will not normally be considered "other confidential information" (although it may constitute a business secret, if the criteria laid down in section 9C. 3.1 are met).

13 Point 9C.4.1 on General principles of the Annex of the Decision provides as follows:

...

2. Besides the basic obligation to state the reasons for its decisions, the Authority has to take into account the need for

effective application of the State Aid rules (inter alia, by giving EFTA States, beneficiaries and interested parties the possibility to comment on or challenge its decisions) and for transparency of its policy. There is therefore an overriding interest in making public the full substance of its decisions. As a general principle, requests for confidential treatment can only be granted where strictly necessary to protect business secrets or other confidential information meriting similar protection.

...

4. *The public version of a Authority decision can only feature deletions from the adopted version for reasons of professional secrecy. Paragraphs cannot be moved, and no sentence can be added or altered. Where the Authority considers that certain information cannot be disclosed, a footnote may be added, paraphrasing the non-disclosed information or indicating a range of magnitude or size, if useful to assure the comprehensibility and coherence of the decision.*

5. *Requests not to disclose the full text of a decision or substantial parts of it which would undermine the understanding of the Authority's statement of reasons cannot be accepted.*

6. *If there is a complainant involved, the Authority will take into account the complainant's interest in ascertaining the reasons why the Authority adopted a certain decision, without the need to have recourse to Court proceedings [3]. Hence, requests by EFTA States for parts of the decision which address concerns of complainants to be covered by the obligation of professional secrecy will need to be particularly well reasoned and persuasive. On the other hand, the Authority will not normally be inclined to disclose information alleged to be of the kind covered by the obligation of professional secrecy where there is a suspicion that the complaint has been lodged primarily to obtain access to the information.*

7. *EFTA States cannot invoke professional secrecy to refuse to provide information to the Authority which the Authority considers necessary for the examination of aid measures. In this respect, reference is made to the procedure set out in Protocol 3 to the*

Surveillance and Court Agreement (in particular Articles 2(2), 5, 10 and 16 in Part II of Protocol 3).

Rules on access to documents – Decision No 407/08/COL of 27 June 2008

14 The preamble to the RAD reads as follows:

HAVING REGARD to the agreement on the European Economic Area, in particular Article 108 thereof,

HAVING REGARD to the agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 13 thereof,

HAVING REGARD to the Rules of Procedures of the EFTA Surveillance Authority,

Whereas openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system, based on democracy and human rights, as referred to in recital 1 of the preamble of the EEA Agreement,

Whereas the purpose of these Rules is to ensure the highest degree possible of openness and transparency at the Authority, while still showing due concern to the necessary limitations due to protection of professional secrecy, legal proceedings and internal deliberations, where this is deemed necessary in order to safeguard the Authority's ability to carry out its tasks,

Whereas the Authority wishes to adopt rules on access to documents substantively similar to Regulation 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents,

Whereas the Authority will in the application of the rules strive to achieve a homogeneous interpretation with that of the Community Courts and the European Ombudsman when interpreting a provision of these which is identical to a provision in Regulation 1049/2001 so as to ensure at least the same degree of openness as provided for by the Regulation,

Whereas the EFTA Surveillance Authority should take the necessary measures to inform the public of the new Rules on access to documents and to train its staff to assist citizens to exercise their rights. In order to facilitate for citizens to exercise their rights, the Authority should provide access to a register of documents.

15 Article 1 RAD reads as follows:

The purpose of these Rules is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to EFTA Surveillance Authority (hereinafter 'the Authority') documents produced or held by the Authority in such a way as to ensure the widest possible access to documents,

(b) to establish rules ensuring the easiest possible exercise of this right, and

(c) to promote good administrative practice on access to documents.

16 Article 2 RAD on beneficiaries and scope reads as follows:

1. Any citizen of an EEA State, and any natural or legal person residing or having its registered office in an EEA State, has a right of access to documents of the Authority, subject to the principles, conditions and limits defined in these Rules.

2. The Authority may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in an EEA State.

3. These Rules shall apply to all documents held by the Authority, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the Authority.

4. Without prejudice to Article 4, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register.

5. These Rules shall be without prejudice to rights of public access to documents held by the Authority which might follow from instruments of international or EEA law.

17 Article 4 RAD on exceptions reads as follows:

1. The Authority shall refuse access to a document where disclosure would undermine the protection of:

...

(b) privacy and the integrity of the individual, in particular in accordance with EEA legislation regarding the protection of personal data.

2. The Authority shall refuse access to a document where disclosure would undermine the protection of:

- *commercial interests of a natural or legal person, including intellectual property,*
- *court proceedings and legal advice,*
- *the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.*

...

5. As regards third-party documents, the Authority shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall not be disclosed or, when the document does not originate from an EFTA State, it is clear that the document shall be disclosed.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 4 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

18 Article 6 RAD on applications reads as follows:

1. The Authority shall examine applications by any natural or legal person for access to a document made in any written form, including electronic form, in one of the languages referred to in Article 129 of the EEA Agreement and Article 20 of the Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice and in a sufficiently precise manner to enable the Authority to identify the document. The applicant is not obliged to state reasons for the application.

2. If an application is not sufficiently precise, the Authority shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.

3. In the event of an application relating to a very long document or to a very large number of documents, the Authority may confer with the applicant informally, with a view to finding a fair solution.

4. The Authority shall provide information and assistance to citizens on how and where applications for access to documents can be made.

19 Article 7 RAD on the processing of applications reads as follows:

1. An application for access to a document shall be handled as quickly as possible. An acknowledgement of receipt shall be sent to the applicant. As a main rule, the Authority shall either grant access to the document requested and provide access in accordance with Article 8 or, in a written reply, state the reasons for the total or partial refusal within 5 working days from registration of the application.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.

20 Article 9 RAD on registers reads as follows:

1. The Authority shall, as soon as possible, provide public access to a register of documents. Access to the register should be provided in

electronic form. References to documents shall be recorded in the register without undue delay.

2. For each document the register shall contain a reference number, the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4.

21 Article 10 RAD on direct access in electronic form or through a register reads as follows:

The Authority shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the Authority.

22 Article 11 RAD on the administrative practice of ESA reads as follows:

The Authority shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by these Rules.

23 Article 13 RAD on entry into force reads as follows:

These Rules shall be applicable from 30 June 2008 and apply to requests for access to documents submitted to the Authority after that date.

The Authority shall publish these Rules in the EEA Supplement to the Official Journal of the European Union.

III FACTS

24 On 11 August 2006, Konkurrenten filed a complaint with ESA alleging that the Norwegian authorities had granted State aid to Oslo Sporveier and Sporveisbussene. This was registered as ESA Case No 60510.

25 On 21 June 2010, ESA closed Case No 60510 by Decision No 254/10/COL, finding that "in view of the termination of the incompatible existing state aid on 30 March 2008, [ESA] considers that no further measures are required in this case".

26 On 22 August 2011, in Case E-14/10 *Konkurrenten*, cited above, the Court annulled ESA Decision No 254/10/COL. The Court held that the Decision was "vitiated both by a lack of reasoning on several issues and an error of law in so far as the defendant, notwithstanding the fact that unlawful aid may have been granted to Oslo Sporveier and Sporveisbussene, decided not to initiate the formal investigation procedure for aid granted between 1997 and 2008" (see Case E-14/10 *Konkurrenten*, cited above, paragraph 92).

27 On 8 September 2011, Konkurrenten filed a second complaint with ESA alleging that KTP had continued to receive aid from the City of Oslo since 31 March 2008 on an ongoing basis. In addition, Konkurrenten alleged that KTP had benefited from further aid measures until 31 March 2008.

28 On 8 February 2012, Konkurrenten served a pre-litigation notice on ESA pursuant to Article 37 SCA on the basis that the latter had not opened a formal investigation into State aid for KTP notwithstanding the Court's judgment in Case E-14/10 *Konkurrenten*.

29 On 21 March 2012, pursuant to Article 2(1) RAD, Konkurrenten submitted to ESA by letter and email a request for access to the statement of content of the file in Case No 60510. The request noted recent case law of the Court of Justice of the European Union ("ECJ") on disclosure of documents pursuant to Regulation (EC) No 1049/2001 in State aid cases and asserted that the statement of content of the file fell outside the general presumption that its disclosure would, in principle, undermine the purpose of investigations, and, in any event, that there was an overriding public interest in disclosure.

30 On 21 March 2012, pursuant to Article 2(1) RAD, Risdal Touring submitted to ESA by letter and email a request seeking public access to the case register/index in Case No 70506, factual questions asked by ESA of the Norwegian Government, City of Oslo and KTP before deciding whether or not to open a formal investigation procedure into the State aid complaint submitted by Konkurrenten on 8 September 2011, factual answers received

by ESA provided by the City of Oslo either directly, or indirectly via the Norwegian Government, and factual answers received before a formal investigation procedure had been opened from the recipient of the potentially unlawful aid, KTP. The request also referred to recent ECJ case law and raised the same arguments as the request of Konkurrenten, as set out in the previous paragraph.

31 On 28 March 2012, ESA decided by Decision No 123/12/COL to open a formal investigation procedure into potential State aid to Oslo Sporveier and Sporveisbussene between 1 January 1994 and 30 March 2008.

32 Also on 28 March 2012, the time limit set out in Article 7(1) RAD for ESA to respond to Konkurrenten's and Risdal Touring's access requests of 21 March 2012 expired without any response from ESA.

33 On 30 March 2012, Konkurrenten and Risdal Touring separately wrote to and emailed ESA to notify it that it had failed to respond to their access to documents requests of 21 March 2012.

34 On 5 April 2012, ESA sent an email (the "first contested correspondence") to counsel for the applicants with the subject "access to lists of documents in the Konkurrenten cases – Oslo". The email reads "[p]lease find attached the list of documents in the two Konkurrenten cases (buses in Oslo). They are in MS Excell [sic!] format. I trust that is acceptable to you." The documents attached to the email were identified as "List70478" and "List70506".

35 On 10 April 2012, Konkurrenten wrote to and emailed ESA stating that its access request concerned "the case register/ index of the file in Case No 60510 (AS Oslo Sporveier and AS Sporveisbussene)" which it had not received. Konkurrenten stated that it assumed from the contents of List70478 that ESA Case No 60510 had possibly been reopened under such a case number on 8 September 2011, and subsequently closed on 28 March 2012. However, it observed that the list did not detail any documents between 2006 and 2011. In relation to the documents listed for the period September 2011 to March 2012, Konkurrenten asserted that the information on those documents was deficient.

The letter continued: "[i]n the event that ESA should consider that its email on 5 April 2012 constitutes an implied decision to deny access to a complete statement of content of the file concerning the subject matter in question, the company requests that this be clarified as soon as possible given that the decision then must be brought before the EFTA Court within two months under Article 36 SCA". Konkurrenten expressed its regret that ESA had failed to act in accordance with the RAD and the principle of good administration and asserted that the handling of the access request had become "non-courteous, see Article 12(1) of the European Code of Good Administrative Behaviour by the European Ombudsman". Konkurrenten concluded by requesting public access to the relevant internal procedures "governing (a) the designation of case numbers and the registration of documents (events) including the information that should be recorded about each document in ESA's database; and (b) the handling of public access requests under the RAD".

36 Also on 10 April 2012, Risdal Touring wrote to and emailed ESA stating that it had failed to respond within the time period prescribed in Article 7(1) RAD to Risdal Touring's access request concerning the case register/index in Case No 70506 and certain documents assumed to be on file. The letter noted ESA's email to its counsel of 5 April 2012 with its attached lists and indicated that Risdal Touring presumed that "List70506" was intended to represent the statement of content of the file. The letter noted, however, that ESA's email made no reference to the other documents that Risdal Touring had requested on 21 March 2012. The letter continued: "[i]n the event that ESA should consider that its email on 5 April 2012 constitutes an implied decision to deny access to a complete statement of content of the file concerning the subject matter in question, the company requests that this be clarified as soon as possible given that the decision then must be brought before the EFTA Court within two months under Article 36 SCA". Risdal Touring complained that List70506 referred only to an "edit date" in relation to each document without further explanation. It contended that, by withholding more detailed information, ESA was undermining the public right

to seek access to individual documents. Risdal Touring stated that "[u]nless such a complete statement of content can be provided, ESA is requested to explain whether it has provided a print-out from its database directly or whether certain information about the documents, available in the database, has been edited away from the statement of the content of the file and, in that case, to provide reasons for denying disclosure of that information". Risdal Touring continued by expressing its regret that ESA had failed to act in accordance with the RAD and the principle of good administration and asserted that the handling of the access request had become "non-courteous, see Article 12(1) of the European Code of Good Administrative Behaviour by the European Ombudsman". Risdal Touring concluded by requesting public access to the relevant internal procedures "governing (a) the designation of case numbers and the registration of documents (events) including the information that should be recorded about each document in ESA's database; and (b) the handling of public access requests under the RAD".

37 ESA did not respond to either Konkurrenten's letter and email of 10 April 2012, or Risdal Touring's letter and email of the same date.

38 On 4 May 2012, both Konkurrenten and Risdal Touring served pre-litigation notices on ESA by letter and email. Recalling their letters of 10 April 2012, both Konkurrenten and Risdal Touring asserted that ESA's email of 5 April 2012 must be considered an implied decision to refuse access to the list "by analogy Article 8(3) of Regulation 1049/2001". The letters notified ESA that Konkurrenten and Risdal Touring intended to contest the decision before the Court pursuant to Article 36 SCA if "no reversal is made in this matter before 11 May 2012".

39 Later on 4 May 2012, ESA emailed Risdal Touring, with a letter dated 30 April 2012 attached, (the "second contested correspondence") in connection with Risdal Touring's letter of 10 April 2012. The second contested correspondence is set out at paragraphs 56 and 57 below.

40 On 8 May 2012, Risdal Touring notified ESA that it had failed to respond to the pre-litigation notice. Risdal Touring asserted that "ESA has laid down a definitive position, by its emails on 5 April 2012 and 4 May 2012, to refuse Risdal Touring AS complete access to the documents sought. Should ESA decide to reverse its decision or adopt the same decision in a different format, it will have until 11 May 2012 to do so, as made clear to you on 4 May 2012."

41 ESA did not respond to Konkurrenten's pre-litigation notice of 4 May 2012.

42 ESA did not respond to Risdal Touring's letter of 8 May 2012.

43 On 13 November 2012, ESA wrote to counsel for the applicants on the subject of "the Authority's Case No 60510 – access to documents". ESA referred to Konkurrenten's request of 21 March 2012 and subsequent correspondence and the ongoing litigation in Case E-5/12 *Konkurrenten*.

44 ESA wrote: "[p]lease find attached up-to-date lists of all events in the Authority's Case No 60510 (Complaint against Oslo municipality for aid to AS Oslo Sporveier), Case No 70478 (Konkurrenten – new decision following the annulment of decision 254/10/COL by the Court in E-14/10) and Case No 72102 (Risdal Touring/Konkurrenten.no – access to file requests), as of 8 November 2012".

45 ESA further stated that "[i]t is noted that, for case-handling purpose[s], a document is considered a draft until an 'end date' has been entered. The formal registration of a document, through the Authority's Registry, includes entering the 'end date'."

46 Also on 13 November 2012, ESA wrote to Risdal Touring concerning "the Authority's Case No 70506 – access to documents". The letter makes reference to Risdal Touring's request of 21 March 2012 and subsequent correspondence as well as the ongoing litigation in Case E-4/12 *Risdal Touring*.

47 ESA's letter reads: "[p]lease find attached up-to-date lists of all events in the Authority's Case No 70506 (NOR – Konkurrenten –

new complaint regarding alleged subsidisation of KTP (CP)) and Case No 72102 (Risdal Touring/Konkurrenten.no – access to file requests), as of November 2012".

48 It continues: "[a]s can be seen from the lists, two events (Nos 632494 and 630679) were at one point moved from Case No 70506 to Case No 72102, which is a separate case concerning public access. One event (No 609745) has been removed as a duplication (of event No 609730)."

49 ESA further stated that "[i]t is noted that, for case-handling purpose[s], a document is considered a draft until an 'end date' has been entered. The formal registration of a document, through the Authority's Registry, includes entering the 'end date'."

50 On 19 December 2012, by Decision No 519/12/COL, ESA closed its formal investigation into potential aid to Oslo Sporveier and Sporveisbussene between 1994 and 2008. ESA found that the application of the group taxation rules to the Oslo Sporveier Group and the commercial activities capital injection did not constitute State aid within the meaning of Article 61(1) EEA and therefore closed the formal investigation procedure. ESA also found that the formal investigation with regard to the annual compensation was without object since the measure represents existing aid that had now been terminated. Finally, ESA found that the formal investigation procedure with regard to the public service capital injection was without object since the measure represented existing aid that had now been terminated. Therefore ESA closed the formal investigation into that measure.

IV THE CONTESTED CORRESPONDENCES

First contested correspondence

51 On 5 April 2012, the Director of ESA's Department of Legal & Executive Affairs sent an email to counsel for the applicants with the subject "Access to lists of documents in the Konkurrenten cases – Oslo".

52 The email reads "[p]lease find attached the list of documents in the two Konkurrenten cases (buses in Oslo). They are in MS Excell [sic!] format. I trust that is acceptable to you." The documents attached to the email were identified as "List70478" and "List70506".

Second contested correspondence

53 On 4 May 2012, ESA emailed Risdal Touring. The subject of the email was "Case 70506 - Risdal Touring AS - Access to documents".

54 The email reads as follows: "Please receive herewith a copy of a letter sent by the Authority today regarding your letter of 10 April 2012, on access to documents in case 70506 - Risdal Touring AS".

55 The letter attached to the email is dated 30 April 2012 and referenced as "Event No: 632494" in Case No 70506. The letter was posted to Risdal Touring on 7 May 2012.

56 The letter reads as follows:

"RE: Case 70506 Risdal Touring AS

Access to documents

Your letter of 10 April 2012

(a) Reference is made to your letter of 10 April 2012 on behalf of Risdal Touring AS.

(b) Your client has requested the Authority to produce the following under its rules on public access to documents:

1. 'a statement of content / case register / index in Case No 70506 (KTP AS)'

2. certain documents that are assumed to be included in the file'/ regarding

a) 'factual questions raised by ESA before deciding whether to open a formal investigation procedure' (as explained in section 3 of your client's letter);

b) 'factual answers received by ESA before a formal investigation procedure has been opened from the

public authority granting the potentially unlawful aid' (as explained in section 4 of your client's letter);

c) 'factual answers received before a formal investigation procedure has been opened from the recipient of the potentially unlawful aid' (as explained in section 5 of your client's letter).

3. Relevant internal procedures governing the registration of documents (events) and the information that should be recorded about each document in ESA's database and the handling of public access requests under the Rules on Access to Documents.

1. Statement of content/case register/index in Case No 70506

(c) Please find attached a list of the content stored in the Authority's database under case no. 70506.

2. Certain documents that are assumed to be included in the file referred to in point 2 a), b) and c) above.

(d) As you are doubtless aware, the state aids case to which your client refers is still open and the investigation pending. The Court of Justice of the European Union held that documents pertaining to the Commission's administrative files relating to state aid investigations are covered by a general presumption that their disclosure would in principle undermine the protection of the purpose of investigations. The state aid rules do not lay down any right of access to the file for interested parties. If they were able to obtain access, on the basis of the EU Transparency Regulation No. 1049/2001, the system for state aid review would be called into question. The Court further ruled that this presumption can be rebutted if the applicant demonstrates that a requested document is not "covered by that presumption' or that there is an overriding public interest in disclosure (see Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau GmbH* [2010] ECR I-5885, paragraph 61).

(e) As regards your clients request to be granted public access to certain documents that are assumed to be included in the file, your client, at sections 2 to 5, has already put forward some arguments why it should be granted access to types of documents mentioned in those sections. However, those reasons are general in nature. In light of the general presumption mentioned above, your client is invited to make document specific submissions to rebut the presumption.

3. Relevant internal procedures governing the registration of documents etc.

(f) Please find attached the parts of the Authority's guidelines on internal procedures which concern the registration of documents (events) and the information to be stored as well as on the handling of public access requests under the Rules on Access to Documents.

(g) The relevant extracts are:

Section 8.4 on requests for access to documents

Section 9.1 dealing with confidentiality in general

Section 11.2 on Registry and filing of documents.

(h) Finally, the Authority is pleased to clarify that neither of its correspondence so far in this matter, *i.e.* neither its email of 5 April 2012 addressed to you on behalf of your client, nor the present document is intended to form a final position by the Authority on the matter in the sense of an act challengeable in the EFTA Court.

(i) Should your client wish to receive such a formal decision by the Authority, possibly in view of judicial review of the Authority's legal position regarding the scope of your client's rights to public access in this matter, your client is requested to so indicate. The Authority will then proceed to adopt a formal College decision."

57 Enclosed with the letter were the "List of documents in case file"; "Section 8.4 on requests for access to documents"; "Section 9.1 dealing with confidentiality in general"; and "Section 11.2 on Registry and filing of documents".

V PROCEDURE AND FORMS OF ORDER SOUGHT BY THE PARTIES

58 By application lodged at the Court on 2 June 2012, Risdal Touring brought an action seeking the annulment of ESA's decision, first notified on 5 April 2012 without stating reasons, and subsequently notified on 4 May 2012, denying public access to the full statement of content and specific documents in ESA Case No 70506.

59 The applicant in Case E-4/12, *Risdal Touring*, requests the Court to:

(i) annul the contested decision; and

(ii) order the defendant and any interveners to bear the costs.

60 On 31 July 2012, the defendant in Case E4/12 *Risdal Touring*, ESA lodged an application pursuant to Article 87 of the Rules of Procedure ("RoP") for a decision on a preliminary objection concerning inadmissibility.

61 In Case E-4/12 *Risdal Touring*, ESA requests the Court to:

(i) dismiss the applicant's application as inadmissible; and

(ii) order the applicant to bear the costs of the proceedings.

62 On 3 September 2012, Risdal Touring submitted its response to the defendant's plea of inadmissibility pursuant to Article 87(2) RoP. Risdal Touring requests the Court to:

(i) dismiss the defendant's inadmissibility plea and rule the application admissible; and

(ii) annul the contested decision; and

(iii) order the defendant and any interveners to bear the costs.

63 By application lodged at the Court on 2 June 2012, Konkurrenten brought an action seeking the annulment of ESA's decision as notified on 5 April 2012 without stating reasons and denying public access to the full statement of content in ESA Case No 60510.

64 The applicant in Case E-5/12, *Konkurrenten*, requests the Court to:

(i) annul the contested decision; and

(ii) order the defendant and any interveners to bear the costs.

65 On 31 July 2012, the defendant in Case E-5/12 *Konkurrenten*, ESA lodged an application, pursuant to Article 87 RoP, for a decision on a preliminary objection concerning inadmissibility.

66 In Case E-5/12 *Konkurrenten*, ESA requests the Court to:

(i) dismiss the applicant's application as inadmissible; and

(ii) order the applicant to bear the costs of the proceedings.

67 On 3 September 2012, Konkurrenten submitted its response to the defendant's plea of inadmissibility pursuant to Article 87(2) RoP. Konkurrenten requests the Court to:

(i) dismiss the defendant's inadmissibility plea and rule the application admissible; and

(ii) annul the contested decision; and

(iii) order the defendant and any interveners to bear the costs.

68 Pursuant to Article 87(4) RoP, the Court decided to reserve its decision upon the defendant's application for a decision on a preliminary objection concerning inadmissibility in both Cases E-4/12 and E-5/12 for the final judgment. This decision was communicated to the parties by letter of 24 October 2012.

69 By decision of 23 October 2012, pursuant to Article 39 RoP, and, having received observations from the parties, the Court decided to join Cases E4/12 and E5/12. This decision was communicated to the parties by letter of 24 October 2012.

70 ESA submitted its defence in the joined cases on 20 November 2012. In its defence, ESA requests the Court to:

(i) dismiss the applications as inadmissible

– or, in the alternative, dismiss the application in Case E-4/12 as unfounded and declare that there is no longer a need to adjudicate on the application in Case E-5/12;

– or, in the alternative, dismiss the applications as unfounded; and

(ii) order the applicants to bear the costs of the proceedings.

71 On 19 December 2012, Risdal Touring and Konkurrenten requested an extension to the deadline for submitting the reply. Pursuant to Article 35(2) RoP, the President granted an extension of the time limit for submitting the reply until 9 January 2013.

72 On 9 January 2013, Risdal Touring and Konkurrenten submitted their joint reply.

73 On 12 February 2013, ESA submitted its rejoinder.

74 The parties presented oral argument and answered questions put to them by the Court at the hearing on 17 April 2013.

75 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

VI LAW

Case E-4/12 Risdal Touring

Arguments of the parties with respect to admissibility

76 Risdal Touring submits that the application is admissible. It asserts that the decision, as notified on 5 April 2012 and 4 May 2012, is a reviewable act of direct and individual concern to Risdal Touring and that it has standing and legal interest to institute proceedings pursuant to the second paragraph of Article 36 SCA.

77 Risdal Touring submits that, after ESA was notified, on 4 May 2012, that Risdal Touring would challenge the contested decision unless reversed, ESA immediately took steps in its letter attached to its email of 4 May 2012 to provide a basis for an inadmissibility objection in order to prevent the present action. Risdal Touring submits that ESA's assertion in that letter to the

effect that the contested decision is not a challengeable act is no more than a delaying tactic.

78 Recalling the provisions in the EU pillar, Risdal Touring asserts that, pursuant to Articles 7 and 8 of Regulation No 1049/2001, it would have had an unquestionable right to bring an action after a similar period and refers to Joined Cases T-355/04 and T-446/04 *Co-Frutta* v *Commission* [2010] ECR II-1, paragraph 59. It contends, however, that Article 7 RAD establishes only a one-stage process when applying for access to documents with a shorter time limit than that contained in the corresponding provision in the EU pillar (Article 7 of Regulation No 1049/2001). Moreover, according to recital 7 in the preamble to the RAD, ESA will, where the provisions of the RAD are identical to those in Regulation No 1049/2001, strive to achieve a homogeneous interpretation so as to ensure at least the same degree of openness as provided for by the Regulation.

79 Consequently, Risdal Touring contends that ESA's objection amounts to an attempt to exploit the absence of a provision corresponding to Article 8(3) of Regulation No 1049/2001 in the RAD. None the less, in its view, having regard to the second paragraph of Article 36 SCA, the absence of such a provision cannot lead to a materially different outcome under the RAD in the present circumstances.

80 Risdal Touring asserts, first, that, pursuant to Article 7(1) RAD, the mandatory time limit for ESA to decide on the access request, submitted on 21 March 2012, expired on 28 March 2012. Reference is made to *Co-Frutta* v *Commission*, cited above, paragraph 56, and Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair* v *Commission* [2010] ECR II-5723, paragraph 39. Moreover, ESA did not invoke Article 7(2) RAD. Second, Risdal Touring contends that ESA's emails of 5 April 2012 and 4 May 2012 granted partial access to the statement of content of the file in Case No 70506. ESA's email of 4 May 2012 stated that ESA could not grant access to the remaining documents as Risdal Touring had not demonstrated a right to have access to those documents. Moreover, the letter attached to ESA's email of 4 May

2012 granted access to the procedural documents that Risdal Touring had requested on 10 April 2012.

81 Third, according to Risdal Touring, the RAD do not require an applicant to specify that it "wish[es] to receive such a formal decision" from the ESA College in order for an access request to be regarded as valid. Fourth, it contends that ESA has not provided any evidence that its College has not delegated the power to decide upon access requests. Fifth, it alleges that the form in which a decision is adopted is in principle irrelevant as regards the right to challenge such a decision by way of an action for annulment. In its view, it is irrelevant whether that act satisfies certain formal requirements. The procedural rules governing actions brought before the European courts must be interpreted so as to ensure, wherever possible, that those rules are implemented in such a way as to contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights and refers to Case C-521/06 P *Athinaïki Techniki* v *Commission* [2008] ECR I-5829, paragraphs 44 and 45 and case law cited. Risdal Touring submits that there is no need for the Court to depart from this standard for judicial review.

82 Sixth, in Risdal Touring's view, ESA's purported intention not to have laid down a final position as late as 4 May 2012, notwithstanding the expiry of the time limit laid down in Article 7(1) RAD, and even giving retroactive effect to its email of 5 April 2012, is entirely irrelevant. Risdal Touring contends that such intention is no more than an intention to disregard the mandatory time limit of Article 7(1) RAD.

83 Consequently, Risdal Touring asserts that the contested decision, as notified on 5 April 2012 and 4 May 2012, is challengeable before the Court pursuant to Article 36 SCA. The application is timely whether calculated from 5 April 2012 or 4 May 2012. Thus, the application must be regarded as admissible.

84 In its response to the defendant's plea of inadmissibility, Risdal Touring asserts that the plea is unfounded. Whether the list sent with ESA's letter of 4 May 2012 represented the complete

"statement of content/case register/index in Case No 70506" constitutes a substantive matter which it has a right to ask the Court to review. Consequently, at any rate, the first and fifth pleas of the application must be ruled admissible insofar as they concern the refusal to disclose a complete statement of content of the file. Risdal Touring therefore focuses on ESA's objections to the admissibility of the second plea (concerning the refusal to disclose the factual questions) and the third and fourth pleas (concerning the factual answers from the City of Oslo and KTP respectively), and the fifth plea (to the extent that it concerns a failure to state reasons for those refusals).

85 In response to ESA's first argument, namely, that the request for access to documents contained "legally inadequate reasoning that the applicant refused to improve", Risdal Touring contends that this is irrelevant as regards the admissibility of the action. Pursuant to Article 6(1) RAD, an applicant is not obliged to state reasons for an application for access to documents and, therefore, is entitled to a decision pursuant to Article 7(1) RAD. The purpose of the RAD, as made clear in the preamble thereto and Article 1, is to make the right of access readily and universally available to the public from any EEA State. Risdal Touring concedes, however, that, according to *Technische Glaswerke Ilmenau* and *Ryanair*, cited above, there is a general presumption in State aid cases that disclosure can, in principle, undermine the protection of the purpose of the investigation, as set out in Article 4 RAD. Nevertheless, the case law acknowledges the right of an applicant to demonstrate that specific documents fall outside that presumption or that there is a higher public interest justifying the disclosure of specific documents. Whether and to what extent the general presumption applies is a substantive matter for the Court to determine.

86 In the view of Risdal Touring, whether ESA would have been willing to disclose any of the contested documents had the applicant resubmitted its access request with different legal reasoning is extraneous to the admissibility of the present action. Neither its letter of 10 April 2012 nor any other part of the

correspondence contains any modification of the access request. Moreover, in its view, neither ESA's email of 5 April 2012 nor its letter of 4 May 2012 contains any request that the applicant should resolve any misunderstandings or clarify matters. On the contrary, ESA's letter of 4 May 2012 repeats the content of the applicant's access request and responds to each part of it.

87 In response to ESA's assertion that Risdal Touring modified its access request and, finally, that ESA was willing to adopt a challengeable decision but the applicant "failed to ask for it", Risdal Touring contends that these allegations must be disregarded. In its view, the correspondence between the parties demonstrates that ESA laid down a definitive position to refuse access to the contested documents in response to the application of 21 March 2012. It asserts that no other credible explanation has been offered.

88 According to Risdal Touring, the legal effect of ESA's refusal is that it has been denied the timely access to the documents provided for in Article 7(1) RAD. This has impaired Risdal Touring's ability to exercise its right to identify additional documents of interest on the file and to seek timely access to those. Consequently, the refusal has negatively affected and altered the applicant's legal position.

89 Risdal Touring asserts that, even in the absence of a mechanism such as Article 8(3) of Regulation No 1049/2001, the EU courts would have declared the present action admissible simply on the basis of established case law as the refusal has the legal effect of denying the applicant the right to timely access to the documents, guaranteed by Article 7(1) RAD.

90 Risdal Touring criticises ESA's reliance on an order by the General Court of the European Union in Case T-22/98 *Scottish Soft Fruit Growers* v *Commission* [1998] ECR II-4219. In its view, that approach has been superseded with a distinction now made between a general request or request for information, on the one hand, and requests for access to documents under Commission Decision 94/90, the predecessor to Regulation No 1049/2001,

on the other hand and makes reference in that regard to the order in Case T-106/99 *Meyer* v *Commission* [1999] ECR II-3273, paragraphs 35 and 36.

91 In addition, Risdal Touring submits that the defendant's reference to its internal procedural manual, which was last updated in 2008, does not reflect the current state of affairs. Moreover, in Case E-14/11 *DB Schenker* v *ESA* [2012] EFTA Ct. Rep. 1178 the contested decision also consisted of a letter from the defendant's Director of Legal & Executive Affairs. In that case, ESA did not contest the fact that the Director had the power to decide upon access requests. In any event, the Director's competence would be a substantive matter for the present proceedings.

92 In its application for a decision on a preliminary objection concerning inadmissibility, ESA contends that Risdal Touring's application is inadmissible. Admissibility is a matter of public policy which the Court can examine of its own motion but it is for the applicant to demonstrate that the relevant criteria have been fulfilled. Reference is made to Case C-208/11 P *Internationaler Hilfsfonds* v *Commission*, order of 15 February 2012, not yet reported, paragraphs 33 and 34. ESA submits that Risdal Touring has not demonstrated that the subject-matter of the proceedings constitutes an act which is challengeable in an action for annulment pursuant to Article 36 SCA.

93 ESA argues that neither its email nor its letter, either individually or collectively, constitutes a decision under Article 36 SCA. As the SCA does not provide a specific definition of what constitutes an ESA decision, it is appropriate to consider how the corresponding provision in EU law, now Article 263 TFEU, is framed. Although there are differences to a certain extent between the two provisions, in its view, the principle of procedural homogeneity dictates that the interpretation of Article 36 SCA should be in conformity with Article 263 TFEU. In ESA's view, the difference in the wording of Article 263 TFEU on this point is effectively such as to codify older case law. Accordingly, ESA submits that, for the purposes of Article 36 SCA, an ESA decision must be an act that is intended to produce legal effects vis-à-vis third parties.

The decision must have binding force on the applicant or produce legal effects altering an applicant's legal position.

94 ESA stresses that the mere fact that a letter or an email is sent by an institution to its addressee in response to a request made by the latter is not enough for it to be treated as a decision and refers to *Scottish Soft Fruit Growers*, cited above, paragraph 34 and case law cited. Citing the ECJ's judgment in Case 60/81 *International Business Machines* v *Commission* [1981] ECR 2639, ESA acknowledges that the test as to whether a decision has been adopted is one of substance and not of form. It contends, however, that neither its email nor its letter altered Risdal Touring's legal position. Instead, its email granted access to a list of documents on the file that could assist the applicant in submitting a more document-specific access request. Indeed, in response to further correspondence, ESA's letter expressly called upon the applicant to "make document-specific submissions" to rebut the presumption against access that follows from *Technische Glaswerke Ilmenau*. Moreover, the letter expressly set out the view that neither it nor ESA's email would constitute a challengeable act. ESA contends that, in its reply of 10 April 2012, Risdal Touring assumed that the email did not constitute a challengeable act.

95 In ESA's view, the contention of Risdal Touring that ESA's email and, by extension, ESA's letter constitute challengeable acts is based primarily upon an analogy with Article 8(3) of Regulation No 1049/2001 which has no corresponding provision in the RAD. Nevertheless, Article 8(3) of Regulation No 1049/2001 cannot be read into the RAD. While it is not excluded that in certain particular circumstances an institution's silence or inaction may exceptionally be considered to constitute an implied refusal, as a rule, mere silence on the part of an institution cannot be placed on the same footing as an implied refusal, except where that result is expressly provided for by a provision of Union law and refers to Case C-123/03 P *Commission* v *Greencore* [2004] ECR I-11647, paragraph 45.

96 ESA submits that the reason why its email and letter are not challengeable acts is not any failure to fulfil formal requirements

but the fact that neither sets out any substantive decision that negatively affects the applicant and alters his legal position and refers to *Athinaïki Techniki* v *Commission*, cited above, paragraphs 44 and 45. The email and letter grant access to a number of documents and invite submissions on grounds for possibly granting access to further documents.

97 ESA asserts that an action for annulment of an alleged implicit decision to refuse access to those documents is not a proper course of action in the absence of an applicable legal framework. In its view, Risdal Touring should have followed up the express invitation in ESA's letter to indicate a wish to receive a formal ESA decision.

98 Alternatively, ESA contends that Risdal Touring could pursue an application for failure to act pursuant to Article 37 SCA. However, were its email or letter challengeable pursuant to Article 36 SCA, this would exclude the possibility of an action for failure to act pursuant to Article 37 SCA. In those circumstances, according to ESA, it would appear difficult to determine what communication would not trigger the two-month period within which to bring an action for annulment pursuant to the second paragraph of Article 36 SCA.

99 ESA observes that were the applicant's action to be admissible and well founded, pursuant to the fourth paragraph of Article 36 SCA, ESA's decision would be declared void. In its view, this would entail nothing more than an obligation on ESA to adopt a proper decision deciding upon the access request.

100 ESA concludes that there has been no decision capable of being challenged pursuant to the second paragraph of Article 36 SCA and submits, therefore, that the action must be dismissed as inadmissible.

Findings of the Court

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

102 ESA decisions taken upon the basis of the RAD are justiciable pursuant to the Court's normal power of review laid down in Article 36 SCA in accordance with the principle of effective judicial protection (see Case E-14/11 *DB Schenker* v *ESA*, cited above, paragraph 123 and case law cited).

103 It is necessary to examine whether the contested correspondences constitute challengeable decisions pursuant to Article 36 SCA.

104 The Court has repeatedly recognised the principle of procedural homogeneity and referred in particular to considerations of equal access to justice and compliance with judgments rendered in infringement proceedings for parties appearing before the EEA courts (see Case E-14/11 *DB Schenker* v *ESA*, cited above, paragraph 77 and case law cited). Moreover, the Court has held that homogeneity cannot be restricted to the interpretation of provisions whose wording is identical in substance to parallel provisions of EU law (see Case E-14/11 *DB Schenker* v *ESA*, cited above, paragraph 78). The second paragraph of Article 36 SCA corresponds in substance to the fourth paragraph of Article 263 TFEU (see, *inter alia*, Case E-5/07 *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. 62, paragraph 48). Consequently, although it is not required to do so pursuant to Article 3(2) SCA, in assessing the application for partial annulment pursuant to the second paragraph of Article 36 SCA, it is appropriate to take account of the reasoning in the case law of the EU courts concerning the fourth paragraph of Article 263 TFEU.

105 First, only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment (see Case E-14/11 *DB Schenker* v *ESA*, cited above, paragraph 80 and case law cited).

106 Second, in order to ascertain whether a measure can be the subject of an action under Article 36 SCA, it is necessary to look to its substance, rather than the form in which it is presented (see Case E-14/11 *DB Schenker* v *ESA*, cited above, paragraph

81 and case law cited). In addition, it is necessary to look to the intention of those who drafted them, in order to classify those measures (compare Case C-362/08 P *Internationaler Hilfsfonds* v *Commission* [2010] ECR I-669, paragraph 52). In that regard, it is in principle those measures which definitively determine ESA's position upon the conclusion of an administrative procedure, and which are intended to have legal effects capable of affecting the interests of the complainant, which are open to challenge and not intermediate measures whose purpose is to prepare for the definitive decision, or measures which are mere confirmation of an earlier measure which was not challenged within the prescribed period (compare Case C-362/08 P *Internationaler Hilfsfonds* v *Commission*, paragraph 52, and *Athinaïki Techniki* v *Commission*, paragraph 42, both cited above).

107 In the present case, Risdal Touring effectively seeks the annulment of alleged ESA decisions, first notified on 5 April 2012 without stating reasons, and subsequently notified on 4 May 2012, denying access to the statement of content of the file in ESA Case No 70506, a State aid case, and specific documents in that case file.

Specific documents

108 Risdal Touring has contended in part that the contested correspondences should be understood as an implicit decision to refuse access to those documents it had sought and which it had presumed to exist by way of its application of 21 March 2012.

109 As a rule, mere silence on the part of ESA cannot be placed on the same footing as an implied refusal, except where that result is expressly provided for by a provision of EEA law (compare *Commission* v *Greencore*, cited above, paragraph 45). The RAD do not contain an express provision that a failure by ESA to reply within the prescribed time limit is to be considered a negative reply and so entitle an applicant to institute court proceedings pursuant to Article 36 SCA. Nor is it appropriate to apply such a rule as that contained in Article 8 of Regulation No 1049/2001 by analogy.

110 Unlike Article 8 of Regulation No 1049/2001, Article 7 RAD provides for a one-step procedure which obliges ESA to process applications for access to documents as quickly as possible in a straightforward manner. However, a failure on behalf of ESA to respond to an access request within the time limit set out in Article 7(1) RAD opens the potential for an action for failure to act pursuant to Article 37 SCA (see, to that effect, Case E-7/12 *DB Schenker II*, judgment of 9 July 2013, not yet reported, paragraph 135).

111 Therefore, whether the contested correspondence, can be regarded as a decision with respect to the specific documents, challengeable pursuant to Article 36 SCA, depends solely upon whether it, on its substance, definitively determined ESA's position.

112 The Court notes that, at the date on which Risdal Touring submitted its access to documents request, ESA was yet to open its formal investigation procedure into potential State aid to Oslo Sporveier and Sporveisbussene. The formal investigation procedure was opened, however, prior to the first contested correspondence.

113 The Court has held that general presumptions based on the nature of certain categories of documents may apply in situations where disclosure would undermine the protection of the purposes of inspections, investigations and audits. Such general presumptions are, of course, applicable in active, ongoing investigations (see Case E-14/11 *DB Schenker* v *ESA*, cited above, paragraph 224).

114 Moreover, general presumptions based on the nature of certain categories of documents have been accepted by the EU courts in interpreting Article 4(2) of Regulation No 1049/2001 in access to documents in State aid and merger cases (see Case E-14/11 *DB Schenker* v *ESA*, cited above, paragraph 131, and, to that effect, as regards State aid, *Technische Glaswerke Ilmenau*, cited above, paragraph 58).

115 Protocol 3 SCA, and, in particular, Article 20 thereof, do not lay down any right of access to documents in ESA's administrative file for interested parties in the context of the review procedure

opened in accordance with Article 1(2) of Part I of Protocol 3 SCA (compare *Technische Glaswerke Ilmenau*, cited above, paragraph 56).

116 By contrast, Article 6(2) of Part II of Protocol 3 SCA provides that comments received by ESA in the context of the said review procedure are to be submitted to the EEA/EFTA State concerned, the latter then having the opportunity to reply to those comments within a given time limit. The procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the EEA/EFTA State responsible for granting the aid, and ESA cannot, without infringing the rights of the defence, use in its final decision information on which that EEA/EFTA State was not afforded an opportunity to comment (compare *Technische Glaswerke Ilmenau*, cited above, paragraph 57 and case law cited).

117 It follows from the above that the interested parties, except for the EEA/EFTA State responsible for granting the aid, do not have a right under the procedure for reviewing State aid to consult the documents on ESA's administrative file. Account must be taken of that fact when interpreting the exception laid down by Article 4(2), third indent, of the RAD. If those interested parties were able to obtain access, on the basis of the RAD, to the documents in ESA's administrative file, the system for the review of State aid would be called into question.

118 ESA was therefore correct to assume that a general presumption that disclosure of documents in the administrative State aid file in principle undermines the protection of the objectives of investigation activities, mentioned in Article 4(2) RAD. This is despite the fact that Risdal Touring's access to documents request was made prior to ESA's opening of the formal investigation procedure. Those questions posed by ESA and the responses it received in determining whether to open the formal procedure must conceptually be considered a part of the administrative file once the formal investigation is opened. This is so despite the particular circumstances of this case, whereby ESA's opening of the formal State aid investigation procedure was a

direct consequence of the Court's annulment in Case E-14/10 *Konkurrenten* v *ESA* of ESA Decision No 254/10/COL of 21 June 2010 (AS Oslo Sporveier and AS Sporveisbussene).

119 General presumptions are, nevertheless, rebuttable, and it is for an applicant to show that such a presumption raised by ESA should not apply (see Case E-14/11 *DB Schenker* v *ESA*, cited above, paragraph 134).

120 ESA made clear in the second contested correspondence that Risdal Touring was "invited to make document specific submissions to rebut the presumption". Since Risdal Touring chose not to rebut the presumption through further submissions, the contested correspondence cannot, in light of the reasoning above at paragraphs 105 and 106, be considered any more than an intermediate step as it does not definitively determine ESA's position.

121 Therefore, the application must be dismissed as inadmissible insofar as it relates to the specific documents.

Statement of content of the case file

122 The first contested correspondence of 5 April 2012 does not directly address Risdal Touring but merely refers to the "two Konkurrenten cases". It is therefore unclear whether the email, while sent to counsel representing both applicants, was necessarily addressed to Risdal Touring. However, it is evident that Risdal Touring was an addressee of the first contested correspondence with the attachment of the list of documents in Case No 70506. This document, headed "List #70506", provides three categories of information, the "Event Nr."; the "Event Name"; and the "Edit date".

123 By way of contrast to the first contested correspondence, ESA made certain to ensure to clearly address the second contested correspondence of 4 May 2012 to Risdal Touring.

124 The first part of the second contested correspondence of 4 May 2012 is headed "[s]tatement of content/case register/

index in Case No 70506". It states "[p]lease find attached a list of the content stored in the Authority's database under case no. 70506." This untitled list provides three categories of information, the "Name"; the "Event"; and the "Case". Three additional entries not included in the list attached to the first contested correspondence may be found on this second list: events 632494, 630679, and 609745.

125 It is worthy of note that on 13 November 2012, ESA wrote to Risdal Touring regarding its access request of 21 March 2012, later correspondence and the present proceedings. The letter states "[p]lease find attached up-to-date lists of all events in the Authority's Case No 70506 (NOR – Konkurrenten – new complaint regarding alleged subsidisation of KTP (CP))..."

126 However, ESA failed to attach the correct list to its letter.

127 Attached to the rejoinder, ESA submitted a third statement of content of the file in ESA Case No 70506. This untitled list provides eight categories of information: File type; "Event #"; "Name"; "Event Type"; "Edited:"; "Due Date"; "End Date"; and "Library". Five entries present on the second list of 4 May 2012 do not appear on this document: Event nos.: 632494; 630679; 609745; 609717; and 608768. Additional entries present however on the third list include Event nos.: 635657; 639422; 639548; 639549; 640198; 645982; 649160; 654179; 654671; 654672; 654673; 654674; 654675; 654676; 654677; 640435; and 639551.

128 In its rejoinder, ESA submits that a statement of content of the file as sought by the applicant has not been recorded in its database. The third list appears, ESA states, as it does to its own staff. Moreover, ESA asserts that there are no documents "saved on this case" that are not on the list. ESA submits that, since 6 September 2012, it has additionally recorded "written date" and "written by" as categories of metadata. ESA notes that it also records the "Subject matter" and "Description" of a document in its publically available online "document register" established pursuant to Article 9 RAD.

129 Risdal Touring did not specifically challenge the content of this third statement of content, submitted by ESA, at the hearing. It maintained that it sought the "complete statement[s] of content of the [file]" "because [we] need it in order to identify documents of interest on the file."

130 The notion of a "document" as defined in Article 3(a) RAD extends to any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within ESA's sphere of responsibility. Pursuant to Article 2(3), the RAD rules apply to all documents in ESA's control in all areas of its activity without exception (Case E-14/11 *DB Schenker* v *ESA*, cited above, paragraph 23). It is therefore evident that the content of ESA's electronic databases, including metadata, is encompassed by this definition and subject to the provisions of the RAD.

131 Moreover, as the Court held previously, if ESA raises a general presumption, so as to shift the burden of proof onto an applicant, the applicant must first be furnished with sufficient and adequate information, for example an appropriately detailed list of documents, in order to have an opportunity to rebut such a presumption (see Case E-14/11 *DB Schenker* v *ESA*, cited above, paragraph 134). Otherwise, an applicant's right to rebut the presumption becomes illusory.

132 Where an absolute bar to proceedings is at issue the Court may raise it of its own motion (compare Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 45 and case law cited).

133 However, in addition to the requirement that the measure be a challengeable act, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure. An applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible. Furthermore, the interest in bringing proceedings must continue until the final

decision, failing which there will be no need to adjudicate, which presupposes that the action must be likely, if successful, to procure an advantage for the party bringing it. If an applicant's interest in bringing proceedings disappears in the course of proceedings, a decision of the Court on the merits cannot bring him any benefit (compare *Co-Frutta* v *Commission*, cited above, paragraphs 41-44 and case law cited).

134 Nevertheless, an applicant may also retain an interest in claiming the annulment of an ESA decision to prevent its alleged unlawfulness recurring in the future (compare, to that effect, Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraph 32, Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 21, and Case 207/86 *Apesco* v *Commission* [1988] ECR 2151, paragraph 16).

135 That interest in bringing proceedings follows from Article 38 SCA. Pursuant to that provision, if an ESA decision has been declared void, ESA is required to take the necessary measures to comply with the judgment of the Court. However, that interest can only exist if the alleged unlawfulness is liable to recur in the future regardless of the circumstances of the case which gave rise to the action brought by the applicant (compare Case C-362/05 P *Wunenburger* v *Commission* [2007] ECR I-4355, paragraphs 51 and 52).

136 By the submission of the third list in the rejoinder, which was not specifically challenged, ESA has effectively supplanted its previous statements of content provided in the first and second contested correspondence. The Court nevertheless notes that the statement of content of the file in ESA Case No 70506 annexed to the first and second contested correspondence are both manifestly inferior in quality to that provided in the rejoinder, which may be considered appropriately detailed only in the context of the present case. This is particularly so given that ESA records a "written date", "written by" "Subject matter" and "Description" of a document as categories of metadata albeit in different databases. The Court recalls that the RAD rules are additionally intended to promote good administrative practice by ESA on access to documents (Case E-14/11 *DB Schenker* v *ESA*, cited above, paragraph 122).

137 It must therefore be held that there is no longer any need to adjudicate in Case E4/12 insofar as it is directed against the statement of content of the file, since Risdal Touring no longer has an interest in bringing proceedings challenging the first and second contested correspondence in this respect, having been provided with the statement of content of the file in ESA Case No 70506 with the same level of information immediately available internally at ESA. Risdal Touring's interest in bringing proceedings has therefore disappeared. Nor may it be presumed that the alleged unlawfulness is liable to recur in the future given the nature of the content of the list provided in the rejoinder and the additional categories of metadata now routinely stored as described above in paragraph 128.

Case E-5/12 Konkurrenten

Arguments of the parties with respect to admissibility

138 Konkurrenten submits that its application is admissible. The contested decision is a reviewable act of direct and individual concern to it and it has standing and legal interest to institute the present proceedings pursuant to Article 36 SCA.

139 Konkurrenten asserts, first, that, pursuant to Article 7(1) RAD, the mandatory time limit for ESA to decide on the access request, submitted on 21 March 2012, expired on 28 March 2012 and refers to *Co-Frutta* v *Commission*, paragraph 56, and *Ryanair* v *Commission*, paragraph 39, both cited above. Moreover, ESA did not invoke Article 7(2) RAD.

140 Second, Konkurrenten contends that ESA's email of 5 April 2012 granted partial access to the statement of content of the file in the reopened Case No 60510.

141 Third, according to Konkurrenten, the form in which a decision is adopted is in principle irrelevant as regards the right to challenge such a decision by way of an action for annulment. It is irrelevant whether that act satisfies certain formal requirements. The procedural rules governing actions brought before the European courts must be interpreted so as to ensure, wherever possible,

that those rules are implemented in such a way as to contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights and refers to *Athinaïki Techniki* v *Commission*, cited above, paragraphs 44 and 45 and case law cited.

142 Konkurrenten asserts that the contested decision is therefore clearly an act that may be challenged before the Court pursuant to the second paragraph of Article 36 SCA. Konkurrenten contends that it was notified of the decision on 5 April 2012 and, hence, that the application is both timely and admissible.

143 In its application for a decision on a preliminary objection concerning inadmissibility, ESA contends that the application is inadmissible.

144 ESA submits that it did not adopt a decision refusing Konkurrenten access to a list of documents in Case No 60510. Instead, ESA states that, "as regrettable as it may be", it effectively remained silent on the request to grant access to such a list, and thereby failed to act. ESA asserts, therefore, that the proper course of action would have been to lodge an action for failure to act pursuant to Article 37 SCA. Consequently, the application for annulment pursuant to Article 36 SCA must, in its view, be declared inadmissible.

145 ESA submits that its email of 5 April 2012 "says nothing, explicitly, about access to a list of documents" in Case No 60510. In that regard, referring to *Commission* v *Greencore*, cited above, paragraph 45, ESA points out that the RAD contains no provision expressly providing that mere silence can be placed on the same footing as an implied refusal.

146 ESA contends that it would not serve the proper administration of justice to allow premature actions for annulment i.e. before the administrative procedure has been completed, as in the present case.

147 Moreover, Konkurrenten has not demonstrated that the subject-matter of the present action constitutes an ESA decision within the meaning of Article 36 SCA. While acknowledging the

differences between Article 36 SCA and Article 263 TFEU, ESA submits that the principle of procedural homogeneity dictates an interpretation of Article 36 SCA in conformity with Article 263 TFEU. In its view, the different wording of Article 263 TFEU is effectively to codify case law. Therefore, for the purposes of Article 36 SCA, an ESA decision must be an act that is intended to produce legal effects vis-à-vis third parties i.e. the applicant in this case.

148 Having regard to the requirements laid down in case law, referring to *Scottish Soft Fruit Growers* v *Commission*, paragraph 34 and case law cited, and *International Business Machines* v *Commission*, paragraph 9, both cited above, ESA submits that its email of 5 April 2012 did not alter the applicant's legal position. Instead, its email granted access to two lists of documents, neither of which the applicant had requested. ESA states that its emails did nothing in relation to the list of documents to which Konkurrenten had actually requested access. ESA itself notes that even when Konkurrenten drew attention to this fact, it remained silent and did not act. Therefore, ESA submits, the proper course of action should have been an action for failure to act. Consequently, the action for annulment must be dismissed as inadmissible.

149 In its response to the defendant's plea of inadmissibility, Konkurrenten contends that ESA's plea is unfounded. The present case concerns ESA's refusal to grant public access in accordance with Article 2 RAD to the complete statement of content of the file concerning ESA Case No 60510. Konkurrenten recalls that its letter of 10 April 2012 to ESA stated that "[t]o the extent that the same subject matter has been dealt with under different case numbers, for unexplained reasons, the access request naturally includes the statement of content of those files in order to obtain a complete picture".

150 Konkurrenten notes that ESA has not denied that its email of 5 April 2012 was indeed intended for Konkurrenten. According to Konkurrenten, the statement of content identified as "List 70478" relates directly to ESA Case No 60510. Konkurrenten notes that

the first event recorded in that list is "Closure due to adoption of opening decision on 28 March" with the second event recorded as "Konkurrenten – Formal pre-litigation notice – Failure to act on a state aid decision within a reasonable time".

151 Consequently, Konkurrenten submits that ESA's email of 5 April 2012 is a response to the access request submitted by Konkurrenten on 21 March 2012. In its view, ESA has failed to put forward any credible explanation to prevent the Court from concluding that the correspondence demonstrates a definitive position on the part of ESA to deny access to the complete statement of content. The legal effect of that refusal, Konkurrenten continues, is that the applicant is denied timely access to the statement of content, guaranteed by Article 7(1) RAD. Consequently, it is impaired in its ability to exercise its right to identify specific documents of interest on the file and to seek timely access to those documents. Therefore, the refusal has negatively affected and altered its legal position.

152 Konkurrenten states that if ESA wishes to have the present case dismissed, it remains free to grant access to the complete statement of content, and then argue that the applicant has no legal interest in continuing the proceedings. However, as ESA has not done so, more than 150 days after the access request was received, according to Konkurrenten, this demonstrates that it is motivated by a desire to delay and frustrate the access request.

153 In its defence in the joined cases, ESA submits that an action for annulment brought by a natural or legal person is admissible only insofar as that person has an interest in the annulment of the contested measure. Such an interest presupposes that the annulment of that measure must of itself be capable of having legal consequences; or, in other words, that the action must be liable, if successful, to procure an advantage for the party who has brought it and that that person has a vested and present interest in the annulment of that measure. ESA makes reference to Case T-19/06 *Mindo* v *Commission* [2011] ECR II-6795, paragraph 77 and case law cited. It is for the applicant to prove that it has an interest in bringing proceedings. ESA submits that

neither applicant has demonstrated this interest in relation to the email of 5 April 2012 and/or the letter emailed on 4 May 2012.

154 ESA asserts that it has subsequently, by letter of 13 November 2012, provided Konkurrenten with up-to-date lists of all documents registered in Cases Nos 60510, 70478 and 72102 as of 8 November 2012. As Konkurrenten only sought a "statement of content of the file case register (index)" which it has now received, in ESA's submission, Konkurrenten no longer has a legal interest in continuing the proceedings.

155 ESA contends that any failure to act comes to an end on the day on which the person who calls upon ESA to act receives the document by which ESA defines its position and refers in this regard to Joined Cases T-194/97 and T-83/98 *Branco* v *Commission* [2000] ECR II-69, paragraph 55. Whether such a definition of position satisfies an applicant is irrelevant for the purposes of Article 37 SCA. Reference is made to Case C-44/00 P *Sodima* v *Commission* [2000] ECR I-11231, paragraph 83, and Case T-423/07 *Ryanair* v *Commission* [2011] ECR II-2397, paragraph 26 and case law cited.

156 In the reply, Konkurrenten responds to the plea in the defence that it has no legal interest in pursuing the first plea by observing that such defence is based on ESA's contention that on 13 November 2012, 237 days after the access requests were submitted, it sent what it asserts are "up-to-date lists of all documents" to both applicants. According to Konkurrenten, this is the second version provided by ESA to it. Konkurrenten observes that the matter before the Court is whether the contested decision failed to grant access to the complete statement of content contrary to Articles 2(1) and 4(2) RAD.

157 In Konkurrenten's view, the fact that ESA has provided new versions of the statement of content does not render its legal interest moot. It asserts a continued legal interest in the annulment of the contested decision in order to prevent recurring violations of its access rights and refers to Case T-233/09 *Access Info Europe* v *Council* [2011] ECR II-1073, paragraph 35 and case law cited.

158 Konkurrenten notes that ESA has denied its public right of access to statements of content, or, in the alternative, argues that such right does not include knowing the author/addressee; whether documents are incoming, outgoing or internal; the date on the documents and the date when they were registered.

159 According to Konkurrenten, it follows from ESA's "general reasoning" that it may take a similar position in future access to document requests for statements of content in State aid cases. In that regard, Konkurrenten contends that there is no basis in law to force an applicant to start a new action against ESA every time ESA refuses access to a statement of content, only to delay before providing the document, as in this case, and then demand that the actions be discontinued. In its view, the inadmissibility pleas are nothing more than an attempt to obstruct their substantive rights and those of any other member of the public in similar cases.

160 Consequently, Konkurrenten asserts that it retains a legal interest in pursuing the present action and that the second inadmissibility plea must be rejected as unfounded.

161 In addition, Konkurrenten observes that on 5 September 2012 new rules on public access to documents were enacted by ESA Decision No 300/12/COL. By Article 13 of the revised RAD, these new rules were given retroactive effect to the matter before the Court. In their view, the revised RAD have a different purpose, which is no longer to ensure the same degree of openness as provided for in EU law. They now include exceptions which go beyond the degree of restrictions found within Regulation No 1049/2001 and the relevant case law. Moreover, the definitions are also more narrowly drafted. In sum, the applicants assert that the substantive changes made as a result of the revised RAD mean that the public right of access is now significantly more restrictive than that permitted under EU law.

162 Konkurrenten submits further that the procedural time limits in the revised RAD are now significantly longer with increased discretionary powers. In its view, the process leading up to

the adoption of the revised RAD demonstrates a fundamental lack of respect for the rule of law and the principle of sound administration. Moreover, the revised RAD have been published only on ESA's website unlike the requirement in Article 13 RAD that the rules be published in the EEA Supplement to the Official Journal. Konkurrenten contends that the present actions must be decided upon on the basis of the RAD, which was in force at the time the contested decisions were taken. Furthermore, it asserts that the revised RAD must also be considered part of EEA law and, hence, subject to the principle of homogeneity. Reference is made to Case E-14/11 *DB Schenker* v *ESA*, cited above, paragraphs 118 and 121.

163 In its rejoinder, ESA submits that admissibility is a matter of public policy which the Court must examine of its own motion.

164 ESA maintains that there is no longer a need to adjudicate on the application in Case E-5/12 as ESA has since communicated "the initially missing list regarding case no 60510 to Konkurrenten.no". Therefore, Konkurrenten lacks any legal interest in continuing to pursue an action for annulment as regards an alleged refusal on the part of ESA to provide such documentation. Referring to Case T-153/10 *Schneider España de Informática* v *Commission*, order of 28 February 2012, not yet reported, paragraphs 22 and 23 and case law cited, ESA asserts that Konkurrenten's arguments to the contrary have no basis in case law. Konkurrenten's reliance on *Access Info Europe* v *Council*, cited above, paragraphs 35 and 36, is rejected.

165 According to ESA, it has been its consistent practice since 6 September 2012, under the revised RAD, to provide a list of the documents on ESA's administrative file whenever such a list is requested or whenever ESA has sought to rely upon a general presumption against access. ESA refutes the applicant's contention that it continues to have a legal interest in annulment because it must be presumed that ESA will not respect the requirements established by the Court in *DB Schenker* and asks the Court not to follow the applicant's argument on this point.

166 ESA maintains that the application is not well founded.

167 While ESA considers the applicant's arguments on the revised RAD not to raise any new plea within the meaning of Article 37(2) RoP and, in any event, to be ineffective to challenge the contested decision, it underlines the fact that, in its view, the revised RAD are not at issue in the present proceedings. Instead, the relevant rules in the present proceedings are the RAD as the dispute must be assessed under the rules applicable at the material time.

168 Referring to Case E-14/11 *DB Schenker* v *ESA*, cited above, paragraph 121, ESA observes that the Court held it indispensable that its interpretation of the RAD is homogeneous with that by the EU courts of Regulation No 1049/2001. In that regard, ESA submits that a general presumption exists that disclosure of documents recorded in administrative State aid files, such as those at issue in the present case, undermines, in principle, the protection of the objectives of investigation activities. ESA asks the Court to decline the applicant's invitation to deviate from the position that there is a general presumption against public access in State aid cases and makes reference to *Technische Glaswerke Ilmenau*, cited above, paragraphs 53, 54, 60 and 61, Article 26 of Regulation No 659/1999 and Part II of Protocol 3 SCA.

169 ESA asserts that the applicant overlooks the fact that the preamble to Regulation No 659/1999 has not been incorporated into either the EEA Agreement or the SCA.

170 Finally, ESA observes that the presumption against public access is rebuttable and asserts that the applicant have not engaged in any form of dialogue in order to explore whether, and if so, with regard to which documents, the presumption against public access to the State aid file, by way of exception, does not hold. Nor did the applicants adduce any argument liable to rebut the presumption by either 5 April 2012 or 4 May 2012.

171 In its rejoinder, ESA adds that it was by mistake that it transmitted to counsel for the applicants lists concerning Case No 70478 and Case No 70506. Only the latter list had

been requested by Risdal Touring, while the list requested by Konkurrenten, in Case No 60510, was missing.

Findings of the Court

172 In the present case, Konkurrenten effectively seeks the annulment of an alleged ESA decision notified on 5 April 2012 without stating reasons, denying access to the statement of content of the file in ESA Case No 60510, a State aid case. The revised RAD are of no relevance in this context.

173 The first contested correspondence of 5 April 2012 does not directly address Konkurrenten but merely refers to the "two Konkurrenten cases". It is therefore unclear whether the email, while sent to counsel representing both applicants, was necessarily addressed to Konkurrenten. While ESA has effectively acknowledged in its submissions that the first contested correspondence was addressed to Konkurrenten, ESA was also correct in noting that it had failed to transmit the statement of content sought. Instead of sending Konkurrenten the statement of content in ESA Case No 60510, ESA attached a list of documents in ESA Case No 70478.

174 Subsequently, ESA failed to respond to Konkurrenten's follow-up correspondence.

175 ESA has acknowledged that it failed to act and, in its application for a decision on a preliminary objection as to inadmissibility of 31 July 2012, submits that the appropriate course of action for the applicant was to make an application pursuant to Article 37 SCA. However, ESA did not immediately seek to rectify its failure to act.

176 Instead, ESA remained silent for an additional 15 weeks. It was not until 13 November 2012, that ESA attempted to rectify its failure to act by writing to Konkurrenten. ESA's letter of that date states, "[p]lease find attached up-to-date lists of all events in the Authority's Case No 60510 (Complaint against Oslo municipality for aid to AS Oslo Sporveier), Case No 70478 (Konkurrenten - new decision following the annulment of decision 254/10/COL by the Court in E14/10) and Case

No 72102 (Risdal Touring/Konkurrenten.no - access to file requests), as of 8 November 2012".

177 It is clear from the defence that this letter was sent in response to a submission made in Konkurrenten's response to the defendant's plea of inadmissibility of 3 September 2012.

178 However, ESA failed to attach the statement of content in ESA Case No 60510 to that letter.

179 ESA only rectified its failure to act when it attached a statement of content of the file in ESA Case No 60510 to the rejoinder, albeit by way of an "illustration". This statement of content of the file is of a similar quality to the third list provided to Risdal Touring described above in paragraph 127.

180 Nevertheless, applying the reasoning contained above in paragraphs 101 to 106, the first contested correspondence sent to Konkurrenten does not amount to a decision. The application must, as a consequence, be dismissed as inadmissible.

VII COSTS

181 Under Article 66(2) RoP, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. ESA has requested that both applicants be ordered to pay the costs. However, under the first paragraph of Article 66(3) RoP, where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs. Moreover, under the second paragraph of Article 66(3) RoP, the Court may order a party, even if successful, to pay costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur. Furthermore, Article 66(6) RoP provides that, where a case does not proceed to judgment, the costs shall be in the discretion of the Court.

182 As regards Case E-4/12 *Risdal Touring*, ESA provided, what only in the present circumstances may be considered an appropriate statement of content of the file in ESA Case No 70506 in its rejoinder. The result of which is that there is no longer any need

to adjudicate upon this part of the case. Only furnishing such a list 47 weeks after the request was made was unreasonable. However, ESA was correct in bringing the general presumption to the applicant's attention, in the circumstances, and inviting Risdal Touring to make document specific submissions to rebut the presumption. It is therefore appropriate that ESA be ordered to bear its own costs and half of the costs incurred by Risdal Touring. Risdal Touring is to bear half of its own costs.

183 As regards Case E-5/12 *Konkurrenten*, ESA itself has characterised its conduct as regrettable. The Court finds that since ESA was seeking the dismissal of the case for reasons of inadmissibility yet refraining from taking measures to rectify its willingly acknowledged failure to act, it must be ordered to bear not only its own costs but also the costs incurred by Konkurrenten.

On those grounds,

THE COURT

hereby orders:

In Case E-4/12 *Risdal Touring AS* v *EFTA Surveillance Authority*:

1. **The part of the application directed at specific documents is dismissed as inadmissible;**
2. **There is no longer any need to adjudicate on the remainder of the application;**
3. **ESA is to bear its own costs and half of the costs incurred by the applicant;**
4. **The applicant is to bear half of its costs.**

In Case E-5/12 Konkurrenten.no AS v EFTA Surveillance Authority:

1. **The application is dismissed as inadmissible;**
2. **ESA is to bear its own costs and the costs incurred by the applicant.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Luxembourg, 7 October 2013.

Gunnar Selvik Carl Baudenbacher

Registrar President

REPORT FOR THE HEARING

In Joined Cases E-4/12 and E-5/12

APPLICATION to the Court pursuant to Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

Risdal Touring AS, established in Evje, Norway, (Case E-4/12)

Konkurrenten.no AS, established in Evje, Norway, (Case E-5/12)

and

EFTA Surveillance Authority

seeking in Case E-4/12 *Risdal Touring* the annulment of the defendant's decision, first notified on 5 April 2012 without stating reasons, and subsequently notified on 4 May 2012, denying public access to the full statement of content and specific documents in ESA Case No 70506, a state aid case, on the basis of the Rules on Access to Documents ("RAD") established by ESA Decision No 407/08/COL on 27 June 2008; and in Case E-5/12 *Konkurrenten* the annulment of the defendant's decision as notified on 5 April 2012 without stating reasons and denying public access to the full statement of content in ESA Case No 60510, a state aid case, on the basis of the RAD established by ESA Decision No 407/08/COL on 27 June 2008.

I INTRODUCTION

1. Risdal Touring AS ("Risdal Touring") operates in the tour bus market in Norway and several EU Member States. It is owned by Olto Holding AS which also owns Konkurrenten.no AS ("Konkurrenten"), which operates in the regional express bus market between the Southern and Central region in Norway ("Olto group").

2. Case E-4/12 concerns an access to document request made by Risdal Touring to the EFTA Surveillance Authority ("ESA" or "the defendant") under Article 2(1) RAD seeking public access to the statement of content in Case No 70506 and specific documents

believed to be included in that file concerning the defendant's handling of the Olto group's State aid complaint, submitted on 8 September 2011, involving potentially unlawful aid granted by the City of Oslo to Kollektivtransportproduksjon AS ("KTP") (formerly known as AS Oslo Sporveier ("Oslo Sporveier")), a company owned and controlled by the City of Oslo. KTP is a direct competitor of Konkurrenten and Risdal Touring in the express bus and tour bus markets.

3. Risdal Touring seeks the annulment of ESA's decision, as notified on 5 April 2012 without stating reasons, and subsequently notified on 4 May 2012, denying public access to the complete statement of content in ESA Case No 70506 and certain documents believed to be included in that file.

4. Case E-5/12 concerns a request that Konkurrenten submitted on 21 March 2012 to ESA pursuant to Article 2(1) RAD seeking public access to the statement of content in ESA Case No 60510 concerning ESA's handling of the group's State aid complaint submitted on 11 August 2006 involving potentially unlawful aid granted by the City of Oslo to KTP. Konkurrenten seeks the annulment of ESA's decision, as notified on 5 April 2012 without stating reasons, which denies public access to the complete statement of content of that file.

5. In Case E-14/10 *Konkurrenten.no* v *ESA*,[1] the Court annulled ESA Decision No 254/10/COL of 21 June 2010 (AS Oslo Sporveier and AS Sporveisbussene) to close Case No 60510 on the grant of State aid by the Norwegian authorities to Oslo Sporveier and AS Sporveisbussene ("Sporveisbussene") for the provision of scheduled bus services in Oslo. The Court annulled the Decision on the basis that it was "vitiated both by a lack of reasoning on several issues and an error of law in so far as the defendant, notwithstanding the fact that unlawful aid may have been granted to Oslo Sporveier and Sporveisbussene, decided not to initiate the formal investigation procedure for aid granted between 1997 and 2008".[2]

[1] Reference is made to Case E-14/10 *Konkurrenten.no* v *ESA* [2011] EFTA Ct. Rep. 266.
[2] Ibid., paragraph 92.

6. By its action in Case E-5/12, Konkurrenten seeks access to the complete statement of content of that file such that it may be fully able to identify documents on file that might be relevant to understanding how its complaint was handled until ESA Decision No 254/10/COL was taken in 2010 [CONFIDENTIAL].

II LEGAL BACKGROUND

EEA law

7. Recital 15 in the preamble to the EEA Agreement reads as follows:

WHEREAS, in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition;

8. Article 61 EEA reads as follows:

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

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.

9. Article 108(1) EEA reads as follows:

The EFTA States shall establish an independent surveillance authority (EFTA Surveillance Authority) as well as procedures similar to those existing in the Community including procedures for ensuring the fulfilment of obligations under this Agreement and for control of the legality of acts of the EFTA Surveillance Authority regarding competition.

10. Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads as follows:

In the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4

and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement.

11. Article 13 SCA reads as follows:

The EFTA Surveillance Authority shall adopt its own rules of procedure.

12. Article 16 SCA reads as follows:

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

13. Article 36 SCA reads as follows:

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

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

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

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

14. Article 37 SCA reads as follows:

Should the EFTA Surveillance Authority, in infringement of this Agreement or the provisions of the EEA Agreement, fail to act, an EFTA State may bring an action before the EFTA Court to have the infringement established.

The action shall be admissible only if the EFTA Surveillance Authority has first been called upon to act. If, within two months of being so called upon, the EFTA Surveillance Authority has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the EFTA Court that the EFTA Surveillance Authority has failed to address to that person any decision.

15. Article 20 of Part II of Protocol 3 SCA reads as follows:

1. Any interested party may submit comments pursuant to Article 6 of this Chapter following an EFTA Surveillance Authority decision to initiate the formal investigation procedure. Any interested party which has submitted such comments and any beneficiary of individual aid shall be sent a copy of the decision taken by the EFTA Surveillance Authority pursuant to Article 7 of this Chapter.

2. Any interested party may inform the EFTA Surveillance Authority of any alleged unlawful aid and any alleged misuse of aid. Where the EFTA Surveillance Authority considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof. Where the EFTA Surveillance Authority takes a decision on a case concerning the subject matter of the information supplied, it shall send a copy of that decision to the interested party.

3. At its request, any interested party shall obtain a copy of any decision pursuant to Articles 4 and 7, Article 10(3) and Article 11 of this Chapter.

16. Article 26 of Part II of Protocol 3 SCA reads as follows:

1. The EFTA Surveillance Authority shall publish in the EEA Section of and the EEA Supplement to the Official Journal of the European Communities a summary notice of the decisions which it takes pursuant to Article 4(2) and (3) and Article 18 in conjunction with Article 19(1) of this Chapter. The summary notice shall state that a copy of the decision may be obtained in the authentic language version or versions.

2. The EFTA Surveillance Authority shall publish in the EEA Section of and the EEA Supplement to the Official Journal of the European Communities the decisions which it takes pursuant to Article 4(4) of this Chapter in their authentic language version. In the Official Journal

published in languages other than the authentic language version, the authentic language version will be accompanied by a meaningful summary in the language of that Official Journal.

3. The EFTA Surveillance Authority shall publish in the EEA Section of and the EEA Supplement to the Official Journal of the European Communities the decisions which it takes pursuant to Article 7 of this Chapter.

4. In cases where Article 4(6) or Article 8(2) of this Chapter applies, a short notice shall be published in the EEA Section of and the EEA Supplement to the Official Journal of the European Communities.

5. The EFTA States, acting unanimously, may decide to publish decisions pursuant to the third subparagraph of Article 1(2) in Part I in the EEA Section of and the EEA Supplement to the Official Journal of the European Communities.

Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty

17. Recital 21 of the Regulation reads as follows:

Whereas, in the interests of transparency and legal certainty, it is appropriate to give public information on Commission decisions while, at the same time, maintaining the principle that decisions in State aid cases are addressed to the Member State concerned; whereas it is therefore appropriate to publish all decisions which might affect the interests of interested parties either in full or in a summary form or to make copies of such decisions available to interested parties, where they have not been published or where they have not been published in full; whereas the Commission, when giving public information on its decisions, should respect the rules on professional secrecy, in accordance with Article 214 of the Treaty;

EFTA Surveillance Authority Decision No 15/04/COL of 18 February 2004 amending for the forty-first time the Procedural and Substantive Rules in the Field of State Aid by introducing a new chapter 9C: Professional secrecy in State aid decisions

18. Point 9C.3.2 on Other confidential information of the Annex of the Decision provides as follows:

...

2. In the field of State Aid, there may, however, be some forms of confidential information, which would not necessarily be present in antitrust and merger procedures, referring specifically to secrets of the State or other confidential information relating to its organisational activity. Generally, in view of the Authority's obligation to state the reasons for its decisions and the transparency requirement, such information can only in very exceptional circumstances be covered by the obligation of professional secrecy. For example, information regarding the organisation and costs of public services will not normally be considered "other confidential information" (although it may constitute a business secret, if the criteria laid down in section 9C. 3.1 are met).

19. Point 9C.4.1 on General principles of the Annex of the Decision provides as follows:

...

2. Besides the basic obligation to state the reasons for its decisions, the Authority has to take into account the need for effective application of the State Aid rules (inter alia, by giving EFTA States, beneficiaries and interested parties the possibility to comment on or challenge its decisions) and for transparency of its policy. There is therefore an overriding interest in making public the full substance of its decisions. As a general principle, requests for confidential treatment can only be granted where strictly necessary to protect business secrets or other confidential information meriting similar protection.

...

4. The public version of a Authority decision can only feature deletions from the adopted version for reasons of professional secrecy. Paragraphs

cannot be moved, and no sentence can be added or altered. Where the Authority considers that certain information cannot be disclosed, a footnote may be added, paraphrasing the non-disclosed information or indicating a range of magnitude or size, if useful to assure the comprehensibility and coherence of the decision.

5. Requests not to disclose the full text of a decision or substantial parts of it which would undermine the understanding of the Authority's statement of reasons cannot be accepted.

6. If there is a complainant involved, the Authority will take into account the complainant's interest in ascertaining the reasons why the Authority adopted a certain decision, without the need to have recourse to Court proceedings [3]. Hence, requests by EFTA States for parts of the decision which address concerns of complainants to be covered by the obligation of professional secrecy will need to be particularly well reasoned and persuasive. On the other hand, the Authority will not normally be inclined to disclose information alleged to be of the kind covered by the obligation of professional secrecy where there is a suspicion that the complaint has been lodged primarily to obtain access to the information.

7. EFTA States cannot invoke professional secrecy to refuse to provide information to the Authority which the Authority considers necessary for the examination of aid measures. In this respect, reference is made to the procedure set out in Protocol 3 to the Surveillance and Court Agreement (in particular Articles 2(2), 5, 10 and 16 in Part II of Protocol 3).

Rules on access to documents (hereinafter "RAD") - Decision No 407/2008/COL of 27 June 2008

20. The preamble to the RAD reads as follows:

HAVING REGARD to the agreement on the European Economic Area, in particular Article 108 thereof,

HAVING REGARD to the agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 13 thereof,

HAVING REGARD to the Rules of Procedures of the EFTA Surveillance Authority,

Whereas openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system, based on democracy and human rights, as referred to in recital 1 of the preamble of the EEA Agreement,

Whereas the purpose of these Rules is to ensure the highest degree possible of openness and transparency at the Authority, while still showing due concern to the necessary limitations due to protection of professional secrecy, legal proceedings and internal deliberations, where this is deemed necessary in order to safeguard the Authority's ability to carry out its tasks.

Whereas the Authority wishes, to adopt rules on access to documents substantively similar to Regulation 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents,

Whereas the Authority will in the application of the rules strive to achieve a homogeneous interpretation with that of the Community Courts and the European Ombudsman when interpreting a provision of these which is identical to a provision in Regulation 1049/2001 so as to ensure at least the same degree of openness as provided for by the Regulation,

Whereas the EFTA Surveillance Authority should take the necessary measures to inform the public of the new Rules on access to documents and to train its staff to assist citizens to exercise their rights. In order to facilitate for citizens to exercise their rights, the Authority should provide access to a register of documents.

21. Article 1 RAD reads as follows:

The purpose of these Rules is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to EFTA Surveillance Authority (hereinafter "the Authority") documents produced or held by the Authority in such a way as to ensure the widest possible access to documents,

(b) to establish rules ensuring the easiest possible exercise of this right, and

(c) to promote good administrative practice on access to documents.

22. Article 2 RAD on beneficiaries and scope reads as follows:

1. Any citizen of an EEA State, and any natural or legal person residing or having its registered office in an EEA State, has a right of access to documents of the Authority, subject to the principles, conditions and limits defined in these Rules.

2. The Authority may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in an EEA State.

3. These Rules shall apply to all documents held by the Authority, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the Authority.

4. Without prejudice to Article 4, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register.

5. These Rules shall be without prejudice to rights of public access to documents held by the Authority which might follow from instruments of international or EEA law.

23. Article 3(a) RAD which establishes definitions reads as follows:

(a) "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the Authority's sphere of responsibility;

24. Article 4 RAD on exceptions reads as follows:

1. The Authority shall refuse access to a document where disclosure would undermine the protection of:

...

(c) privacy and the integrity of the individual, in particular in accordance with EEA legislation regarding the protection of personal data.

2. The Authority shall refuse access to a document where disclosure would undermine the protection of:

– *commercial interests of a natural or legal person, including intellectual property,*

– *court proceedings and legal advice,*

– *the purpose of inspections, investigations and audits,*

unless there is an overriding public interest in disclosure.

...

5. As regards third-party documents, the Authority shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall not be disclosed or, when the document does not originate from an EFTA State, it is clear that the document shall be disclosed.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 4 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

25. Article 6 RAD on applications reads as follows:

1. The Authority shall examine applications by any natural or legal person for access to a document made in any written form, including electronic form, in one of the languages referred to in Article 129 of the EEA Agreement and Article 20 of the Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice and in a sufficiently precise manner to enable the Authority to identify the document. The applicant is not obliged to state reasons for the application.

2. If an application is not sufficiently precise, the Authority shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.

3. In the event of an application relating to a very long document or to a very large number of documents, the Authority may confer with the applicant informally, with a view to finding a fair solution.

4. The Authority shall provide information and assistance to citizens on how and where applications for access to documents can be made.

26. Article 7 RAD on the processing of applications reads as follows:

1. An application for access to a document shall be handled as quickly as possible. An acknowledgement of receipt shall be sent to the applicant. As a main rule, the Authority shall either grant access to the document requested and provide access in accordance with Article 8 or, in a written reply, state the reasons for the total or partial refusal within 5 working days from registration of the application.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.

27. Article 9 RAD on registers reads as follows:

1. The Authority shall, as soon as possible, provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without undue delay.

2. For each document the register shall contain a reference number, the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4.

28. Article 10 RAD on direct access in electronic form or through a register reads as follows:

The Authority shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the Authority.

29. Article 11 RAD on the administrative practice of ESA reads as follows:

The Authority shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by these Rules.

30. Article 13 RAD on entry into force reads as follows:

These Rules shall be applicable from 30 June 2008 and apply to requests for access to documents submitted to the Authority after that date.

The Authority shall publish these Rules in the EEA Supplement to the Official Journal of the European Union.

ESA Decision No 300/12/COL of 5 September 2012 to adopt revised Rules on public access to documents and repealing Decision No 407/08/COL (hereinafter "revised RAD")

31. The preamble to the revised RAD reads as follows:

HAVING REGARD to the agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular its Article 13,

Whereas:

Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system, based on democracy and human rights, as referred to in recital 1 of the preamble of the EEA Agreement,

The purpose of these Rules is to ensure openness and transparency at the Authority, while still showing due concern for the necessary limitations due to protection of professional secrecy, legal proceedings and internal deliberations, where this is deemed

necessary in order to safeguard the Authority's ability to carry out its tasks,

The Authority should take the necessary measures to inform the public of the new Rules on public access to documents and to train its staff to assist citizens to exercise their rights. In order to facilitate the exercise by citizens of their rights, the Authority should provide access to a register of documents,

32. Article 1 of the revised RAD reads as follows:

The purpose of these Rules is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to documents held by the Authority,

(b) to establish rules ensuring the easiest possible exercise of this right, and

(c) to promote good administrative practice relating to access to documents.

33. Article 2 of the revised RAD on beneficiaries and scope reads as follows:

1. Any natural or legal person has a right to request access to documents of the Authority, subject to the principles, conditions and limits defined in these Rules.

2. These Rules shall apply to documents drawn up or received by the Authority and in its possession, in all areas of activity of the Authority.

3. Without prejudice to Article 4, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register.

4. These Rules shall be without prejudice to rights of public access to documents held by the Authority which might follow from instruments of international or EEA law.

34. Article 3 of the revised RAD which establishes definitions reads as follows:

For the purpose of these Rules:

(a) "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the Authority's sphere of responsibility, except unfinished documents or drafts of documents;

...

35. Article 4 of the revised RAD on exceptions reads as follows:

Under these Rules:

...

2. Unless there is an overriding public interest in disclosure, the Authority shall refuse access to a document:

(a) relating to any pending proceedings or open investigation conducted by the Authority pursuant to its powers laid down in Protocols 3 and 4 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. Proceedings are pending and investigations are open within the meaning of this provision until such time as the Authority can no longer be called upon to recommence them;

(b) relating to gathering, obtaining or receiving information from natural or legal persons in the framework of investigations conducted by the Authority pursuant to its powers laid down in Protocols 3 and 4 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice;

(c) sent to or received from the European Commission within the framework of cooperation laid down in the EEA Agreement;

(d) sent to or received from the EFTA competition authorities within the framework of cooperation laid down in Protocol 4 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

...

4. The Authority shall refuse access to a document, unless there is an overriding public interest in disclosure, where disclosure would undermine the protection of:

– commercial interests of a natural or legal person, including intellectual property,

– court proceedings and legal advice,

– the purpose of inspections, investigations and audits

5. The Authority shall refuse access to a document which relates to a matter where the decision has not been taken by the Authority, if disclosure of the document would seriously undermine the Authority's decision-making process, unless there is an overriding public interest in disclosure.

6. The Authority shall refuse access to Authority internal memos or notes and Authority internal communication, except if such memos, notes or communications set out a final decision unavailable in any other form, or if there is an overriding public interest in disclosure.

7. The Authority shall refuse access to its internal manuals, unless there is an overriding public interest in disclosure.

...

9. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

10. The exceptions as laid down in paragraphs 1 to 7 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

36. Article 5 of the revised RAD on documents in the possession of the EFTA States reads as follows:

Upon request, the Authority shall indicate whether it considers that disclosure of an Authority document in the possession of an EFTA State would undermine such interests as protected in Article 4.

37. Article 6 of the revised RAD on applications reads as follows:

1. The Authority shall examine applications by any natural or legal person for access to a document made in any written form, including electronic form, in one of the languages referred to in Article 129 of the EEA Agreement and Article 20 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice and in a sufficiently precise manner to enable the Authority to identify the document. The applicant is not obliged to state reasons for the application.

2. If an application is not sufficiently precise, the Authority shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example by providing information on the use of the public register of documents.

3. In the event of an application relating to a long document or to a large number of documents, the Authority may confer with the applicant informally, with a view to finding a fair solution. The Authority, in cooperation with the applicant, shall endeavour to arrive at a fair solution as quickly as possible. If no fair solution has been found within a reasonable time, the applicant may request that the Authority proceed to process the application in accordance with Article 7. The request shall be made in writing.

4. The Authority shall provide information and assistance to citizens on how and where applications for access to documents can be made.

38. Article 7 of the revised RAD on the processing of applications reads as follows:

...

2. An application for access to a document shall be handled as quickly as possible. An acknowledgement of receipt shall be sent to the applicant. As a main rule, the Authority shall either grant access to the document requested and provide access in accordance with Article 8 or, in a written reply, state the reasons for the total or partial refusal within 10 working days from registration of the application.

3. In exceptional cases, for example in the event of an application relating to a long document or to a large number of documents, the time-limit provided for in paragraph 2 may be extended by 30 working days. The Authority shall notify the applicant thereof as quickly as possible.

4. In cases where the Authority consults third parties in accordance with Article 4(8) of these Rules, the time-limit provided for in paragraph 2 or 3 above may be suspended, for the documents concerned and for as long as the consultation is pending. The Authority shall inform the applicant of any such suspension as quickly as possible, and the Authority shall endeavour to complete any such consultation within a reasonable time.

5. Failure by the Authority to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application under paragraph 6 below.

6. In the event of total or partial refusal, the applicant may, within 30 working days of receiving the Authority's reply, make a confirmatory application asking the Authority to reconsider its position. Paragraphs 1 to 4 above apply. The Decision of the Authority shall be adopted by the College Member responsible for public access to documents. In the event of confirmation of the total or partial refusal, the Authority shall inform the applicant of the remedies open to him or her by instituting court proceedings against the Authority under the conditions laid down in Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. Failure by the Authority to reply within the prescribed time limit shall be considered as a negative reply and thus also entitle the applicant to institute such court proceedings.

39. Article 10 of the revised RAD on direct access in electronic form or through a register reads as follows:

The Authority shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the Authority.

40. Article 11 of the revised RAD on administrative practice in ESA reads as follows:

The Authority shall develop good administrative practices in order to facilitate the exercise of the rights of access guaranteed by these Rules.

41. Article 13 of the revised RAD on entry into force, publication and repeal of Decision No 407/08/COL reads as follows:

These Rules shall enter into force on the day following the adoption of the present Decision and shall be applicable to all access requests decided upon from that date onwards. From the same time, Decision 407/08/COL of 27 June 2008 to adopt new Rules on Public Access to documents, is repealed.

The Authority shall make these Rules available on its website

III FACTS AND PRE-LITIGATION PROCEDURE

42. On 11 August 2006, Konkurrenten filed a complaint to ESA alleging that the Norwegian authorities had granted State aid to Oslo Sporveier and Sporveisbussene. This was registered as ESA Case No 60510.

43. On 21 June 2010, ESA closed Case No 60510 by way of Decision No 254/10/COL, finding that "in view of the termination of the incompatible existing state aid on 30 March 2008, [ESA] considers that no further measures are required in this case".

44. On 22 August 2011, the Court annulled ESA Decision No 254/10/COL.[3] The Court held that the Decision was "vitiated both by a lack of reasoning on several issues and an error of law in so far as the defendant, notwithstanding the fact that unlawful aid may have been granted to Oslo Sporveier and Sporveisbussene, decided not to initiate the formal investigation procedure for aid granted between 1997 and 2008".[4]

45. On 8 September 2011, Konkurrenten filed a second complaint to ESA alleging that KTP had continued to receive aid from the City of Oslo since 31 March 2008 on an ongoing basis. In addition,

[3] Reference is made to Case E-14/10 *Konkurrenten*, cited above.
[4] Ibid., paragraph 92.

the second complaint alleged that KTP had benefited from further aid measures until 31 March 2008.

46. On 8 February 2012, Konkurrenten served a pre-litigation notice on ESA pursuant to Article 37 SCA on the basis that ESA had not opened a formal investigation into State aid for KTP notwithstanding the Court's judgment in Case E-14/10 *Konkurrenten.no* v *ESA*.[5]

47. On 21 March 2012, pursuant to Article 2(1) RAD, Konkurrenten submitted to ESA by letter and email a request for access to documents seeking access to the statement of content of the file in Case No 60510. The request noted recent case law of the Court of Justice of the European Union ("ECJ") on disclosure of documents pursuant to Regulation (EC) No 1049/2001[6] in State aid cases and asserted that the statement of content of the file fell outside the general presumption that its disclosure would, in principle, undermine the purpose of investigations, and, in any event, that there was an overriding public interest in disclosure.

48. On 21 March 2012, pursuant to Article 2(1) RAD, Risdal Touring submitted to ESA by letter and email a request for access to documents seeking public access to the case register/index in Case No 70506, factual questions asked by ESA of the Norwegian Government, City of Oslo and KTP before deciding whether or not to open a formal investigation procedure into the State aid complaint submitted by Konkurrenten on 8 September 2011, factual answers received by ESA provided by the City of Oslo either directly, or indirectly via the Norwegian Government, and factual answers received before a formal investigation procedure had been opened from the recipient of the potentially unlawful aid, KTP. The request also noted recent ECJ case law and raised the same arguments as Konkurrenten, as set out in the previous paragraph.

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5 Reference is made to Case E-14/10 *Konkurrenten*, cited above.

6 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

49. On 28 March 2012, ESA decided by Decision 123/12/COL to open a formal investigation procedure into potential state aid to Oslo Sporveier and Sporveisbussene between 1 January 1994 and 30 March 2008.

50. Also on 28 March 2012, the time limit set out in Article 7(1) RAD for ESA to respond to Konkurrenten's access request of 21 March 2012 expired without any response from ESA.

51. Also on 28 March 2012, the time limit set out in Article 7(1) RAD for ESA to respond to Risdal Touring's access request of 21 March 2012 expired without any response from ESA.

52. On 30 March 2012, Konkurrenten wrote to and emailed ESA to notify it that it had failed to respond to Konkurrenten's access to documents request of 21 March 2012.

53. Also on 30 March 2012, Risdal Touring wrote to and emailed ESA to notify it that it had failed to respond to Risdal Touring's access to documents request of 21 March 2012.

54. On 5 April 2012, ESA sent an email to counsel for the applicants with the subject "access to lists of documents in the Konkurrenten cases – Oslo". The email reads "[p]lease find attached the list of documents in the two Konkurrenten cases (buses in Oslo). They are in MS Excell [sic] format. I trust that is acceptable to you." The documents attached to the email were identified as "List70478" and "List70506".

55. On 10 April 2012, Konkurrenten wrote to and emailed ESA stating that its access request concerned "the case register/ index of the file in Case No 60510 (AS Oslo Sporveier and AS Sporveisbussene)" which it had not received. Konkurrenten stated that it assumed from the contents of List70478 that ESA Case No 60510 had possibly been reopened under such a case number on 8 September 2011, and subsequently closed on 28 March 2012. However, it observed that the list did not detail any documents between 2006 and 2011. In relation to the documents listed for the period September 2011 to March 2012, Konkurrenten asserted that the information on those documents was deficient.

The letter continued: "[i]n the event that ESA should consider that its email on 5 April 2012 constitutes an implied decision to deny access to a complete statement of content of the file concerning the subject matter in question, the company requests that this be clarified as soon as possible given that the decision then must be brought before the EFTA Court within two months under Article 36 SCA". Konkurrenten stated that it regretted that ESA had failed to act in accordance with the RAD and the principle of good administration and asserted that the handling of the access request had become "non-courteous, see Article 12(1) of the European Code of Good Administrative Behaviour by the European Ombudsman". Konkurrenten concluded by requesting public access to the relevant internal procedures "governing (a) the designation of case numbers and the registration of documents (events) including the information that should be recorded about each document in ESA's database; and (b) the handling of public access requests under the RAD".

56. Also on 10 April 2012, Risdal Touring wrote to and emailed ESA stating that it had failed to respond within the time period prescribed in Article 7(1) RAD to Risdal Touring's access request concerning the case register/index in Case No 70506 and certain documents assumed to be on file. The letter noted ESA's email to its counsel of 5 April 2012 with its attached lists and indicated that Risdal Touring presumed that "List70506" was intended to represent the statement of content of the file. The letter noted, however, that ESA's email made no reference to the other documents that Risdal Touring had requested on 21 March 2012. The letter continued: "[i]n the event that ESA should consider that its email on 5 April 2012 constitutes an implied decision to deny access to a complete statement of content of the file concerning the subject matter in question, the company requests that this be clarified as soon as possible given that the decision then must be brought before the EFTA Court within two months under Article 36 SCA". Risdal Touring complained that List70506 referred only to an "edit date" in relation to each document without further explanation. It contended that, by withholding more detailed information, ESA was undermining the public right

to seek access to individual documents. Risdal Touring stated that "[u]nless such a complete statement of content can be provided, ESA is requested to explain whether it has provided a print-out from its database directly or whether certain information about the documents, available in the database, has been edited away from the statement of the content of the file and, in that case, to provide reasons for denying disclosure of that information". Risdal Touring continued that it regretted that ESA had failed to act in accordance with the RAD and the principle of good administration and asserted that the handling of the access request had become "non-courteous, see Article 12(1) of the European Code of Good Administrative Behaviour by the European Ombudsman". Risdal Touring concluded by requesting public access to the relevant internal procedures "governing (a) the designation of case numbers and the registration of documents (events) including the information that should be recorded about each document in ESA's database; and (b) the handling of public access requests under the RAD".

57. ESA did not respond to Konkurrenten's letter and email of 10 April 2012.

58. ESA did not respond to Risdal Touring's letter and email of 10 April 2012.

59. On 4 May 2012, Konkurrenten served a pre-litigation notice on ESA by letter and email. Recalling its letter of 10 April 2012, Konkurrenten asserted that ESA's email of 5 April 2012 must be considered an implied decision to refuse access to the list "by analogy Article 8(3) of Regulation 1049/2001". The letter notified ESA that Konkurrenten intended to contest the decision before the Court pursuant to Article 36 SCA if "no reversal is made in this matter before 11 May 2012".

60. Also on 4 May 2012, Risdal Touring served a pre-litigation notice on ESA by letter and email. Recalling its letter of 10 April 2012, Risdal Touring asserted that ESA's email of 5 April 2012 must be considered an implied decision to refuse access to the list "by analogy Article 8(3) of Regulation 1049/2001". The letter notified

ESA that Risdal Touring intended to contest the decision before the Court pursuant to Article 36 SCA if "no reversal is made in this matter before 11 May 2012".

61. Later on 4 May 2012, ESA emailed Risdal Touring, with a letter dated 30 April 2012 attached, in connection with Risdal Touring's letter of 10 April 2012.

62. ESA attached to that letter a statement of content/case register/index in Case No 70506. ESA indicated in its letter that the State aid case was still open and the investigation pending. Referring to Risdal Touring's request for certain documents that were assumed to be included in the file, ESA noted that Risdal Touring had already put forward some arguments why it should be granted access to those "types of documents". ESA asserted that those reasons were simply "general in nature". Therefore, given the general presumption established by the ECJ in relation to the European Commission's administrative files concerning State aid investigations, that is that their disclosure would, in principle, undermine the protection of the purpose of investigations,[7] ESA invited Risdal Touring to make document-specific submissions to rebut the presumption. ESA attached the relevant parts of its guidelines on internal procedures concerning the registration of documents (events) and the information to be stored as well as on the handling of public access requests under the RAD.

63. ESA's letter to Risdal Touring continued by stating that ESA was "pleased to clarify that neither of its correspondence in this matter, i.e. neither its email of 5 April 2012 addressed to you on behalf of your client, nor the present document is intended to form a final position by the Authority on the matter in the sense of an act challengeable in the EFTA Court".

64. ESA concluded, "[s]hould your client wish to receive such a formal decision by the Authority, possibly in view of judicial review of the Authority's legal position regarding the scope of your client's rights to public access in the matter, your client is

[7] Reference was made to Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5885.

requested to so indicate, the Authority will then proceed to adopt a formal College decision".

65. On 8 May 2012, Risdal Touring notified ESA that it had failed to respond to the pre-litigation notice. Risdal Touring asserted that "ESA has laid down a definitive position, by its emails on 5 April 2012 and 4 May 2012, to refuse Risdal Touring AS complete access to the documents sought. Should ESA decide to reverse its decision or adopt the same decision in a different format, it will have until 11 May 2012 to do so, as made clear to you on 4 May 2012. ..."

66. ESA did not respond to Konkurrenten's pre-litigation notice of 4 May 2012.

67. ESA did not respond to Risdal Touring's letter of 8 May 2012.

68. On 13 November 2012, ESA wrote to counsel for the applicants on the subject of "the Authority's Case No 60510 – access to documents". ESA referred to Konkurrenten's request for access to documents of 21 March 2012 and subsequent correspondence and the ongoing litigation in Case E-5/12 *Konkurrenten.*

69. ESA wrote: "[p]lease find attached up-to-date lists of all events in the Authority's Case No 60510 (Complaint against Oslo municipality for aid to AS Oslo Sporveier), Case No 70478 (Konkurrenten – new decision following the annulment of decision 254/10/COL by the Court in E-14/10) and Case No 72102 (Risdal Touring/Konkurrenten.no – access to file requests), as of 8 November 2012".

70. ESA further stated that "[i]t is noted that, for case-handling purpose[s], a document is considered a draft until an 'end date' has been entered. The formal registration of a document, through the Authority's Registry, includes entering the 'end date'."

71. Also on 13 November 2012, ESA wrote to Risdal Touring concerning "the Authority's Case No 70506 – access to documents". The letter makes reference to Risdal Touring's access request of 21 March 2012 and subsequent correspondence as well as the ongoing litigation in Case E-4/12 *Risdal Touring*.

72. ESA's letter reads: "[p]lease find attached up-to-date lists of all events in the Authority's Case No 70506 [CONFIDENTIAL] and Case No 72102 (Risdal Touring/Konkurrenten.no – access to file requests), as of November 2012".

73. It continues: "[a]s can be seen from the lists, two events (Nos 632494 and 630679) were at one point moved from Case No 70506 to Case No 72102, which is a separate case concerning public access. One event (No 609745) has been removed as a duplication (of event No 609730)."

74. ESA further stated that "[i]t is noted that, for case-handling purpose[s], a document is considered a draft until an 'end date' has been entered. The formal registration of a document, through the Authority's Registry, includes entering the 'end date'."

75. On 19 December 2012, by Decision No 519/12/COL, ESA closed its formal investigation into potential aid to Oslo Sporveier and Sporveisbussene between 1994 and 2008. ESA found that the application of the group taxation rules to the Oslo Sporveier Group and the commercial activities capital injection did not constitute State aid within the meaning of Article 61(1) EEA and therefore closed the formal investigation procedure. ESA also found that the formal investigation with regard to the annual compensation was without object since the measure represents existing aid that had now been terminated. Finally, ESA found that the formal investigation procedure with regard to the public service capital injection was without object since the measure represented existing aid that had now been terminated. Therefore ESA closed the formal investigation into that measure.

IV THE CONTESTED CORRESPONDENCE

First contested correspondence

76. On 5 April 2012, as stated above at paragraph 54, the Director of ESA's Department of Legal & Executive Affairs sent an email to counsel for the applicants with the subject "Access to lists of documents in the Konkurrenten cases – Oslo".

77. The email reads "[p]lease find attached the list of documents in the two Konkurrenten cases (buses in Oslo). They are in MS Excell [sic] format. I trust that is acceptable to you." The documents attached to the email were identified as "List70478" and "List70506".

Second contested correspondence

78. On 4 May 2012, as stated above at paragraphs 62 to 65, ESA emailed Risdal Touring. The subject of the email was "Case 70506 - Risdal Touring AS - Access to documents".

79. The email reads as follows: "Please receive herewith a copy of a letter sent by the Authority today regarding your letter of 10 April 2012, on access to documents in case 70506 - Risdal Touring AS".

80. The letter attached to the email is dated 30 April 2012 and referenced as "Event No: 632494" in Case No 70506. The letter was posted to Risdal Touring on 7 May 2012.

81. The letter reads as follows:

"RE: Case 70506 Risdal Touring AS

Access to documents

Your letter of 10 April 2012

(a) Reference is made to your letter of 10 April 2012 on behalf of Risdal Touring AS.

(b) Your client has requested the Authority to produce the following under its rules on public access to documents:

1. 'a statement of content / case register / index in Case No 70506 (KTP AS)'

2. 'certain documents that are assumed to be included in the file'/ regarding

a) 'factual questions raised by ESA before deciding whether to open a formal investigation procedure' (as explained in section 3 of your client's letter);

b) 'factual answers received by ESA before a formal investigation procedure has been opened from the public

authority granting the potentially unlawful aid' (as explained in section 4 of your client's letter);

c) 'factual answers received before a formal investigation procedure has been opened from the recipient of the potentially unlawful aid' (as explained in section 5 of your client's letter).

3. Relevant internal procedures governing the registration of documents (events) and the information that should be recorded about each document in ESA's database and the handling of public access requests under the Rules on Access to Documents.

1. Statement of content/case register/index in Case No 70506

(c) Please find attached a list of the content stored in the Authority's database under case no. 70506.

2. Certain documents that are assumed to be included in the file referred to in point 2 a), b) and c) above.

(d) As you are doubtless aware, the state aids case to which your client refers is still open and the investigation pending. The Court of Justice of the European Union held that documents pertaining to the Commission's administrative files relating to state aid investigations are covered by a general presumption that their disclosure would in principle undermine the protection of the purpose of investigations. The state aid rules do not lay down any right of access to the file for interested parties. If they were able to obtain access, on the basis of the EU Transparency Regulation No. 1049/2001, the system for state aid review would be called into question. The Court further ruled that this presumption can be rebutted if the applicant demonstrates that a requested document is not "covered by that presumption' or that there is an overriding public interest in disclosure (see Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau GmbH* [2010] ECR I-5885, paragraph 61).

(e) As regards your clients request to be granted public access to certain documents that are assumed to be included in

the file, your client, at sections 2 to 5, has already put forward some arguments why it should be granted access to types of documents mentioned in those sections. However, those reasons are general in nature. In light of the general presumption mentioned above, your client is invited to make document specific submissions to rebut the presumption.

3. Relevant internal procedures governing the registration of documents etc.

(f) Please find attached the parts of the Authority's guidelines on internal procedures which concern the registration of documents (events) and the information to be stored as well as on the handling of public access requests under the Rules on Access to Documents.

(g) The relevant extracts are:

Section 8.4 on requests for access to documents

Section 9.1 dealing with confidentiality in general

Section 11.2 on Registry and filing of documents.

(h) Finally, the Authority is pleased to clarify that neither of its correspondence so far in this matter, *i.e.* neither its email of 5 April 2012 addressed to you on behalf of your client, nor the present document is intended to form a final position by the Authority on the matter in the sense of an act challengeable in the EFTA Court.

(i) Should your client wish to receive such a formal decision by the Authority, possibly in view of judicial review of the Authority's legal position regarding the scope of your client's rights to public access in this matter, your client is requested to so indicate. The Authority will then proceed to adopt a formal College decision."

82. Enclosed with the letter were the "List of documents in case file"; "Section 8.4 on requests for access to documents"; "Section 9.1 dealing with confidentiality in general"; and "Section 11.2 on Registry and filing of documents".

V PROCEDURE AND FORMS OF ORDER SOUGHT BY THE PARTIES

83. By application lodged at the Court on 2 June 2012, Risdal Touring brought an action seeking the annulment of ESA's decision, first notified on 5 April 2012 without stating reasons, and subsequently notified on 4 May 2012, denying public access to the full statement of content and specific documents in ESA Case No 70506.

84. The applicant in Case E-4/12, *Risdal Touring*, requests the Court to:

(i) annul the contested decision; and

(ii) order the defendant and any interveners to bear the costs.

85. By application lodged at the Court on 2 June 2012, Konkurrenten brought an action seeking the annulment of ESA's decision as notified on 5 April 2012 without stating reasons and denying public access to the full statement of content in ESA Case No 60510.

86. Pursuant to Article 87 of the Rules of Procedure ("RoP"), the defendant in Case E-4/12 *Risdal Touring*, ESA, lodged an application on 31 July 2012 for a decision on a preliminary objection concerning inadmissibility.

87. In Case E-4/12 *Risdal Touring*, ESA requests the Court to:

(i) dismiss the applicant's application as inadmissible; and

(ii) order the applicant to bear the costs of the proceedings.

88. Pursuant to Article 87(2) of the RoP, Risdal Touring submitted its response to the defendant's plea of inadmissibility on 3 September 2012. Risdal Touring requests the Court to:

(i) dismiss the defendant's inadmissibility plea and rule the application admissible; and

(ii) annul the contested decision; and

(iii) order the defendant and any interveners to bear the costs.

89. The applicant in Case E-5/12, *Konkurrenten*, requests the Court to:

(i) annul the contested decision; and

(ii) order the defendant and any interveners to bear the costs.

90. Pursuant to Article 87 of the RoP, the defendant in Case E-5/12 *Konkurrenten*, ESA, lodged an application on 31 July 2012 for a decision on a preliminary objection concerning inadmissibility.

91. In Case E-5/12 *Konkurrenten*, ESA requests the Court to:

(i) dismiss the applicant's application as inadmissible; and

(ii) order the applicant to bear the costs of the proceedings.

92. Pursuant to Article 87(2) of the RoP, Konkurrenten submitted its response to the defendant's plea of inadmissibility on 3 September 2012. Konkurrenten requests the Court to:

(i) dismiss the defendant's inadmissibility plea and rule the application admissible; and

(ii) annul the contested decision; and

(iii) order the defendant and any interveners to bear the costs.

93. Pursuant to Article 87(4) of the RoP, the Court decided to reserve its decision upon the defendant's application for a decision on a preliminary objection concerning inadmissibility in both Case E-4/12 and E-5/12 for the final judgment. This decision was communicated to the parties by letter of 24 October 2012.

94. By decision of 23 October 2012, pursuant to Article 39 of the RoP, and, having received observations from the parties, the Court decided to join Case E-4/12 and Case E-5/12. This decision was communicated to the parties by letter of 24 October 2012.

95. ESA submitted its defence in the joined cases on 20 November 2012. In its defence, ESA requests the Court to:

(i) dismiss the applications as inadmissible

or, in the alternative, dismiss the application in Case E-4/12 as unfounded and declare that there is no longer a need to adjudicate on the application in Case E-5/12;

or, in the alternative, dismiss the applications as unfounded; and

(ii) order the applicants to bear the cost of the proceedings.

96. On 19 December 2012, Risdal Touring and Konkurrenten requested an extension to the deadline for submitting the reply. Pursuant to Article 35(2) of the RoP, the President granted an extension of the time limit for submitting the reply until 9 January 2013.

97. On 9 January 2013, Risdal Touring and Konkurrenten submitted their reply.

98. On 12 February 2013, ESA submitted its rejoinder.

VI WRITTEN OBSERVATIONS

99. Pleadings have been received from:

- the applicants, represented by Jon Midthjell, advokat;
- the defendant, represented by Markus Schneider, Deputy Director, Gjermund Mathisen, and Auður Ýr Steinsarsdóttir, Officers, Department of Legal & Executive Affairs, acting as Agents.

Admissibility

Case E-4/12 Risdal Touring

100. Risdal Touring submits that the application is admissible. It asserts that the decision [as notified on 5 April 2012 and 4 May 2012] is a reviewable act of direct and individual concern to Risdal Touring and that it has standing and legal interest to institute proceedings pursuant to Article 36(2) SCA.

101. Risdal Touring submits that, after ESA was notified, on 4 May 2012, that it would challenge the contested decision unless reversed, ESA immediately took steps in its letter attached to its email of 4 May 2012 to provide a basis for an inadmissibility objection in order to prevent the present action. Risdal Touring submits that ESA's

assertion in that letter to the effect that the contested decision is not a challengeable act is no more than a delaying tactic.

102. Recalling the provisions in the Union pillar, Risdal Touring asserts that, pursuant to Articles 7 and 8 of Regulation No 1049/2001, it would have had an unquestionable right to bring an action after a similar period.[8] It notes, however, that Article 7 RAD establishes only a one-stage process when applying for access to documents with a shorter time limit than that contained in the corresponding provision in the EU pillar (Article 7 of Regulation No 1049/2001). Moreover, it stresses the statement made in recital 7 in the preamble to the RAD to the effect that, where the provisions RAD are identical to those in Regulation No 1049/2001, ESA will strive to achieve a homogeneous interpretation so as to ensure at least the same degree of openness as provided for by the Regulation.

103. Consequently, Risdal Touring asserts that ESA's objection amounts to an attempt to exploit the absence of a provision corresponding to Article 8(3) of Regulation No 1049/2001 in the RAD. None the less, in its view, having regard to Article 36(2) SCA, the absence of such a provision cannot lead to a materially different outcome under the RAD in the present circumstances.

104. Risdal Touring asserts, first, that, pursuant to Article 7(1) RAD, the mandatory time limit for ESA to decide on the access request, submitted on 21 March 2012, expired on 28 March 2012.[9] Moreover, ESA did not invoke Article 7(2) RAD. Second, it contends that ESA's emails of 5 April 2012 and 4 May 2012 granted partial access to the statement of content of the file in Case No 70506. ESA's email of 4 May 2012 stated that ESA could not grant access to the remaining documents as Risdal Touring had not demonstrated a right to have access those documents. Moreover, the email attached to ESA's email of 4

[8] Reference is made to Joined Cases T-355/04 and T-446/04 *Co-Frutta* v *Commission* [2010] ECR II-1, paragraph 59.

[9] Reference is made to *Co-Frutta*, cited above, paragraph 56, and Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair* v *Commission* [2010] ECR II-5723, paragraph 39.

May 2012 granted access to the procedural documents that Risdal Touring had requested on 10 April 2012.

105. Third, according to Risdal Touring, the RAD does not require an applicant to specify that it "wish[es] to receive such a formal decision" from the ESA College in order for an access request to be regarded as valid. Fourth, it contends that ESA has not provided any evidence that the ESA College has not delegated the power to decide upon access requests. Fifth, it alleges that the form in which a decision is adopted is in principle irrelevant as regards the right to challenge such a decision by way of an action for annulment. In its view, it is irrelevant whether that act satisfies certain formal requirements. The procedural rules governing actions brought before the European courts must be interpreted so as to ensure, wherever possible, that those rules are implemented in such a way as to contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights.[10] Risdal Touring submits that there is no need for the Court to depart from this standard for judicial review.

106. Sixth, in the view of Risdal Touring, ESA's purported intention not to have laid down a final position as late as 4 May 2012, notwithstanding the expiry of the time limit laid down in Article 7(1) RAD, and even giving retroactive effect to its email of 5 April 2012, is entirely irrelevant. Risdal Touring contends that such intention is no more than an intention to disregard the mandatory time limit of Article 7(1) RAD.

107. Consequently, Risdal Touring asserts that the contested decision, as notified on 5 April 2012 and 4 May 2012, is challengeable before the Court pursuant to Article 36 SCA. Risdal Touring asserts that the application is timely whether calculated from 5 April 2012 or 4 May 2012. Thus, the application must be regarded as admissible.

108. In its response to the defendant's plea of inadmissibility, Risdal Touring asserts that the plea is unfounded. In its view, whether

[10] Reference is made to Case C-521/06 P *Athinaïki Techniki* v *Commission* [2008] ECR I-5829, paragraphs 44-45 and case law cited.

the list sent with ESA's letter of 4 May 2012 represented the complete "statement of content/case register/index in Case No 70506" constitutes a substantive matter which it has a right to ask the Court to review. Consequently, at any rate, the first and fifth pleas of the application must be ruled admissible in so far as they concern the refusal to disclose a complete statement of content of the file. Risdal Touring focuses, therefore, on ESA's objections to the admissibility of the second plea (concerning the refusal to disclose the factual questions) and the third and fourth pleas (concerning the factual answers from the City of Oslo and KTP respectively), and the fifth plea (to the extent that it concerns a failure to state reasons for those refusals).

109. In response to ESA's first argument, namely, that the request for access to documents contained "legally inadequate reasoning that the applicant refused to improve", Risdal Touring contends that this is irrelevant as regards the admissibility of the action. In its view, pursuant to Article 6(1) RAD, an applicant is not obliged to state reasons for an application for access to documents and, therefore, is entitled to a decision pursuant to Article 7(1) RAD. The purpose of the RAD, as made clear in the preamble thereto and Article 1 RAD, is to make the right of access readily and universally available to the public from any EEA State. Risdal Touring concedes, however, that, according to ECJ case law, there is a general presumption in State aid cases that disclosure can, in principle, undermine the protection of the purpose of the investigation, as set out in Article 4 RAD.[11] Nevertheless, it stresses that the case law acknowledges the right of an applicant to demonstrate that specific documents fall outside that presumption or that there is a higher public interest justifying the disclosure of specific documents. Risdal Touring submits that whether and to what extent the general presumption applies is a substantive matter for the Court to determine.

110. In the view of Risdal Touring, whether ESA would have been willing to disclose any of the contested documents had the

[11] Reference is made to *Technische Glaswerke Ilmenau* and *Ryanair*, cited above.

applicant resubmitted its access request with different legal reasoning is extraneous to the admissibility of the present action. It submits that neither its letter of 10 April 2012 nor any other part of the correspondence contains any modification of the access request. Moreover, in its view, neither ESA's email of 5 April 2012 nor its letter of 4 May 2012 contains any request that the applicant should resolve any misunderstandings or clarify matters. On the contrary, ESA's letter of 4 May 2012 repeats the content of the applicant's access request and responds to each part of it.

111. In response to ESA's assertion that Risdal Touring modified its access request and, finally, that ESA was willing to adopt a challengeable decision but the applicant "failed to ask for it", Risdal Touring contends that these allegations must be discarded. In its view, the correspondence between the parties demonstrates that ESA laid down a definitive position to refuse access to the contested documents in response to the application of 21 March 2012. It asserts that no other credible explanation has been offered.

112. According to Risdal Touring, the legal effect of ESA's refusal is that it has been denied the timely access to the documents provided for in Article 7(1) RAD. This has impaired Risdal Touring's ability to exercise its right to identify additional documents of interest on the file and to seek timely access to those. Consequently, the refusal has negatively affected and altered the applicant's legal position.

113. Risdal Touring asserts that, even in the absence of a mechanism such as Article 8(3) of Regulation No 1049/2001, the Union courts would have declared the present action admissible simply on the basis of established case law as the refusal has the legal effect of denying the applicant the right to timely access to the documents, guaranteed by Article 7(1) RAD.

114. Risdal Touring criticises ESA's reliance on an order by the Court of First Instance in *Scottish Soft Fruit Growers*.[12] According to Risdal

[12] Reference is made to the Order in Case T-22/98 *Scottish Soft Fruit Growers* [1998] ECR II-4219.

Touring, that approach has been superseded with a distinction now made between a general request or request for information, on the one hand, and requests for access to documents under Commission Decision 94/90,[13] the predecessor to Regulation No 1049/2001, on the other hand.[14]

115. In addition, Risdal Touring submits that the defendant's reference to its internal procedural manual, which was last updated in 2008, does not reflect the current state of affairs. Moreover, it notes that in *DB Schenker* v *ESA*[15] the contested decision also consisted of a letter from the defendant's Director of Legal & Executive Affairs. It observes that in that case ESA did not contest the fact that the Director of Legal & Executive Affairs had the power to decide upon access requests. In any event, Risdal Touring continues, the Director's competence would be a substantive issue in the present proceedings.

116. In its application for a decision on a preliminary objection concerning inadmissibility, ESA contends that the application is inadmissible. ESA submits that admissibility is a matter of public policy which the Court can examine of its own motion[16] but it is for the applicant to demonstrate that the relevant criteria have been fulfilled. ESA submits that Risdal Touring has not demonstrated that the subject-matter of the proceedings constitutes an act which is challengeable in an action for annulment pursuant to Article 36 SCA.

117. ESA submits that neither its email nor its letter, either individually or collectively, constitutes an ESA decision within the meaning of Article 36 SCA. As the SCA does not provide a specific definition of what constitutes an ESA decision, in ESA's view, it is appropriate to observe how the corresponding provision

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13 Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents, OJ 1994 L 46, p. 58.

14 Reference is made to the Order in Case T-106/99 *Meyer* v *Commission* [1999] ECR II-3273, paragraphs 35-36.

15 Reference is made to Case E-14/11 *DB Schenker* v *ESA*, judgment of 21 December 2012, not yet reported.

16 Reference is made to Case C-208/11 P *Internationaler Hilfsfonds* v *Commission*, Order of 15 February 2012, not published in English, paragraphs 33-34.

in EU law, now Article 263 TFEU, is framed. Although there are differences to a certain extent between the two provisions, in its view, the principle of procedural homogeneity dictates that the interpretation of Article 36 SCA should be in conformity with Article 263 TFEU. In its view, the difference in the wording of Article 263 TFEU on this point is effectively such as to codify older case law. Accordingly, ESA submits that, for the purposes of Article 36 SCA, an ESA decision must be an act that is intended to produce legal effects vis-à-vis third parties. The decision must have binding force on the applicant or produce legal effects altering an applicant's legal position.

118. ESA stresses that the mere fact that a letter or an email is sent by an institution to its addressee in response to a request made by the latter is not enough for it to be treated as a decision.[17] ESA acknowledges that the test as to whether a decision has been adopted is one of substance and not of form.[18] It contends, however, that neither its email nor its letter altered Risdal Touring's legal position. Instead, its email granted access to a list of documents on the file that could assist the applicant in submitting a more document-specific access request. Indeed, in response to further correspondence, ESA's letter expressly called upon the applicant to "make document-specific submissions" to rebut the presumption against access that follows from *Technische Glaswerke Ilmenau*. Moreover, the letter expressly set out the view that neither it nor ESA's email would constitute a challengeable act. ESA contends that, in its reply of 10 April 2012, Risdal Touring assumed that the email did not constitute a challengeable act.

119. In ESA's view, the contention of Risdal Touring that ESA's email and, by extension, ESA's letter constitute challengeable acts is based primarily upon an analogy with Article 8(3) of Regulation No 1049/2001 which has no corresponding provision

[17] Reference is made to the Order in *Scottish Soft Fruit Growers*, cited above, paragraph 34 and case law cited.

[18] Reference is made to Case 60/81 *International Business Machines* v *Commission* [1981] ECR 2639.

in the RAD. As a consequence, ESA asserts, Article 8(3) of Regulation No 1049/2001 cannot be read into the RAD. It observes, moreover, that while it is not excluded that in certain particular circumstances an institution's silence or inaction may exceptionally be considered to constitute an implied refusal, as a rule, mere silence on the part of an institution cannot be placed on the same footing as an implied refusal, except where that result is expressly provided for by a provision of Community law.[19]

120. ESA submits that the reason why its email and letter are not challengeable acts is not any failure to fulfil formal requirements but the fact that neither sets out any substantive decision that negatively affects the applicant and alters his legal position.[20] The email and letter grant access to a number of documents and invite submissions on grounds for possibly granting access to further documents.

121. ESA asserts that an action for annulment of an alleged implicit decision to refuse access to those documents is not a proper course of action in the absence of an applicable legal framework. In its view, Risdal Touring should have followed up the express invitation in ESA's letter to indicate a wish to receive a formal ESA decision.[21]

122. Alternatively, ESA contends that Risdal Touring could pursue an application for failure to act pursuant to Article 37 SCA. However, were its email or letter challengeable pursuant to Article 36 SCA, this would exclude the possibility of an action for failure to act pursuant to Article 37 SCA. In those circumstances, according to ESA, it would appear difficult to determine what would not trigger the two-month period within which to bring an action for annulment pursuant to Article 36(2) SCA.

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19 Reference is made to Case C-123/03 P *Commission* v *Greencore* [2004] ECR I-11647, paragraph 45.

20 Reference is made to *Athinaïki Techniki*, cited above, paragraphs 44-45.

21 Reference is made to Section 8.4, first paragraph, of ESA's Manual of Operational Procedures, which reads: "Requests for access to documents are governed by the Authority's Rules on Public Access to Documents. Decisions on access shall be taken by the President or, in cases where general or sensitive policy issues are involved, the College, upon proposal from Legal and Executive Affairs which shall consult with the directorate responsible for the underlying case before submitting its proposal."

123. ESA observes that were the applicant's action to be admissible and well founded, pursuant to Article 36(4) SCA, ESA's decision would be declared void. In its view, this would entail nothing more than an obligation on ESA to adopt a proper decision deciding upon the access request.

124. ESA concludes that there has been no decision capable of being challenged pursuant to Article 36(2) SCA and submits, therefore, that the action must be dismissed as inadmissible.

Admissibility

Case E-5/12 Konkurrenten

125. Konkurrenten submits that its application is admissible. The contested decision is a reviewable act of direct and individual concern to it and it has standing and legal interest to institute the present proceedings pursuant to Article 36 SCA.

126. Konkurrenten asserts, first, that, pursuant to Article 7(1) RAD, the mandatory limit for ESA to decide on the access request, submitted on 21 March 2012, expired on 28 March 2012.[22] Moreover, ESA did not invoke Article 7(2) RAD.

127. Second, it contends that ESA's email of 5 April 2012 granted partial access to the statement of content of the file in the reopened Case No 60510.

128. Third, according to Konkurrenten, the form in which a decision is adopted is in principle irrelevant as regards the right to challenge such a decision by way of an action for annulment. It is irrelevant whether that act satisfies certain formal requirements. The procedural rules governing actions brought before the European courts must be interpreted so as to ensure, wherever possible, that those rules are implemented in such a way as to contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights.[23]

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22 Reference is made to *Co-Frutta*, cited above, paragraph 56, and *Ryanair*, cited above, paragraph 39.

23 Reference is made to *Athinaïki Techniki*, cited above, paragraphs 44-45 and case law cited.

129. Konkurrenten asserts that the contested decision is therefore clearly an act that may be challenged before the Court pursuant to Article 36(2) SCA. Konkurrenten contends that it was notified of the decision on 5 April 2012 and, hence, that the application is both timely and admissible.

130. In its application for a decision on a preliminary objection concerning inadmissibility, ESA contends that the application is inadmissible.

131. ESA submits that it did not adopt a decision refusing Konkurrenten access to a list of documents in Case No 60510. Instead, ESA states, "as regrettable as it may be", it effectively remained silent on the request to grant access to such a list, and thereby failed to act. ESA asserts, therefore, that the proper course of action would have been to lodge an action for failure to act pursuant to Article 37 SCA. Consequently, the application for annulment, pursuant to Article 36 SCA, must be declared inadmissible.

132. ESA submits that its email of 5 April 2012 "says nothing, explicitly, about access to a list of documents" in Case No 60510. In that regard, ESA stresses that the RAD contains no provision expressly providing that mere silence can be placed on the same footing as an implied refusal.[24]

133. ESA contends that it would not serve the proper administration of justice to allow premature actions for annulment i.e. before the administrative procedure has been completed, as in the present case.

134. Moreover, ESA asserts that Konkurrenten has not demonstrated that the subject-matter of the present action constitutes an ESA decision within the meaning of Article 36 SCA. While acknowledging the differences between Article 36 SCA and Article 263 TFEU, ESA submits that the principle of procedural homogeneity dictates an interpretation of Article 36 SCA in conformity with Article 263 TFEU. In its view, the different wording of Article 263 TFEU is effectively to codify case law. Therefore,

[24] Reference is made to *Commission* v *Greencore*, cited above, paragraph 45.

according to ESA, for the purposes of Article 36 SCA, an ESA decision must be an act that is intended to produce legal effects vis-à-vis third parties i.e. the applicant in this case.

135. Having regard to the requirements laid down in case law, ESA submits that its email of 5 April 2012 did not alter the applicant's legal position.[25] Instead, its email granted access to two lists of documents, neither of which the applicant had asked for. ESA states that its emails did nothing in relation to the list of documents to which Konkurrenten had actually requested access. ESA notes that even when Konkurrenten drew attention to this fact ESA remained silent and did not act. Therefore, ESA submits, the proper course of action should have been an action for failure to act. Consequently, the action for annulment must be dismissed as inadmissible.

136. In its response to the defendant's plea of inadmissibility, Konkurrenten contends that ESA's plea is unfounded. Konkurrenten submits that the present case concerns ESA's refusal to grant public access in accordance with Article 2 RAD to the complete statement of content of the file concerning ESA Case No 60510. Konkurrenten recalls that its letter of 10 April 2012 to ESA stated that "[t]o the extent that the same subject matter has been dealt with under different case numbers, for unexplained reasons, the access request naturally includes the statement of content of those files in order to obtain a complete picture".

137. Konkurrenten notes that ESA has not denied that its email of 5 April 2012 was indeed intended for Konkurrenten. According to Konkurrenten, the statement of content identified as "List 70478" relates directly to ESA Case No 60510. Konkurrenten notes that the first event recorded in that list is "Closure due to adoption of opening decision on 28 March" with the second event recorded as "Konkurrenten – Formal pre-litigation notice – Failure to act on a state aid decision within a reasonable time".

[25] Reference is made to the Order in *Scottish Soft Fruit Growers*, cited above, paragraph 34 and case law cited, and *International Business Machines*, cited above.

138. Consequently, Konkurrenten submits that ESA's email of 5 April 2012 is a response to the access request submitted by Konkurrenten on 21 March 2012. In its view, ESA has failed to put forward any credible explanation to prevent the Court from concluding that the correspondence demonstrates a definitive position on the part of ESA to deny access to the complete statement of content. The legal effect of that refusal, Konkurrenten continues, is that the applicant is denied timely access to the statement of content, guaranteed by Article 7(1) RAD. Consequently, it is impaired in its ability to exercise its right to identify specific documents of interest on the file and to seek timely access to those documents. Therefore, the refusal has negatively affected and altered its legal position.

139. Konkurrenten states that if ESA wishes to have the present case dismissed, it remains free to grant access to the compete statement of content, and then argue that the applicant has no legal interest in continuing the proceedings. However, as ESA has not done so, more than 150 days after the access request was received, according to Konkurrenten, this demonstrates that it is motivated by a desire to delay and frustrate the access request.

140. In its defence in the joined cases, ESA submits that an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure. Such an interest presupposes that the annulment of that measure must of itself be capable of having legal consequences; or, in other words, that the action must be liable, if successful, to procure an advantage for the party who has brought it and that that person has a vested and present interest in the annulment of that measure.[26] It is for the applicant to prove that it has an interest in bringing proceedings.[27] ESA submits neither applicant has demonstrated this interest in relation to the email of 5 April 2012 and/or the letter emailed on 4 May 2012.

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[26] Reference is made to Case T-19/06 *Mindo* v *Commission*, judgment of 5 October 2011, not yet reported, paragraph 77 and case law cited.

[27] Ibid., paragraph 80 and case law cited.

141. ESA asserts that it has subsequently, by letter of 13 November 2012, provided Konkurrenten with up-to-date lists of all documents registered in Cases Nos 60510, 70478 and 72102 as of 8 November 2012. As Konkurrenten only sought a "statement of content of the file case register (index)" which it has now received, in ESA's submission, Konkurrenten no longer has a legal interest in continuing the proceedings in Case E-5/12 *Konkurrenten.*

142. ESA contends that any failure to act comes to an end on the day on which the person who calls upon ESA to act receives the document by which ESA defines its position.[28]

143. In that regard, ESA asserts, whether such a definition of position satisfies an applicant is irrelevant for the purposes of Article 37 SCA.[29]

144. In the reply, the applicants respond to the plea in the defence that they have no legal interest in pursuing the first plea in Case E-4/12 and the first plea in Case E-5/12 by observing that such a defence is based on ESA's contention that on 13 November 2012, 237 days after the access requests were submitted, it sent what it asserts are "up-to-date lists of all documents" to both applicants. According to the applicants, this is the third version of the statement of content provided by ESA to Risdal Touring and the second version provided by ESA to Konkurrenten. The applicants observe that the matter before the Court is whether the contested decisions failed to grant access to the complete statement of content contrary to Articles 2(1) and 4(2) RAD.

145. In the view of the applicants, the fact that ESA has provided new versions of the statement of content does not render their legal interests moot. They assert a continued legal interest in the annulment of the contested decisions in order to prevent recurring violations of their access rights.[30]

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28 Reference is made to Joined Cases T-194/97 and T-83/98 *Branco* v *Commission* [2000] ECR II-69, paragraph 55.

29 Reference is made to Case C-44/00 P *Sodima* v *Commission* [2000] ECR I-11231, paragraph 83, and Case T-423/07 *Ryanair* v *Commission* [2011] ECR II-2397, paragraph 26 and case law cited.

30 Reference is made to Case T-233/09 *Access Info Europe* v *Council* [2011] ECR II-1073, paragraph 35 and case law cited.

146. The applicants note that both in Case E-5/12 and Case E-4/12 ESA denies their public right of access to statements of content, or, in the alternative, argues that such right does not include knowing the author/addressee; whether documents are incoming, outgoing or internal; the date on the documents and the date when it was registered.

147. According to the applicants, it follows from ESA's "general reasoning" that it may take a similar position in future access to document requests for statements of content in State aid cases. In that regard, the applicants contend that there is no basis in law to force an applicant to start a new action against ESA every time ESA refuses access to a statement of content, only to delay before providing the document, as in this case, and then demand that the actions be discontinued. In their view, the inadmissibility pleas are nothing more than an attempt to obstruct the substantive rights of the applicants and any other member of the public in similar cases.

148. Consequently, the applicants assert that they retain a legal interest in pursuing the present actions and that the second inadmissibility plea must be rejected as unfounded.

149. In addition, the applicants note that on 5 September 2012 ESA enacted new rules on public access to documents by way of ESA Decision No 300/12/COL. The applicants submit that these new rules have been given retroactive effect by Article 13 of the revised RAD to the matter before the Court. In their view, the revised RAD has a different purpose, which is no longer to ensure the same degree of openness as provided for in EU law, and now includes exceptions which go beyond the degree of restrictions found within Regulation No 1049/2001 and the relevant case law. Moreover, the definitions are also more narrowly defined. In sum, they assert that the substantive changes made as a result of the revised RAD mean that the public right of access is now significantly more restrictive than permitted under EU law. Furthermore, they continue, ESA has sought to give the revised RAD retroactive effect to all actions pending before the Court.

150. The applicants submit further that the procedural time limits in the revised RAD are now significantly longer with increased discretionary powers. In their view, the process leading up to the adoption of the revised RAD demonstrates a fundamental lack of respect for the rule of law and the principle of sound administration. They observe, moreover, that the revised RAD have been published only on ESA's website unlike the requirement in Article 13 RAD that the rules be published in the EEA Supplement to the Official Journal. The applicants contend that the present actions must be decided upon on the basis of the RAD, which was in effect at the time the contested decisions were taken. Furthermore, they assert that the revised RAD must also be considered part of EEA law and, hence, subject to the principle of homogeneity.[31]

151. In its rejoinder, ESA submits that admissibility is a matter of public order which the Court must examine of its own motion.[32]

152. In the alternative, should the Court consider the relevant correspondence to constitute challengeable decisions pursuant to Article 36(2) SCA, in the present circumstances, ESA maintains that neither application can succeed on the merits.

153. ESA maintains that there is no longer a need to adjudicate on the application in Case E-5/12 as ESA has since communicated "the initially missing list regarding case no 60510 to Konkurrenten.no". Therefore, Konkurrenten lacks any legal interest to continue to seek an action for annulment as regards an alleged refusal to be provided with such documentation. ESA asserts that Konkurrenten's arguments to the contrary have no basis in case law[33] and rejects its reliance on *Access Info Europe*.[34]

154. According to ESA, it has been its consistent practice since 6 September 2012, under the revised RAD, to provide a list of the documents on ESA's administrative file whenever such a

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31 Reference is made to *DB Schenker*, cited above, paragraphs 118 and 121.
32 Reference is made to *Internationaler Hilfsfonds*, cited above, paragraphs 33-34.
33 Reference is made to Case T-153/10 *Schneider España de Informática* v *Commission*, Order of 28 February 2012, not yet reported, paragraphs 22 and 23 and case law cited.
34 Reference is made to *Access Info Europe*, cited above, paragraphs 35 and 36. This case is under appeal (Case C-280/11 P).

list is requested or whenever ESA has sought to rely upon a general presumption against access. As regards the applicants' contention that they continue to have a legal interest in annulment because it must be presumed that ESA will not respect the requirements established by the Court in *DB Schenker*,[35] ESA refutes such a suggestion and, consequently, urges the Court not to follow the applicants' argument on this point.

155. ESA maintains that neither application is well founded.

156. While ESA considers the applicants' arguments on the revised RAD not to raise any new plea within the meaning of Article 37(2) of the RoP and, in any event, ineffective to challenge the contested decisions, ESA underlines the fact that, in its view, the revised RAD is not at issue in the present proceedings. Instead, the relevant rules in the present proceedings are the RAD as the dispute must be assessed under the rules applicable at the material time.[36]

157. ESA observes that the Court held it indispensable that its interpretation of the RAD is homogeneous with that by the Union courts of Regulation No 1049/2001.[37] In that regard, ESA submits that a general presumption exists that disclosure of documents recorded in administrative State aid files, such as those at issue in the present case, in principle undermines the protection of the objectives of investigation activities. ESA urges the Court to decline the applicants' invitation to deviate from the position that there is a general presumption against public access in State aid cases.[38]

158. ESA asserts that the applicants overlook the fact that the preamble to Regulation No 659/1999[39] has not been incorporated into either the EEA Agreement or the SCA.

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35 Reference is made to *DB Schenker*, cited above, paragraph 134.

36 Reference is made to Case C-296/08 PPU *Santesteban Goicoechea* [2008] ECR I-6307, paragraph 80 and case law cited.

37 Reference is made to *DB Schenker*, cited above, paragraph 121.

38 Reference is made to *Technische Glaswerke Ilmenau*, cited above, paragraphs 53, 54, 60 and 61; Article 26 of Regulation No 659/1999 and Part II of Protocol 3 SCA.

39 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 1999 L 83, p. 1.

159. Finally, ESA observes that the presumption against public access is rebuttable and asserts that the applicants have not engaged in any form of dialogue in order to explore whether, and if so, with regard to which documents, the presumption against public access to the State aid file, by way of exception, does not hold. Moreover, ESA continues, nor did the applicants adduce any argument liable to rebut the presumption by either 5 April 2012 or 4 May 2012.

160. ESA adds in its rejoinder that it was by mistake that it transmitted to counsel for the applicants lists concerning Case no 70478 and Case no 70506. [CONFIDENTIAL]

Substance

Legal background

161. ESA submits that, in essence, the case concerns how to reconcile the RAD with the need to take due account of the special accessibility arrangements prescribed with regard to State aid investigations and in particular Protocol 26 to the EEA Agreement ("Protocol 26 EEA") and Article 20 of Part II of Protocol 3 SCA, which mirrors Article 20 of Regulation No 659/1999. ESA submits that these rules provide only for limited rights of information and participation in any formal investigation procedure opened under Article 1(2) of Part II of Protocol 3 SCA.[40]

162. ESA submits that similarly strict sector-specific access rules apply to administrative files in merger proceedings and competition investigations.

163. ESA submits that in the EFTA pillar potential discrepancies between the RAD and Article 20 of Part II of Protocol 3 SCA should be addressed by a balanced solution that does not breach either provision or Protocol 26 EEA nor gives rise to a material lack of homogeneity. ESA submits that this is best achieved by applying the principles set out in *Technische Glaswerke Ilmenau*.[41]

[40] Reference is made to *Technische Glaswerke Ilmenau*, paragraph 56.
[41] Ibid., paragraphs 50 to 56, and 61 to 63.

164. ESA considers that the case must be assessed under the legislation applicable at the time at which the events took place giving rise to the dispute. In that regard, ESA submits that it was bound at that time by the RAD.[42] The RAD essentially copied the operative provisions of Regulation No 1049/2001 but neither its preamble nor its procedure. ESA submits that there is a legislative difference between the EU and EFTA pillars in that, in the EU pillar, Regulation No 1049/2001 and Regulation No 659/1999 are both instruments of secondary law. However, in the EFTA pillar, although Regulation No 659/1999 is referred to in Article 2 of Protocol 26 EEA and enacted through equivalent rules in Part II of Protocol 3 SCA, Regulation No 1049/2001 has not been incorporated into the EEA Agreement. Therefore, the respective legal rules in the two pillars on access to documents held in State aid files may be regarded as not being "identical in substance" within the meaning of Article 3(2) SCA.

165. ESA submits that a sufficient degree of homogeneity can and should be achieved[43] in order to ensure the equal treatment of economic operators as regards the conditions of competition. In that regard, it stresses that the disclosure of documents obtained in State aid investigations may undermine the protection of the purpose of the investigations.[44]

166. ESA notes that the ECJ has held that account must be taken of the fact that interested parties other than the Member State concerned in the procedures for reviewing State aid do not have the right to consult the documents in the Commission's administrative file, and that, therefore, a general presumption exists that disclosure of documents in the administrative file in principle undermines the protection of the objectives of investigation activities.[45] Moreover, the ECJ held that, in the case

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42 Reference is made to *Santesteban Goicoechea*, cited above, paragraph 80 and case law cited.

43 Reference is made to *Technische Glaswerke Ilmenau*, cited above, paragraph 65, and Case C-28/08 P *Commission* v *Bavarian Lager* [2010] ECR I-6055, paragraph 65.

44 Reference is made to Article 4(2) RAD, third indent, and *Technische Glaswerke Ilmenau,* cited above, paragraph 58.

45 Reference is made to *Technische Glaswerke Ilmenau*, cited above, paragraph 61.

at issue, the Commission was able to refuse access to all the documents relating to procedures for the review of State aid covered by the applicant's request and could do so without first making a concrete, individual examination of those documents.[46]

167. ESA asserts in its rejoinder by way of addition that it is not bound by European Commission communications but its own and notes that when interpreting such a communication, account must be taken of subsequent case law. ESA rejects the suggestion that *Technische Glaswerke Ilmenau* does not establish an all-embracing presumption against disclosure for all documents in any State aid file and, in that regard, contends that the applicants are wrong to rely on the earlier *Sweden and Turco* judgment.[47]

168. The applicants submit that ESA's presentation of the law in the defence is flawed and incomplete. The applicants assert that ESA has erroneously claimed that the rules on public access are not part of EEA law and not subject to the principle of homogeneity. The applicants assert that similar arguments have recently been rejected by the Court.[48] In their view, the Court's reasoning extends to the revised RAD.

169. The applicants submit that the procedural State aid rules do not contain any provisions giving them primacy over the rules on public access to documents in EU law and that these should be interpreted together, in accordance with the principle of homogeneity, with that result being transposed to the contested decisions in the present proceedings.[49] Moreover, they argue that, in focusing only on Article 20 of Part II of Protocol 3 SCA, ESA has ignored the fact that the procedural State aid rules contain

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46 Ibid., paragraphs 61, 63 and 67.

47 Ibid., paragraphs 53, 54, 60 and 61. Reference is also made to Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723.

48 Reference is made to *DB Schenker*, cited above, paragraphs 118 and 121.

49 Reference is made to *Technische Glaswerke Ilmenau*, cited above, Case C-477/10 P *Commission* v *Agrofert Holding*, judgment of 28 June 2012, not yet reported, paragraphs 50 to 52, and Case C-404/10 P *Commission* v *Odile Jacob*, judgment of 28 June 2012, not yet reported, paragraphs 108 to 110.

an extensive obligation to publish decisions.[50] Moreover, these State aid decisions must all contain factual and legal reasoning in compliance with Article 16 SCA, although the public version cannot divulge information covered by the professional secrecy obligation in Article 122 EEA.[51] Thus, in the applicants' view, the procedural State aid rules recognise that there is a strong public interest in the decisions taken at the various stages of an investigation with the only restriction on the content of the public version of those decisions being that of professional secrecy.

170. The applicants contend that ESA has overlooked the fact that *Technische Glaswerke Ilmenau* does not provide for a presumption against disclosure for all documents in any State aid file with no limitations as to time.[52] In their view, the ECJ referred to general presumptions that may arise from the procedural State aid rules concerning certain categories of documents.[53] In addition, the present proceedings may be distinguished on the facts from those in *Technische Glaswerke Ilmenau*. Moreover, they emphasise that a general presumption may be rebutted by an applicant.[54] In the specific circumstances of that case, however, there was no reason to set the presumption aside because the applicant had not advanced pleas to that effect.[55]

Case E-4/12 Risdal Touring

First plea: infringement of Articles 2(1) and 4(2) RAD by refusing to disclose a complete statement of content of the file

171. Risdal Touring submits that it has a right of access to ESA's documents, pursuant to Article 2(1) RAD, which it sought to

50 Reference is made to Article 26 of Regulation No 659/1999 and Article 26 of Part II of Protocol 3 SCA.
51 Reference is made to recital 21 in the preamble to Regulation No 659/1999, Commission Communication C(2003) 4582 of 1 December 2003 on professional secrecy in state aid decisions (OJ 2003 C 297, p. 3), and the corresponding ESA College Decision No 15/04/COL of 18 February 2004 (OJ 2006 L 154, p. 27, and EEA supplement No 29), paragraphs 17, 19, and 21 to 24.
52 Reference is made to *Technische Glaswerke Ilmenau*, cited above, paragraphs 53 and 54.
53 Reference is made to *Sweden and Turco*, cited above, paragraph 50.
54 Reference is made to *Technische Glaswerke Ilmenau*, cited above, paragraph 62.
55 Ibid., paragraph 70.

exercise on 21 March 2012 by virtue of its access request. Risdal Touring notes that, pursuant to Article 2(3) RAD, this access right extends to all documents held by ESA in whatever medium the content is held.[56]

172. Risdal Touring asserts that ESA has a duty to continuously record statements of content for each case it opens pursuant to both Article 11 RAD and, independently, the principle of good administration. ESA is required to allow public access, at the very least, to statements of content of cases online.[57] Moreover, it is also obliged separately to record a public register, which must be distinguished from the functions of statements of content of specific cases.[58] Pursuant to Article 9(2) RAD, that register shall contain a reference number, the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine the protection of the interests in Article 4 RAD.[59]

173. Noting that Article 4(2) RAD sets out exceptions to the right in Article 2(1) RAD, Risdal Touring submits that the RAD embodies rules similar to Regulation No 1049/2001 and is part of EEA law by virtue of Article 108 EEA and Article 13 SCA as also set out in its preamble. Consequently, the RAD is subject to the principle of homogeneity and must be interpreted with due regard to the case law of the Union courts in relation to Regulation No 1049/2001.

174. Risdal Touring acknowledges that the case law on Regulation No 1049/2001 recognises as a general presumption that the disclosure of documents in State aid cases would in principle undermine the protection of the purpose of the investigation within a restricted context.[60] However, it stresses that there is a right to demonstrate that specific documents fall outside of that presumption. Similarly,

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56 Reference is made to Article 3(a) RAD. Further reference is made to the Commission's proposal to recast Regulation No 1049/2001.See COM(2008) 229 final, 30 April 2008, p. 17.

57 Reference is made to Article 10 RAD.

58 Reference is made to Article 9 RAD.

59 Reference is made to Article 9(2) RAD.

60 Reference is made to *Technische Glaswerke Ilmenau*, cited above, paragraphs 58 to 61, and Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair*, cited above, paragraph 70.

there is a right to establish that there is a higher public interest justifying disclosure in line with the purpose of the Regulation.[61] Risdal Touring notes that case law has only applied the general presumption where the Commission had already opened a formal investigation procedure when the access requests were submitted. This is not the position in the present case.

175. However, according to Risdal Touring, the general presumption, described above, cannot be relied upon in order to undermine the rights of interested parties from effectively seeking judicial review, pursuant to Article 36 SCA, of ESA's decisions to close cases concerning potentially unlawful aid without opening a formal investigation procedure or its decisions to restrict the scope of the formal investigation in such cases, or to take action, pursuant to Article 37 SCA, against unlawful passivity by ESA that results in no decision being taken.

176. Risdal Touring asserts that the statement of content is not a document covered by the general presumption.[62] In its view, ESA appears to agree that the general presumption does not apply in this case as it produced a statement of content in its emails of 5 April 2012 and 4 May 2012, albeit in an incomplete form.

177. Risdal Touring contends that the contested decision granted only partial access to the statement of content, in the sense that it failed to describe, in a regular manner, the author/addressee of the documents and whether the documents were incoming, outgoing or internal. Nor did the list distinguish between the dates of the actual documents and the dates on which they were registered. The first list, received on 5 April 2012 referred only to an "edit date" without further explanation. The second list, received on 4 May 2012, lacked even those date references.

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61 Reference is made to recital 4 in the preamble to Regulation No 1049/2001 and *Technische Glaswerke Ilmenau*, cited above, paragraph 62, and Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair*, cited above, paragraph 72.

62 Reference is made to Case T-437/08 *Cartel Damage Claims* v *Commission*, judgment of 15 December 2011, not yet reported.

178. Risdal Touring observes that, in its letter of 10 April 2012, it requested ESA to explain whether it had provided a print-out from its database directly or whether certain information about the documents, available in the database, had been edited out. If that were the case, Risdal Touring requested ESA to provide reasons for denying disclosure of that information.

179. Risdal Touring asserts that as ESA disclosed two different versions of the statement of content on 5 April 2012 and on 4 May 2012 this supports its view that ESA is able to amplify the print-outs from its database and extract additional data. Moreover, even if there were no requirement pursuant to Article 9 RAD to properly record the missing data in the statement of content of the file, ESA had a duty to continuously do so pursuant to Article 11 RAD and the principle of good administration. Consequently, according to Risdal Touring, the contested decision would, in any event, have to be annulled on that basis

180. Risdal Touring asserts that, in withholding the missing data from the statement of content, ESA is undermining the public right to seek access to individual documents in State aid cases as this makes it more difficult for an applicant to identify specific documents of interest, and subsequently make effective use of its rights to demonstrate either that the general presumption does not apply to those documents or that there is an overriding public interest in disclosure.

181. Consequently, Risdal Touring asserts that, in refusing to grant access to the full statement of content in ESA Case No 70506, ESA has infringed Articles 2(1) and 4(2) RAD. The contested decision must therefore be annulled at least in so far as it denies access to the full statement of content of that file.

182. In their reply, the applicants assert that the concept of a document includes an electronically stored statement of content.[63] The purpose of ESA's database, and the central

[63] Reference is made to Article 3(a) RAD. Further reference is made to the Commission's proposal to recast Regulation No 1049/2001. See COM(2008) 229 final, 30 April 2008, p. 17.

functionality that it offers, is to enable case handlers to identify which documents belong to any given case at a particular time.[64] The applicants assert that, in failing to continuously record statements of content for each case it opens pursuant to both Article 11 RAD and, independently, the principle of good administration, ESA has infringed, in effect, the applicant's right of access under Article 2(1) RAD.

183. The applicants understand the defence to mean that ESA wishes to challenge the assertion that it is obliged to continuously register in its database a description of the author/addressee of the documents; a description of whether the documents are incoming, outgoing or internal; and a description of the dates of the actual documents and the dates on which they have been registered on the file.

184. According to the applicants, ESA has not contested the argument that a general presumption cannot be relied upon to suppress the statement of content. Moreover, in their view, ESA's interpretation of *Cartel Damages Claims* is contradictory and flawed. The applicants assert that the right to rebut a general presumption against disclosure of a particular State aid document would be of little use if an applicant were denied the right to know of the existence of the document in the first place.

ESA

185. ESA submits its defence in the alternative that the Court finds the case admissible.

186. As regards the arguments raised by Risdal Touring based on *Cartel Damages Claims*, ESA refers to its defence in Case E-5/12 and its submissions on the first plea in that case set out below, which apply by analogy [paragraphs 259 and 260].

187. ESA contends that there is no disagreement between the parties that the email of 5 April 2012 provided a statement of content of the file in Case No 70506. ESA refers to its arguments concerning

64 Reference is made to Article 3(a) RAD.

the first plea in Case E-5/12 below [paragraphs 261 to 263]. ESA explains that it is able to export metadata to a document, such as to provide a list of documents in a case, and states that, although not obliged to do so, this is what it did in Case E-4/12 *Risdal Touring*.

188. However, ESA contends that it was not in a position to provide all the information that is claimed to be included in a statement of content of the file. ESA does not record the authors/addressees of documents as metadata in ESA's information management system ("AIM"). In order to obtain such information, each document would need to be opened individually. The same applies for the dates of documents. Nor has a meaningful description of the content of each document been recorded as metadata other than what is included in the title of each "event name". Therefore, ESA has not been able to export these three types of data to a list of documents, or events, on the file.

189. Therefore, ESA contends that the plea must be dismissed.

190. In addition, ESA explains that the "edit date" is automatically set by the AIM and is reset every time an "event" is "edited" in an information management sense. ESA refers to its arguments concerning its online document register in relation to the first plea in Case E-5/12 [see paragraph 265 below].

191. In its rejoinder, ESA refers to its arguments raised in relation to the first plea in Case E-5/12 which may be found below at paragraph 266.

Second plea: infringement of Articles 2(1) and 4(2) RAD by refusing to disclose the factual questions ESA asked the Norwegian Government, the City of Oslo and KTP in order to establish whether a formal investigation procedure needed to be opened following the State aid complaint ESA received on 8 September 2011

192. Risdal Touring submits that factual questions ESA asked the Norwegian Government, the City of Oslo and KTP in its correspondence are all subject to the RAD.[65] To the extent that

[65] Reference is made to Article 2(1) and (3) RAD.

these are covered by the exception in Article 4(2) RAD, a right of partial access remains, pursuant to Article 4(6) RAD, to the non-confidential parts of the documents. Risdal Touring acknowledges that the case law on Regulation No 1049/2001 recognises as a general presumption that the disclosure of documents in State aid cases would in principle undermine the protection of the purpose of the investigation within a restricted context.[66] However, it stresses that there is a right to demonstrate that specific documents fall outside of that presumption. Similarly, there is a right to establish that there is a higher public interest justifying disclosure in line with the purpose of the Regulation.[67]

193. Risdal Touring notes that, in its access request of 21 March 2012, it narrowed down its request in that it only sought access to documents containing factual questions from ESA asked in order to establish whether a formal investigation procedure needed to be opened after it had received the State aid complaint on 11 September 2012 and addressed (i) to the Norwegian Government, on behalf of the Member State that would be formally responsible if unlawful State aid had been granted, (ii) to the City of Oslo, the public authority that had granted the potentially unlawful aid to a company it owns and controls, and (iii) to KTP, the company that had received the potentially unlawful aid from its owner, and at risk of being subject to a recovery order.

194. Risdal Touring indicates that some of the initial questions posed by ESA to the Norwegian Government have been disclosed to it by the Government. Moreover, it submits that partial access to the questions posed would fall outside the general presumption that the purpose of the investigation would be undermined and that there is, in any event, a higher public interest justifying disclosure as this will allow, *inter alia*, any member of the public to bring

66 Reference is made to *Technische Glaswerke Ilmenau*, cited above, paragraphs 58 to 61, and Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair*, cited above, paragraph 70.

67 Reference is made to recital 4 in the preamble to Regulation No 1049/2001 and *Technische Glaswerke Ilmenau*, cited above, paragraph 62, and Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair*, cited above, paragraph 72.

forward information in furtherance of the effective enforcement of the prohibition on State aid in Article 61 EEA.

195. Moreover, Risdal Touring continues, such public access will also allow interested parties to effectively contest, pursuant to Article 36 SCA, a premature decision to close the case without a formal investigation procedure or challenge a decision to restrict the scope of such investigations unduly or take action against ESA, pursuant to Article 37 SCA, for unlawful inactivity resulting in no decision being taken and, thus, further the interests of the public at large, namely, that potentially unlawful State aid be investigated properly and effectively by ESA.

196. As a consequence, Risdal Touring submits, the contested decision must be annulled, at least in so far as it denies public access to the factual questions that ESA in its correspondence has presented to the Norwegian Government, the City of Oslo, and KTP to establish whether a formal investigation procedure must be opened in conjunction with the State aid complaint that Konkurrenten submitted on 8 September 2011.

197. In the reply, the applicants note that, unlike in *Technische Glaswerke Ilmenau*, the present case concerns a complaint against aid measures that have not been notified and therefore may constitute unlawful State aid. Furthermore, the present case concerns the preliminary examination phase in which the factual basis for ESA's decisions is likely to be significantly less detailed than after a formal investigation has been opened. In addition, the applicants observe that the Commission has proposed that significant fines be levied on undertakings for supplying "incorrect, incomplete or misleading information" in response to information requests during a formal State aid investigation[68] in order "to improve the quality of the information received by the Commission".[69]

[68] Reference is made to the proposed Article 6b(1) and 6a to be inserted in Regulation No 659/1999 as set out in COM(2012) 725 final, 5 December 2012.

[69] Reference is made to COM(2012) 725 final of 5 December 2012, p. 7.

198. Risdal Touring notes that ESA's guidelines recognise the overriding public interest in making public the full substance of its decisions.[70] Risdal Touring asserts that the obligation to decide individually, and not by general presumption, on public access requests for source documents, i.e. factual questions and answers, used to determine whether or not to open a formal investigation in matters concerning complaints against potentially unlawful state aid is consistent with both the standard approach taken under the rules on public access and the objective of Article 61 EEA.[71]

ESA

199. ESA has responded to the second, third and fourth pleas together.

200. ESA acknowledges that there may be types of documents which are not covered by the *Technische Glaswerke Ilmenau* presumption. One example "may be requests for public access to documents, if these are saved on the State aid case". Another example may be replies to such request.

201. However, ESA asserts that the applicant has requested access to documents which are directly related to the subject matter of the "(still) ongoing State aid investigation". Such documents must be covered by the *Technische Glaswerke Ilmenau* presumption.[72] ESA asserts that Risdal Touring has not brought forward convincing arguments why the documents containing factual answers received from the City of Oslo fall outside the scope of the *Technische Glaswerke Ilmenau* presumption. ESA asserts that accepting Risdal Touring's arguments would arguably go a long way to render the *Technische Glaswerke Ilmenau* presumption meaningless, exempting significant categories of documents directly related to the investigation. ESA asserts that the same

70 Reference is made to ESA College Decision No 15/04/COL of 18 February 2004 (OJ 2006 L 154, p. 27 and EEA supplement No 29), paragraph 19, and the corresponding provision in Commission Communication C(2003) 4582 of 1 December 2003 on professional secrecy in state aid decisions (OJ 2003 C 297, p. 6), paragraph 19.

71 Reference is made to Joined Cases T-109/05 and T-444/05 *NLG* v *Commission* [2011] ECR II-2479, paragraphs 135 and 136, currently under appeal.

72 Reference is made to *Technische Glaswerke Ilmenau*, cited above, paragraphs 17, 50, 52, 61 and 67.

applies in respect of documents containing factual answers ESA has received from KTP.

202. ESA asserts that the *Technische Glaswerke Ilmenau* presumption must apply equally whether the formal investigation procedure has been opened or not. There is no ECJ case law to the contrary, and, ESA contends, it would be inconsistent to apply the *Technische Glaswerke Ilmenau* presumption to all the documents relating to the procedures for the review of State aid[73] only after the opening of the formal investigation procedure.[74] ESA asserts that it cannot be justified to set aside or disapply the *Technische Glaswerke Ilmenau* presumption in relation to those factual questions and factual answers provided on the basis that to do so would give the public an opportunity to review what type of information ESA seeks in order to decide whether to open a formal investigation procedure or not. Nor does it suffice that reversing the presumption would allow the public to provide additional relevant information in order to facilitate the effective enforcement of Article 61 EEA.

203. ESA asserts that, in order to set aside or disapply the *Technische Glaswerke Ilmenau* presumption, it also cannot suffice that its investigative powers, pursuant to Article 61 EEA, to seek evidence from public authorities which may have granted the unlawful aid in the first place are said to be very limited. ESA stresses the fact that it also has investigative powers during its preliminary examination of allegedly unlawful aid. It points out that the preliminary examination of possible unlawful aid shall result in the opening of the formal investigation procedure unless ESA finds that there is no aid or that there are no doubts raised as to the compatibility of the aid with the functioning of the EEA Agreement. In such situations, any "party concerned" may challenge ESA's decision not to open the formal investigation procedure before the Court. The private interests of interested parties to challenge such decisions constitute no reason to set aside or disapply the *Technische Glaswerke Ilmenau* presumption. ESA asserts further that if the

[73] Ibid., paragraph 67.
[74] Ibid., paragraph 54.

effective enforcement of Article 61 EEA were to constitute a higher public interest in the disclosure of documents in State aid cases there would be little or no room for non-disclosure in State aid cases. This would be contrary to the RAD.

204. ESA asserts that the overriding public interest referred to in Article 4(2) of Regulation No 1049/2001 must, as a rule, be distinct from the principle of transparency.[75] It asserts further, specifically with regard to court proceedings, that the ECJ has held that the principles of equality of arms and sound administration of justice place limitations on the principle of transparency.[76] In addition, the ECJ has clarified, with regard to merger control proceedings, that an interest to enable an applicant to present more convincing arguments in court proceedings brought against a Commission merger decision does not constitute any overriding public interest justifying disclosure within the meaning of Article 4(2) of Regulation No 1049/2001.[77]

205. ESA asserts that the contention that public access to the documents on the administrative file will allow interested parties to bring an action against ESA under Article 37 SCA is no reason to set aside or disapply the *Technische Glaswerke Ilmenau* presumption or limit its temporal application. ESA contends that such argument also does not demonstrate a higher public interest in the disclosure of the documents concerned.

206. ESA contends that it is for the applicant to demonstrate the existence of a higher public interest justifying disclosure of the documents concerned.[78] In its view, the applicant has not satisfied this requirement in its reasoning.

207. Consequently, ESA concludes that the second, third and fourth pleas in Case E-4/12 *Risdal Touring* are unfounded.

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75 Reference is made to Case T-26/04 *API* v *Commission* [2007] ECR II-3201, paragraph 97, not overruled on appeal in Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others* v *API and Commission* [2010] ECR I-8533, paragraph 152 et seq.

76 Reference is made to *Odile Jacob*, cited above, paragraph 132, with reference to *Sweden and Others* v *API and Commission*, cited above, paragraphs 84, 85 and 87.

77 Reference is made to *Odile Jacob*, cited above, paragraphs 114 to 146.

78 Reference is made to *Technische Glaswerke Ilmenau*, cited above, paragraph 62.

Third plea: infringement of Articles 2(1) and 4(2) RAD by refusing to disclose the factual answers ESA received from the City of Oslo in order to decide whether a formal investigation procedure needed to be opened following the State aid complaint ESA received on 8 September 2011

208. Risdal Touring submits that factual answers ESA received from the City of Oslo in its correspondence are all subject to the RAD.[79] To the extent that these are covered by the exception in Article 4(2) RAD, a right of partial access remains, pursuant to Article 4(6) RAD, to the non-confidential parts of the documents. Risdal Touring acknowledges that the case law on Regulation No 1049/2001 recognises as a general presumption that the disclosure of documents in State aid cases would in principle undermine the protection of the purpose of the investigation within a restricted context.[80] However, it stresses that there is a right to demonstrate that specific documents fall outside of that presumption. Similarly, there is a right to establish that there is a higher public interest justifying disclosure in line with the purpose of the Regulation.[81]

209. Risdal Touring notes that, in its access request of 21 March 2012, it narrowed down its request in that it only sought access to documents containing factual answers provided by the City of Oslo directly, or indirectly through the Norwegian Government, that are relevant for ESA's decision on whether to open a formal investigation procedure in conjunction with the State aid complaint that Konkurrenten submitted on 8 September 2011.

210. Risdal Touring notes that the City of Oslo is the public authority that is being investigated for possibly having granted substantial unlawful aid, and that this aid has been paid to KTP, a company owned and controlled by the City of Oslo.

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79 Reference is made to Article 2(1) and (3) RAD.

80 Reference is made to *Technische Glaswerke Ilmenau*, cited above, paragraphs 58 to 61, and Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair*, cited above, paragraph 70.

81 Reference is made to recital 4 in the preamble to Regulation No 1049/2001, *Technische Glaswerke Ilmenau*, cited above, paragraph 62, and Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair*, cited above, paragraph 72.

211. Risdal Touring contends, therefore, that access, if only partial, to the answers from the City of Oslo falls outside the general presumption that the purpose of the investigation would be undermined and, in any event, that there is a higher public interest justifying disclosure.

212. Risdal Touring submits that access to these answers gives the public an opportunity to review what type of factual information the public authority, which may have committed a serious violation of the prohibition on State aid in Article 61 EEA, is asking ESA to rely on when it considers whether to open a formal investigation procedure. This will enable any member of the public to come forward with additional information of relevance to the enquiries. In that regard, Risdal Touring asserts that ESA has very limited investigative powers to seek evidence from public authorities in cases concerning potentially unlawful State aid and that it would undermine the effectiveness of Article 61 EEA if the enquiries were dependent to a large extent on the public authority coming forward with relevant, accurate and complete information.

213. Moreover, Risdal Touring contends that such public access will also allow interested parties to effectively contest, pursuant to Article 36 SCA, a premature decision to close the case without a formal investigation procedure or challenge a decision to restrict the scope of such investigations unduly or take action against ESA, pursuant to Article 37 SCA, for unlawful inactivity resulting in no decision being taken and, thus, further the interests of the public at large, namely, that potentially unlawful State aid be investigated properly and effectively by ESA.

214. As a consequence, Risdal Touring asserts that the contested decision must be annulled, at least in so far as it denies public access to the factual answers provided by the City of Oslo to ESA in response to ESA's questions, asked in order to establish whether a formal investigation procedure must be opened in conjunction with the State aid complaint that Konkurrenten submitted on 8 September 2011.

215. Risdal Touring's additional arguments on the second, third and fourth pleas, advanced in the reply, are set out above at paragraphs 197-198.

ESA

216. ESA responds to the second, third and fourth pleas together. That response is set out above at paragraphs 200 to 207.

Fourth plea: infringement of Articles 2(1) and 4(2) RAD by refusing to disclose the factual answers ESA received from KTP in order to decide whether a formal investigation procedure needed to be opened following the State aid complaint ESA received on 8 September 2011

217. Risdal Touring submits that factual answers ESA received from KTP in its correspondence are all subject to the RAD.[82] To the extent that these are covered by the exception in Article 4(2) RAD, a right of partial access remains, pursuant to Article 4(6) RAD, to the non-confidential parts of the documents. Risdal Touring acknowledges that the case law on Regulation No 1049/2001 recognises as a general presumption that the disclosure of documents in State aid cases would in principle undermine the protection of the purpose of the investigation within a restricted context.[83] However, it stresses that there is a right to demonstrate that specific documents fall outside of that presumption. Similarly, there is a right to establish that there is a higher public interest justifying disclosure in line with the purpose of the Regulation.[84]

218. Risdal Touring notes that, in its access request of 21 March 2012, it narrowed down its request in that it only sought access to documents containing factual answers provided by KTP directly, or indirectly through the Norwegian Government, that are relevant for ESA's decision on whether to open a formal investigation

82 Reference is made to Article 2(1) and (3) RAD.

83 Reference is made to *Technische Glaswerke Ilmenau*, paragraphs 58 to 61, and Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair*, cited above, paragraph 70.

84 Reference is made to recital 4 in the preamble to Regulation No 1049/2001 and *Technische Glaswerke Ilmenau*, cited above, paragraph 62, and Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair*, cited above, paragraph 72.

procedure in conjunction with the State aid complaint that Konkurrenten submitted on 8 September 2011.

219. Risdal Touring asserts that KTP may have benefited substantially from the potentially unlawful aid. Risdal Touring contends, therefore, that access, if only partial, to the answers from KTP falls outside the general presumption that the purpose of the investigation would be undermined, and, in any event, that there is a higher public interest justifying disclosure.

220. Risdal Touring submits that access to these answers gives the public an opportunity to review what type of factual information KTP, as the recipient of potentially unlawful aid, is asking ESA to rely on when it considers whether to open a formal investigation procedure. This will enable any member of the public to come forward with additional information of relevance to the enquiries. In that regard, Risdal Touring asserts that ESA has very limited investigative powers to seek evidence from aid recipients in cases concerning potentially unlawful State aid and that it would undermine the effectiveness of Article 61 EEA if the enquiries were dependent to a large extent on the aid recipient coming forward with relevant, accurate and complete information, particularly when it faces the risk of having to return such aid.

221. Moreover, Risdal Touring contends such public access will also allow interested parties to effectively contest, pursuant to Article 36 SCA, a premature decision to close the case without a formal investigation procedure or challenge a decision to restrict the scope of such investigations unduly or take action against ESA, pursuant to Article 37 SCA, for unlawful inactivity resulting in no decision being taken and, thus, further the interests of the public at large, namely, that potentially unlawful State aid be investigated properly and effectively by ESA.

222. As a consequence, Risdal Touring asserts that the contested decision must be annulled, at least in so far as it denies public access to the factual answers provided by KTP to ESA in response to ESA's questions, asked in order to establish whether

a formal investigation procedure must be opened in conjunction with the State aid complaint that Konkurrenten submitted on 8 September 2011.

223. Risdal Touring's additional arguments on the second, third and fourth pleas, advanced in the reply, are set out above at paragraphs 197-198.

ESA

224. ESA responds to the second, third and fourth pleas together. That response is set out above at paragraphs 200 to 207.

Fifth plea: infringement of Article 16 SCA by not stating reasons for the contested decision

225. Risdal Touring submits that the Court has consistently emphasised that one of the purposes of Article 16 SCA is to ensure that the addressee of a decision must be able to assess why the decision has been taken, how ESA applied the law and whether or not there are grounds to seek judicial review.[85]

226. Risdal Touring submits that, in its first email of 5 April 2012, ESA did not provide any reasons for its decision. Moreover, in its decision, as notified on 4 May 2012, ESA failed to state reasons why the missing data from the statement of content of ESA Case No 70506 was withheld.

227. Risdal Touring submits that the last decision also failed to state reasons why the factual questions and factual answers, as described above, were withheld, with ESA stating simply that it found the reasons put forward as being "general in nature".

228. Risdal Touring asserts that its four-page access request of 21 March 2012 contained detailed reasons and specifications. Risdal Touring asserts that ESA has not made any attempt to explain what is missing from that access request or what is required to rebut the general presumption above. In that vein, the applicant also notes that the handling of its access request has been

[85] Reference is made to *Konkurrenten*, cited above, paragraph 42 and case law cited.

characterised by plain disregard for the obligations that flow from Article 7(1) RAD and the principle of good administration.

229. Risdal Touring submits that ESA has infringed Article 16 SCA and that the contested decision must therefore be annulled.

230. The applicants have submitted a joint reply to the fifth plea in Case E-4/12 *Risdal Touring* and to the second plea in Case E-5/12 *Konkurrenten*. The applicants submit that ESA's principal defence is ineffective because the contested decisions are challengeable under Article 36(2) SCA. The applicants refute ESA's contentions that both the fifth plea in Case E-4/12 *Risdal Touring* and the second plea in Case E-5/12 *Konkurrenten* advance arguments relating to the soundness of the alleged decisions and not their reasoning. The applicants aver that it is the lack of reasoning of the contested decisions that has led to the infringements of Article 16 SCA.

231. Additionally, the applicants submit that ESA has ignored the fact that Article 16 SCA applies to all decisions with no exception for public access requests. Furthermore, there is nothing to support the notion that ESA could not state reasons for the contested decisions without divulging confidential information. Indeed, the applicants assert that ESA has confused to what extent it had an obligation to disclose the contested documents under Article 2 RAD with its procedural obligation under Article 16 SCA to state reasons for its interpretation and application of that substantive law. The lack of reasoning in the decisions does not enable the applicants to ascertain the reasons for the measure and thus enable them to defend their rights and enable the Court to exercise its power of review.[86]

232. As a matter of procedure, the applicants note that annexes A.14 and A.19 to A.21 in Case E-4/12 and the same documents submitted as annexes A.13 to A.19 and A.20 in Case E-5/12 are in Norwegian with certain extracts translated in the main body of the applications. The applicants observe that ESA has

[86] Ibid.

not contested those parts of the applications or demanded that any of the annexes in Norwegian be held inadmissible. Thus, the applicants respectfully ask the Court, in its discretion, to admit those annexes in Norwegian or to set a time limit for English translations to be submitted pursuant to Article 25(3) of the RoP.

ESA

233. ESA responds jointly to the fifth plea in Case E-4/12 *Risdal Touring* and the second plea in Case E-5/12 *Konkurrenten*.

234. ESA submits that both applicants' pleas on alleged infringements of Article 16 SCA are inoperative. Neither ESA's email of 5 April 2012 nor its letter of 4 May 2012 constitutes a decision within the meaning of Article 16 SCA. According to ESA, there is nothing to suggest that the notion of a decision should be interpreted differently for the purposes of Article 16 SCA and Article 36 SCA. Accordingly, ESA maintains that, in the absence of any challengeable act, the appropriate course of action would have been to lodge an action for failure to act.

235. In the alternative, ESA makes the following submissions. Whether an ESA decision sets out the degree of reasoning required pursuant to Article 16 SCA depends upon the circumstances of each case and the legal rules governing the matter in question in particular.[87]

236. ESA submits that an unfounded plea challenging the legality of a decision cannot succeed in the guise of a plea on procedure. It stresses that an infringement of the duty to state reasons concerns an essential procedural requirement which is different from the question whether the grounds of a decisions are inaccurate as the latter is reviewed by the Court when its examines the validity of that decision.[88] Moreover, it is necessary to distinguish a plea based on an absence or inadequacy of reasons

[87] Reference is made to Joined Cases E-4/10, E-6/10 and E-7/10 *Liechtenstein and Others* v *ESA* [2011] EFTA Ct. Rep. 16, paragraph 172, and Joined Cases E-10/11 and E-11/11 *Hurtigruten and Norway* v *ESA*, judgment of 8 October 2012, not yet reported, paragraph 254.

[88] Reference is made to Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair*, cited above, paragraph 97 and case law cited.

from a plea based on an error of fact or law. This latter aspect falls within the review of the substantive legality of the contested decision and not the review of an infringement of essential procedural requirements within the meaning of Article 16 SCA.[89]

237. ESA observes that both applicants have claimed that their access requests were handled in disregard of Article 7(1) RAD and the principle of good administration. ESA notes further that Risdal Touring contends that, in its letter of 4 May 2012, ESA failed to state reasons why the "factual questions and factual answers" were withheld. ESA submits that it is clear from their wording that these arguments relate to the soundness of the alleged decisions and not their reasoning.

238. ESA maintains that both applicants' submissions are based on a narrow interpretation RAD read largely in isolation of Protocol 26 to the EEA Agreement and Protocol 3 SCA. In light of Article 3(2) SCA, ESA continues, that approach is questionable.

239. On the other hand, ESA submits that it was not under an "examination duty" but could rely upon the *Technische Glaswerke Ilmenau* presumption against public access and, hence, the applicants' pleas based on Article 16 SCA are unfounded.[90]

240. ESA contends that it was not obliged, in its email of 5 April 2012, to provide counsel for the applicants with lists of documents in Case Nos 70478 and 70506, as it had voluntarily created those documents and made them available in order to facilitate the exercise of the applicants' right to public access even though the requests concerned State aid investigations. ESA asserts that it was not under a formal obligation to provide reasons for the metadata it included on those lists.

241. ESA maintains that both the email of 5 April 2012 and the letter of 4 May 2012 were preparatory, factual acts taken in response to access requests that, pursuant to the legal rules governing the matter, could not be unconditionally granted as they concerned

[89] Reference is made to *Hurtigruten*, cited above, paragraph 165, and Case E-6/11 *Liechtenstein and VTM* v *ESA*, judgment of 30 March 2012, not yet reported, paragraph 165.

[90] Reference is made to *Technische Glaswerke Ilmenau*, cited above, paragraphs 53 to 58.

State aid cases. This explains why the letter to Risdal Touring of 4 May 2012 invited it to make document-specific submissions to rebut the *Technische Glaswerke Ilmenau* presumption.[91]

242. ESA stresses that the assessment of the legality of a contested decision must be made based on the information available to ESA at the moment it adopted the alleged decision in question.[92]

243. As a result, ESA concludes that the contentions of both applicants that it failed to reason or failed to reason sufficiently the contested email of 5 April 2012 and/or its letter of 4 May 2012 should be rejected.

244. In its rejoinder, ESA avers that it has made no submission arguing that it was barred from stating reasons on grounds of confidentiality either in relation to its email or its letter to the applicants. In ESA's view, it suffices to recall that the degree of reasoning required under Article 16 SCA depends on the circumstances of each case, and in particular on the legal rules governing the matter in question,[93] here the principles set out in *Technische Glaswerke Ilmenau*.

245. ESA notes that certain annexes to the applications have been submitted in Norwegian. In that connection, ESA refers to Article 25(3) of the RoP and to case law.[94]

Case E-5/12 Konkurrenten

First plea: infringement of Articles 2(1) and 4(2) RAD by refusing to disclose a complete statement of content of the file

246. Konkurrenten submits that it has a right of access to ESA's documents, pursuant to Article 2(1) RAD, which it sought to

91 Reference is made to *Odile Jacob*, cited above, paragraph 122.
92 Reference is made to *Hurtigruten*, cited above, paragraph 186.
93 Reference is made to *Liechtenstein and Others*, cited above, paragraph 172, and *Hurtigruten*, cited above, paragraph 254.
94 Reference is made to Case E-15/10 *Posten Norge* v *ESA*, judgment of 18 April 2012, not yet reported, paragraph 115; Case E-10/12 *Asker Brygge* v *ESA*, judgment of 17 August 2012, not yet reported, paragraphs 32 to 36; *Hurtigruten*, cited above, paragraphs 70 to 77; and Case E-1/12 *Den norske Forleggerforening* v *ESA*, judgment of 11 December 2012, not yet reported, paragraphs 46 to 55.

exercise on 21 March 2012 by virtue of its access request. Konkurrenten notes that, pursuant to Article 2(3) RAD, this access right extends to all documents held by ESA in whatever medium the content is held.[95]

247. Konkurrenten asserts that ESA has a duty to continuously record statements of content for each case it opens pursuant to both Article 11 RAD and, independently, the principle of good administration. ESA is required to allow public access, at the very least, to statements of content of cases online.[96] Moreover, it is also obliged separately to record a public register, which must be distinguished from the functions of statements of content of specific cases.[97] Pursuant to Article 9(2) RAD, that register shall contain a reference number, the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine the protection of the interests in Article 4 RAD.[98]

248. Noting that Article 4(2) RAD sets out an exception from the right in Article 2(1) RAD, Konkurrenten submits that the RAD embodies rules similar to Regulation No 1049/2001 and is part of EEA law by virtue of Article 108 EEA and Article 13 SCA as also set out in its preamble. Consequently, the RAD is subject to the principle of homogeneity and must be interpreted with due regard to the case law of the Union courts in relation to Regulation No 1049/2001.

249. Konkurrenten acknowledges that the case law on Regulation No 1049/2001 recognises as a general presumption that the disclosure of documents in State aid cases would in principle undermine the protection of the purpose of the investigation within a restricted context.[99] However, it stresses that there is a right to demonstrate

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95 Reference is made to Article 3(a) RAD. Further reference is made to the Commission's proposal to recast Regulation No 1049/2001. See COM(2008) 229 final, 30 April 2008, p. 17.

96 Reference is made to Article 10 RAD.

97 Reference is made to Article 9 RAD.

98 Reference is made to Article 9(2) RAD.

99 Reference is made to *Technische Glaswerke Ilmenau*, cited above, paragraphs 58 to 61, and Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair*, cited above, paragraph 70.

that specific documents fall outside of that presumption. Similarly, there is a right to establish that there is a higher public interest justifying disclosure in line with the purpose of the Regulation.[100] Konkurrenten notes that case law has only applied the general presumption where the Commission had already opened a formal investigation procedure when the access requests were submitted. This is not the position in the present case.

250. However, according to Konkurrenten, the general presumption, described above, cannot be relied upon in order to undermine the rights of interested parties from effectively seeking judicial review, pursuant to Article 36 SCA, of ESA's decisions to close cases concerning potentially unlawful aid without opening a formal investigation procedure or its decisions to restrict the scope of the formal investigation in such cases or to take action, pursuant to Article 37 SCA, against unlawful passivity by ESA that results in no decision being taken.

251. Konkurrenten asserts that the statement of content is not a document covered by the general presumption.[101] In its view, ESA appears to agree that the general presumption does not apply in this case as it produced a statement of content in its emails of 5 April 2012 and 4 May 2012, albeit in an incomplete form.

252. Konkurrenten contends that the contested decision granted only partial access to the statement of content. First, the list only covered the period after the case was reopened on 8 September 2011, following the Court's judgment in Case E-14/10 *Konkurrenten*.[102] No access was granted to the statement of content covering the period from the date the complaint was submitted, on 11 August 2005, until the case was reopened on 8 September 2011. Second, the statement of content that was provided failed to describe, in a regular manner, the author/addressee of the documents and whether the documents were incoming, outgoing

[100] Reference is made to recital 4 in the preamble to Regulation No 1049/2001 and *Technische Glaswerke Ilmenau*, cited above, paragraph 62, and Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair*, cited above, paragraph 72.

[101] Reference is made to *Cartel Damage Claims*, cited above.

[102] Reference is made to *Konkurrenten*, cited above.

or internal. Nor did the list distinguish between the dates of the actual documents and the dates on which they were registered. The list referred only to an "edit date" without further explanation.

253. Konkurrenten observes that, in its letter of 10 April 2012, it requested that ESA explain whether it had provided a print-out from its database directly or whether certain information about the documents, available in the database, had been edited out. If that were the case, Konkurrenten requested ESA to provide reasons for denying disclosure of that information.

254. Konkurrenten asserts that the data missing from the statement of content is information that ESA must have in its possession and presumes that could have provided a full statement of content based on the data already recorded in ESA's database. Moreover, even if there were no requirement pursuant to Article 9 RAD to properly record the missing data in the statement of content of the file, ESA had a duty to continuously do so pursuant to Article 11 RAD and the principle of good administration. Consequently, according to Konkurrenten, the contested decision would, in any event, have to be annulled on that basis.

255. Konkurrenten asserts that, in withholding the missing data from the statement of content, ESA is undermining the public right to seek access to individual documents in State aid cases as this makes it more difficult for an applicant to identify specific documents of interest, and subsequently make effective use of its rights to demonstrate either that the general presumption does not apply to those documents or that there is an overriding public interest in disclosure.

256. Consequently, Konkurrenten asserts that, in refusing to grant access to the full statement of content in ESA Case No 60510, ESA has infringed Articles 2(1) and 4(2) RAD. The contested decision must therefore be annulled, at least in so far as it denies access to the full statement of content of that file.

257. Konkurrenten's additional arguments on its first plea, advanced in the reply, are set out above at paragraphs 182-184.

ESA

258. ESA submits its defence in the alternative that the Court finds the case admissible.

259. As regards the applicant's first plea, ESA disputes Konkurrenten's analogy based on *Cartel Damages Claims*[103] that the *Technische Glaswerke Ilmenau* case law does not apply to a "statement of content" in State aid files. ESA observes that *Cartel Damages Claims* concerned access to an existing document, "the statement of contents of the Commission's case-file, as it was made available to the addressees of the statement of objections" in a cartel investigation. Moreover, it continues, the ECJ has held that if interested parties were able to obtain access, on the basis of Regulation No 1049/2001, to the documents in the Commission's administrative file, the system for the review of State aid would be called into question.[104]

260. ESA contends that several of the Commission's arguments dismissed by the General Court in *Cartel Damages Claims* have been accepted by the ECJ in other appeal cases won by the Commission, namely, on the need to protect competition investigations[105] and concerning the time when a case can be regarded as closed.[106] It observes further that in *Cartel Damages Claims* the General Court did not give any consideration to the relationship between Regulation No 1049/2001 and Regulation No 1/2003.[107]

261. In any event, ESA contends that the claim advanced by Konkurrenten, namely, that it should have provided Konkurrenten with documents setting out specific information, ignores the fact that there were no such documents in ESA's "case file(s) in

[103] Reference is made to *Cartel Damages Claims*, cited above, paragraphs 45 and 48.
[104] Reference is made to *Technische Glaswerke Ilmenau*, cited above, paragraph 58.
[105] Reference is made to *Agrofert*, cited above, paragraph 64, and *Odile Jacob*, cited above, paragraph 123.
[106] Reference is made to *Agrofert*, cited above, paragraphs 62 and 66, and *Odile Jacob*, cited above, paragraphs 128 to 131.
[107] Reference is made to *Agrofert*, cited above, paragraph 52, and *Odile Jacob*, cited above, paragraph 110.

question". ESA stresses that neither the RAD nor the revised RAD obliges ESA to grant access to a document it does not possess. This means that it is not obliged to create a document in order to satisfy a request for public access to such a document.[108] Moreover, it continues, the concept of a document must be distinguished from that of information more widely. In its view, the notion of access to documents presupposes that documents actually exist.[109]

262. ESA states that lists of documents in case files are not created or stored as any kind of document unless there is a specific need to do so. In contrast, what is contained at all times in ESA's information management system ("AIM") is the metadata for each document. AIM can display such metadata in various combinations but does not store such combinations as documents. Therefore, ESA was not under any obligation to create the requested list.

263. ESA rejects the view that it has "a duty to continuously record statements of content for each case it opens" whether on the basis of Article 11 RAD or according to the principle of good administration. ESA also denies that Article 10 RAD entails an obligation for it to provide for public access to continuously recorded statements of content. Consequently, ESA concludes that the plea must be dismissed.

264. ESA adds that, in any event, although not obliged to do so, it regularly exports metadata to a document, such as to provide a list of documents on a case when a request for public access is received.

265. In clarification, ESA states that its online document register does not contain a consecutive record of all its documents but contains simply a record of certain categories of documents. In any event, it asserts that Konkurrenten's submissions regarding the document register are inoperative for the purposes of challenging the legality of ESA's email of 5 April 2012.

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[108] Reference is made to Articles 1(1) and 2(3) RAD.
[109] Reference is made to Case T-264/04 *WWF* v *Council* [2007] ECR II-911, paragraph 76, and Case T-380/04 *Terezakis* v *Commission* [2008] ECR II-11, paragraphs 152-156.

266. In its rejoinder, ESA maintains that a statement of the content in Case No 60510, as sought by the applicants, has not been recorded in ESA's database. ESA avers that it has provided a complete list of documents in Case No 60510. However, neither a description of the author of each document nor the addressee of each document has been recorded other than what is included in the title of each document. The "event type" metadata provides some indication as to the kind of document recorded as the event. In accordance with ESA practice at the time, the date on each document in Case No 60510 was not recorded separately. ESA states that it is only since the introduction of the revised RAD on 6 September 2012 that it has developed the practice of recording "written date" and "written by" metadata. Moreover, it indicates that, in light of the judgment in Case E-14/11 *DB Schenker*, it is currently reviewing whether any additional information should be recorded as metadata and provided to applicants.

Second plea: infringement of Article 16 SCA by not stating reasons for the contested decision

267. Konkurrenten submits that the Court has consistently emphasised that one of the purposes of Article 16 SCA is to ensure that the addressee of a decision must be able to assess why the decision has been taken, how ESA applied the law and whether or not there are grounds to seek judicial review.[110]

268. Konkurrenten submits that ESA has not provided any reasons in the contested decision. ESA's email of 5 April 2012 failed to explain why Konkurrenten had been denied access to a full statement of content of ESA Case No 60510. Konkurrenten submits that ESA remained silent even after it had informed ESA on several occasions that it had not received a complete statement of content. Konkurrenten submits that ESA's handling of its access request has been characterised by a disregard for the obligations flowing from Article 7(1) RAD and the principle of good administration.

[110] Reference is made to *Konkurrenten*, cited above, paragraph 42 and case law cited.

269. Konkurrenten submits that ESA has infringed Article 16 SCA and that the contested decision must therefore be annulled.

270. Konkurrenten's additional arguments on its second plea, advanced in the reply, are set out above at paragraphs 230-232.

ESA

271. ESA responds jointly to the fifth plea in Case E-4/12 *Risdal Touring* and the second plea in Case E-5/12 *Konkurrenten*. Its arguments are set out above at paragraphs 234 to 243.

Carl Baudenbacher

Judge-Rapporteur


EFTA COURT

Case E-2/13

Bentzen Transport AS
v
EFTA Surveillance Authority

CASE E-2/13

Bentzen Transport AS

v

EFTA Surveillance Authority

(Refusal to commence proceedings for alleged failure of an EEA State to fulfil its obligations in the field of procurement – Actionable measures – Admissibility)

Summary of the Order

1. The applicant seeks under the second paragraph of Article 36 SCA the annulment of Decision No 507/12/COL of 19 December 2012 by which ESA discontinued its examination of the complaint submitted by the applicant without taking further action on the breaches alleged therein.

2. Private applicants do not have the right to challenge a refusal by ESA to initiate proceedings against an EEA/EFTA State for failure to fulfil its obligations under the EEA Agreement.

3. That conclusion is not undermined by the applicant's argument that ESA allegedly infringed the applicant's procedural rights, including the duty to state reasons. Consequently, as the contested decision does not constitute a challengeable act, the application must be dismissed as manifestly inadmissible.

ORDER OF THE COURT

23 October 2013

(Refusal to commence proceedings for alleged failure of an EEA State to fulfil its obligations in the field of procurement – Actionable measures – Admissibility)

In Case E-2/13,

Bentzen Transport AS, represented by Line Voldstad, advokat, Advokatfirma DLA Piper Norway DA, Oslo, Norway,

applicant,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Catherine Howdle, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents, Brussels, Belgium,

defendant,

APPLICATION under the second paragraph of Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice for annulment of the EFTA Surveillance Authority's Decision No 507/12/COL of 19 December 2012 in Case No 71620 concerning the closure of a case against Norway commenced following receipt of a complaint against the State in the field of public procurement,

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

makes the following

ORDER

I FACTS AND PROCEDURE

1 Bentzen Transport AS ("Bentzen" or "the applicant") is an Oslo-based private company which operates in the waste management business.

2 In April 2008, the Waste Management Department of the Municipality of Oslo ("REN") announced a tender for the award of a contract for waste collection services in that area. The applicant was among the companies that applied. As a result of the procurement procedure, the contract was eventually awarded to Veolia Environmental Recycling AS and Reno Norway AS ("Reno").

3 The applicant appealed against REN's decision as regards the partial award of the contract to Reno. After the waste management authorities upheld their decision, the applicant filed a formal complaint with the Appeals Board for Public Procurement.

4 On 2 April 2009, the applicant also instituted legal proceedings before Oslo City Court claiming compensation from the Municipality of Oslo. In a judgment of 12 March 2010, the claim was dismissed. The applicant's appeal against that decision was rejected in a judgment of 1 July 2011 by Borgarting Court of Appeal. The applicant appealed against that judgment to the Supreme Court of Norway, which in a decision of 13 December 2011 refused leave to appeal.

5 On 23 March 2012, the applicant lodged a complaint against Norway with the EFTA Surveillance Authority ("ESA"). The complaint concerned the procurement procedure conducted by the Norwegian authorities for the collection of waste in Oslo. The applicant claimed that Norway had failed to fulfil its obligations under the EEA rules on public procurement, and in particular under the act referred to in point 2 of Annex XVI to the EEA Agreement (Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public

supply contracts and public service contracts (OJ 2004 L 134, p. 114), "Directive 2004/18"), in awarding a contract for the collection of such waste.

6 On 4 April 2012, ESA sent a request to the Norwegian Government for information about the award of the contract, with which the Norwegian Government complied. On 9 November 2012, after having reached a preliminary view, ESA contacted the applicant in order to give it the possibility to comment further and to furnish new evidence.

7 By Decision No 507/12/COL of 19 December 2012 ("the contested decision"), ESA closed the case. By this act of closure, ESA decided not to initiate the formal infringement procedure laid down in Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA").

8 By an application registered at the Court on 13 March 2013, the applicant brought an action under the second paragraph of Article 36 SCA. The applicant requests the Court to:

(1) annul the EFTA Surveillance Authority Decision of 19 December 2012, Case No. 71620, concerning closing a case against Norway commenced following receipt of a complaint against the State in the field of public procurement;

(2) order the EFTA Surveillance Authority to pay the costs of the proceedings.

9 The action is based on four pleas in law, namely that ESA infringed:

- its duty to uphold Article 2 of Directive 2004/18, and
- the fundamental rules of the EEA Agreement applicable to public procurement, as well as
- its special duty under Article 23 SCA to ensure that the rules of the EEA Agreement on public procurement are upheld, and finally
- its duty to state reasons under Article 16 SCA.

10 By a letter registered at the Court on 18 April 2013, the defendant lodged an application for a decision on the admissibility of the action as a preliminary matter pursuant to Article 87(1) of the Court's Rules of Procedure ("RoP").

11 The defendant claims that the Court should:

(1) dismiss the application as inadmissible; and

(2) order the applicant to pay the costs.

12 If its plea of inadmissibility is not accepted, the defendant seeks relief as follows:

In the alternative, if the EFTA Court should decide not to dismiss the application as inadmissible, the Authority asks for a new deadline to be set for the submission of a full defence.

13 On 15 May 2013, the applicant submitted, pursuant to Article 87(2) RoP, its observations on the preliminary objection and lodged a statement in which it contested ESA's plea of inadmissibility and claimed that it "must be considered to have a legal interest in applying to the EFTA Court to annul the decision from ESA".

II LEGAL BACKGROUND

14 According to Article 65(1) of the EEA Agreement ("EEA"), Annex XVI contains specific provisions and arrangements concerning procurement which, unless otherwise specified, shall apply to all products and to services as specified. The provisions on procurement are also subject to monitoring by ESA pursuant to Article 109 EEA.

15 The second paragraph of Article 36 SCA reads:

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

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

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

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

17 Article 23 SCA contains a special provision on procurement which reads:

The EFTA Surveillance Authority shall, in accordance with Articles 22 and 37 of this Agreement and Articles 65(1) and 109 of, and Annex XVI to, the EEA Agreement as well as subject to the provisions contained in Protocol 2 to the present Agreement, ensure that the provisions of the EEA Agreement concerning procurement are applied by the EFTA States.

18 Article 1(1), (2) and (3) of Protocol 2 to the SCA on the Functions and Powers of the EFTA Surveillance Authority in the Field of Procurement reads:

1. *Without prejudice to Article 31 and 32 of this Agreement, the EFTA Surveillance Authority may invoke the procedure for which the present Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of the provisions of the EEA Agreement in the field of procurement has been committed during a contract award procedure falling within the scope of the acts referred to in points 2 and 3 of Annex XVI to the EEA Agreement.*
2. *The EFTA Surveillance Authority shall notify the EFTA State and the contracting authority concerned of the reasons which have led it to conclude that a clear and manifest infringement has been committed and request its correction.*
3. *Within 21 days of receipt of the notification referred to in paragraph 2, the EFTA State concerned shall communicate to the EFTA Surveillance Authority:*

(a) *its confirmation that the infringement has been corrected; or*

(b) *a reasoned submission as to why no correction has been made; or*

(c) *a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2(1)(a) of the act referred to in point 5 of Annex XVI to the EEA Agreement.*

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

1. A party applying to the Court for a decision on a preliminary objection or other preliminary plea not going to the substance of the case shall make the application by a separate document.

The application must state the pleas of fact and law relied on and the form of order sought by the applicant; any supporting documents must be annexed to it.

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

20 Article 88(1) RoP reads:

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

III ARGUMENTS OF THE PARTIES WITH RESPECT TO ADMISSIBILITY

21 ESA submits that the application is inadmissible on the ground that a decision not to initiate the procedure laid down in Article 31 SCA is not amenable to judicial review.

22 ESA agrees with the applicant's submission that it has a duty to ensure that the provisions of the EEA Agreement concerning procurement are applied by the EFTA States. This duty arises under Article 23 SCA, read in conjunction with Articles 22 and 37 SCA, Articles 65(1) and 109 EEA, Annex XVI to the EEA Agreement and is subject to the provisions contained in Protocol 2 to the SCA.

23 ESA submits further that, to the extent that its obligations of surveillance are not regulated by Protocol 2 to the SCA, they are governed by the general provisions of the SCA, and Article 31 in particular.

24 The special rules in Protocol 2 to the SCA, cited by the applicant, are in ESA's view first and foremost concerned with the special powers conferred on it when considering, prior to the conclusion of a contract, that a clear and manifest infringement of the procurement rules has taken place. As the applicant's original complaint was a request that ESA evaluate a procurement decision already taken by the Norwegian authorities, ESA considers that those special rules did not govern the contested decision. Hence, ESA takes the view that the contested decision is based on Article 31 SCA.

25 Having regard to the Court's order in Case E-13/10 *Aleris Ungplan* v *ESA* [2011] EFTA Ct. Rep. 5, ESA submits that Article 31 SCA and Article 258 of the Treaty on the Functioning of the European Union ("TFEU") correspond and, according to the principle of procedural homogeneity, it has, in a comparable manner to the European Commission ("the Commission"), a right but no duty to initiate formal proceedings under Article 31 SCA. Accordingly, ESA suggests that the Court should declare the present application inadmissible.

26 Having regard further to *Aleris Ungplan*, ESA submits also that its decision has no legal effect on the position of the applicant. It contends that this circumstance serves as another justification for the well-established case law of the Court of Justice of the European Union ("ECJ"), according to which a decision of the Commission whether or not to commence proceedings cannot be reviewed in an action for annulment brought by a private party.

27 On a general note, the applicant agrees with ESA that, pursuant to Article 31 SCA, it is at ESA's discretion whether to bring a matter before the Court. The applicant further agrees that the SCA provisions which correspond with provisions of the TFEU should be interpreted in a similar manner as a consequence

of the principle of homogeneity. By reference to ECJ case law, the applicant submits that – as a main rule – natural and legal persons cannot invoke Article 256 TFEU in order to obtain a declaration that the Commission has failed to initiate infringement proceedings.

28 However, the applicant contends that ESA has infringed its duty to state the reasons on which its decision is based under Article 16 SCA. It submits that compliance with the duty to give reasons is a key procedural requirement.

29 Moreover, the applicant argues that the reasoning must not be too vague or inconsistent. Instead, it must be coherent and mention figures and essential facts upon which the decision relies. In the applicant's view, however, ESA's reasoning in the contested decision does not provide enough information to ascertain the circumstances under which ESA has applied Directive 2004/18.

30 Furthermore, the applicant contends that ESA has infringed its special duty under Article 23 SCA to ensure that the rules of the EEA Agreement are upheld by the EEA/EFTA States.

31 In response to ESA's submission that it did not assess the applicant's complaint further because the national authority had already taken its decision in the procurement proceedings, the applicant contends that this cannot be considered a legitimate argument. Consequently, the applicant asserts that ESA has failed to meet the requisite standard of assessment in procurement cases. In particular, ESA should have assessed whether there had been a breach of the fundamental principles of EEA law.

32 As essential procedural requirements have not been met, the applicant asserts that it must be found to have legal interest.

IV FINDINGS OF THE COURT

33 Article 88(1) RoP provides that the Court may, where an action is manifestly inadmissible, by reasoned order, and without taking further steps in the proceedings, give a decision on the action. After considering the submissions of the parties pursuant to

Article 87(1) and (2) RoP, the Court has decided to base its assessment of the case on Article 88(1) RoP.

34 By the present action, brought under the second paragraph of Article 36 SCA, the applicant seeks the annulment of Decision No 507/12/COL of 19 December 2012 by which ESA discontinued its examination of the complaint submitted by the applicant without taking further action on the breaches alleged therein.

35 The applicant submits that the application does not concern Article 31 SCA, but rather the special procedures relating to public procurement contracts under Article 23 SCA, according to which ESA is obliged to act. In this regard, the Court notes that, according to Article 23 SCA, the process entailed in the special procedures for public procurement is subject to the provisions of Protocol 2 to the SCA.

36 Under Article 1(1) of that Protocol, ESA may, without prejudice to Articles 31 and 32 SCA, invoke the procedure for which the Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of EEA procurement provisions has been committed during a contract award procedure falling within the scope of the acts referred to in Annex XVI to the EEA Agreement.

37 The Court has repeatedly recognised the principle of procedural homogeneity and referred in particular to considerations of equal access to justice and compliance with judgments rendered in infringement proceedings for parties appearing before the EEA courts (see Case E-14/11 *DB Schenker* v *ESA* [2012] EFTA Ct. Rep. 1178, paragraph 77 and case law cited). Moreover, the Court has held that homogeneity cannot be restricted to the interpretation of provisions whose wording is identical in substance to parallel provisions of EU law (see *DB Schenker* v *ESA*, cited above, paragraph 78, and the order of the Court of 7 October 2013 in Joined Cases E-4/12 and E-5/12 *Risdal Touring* and *Konkurrenten.no* v *ESA*, not yet reported, paragraph 104).

38 The second paragraph of Article 36 SCA corresponds in substance to the fourth paragraph of Article 263 TFEU (see, *inter alia*, Case E-5/07 *Private Barnehagers Landsforbund* [2008] EFTA Ct. Rep. 62, paragraph 48). Although it is not required to do so pursuant to Article 3(2) SCA, in assessing the application for annulment pursuant to the second paragraph of Article 36 SCA, the Court finds it appropriate to take account of the reasoning in the case law of the EU courts concerning the fourth paragraph of Article 263 TFEU.

39 The procedure for direct intervention, defined in Article 23 SCA and Protocol 2 to the SCA, corresponds in substance to the special procedures relating to public procurement contracts laid down in Article 3 of Council Directive 89/665 and Article 8 of Council Directive 92/13/EEC. That procedure can neither derogate from nor replace the powers of ESA under Article 31 SCA or the Commission under Article 258 TFEU (see *Aleris Ungplan* v *ESA*, cited above, paragraphs 25 to 27, and case law cited).

40 According to this case law, it is irrelevant, when deciding on the admissibility of infringement proceedings in the EFTA pillar of the EEA, whether or not ESA invoked the special procedure in relation to public procurement contracts. ESA alone is competent to decide whether it is appropriate to bring proceedings under the first paragraph of Article 31 SCA for failure to fulfil obligations. Furthermore, the choice between that procedure and the special procedure in matters of public procurement is within ESA's discretion (see *Aleris Ungplan* v *ESA*, cited above, paragraph 26).

41 Private applicants do not have the right to challenge a refusal by ESA to initiate proceedings against an EEA/EFTA State for failure to fulfil its obligations under the EEA Agreement (see *Aleris Ungplan* v *ESA*, cited above, paragraph 27, and case law cited).

42 That conclusion is not undermined by the applicant's argument that ESA allegedly infringed the applicant's procedural rights, such as the duty to state reasons (see, by comparison, the order of the General Court in Case T-202/02 *Makedoniko Metro and Michaniki* v *Commission* [2004] ECR II-181, paragraph 45).

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

44 For the sake of completeness, it is recalled that the findings contained in ESA's decision to close the case do not have the effect of resolving the dispute between the applicant and the Norwegian authorities as to the legality of the procurement procedures undertaken by those authorities (see *Aleris Ungplan* v *ESA*, cited above, paragraph 28 and case law cited).

V COSTS

45 Under Article 66(2) RoP, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since ESA has requested that the applicant be ordered to pay the costs and the latter has been unsuccessful, the applicant must be ordered to pay the costs.

On the grounds stated above,

THE COURT

hereby orders:

1. The application is dismissed as inadmissible.

2. The applicant bears the costs of the proceedings.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Luxembourg, 23 October 2013.

Gunnar Selvik Carl Baudenbacher

Registrar President


EFTA COURT

Case E-2/12 INT

HOB-vín ehf.

CASE E-2/12 INT

HOB-vín ehf.

(Interpretation of a judgment – Advisory Opinion – Application manifestly inadmissible)

Summary of the Order

1. Article 39 of the Statute of the Court states that, if the meaning or scope of a judgment is in doubt, the Court shall construe it on application by any party establishing an interest therein or by the EFTA Surveillance Authority.

2. Pursuant to Article 95 of the Rules of Procedure ("RoP"), an application for interpretation of a judgment shall be lodged in accordance with the general requirements for the form and content of applications set out in Articles 32 and 33 RoP. In addition, Article 95(1)(b) RoP states that the applicant must specify the passages for which an interpretation is sought.

3. According to the Court's settled case law, Article 34 SCA establishes a special means of judicial cooperation between the Court and national courts with the aim of providing the national courts with the necessary interpretations of elements of EEA law in order to decide the cases before them. Under this system of cooperation, which is intended as a means of ensuring a homogenous interpretation of the EEA Agreement, a national court or tribunal is entitled to request the Court to give an Advisory Opinion on the interpretation of the Agreement.

4. Article 34 SCA provides for direct cooperation between the Court and the national courts irrespective of any steps taken by the parties to the main proceedings. In the course of such proceedings, the parties are merely invited to submit observations within the legal framework set out by the court making the request. It is also the task of such courts alone to assess whether they consider that sufficient guidance is given by an Advisory Opinion or whether it appears to

them that a further request to the Court is required.

5. Therefore, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine the need for an Advisory Opinion in light of the particular circumstances of the case.

6. The parties to the proceedings before the national court are not parties to Advisory Opinion proceedings before the Court. Accordingly, the provisions on the interpretation of judgments in Article 39 of the Statute of the Court and Article 95 RoP do not apply to a judgment given as a reply to a request for an Advisory Opinion under Article 34 SCA.

ORDER OF THE COURT

31 October 2013

(Interpretation of a judgment – Advisory Opinion – Application manifestly inadmissible)

In Case E-2/12 INT,

HOB-vín ehf.,

APPLICATION under Article 39 of the Statute of the Court and Article 95 of the Rules of Procedure for an interpretation of the judgment of the Court of 11 December 2012 in Case E-2/12 *HOB-vín* [2012] EFTA Ct. Rep. 1092,

THE COURT

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

Registrar: Gunnar Selvik,

makes the following

ORDER

I FACTS, PROCEDURE AND THE ARGUMENTS OF THE APPLICANT

1 By letter dated 11 October 2013, HOB-vín ehf. ("the applicant" or "HOB-vín") lodged an application under Article 39 of the Statute of the Court and Article 95 of the Rules of Procedure ("RoP") for an interpretation of the judgment of the Court of 11 December 2012 in Case E-2/12 *HOB-vín* [2012] EFTA Ct. Rep. 1092.

2 In that judgment, the Court replied to a request for an Advisory Opinion from Reykjavík District Court on the compatibility with the EEA Agreement of national rules under which a State monopoly on the retail sale of alcohol may refuse, under certain conditions, to accept for sale alcoholic beverages that are lawfully produced and marketed in another EEA State. The request contained five questions.

3 The applicant requests, first, clarification of the answer provided by the Court to the fifth question from Reykjavík District Court. It submits that the Court has not answered the question conclusively or clearly. In the applicant's view, the question concerned whether the State Alcohol and Tobacco Company of Iceland ("ÁTVR") could be liable to pay compensation pursuant to the principle of State liability under the EEA Agreement. However, according to the applicant, the answer given by the Court does not address the liability of ÁTVR. It is limited to stating that the Icelandic State could be liable to pay compensation for the conduct examined in the judgment.

4 Second, according to the applicant, some readers have doubts about whether the Court has answered the questions put to it concerning whether Article 11 EEA was contravened. However, HOB-vín considers that the Court's answers imply that Article 11 EEA was in fact violated, since Directive 2000/13/EC of 20 March 2000 of the European Parliament and of the Council on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, on which the Court based its answers, is merely a more detailed application of Article 11 EEA.

5 To remove all doubt, HOB-vín requests that the Court issue a statement explaining these aspects of its judgment.

II FINDINGS OF THE COURT

6 Article 88(1) RoP provides that the Court may, where an action is manifestly inadmissible, by reasoned order, and without taking further steps in the proceedings, give a decision on the action. In the present case, the Court considers that it has sufficient information in the application to give a decision without taking further steps in the proceedings.

7 Article 39 of the Statute of the Court states that, if the meaning or scope of a judgment is in doubt, the Court shall construe it on application by any party establishing an interest therein or by the EFTA Surveillance Authority.

8 Pursuant to Article 95 RoP, an application for interpretation of a judgment shall be lodged in accordance with the general requirements for the form and content of applications set out in Articles 32 and 33 RoP. In addition, Article 95(1)(b) RoP states that the applicant must specify the passages for which an interpretation is sought.

9 When interpreting the main part of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), the Statute of the Court or the RoP, the Court is not required by Article 3(1) SCA to follow the reasoning of the EU courts concerning parallel provisions of EU law. However, the Court has repeatedly recognised the principle of procedural homogeneity and referred, in particular, to considerations of equal access to justice and of compliance with judgments rendered in infringement proceedings for parties appearing before the EEA courts (see Case E-14/11 *DB Schenker* v *ESA* [2012] EFTA Ct. Rep. 1178, paragraph 77 and case law cited). Therefore, the case law of the EU courts is nevertheless relevant when the expressions of the main part of the SCA, the Statute of the Court or RoP that are to be interpreted are identical in substance to those in EU law (see Case E-15/10 *Posten Norge* v *ESA* [2012] EFTA Ct. Rep. 246, paragraphs 109 and 110). Moreover, the Court has held that homogeneity cannot be limited to the interpretation of provisions whose wording is identical in substance to parallel provisions of EU law (see *DB Schenker* v *ESA*, cited above, paragraph 78, and order of the Court of 7 October 2013 in Joined Cases E-4/12 and E-5/12 *Risdal Touring and Konkurrenten.no* v *ESA*, not yet reported, paragraph 104).

10 The wording of Article 39 of the Statute of the Court is identical in substance to Article 43 of the Statute of the Court of Justice of the European Union ("ECJ"). Article 95 RoP corresponds in substance to Article 158(3) to (6) of the Rules of Procedure of the ECJ, and Article 129(1) and (3) of the Rules of Procedure of the General Court. Therefore, when assessing applications for interpretation pursuant to Article 39 of the Statute of the

Court and Article 95 RoP, the Court finds it appropriate to take account of the reasoning in the case law on the corresponding rules in EU law.

11 According to the Court's settled case law, Article 34 SCA establishes a special means of judicial cooperation between the Court and national courts with the aim of providing the national courts with the necessary interpretations of elements of EEA law in order to decide the cases before them. Under this system of cooperation, which is intended as a means of ensuring a homogenous interpretation of the EEA Agreement, a national court or tribunal is entitled to request the Court to give an Advisory Opinion on the interpretation of the Agreement (Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraphs 53 to 54, and case law cited; for the different legal situation concerning courts against whose decisions there is no remedy under national law, see paragraphs 57 to 58, and Case E-3/12 *Jonsson*, judgment of 20 March 2013, not yet reported, paragraph 60).

12 Article 34 SCA provides for direct cooperation between the Court and the national courts irrespective of any steps taken by the parties to the main proceedings. In the course of such proceedings, the parties are merely invited to submit observations within the legal framework set out by the court making the request (see, for comparison, orders of the ECJ in Cases 40/70 *Sirena* [1979] ECR 3169, and C-116/96 REV *Reisebüro Binder* [1998] ECR I-1889, paragraph 7).

13 Therefore, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine the need for an Advisory Opinion in light of the particular circumstances of the case (see, *inter alia*, *Irish Bank*, cited above, paragraph 55 and the case law cited).

14 It is also the task of such courts alone to assess whether they consider that sufficient guidance is given by an Advisory Opinion or whether it appears to them that a further request to the Court is required.

15 The parties to the proceedings before the national court are not parties to Advisory Opinion proceedings before the Court. Accordingly, the provisions on the interpretation of judgments in Article 39 of the Statute of the Court and Article 95 RoP do not apply to a judgment given as a reply to a request for an Advisory Opinion under Article 34 SCA (see, for comparison, *Sirena*, and *Reisebüro Binder*, paragraph 8, both cited above, and order of the ECJ in C-345/09 INT *Baumann* [2011] ECR I-28*, paragraph 5). The Court adds that, if the parties to the proceedings before the national court consider that the answers given by the Court are not sufficiently clear, they may at any time ask that court to submit a new request for an Advisory Opinion (see, in that respect, Case E-6/01 *CIBA Speciality Chemicals Water Treatment and Others* [2002] EFTA Ct. Rep. 281, paragraphs 3 to 7).

16 In the EU pillar, it has now been codified in Article 104 of the Rules of Procedure of the ECJ that the rules relating to the interpretation of judgments and orders do not apply to decisions given in reply to a request for a preliminary ruling.

17 Consequently, the application must be dismissed as manifestly inadmissible.

18 For the sake of order, the Court adds that the application does not fulfil the general requirements regarding the form and content of applications set out in Articles 32 and 33 RoP. Nor does it, at least with regard to the second issue for which clarification is requested, fulfil the specific requirement, pursuant to Article 95(1)(b) RoP, that the passages for which interpretation is sought be specified.

On the grounds stated above,

THE COURT

hereby orders:

The application is dismissed as manifestly inadmissible.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Luxembourg, 31 October 2013.

Gunnar Selvik
Registrar

Carl Baudenbacher
President


EFTA COURT

Case E-22/13

Íslandsbanki hf.

v

Gunnar V. Engilbertsson

ORDER OF THE PRESIDENT OF THE COURT

12 November 2013

(Withdrawal of a request for an Advisory Opinion)

In Case E-22/13,

Íslandsbanki hf. *(Jóhannes Karl Sveinsson, Supreme Court Attorney)* v **Gunnar V. Engilbertsson** *(Hjörleifur B. Kvaran, Supreme Court Attorney),*

a request from Hæstiréttur Íslands (the Supreme Court of Iceland) requesting the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice,

THE PRESIDENT OF THE COURT

makes the following

ORDER

By letter dated 9 October 2013, registered at the Court on the same date, a request has been made to the EFTA Court by decision of 8 October 2006 of Hæstiréttur Íslands, for an Advisory Opinion in the case of *Íslandsbanki hf.* (Jóhannes Karl Sveinsson, Supreme Court Attorney) v *Gunnar V. Engilbertsson* (Hjörleifur B. Kvaran, Supreme Court Attorney), on the following questions:

1. Is it compatible with the provisions of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts if the legislation in a State which is a party to the EEA Agreement permits contracts between consumers and suppliers for loans to finance real-estate purchases to contain provisions stating that instalment repayments of the loan are to be linked to a pre-determined index?

2. If the answer to the first question is that the index-linking of repayments of loans taken to finance real-estate purchases is compatible with the provisions of Directive 93/13/EEC, then the

second question is: Does the Directive limit the discretion of the EEA State in question to determine, through legislation or by means of administrative regulations, the factors that are to cause changes in the predetermined index and the methods by which these changes are to be measured?

3. If the answer to the second question is that Directive 93/13/EEC does not restrict the discretion of the Member State referred to in that question, then the third question is: Is a contractual term regarded as having been individually negotiated within the meaning of Article 3(1) of the Directive when a) it is stated in the bond which the consumer signs when taking the loan that his obligation is index-linked and the base index to be used when calculating price-changes is specified in the bond, b) the bond is accompanied by a payment schedule showing estimated and itemised payments to be made on the due dates of the loan, and it is stated in the schedule that these estimates may change in accordance with the indexation provision of the bond, and c) both the consumer and the supplier sign the payment schedule at the same time and in conjunction with the signature of the bond by the consumer?

4. Is the method of calculation of price changes in contracts for loans to finance real-estate purchases regarded as having been explicitly explained to the consumer within the meaning of paragraph 2(d) of the Annex to Directive 93/13/EEC when the circumstances are as described in the third question?

5. Does a State that is party to the EEA Agreement have the option, when implementing Article 6(1) of Directive 93/13/EEC, of either prescribing in domestic legislation that unfair contract terms within the meaning of Article 6(1) of the Directive may be declared non-binding on the consumer, or prescribing in domestic legislation that such terms shall at all times be non-binding on the consumer?

By letter dated 12 November 2013, registered at the Court on the same date, the Hæstiréttur Íslands withdrew the request for an Advisory Opinion.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

Case E-22/13 removed from the Register.

Luxembourg, 12 November 2013.

Carl Baudenbacher	Gunnar Selvik
President	Registrar

Case E-9/13

EFTA Surveillance Authority

v

The Kingdom of Norway

CASE E-9/13

EFTA Surveillance Authority

v

The Kingdom of Norway

(Failure by an EEA State to fulfil its obligations – Commission Directive 2010/48/EU of 5 July 2010 adapting to technical progress Directive 2009/40/EC of the European Parliament and of the Council on roadworthiness tests for motor vehicles and their trailers)

Summary of the Judgment

1. Article 3 EEA imposes upon the EEA States the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement. Under Article 7 EEA, the EEA States are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee.

2. The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion. It is undisputed that Norway did not adopt the measures necessary to implement the Act before the expiry of the time limit given in the reasoned opinion.

3. By failing to adopt the measures necessary to implement the Act referred to at point 16a of Chapter II of Annex XIII to the Agreement on the European Economic Area, i.e. Commission Directive 2010/48/EU of 5 July 2010 adapting to technical progress Directive 2009/40/EC of the European Parliament and of the Council on roadworthiness tests for motor vehicles and their trailers, the Kingdom of Norway has failed to fulfil its obligations under that Act and under Article 7 of the EEA agreement.

JUDGMENT OF THE COURT

15 November 2013

(Failure by an EEA State to fulfil its obligations – Commission Directive 2010/48/EU of 5 July 2010 adapting to technical progress Directive 2009/40/EC of the European Parliament and of the Council on roadworthiness tests for motor vehicles and their trailers)

In Case E-9/13,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Markus Schneider, Deputy Director, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

The Kingdom of Norway, represented by Dag Sørlie Lund, Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, and Ketil Bøe Moen, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents

defendant,

APPLICATION for a declaration that by failing to adopt, or to notify the EFTA Surveillance Authority forthwith of all the measures necessary to implement the Act referred to at point 16a of Chapter II of Annex XIII to the Agreement on the European Economic Area (Commission Directive 2010/48/EU of 5 July 2010 adapting to technical progress Directive 2009/40/EC of the European Parliament and of the Council on roadworthiness tests for motor vehicles and their trailers), as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed (both except for paragraph 3 of Annex II to the Directive on roadworthiness certificates which is only to be implemented by 31 December 2013), the Kingdom of Norway has failed to fulfil its obligations under the Act and under Article 7 of the Agreement.

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

JUDGMENT

I INTRODUCTION

1 By an application lodged at the Court on 28 June 2013, the EFTA Surveillance Authority ("ESA") brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") seeking a declaration from the Court that by failing to adopt, or to notify ESA forthwith of all the measures necessary to implement the Act referred to at point 16a of Chapter II of Annex XIII to the Agreement on the European Economic Area (Commission Directive 2010/48/EU of 5 July 2010 adapting to technical progress Directive 2009/40/EC of the European Parliament and of the Council on roadworthiness tests for motor vehicles and their trailers ("the Directive" or "the Act")), as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed (both except for paragraph 3 of Annex II to the Directive on roadworthiness certificates which is only to be implemented by 31 December 2013), the Kingdom of Norway has failed to fulfil its obligations under the Act and under Article 7 of the Agreement.

II FACTS AND PRE-LITIGATION PROCEDURE

2 By Decision No 55/2011 of 20 May 2011, the EEA Joint Committee amended Annex XIII to the EEA Agreement by adding the Directive to point 16a of that Annex.

3 The Decision entered into force on 21 May 2011. Pursuant to Article 2 of the Directive, the time limit for EEA States to adopt the measures necessary to implement the Directive expired on 31 December 2011. Except for the provisions of paragraph 3 of Annex II to the Directive which shall be implemented by the EEA States by 31 December 2013.

4 By a letter dated 3 January 2012, ESA pointed out to the Norwegian Government that 31 December 2011 was the final date by which measures necessary to implement the Directive should have been taken. In its letter, ESA also requested that the Norwegian Government provide detailed structured information, so that ESA would be able to assess the corresponding national measures for conformity.

5 The Norwegian Government responded in an email dated 19 January 2012, where it stated that it expected the Directive to be implemented in Norway by 1 July 2012, and that the requested documents would be sent to ESA by 2 July 2012.

6 Having received no further information, ESA issued a letter of formal notice to Norway dated 19 April 2012. ESA concluded that, as its information presently stood, Norway had, by failing to adopt or, in any event, to inform ESA of the national measures it had adopted to implement the Act, failed to fulfil its obligations under the Act and under Article 7 EEA.

7 By a letter dated 4 June 2012 the Norwegian Government stated that it expected that a Norwegian regulation implementing the Directive would be adopted by 1 October 2012.

8 Having received no further information, ESA delivered a reasoned opinion to Norway by a letter dated 3 October 2012. ESA maintained the conclusion of its letter of formal notice that by failing to adopt the measures necessary to implement the Act, or in any event, by failing to notify ESA forthwith of the measures necessary it had adopted to implement the Act, Norway had failed to fulfil its obligations under the Act and under Article 7 EEA. Furthermore, ESA required Norway pursuant to Article

31(2) SCA to take the measures necessary to comply with the reasoned opinion within two months following notification thereof, i.e. no later than 3 December 2012. By that date, the Norwegian Government did not respond to ESA's reasoned opinion.

9 By a letter dated 11 December 2012, the Norwegian Government notified ESA of the implementation of the Directive into Norwegian law, referring to national Regulation no. 1039 of 1 November 2012 amending national Regulation No. 591 of 13 May 2009 on periodic roadworthiness tests of vehicles (*forskrift om endring i forskrift om periodisk kontroll av kjøretøy*). The Norwegian Government further stated that the national provisions corresponding to Annex II to the Directive would enter into force on 31 December 2013.

10 By a letter to the Norwegian Government dated 18 December 2012, ESA noted that these submissions seemed to be inconsistent with the information contained in Norwegian Regulation No. 1039/2012 which specified 1 January 2015 as the date of entry into force for the relevant amendments. Therefore, ESA requested the Norwegian Government to clarify the matter.

11 The Norwegian Government responded to that letter by a letter dated 15 January 2013. In the letter it indicated that the Annex to Norwegian Regulation No. 1039/2012 was equivalent to Annex II to the Directive and that the Annex to Norwegian Regulation No. 1039/2012 would enter into force on 1 January 2015. Furthermore, the Norwegian Government submitted that it had decided, in light of ESA's reasoned opinion, to precipitate the implementation of the Annex to the Directive to 31 December 2013, by way of adaptations to the existing instruction for the periodic roadworthiness tests of vehicles, while the existing instruction in its entirety would be replaced by a new Annex to the national regulation on 1 January 2015. As a consequence, the revised instruction for the periodic roadworthiness tests would enter into force on 31 December 2013.

12 The Norwegian Government further explained that the Annex to the national regulation was "systematically adapted" in order to be

compatible with a future data system for electronic registration of periodic roadworthiness tests. As that data system was still under development, and would not be ready before 1 January 2015, temporary measures would be made in the present instruction to ensure the implementation of the Directive in the meantime.

13 In light of this information, ESA decided on 29 May 2012, to bring the matter before the Court pursuant to Article 31(2) SCA.

III PROCEDURE BEFORE THE COURT AND FORMS OF ORDER SOUGHT

14 ESA lodged the present application at the Court on 28 June 2013. The statement of defence from Norway was received on 2 September 2013.

15 The applicant, the EFTA Surveillance Authority, requests the Court to:

1. Declare that by failing (i) to adopt, or (ii) to notify the Authority forthwith of, all the measures necessary to implement the Act referred to at point 16a of Chapter II of Annex XIII to the Agreement on the European Economic Area ("the EEA Agreement") (Commission Directive 2010/48/EU of 5 July 2010 adapting to technical progress Directive 2009/40/EC of the European Parliament and of the Council on roadworthiness tests for motor vehicles and their trailers), as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed (both except for paragraph 3 of Annex II to the Directive on roadworthiness certificates which is only to be implemented by 31 December 2013), the Kingdom of Norway has failed to fulfil its obligations under the Act and under Article 7 of the Agreement.

2. Order the Kingdom of Norway to bear the costs of these proceedings.

16 The defendant, the Kingdom of Norway, requests the Court to:

Declare the application to be founded.

17 For clarification, Norway adds that it has notified ESA of partial implementation measures regarding the Act. Moreover, it states that all remaining amendments will have entered into force by the end of December 2013.

18 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided to dispense with the oral procedure.

IV FINDINGS OF THE COURT

19 Article 3 EEA imposes upon the EEA States the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement (see, *inter alia*, Case E-13/12 *ESA* v *Iceland*, judgment of 5 May 2013, not yet reported, paragraph 13, and the case law cited). Under Article 7 EEA, the EEA States are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee.

20 By Decision No 55/2011 of 20 May 2011, the EEA Joint Committee made the Directive part of the EEA Agreement. The Decision entered into force on 21 May 2011, and the time limit for EFTA States to adopt the measures necessary to implement the Act expired on 31 December 2011, pursuant to Article 2 of the Directive.

21 The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion (see, *inter alia*, *ESA* v *Iceland*, cited above, paragraph 15, and the case law cited). It is undisputed that Norway did not adopt the measures necessary to implement the Act before the expiry of the time limit given in the reasoned opinion.

22 Since Norway did not in fact implement the Act within the prescribed period, the Court does not need to examine the alternative form of order sought for failing to notify ESA of the measures implementing the Act.

23 It must therefore be held that, by failing to adopt the measures necessary to implement the Act referred to at point 16a of Chapter II of Annex XIII to the Agreement on the European Economic Area, the Kingdom of Norway has failed to fulfil its obligations under that Act and under Article 7 of the EEA agreement.

V COSTS

24 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 ESA has requested that the Kingdom of Norway be ordered to pay the costs, and the latter has been unsuccessful, and since none of the exceptions in Article 66(3) apply, the Kingdom of Norway must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that by failing to adopt all the measures necessary to implement the Act referred to at point 16a of Chapter II of Annex XIII to the Agreement on the European Economic Area (Commission Directive 2010/48/EU of 5 July 2010 adapting to technical progress Directive 2009/40/EC of the European Parliament and of the Council on roadworthiness tests for motor vehicles and their trailers), as adapted by the Agreement by way of Protocol 1 thereto, within the time prescribed (both except for paragraph 3 of Annex II to the Directive on roadworthiness certificates which is only to be implemented by 31 December 2013), the Kingdom of Norway has failed to fulfil its obligations under the Act and under Article 7 of the EEA agreement.**

2. **Orders the Kingdom of Norway to bear the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 15 November 2013.

Gunnar Selvik — Carl Baudenbacher

Registrar — President


EFTA COURT

Case E-10/13

EFTA Surveillance Authority
v
Iceland

CASE E-10/13

EFTA Surveillance Authority

v

Iceland

(Failure by an EEA/EFTA State to fulfil its obligations – Directive 2006/54/EC)

Summary of the Judgment

1. Under Article 7 EEA, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. Furthermore, Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement.

2. The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion.

3. Iceland has failed to fulfil its obligations under the Act referred to at point 21b of Annex XVIII to the Agreement on the European Economic Area, that is Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle for equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)), as adapted to the EEA Agreement by Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt all the measures necessary to correctly implement into its national legislation Articles 2(1)(a)-(d) and 2(2)(a)-(b) of the Act within the time prescribed.

JUDGMENT OF THE COURT

15 November 2013

(Failure by an EEA/EFTA State to fulfil its obligations – Directive 2006/54/EC of the European Parliament and of the Council of 6 July 2006 on the implementation of the principle for equal opportunities and equal treatment of men and women in matters of employment and occupation (recast))

In Case E-10/13,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Maria Moustakali, Officer, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

Iceland, represented by Anna Katrín Vilhjálmsdóttir, First Secretary, Ministry for Foreign affairs, acting as Agent,

defendant,

APPLICATION for a declaration that by failing, within the time prescribed, to adopt measures necessary to correctly implement into its national legislation the provisions of Articles 2(1)(a)-(d) and 2(2)(a)-(b) of the Act referred to at point 21b of Annex XVIII to the Agreement on the European Economic Area, (Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle for equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)), as adapted to the Agreement by way of Protocol 1 thereto, Iceland has failed to fulfil its obligations under the Act.

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

JUDGMENT

I INTRODUCTION

1 By application lodged at the Court Registry on 28 June 2013, the EFTA Surveillance Authority ("ESA") brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), for a declaration that, by failing within the time limit prescribed, to adopt measures necessary to correctly implement into its national legislation the provisions of Articles 2(1)(a)-(d) and 2(2)(a)-(b) of the Act referred to at point 21b of Annex XVIII to the Agreement on the European Economic Area, that is Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle for equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23) ("the Directive"), as adapted to the Agreement by way of Protocol 1 thereto, Iceland has failed to fulfil its obligations under the Directive.

II FACTS AND PRE-LITIGATION PROCEDURE

2 Decision No 33/2008 of 14 March 2008 of the EEA Joint Committee amended Annex XVIII to the EEA Agreement by adding the Directive to point 21b of that Annex. The Decision entered into force on 1 February 2009. The time limit for the EFTA States

to adopt the measures necessary to implement the Act expired on the same date.

3 On 11 May 2009, Iceland provided ESA with a list of the national measures implementing the Directive, on the basis of which ESA undertook a conformity assessment. On 2 December 2010 ESA requested Iceland to submit a table of correspondence. On 20 July 2011, it submitted a request for information to Iceland, setting out the questions raised by the conformity assessment. On 11 October 2011, Iceland replied to the request for information.

4 On 7 December 2011, ESA issued a letter of formal notice to Iceland. ESA concluded that, due to an incorrect implementation of Articles 2(1)(a)-(d) and 2(2)(a)-(b) of the Directive, Iceland had failed to fulfil its obligations arising from the Directive.

5 On 6 February 2012, the Icelandic Government stated that legislative proposals were being drafted with the aim of correctly transposing the provisions of the Directive, and estimated that the bill would be submitted in the following legislative session of the Parliament, that is in the autumn of 2012.

6 By letter dated 20 June 2012, ESA delivered a reasoned opinion where it maintained its conclusions from the letter of formal notice. Pursuant to the second paragraph of Article 31 SCA, ESA requested Iceland to take the necessary measures to comply with the reasoned opinion within two months following notification thereof, that is no later than 20 August 2012.

7 Iceland replied to ESA's reasoned opinion on 20 August 2012, reiterating that a legislative proposal was being drafted with the aim to correctly transpose the provisions. The intention of the Icelandic Authorities was to submit the proposal to the Icelandic Parliament in October 2012.

8 On 5 March 2013, the Icelandic Government submitted to the Icelandic Parliament a bill for the amendment of the national measures with the purpose of addressing ESA's concerns.

However, the bill was neither discussed nor adopted during the parliamentary session which ended on 28 March 2013.

9 On 29 May 2013, ESA decided to bring the matter before the Court.

III PROCEDURE AND FORMS OF ORDER SOUGHT

10 ESA lodged the present application at the Court Registry on 28 June 2013.

11 Iceland submitted a statement of defence which was registered at the Court on 2 September 2013. The reply from ESA was registered at the Court on 20 September 2013. By e-mail of 8 October 2013, Iceland waived its right to submit a rejoinder.

12 The applicant, ESA, requests the Court to:

1. Declare that by failing to implement correctly Articles 2(1)(a)-(d) and Articles 2(2)(a)-(b) of the Act referred to at point 21b in Annex XVIII to the Agreement on the European Economic Area (Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment occupation (recast)), as adapted to the EEA Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations under the Act.

2. Order Iceland to bear the costs of these proceedings.

13 The defendant, Iceland, does not dispute the declaration sought by the applicant. However, in Iceland's view, the delay in implementation results from the legislative procedure. A draft bill needed for the correct implementation was presented to the Icelandic Parliament for its 2012-2013 legislative session, but due to an exceptionally short session preceding parliamentary elections, the bill was not discussed and accordingly not passed by Parliament. However, the Icelandic Government intends to reintroduce such a bill to Parliament for the legislative session which was scheduled to start on 1 October 2013.

14 Therefore, Iceland requests the Court to:

Order each party to bear its own costs of the proceedings.

15 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided to dispense with the oral procedure.

IV FINDINGS OF THE COURT

16 Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement (see, *inter alia*, Case E-13/12 *ESA* v *Iceland*, judgment of 5 May 2013, not yet reported, paragraph 13, and the case law cited). Under Article 7 EEA, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. An obligation to implement the Directive also follows from Article 33 of the Directive.

17 Decision 33/2008 of the EEA Joint Committee of 14 March 2008 entered into force on 1 February 2009. The time limit for EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

18 The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion (see, *inter alia*, *ESA* v *Iceland*, cited above, paragraph 15, and the case law cited). It is undisputed that Iceland did not adopt measures necessary to implement correctly Articles 2(1)(a)-(d) and Articles (2(2)(a)-(b) of the Directive before the expiry of the time limit given in the reasoned opinion.

19 It must therefore be held that, by failing within the time limit prescribed to adopt the measures necessary to correctly implement into its national legislation the provisions of Articles 2(1)(a)-(d) and 2(2)(a)-(b) of the Directive, Iceland has failed to fulfil its obligations under the Directive.

V COSTS

20 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 EFTA Surveillance Authority has requested that Iceland be ordered to pay the costs and the latter has been unsuccessful, and since none of the exceptions in Article 66(3) apply, Iceland must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by failing within the time limit prescribed to adopt the measures necessary to correctly implement into its national legislation Articles 2(1)(a)-(d) and 2(2)(a)-(b) of the Act referred to at point 21b of Annex XVIII to the Agreement on the European Economic Area (Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle for equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)), as adapted to the Agreement by way of Protocol 1 thereto, Iceland has failed to fulfil its obligations under the Act.**

2. **Orders Iceland to bear the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 15 November 2013.

Gunnar Selvik Carl Baudenbacher

Registrar President

Case E-11/13

EFTA Surveillance Authority
v
Iceland

CASE E-11/13

EFTA Surveillance Authority

v

Iceland

(Failure by a Contracting Party to fulfil its obligations – Directive 2002/92/EC of 9 December 2002 on insurance mediation)

Summary of the Judgment

1. Under Article 7 EEA, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. Furthermore, Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement.

2. The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion.

3. By failing to correctly implement Article 9, paragraphs 1 and 2, and Article 10 of the Act referred to at point 13b of Annex IX to the EEA Agreement, i.e. Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, as adapted to the EEA Agreement by Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations pursuant to that Act and pursuant to Article 7 of the EEA Agreement.

JUDGMENT OF THE COURT

15 November 2013

(Failure by a Contracting Party to fulfil its obligations – Directive 2002/92/EC of 9 December 2002 on insurance mediation)

In Case E-11/13,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Clémence Perrin and Maria Moustakali, Officers, Department of Legal and Executive Affairs, acting as Agents,

applicant,

v

Iceland, represented by Anna Katrín Vilhjálmsdóttir, Ministry for Foreign Affairs, acting as Agent,

defendant,

APPLICATION for a declaration that, by failing to correctly implement Article 9, paragraphs 1 and 2, and Article 10 of the Act referred to at point 13b of Annex IX to the Agreement on the European Economic Area (Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation), as adapted to the EEA Agreement by Protocol 1 thereto, Iceland has failed to fulfil its obligations arising under that Act and under Article 7 of the EEA Agreement.

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

JUDGMENT

I THE APPLICATION

1 By application lodged at the Court Registry on 28 June 2013, the EFTA Surveillance Authority ("ESA") brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), for a declaration that by failing to correctly implement Articles 9 and 10 of the Act referred to at point 13b of Annex IX to the Agreement on the European Economic Area (Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation) ("the Directive"), as adapted to the EEA Agreement by Protocol 1 thereto, Iceland has failed to fulfil its obligations arising pursuant to that Act and pursuant to Article 7 of the EEA Agreement.

II FACTS AND PRE-LITIGATION PROCEDURE

2 Decision No 115/2003 of 26 September 2003 of the EEA Joint Committee ("Decision 115/2003") amended Annex IX to the EEA Agreement by adding the Directive to point 13b of that Annex. Iceland indicated constitutional requirements for the purposes of Article 103 EEA.

3 As Iceland notified on 31 March 2004 that the constitutional requirements had been fulfilled, Decision 115/2003 entered into force on 1 May 2004. According to Article 16(1) of the Directive, the time limit for the EEA States to adopt the measures necessary to implement the Act expired on 15 January 2005.

4 In a letter dated 9 May 2008, Iceland provided ESA with a completed table of correspondence for the Directive on the basis of which ESA undertook the conformity assessment. The national measures indicated in the table of correspondence as implementing measures were:

A. Act No. 32/2005 on Insurance Mediation.

B. Act No. 60/1994 on Insurance Activity.

C. Act No. 30/2004 on Insurance Contracts.

D. Regulation No. 590/2005 on Trusteeship Accounts of Insurance Intermediaries and Tied Insurance Intermediaries.

E. Regulation No. 592/2005 on Professional Indemnity Insurance.

F. Regulation No. 972/2006 on Examination of Insurance Mediation.

G. Act No. 87/1998 on Official Supervisions of Financial Operations.

5 By letters dated 3 September 2009, 18 March 2010, 10 and 16 September 2011, ESA requested Iceland to submit information on the implementation measures taken by Iceland with regard to Article 9, paragraphs 1 and 2, and Article 10 of the Directive.

6 Iceland replied to these requests for information on 25 October 2009, 7 June 2011 and 21 November 2011 respectively.

7 On 21 March 2012, ESA sent a letter of formal notice to Iceland, in which it concluded that due to the incorrect implementation of Article 9, paragraphs 1 and 2 and Article 10 of the Directive, Iceland had failed to fulfil its obligations arising from the Directive, in particular Article 9, paragraphs 1 and 2 and Article 10 thereof, and pursuant to Article 7 EEA.

8 In its reply on 18 June 2012 to the letter of formal notice, Iceland acknowledged that changes needed to be made to Icelandic law to fully implement Article 9, paragraphs 1 and 2, and Article 10 of the Directive and stated that the necessary changes would be submitted before the Icelandic Parliament in autumn 2012.

9 ESA issued a reasoned opinion on 4 July 2012, in which it maintained its conclusions made in its letter of formal notice. Pursuant to the first paragraph of Article 31 SCA, ESA concluded that by failing to correctly implement Article 9, paragraphs 1 and 2 and Article 10 of the Directive, Iceland had failed to fulfil its obligations pursuant to the Directive and pursuant to Article 7 EEA.

10 Pursuant to the second paragraph of Article 31 SCA, ESA requested Iceland to take the necessary measures to comply with

the reasoned opinion within two months following notification thereof, i.e. no later than 4 September 2012.

11 In its reply to the reasoned opinion dated 29 August 2012, Iceland reiterated that it acknowledged the shortcomings in its national legislation. By email dated 2 April 2013, Iceland informed ESA that the amending bills had yet to be adopted by the Icelandic Parliament.

III PROCEDURE BEFORE THE COURT AND FORMS OF ORDER SOUGHT

12 On 28 June 2013, the present application was lodged at the Court Registry.

13 On 2 September 2013, Iceland lodged its statement of defence.

14 On 20 September 2013, ESA's reply was registered at the Court.

15 On 8 October 2013, Iceland by way of an email, waived its right to submit a rejoinder.

16 The applicant, the EFTA Surveillance Authority, requests the Court to:

(1) Declare that by failing to correctly implement Article 9, paragraphs 1 and 2, and Article 10 of the Act referred to at point 13b of Annex IX to the Agreement on the European Economic Area (Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation), as adapted to the EEA Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations pursuant to that Act and pursuant to Article 7 of the EEA Agreement.

(2) Order Iceland to bear the costs of these proceedings.

17 The defendant, Iceland, does not dispute the declaration sought by the applicant, but requests the Court to:

Order each party to bear its own costs of the proceedings.

18 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided to dispense with the oral procedure in accordance with Article 41(2) of the Rules of Procedure ("RoP").

IV FINDINGS OF THE COURT

19 Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement (see, inter alia., Case E-13/12 ESA v Iceland, judgment of 5 May 2013, not yet reported, paragraph 13 and the case law cited). Under Article 7 EEA, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee.

20 EEA Joint Committee Decision No 115/2003 of 26 September 2003 entered into force on 1 May 2004. The obligation to implement also follows from Article 16(1) of the Directive, according to which transposition by the EU Member States was required before 15 January 2005. Decision 115/2003 did not set a separate EEA time-limit for the implementation of the Directive into national law.

21 The question of whether an EEA/EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion (see, inter alia, ESA v Iceland, cited above, paragraph 15, and the case law cited). It is undisputed that by the expiry of the time limit given in the reasoned opinion, Iceland had not adopted such measures as to correctly implement Article 9, paragraphs 1 and 2, and Article 10 of the Directive.

22 It must therefore be held that, by failing within the time limit prescribed to adopt the measures necessary to implement into its national legislation Article 9, paragraphs 1 and 2, and Article 10 of the Act referred to at point 13b of Annex IX to the EEA Agreement (Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation), as adapted to the EEA Agreement by way of Protocol 1 thereto, Iceland has failed to fulfil its obligations pursuant to the Act, as well as pursuant to Article 7 EEA.

V COSTS

23 Under Article 66(2) RoP, the unsuccessful party is to be ordered to bear the costs of the proceedings if it has been applied for in the successful party's pleadings, and if none of the exceptions set out in Article 66(3) RoP apply to the case.

24 Iceland has requested the Court to order that each party should bear its own costs of the proceedings, with reference to the circumstances of the case.

25 Since Iceland has neither specified what circumstances of the case, nor set out any other reason as to why any of the exceptions set out in Article 66(3) RoP should apply, and being the unsuccessful party, Iceland is ordered to pay the costs of the proceedings in accordance with Article 66(2) RoP.

On those grounds,

THE COURT

hereby:

1. **Declares that, by failing to correctly implement Article 9, paragraphs 1 and 2, and Article 10 of the Act referred to at point 13b of Annex IX to the Agreement on the European Economic Area (Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation), as adapted to the EEA Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations pursuant to that Act and pursuant to Article 7 of the EEA Agreement.**

2. **Orders Iceland to bear the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 15 November 2013

Gunnar Selvik Carl Baudenbacher

Registrar President

Case E-6/13

Metacom AG
v
Rechtsanwälte Zipper
& Collegen

CASE E-6/13

Metacom AG

v

Rechtsanwälte Zipper & Collegen

(Lawyers' freedom to provide cross-border services – Directive 77/249/EEC – Self-representation – Notification requirement in national law – Consequences of failure to notify)

Summary of the Judgment

1. Article 36(1) EEA prohibits any restriction on the free movement of services. The objective of the provision is to liberalise all gainful activity not covered by the free movement of goods, persons and capital. Pursuant to the third paragraph of Article 37 EEA, a person providing a service may temporarily pursue the activity in the State where the service is rendered, under the same conditions as are imposed by that State on its own nationals.

2. Directive 77/249/EEC ("the Directive") lays down more detailed rules with respect to the provision of cross-border services by lawyers. As stated in its preamble, the Directive only contains measures intended to facilitate the effective pursuit of the activities of lawyers by way of the provision of services. The Directive must be interpreted in light of the general principles enshrined in the EEA Agreement governing the freedom to provide services.

RECHTSSACHE E-6/13

Metacom AG

und

Rechtsanwälte Zipper & Collegen

(Ausübung des freien Dienstleistungsverkehrs durch Rechtsanwälte – Richtlinie 77/249/EWG – Vertretung in eigener Sache – Meldepflicht gemäss nationalem Recht – Folgen der Unterlassung der Meldung)

Summary of the Judgment

1. Artikel 36 Absatz 1 des EWR-Abkommens verbietet jegliche Beschränkung des freien Dienstleistungsverkehrs. Ziel der Bestimmung ist die Liberalisierung jeder gegen Entgelt geleisteten Tätigkeit, die nicht unter den freien Waren- und Kapitalverkehr und unter die Freizügigkeit der Personen fällt (vgl. entsprechend u. a. Verbundene Rechtssachen 286/82 und 26/83 Luisi und Carbone, Slg. 1984, 377, Randnr. 10, und, aus jüngerer Zeit, Rechtssache C-221/11 Demirkan, Urteil vom 24. September 2013, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 34). Gemäss dem dritten Absatz von Artikel 37 des EWR-Abkommens kann ein Dienstleistender seine Tätigkeit vorübergehend in dem Staat ausüben, in dem die Leistung erbracht wird, und zwar unter den Voraussetzungen, welche dieser Staat für seine eigenen Angehörigen vorschreibt.

2. Die Richtlinie 77/249/EWG („die Richtlinie") beinhaltet im Hinblick auf die grenzüberschreitende Erbringung von Dienstleistungen durch Rechtsanwälte ausführlichere Vorschriften. Wie in der Präambel festgehalten, enthält die Richtlinie nur Massnahmen zur Erleichterung der tatsächlichen Ausübung von Rechtsanwaltstätigkeiten durch die Erbringung von Dienstleistungen. Die Richtlinie ist im Lichte der im EWR-Abkommen verankerten allgemeinen Prinzipien zum freien Dienstleistungsverkehr auszulegen.

3. According to the first paragraph of Article 37 EEA, only services normally provided for remuneration shall be deemed to be services within the meaning of the EEA Agreement. For the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes a consideration for the service rendered. In this regard, it is not necessary that the remuneration be paid in money, as long as the consideration for the provision of the service is capable of being expressed in money.

4. Representation of a client in legal proceedings is a service normally provided for remuneration. In some jurisdictions, lawyers are entitled to represent themselves in legal proceedings. In such situations where lawyers act on their own behalf, the provider and the recipient of the service are the same person. However, this does not alter the fact that the service provided is a service normally provided for remuneration.

5. A lawyer representing himself in judicial proceedings may be awarded compensation for costs incurred during the proceedings. This effectively means that the service provided is paid for not by the recipient of the service, but, instead, by the opposing party in the proceedings. In this regard, it should be kept in mind that Article 37 EEA does not require that the service be paid for by those for whom it is performed.

6. Consequently, a lawyer bringing proceedings in his own name in an EEA State other than the one in which he is established may rely on the freedom to provide services and the Directive if he is acting in a professional capacity, and if the national legal order of the host State allows a lawyer to act on his own behalf in the capacity as a lawyer in legal proceedings. If these conditions are fulfilled, the Directive will apply.

7. Article 7(1) of the Directive permits the competent authority of the host EEA State to request the person providing the services to establish his qualification as a lawyer, that is, to show that he is

3. Nach dem ersten Absatz von Artikel 37 des EWR-Abkommens gelten nur Dienstleistungen, die in der Regel gegen Entgelt erbracht werden, als Dienstleistungen im Sinne des EWR-Abkommens. Für die Zwecke dieser Bestimmung besteht die massgebliche Eigenschaft eines Entgelts in dem Umstand, dass es sich dabei um eine Gegenleistung für die erbrachte Dienstleistung handelt. In diesem Zusammenhang ist es nicht erforderlich, dass das Entgelt monetär ausgezahlt wird, solange die Gegenleistung für die Erbringung der Dienstleistung als Geldwert ausgedrückt werden kann.

4. Einem Rechtsanwalt, der sich im Bereich der Rechtspflege selbst vertritt, kann ein Kostenersatz für die im Verfahren angefallenen Kosten zugesprochen werden. Dies bedeutet, dass die erbrachte Dienstleistung nicht vom Empfänger der Dienstleistung vergütet wird, sondern stattdessen von der Gegenpartei im Verfahren. In diesem Zusammenhang sollte berücksichtigt werden, dass Artikel 37 des EWR-Abkommens nicht verlangt, dass die Dienstleistung von demjenigen bezahlt wird, dem sie zugutekommt.

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6. Dementsprechend, kann sich ein Rechtsanwalt, der in einem EWR-Staat, bei dem es sich nicht um den Staat handelt, in dem er niedergelassen ist, in eigener Sache prozessiert, auf die Dienstleistungsfreiheit und die Richtlinie berufen, wenn er in seiner beruflichen Funktion als Rechtsanwalt tätig wird und wenn es die nationale Rechtsordnung des Aufnahmestaats Rechtsanwälten erlaubt, in eigener Sache als Rechtsanwalt tätig zu werden. Sind diese Voraussetzungen erfüllt, ist die Richtlinie anwendbar.

7. Artikel 7 Absatz 1 der Richtlinie ermöglicht der zuständigen Stelle im EWR-Aufnahmestaat, vom Dienstleistungserbringer zu verlangen, dass er seine Eigenschaft als Rechtsanwalt nachweist,

entitled to pursue his professional activities under the national designation in his home EEA State, as defined in Article 1(2). As pointed out by ESA and the Commission, this can often be easily done, as many European lawyers carry an identification card issued by the Chamber of Lawyers or Bar Association with which they are registered.

8. A national rule whereby a lawyer established in another EEA State is required in all circumstances, and on his own motion, not only to provide documentation to establish his qualifications as a lawyer, but also to notify the competent authorities of the host State prior to providing services in that State, and to renew the notification yearly, goes beyond what a host State is permitted to request pursuant to Article 7(1) of the Directive.

9. Moreover, such a compulsory requirement to notify the Chambers of Lawyers prior to commencing any activities is liable to dissuade those lawyers who only intend to provide services in a host EEA State on an occasional basis from proceeding with their plans, and thus render Directive 77/249/EEC ineffective. As such a rule is liable to hinder or render less attractive the provision of cross-border services, it also infringes Article 36(1) EEA.

10. Such a national rule cannot be considered proportionate to the legitimate objective to ensure that a person is a qualified lawyer currently entitled to practise in another EEA State. That objective is already taken into account in the safeguard measure set out in Article 7(1) of the Directive, and it cannot therefore be used to justify verification measures that go beyond what is permitted under that Article.

d. h. zeigt, dass er zur Ausübung seiner beruflichen Tätigkeiten unter der nationalen Bezeichnung in seinem EWR-Herkunftsstaat berechtigt ist, wie in Artikel 1 Absatz 2 festgehalten. Wie von der EFTA-Überwachungsbehörde und der Kommission ausgeführt, kann dieser Nachweis oft einfach geführt werden, da viele europäische Rechtsanwälte einen von ihrer Rechtsanwaltskammer ausgestellten Anwaltsausweis bei sich tragen.

8. Eine nationale Vorschrift, die von einem in einem anderen EWR-Staat niedergelassenen Rechtsanwalt fordert, dass er unter allen Umständen und aus eigenem Antrieb nicht nur seine Eigenschaft als Rechtsanwalt nachweist, sondern der zuständigen Stelle im Aufnahmestaat vor der Erbringung von Dienstleistungen in diesem Staat Meldung erstattet und diese Meldung einmal jährlich erneuert, geht über das hinaus, was ein Aufnahmestaat gemäss Artikel 7 Absatz 1 der Richtlinie verlangen darf.

9. Zudem kann eine solche zwingende Anforderung zur Meldung bei der Rechtsanwaltskammer vor der Aufnahme von Tätigkeiten Rechtsanwälte, die nur die gelegentliche Erbringung von Dienstleistungen in einem EWR-Aufnahmestaat beabsichtigen, davon abbringen, ihre Pläne zu verwirklichen und Richtlinie 77/249/EWG dadurch wirkungslos machen. Da davon auszugehen ist dass eine solche Regelung die Erbringung grenzüberschreitender Dienstleistungen behindert oder weniger attraktiv macht, liegt ausserdem ein Verstoss gegen Artikel 36 Absatz 1 EWR-Abkommen vor.

10. Eine nationale Vorschrift wie die in Frage stehende kann jedoch nicht als verhältnismässig zur Erreichung des legitimen Ziels betrachtet werden, sicherzustellen, dass es sich um einen Rechtsanwalt handelt, der derzeit seine Tätigkeit in einem anderen EWR-Staat ausüben darf. Dieses Ziel wird bereits in der in Artikel 7 Absatz 1 der Richtlinie vorgesehenen Schutzmassnahme berücksichtigt und kann daher nicht zur Rechtfertigung von Überprüfungsmassnahmen herangezogen werden, die über das hinausgehen, was laut diesem Artikel zulässig ist.

JUDGMENT OF THE COURT

27 November 2013 *

(Lawyers' freedom to provide cross-border services – Directive 77/249/EEC – Self-representation – Notification requirement in national law – Consequences of failure to notify)

In Case E-6/13,

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 Fürstliche Landgericht des Fürstentums Liechtenstein (Princely Court of the Principality of Liechtenstein), in the case of

Metacom AG

and

Rechtsanwälte Zipper & Collegen

concerning the interpretation of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of the freedom to provide services,

THE COURT,

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

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

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

* Language of the request: German.

URTEIL DES GERICHTSHOFS

27. November 2013 *

(Ausübung des freien Dienstleistungsverkehrs durch Rechtsanwälte – Richtlinie 77/249/EWG – Vertretung in eigener Sache – Meldepflicht gemäss nationalem Recht – Folgen der Unterlassung der Meldung)

In der Rechtssache E-6/13,

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

Metacom AG

und

Rechtsanwälte Zipper & Collegen

betreffend die Auslegung der Richtlinie 77/249/EWG des Rates vom 22. März 1977 zur Erleichterung der tatsächlichen Ausübung des freien Dienstleistungsverkehrs der Rechtsanwälte, erlässt

DER GERICHTSHOF

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

Kanzler: Gunnar Selvik,

unter Berücksichtigung der schriftlichen Erklärungen

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

* Sprache des Antrags: Deutsch.

– the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Markus Schneider, Deputy Director, Department of Legal & Executive Affairs, acting as Agents; and

– the European Commission ("the Commission"), represented by Hans Stovlbaek and Nicola Yerrell, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Liechtenstein Government, represented by Dr Andrea Entner-Koch; ESA, represented by Markus Schneider; and the Commission, represented by Nicola Yerrell, at the hearing on 2 October 2013,

gives the following

JUDGMENT

I LEGAL BACKGROUND

EEA law

1 Article 36(1) EEA reads:

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

2 Pursuant to the first paragraph of Article 37 EEA, "services shall be considered services within the meaning of this Agreement where they are normally provided for remuneration".

3 Pursuant to Article 39 EEA, the provisions of, *inter alia*, Article 30 EEA shall apply to the matters covered by Chapter 3 (services) of the Agreement. Pursuant to Article 30 EEA, the Contracting Parties shall take the necessary measures,

– der EFTA-Überwachungsbehörde, vertreten durch Xavier Lewis, Direktor, und Markus Schneider, Stv. Direktor, Abteilung Rechts- und Verwaltungsangelegenheiten, als Bevollmächtigte;

– der Europäischen Kommission (im Folgenden: die Kommission), vertreten durch Hans Stovlbaek und Nicola Yerrell, Mitarbeiter des Juristischen Diensts der Kommission, als Bevollmächtigte;

unter Berücksichtigung des Sitzungsberichts,

nach Anhörung der mündlichen Ausführungen der Regierung des Fürstentums Liechtenstein, vertreten durch Dr. Andrea Entner-Koch; der EFTA-Überwachungsbehörde, vertreten durch Markus Schneider; und der Kommission, vertreten durch Nicola Yerrell, in der Sitzung vom 2. Oktober 2013

folgendes

URTEIL

I RECHTLICHER HINTERGRUND

EWR-Recht

1 Artikel 36 Absatz 1 des EWR-Abkommens lautet:

Im Rahmen dieses Abkommens unterliegt der freie Dienstleistungsverkehr im Gebiet der Vertragsparteien für Angehörige der EG-Mitgliedstaaten und der EFTA-Staaten, die in einem anderen EG-Mitgliedstaat beziehungsweise in einem anderen EFTA-Staat als demjenigen des Leistungsempfängers ansässig sind, keinen Beschränkungen.

2 Gemäss dem ersten Absatz von Artikel 37 des EWR-Abkommens sind „Dienstleistungen im Sinne dieses Abkommens [....] Leistungen, die in der Regel gegen Entgelt erbracht werden".

3 Gemäss Artikel 39 des EWR-Abkommens finden die Bestimmungen u. a. von Artikel 30 des EWR-Abkommens auf das von Kapitel 3 (Dienstleistungen) des Abkommens geregelte Sachgebiet Anwendung. Laut Artikel 30 des EWR-Abkommens treffen die Vertragsparteien die erforderlichen Massnahmen

contained in Annex VII to the Agreement, to make it easier for persons to take up and pursue activities as workers and self-employed persons.

4 Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17) ("the Directive") is referred to at point 2 of Annex VII to the EEA Agreement (mutual recognition of professional qualifications).

5 Article 1 of the Directive reads:

1. This Directive shall apply, within the limits and under the conditions laid down herein, to the activities of lawyers pursued by way of provision of services. ...

2. "Lawyer" means any person entitled to pursue his professional activities under one of the following designations: ... Germany: Rechtsanwalt.

6 Article 2 of the Directive reads:

Each Member State shall recognize as a lawyer for the purpose of pursuing the activities specified in Article 1 (1) any person listed in paragraph 2 of that Article.

7 Article 3 of the Directive reads:

A person referred to in Article 1 shall adopt the professional title used in the Member State from which he comes, expressed in the language or one of the languages, of that State, with an indication of the professional organization by which he is authorized to practise or the court of law before which he is entitled to practise pursuant to the laws of that State.

8 Article 4 of the Directive reads:

1. Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions

nach Anhang VII des Abkommens, um Arbeitnehmern und selbständig Erwerbstätigen die Aufnahme und Ausübung von Erwerbstätigkeiten zu erleichtern.

4 Auf Richtlinie 77/249/EWG vom 22. März 1977 zur Erleichterung der tatsächlichen Ausübung des freien Dienstleistungsverkehrs der Rechtsanwälte (ABl. 1977, L 78, 17) (im Folgenden: die Richtlinie) wird unter Punkt 2 von Anhang VII des EWR-Abkommens (gegenseitige Anerkennung beruflicher Qualifikationen) verwiesen.

5 Artikel 1 der Richtlinie lautet:

1. Diese Richtlinie gilt innerhalb der darin festgelegten Grenzen und unter den darin vorgesehenen Bedingungen für die in Form der Dienstleistung ausgeübten Tätigkeiten der Rechtsanwälte. ...

2. Unter „Rechtsanwalt" ist jede Person zu verstehen, die ihre beruflichen Tätigkeiten unter einer der folgenden Bezeichnungen auszuüben berechtigt ist: ... Deutschland: Rechtsanwalt.

6 Artikel 2 der Richtlinie lautet:

Jeder Mitgliedstaat erkennt für die Ausübung der in Artikel 1 Absatz 1 genannten Tätigkeiten alle unter Artikel 1 Absatz 2 fallenden Personen als Rechtsanwalt an.

7 Artikel 3 der Richtlinie lautet:

Jede unter Artikel 1 fallende Person verwendet die in der Sprache oder in einer der Sprachen des Herkunftsstaats gültige Berufsbezeichnung unter Angabe der Berufsorganisation, deren Zuständigkeit sie unterliegt, oder des Gerichtes, bei dem sie nach Vorschriften dieses Staates zugelassen ist.

8 Artikel 4 der Richtlinie lautet:

1. Die mit der Vertretung oder der Verteidigung eines Mandanten im Bereich der Rechtspflege oder vor Behörden zusammenhängenden Tätigkeiten des Rechtsanwalts werden im jeweiligen Aufnahmestaat unter den für die in diesem Staat niedergelassenen Rechtsanwälte vorgesehenen Bedingungen ausgeübt, wobei jedoch das

requiring residence, or registration with a professional organization, in that State.

2. A lawyer pursuing these activities shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes.

9 Article 5 of the Directive reads:

For the pursuit of activities relating to the representation of a client in legal proceedings, a Member State may require lawyers to whom Article 1 applies:

– *to be introduced, in accordance with local rules or customs, to the presiding judge and, where appropriate, to the President of the relevant Bar in the host Member State;*

– *to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority, or with an "avoué" or "procuratore" practising before it.*

10 Article 7 of the Directive reads:

1. The competent authority of the host Member State may request the person providing the services to establish his qualifications as a lawyer.

2. In the event of non-compliance with the obligations referred to in Article 4 and in force in the host Member State, the competent authority of the latter shall determine in accordance with its own rules and procedures the consequences of such non-compliance, and to this end may obtain any appropriate professional information concerning the person providing services. It shall notify the competent authority of the Member State from which the person comes of any decision taken. Such exchanges shall not affect the confidential nature of the information supplied.

Erfordernis eines Wohnsitzes sowie das der Zugehörigkeit zu einer Berufsorganisation in diesem Staat ausgeschlossen sind.

2. Bei der Ausübung dieser Tätigkeit hält der Rechtsanwalt die Standesregeln des Aufnahmestaats neben den ihm im Herkunftsstaat obliegenden Verpflichtungen ein.

9 Artikel 5 der Richtlinie lautet:

Für die Ausübung der Tätigkeiten, die mit der Vertretung und der Verteidigung von Mandanten im Bereich der Rechtspflege verbunden sind, kann ein Mitgliedstaat den unter Artikel 1 fallenden Rechtsanwälten als Bedingung auferlegen,

– *daß sie nach den örtlichen Regeln oder Gepflogenheiten beim Präsidenten des Gerichtes und gegebenenfalls beim zuständigen Vorsitzenden der Anwaltskammer des Aufnahmestaats eingeführt sind;*

– *daß sie im Einvernehmen entweder mit einem bei dem angerufenen Gericht zugelassenen Rechtsanwalt, der gegebenenfalls diesem Gericht gegenüber die Verantwortung trägt, oder mit einem bei diesem Gericht tätigen „avoué“ oder „procuratore“ handeln.*

10 Artikel 7 der Richtlinie lautet:

1. Die zuständige Stelle des Aufnahmestaats kann von dem Dienstleistungserbringer verlangen, daß er seine Eigenschaft als Rechtsanwalt nachweist.

2. Bei Verletzung der im Aufnahmestaat geltenden Verpflichtungen im Sinne des Artikels 4 entscheidet die zuständige Stelle des Aufnahmestaats nach den eigenen Rechts- und Verfahrensregeln über die rechtlichen Folgen dieses Verhaltens; sie kann zu diesem Zweck Auskünfte beruflicher Art über den Dienstleistungserbringer einholen. Sie unterrichtet die zuständige Stelle des Herkunftsstaats von jeder Entscheidung, die sie getroffen hat. Diese Unterrichtung berührt nicht die Pflicht zur Geheimhaltung der Auskünfte.

National law

11 Pursuant to Article 55(1) of the Lawyers Act (*Rechtsanwaltsgesetz*, LGBl 1993 No 41, as amended), nationals of an EEA State who are entitled to engage in professional activity as a lawyer in their home State using one of the designations listed in the annex to the Act shall be authorised to engage in activity as a lawyer in Liechtenstein on a temporary cross-border basis (otherwise known as "European lawyers engaging in the provision of services").

12 However, pursuant to Article 59 of the Lawyers Act, such authorisation is subject to the following requirements:

(1) A European lawyer engaging in the provision of services shall be supervised by the chamber of lawyers.

(2) Prior to the exercise of an activity in Liechtenstein, a European lawyer engaging in the provision of services shall notify the head of the chamber of lawyers of his intention to do so and submit the following evidence:

(a) A certificate evidencing the fact that the service provider lawfully exercises the relevant activity in his home State and that, on the date the certificate is submitted, he is not prohibited, not even on a temporary basis, from the exercise of that activity;

(b) evidence of his nationality; and

(c) that he is covered by professional indemnity insurance within the meaning of Article 25.

(3) The chamber of lawyers shall confirm receipt of the notification without delay. On request, evidence of the notification shall be provided to the courts or administrative authorities.

(3a) Notification shall be renewed once every year if the European lawyer engaging in the provision of services intends in the year in question to provide services in Liechtenstein on a temporary or occasional basis. Furthermore, it shall be renewed immediately, if – with respect to the situation certified – a substantive change has occurred.

Nationales Recht

11 Laut Artikel 55 Absatz 1 des Rechtsanwaltsgesetzes (LGBl. 1993, Nr. 41, in der gültigen Fassung) sind Staatsangehörige eines EWR-Staats, die berechtigt sind, als Rechtsanwalt in ihrem Herkunftsstaat unter einer der im Anhang zu diesem Gesetz aufgeführten Berufsbezeichnungen beruflich tätig zu sein, zur vorübergehenden grenzüberschreitenden Berufsausübung in Liechtenstein zugelassen (dienstleistungserbringende europäische Rechtsanwälte).

12 Allerdings unterliegt die Zulassung laut Artikel 59 des Rechtsanwaltsgesetzes den folgenden Voraussetzungen:

(1) Der dienstleistungserbringende europäische Rechtsanwalt wird durch die Rechtsanwaltskammer beaufsichtigt.

(2) Vor Aufnahme einer Tätigkeit im Inland hat der dienstleistungserbringende europäische Rechtsanwalt seine Absicht dem Vorstand der Rechtsanwaltskammer zu melden und die folgenden Nachweise zu erbringen:

(a) eine Bescheinigung, aus der hervorgeht, dass der Dienstleister die betreffende Tätigkeit im Herkunftsstaat rechtmässig ausübt und dass ihm die Ausübung dieser Tätigkeit zum Zeitpunkt der Vorlage der Bescheinigung nicht, auch nicht vorübergehend, untersagt ist;

(b) ein Nachweis über die Staatsangehörigkeit;

(c) über das Bestehen einer Haftpflichtversicherung im Sinne von Art. 25.

(3) Die Rechtsanwaltskammer bestätigt den Erhalt der Meldung unverzüglich. Die Meldung ist gegenüber Gerichten oder Verwaltungsbehörden auf Verlangen nachzuweisen.

(3a) Die Meldung ist einmal jährlich zu erneuern, wenn der dienstleistungserbringende europäische Rechtsanwalt beabsichtigt, während des betreffenden Jahres vorübergehend oder gelegentlich Dienstleistungen im Inland zu erbringen. Weiters ist sie umgehend zu erneuern, wenn sich eine wesentliche Änderung gegenüber der bisher bescheinigten Situation ergibt.

(4) It shall be the responsibility of the head of the chamber of lawyers

(a) to advise and instruct a European lawyer engaging in the provision of services on matters concerning the professional obligations of a lawyer;

(b) to supervise the discharge of the obligations to which such persons are subject;

(c) to prohibit the exercise of the provision of services and, where appropriate, notify the courts or administrative authorities of that fact if the requirements set out in paragraph 2 above are not satisfied or cease to be satisfied;

(d) to notify the competent authority of the home State of decisions taken in respect of that person.

13 Under Liechtenstein law, the payment of legal fees and expenses is regulated by the Lawyers' Fees Act (*Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten, LGBl 1988 No 9) and by the Lawyers' Fees Regulation (Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten, LGBl 1992 No 69*). Failure on the part of a European lawyer engaged in the provision of services to provide notification in the host State has the consequence that the lawyer concerned may not claim lawyers' fees in accordance with the scale of fees provided for in Liechtenstein.

II FACTS AND PROCEDURE BEFORE THE NATIONAL COURT

14 The case before the national court concerns a claim for a declaratory judgment that a debt does not exist (*Aberkennungsklage*). The parties to the case are Metacom AG, a company registered in Liechtenstein ("the plaintiff"), and Rechtsanwälte Zipper & Collegen, a firm of lawyers based in Germany ("the defendant").

15 In a letter of 13 August 2012, the defendant raised the issue of whether the plaintiff had sufficient standing to sue. However, the plaintiff withdrew the action. The withdrawal was formally noted in an order dated 21 August 2012 by the Princely Court. The order was served on the defendant. On 3 September 2012,

(4) Dem Vorstand der Rechtsanwaltskammer obliegt es,

(a) den dienstleistungserbringenden europäischen Rechtsanwalt in Fragen der Berufspflichten eines Rechtsanwaltes zu beraten und zu belehren;

(b) die Erfüllung der diesen Personen obliegenden Pflichten zu überwachen;

(c) die Dienstleistungsausübung zu untersagen und gegebenenfalls die Gerichte oder Verwaltungsbehörden darüber zu unterrichten, wenn die Voraussetzungen gemäss Abs. 2 nicht oder nicht mehr erfüllt sind;

(d) die zuständige Stelle des Herkunftslandes über Entscheidungen zu unterrichten, die hinsichtlich dieser Person getroffen worden sind.

13 Nach liechtensteinischem Recht ist die Zahlung von Honoraren und Auslagen im Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten (LGBl. 1988, Nr. 9) und der Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten (LGBl. 1992, Nr. 69) geregelt. Unterlässt ein dienstleistungserbringender europäischer Rechtsanwalt die Meldung im Aufnahmestaat, führt dies dazu, dass der betroffene Rechtsanwalt den liechtensteinischen Rechtsanwaltstarif nicht beanspruchen kann.

II SACHVERHALT UND VERFAHREN VOR DEM NATIONALEN GERICHT

14 Die Rechtssache vor dem nationalen Gericht betrifft eine Aberkennungsklage. Die Parteien in der Rechtssache sind die Metacom AG, ein in Liechtenstein eingetragenes Unternehmen (im Folgenden: die Klägerin) und Rechtsanwälte Zipper & Collegen, eine Anwaltskanzlei mit Sitz in Deutschland (im Folgenden: die Beklagte).

15 Mit Schreiben vom 13. August 2012 stellte die Beklagte im Ausgangsverfahren die ausreichende Aktivlegitimation der Klägerin in Frage. Die Klägerin zog die Klage jedoch zurück. Der Rückzug wurde mit Beschluss des Fürstlichen Landgerichts vom 21. August 2012 formell zur Kenntnis genommen. Der Beschluss wurde der Beklagten zugestellt. Am 3. September 2012 reichte

the defendant submitted its defence to the action, arguing that it should be dismissed and that the plaintiff should pay the costs.

16 By order of the Princely Court of 14 September 2012, the defendant's request for costs was rejected. In principle, the plaintiff was to be regarded as the unsuccessful party. However, costs could not be awarded in relation to procedural steps that had taken place after 21 August 2012, or in connection with the defendant's letter of 13 August, which had not been required by the court. In any event, under Articles 58 and 59 of the Liechtenstein Lawyers Act, the defendant, as a firm of German lawyers, had to nominate a lawyer from the list of Liechtenstein lawyers with an address for service in Liechtenstein, and to notify in advance the Head of the Liechtenstein Chamber of Lawyers (*Liechtensteinische Rechtsanwaltskammer*) of its intention to provide services in Liechtenstein.

17 On 24 September 2012, the defendant (now represented by Ritter & Wohlwend Rechtsanwälte, a firm of lawyers based in Liechtenstein), applied for costs amounting to CHF 676.75. The defendant argued that i) it had mandated a Liechtenstein lawyer to represent it at a cancelled hearing scheduled for 12 September, ii) the mandated lawyer only became aware of the withdrawal of the action upon being informed by the court of that cancellation, and iii) the documents to that effect had only been served on the defendant on 18 September.

18 On 4 December 2012, the decision to reject the request for costs was annulled by the Princely Court of Appeal (*Fürstliches Obergericht*) on the grounds that, *inter alia*, no hearing had been held.

19 A hearing was held by the Princely Court on 6 February 2013. At the hearing, the defendant submitted a new schedule for costs.

20 By order of the Princely Court of 7 February 2013, the defendant was given 14 days to produce its notification to the Liechtenstein

die Beklagte eine Klagebeantwortung ein, mit der sie die kostenpflichtige Abweisung der Klage beantragte.

16 Mit Beschluss des Fürstlichen Landgerichts vom 14. September 2012 wurde der Antrag der Beklagten auf Kostenersatz abgewiesen. Grundsätzlich war die Klägerin als unterlegen anzusehen. Allerdings konnte kein Kostenersatz für nach dem 21. August 2012 erfolgte Verfahrenshandlungen oder im Zusammenhang mit dem Schreiben der Beklagten vom 13. August, das vom Gericht nicht aufgetragen war, zugesprochen werden. In jedem Fall musste die Beklagte als deutsche Rechtsanwaltskanzlei gemäss Artikel 58 und 59 des liechtensteinischen Rechtsanwaltsgesetzes einen in die liechtensteinische Rechtsanwaltsliste eingetragenen Rechtsanwalt als Zustellungsbevollmächtigten benennen und ihre Absicht zur Erbringung von Leistungen in Liechtenstein dem Vorstand der Liechtensteinischen Rechtsanwaltskammer vorab melden.

17 Am 24. September 2012 stellte die Beklagte (nunmehr vertreten durch Ritter & Wohlwend Rechtsanwälte, eine Rechtsanwaltskanzlei mit Sitz in Liechtenstein) einen Antrag auf Kostenbestimmung von insgesamt 676,75 CHF. Die Beklagte brachte vor, dass sie i) eine liechtensteinische Rechtsanwältin mit der Wahrnehmung eines abberaumten Verhandlungstermins am 12. September beauftragt hatte, ii) die beauftragte Rechtsanwältin erst von der Klagerücknahme erfuhr, als ihr diese Abberaumung vom Gericht mitgeteilt wurde, und iii) die entsprechenden Schriftstücke der Beklagten erst am 18. September zugestellt worden seien.

18 Am 4. Dezember 2012 wurde der Beschluss zur Abweisung des Antrags auf Kostenersatz vom Fürstlichen Obergericht als nichtig aufgehoben, weil u. a. keine Verhandlung stattgefunden habe.

19 Am 6. Februar 2013 hielt das Fürstliche Landgericht eine Verhandlung ab. In dieser Verhandlung legte die Beklagte ein neues Kostenverzeichnis vor.

20 Mit Beschluss des Fürstlichen Landgerichts vom 7. Februar 2013 wurde der Beklagten eine Frist von 14 Tagen eingeräumt, um die

Chamber of Lawyers and all the accompanying evidence required by Article 59 of the Liechtenstein Lawyers Act. The defendant was also given 14 days within which to submit observations concerning its claim that it was entitled to costs in accordance with the scale set out in the Lawyers' Fees Act and Regulation.

21 On 26 February 2013, the defendant provided a certificate (dated that day) from the Liechtenstein Chamber of Lawyers to the effect that Mr Zipper of Rechtsanwälte Zipper & Collegen had notified his intention of providing cross-border services as a lawyer in Liechtenstein from 20 February 2013, and that he satisfied the other relevant legal requirements. The defendant also pointed out that, had it been aware of the notification requirement, it would have complied with it prior to the start of proceedings.

22 However, since the defendant had not complied with the requirements laid down in Article 59 of the Lawyers Act at the time the costs had been incurred (in August and September 2012), the Princely Court expressed doubts as to whether the defendant could, as a matter of national law, be entitled to claim costs in accordance with the scale set out in the Lawyers' Fees Act and Regulation. It also queried the impact on this question of the principle of the freedom to provide services enshrined in EEA law, e.g. the detailed provisions of the Directive, and, in particular, its Article 7.

23 Consequently, on 9 April 2013 the Princely Court referred the following questions to the Court:

1. *Can a European lawyer bringing proceedings in another EEA State in his own name and not pursuant to the mandate of a third party rely on Council Directive 77/249/EEC of 22 March*

Meldung an die liechtensteinische Rechtsanwaltskammer und die in Artikel 59 des liechtensteinischen Rechtsanwaltsgesetzes vorgesehenen damit verbundenen Nachweise vorzulegen. Zudem wurde der Beklagten eine Frist von 14 Tagen gesetzt, um zur Frage der Honorierung nach dem Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten und der Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten Stellung zu nehmen.

21 Am 26. Februar 2013 legte die Beklagte eine Bescheinigung der Liechtensteinischen Rechtsanwaltskammer (mit dem Datum dieses Tages) vor, aus der hervorging, dass Herr Zipper von den Rechtsanwälten Zipper & Collegen seine Absicht zur Erbringung von anwaltlichen grenzüberschreitendenden Dienstleistungen in Liechtenstein ab dem 20. Februar 2013 gemeldet hatte und die dafür vorgeschriebenen sonstigen gesetzlichen Voraussetzungen erfüllte. Die Beklagte führte dazu des Weiteren aus, dass sie der Verpflichtung zur Meldung schon vor Beginn des Verfahrens nachgekommen wäre, wäre ihr diese Verpflichtung bewusst gewesen.

22 Da die Beklagte jedoch zu jenem Zeitpunkt, zu dem die Kosten entstanden (im August und September 2012), die Anforderungen gemäss Artikel 59 des Rechtsanwaltsgesetzes nicht erfüllte, äusserte das Fürstliche Landgericht Zweifel, ob die Beklagte nach nationalem Recht Anspruch auf eine Honorierung nach dem Tarif laut dem Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten und der Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten haben konnte. Das Fürstliche Landgericht erkundigte sich ausserdem nach den Auswirkungen dieser Frage auf den im EWR-Recht, beispielsweise in den ausführlichen Bestimmungen der Richtlinie und insbesondere in deren Artikel 7, verankerten Grundsatz des freien Dienstleistungsverkehrs.

23 Dementsprechend legte das Fürstliche Landgericht dem Gerichtshof am 09. April 2013 die folgenden Fragen vor:

1. *Kann sich ein europäischer Rechtsanwalt, der in einem anderen EWR-Staat in eigener Sache prozessiert und nicht von einem Dritten mandatiert ist, auf die Richtlinie 77/249/EWG des Rates*

1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17)?

2. *Is an obligation on European lawyers to notify the authorities of the host State (as provided for here in Article 59 of the Liechtenstein Lawyers Act (Rechtsanwaltsgesetz)) compatible with Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17) and, in particular, with Article 7 of that directive?*

3. *If Question 2 is answered in the affirmative: Having regard to Directive 77/249/EEC, may failure to provide notification in the host State on the part of a European lawyer engaged in the provision of services result in the consequence that the lawyer concerned may not claim lawyers' fees in accordance with the scale of fees provided for in the host State (in Liechtenstein the fees provided for in the Lawyers' Fees Act (Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten) and the Lawyers' Fees Regulation (Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten))?*

4. *Where a European lawyer engaged in the provision of services has only notified the authorities in the host State at a later date, may this subsequent notification result in the consequence that the lawyer may only claim fees in accordance with the scale of fees provided for in the host State in relation to the period following that notification but not in relation to procedural steps taken prior to that date?*

5. *Having regard to Directive 77/249/EEC, does the answer to Questions 3 and 4 depend on whether, at the start of the proceedings, the court of the host State referred the European lawyer engaged in the provision of services to the obligation under the law of that State to notify the authorities?*

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

vom 22.3.1977 zur Erleichterung der tatsächlichen Ausübung des freien Dienstleistungsverkehrs der Rechtsanwälte (Amtsblatt L 078 vom 26.3.1977, Seite 0017 bis 0018) berufen?

2. *Ist die im Aufnahmestaat (wie hier in Art. 59 des liechtensteinischen Rechtsanwaltsgesetzes) vorgesehene Meldepflicht für dienstleistungserbringende europäische Rechtsanwälte mit der Richtlinie 77/249/EWG des Rates vom 22.3.1977 zur Erleichterung der tatsächlichen Ausübung des freien Dienstleistungsverkehrs der Rechtsanwälte (Amtsblatt L 078 vom 26.3.1977, Seite 0017 bis 0018), insbesondere mit deren Art. 7, vereinbar?*

3. *Falls die Frage zu 2 bejaht wird: Darf die von einem dienstleistungserbringenden europäischen Rechtsanwalt unterlassene Meldung im Aufnahmestaat mit Blick auf die Richtlinie 77/249/EWG dazu führen, dass der betroffene Rechtsanwalt den inländischen Rechtsanwaltstarif (in Liechtenstein gemäss dem Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten und der Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten) nicht beanspruchen kann?*

4. *Darf die nachträgliche Meldung des dienstleistungserbringenden europäischen Rechtsanwaltes im Aufnahmestaat dazu führen, dass dieser nur für die Zeit ab erfolgter Meldung den inländischen Rechtsanwaltstarif beanspruchen kann, nicht dagegen für die zuvor vorgenommenen Verfahrenshandlungen?*

5. *Hängt die Beantwortung der Fragen zu 3 und 4 davon ab, dass der dienstleistungserbringende europäische Rechtsanwalt zu Beginn des Verfahrens vom Gericht auf die Meldepflicht gemäss inländischem Recht hingewiesen worden ist, dies im Hinblick auf die Richtlinie 77/249/EWG?*

24 Für eine ausführliche Darstellung des rechtlichen Hintergrunds, des Sachverhalts, des Verfahrens und der beim Gerichtshof eingereichten schriftlichen Erklärungen wird auf den Sitzungsbericht verwiesen. Auf den Sitzungsbericht wird im Folgenden nur insoweit eingegangen, wie es für die Begründung des Gerichtshofs erforderlich ist.

III THE FIRST QUESTION

25 By its first question, the national court asks whether a lawyer bringing proceedings in an EEA State other than the one in which he is established can rely on the provisions of the Directive when he is representing himself, rather than being engaged to provide legal services by a client.

26 It is not clear from the request whether the defendant was in fact representing itself before it mandated a lawyer based in Liechtenstein to represent it, or whether the defendant as an entity was the recipient of services provided by an individual lawyer working for it. However, questions posed by national courts under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice enjoy a presumption of relevance (see, *inter alia*, Case E-11/12 *Koch and Others*, judgment of 13 June 2013, not yet reported, paragraph 50, and case law cited). The Court therefore assumes that the defendant was self-represented.

Observations submitted to the Court

27 The Liechtenstein Government submits that, for Article 36(1) EEA and the Directive to be applicable, the provider and the recipient of the service must be two different persons. As Rechtsanwälte Zipper & Collegen are at the same time the provider and recipient of the services concerned, neither Article 36 EEA nor the Directive is applicable in the present case.

28 At the oral hearing, the Liechtenstein Government stated, in response to a question put to it, that, under Liechtenstein law, a lawyer is entitled to represent himself in judicial proceedings.

III ZUR ERSTEN FRAGE

25 Mit seiner ersten Frage ersucht das nationale Gericht um Klärung, ob sich ein Rechtsanwalt, der in einem EWR-Staat prozessiert, bei dem es sich nicht um den Staat handelt, in dem er niedergelassen ist, auf die Bestimmungen der Richtlinie berufen kann, wenn er sich selbst vertritt und nicht von einem Dritten mandatiert ist.

26 Aus dem Antrag auf Vorabentscheidung geht nicht hervor, ob sich die Beklagte tatsächlich selbst vertrat, bevor sie eine Rechtsanwältin mit Sitz in Liechtenstein mit ihrer Vertretung beauftragte, oder ob die Beklagte als eine Anwaltskanzlei Empfängerin einer von einem einzelnen, für sie tätigen Rechtsanwalt erbrachten Dienstleistung war. Allerdings gilt für von nationalen Gerichten gemäss Artikel 34 des Abkommens zwischen den EFTA-Staaten zur Errichtung einer Überwachungsbehörde und eines Gerichtshofs vorgelegte Fragen eine Vermutung der Entscheidungserheblichkeit (vgl. u. a. Rechtssache E-11/12 *Koch u. a.*, Urteil vom 13. Juni 2013, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 50, und die zitierte Rechtsprechung). Der Gerichtshof geht daher davon aus, dass sich die Beklagte selbst vertrat.

Dem Gerichtshof vorgelegte Stellungnahmen

27 Die Regierung des Fürstentums Liechtensteins bringt vor, dass es sich beim Erbringer und beim Empfänger der Dienstleistung um zwei verschiedene Personen handeln muss, damit Artikel 36 Absatz 1 des EWR-Abkommens und die Richtlinie anwendbar sind. Da die Rechtsanwälte Zipper & Collegen gleichzeitig Erbringer und Empfänger der betreffenden Dienstleistungen sind, finden weder Artikel 36 des EWR-Abkommens noch die Richtlinie auf den gegenständlichen Fall Anwendung.

28 Im Zuge der mündlichen Verhandlung gab die Regierung des Fürstentums Liechtenstein in Beantwortung einer an sie gerichteten Frage an, dass ein Rechtsanwalt nach liechtensteinischem Recht dazu berechtigt ist, sich im Bereich der Rechtspflege selbst zu vertreten.

29 ESA and the Commission take the opposite view. ESA submits that, where an EEA host State's national law allows a lawyer to act before that State's courts or public authorities in his own name, in other words to represent himself, Article 36 EEA and the Directive apply. In a legal order in which a lawyer can represent himself rather than seeking the services of a colleague, there is nothing to suggest that that activity would fall outside the scope of activities relating to the representation of a client in legal proceedings within the meaning of Article 4(1) of the Directive.

30 The Commission contends that the key point for a lawyer representing himself is that the lawyer is nevertheless acting in a professional capacity. The fact that he, at the same time, is also a party to the proceedings is immaterial. He is both client and lawyer, and simply "wears two different hats".

Findings of the Court

31 Article 36(1) EEA prohibits any restriction on the free movement of services. The objective of the provision is to liberalise all gainful activity not covered by the free movement of goods, persons and capital (see, for comparison, *inter alia*, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 10, and, more recently, Case C-221/11 *Demirkan*, judgment of 24 September 2013, not yet reported, paragraph 34). Pursuant to the third paragraph of Article 37 EEA, a person providing a service may temporarily pursue the activity in the State where the service is rendered, under the same conditions as are imposed by that State on its own nationals.

32 The Directive lays down more detailed rules with respect to the provision of cross-border services by lawyers. As stated in its preamble, the Directive only contains measures intended to

29 Die EFTA-Überwachungsbehörde und die Kommission vertreten eine gegenteilige Ansicht. Der EFTA-Überwachungsbehörde zufolge sind Artikel 36 des EWR-Abkommens und die Richtlinie anwendbar, wenn es die nationale Gesetzgebung eines EWR-Aufnahmestaats einem Rechtsanwalt erlaubt, in eigener Sache vor den Gerichten oder Behörden dieses Staats tätig zu werden, sich mit anderen Worten also selbst zu vertreten. In einer Rechtsordnung, in der sich ein Rechtsanwalt selbst vertreten kann, anstatt einen Kollegen damit zu beauftragen, weist nichts darauf hin, dass diese Tätigkeit nicht in den Geltungsbereich der Vertretung oder Verteidigung eines Mandanten im Bereich der Rechtspflege im Sinne des Artikels 4 Absatz 1 der Richtlinie fällt.

30 Die Kommission bringt vor, dass es im Hinblick auf die Eigenvertretung eines Rechtsanwalts wesentlich ist, dass der Rechtsanwalt trotzdem in seiner beruflichen Funktion tätig wird. Die Tatsache, dass er gleichzeitig auch eine Verfahrenspartei darstellt, ist unerheblich. Er ist sowohl Mandant als auch Rechtsanwalt und hat einfach zwei verschiedene Rollen.

Entscheidung des Gerichtshofs

31 Artikel 36 Absatz 1 des EWR-Abkommens verbietet jegliche Beschränkung des freien Dienstleistungsverkehrs. Ziel der Bestimmung ist die Liberalisierung jeder gegen Entgelt geleisteten Tätigkeit, die nicht unter den freien Waren- und Kapitalverkehr und unter die Freizügigkeit der Personen fällt (vgl. entsprechend u. a. Verbundene Rechtssachen 286/82 und 26/83 *Luisi und Carbone*, Slg. 1984, 377, Randnr. 10, und, aus jüngerer Zeit, Rechtssache C-221/11 *Demirkan*, Urteil vom 24. September 2013, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 34). Gemäss dem dritten Absatz von Artikel 37 des EWR-Abkommens kann ein Leistender seine Tätigkeit vorübergehend in dem Staat ausüben, in dem die Leistung erbracht wird, und zwar unter den Voraussetzungen, welche dieser Staat für seine eigenen Angehörigen vorschreibt.

32 Die Richtlinie beinhaltet im Hinblick auf die grenzüberschreitende Erbringung von Dienstleistungen durch Rechtsanwälte

facilitate the effective pursuit of the activities of lawyers by way of the provision of services. The Directive must be interpreted in light of the general principles enshrined in the EEA Agreement governing the freedom to provide services (see Case E-1/07 *Criminal Proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 28).

33 For services to fall within the scope of Article 36 EEA, it is sufficient that they are provided to nationals of an EEA State on the territory of another EEA State, irrespective of the place of establishment of the provider or the recipient of the services (see Case E-13/11 *Granville* [2012] EFTA Ct. Rep. 400, paragraph 38).

34 Moreover, according to the first paragraph of Article 37 EEA, only services normally provided for remuneration shall be deemed to be services within the meaning of the EEA Agreement. For the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes a consideration for the service rendered (see Case E-5/07 *Private Barnehagers Landsforbund* v *ESA* [2008] EFTA Ct. Rep. 62, paragraph 81, and case law cited). In this regard, it is not necessary that the remuneration be paid in money, as long as the consideration for the provision of the service is capable of being expressed in money.

35 Representation of a client in legal proceedings is a service normally provided for remuneration. In some jurisdictions, lawyers are entitled to represent themselves in legal proceedings. In such situations where lawyers act on their own behalf, the provider and the recipient of the service are the same person. However, this does not alter the fact that the service provided is a service normally provided for remuneration.

ausführlichere Vorschriften. Wie in der Präambel festgehalten, enthält die Richtlinie nur Massnahmen zur Erleichterung der tatsächlichen Ausübung von Rechtsanwaltstätigkeiten durch die Erbringung von Dienstleistungen. Die Richtlinie ist im Lichte der im EWR-Abkommen verankerten allgemeinen Prinzipien zum freien Dienstleistungsverkehr auszulegen (vgl. Rechtssache E-1/07 *Strafverfahren gegen A*, EFTA Court Report 2007, 246, Randnr. 28).

33 Damit Dienstleistungen unabhängig davon, wo der Dienstleistende oder der Dienstleistungsempfänger ansässig sind, in den Geltungsbereich von Artikel 36 des EWR-Abkommens fallen, ist es ausreichend, wenn diese Dienstleistungen von Staatsangehörigen eines EWR-Staats in einem anderen EWR-Staat erbracht werden (vgl. Rechtssache E-13/11 *Granville*, EFTA Court Report 2012, 400, Randnr. 38).

34 Zudem gelten laut erstem Absatz von Artikel 37 des EWR-Abkommens nur Dienstleistungen, die in der Regel gegen Entgelt erbracht werden, als Dienstleistungen im Sinne des EWR-Abkommens. Für die Zwecke dieser Bestimmung besteht die massgebliche Eigenschaft eines Entgelts in dem Umstand, dass es sich dabei um eine Gegenleistung für die erbrachte Dienstleistung handelt (vgl. Rechtssache E-5/07 *Private Barnehagers Landsforbund ./. ESA*, EFTA Court Report 2008, 62, Randnr. 81, und die zitierte Rechtsprechung). In diesem Zusammenhang ist es nicht erforderlich, dass das Entgelt monetär ausgezahlt wird, solange die Gegenleistung für die Erbringung der Dienstleistung als Geldwert ausgedrückt werden kann.

35 Die Vertretung oder Verteidigung eines Mandanten im Bereich der Rechtspflege ist eine Dienstleistung, die in der Regel gegen Entgelt erbracht wird. In manchen Rechtssystemen sind Rechtsanwälte berechtigt, sich selbst zu vertreten. In Situationen, in denen Rechtsanwälte in eigener Sache tätig werden, handelt es sich beim Erbringer und beim Empfänger der Dienstleistung um dieselbe Person. Dies ändert jedoch nichts an der Tatsache, dass es sich bei der erbrachten Dienstleistung um eine Dienstleistung handelt, die in der Regel gegen Entgelt erbracht wird.

36 A lawyer representing himself in judicial proceedings may be awarded compensation for costs incurred during the proceedings. This effectively means that the service provided is paid for not by the recipient of the service, but, instead, by the opposing party in the proceedings. In this regard, it should be kept in mind that Article 37 EEA does not require that the service be paid for by those for whom it is performed (see, for comparison, *inter alia,* ECJ Cases 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraph 16, and C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849, paragraph 41).

37 Consequently, the answer to the first question must be that a lawyer bringing proceedings in his own name in an EEA State other than the one in which he is established may rely on the freedom to provide services and the Directive if he is acting in a professional capacity, and if the national legal order of the host State allows a lawyer to act on his own behalf in the capacity as a lawyer in legal proceedings. If these conditions are fulfilled, the Directive will apply.

38 It is for the national court to assess whether this is the situation in the case before it.

IV THE SECOND QUESTION

39 By its second question, the national court asks whether a national rule such as Article 59 of the Lawyers Act, pursuant to which lawyers established in other EEA States (also referred to as 'European lawyers') are required to notify the Liechtenstein Chamber of Lawyers of their intention to provide cross-border legal services in Liechtenstein before commencing that activity, and to attach certain documentation to such a notification, is compatible with the Directive, in particular Article 7(1) thereof.

36 Einem Rechtsanwalt, der sich im Bereich der Rechtspflege selbst vertritt, kann ein Kostenersatz für die im Verfahren angefallenen Kosten zugesprochen werden. Dies bedeutet, dass die erbrachte Dienstleistung nicht vom Empfänger der Dienstleistung vergütet wird, sondern stattdessen von der Gegenpartei im Verfahren. In diesem Zusammenhang sollte berücksichtigt werden, dass Artikel 37 des EWR-Abkommens nicht verlangt, dass die Dienstleistung von demjenigen bezahlt wird, dem sie zugutekommt (vgl. entsprechend u. a. die Rechtssachen des Gerichtshofs der Europäischen Union 352/85 *Bond van Adverteerders u. a.*, Slg. 1988, 2085, Randnr. 16, und C-76/05 *Schwarz und Gootjes-Schwarz*, Slg. 2007, I-6849, Randnr. 41).

37 Dementsprechend muss die Antwort auf die erste Frage lauten, dass sich ein Rechtsanwalt, der in einem EWR-Staat, bei dem es sich nicht um den Staat handelt, in dem er niedergelassen ist, in eigener Sache prozessiert, auf die Dienstleistungsfreiheit und die Richtlinie berufen kann, wenn er in seiner beruflichen Funktion als Rechtsanwalt tätig wird und wenn es die nationale Rechtsordnung des Aufnahmestaats Rechtsanwälten erlaubt, in eigener Sache als Rechtsanwalt tätig zu werden. Sind diese Voraussetzungen erfüllt, ist die Richtlinie anwendbar.

38 Es ist Sache des nationalen Gerichts zu beurteilen, ob dies in der bei ihm anhängigen Rechtssache der Fall ist.

IV ZUR ZWEITEN FRAGE

39 Mit seiner zweiten Frage ersucht das nationale Gericht um Klärung, ob eine nationale Vorschrift wie Artikel 59 des Rechtsanwaltsgesetzes, demzufolge in anderen EWR-Staaten niedergelassene Rechtsanwälte (auch als ‚europäische Rechtsanwälte' bezeichnet) ihre Absicht zur Erbringung von grenzüberschreitenden juristischen Dienstleistungen vor der Aufnahme dieser Tätigkeit der Liechtensteinischen Rechtsanwaltskammer melden und dieser Meldung bestimmte Dokumente beifügen müssen, mit der Richtlinie, insbesondere deren Artikel 7 Absatz 1, vereinbar ist.

Observations submitted to the Court

40 The Liechtenstein Government submits that such an obligation to notify is compatible with the Directive. Article 4(1) of the Directive states that a lawyer must abide by all the conditions laid down in the host State for lawyers established in that State, except all the conditions that require residence and/or registration with a professional organisation in the host State.

41 Furthermore, Article 7(2) entrusts the competent authority of the host State with a supervisory function in relation to lawyers providing services in that State within the scope of the Directive. In order to be able to exercise effective supervision of lawyers practising in Liechtenstein, the Liechtenstein Chamber of Lawyers must first and foremost know these lawyers.

42 The Liechtenstein Government contends further that Article 59 of the Lawyers Act is intended to ensure adequate and effective supervision of lawyers established in other EEA States providing services in Liechtenstein, for the benefit of present and future clients. The provision also complies with the principle of proportionality insofar as it is appropriate to ensure the attainment of the objective pursued and does not go beyond what is necessary for its attainment.

43 The Liechtenstein Government submits that Austrian law contains an obligation to notify that is comparable to that laid down in Article 59 of the Liechtenstein Lawyers Act.

44 At the oral hearing, the Liechtenstein Government added in response to a question from the bench that most of the provisions in the Lawyers Act have been in place since Liechtenstein joined the EEA Agreement on 1 May 1995, and that ESA has not instigated infringement proceedings against those provisions.

Dem Gerichtshof vorgelegte Stellungnahmen

40 Die Regierung des Fürstentums Liechtenstein bringt vor, eine solche Meldepflicht sei mit der Richtlinie vereinbar. Aus Artikel 4 Absatz 1 der Richtlinie geht hervor, dass ein Rechtsanwalt alle im Aufnahmestaat vorgesehenen Bedingungen für niedergelassene Rechtsanwälte mit Ausnahme der Erfordernisse eines Wohnsitzes und/oder der Zugehörigkeit zu einer Berufsorganisation im Aufnahmestaat erfüllen muss.

41 Zudem überträgt Artikel 7 Absatz 2 der Richtlinie der zuständigen Stelle des Aufnahmestaats eine Aufsichtsfunktion in Bezug auf Rechtsanwälte, die in diesem Staat Dienstleistungen im Geltungsbereich der Richtlinie erbringen. Damit die Liechtensteinische Rechtsanwaltskammer die in Liechtenstein praktizierenden Rechtsanwälte wirksam beaufsichtigen kann, müssen ihr diese zuallererst bekannt sein.

42 Mit Artikel 59 des Rechtsanwaltsgesetzes, so die Regierung des Fürstentums Liechtenstein weiter, wird zugunsten gegenwärtiger und künftiger Mandanten eine angemessene und wirksame Beaufsichtigung von in anderen EWR-Staaten niedergelassenen Rechtsanwälten, die Dienstleistungen in Liechtenstein erbringen, beabsichtigt. Die Bestimmung entspricht ausserdem dem Grundsatz der Verhältnismässigkeit, insofern als sie zur Erreichung des angestrebten Ziels geeignet ist und sich gleichzeitig auf das hierfür unbedingt notwendige Mass beschränkt.

43 Laut der Regierung des Fürstentums Liechtenstein enthält das österreichische Recht eine mit der in Artikel 59 des liechtensteinischen Rechtsanwaltsgesetzes vorgesehenen Meldepflicht vergleichbare Verpflichtung.

44 Bei der Anhörung der mündlichen Ausführungen ergänzte die Regierung des Fürstentums Liechtenstein in Beantwortung einer Frage des Gerichtshofs, dass die meisten der Bestimmungen des Rechtsanwaltsgesetzes seit dem Beitritt Liechtensteins zum EWR-Abkommen am 1. Mai 1995 in Kraft sind, und dass die EFTA-Überwachungsbehörde kein Vertragsverletzungsverfahren gegen diese Bestimmungen eingeleitet hat.

45 ESA and the Commission submit that the second question should be answered in the negative. In their view, Article 59 of the Lawyers Act goes beyond what it is possible to request from a European lawyer under the Directive.

46 Article 4(1) of the Directive expressly precludes a host State from requiring a European lawyer to register with a professional organisation in that State as a condition for temporarily pursuing activities relating to the representation of a client in legal proceedings. The logic behind this is essentially that a lawyer remains subject to the national rules for practising the profession in his home State. It is his qualification as a lawyer in the home State that is crucial.

47 Furthermore, Article 7(1) of the Directive states that the competent national authority in the host State may request the person providing the services to establish that he is a qualified lawyer entitled to practise in his home State. Many European lawyers carry an identification card issued by the Chamber of Lawyers or Bar Association with which they are registered. Producing this card is comparable to a driver producing a driver's licence on request in a traffic control. Verification is therefore easy in practice.

48 In contrast, Liechtenstein law subjects a European lawyer intending to exercise his rights under Article 36 EEA and the Directive to a systematic procedure, whereby he, on his own motion, must give prior notification of his intention to provide services in Liechtenstein. This is coupled with an obligation to provide a certificate showing his qualification to practise in his home State, as well as evidence of nationality and professional indemnity insurance. Where appropriate, the notification must be renewed once every year. In the opinion of ESA and the Commission, this notification obligation

45 Die EFTA-Überwachungsbehörde und die Kommission tragen vor, dass die zweite Frage abschlägig beantwortet werden sollte. Ihrer Auffassung nach geht Artikel 59 des Rechtsanwaltsgesetzes über das hinaus, was von einem europäischen Rechtsanwalt gemäss der Richtlinie gefordert werden kann.

46 Artikel 4 Absatz 1 der Richtlinie schliesst ausdrücklich aus, dass ein Aufnahmestaat von einem europäischen Rechtsanwalt die Zugehörigkeit zu einer Berufsorganisation in diesem Staat als Voraussetzung für die vorübergehende Ausübung der mit der Vertretung oder der Verteidigung eines Mandanten im Bereich der Rechtspflege zusammenhängenden Tätigkeiten fordert. Die Logik dieses Konzepts besteht im Wesentlichen darin, dass ein Rechtsanwalt bei der Berufsausübung weiterhin den nationalen Vorschriften seines Herkunftsstaats unterliegt. Entscheidend ist dabei seine Qualifikation als Rechtsanwalt im Herkunftsstaat.

47 Darüber hinaus legt Artikel 7 Absatz 1 der Richtlinie fest, dass die zuständige nationale Stelle im Aufnahmestaat von dem Dienstleistungserbringer fordern kann, dass er seine Eigenschaft als Rechtsanwalt, dem es gestattet ist, in seinem Herkunftsstaat zu praktizieren, nachweist. Viele europäische Rechtsanwälte tragen einen von ihrer Rechtsanwaltskammer ausgestellten Anwaltsausweis bei sich. Die Vorlage dieses Ausweises ist mit dem Vorzeigen des Führerscheins in einer Verkehrskontrolle vergleichbar. Der Nachweis ist in der Praxis daher einfach zu führen.

48 Im Gegensatz dazu muss sich ein europäischer Rechtsanwalt, der sein Recht gemäss Artikel 36 des EWR-Abkommens und der Richtlinie ausüben will, nach liechtensteinischem Recht einem systematischen Verfahren unterwerfen, in dessen Rahmen er seine Absicht zur Erbringung von Dienstleistungen in Liechtenstein aus eigenem Antrieb vorab melden muss. Dies ist verbunden mit einer Verpflichtung zur Vorlage einer Bescheinigung, aus der seine Zulassung im Herkunftsstaat hervorgeht, sowie von Nachweisen über die Staatsangehörigkeit und das Bestehen einer Haftpflichtversicherung. Gegebenenfalls ist die Meldung einmal jährlich zu erneuern. Nach Auffassung der EFTA-Überwachungsbehörde und der Kommission geht diese

exceeds what it is possible to require from a European lawyer under the Directive.

49 ESA and the Commission recall that it is well-established that restrictions on the freedom to provide services can only be justified when they are appropriate to achieve the objective sought and do not go beyond what is necessary to attain it.

50 ESA and the Commission submit that a universal rule requiring a lawyer, in all circumstances, not only to provide documentation but also prior notification to the competent authorities cannot be considered proportionate to the legitimate objective of ensuring that he is a qualified lawyer currently entitled to practise.

51 Articles 3, 4, 5 and 7 of the Directive take sufficient account of public policy objectives that arise in the context of the provision of cross-border legal services. The public interest objectives of ensuring answerability to the judicial authority concerned, the efficient functioning of the justice system and protection of clients are thus already taken into account, and cannot be used to justify an additional and general notification rule.

52 At the oral hearing, the Commission added that, according to its information, Austrian law, referred to by the Liechtenstein Government, differs from Liechtenstein law. The former only requires a one-off notification before the initial provision of services involving representation of a client in legal proceedings. Moreover, no documents must be submitted. In the Commission's view, the level of impact or burden on the service provider is quite different from that of Article 59 of the Liechtenstein Lawyers Act.

Meldepflicht über das hinaus, was von einem europäischen Rechtsanwalt gemäss der Richtlinie gefordert werden kann.

49 Die EFTA-Überwachungsbehörde und die Kommission erinnern daran, dass nach ständiger Rechtsprechung Beschränkungen des freien Dienstleistungsverkehrs nur gerechtfertigt werden können, wenn sie geeignet sind, das angestrebte Ziel zu erreichen, und sich auf das hierfür unbedingt notwendige Mass beschränken.

50 Die EFTA-Überwachungsbehörde und die Kommission bringen vor, dass eine allgemeingültige Vorschrift, die von einem Rechtsanwalt unter allen Umständen nicht nur die Vorlage von Schriftstücken, sondern auch eine vorherige Meldung bei den zuständigen Stellen fordert, nicht als verhältnismässig zur Erreichung des legitimen Ziels betrachtet werden kann, sicherzustellen, dass es sich um einen Rechtsanwalt handelt, der derzeit seine Tätigkeit ausüben darf.

51 Die Artikel 3, 4, 5 und 7 der Richtlinie widmen sich Zielsetzungen im Bereich der öffentlichen Ordnung, die im Zusammenhang mit der grenzüberschreitenden Erbringung von juristischen Dienstleistungen von Bedeutung sind, in ausreichendem Masse. Die Zielsetzungen im öffentlichen Interesse, nämlich die Gewährleistung der Übernahme der Verantwortung gegenüber dem angerufenen Gericht, der wirksamen Funktion des Rechtssystems und des Mandantenschutzes, werden daher bereits berücksichtigt und können nicht zur Rechtfertigung einer zusätzlichen und allgemeinen Meldepflicht herangezogen werden.

52 Bei der Anhörung der mündlichen Ausführungen ergänzte die Kommission, dass sich das österreichische Recht, auf das sich die Regierung des Fürstentums Liechtenstein bezog, nach ihren Informationen vom liechtensteinischen Recht unterscheidet. Ersteres sieht nur eine einmalige Meldung vor der erstmaligen Erbringung von Dienstleistungen im Zusammenhang mit der Vertretung oder Verteidigung eines Mandanten im Bereich der Rechtspflege vor. Zudem müssen keine Dokumente vorgelegt werden. Nach Auffassung der Kommission ist die Beeinträchtigung bzw. Belastung des Dienstleistungserbringers eine ganz andere als die mit Artikel 59 des liechtensteinischen Rechtsanwaltsgesetzes verbundene.

Findings of the Court

53 The Directive only contains measures intended to facilitate the effective pursuit of the activities of lawyers by way of the provision of services.

54 Article 2 of the Directive requires an EEA State to recognise as a lawyer for the purpose of pursuing services any person listed in Article 1(2), that is, any person entitled to pursue his professional activities under certain national designations.

55 Nevertheless, the Directive sets out certain safeguard measures. First, pursuant to its Article 3, a lawyer shall adopt the professional title used in the EEA State where he is authorised to practise, with an indication of the professional organisation by which he is authorised to practise or the court of law before which he is entitled to practise under the law of that State.

56 Second, Article 4(1) of the Directive provides that the activity of representing a client in legal proceedings in another EEA State must be pursued under the conditions laid down for lawyers established in the host State. However, a host State is expressly precluded from requiring a lawyer wishing to provide cross-border services to register with a professional organisation in that State.

57 Moreover, Article 5 of the Directive enables the EEA States to require lawyers from other EEA States representing a client in legal proceedings to work in conjunction with a national lawyer, albeit only in cases where representation by a lawyer is mandatory (see *Criminal proceedings against A*, cited above, paragraph 30, and the case law cited).

58 Furthermore, Article 7(1) of the Directive permits the competent authority of the host EEA State to request the person providing the services to establish his qualification as a lawyer, that is, to show that he is entitled to pursue his professional activities

Entscheidung des Gerichtshofs

53 Die Richtlinie enthält nur Massnahmen zur Erleichterung der tatsächlichen Ausübung von Rechtsanwaltstätigkeiten durch die Erbringung von Dienstleistungen.

54 Artikel 2 der Richtlinie fordert von jedem EWR-Staat für die Erbringung von Dienstleistungen die Anerkennung aller unter Artikel 1 Absatz 2 fallenden Personen als Rechtsanwalt, d. h. als Person, die ihre beruflichen Tätigkeiten unter bestimmten nationalen Bezeichnungen auszuüben berechtigt ist.

55 Nichtsdestotrotz sieht die Richtlinie bestimmte Schutzmassnahmen vor. So soll ein Rechtsanwalt erstens gemäss Artikel 3 die in dem EWR-Staat, in dem er zugelassen ist, gültige Berufsbezeichnung unter Angabe der Berufsorganisation, deren Zuständigkeit er unterliegt, oder des Gerichtes, bei dem er nach Vorschriften dieses Staates zugelassen ist, verwenden.

56 Zweitens hält Artikel 4 Absatz 1 der Richtlinie fest, dass die mit der Vertretung oder Verteidigung eines Mandanten im Bereich der Rechtspflege zusammenhängenden Tätigkeiten in einem anderen EWR-Staat unter den für die im Aufnahmestaat niedergelassenen Rechtsanwälte vorgesehenen Bedingungen ausgeübt werden. Allerdings wird ausdrücklich ausgeschlossen, dass ein Aufnahmestaat von einem Rechtsanwalt, der grenzüberschreitende Dienstleistungen erbringen möchte, die Zugehörigkeit zu einer Berufsorganisation in diesem Staat fordern kann.

57 Zudem erlaubt es Artikel 5 der Richtlinie den EWR-Staaten, Rechtsanwälten aus anderen EWR-Staaten, die einen Mandanten im Bereich der Rechtspflege vertreten, aufzuerlegen, im Einvernehmen mit einem nationalen Rechtsanwalt zu handeln; dies gilt jedoch nur in Fällen, in denen Anwaltszwang herrscht (vgl. *Strafverfahren gegen A*, oben erwähnt, Randnr. 30, und die zitierte Rechtsprechung).

58 Darüber hinaus ermöglicht Artikel 7 Absatz 1 der Richtlinie der zuständigen Stelle im EWR-Aufnahmestaat, vom Dienstleistungserbringer zu verlangen, dass er seine Eigenschaft als Rechtsanwalt nachweist, d. h. zeigt, dass er zur Ausübung

under the national designation in his home EEA State, as defined in Article 1(2). As pointed out by ESA and the Commission, this can often be easily done, as many European lawyers carry an identification card issued by the Chamber of Lawyers or Bar Association with which they are registered.

59 Article 59 of the Liechtenstein Lawyers Act requires that a lawyer established in another EEA State intending to provide cross-border services in Liechtenstein, on his own motion, must notify the Chamber of Lawyers before commencing such activities. The notification must be renewed once every year. Moreover, the lawyer must provide the Chamber of Lawyers with a certificate showing his qualification to practise in his home State, as well as evidence of nationality and professional indemnity insurance.

60 Such a national rule, whereby a lawyer established in another EEA State is required in all circumstances, and on his own motion, not only to provide documentation to establish his qualifications as a lawyer, but also to notify the competent authorities of the host State prior to providing services in that State, and to renew the notification yearly, goes beyond what a host State is permitted to request pursuant to Article 7(1) of the Directive. The Court notes that the latter provision differs from the requirements that may be imposed on lawyers who seek to establish themselves in another EEA State on a permanent basis, as set out in Article 3 of Directive 98/5/EC of the European Parliament and the Council of 16 February 1998 to facilitate the practice of the profession of lawyer in a Member State other than that in which the qualification was obtained.

61 Moreover, such a compulsory requirement to notify the Chambers of Lawyers prior to commencing any activities is liable to dissuade those lawyers who only intend to provide services in a host EEA State on an occasional basis from proceeding with their

seiner beruflichen Tätigkeiten unter der nationalen Bezeichnung in seinem EWR-Herkunftsstaat berechtigt ist, wie in Artikel 1 Absatz 2 festgehalten. Wie von der EFTA-Überwachungsbehörde und der Kommission ausgeführt, kann dieser Nachweis oft einfach geführt werden, da viele europäische Rechtsanwälte einen von ihrer Rechtsanwaltskammer ausgestellten Anwaltsausweis bei sich tragen.

59 Artikel 59 des liechtensteinischen Rechtsanwaltsgesetzes sieht vor, dass ein in einem anderen EWR-Staat niedergelassener Rechtsanwalt seine Absicht zur Erbringung grenzüberschreitender Dienstleistungen in Liechtenstein aus eigenem Antrieb vor der Aufnahme derartiger Tätigkeiten der Rechtsanwaltskammer melden muss. Die Meldung ist einmal jährlich zu erneuern. Ausserdem muss der Rechtsanwalt der Rechtsanwaltskammer eine Bescheinigung, aus der seine Zulassung im Herkunftsstaat hervorgeht, sowie Nachweise über die Staatsangehörigkeit und das Bestehen einer Haftpflichtversicherung vorlegen.

60 Eine nationale Vorschrift, die von einem in einem anderen EWR-Staat niedergelassenen Rechtsanwalt fordert, dass er unter allen Umständen und aus eigenem Antrieb nicht nur seine Eigenschaft als Rechtsanwalt nachweist, sondern der zuständigen Stelle im Aufnahmestaat vor der Erbringung von Dienstleistungen in diesem Staat Meldung erstattet und diese Meldung einmal jährlich erneuert, geht über das hinaus, was ein Aufnahmestaat gemäss Artikel 7 Absatz 1 der Richtlinie verlangen darf. Der Gerichtshof weist darauf hin, dass die letztere Bestimmung von den Anforderungen abweicht, die Rechtsanwälten auferlegt werden können, die sich ständig in einem anderen EWR-Staat niederlassen wollen, wie in Artikel 3 der Richtlinie 98/5/EG des Europäischen Parlaments und des Rates vom 16. Februar 1998 zur Erleichterung der ständigen Ausübung des Rechtsanwaltsberufs in einem anderen Mitgliedstaat als dem, in dem die Qualifikation erworben wurde, festgehalten.

61 Zudem kann eine solche zwingende Anforderung zur Meldung bei der Rechtsanwaltskammer vor der Aufnahme von Tätigkeiten Rechtsanwälte, die nur die gelegentliche Erbringung von Dienstleistungen in einem EWR-Aufnahmestaat beabsichtigen,

plans, and thus render Directive 77/249/EEC ineffective. As such a rule is liable to hinder or render less attractive the provision of cross-border services, it also infringes Article 36(1) EEA.

62 It is settled case law that, in order to be capable of being justified, restrictions on the freedom to provide services must not go beyond what is necessary to attain the objective pursued (see, *inter alia*, Case E-2/11 *STX Norway and Others* [2012] EFTA Ct. Rep. 4, paragraph 68).

63 According to the observations of the Liechtenstein Government, the objective of Article 59 of the Liechtenstein Lawyers Act is to exercise effective supervision of lawyers practising in Liechtenstein, for the benefit of present and future clients.

64 However, a national rule such as Article 59 of the Liechtenstein Lawyers Act cannot be considered proportionate to the legitimate objective to ensure that a person is a qualified lawyer currently entitled to practise in another EEA State. That objective is already taken into account in the safeguard measure set out in Article 7(1) of the Directive, and it cannot therefore be used to justify verification measures that go beyond what is permitted under that Article.

65 For the sake of completeness, the Court adds that the argument of the Government of Liechtenstein that ESA has not brought infringement proceedings against the provisions of the Lawyers Act, despite most of those provisions being in force since 1995, is of no relevance. It cannot be inferred from the lack of an infringement proceeding concerning a national measure that the measure in question is in conformity with EEA law.

davon abbringen, ihre Pläne zu verwirklichen, und Richtlinie 77/249/EWG dadurch wirkungslos machen. Da davon auszugehen ist, dass eine solche Regelung die Erbringung grenzüberschreitender Dienstleistungen behindert oder weniger attraktiv macht, liegt ausserdem ein Verstoss gegen Artikel 36 Absatz 1 EWR-Abkommen vor.

62 Nach ständiger Rechtsprechung müssen sich Beschränkungen des freien Dienstleistungsverkehrs, um gerechtfertigt werden zu können, auf das zur Erreichung des angestrebten Ziels notwendige Mass beschränken (vgl. u. a. Rechtssache E-2/11 *STX Norway and Others*, EFTA Court Report 2012, 4, Randnr. 68).

63 Den Ausführungen der Regierung des Fürstentums Liechtenstein zufolge besteht das Ziel des Artikels 59 des liechtensteinischen Rechtsanwaltsgesetzes in der wirksamen Beaufsichtigung von in Liechtenstein praktizierenden Rechtsanwälten zugunsten gegenwärtiger und künftiger Mandanten.

64 Eine nationale Vorschrift wie Artikel 59 des liechtensteinischen Rechtsanwaltsgesetzes kann jedoch nicht als verhältnismässig zur Erreichung des legitimen Ziels betrachtet werden, sicherzustellen, dass es sich um einen Rechtsanwalt handelt, der derzeit seine Tätigkeit in einem anderen EWR-Staat ausüben darf. Dieses Ziel wird bereits in der in Artikel 7 Absatz 1 der Richtlinie vorgesehenen Schutzmassnahme berücksichtigt und kann daher nicht zur Rechtfertigung von Überprüfungsmassnahmen herangezogen werden, die über das hinausgehen, was laut diesem Artikel zulässig ist.

65 Aus Gründen der Vollständigkeit ergänzt der Gerichtshof, dass das Argument der Regierung des Fürstentums Liechtenstein, dass die EFTA-Überwachungsbehörde kein Vertragsverletzungsverfahren gegen die Bestimmungen des Rechtsanwaltsgesetzes eingeleitet hat, obwohl die meisten dieser Bestimmungen seit 1995 in Kraft sind, nicht von Bedeutung ist. Aus dem Fehlen eines Vertragsverletzungsverfahrens betreffend eine nationale Massnahme kann nicht der Rückschluss gezogen werden, dass die fragliche Massnahme im Einklang mit dem EWR-Recht steht.

66 The answer to the second question must therefore be that a national rule such as Article 59 of the Liechtenstein Lawyers Act, whereby a lawyer established in another EEA State is required, in all circumstances and on his own motion, not only to provide documentation to establish his qualifications as a lawyer but also to notify the competent authorities of the host State prior to providing services in that State, and to renew the notification yearly, is contrary to Article 7(1) of the Directive and to Article 36 EEA.

V THE THIRD, FOURTH AND FIFTH QUESTIONS

67 The remaining questions from the national court concern the consequences with regard to remuneration of legal services under national law of non-compliance with a notification requirement such as that in Article 59 of the Liechtenstein Lawyers Act.

68 In its reply to the second question, the Court has found that a national rule such as Article 59 of the Liechtenstein Lawyers Act is contrary to the Directive and to Article 36 EEA. Therefore, the answer to the remaining questions must be that a failure to comply with such a rule cannot be a relevant consideration as regards the possibility of claiming legal fees relating to the cross-border provision of services by a lawyer.

69 In this regard, the Court recalls that Article 3 EEA requires the EEA States to take all measures necessary to guarantee the application and effectiveness of EEA law. It is inherent in the objectives of the EEA Agreement that national courts are bound, as far as possible, to interpret national law in conformity with EEA law. Consequently, they must, as far as possible, apply the

66 Die Antwort auf die zweite Frage muss daher lauten, dass eine nationale Vorschrift wie Artikel 59 des liechtensteinischen Rechtsanwaltsgesetzes, die von einem in einem anderen EWR-Staat niedergelassenen Rechtsanwalt fordert, dass er unter allen Umständen und aus eigenem Antrieb nicht nur seine Eigenschaft als Rechtsanwalt schriftlich nachweist, sondern der zuständigen Stelle im Aufnahmestaat vor der Erbringung von Dienstleistungen in diesem Staat Meldung erstattet und diese Meldung einmal jährlich erneuert, im Widerspruch zu Artikel 7 Absatz 1 der Richtlinie und Artikel 36 des EWR-Abkommens steht.

V ZUR DRITTEN, VIERTEN UND FÜNFTEN FRAGE

67 Die verbleibenden Fragen des nationalen Gerichts betreffen die Folgen der Nichteinhaltung einer Meldepflicht wie jener gemäss Artikel 59 des liechtensteinischen Rechtsanwaltsgesetzes im Hinblick auf die Vergütung von juristischen Dienstleistungen nach nationalem Recht.

68 In Beantwortung der zweiten Frage gelangte der Gerichtshof zu der Schlussfolgerung, dass eine nationale Vorschrift wie Artikel 59 des liechtensteinischen Rechtsanwaltsgesetzes der Richtlinie und Artikel 36 des EWR-Abkommens widerspricht. Die Antwort auf die verbleibenden Fragen muss daher lauten, dass die Nichteinhaltung einer solchen Vorschrift keine relevante Erwägung im Hinblick auf die Möglichkeit der Forderung eines Rechtsanwaltshonorars in Bezug auf die grenzüberschreitende Erbringung von Dienstleistungen durch einen Rechtsanwalt darstellen kann.

69 In diesem Zusammenhang erinnert der Gerichtshof daran, dass die EWR-Staaten nach Artikel 3 des EWR-Abkommens verpflichtet sind, alle geeigneten Massnahmen zur Gewährleistung der Anwendung und Wirksamkeit des EWR-Rechts zu treffen. Es ist integraler Bestandteil der Ziele des EWR-Abkommens, dass die nationalen Gerichte verpflichtet sind, innerstaatliche Vorschriften soweit wie möglich im Einklang mit dem EWR-Recht auszulegen. Folglich müssen sie die im nationalen Recht anerkannten Auslegungsmethoden soweit wie möglich anwenden, um das von

methods of interpretation recognised by national law in order to achieve the result sought by the relevant rule of EEA law (see, *inter alia*, Case E-15/12 *Wahl*, judgment of 22 July 2013, not yet reported, paragraph 54, and case law cited).

VI COSTS

70 The costs incurred by the Liechtenstein Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Princely Court, any decision on costs for the parties to those proceedings is a matter for that court.

der einschlägigen EWR-Norm angestrebte Ergebnis zu erreichen (siehe, u. a., Rechtssache E-15/12 *Wahl*, Urteil vom 22. Juli 2013, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 54, und die zitierte Rechtsprechung).

VI KOSTEN

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

On those grounds,

THE COURT

in answer to the questions referred to it by Fürstliche Landgericht des Fürstentums Liechtenstein, hereby gives the following Advisory Opinion:

1. **A lawyer bringing proceedings in his own name in an EEA State other than the one in which he is established may rely on the freedom to provide services and Directive 77/249/EEC if he is acting in a professional capacity, and if the national legal order of the host State foresees that a lawyer may act on his own behalf in the capacity as a lawyer in legal proceedings.**

2. **A national rule such as Article 59 of the Liechtenstein Lawyers Act, whereby a lawyer established in another EEA State is required, in all circumstances and on his own motion, not only to provide documentation to establish his qualifications as a lawyer, but also to notify the competent authorities of the host State prior to providing services in that State, and to renew the notification yearly, is contrary to Article 7(1) of Directive 77/249/EEC and to Article 36 EEA.**

3. **Failure to comply with a national rule such as Article 59 of the Liechtenstein Lawyers Act cannot be a relevant consideration as regards the possibility of claiming legal fees relating to the cross-border provision of services by a lawyer.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 27 November 2013.

Gunnar Selvik Per Christiansen

Registrar Acting President

Aus diesen Gründen erstellt

DER GERICHTSHOF

in Beantwortung der ihm vom Fürstlichen Landgericht des Fürstentums Liechtenstein vorgelegten Frage folgendes Gutachten:

1. **Ein Rechtsanwalt, der in einem EWR-Staat, bei dem es sich nicht um den Staat handelt, in dem er niedergelassen ist, in eigener Sache prozessiert, kann sich auf die Dienstleistungsfreiheit und die Richtlinie 77/249 berufen, wenn er in seiner beruflichen Funktion als Rechtsanwalt tätig wird und wenn es die nationale Rechtsordnung des Aufnahmestaats Rechtsanwälten erlaubt, in eigener Sache als Rechtsanwalt tätig zu werden.**

2. **Eine nationale Vorschrift wie Artikel 59 des liechtensteinischen Rechtsanwaltsgesetzes, die von einem in einem anderen EWR-Staat niedergelassenen Rechtsanwalt fordert, dass er unter allen Umständen und aus eigenem Antrieb nicht nur seine Eigenschaft als Rechtsanwalt schriftlich nachweist, sondern der zuständigen Stelle im Aufnahmestaat vor der Erbringung von Dienstleistungen in diesem Staat Meldung erstattet und diese Meldung einmal jährlich erneuert, steht im Widerspruch zu Artikel 7 Absatz 1 der Richtlinie 77/249 und Artikel 36 des EWR-Abkommens.**

3. **Die Nichteinhaltung einer nationalen Vorschrift wie Artikel 59 des liechtensteinischen Rechtsanwaltsgesetzes kann keine relevante Erwägung im Hinblick auf die Möglichkeit der Forderung eines Rechtsanwaltshonorars im Zusammenhang mit der grenzüberschreitenden Erbringung von Dienstleistungen durch einen Rechtsanwalt darstellen.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Verkündet in öffentlicher Sitzung in Luxemburg am 27. November 2013.

Gunnar Selvik Per Christiansen

Kanzler Acting President

REPORT FOR THE HEARING

in Case E-6/13

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 Fürstliche Landgericht des Fürstentums Liechtenstein (Princely Court of the Principality of Liechtenstein) in the case of

Metacom AG

and

Rechtsanwälte Zipper & Collegen

concerning the interpretation of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.

I INTRODUCTION

1. In a letter of 9 April 2013, registered at the EFTA Court on 15 April 2013, the Fürstliches Landgericht made a request for an Advisory Opinion in a case pending before it between Metacom AG, a company registered in Liechtenstein ("the plaintiff"), and Rechtsanwälte Zipper & Collegen, a firm of lawyers based in Germany ("the defendant").

2. The case concerns whether a European lawyer representing himself in proceedings in an EEA State other than his State of establishment can rely on EEA law on the freedom for lawyers to provide temporary cross-border legal services. If so, the case also raises the question of whether an obligation in national law requiring European lawyers to notify the relevant authorities in the host State prior to the exercise of temporary cross-border legal services is compatible with EEA law.

SITZUNGSBERICHT

in der Rechtssache E-6/13

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

Metacom AG

und

Rechtsanwälte Zipper & Collegen

betreffend die Auslegung der Richtlinie 77/249/EWG des Rates vom 22. März 1977 zur Erleichterung der tatsächlichen Ausübung des freien Dienstleistungsverkehrs der Rechtsanwälte.

I EINLEITUNG

1. Mit Schreiben vom 9. April 2013, beim EFTA-Gerichtshof eingegangen am 15. April 2013, stellte das Fürstliche Landgericht einen Antrag auf Vorabentscheidung in einer bei ihm anhängigen Rechtssache zwischen der Metacom AG, einem in Liechtenstein eingetragenen Unternehmen (im Folgenden: Klägerin), und den Rechtsanwälten Zipper & Collegen, einer Anwaltskanzlei mit Sitz in Deutschland (im Folgenden: die Beklagten).

2. Die Rechtssache betrifft die Frage, ob sich ein europäischer Rechtsanwalt, der sich selbst in einem Verfahren in einem EWR-Staat vertritt, bei dem es sich nicht um den Staat handelt, in dem er niedergelassen ist, zur vorübergehenden grenzüberschreitenden Erbringung von juristischen Dienstleistungen auf den im EWR-Recht verankerten freien Dienstleistungsverkehr berufen kann. Wenn ja, so stellt sich in dieser Rechtssache zudem die Frage, ob eine im nationalen Recht vorgesehene Verpflichtung europäischer Rechtsanwälte zur Erstattung einer Meldung an die zuständige Stelle des Aufnahmestaats im Vorfeld der vorübergehenden grenzüberschreitenden Erbringung von juristischen Dienstleistungen mit dem EWR-Recht vereinbar ist.

II LEGAL BACKGROUND

EEA law

3. Article 36(1) EEA reads:

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

4. Pursuant to Article 37(1) EEA, "services shall be considered services within the meaning of this Agreement where they are normally provided for remuneration". Pursuant to Article 37(1)(d) EEA, that notion includes the "activities of the professions".

5. Article 37(2) EEA states that, without prejudice to the provisions of Chapter 2 (right of establishment), "the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals".

6. Pursuant to Article 39 EEA, the provisions of, *inter alia,* Article 30 EEA shall apply to the matters covered by Chapter 3 (services) of the Agreement. Pursuant to Article 30 EEA, the Contracting Parties shall take the necessary measures, contained in Annex VII to the Agreement, to make it easier for persons to take up and pursue activities as workers and self-employed persons.

7. Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17) ("Directive 77/249") is referred to at point 2 of Annex VII to the EEA Agreement (mutual recognition of professional qualifications).

II RELEVANTES RECHT

EWR-Recht

3. Artikel 36 Absatz 1 des EWR-Abkommens lautet:

   Im Rahmen dieses Abkommens unterliegt der freie Dienstleistungsverkehr im Gebiet der Vertragsparteien für Angehörige der EG-Mitgliedstaaten und der EFTA-Staaten, die in einem anderen EG-Mitgliedstaat beziehungsweise in einem anderen EFTA-Staat als demjenigen des Leistungsempfängers ansässig sind, keinen Beschränkungen.

4. Gemäss Artikel 37 Absatz 1 des EWR-Abkommens sind „Dienstleistungen im Sinne dieses Abkommens ... Leistungen, die in der Regel gegen Entgelt erbracht werden". Laut Artikel 37 Absatz 1 Buchstabe d des EWR-Abkommens fallen darunter „freiberufliche Tätigkeiten".

5. Nach Artikel 37 Absatz 2 des EWR-Abkommens kann der Leistende unbeschadet der Bestimmungen des Kapitels 2 (Niederlassungsrecht) „zwecks Erbringung seiner Leistung seine Tätigkeit vorübergehend in dem Staat ausüben, in dem die Leistung erbracht wird, und zwar unter den Voraussetzungen, welche dieser Staat für seine eigenen Angehörigen vorschreibt".

6. Gemäss Artikel 39 des EWR-Abkommens finden die Bestimmungen u. a. von Artikel 30 des EWR-Abkommens auf das von Kapitel 3 (Dienstleistungen) des Abkommens geregelte Sachgebiet Anwendung. Laut Artikel 30 des EWR-Abkommens treffen die Vertragsparteien die erforderlichen Massnahmen nach Anhang VII des Abkommens, um Arbeitnehmern und selbständig Erwerbstätigen die Aufnahme und Ausübung von Erwerbstätigkeiten zu erleichtern.

7. Auf Richtlinie 77/249/EWG vom 22. März 1977 zur Erleichterung der tatsächlichen Ausübung des freien Dienstleistungsverkehrs der Rechtsanwälte (ABl. 1977, L 78, 17) („Richtlinie 77/249") wird unter Punkt 2 von Anhang VII des EWR-Abkommens (gegenseitige Anerkennung beruflicher Qualifikationen) verwiesen.

8. Article 1 of Directive 77/249 reads:

1. This Directive shall apply, within the limits and under the conditions laid down herein, to the activities of lawyers pursued by way of provision of services. ...

2. "Lawyer" means any person entitled to pursue his professional activities under one of the following designations: ... Germany: Rechtsanwalt.

9. Article 2 of Directive 77/249 reads:

Each Member State shall recognize as a lawyer for the purpose of pursuing the activities specified in Article 1 (1) any person listed in paragraph 2 of that Article.

10. Article 3 of Directive 77/249 reads:

A person referred to in Article 1 shall adopt the professional title used in the Member State from which he comes, expressed in the language or one of the languages, of that State, with an indication of the professional organization by which he is authorized to practise or the court of law before which he is entitled to practise pursuant to the laws of that State.

11. Article 4 of Directive 77/249 reads:

1. Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State.

2. A lawyer pursuing these activities shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes.

...

4. A lawyer pursuing activities other than those referred to in paragraph 1 shall remain subject to the conditions and rules of

8. Artikel 1 der Richtlinie 77/249 lautet:

1. *Diese Richtlinie gilt innerhalb der darin festgelegten Grenzen und unter den darin vorgesehenen Bedingungen für die in Form der Dienstleistung ausgeübten Tätigkeiten der Rechtsanwälte. ...*

2. *Unter „Rechtsanwalt" ist jede Person zu verstehen, die ihre beruflichen Tätigkeiten unter einer der folgenden Bezeichnungen auszuüben berechtigt ist: ... Deutschland: Rechtsanwalt.*

9. Artikel 2 der Richtlinie 77/249 lautet:

Jeder Mitgliedstaat erkennt für die Ausübung der in Artikel 1 Absatz 1 genannten Tätigkeiten alle unter Artikel 1 Absatz 2 fallenden Personen als Rechtsanwalt an.

10. Artikel 3 der Richtlinie 77/249 lautet:

Jede unter Artikel 1 fallende Person verwendet die in der Sprache oder in einer der Sprachen des Herkunftsstaats gültige Berufsbezeichnung unter Angabe der Berufsorganisation, deren Zuständigkeit sie unterliegt, oder des Gerichtes, bei dem sie nach Vorschriften dieses Staates zugelassen ist.

11. Artikel 4 der Richtlinie 77/249 lautet:

1. Die mit der Vertretung oder der Verteidigung eines Mandanten im Bereich der Rechtspflege oder vor Behörden zusammenhängenden Tätigkeiten des Rechtsanwalts werden im jeweiligen Aufnahmestaat unter den für die in diesem Staat niedergelassenen Rechtsanwälte vorgesehenen Bedingungen ausgeübt, wobei jedoch das Erfordernis eines Wohnsitzes sowie das der Zugehörigkeit zu einer Berufsorganisation in diesem Staat ausgeschlossen sind.

2. Bei der Ausübung dieser Tätigkeit hält der Rechtsanwalt die Standesregeln des Aufnahmestaats neben den ihm im Herkunftsstaat obliegenden Verpflichtungen ein.

...

4. Für die Ausübung anderer als der in Absatz 1 genannten Tätigkeiten bleibt der Rechtsanwalt den im Herkunftsstaat

professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity. The latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the host Member State and to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility.

12. Article 5 of Directive 77/249 reads:

For the pursuit of activities relating to the representation of a client in legal proceedings, a Member State may require lawyers to whom Article 1 applies:

– *to be introduced, in accordance with local rules or customs, to the presiding judge and, where appropriate, to the President of the relevant Bar in the host Member State;*

– *to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority, or with an "avoué" or "procuratore" practising before it.*

13. Article 7 of Directive 77/249 reads:

1. The competent authority of the host Member State may request the person providing the services to establish his qualifications as a lawyer.

2. In the event of non-compliance with the obligations referred to in Article 4 and in force in the host Member State, the competent

geltenden Bedingungen und Standesregeln unterworfen; daneben hält er die im Aufnahmestaat geltenden Regeln über die Ausübung des Berufes, gleich welchen Ursprungs, insbesondere in bezug auf die Unvereinbarkeit zwischen den Tätigkeiten des Rechtsanwalts und anderen Tätigkeiten in diesem Staat, das Berufsgeheimnis, die Beziehungen zu Kollegen, das Verbot des Beistands für Parteien mit gegensätzlichen Interessen durch denselben Rechtsanwalt und die Werbung ein. Diese Regeln sind nur anwendbar, wenn sie von einem Rechtsanwalt beachtet werden können, der nicht in dem Aufnahmestaat niedergelassen ist, und nur insoweit, als ihre Einhaltung in diesem Staat objektiv gerechtfertigt ist, um eine ordnungsgemäße Ausübung der Tätigkeiten des Rechtsanwalts sowie die Beachtung der Würde des Berufes und der Unvereinbarkeiten zu gewährleisten.

12. Artikel 5 der Richtlinie 77/249 lautet:

Für die Ausübung der Tätigkeiten, die mit der Vertretung und der Verteidigung von Mandanten im Bereich der Rechtspflege verbunden sind, kann ein Mitgliedstaat den unter Artikel 1 fallenden Rechtsanwälten als Bedingung auferlegen,

– *daß sie nach den örtlichen Regeln oder Gepflogenheiten beim Präsidenten des Gerichtes und gegebenenfalls beim zuständigen Vorsitzenden der Anwaltskammer des Aufnahmestaats eingeführt sind;*

– *daß sie im Einvernehmen entweder mit einem bei dem angerufenen Gericht zugelassenen Rechtsanwalt, der gegebenenfalls diesem Gericht gegenüber die Verantwortung trägt, oder mit einem bei diesem Gericht tätigen „avoué“ oder „procuratore“ handeln.*

13. Artikel 7 der Richtlinie 77/249 lautet:

1. Die zuständige Stelle des Aufnahmestaats kann von dem Dienstleistungserbringer verlangen, daß er seine Eigenschaft als Rechtsanwalt nachweist.

2. Bei Verletzung der im Aufnahmestaat geltenden Verpflichtungen im Sinne des Artikels 4 entscheidet die zuständige Stelle des

authority of the latter shall determine in accordance with its own rules and procedures the consequences of such non-compliance, and to this end may obtain any appropriate professional information concerning the person providing services. It shall notify the competent authority of the Member State from which the person comes of any decision taken. Such exchanges shall not affect the confidential nature of the information supplied.

14. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22) ("Directive 2005/36") was incorporated into Annex VII to the EEA Agreement at point 1 by Decision 142/2007 of 26 October 2007 of the EEA Joint Committee (OJ 2008 L 100, p. 70). The Decision entered into force on 1 July 2009.

15. Article 1 of Directive 2005/36 reads:

Purpose

This Directive establishes rules according to which a Member State which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications (referred to hereinafter as the host Member State) shall recognise professional qualifications obtained in one or more other Member States (referred to hereinafter as the home Member State) and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession.

16. Article 2 of Directive 2005/36 reads:

Scope

...

3. Where, for a given regulated profession, other specific arrangements directly related to the recognition of professional qualifications are established in a separate instrument of Community law, the corresponding provisions of this Directive shall not apply.

Aufnahmestaats nach den eigenen Rechts- und Verfahrensregeln über die rechtlichen Folgen dieses Verhaltens; sie kann zu diesem Zweck Auskünfte beruflicher Art über den Dienstleistungserbringer einholen. Sie unterrichtet die zuständige Stelle des Herkunftsstaats von jeder Entscheidung, die sie getroffen hat. Diese Unterrichtung berührt nicht die Pflicht zur Geheimhaltung der Auskünfte.

14. Die Richtlinie 2005/36/EG des Europäischen Parlaments und des Rates vom 7. September 2005 über die Anerkennung von Berufsqualifikationen (ABl. 2005, L 255, 22) (im Folgenden: Richtlinie 2005/36) wurde mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 142/2007 vom 26. Oktober 2007 (ABl. 2008, L 100, 70) unter Punkt 1 in Anhang VII des EWR-Abkommens aufgenommen. Der Beschluss trat am 1. Juli 2009 in Kraft.

15. Artikel 1 der Richtlinie 2005/36 lautet:

Gegenstand

Diese Richtlinie legt die Vorschriften fest, nach denen ein Mitgliedstaat, der den Zugang zu einem reglementierten Beruf oder dessen Ausübung in seinem Hoheitsgebiet an den Besitz bestimmter Berufsqualifikationen knüpft (im Folgenden „Aufnahmemitgliedstaat" genannt), für den Zugang zu diesem Beruf und dessen Ausübung die in einem oder mehreren anderen Mitgliedstaaten (im Folgenden „Herkunftsmitgliedstaat" genannt) erworbenen Berufsqualifikationen anerkennt, die ihren Inhaber berechtigen, dort denselben Beruf auszuüben.

16. Artikel 2 der Richtlinie 2005/36 lautet:

Anwendungsbereich

...

(3) Wurden für einen bestimmten reglementierten Beruf in einem gesonderten gemeinschaftlichen Rechtsakt andere spezielle Regelungen unmittelbar für die Anerkennung von Berufsqualifikationen festgelegt, so finden die entsprechenden Bestimmungen dieser Richtlinie keine Anwendung.

17. Article 7 of Directive 2005/36 reads:

Declaration to be made in advance, if the service provider moves

1. Member States may require that, where the service provider first moves from one Member State to another in order to provide services, he shall inform the competent authority in the host Member State in a written declaration to be made in advance including the details of any insurance cover or other means of personal or collective protection with regard to professional liability. Such declaration shall be renewed once a year if the service provider intends to provide temporary or occasional services in that Member State during that year. The service provider may supply the declaration by any means.

2. Moreover, for the first provision of services or if there is a material change in the situation substantiated by the documents, Member States may require that the declaration be accompanied by the following documents:

(a) proof of the nationality of the service provider;

(b) an attestation certifying that the holder is legally established in a Member State for the purpose of pursuing the activities concerned and that he is not prohibited from practising, even temporarily, at the moment of delivering the attestation;

(c) evidence of professional qualifications;

(d) for cases referred to in Article 5(1)(b), any means of proof that the service provider has pursued the activity concerned for at least two years during the previous ten years;

(e) for professions in the security sector, where the Member State so requires for its own nationals, evidence of no criminal convictions.

...

17. Artikel 7 der Richtlinie 2005/36 lautet:

Vorherige Meldung bei Ortswechsel des Dienstleisters

1. Die Mitgliedstaaten können verlangen, dass der Dienstleister in dem Fall, dass er zur Erbringung von Dienstleistungen erstmals von einem Mitgliedstaat in einen anderen wechselt, den zuständigen Behörden im Aufnahmemitgliedstaat vorher schriftlich Meldung erstattet und sie dabei über Einzelheiten zu einem Versicherungsschutz oder einer anderen Art des individuellen oder kollektiven Schutzes in Bezug auf die Berufshaftpflicht informiert. Diese Meldung ist einmal jährlich zu erneuern, wenn der Dienstleister beabsichtigt, während des betreffenden Jahres vorübergehend oder gelegentlich Dienstleistungen in dem Mitgliedstaat zu erbringen. Der Dienstleister kann die Meldung in beliebiger Form vornehmen.

2. Darüber hinaus können die Mitgliedstaaten fordern, dass, wenn Dienstleistungen erstmals erbracht werden oder sich eine wesentliche Änderung gegenüber der in den Dokumenten bescheinigten Situation ergibt, der Meldung folgende Dokumente beigefügt sein müssen:

a) ein Nachweis über die Staatsangehörigkeit des Dienstleisters;

b) eine Bescheinigung darüber, dass der Dienstleister in einem Mitgliedstaat rechtmäßig zur Ausübung der betreffenden Tätigkeiten niedergelassen ist und dass ihm die Ausübung dieser Tätigkeiten zum Zeitpunkt der Vorlage der Bescheinigung nicht, auch nicht vorübergehend, untersagt ist;

c) ein Berufsqualifikationsnachweis;

d) in den in Artikel 5 Absatz 1 Buchstabe b genannten Fällen ein Nachweis in beliebiger Form darüber, dass der Dienstleister die betreffende Tätigkeit während der vorhergehenden zehn Jahre mindestens zwei Jahre lang ausgeübt hat;

e) im Fall von Berufen im Sicherheitssektor der Nachweis, dass keine Vorstrafen vorliegen, soweit der Mitgliedstaat diesen Nachweis von den eigenen Staatsangehörigen verlangt.

...

18. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) ("Directive 2006/123") was incorporated into Annex X to the EEA Agreement at point 1 by Decision 45/2009 of 9 June 2009 of the EEA Joint Committee (OJ 2009 L 162, p. 23). The Decision entered into force on 1 May 2010.

19. Pursuant to its Article 17(4), Article 16 of Directive 2006/123 on freedom to provide services does not apply to matters covered by Directive 77/249.

National law

20. Pursuant to Article 55(1) of the Lawyers Act (*Rechtsanwaltsgesetz*, LGBl 1993 No 41, as amended), nationals of an EEA State who are entitled to exercise a professional activity as a lawyer in their home State using one of the designations listed in the annex to the Act shall be authorised to exercise their activity as a lawyer in Liechtenstein on a temporary cross-border basis (otherwise known as "European lawyers engaging in the provision of services").

21. However, pursuant to Article 59 of the Lawyers Act, such authorisation is subject to the following set of requirements:

(1) A European lawyer engaging in the provision of services shall be supervised by the chamber of lawyers.

(2) Prior to the exercise of an activity in Liechtenstein, a European lawyer engaging in the provision of services shall notify the head of the chamber of lawyers of his intention to do so and submit the following evidence:

(a) A certificate evidencing the fact that the service provider lawfully exercises the relevant activity in his home State and that, on the date the certificate is submitted, he is not prohibited, not even on a temporary basis, from the exercise of that activity;

(b) evidence of his nationality; and

(c) that he is covered by professional indemnity insurance within the meaning of Article 25.

18. Die Richtlinie 2006/123/EG des Europäischen Parlaments und des Rates vom 12. Dezember 2006 über Dienstleistungen im Binnenmarkt (ABl. 2006, L 376, 36) (im Folgenden: Richtlinie 2006/123) wurde mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 45/2009 vom 9. Juni 2009 (ABl. 2009, L 162, 23) unter Punkt 1 in Anhang X des EWR-Abkommens aufgenommen. Der Beschluss trat am 1. Mai 2010 in Kraft.

19. Gemäss Artikel 17 Absatz 4 findet Artikel 16 der Richtlinie 2006/123, der sich auf die Dienstleistungsfreiheit bezieht, keine Anwendung auf Angelegenheiten, die unter Richtlinie 77/249 fallen.

Nationales Recht

20. Nach Artikel 55 Absatz 1 des Rechtsanwaltsgesetzes (LGBl. 1993, Nr. 41, in der gültigen Fassung) sind Staatsangehörige eines EWR-Staats, die berechtigt sind, als Rechtsanwalt in ihrem Herkunftsstaat unter einer der im Anhang zu diesem Gesetz aufgeführten Berufsbezeichnungen beruflich tätig zu sein, zur vorübergehenden grenzüberschreitenden Berufsausübung in Liechtenstein zugelassen (dienstleistungserbringende europäische Rechtsanwälte).

21. Allerdings unterliegt die Zulassung laut Artikel 59 des Rechtsanwaltsgesetzes den folgenden Voraussetzungen:

(1) Der dienstleistungserbringende europäische Rechtsanwalt wird durch die Rechtsanwaltskammer beaufsichtigt.

(2) Vor Aufnahme einer Tätigkeit im Inland hat der dienstleistungserbringende europäische Rechtsanwalt seine Absicht dem Vorstand der Rechtsanwaltskammer zu melden und die folgenden Nachweise zu erbringen:

(a) eine Bescheinigung, aus der hervorgeht, dass der Dienstleister die betreffende Tätigkeit im Herkunftsstaat rechtmässig ausübt und dass ihm die Ausübung dieser Tätigkeit zum Zeitpunkt der Vorlage der Bescheinigung nicht, auch nicht vorübergehend, untersagt ist;

(b) ein Nachweis über die Staatsangehörigkeit;

(c) über das Bestehen einer Haftpflichtversicherung im Sinne von Art. 25.

(3) The chamber of lawyers shall confirm receipt of the notification without delay. On request, evidence of the notification shall be provided to the courts or administrative authorities.

(3a) Notification shall be renewed once every year if the European lawyer engaging in the provision of services intends in the year in question to provide services in Liechtenstein on a temporary or occasional basis. Furthermore, it shall be renewed immediately, if – with respect to the situation certified – a substantive change has occurred.

(4) It shall be the responsibility of the head of the chamber of lawyers

(a) to advise and instruct a European lawyer engaging in the provision of services on matters concerning the professional obligations of a lawyer;

(b) to supervise the discharge of the obligations to which such persons are subject;

(c) to prohibit the exercise of the provision of services and, where appropriate, notify the courts or administrative authorities of that fact if the requirements set out in paragraph 2 above are not satisfied or cease to be satisfied;

(d) to notify the competent authority of the home State of decisions taken in respect of that person.[1]

22. Under Liechtenstein law, the payment of legal fees and expenses is regulated by the Lawyers' Fees Act (*Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten*, LGBl 1988 No 9) and by the Lawyers' Fees Regulation (*Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten*, LGBl 1992 No 69).

[1] In the translation of the request for an Advisory Opinion provided for the purposes of Article 20 of the Statute of the Court, "register" and "registration" were used. In the present Report "notify" and "notification" have been used instead. Those who have submitted written observations have pointed out that "notify" and "notification" are more appropriate translations of the German terms "*melden*" and "*Meldung*" used in the official German version of the Lawyers Act.

(3) Die Rechtsanwaltskammer bestätigt den Erhalt der Meldung unverzüglich. Die Meldung ist gegenüber Gerichten oder Verwaltungsbehörden auf Verlangen nachzuweisen.

(3a) Die Meldung ist einmal jährlich zu erneuern, wenn der dienstleistungserbringende europäische Rechtsanwalt beabsichtigt, während des betreffenden Jahres vorübergehend oder gelegentlich Dienstleistungen im Inland zu erbringen. Weiters ist sie umgehend zu erneuern, wenn sich eine wesentliche Änderung gegenüber der bisher bescheinigten Situation ergibt.

(4) Dem Vorstand der Rechtsanwaltskammer obliegt es,

(a) den dienstleistungserbringenden europäischen Rechtsanwalt in Fragen der Berufspflichten eines Rechtsanwaltes zu beraten und zu belehren;

(b) die Erfüllung der diesen Personen obliegenden Pflichten zu überwachen;

(c) die Dienstleistungsausübung zu untersagen und gegebenenfalls die Gerichte oder Verwaltungsbehörden darüber zu unterrichten, wenn die Voraussetzungen gemäss Abs. 2 nicht oder nicht mehr erfüllt sind;

(d) die zuständige Stelle des Herkunftslandes über Entscheidungen zu unterrichten, die hinsichtlich dieser Person getroffen worden sind.[1]

22. Nach liechtensteinischem Recht ist die Zahlung von Honoraren und Auslagen im Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten (LGBl. 1988, Nr. 9) und der Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten, LGBl. 1992, Nr. 69) geregelt.

[1] In der Übersetzung des Antrags auf Vorabentscheidung ins Englische, die für die Zwecke gemäss Artikel 20 der Satzung des Gerichtshofs bereitgestellt wird, wurden die Begriffe „register" und „registration" verwendet. Im vorliegenden Sitzungsbericht wurden stattdessen die Begriffe „notify" und „notification" gewählt. Die Parteien, die schriftliche Erklärungen vorgelegt haben, haben darauf hingewiesen, dass „notify" und „notification" angemessenere Übersetzungen für die in der amtlichen deutschen Fassung des Rechtsanwaltsgesetzes verwendeten deutschen Begriffe *„melden"* und *„Meldung"* darstellen.

23. Article 1 of the Lawyers' Fees Act reads:

Scope of the tariff scale

Art. 1

1) In proceedings concerning ... civil litigation ... lawyers ... are entitled ... to legal fees pursuant to the following provisions:

2) The provisions of this Act apply, unless otherwise provided for in the following, both as regards the relationship between the lawyer ... and the party represented by him, and as regards the determination of the costs that the opponent must reimburse, also where costs are to be reimbursed by the opponent to a lawyer ... for his own account.

III FACTS AND PROCEDURE

24. The case before the national court concerns a claim for "de-recognition" of a debt (*Aberkennungsklage*).

25. In a letter of 13 August 2012, the defendant raised the issue of whether the plaintiff had sufficient standing to sue.

26. The plaintiff withdrew the action for de-recognition. The withdrawal was formally noted in an order dated 21 August 2012 by the Princely Court. The order was served on the defendant. At the same time, a hearing of the parties scheduled for 12 September 2012 was cancelled. On 3 September 2012, the defendant submitted its defence to the action for de-recognition, arguing that it should be dismissed and that the plaintiff should pay the costs.

27. By order of the Princely Court of 14 September 2012, the defendant's pleadings, as well as the request for costs, were rejected. The basis for the decision was that the proceedings had been resolved as a result of the withdrawal of the action. Any further documents were therefore out of time and unnecessary. In principle, the plaintiff was to be regarded as the unsuccessful party. However, costs could not be awarded in relation to procedural steps that had taken place after 21 August 2012, or in connection with the letter of 13 August, which had

23. Artikel 1 des Gesetzes über den Tarif für Rechtsanwälte und Rechtsagenten lautet:

Gegenstand des Tarifs

Art. 1

1) Rechtsanwälte ... haben im zivilgerichtlichen Verfahren ... Anspruch auf Entlohnung nach Massgabe der folgenden Bestimmungen:

2) Die Vorschriften dieses Gesetzes gelten, soweit im folgenden nichts anderes bestimmt wird, sowohl im Verhältnis zwischen dem Rechtsanwalt ... und der von ihm vertretenen Partei als auch bei Bestimmung der Kosten, die der Gegner zu ersetzen hat, und zwar auch dann, wenn dem Rechtsanwalt ... in eigener Sache Kosten vom Gegner zu ersetzen sind.

III SACHVERHALT UND VERFAHREN

24. Die Rechtssache vor dem nationalen Gericht betrifft eine Aberkennungsklage.

25. Mit Schreiben vom 13. August 2012 stellten die Beklagten im Ausgangsverfahren die ausreichende Aktivlegitimation der Klägerin in Frage.

26. Die Klägerin zog die Aberkennungsklage zurück. Der Rückzug wurde mit Beschluss des Fürstlichen Landgerichts vom 21. August 2012 formell zur Kenntnis genommen. Der Beschluss wurde den Beklagten zugestellt. Gleichzeitig wurde die für den 12. September 2012 angesetzte Tagsatzung abberaumt. Am 3. September 2012 reichten die Beklagten eine Klagebeantwortung ein, mit der sie die kostenpflichtige Abweisung der Aberkennungsklage beantragten.

27. Mit Beschluss des Fürstlichen Landgerichts vom 14. September 2012 wurde der Schriftsatz der Beklagten sowie der Antrag auf Kostenersatz abgewiesen. Die Grundlage für diesen Beschluss bildete der Umstand, dass das Verfahren infolge des Klagerückzugs erledigt wurde. Weitere Schriftstücke seien daher verspätet eingelangt und unnötig. Grundsätzlich

not been required by the court. In any event, under Articles 58 and 59 of the Liechtenstein Lawyers Act, the defendant had to nominate a lawyer from the list of Liechtenstein lawyers with an address for service in Liechtenstein, and to notify in advance the Head of the Liechtenstein Chamber of Lawyers (*Liechtensteinische Rechtsanwaltskammer*) stating the intention to provide services in Liechtenstein.

28. On 24 September 2012, the defendant (now represented by Ritter & Wohlwend Rechtsanwälte, a firm of lawyers based in Liechtenstein), applied for costs amounting to CHF 676,75. The defendant argued that i) it had mandated a Liechtenstein lawyer to represent it at the cancelled hearing on 12 September, ii) the mandated lawyer only became aware of the withdrawal of the action upon being informed by the court of the cancellation of the hearing, and iii) the documents to that effect had only been served on the defendant on 18 September.

29. On 4 December 2012, the decision to reject the request for costs was annulled by the Princely Court of Appeal (*Fürstliches Obergericht*) on the grounds that, *inter alia*, no hearing had been held.

30. A hearing was held by the Princely Court on 6 February 2013. At the hearing, the defendant submitted a new schedule for costs.

31. By order of the Princely Court of 7 February 2013, the defendant was given 14 days to produce its notification to the Liechtenstein Chamber of Lawyers and all the accompanying evidence required by Article 59 of the Liechtenstein Lawyers Act. The defendant was also given 14 days within which to submit observations concerning its claim that it was entitled to costs in accordance with the scale set out in the Lawyers' Fees Act and Regulation.

war die Klägerin als unterlegen anzusehen. Allerdings konnte kein Kostenersatz für nach dem 21. August 2012 erfolgte Verfahrenshandlungen oder im Zusammenhang mit dem Schreiben vom 13. August, das vom Gericht nicht aufgetragen war, zugesprochen werden. In jedem Fall mussten die Beklagten gemäss Artikel 58 und 59 des liechtensteinischen Rechtsanwaltsgesetzes einen in die liechtensteinische Rechtsanwaltsliste eingetragenen Rechtsanwalt als Zustellungsbevollmächtigten benennen und ihre Absicht zur Erbringung von Leistungen in Liechtenstein dem Vorstand der Liechtensteinischen Rechtsanwaltskammer vorab melden.

28. Am 24. September 2012 stellten die Beklagten (nunmehr vertreten durch Ritter & Wohlwend Rechtsanwälte, eine Rechtsanwaltskanzlei mit Sitz in Liechtenstein) einen Antrag auf Kostenbestimmung von insgesamt 676,75 CHF. Die Beklagten brachten vor, dass i) sie eine liechtensteinische Rechtsanwältin mit der Wahrnehmung des abberaumten Verhandlungstermins am 12. September beauftragt hatten, ii) die beauftragte Rechtsanwältin erst von der Klagerücknahme erfuhr, als ihr vom Gericht mitgeteilt wurde, dass die Verhandlung abberaumt worden sei und iii) die entsprechenden Schriftstücke den Beklagten erst am 18. September zugestellt worden seien.

29. Am 4. Dezember 2012 wurde der Beschluss zur Abweisung des Antrags auf Kostenersatz vom Fürstlichen Obergericht als nichtig aufgehoben, weil u. a. keine Verhandlung stattgefunden habe.

30. Am 6. Februar 2013 hielt das Fürstliche Landgericht eine Verhandlung ab. In dieser Verhandlung legten die Beklagten ein neues Kostenverzeichnis vor.

31. Mit Beschluss des Fürstlichen Landgerichts vom 7. Februar 2013 wurde den Beklagten eine Frist von 14 Tagen eingeräumt, um die Meldung an die liechtensteinische Rechtsanwaltskammer und die in Artikel 59 des liechtensteinischen Rechtsanwaltsgesetzes vorgesehenen damit verbundenen Nachweise vorzulegen. Zudem wurde den Beklagten eine Frist von 14 Tagen gesetzt, um zur Frage der Honorierung nach dem Gesetz über den Tarif für Rechtsanwälte

32. On 26 February 2013, the defendant provided a certificate (dated that day) from the Liechtenstein Chamber of Lawyers to the effect that Mr Zipper of Rechtsanwälte Zipper & Collegen had notified his intention of providing cross-border services as a lawyer in Liechtenstein from 20 February 2013, and that he satisfied the other relevant legal requirements. The defendant also pointed out that, had it been aware of the notification requirement, it would have complied with it prior to the start of proceedings.

33. However, since the defendant had not complied with the requirements laid down in Article 59 of the Lawyers Act at the time the costs had been incurred (in August and September 2012), the Princely Court expressed doubts as to whether the defendant can, as a matter of national law, be entitled to claim costs in accordance with the scale set out in the Lawyers' Fees Act and Regulation. It also queried the impact on this question of the principle of the freedom to provide services enshrined in EEA law, e.g the detailed provisions of Directive 77/248 and, in particular, its Article 7.

34. Consequently, the Princely Court referred the following questions to the Court:

1. Can a European lawyer bringing proceedings in another EEA State in his own name and not pursuant to the mandate of a third party rely on Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17)?

und Rechtsagenten und der Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten Stellung zu nehmen.

32. Am 26. Februar 2013 legten die Beklagten eine Bescheinigung der Liechtensteinischen Rechtsanwaltskammer (mit dem Datum dieses Tages) vor, aus der hervorging, dass Herr Zipper von den Rechtsanwälten Zipper & Collegen seine Absicht zur Erbringung von anwaltlichen grenzüberschreitendenden Dienstleistungen in Liechtenstein ab dem 20. Februar 2013 gemeldet hatte und die dafür vorgeschriebenen sonstigen gesetzlichen Voraussetzungen erfüllte. Die Beklagten führten dazu des Weiteren aus, dass sie der Verpflichtung zur Meldung schon vor Beginn des Verfahrens nachgekommen wären, wäre ihnen diese Verpflichtung bewusst gewesen.

33. Da die Beklagten jedoch zu jenem Zeitpunkt, zu dem die Kosten entstanden (im August und September 2012), die Anforderungen gemäss Artikel 59 des Rechtsanwaltsgesetzes nicht erfüllten, äusserte das Fürstliche Landgericht Zweifel, ob die Beklagten nach nationalem Recht Anspruch auf eine Honorierung nach dem Tarif laut dem Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten und der Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten haben können. Das Fürstliche Landgericht erkundigt sich ausserdem nach den Auswirkungen dieser Frage auf den im EWR-Recht, beispielsweise in den ausführlichen Bestimmungen der Richtlinie 77/248 und insbesondere in deren Artikel 7 verankerten Grundsatz des freien Dienstleistungsverkehrs.

34. Dementsprechend legte das Fürstliche Landgericht dem Gerichtshof die folgenden Fragen vor:

1. Kann sich ein europäischer Rechtsanwalt, der in einem anderen EWR-Staat in eigener Sache prozessiert und nicht von einem Dritten mandatiert ist, auf die Richtlinie 77/249/EWG des Rates vom 22.3.1977 zur Erleichterung der tatsächlichen Ausübung des freien Dienstleistungsverkehrs der Rechtsanwälte (Amtsblatt L 078 vom 26.3.1977, Seite 0017 bis 0018) berufen?

2. Is an obligation on European lawyers to notify the authorities of the host State (as provided for here in Article 59 of the Liechtenstein Lawyers Act (Rechtsanwaltsgesetz)) compatible with Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17) and, in particular, with Article 7 of that directive?

3. If Question 2 is answered in the affirmative: Having regard to Directive 77/249/EEC, may failure to provide notification in the host State on the part of a European lawyer engaged in the provision of services result in the consequence that the lawyer concerned may not claim lawyers' fees in accordance with the scale of fees provided for in the host State (in Liechtenstein the fees provided for in the Lawyers' Fees Act (Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten) and the Lawyers' Fees Regulation (Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten))?

4. Where a European lawyer engaged in the provision of services has only notified the authorities in the host State at a later date, may this subsequent notification result in the consequence that the lawyer may only claim fees in accordance with the scale of fees provided for in the host State in relation to the period following that notification but not in relation to procedural steps taken prior to that date?

5. Having regard to Directive 77/249/EEC, does the answer to Questions 3 and 4 depend on whether, at the start of the proceedings, the court of the host State referred the European lawyer engaged in the provision of services to the obligation under the law of that State to notify the authorities?

IV WRITTEN OBSERVATIONS

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

- the Liechtenstein Government, represented by Dr Andrea Entner-Koch, Director, and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents;
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Markus Schneider, Deputy

2. Ist die im Aufnahmestaat (wie hier in Art. 59 des liechtensteinischen Rechtsanwaltsgesetzes) vorgesehene Meldepflicht für dienstleistungserbringende europäische Rechtsanwälte mit der Richtlinie 77/249/EWG des Rates vom 22.3.1977 zur Erleichterung der tatsächlichen Ausübung des freien Dienstleistungsverkehrs der Rechtsanwälte (Amtsblatt L 078 vom 26.3.1977, Seite 0017 bis 0018), insbesondere mit deren Art. 7, vereinbar?

3. Falls die Frage zu 2 bejaht wird: Darf die von einem dienstleistungserbringenden europäischen Rechtsanwalt unterlassene Meldung im Aufnahmestaat mit Blick auf die Richtlinie 77/249/EWG dazu führen, dass der betroffene Rechtsanwalt den inländischen Rechtsanwaltstarif (in Liechtenstein gemäss dem Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten und der Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten) nicht beanspruchen kann?

4. Darf die nachträgliche Meldung des dienstleistungserbringenden europäischen Rechtsanwaltes im Aufnahmestaat dazu führen, dass dieser nur für die Zeit ab erfolgter Meldung den inländischen Rechtsanwaltstarif beanspruchen kann, nicht dagegen für die zuvor vorgenommenen Verfahrenshandlungen?

5. Hängt die Beantwortung der Fragen zu 3 und 4 davon ab, dass der dienstleistungserbringende europäische Rechtsanwalt zu Beginn des Verfahrens vom Gericht auf die Meldepflicht gemäss inländischem Recht hingewiesen worden ist, dies im Hinblick auf die Richtlinie 77/249/EWG?

IV SCHRIFTLICHE ERKLÄRUNGEN

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

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

– die EFTA-Überwachungsbehörde, vertreten durch Xavier Lewis, Direktor, und Markus Schneider, Stv. Direktor,

Director, Department of Legal & Executive Affairs, acting as Agents; and

– the European Commission ("the Commission"), represented by Hans Stovlbaek and Nicola Yerrell, Members of its Legal Service, acting as Agents.

V SUMMARY OF THE ARGUMENTS SUBMITTED

The first question

The Liechtenstein Government

36. The Liechtenstein Government observes that Directive 77/249 lays down detailed rules to facilitate the effective provision of services by lawyers. As an instrument of secondary legislation dealing with the free movement of services, Directive 77/249 must be interpreted in light of the general principles enshrined in the EEA Agreement governing the freedom to provide services.[2]

37. According to the Liechtenstein Government, two of those general principles are laid down in Article 36(1) EEA: first, that the provider and the recipient of the service concerned are established in two different Member States,[3] and, second, that the provider and the recipient of the service are two different persons.

38. The Liechtenstein Government submits that, as regards the first principle, the Court of Justice of the European Union ("ECJ") has developed a wide interpretation of the EU provision corresponding

[2] Reference is made to Case E-1/07 *Criminal Proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 28.

[3] Reference is made to Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 22.

Abteilung Rechts- & Verwaltungsangelegenheiten, als Bevollmächtigte;

– die Europäische Kommission (im Folgenden: Kommission), vertreten durch Hans Stovlbaek und Nicola Yerrell, Mitarbeiter des Juristischen Diensts der Kommission, als Bevollmächtigte.

V ZUSAMMENFASSUNG DER AUSFÜHRUNGEN

Zur ersten Frage

Die Regierung des Fürstentums Liechtenstein

36. Die Regierung des Fürstentums Liechtenstein stellt fest, dass die Richtlinie 77/249 ausführliche Vorschriften zur Erleichterung der tatsächlichen Erbringung von Dienstleistungen durch Rechtsanwälte enthält. Als sekundärrechtlicher Rechtsakt zur Dienstleistungsfreiheit ist die Richtlinie 77/249 im Lichte der im EWR-Abkommen verankerten allgemeinen Prinzipien zum freien Dienstleistungsverkehr auszulegen.[2]

37. Der Regierung des Fürstentums Liechtenstein zufolge sind zwei dieser allgemeinen Prinzipien in Artikel 36 Absatz 1 des EWR-Abkommens festgelegt: Erstens sind der Erbringer und der Empfänger der betreffenden Dienstleistung in zwei verschiedenen Mitgliedstaaten ansässig[3] und zweitens handelt es sich beim Erbringer und beim Empfänger der Dienstleistung um zwei verschiedene Personen.

38. Die Regierung des Fürstentums Liechtenstein bringt vor, dass der Gerichtshof der Europäischen Union (im Folgenden: EuGH) hinsichtlich des ersten Prinzips eine weite Auslegung der Artikel 36 des EWR-Abkommens entsprechenden Bestimmung des EU-Rechts entwickelt

[2] Es wird auf die Rechtssache E-1/07 *Strafverfahren gegen A*, EFTA Court Report 2007, 246, Randnr. 28, verwiesen.
[3] Es wird auf die Rechtssache C-55/94 *Gebhard,* Slg. 1995, I-4165, Randnr. 22, verwiesen.

to Article 36 EEA.[4] This entails that Article 36 EEA must apply in all cases where a person providing services offers them in a Member State other than the State in which he is established, wherever the recipients of those services may be established.

39. However, as regards the second principle, neither the ECJ nor the Court seems to have departed from the clear wording of Article 36 EEA – the provider and the recipient of the service concerned still have to be two different persons.

40. The facts of the present case are that Rechtsanwälte Zipper & Collegen are at the same time the provider and recipient of the services concerned. The Liechtenstein Government submits that, as a consequence, neither Article 36 EEA nor Directive 77/249 is applicable in the present case.

41. The Liechtenstein Government proposes that the Court should answer the first question as follows:

A European lawyer bringing proceedings in another EEA State in his own name and not pursuant to the mandate of a third party cannot rely on Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.

EFTA Surveillance Authority

42. ESA submits that the first question must be answered in the affirmative where national law allows for self-representation.

43. According to ESA, it is appropriate, first, to establish which directive applies to the cross-border provision of legal services: Directive 77/249, Directive 2005/36 or the Services Directive 2006/123.

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4 Reference is made to Case C-154/89 *Commission* v *France* [1991] ECR I-659, paragraphs 9 and 10.

hat.[4] Dementsprechend muss Artikel 36 des EWR-Abkommens in allen Fällen Anwendung finden, in denen ein Leistungserbringer Dienstleistungen in einem anderen Mitgliedstaat als demjenigen anbietet, in dem er niedergelassen ist, und zwar unabhängig davon, wo die Empfänger dieser Dienstleistungen ansässig sind.

39. Hinsichtlich des zweiten Prinzips scheinen jedoch weder der EuGH noch der Gerichtshof vom eindeutigen Wortlaut des Artikels 36 des EWR-Abkommens abgewichen zu sein: Beim Erbringer und beim Empfänger der betreffenden Dienstleistung muss es sich nach wie vor um zwei verschiedene Personen handeln.

40. Im vorliegenden Fall stellt sich der Sachverhalt jedoch so dar, dass die Rechtsanwälte Zipper & Collegen gleichzeitig Erbringer und Empfänger der betreffenden Dienstleistungen sind. Die Regierung des Fürstentums Liechtenstein hält daher fest, dass infolgedessen in der gegenständlichen Rechtssache weder Artikel 36 des EWR-Abkommens noch Richtlinie 77/249 anwendbar sind.

41. Die Regierung des Fürstentums Liechtenstein schlägt vor, dass der Gerichtshof die erste Frage folgendermassen beantwortet:

Ein europäischer Rechtsanwalt, der in einem anderen EWR-Staat in eigener Sache prozessiert und nicht von einem Dritten mandatiert ist, kann sich nicht auf die Richtlinie 77/249/EWG des Rates vom 22. März 1977 zur Erleichterung der tatsächlichen Ausübung des freien Dienstleistungsverkehrs der Rechtsanwälte berufen.

Die EFTA-Überwachungsbehörde

42. Die EFTA-Überwachungsbehörde führt aus, dass die erste Frage zu bejahen ist, sofern das nationale Recht eine Eigenvertretung zulässt.

43. Der EFTA-Überwachungsbehörde zufolge sollte zuerst festgestellt werden, welche Richtlinie auf die grenzüberschreitende Erbringung von juristischen Dienstleistungen Anwendung findet: Richtlinie 77/249, Richtlinie 2005/36 oder die Dienstleistungsrichtlinie 2006/123.

[4] Es wird auf die Rechtssache C-154/89 *Kommission ./. Frankreich,* Slg. 1991, I-659, Randnrn. 9 und 10, verwiesen.

44. ESA takes the view that only Directive 77/249 applies. Article 4(1) of that Directive specifically concerns activities relating to the representation of a client in legal proceedings or before public authorities.

45. Conversely, Directive 2005/36, although it concerns, *inter alia*, the mutual recognition of professional qualifications of lawyers and sets out rules on the provision of services, does not apply to the provision of legal services by virtue of its Article 2(3).

46. Directive 77/249 is a separate Community instrument within the meaning of Article 2(3) of Directive 2005/36 that provides for a specific arrangement directly related to the recognition of the professional qualifications of lawyers. Both directives are referred to in Annex VII to the EEA Agreement on the mutual recognition of professional qualifications. Moreover, to consider otherwise would risk depriving Directive 77/249 of its very purpose, i.e. to facilitate the effective pursuit of the activities of lawyers by way of the provision of services.

47. According to ESA, this reading of Article 2(3) of Directive 2005/36 is further supported by Article 17(4) of Directive 2006/123 (the Services Directive). Pursuant to its Article 17(4), Directive 2006/123 explicitly does not apply to matters governed by Directive 77/249.

48. ESA submits that, where an EEA host State's national law allows a lawyer to act before that State's courts or public authorities in his own name, in other words to represent himself, Directive 77/249 should apply. In a legal order in which a lawyer can represent himself rather than seeking the services of a colleague, there is nothing to suggest that that activity would

44. Die EFTA-Überwachungsbehörde vertritt die Auffassung, dass nur Richtlinie 77/249 anwendbar ist. Artikel 4 Absatz 1 dieser Richtlinie bezieht sich eigens auf mit der Vertretung oder der Verteidigung eines Mandanten im Bereich der Rechtspflege oder vor Behörden zusammenhängende Tätigkeiten des Rechtsanwalts.

45. Dagegen ist die Richtlinie 2005/36, obwohl sie u. a. die gegenseitige Anerkennung von Berufsqualifikationen von Rechtsanwälten betrifft und Vorschriften für die Erbringung von Dienstleistungen enthält, aufgrund ihres Artikels 2 Absatz 3 nicht auf die Erbringung von juristischen Dienstleistungen anwendbar.

46. Bei der Richtlinie 77/249 handelt es sich um einen gesonderten gemeinschaftlichen Rechtsakt im Sinne von Artikel 2 Absatz 3 der Richtlinie 2005/36, der eine spezielle Regelung unmittelbar für die Anerkennung von Berufsqualifikationen von Rechtsanwälten vorsieht. Auf beide Richtlinien wird in Anhang VII des EWR-Abkommens über die gegenseitige Anerkennung beruflicher Qualifikationen verwiesen. Zudem birgt eine andere Betrachtungsweise die Gefahr, dass Richtlinie 77/249 ihres eigentlichen Zwecks – nämlich der Erleichterung der tatsächlichen Ausübung von Rechtsanwaltstätigkeiten durch die Erbringung von Dienstleistungen – beraubt wird.

47. Laut der EFTA-Überwachungsbehörde wird diese Auslegung von Artikel 2 Absatz 3 der Richtlinie 2005/36 durch Artikel 17 Absatz 4 der Richtlinie 2006/123 (Dienstleistungsrichtlinie) weiter gestützt. Gemäss Artikel 17 Absatz 4 findet Richtlinie 2006/123 ausdrücklich keine Anwendung auf Angelegenheiten, die unter Richtlinie 77/249 fallen.

48. Die EFTA-Überwachungsbehörde bringt vor, dass Richtlinie 77/249 angewendet werden sollte, wenn es die nationale Gesetzgebung eines EWR-Aufnahmestaats einem Rechtsanwalt erlaubt, in eigener Sache vor den Gerichten oder Behörden dieses Staats tätig zu werden, sich in anderen Worten also selbst zu vertreten. In einer Rechtsordnung, in der sich ein Rechtsanwalt selbst vertreten kann, anstatt einen Kollegen damit zu beauftragen, weist nichts darauf hin, dass diese Tätigkeit nicht in den Geltungsbereich der

fall outside the scope of activities relating to the representation of a client in legal proceedings within the meaning of Article 4(1) of the Directive.

49. According to ESA, this reading of Article 4(1) of Directive 77/249 is supported by the legal definition of services in Article 37(1) EEA. It is decisive that the services in question are normally provided for remuneration, explicitly including the services provided by the professions, which include lawyers. In ESA's view, legal services of the kind in question in this case (i.e. participation in civil litigation) satisfy both criteria.

50. Whether a lawyer may represent himself in a given EEA State is a matter of national law and, in particular, of forum law. In the absence of harmonisation and since the Contracting Parties enjoy procedural autonomy, EEA law in general, and Directive 77/249 in particular, does not predetermine this question either way as long as European lawyers are not discriminated against compared to their national peers.

51. Whether this is the case under Liechtenstein law is for the referring court to decide.

52. ESA proposes that the Court should answer the first question as follows:

Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of the freedom to provide services applies to situations in which a lawyer represents him- or herself in legal proceedings where the national legal order of the host State foresees that lawyers may act on their own behalf.

European Commission

53. The Commission submits that the key point with regard to whether a lawyer bringing proceedings in an EEA State other than

Vertretung oder Verteidigung eines Mandanten im Bereich der Rechtspflege im Sinne des Artikels 4 Absatz 1 der Richtlinie fällt.

49. Der EFTA-Überwachungsbehörde zufolge wird diese Auslegung von Artikel 4 Absatz 1 der Richtlinie 77/249 durch die gesetzliche Definition des Dienstleistungsbegriffs nach Artikel 37 Absatz 1 des EWR-Abkommens gestützt. Es ist ausschlaggebend, dass die massgeblichen Dienstleistungen in der Regel gegen Entgelt erbracht werden, wobei freiberufliche Tätigkeiten, unter die auch jene von Rechtsanwälten fallen, ausdrücklich eingeschlossen sind. Nach Ansicht der EFTA-Überwachungsbehörde erfüllen juristische Dienstleistungen der in diesem Fall in Frage stehenden Art (wie die Teilnahme an zivilgerichtlichen Verfahren) beide Kriterien.

50. Ob sich ein Rechtsanwalt in einem bestimmten EWR-Staat selbst vertreten kann, ist eine Frage der nationalen Gesetzgebung und insbesondere der lex fori. Aufgrund der fehlenden Harmonisierung und da die Vertragsparteien Verfahrensautonomie geniessen, nehmen das EWR-Recht im Allgemeinen und die Richtlinie 77/249 im Besonderen die Antwort auf diese Frage nicht vorweg, solange europäische Rechtsanwälte im Vergleich zu ihren auf nationaler Ebene tätigen Kollegen nicht diskriminiert werden.

51. Die Entscheidung, ob dies nach liechtensteinischem Recht der Fall ist, obliegt dem vorlegenden Gericht.

52. Die EFTA-Überwachungsbehörde schlägt vor, dass der Gerichtshof die erste Frage folgendermassen beantwortet:

Die Richtlinie 77/249/EWG vom 22. März 1977 zur Erleichterung der tatsächlichen Ausübung des freien Dienstleistungsverkehrs der Rechtsanwälte ist auf Situationen anwendbar, in denen sich ein Rechtsanwalt im Bereich der Rechtspflege selbst vertritt, wenn in der nationalen Rechtsordnung des Aufnahmestaats vorgesehen ist, dass Rechtsanwälte in eigener Sache tätig werden können.

Die Kommission

53. Die Kommission bringt vor, dass es im Hinblick darauf, ob sich ein Rechtsanwalt, der in einem EWR-Staat prozessiert, bei dem es

the State in which he is established may rely on the provisions of Directive 77/249 when he is representing himself is that the lawyer is nevertheless acting in a professional capacity as a lawyer. The fact that he, at the same time, is also a party to the proceedings is immaterial – he is both client and lawyer, and simply "wears two different hats".

54. The Commission proposes that the Court should answer the first question as follows:

A lawyer bringing proceedings in his own name in an EEA State other than the one in which he is established falls within the scope of Directive 77/249/EEC if he is acting in a professional capacity as a lawyer.

The second question

The Liechtenstein Government

55. The Liechtenstein Government submits that, since, in its view, Directive 77/249 is obviously not applicable in the present case, an interpretation thereof cannot be considered necessary to enable the national court to give judgment in the case pending before it. Consequently, it is no longer necessary to consider the remaining questions.

56. However, should the Court come to the conclusion that it may rule on questions two to five, the Liechtenstein Government submits the following observations in the alternative.

57. The Liechtenstein Government observes that, in the present case, the service provided by the defendant consists of the representation of a client (the defendant himself) in legal proceedings. Consequently, Article 4(1) and (2) of Directive 77/249 apply.

58. Article 4(1) of Directive 77/249 states that a lawyer must abide by all the conditions laid down in the host Member State for lawyers established in that State, except all the conditions

sich nicht um den Staat handelt, in dem er niedergelassen ist, auf die Bestimmungen der Richtlinie 77/249 berufen kann, wenn er sich selbst vertritt, wesentlich ist, dass der Rechtsanwalt trotzdem in seiner beruflichen Funktion als Rechtsanwalt tätig wird. Die Tatsache, dass er gleichzeitig auch eine Verfahrenspartei darstellt, ist unerheblich – er ist sowohl Mandant als auch Rechtsanwalt und hat einfach zwei verschiedene Rollen.

54. Die Kommission schlägt vor, dass der Gerichtshof die erste Frage folgendermassen beantwortet:

Ein Rechtsanwalt, der in eigener Sache in einem EWR-Staat prozessiert, bei dem es sich nicht um den Staat handelt, in dem er niedergelassen ist, fällt in den Geltungsbereich der Richtlinie 77/249/EWG, wenn er in seiner beruflichen Funktion als Rechtsanwalt tätig wird.

Zur zweiten Frage

Die Regierung des Fürstentums Liechtenstein

55. Da die Richtlinie 77/249 im gegenständlichen Fall offensichtlich nicht anwendbar ist, so die Regierung des Fürstentums Liechtenstein, kann ihre Auslegung nicht als erforderlich betrachtet werden, um das nationale Gericht in die Lage zu versetzen, in der vor ihm anhängigen Rechtssache ein Urteil zu fällen. Dementsprechend ist die Beantwortung der verbleibenden Fragen unnötig.

56. Für den Fall, dass der Gerichtshof jedoch zu der Schlussfolgerung gelangen sollte, dass er über die Fragen zwei bis fünf entscheiden kann, reicht die Regierung des Fürstentums Liechtenstein die nachstehenden Ausführungen ein.

57. Die Regierung des Fürstentums Liechtenstein hält fest, dass die von den Beklagten in dieser Sache erbrachte Dienstleistung in der Vertretung oder der Verteidigung eines Mandanten (der Beklagten selbst) im Bereich der Rechtspflege besteht. Dementsprechend finden Artikel 4 Absatz 1 und 2 der Richtlinie 77/249 Anwendung.

58. Aus Artikel 4 Absatz 1 der Richtlinie 77/249 geht hervor, dass ein Rechtsanwalt alle im Aufnahmestaat vorgesehenen Bedingungen für niedergelassene Rechtsanwälte mit Ausnahme

that require residence and/or registration with a professional organisation in the host State.

59. Furthermore, Article 7(2) entrusts the competent authority of the host Member State with a supervisory function in relation to lawyers providing services in that State in terms of the Directive. Supervision of lawyers established in Liechtenstein, and lawyers established in another Member State but effectively pursuing the activities of a lawyer on Liechtenstein territory, is exercised by the Liechtenstein Chamber of Lawyers pursuant to Articles 40(1) and 59(1) of the Lawyers Act.

60. The Liechtenstein Government submits that, in order to be able to exercise effective supervision of lawyers practising in Liechtenstein, the Liechtenstein Chamber of Lawyers must first and foremost know these lawyers.

61. The Liechtenstein Government observes that, pursuant to Article 1b(1) of the Lawyers Act, lawyers established in Liechtenstein are only allowed to pursue the activities of a lawyer once they are registered in the list of Liechtenstein lawyers. Thus, that list provides the Liechtenstein Chamber of Lawyers with sufficient information about established lawyers to adequately fulfil its supervisory function.

62. However, lawyers established in another EEA State but effectively pursuing the activities of a lawyer in Liechtenstein by way of the provision of services, are neither obliged nor entitled to be registered in the above-mentioned list of Liechtenstein lawyers as mentioned in Article 56 of the Lawyers Act.

63. The Liechtenstein Government submits that Article 59 of the Lawyers Act is intended to ensure equally adequate and effective supervision of lawyers established in another

der Erfordernisse eines Wohnsitzes und/oder der Zugehörigkeit zu einer Berufsorganisation im Aufnahmestaat erfüllen muss.

59. Zudem überträgt Artikel 7 Absatz 2 der zuständigen Stelle des Aufnahmestaats eine Aufsichtsfunktion in Bezug auf Rechtsanwälte, die in diesem Staat Dienstleistungen im Sinne der Richtlinie erbringen. Die Beaufsichtigung von in Liechtenstein niedergelassenen Rechtsanwälten und in anderen Mitgliedstaaten niedergelassenen Rechtsanwälten, die jedoch die Tätigkeiten eines Rechtsanwalts auf liechtensteinischem Gebiet tatsächlich ausüben, obliegt gemäss Artikel 40 Absatz 1 und Artikel 59 Absatz 1 des Rechtsanwaltsgesetzes der Liechtensteinischen Rechtsanwaltskammer.

60. Damit die Liechtensteinische Rechtsanwaltskammer die in Liechtenstein praktizierenden Rechtsanwälte wirksam beaufsichtigen kann, müssen ihr diese vor allem bekannt sein, so die Regierung des Fürstentums Liechtenstein.

61. Die Regierung des Fürstentums Liechtenstein merkt an, dass in Liechtenstein niedergelassene Rechtsanwälte gemäss Artikel 1b Absatz 1 des Rechtsanwaltsgesetzes nur zur Ausübung des Berufs des Rechtsanwalts berechtigt sind, wenn sie in die Liste der liechtensteinischen Rechtsanwälte eingetragen sind. Dementsprechend bietet diese Liste der Liechtensteinischen Rechtsanwaltskammer ausreichende Informationen über niedergelassene Rechtsanwälte, damit sie ihre Aufsichtsfunktion angemessen erfüllen kann.

62. Allerdings sind in einem anderen EWR-Staat niedergelassene Rechtsanwälte, die jedoch die Tätigkeiten eines Rechtsanwalts tatsächlich in Liechtenstein ausüben, indem sie dort Dienstleistungen erbringen, zur Eintragung in die oben genannte Liste der liechtensteinischen Rechtsanwälte gemäss Artikel 56 des Rechtsanwaltsgesetzes weder verpflichtet noch berechtigt.

63. Laut der Regierung des Fürstentums Liechtenstein beabsichtigt Artikel 59 des Rechtsanwaltsgesetzes eine vergleichbar angemessene und wirksame Beaufsichtigung von in einem anderen

EEA State providing services in Liechtenstein as of lawyers established in Liechtenstein. In its view, the duty to notify under that provision pursues the public interest of guaranteeing adequate and effective supervision of lawyers providing services in Liechtenstein. According to the Liechtenstein Government, it also complies with the principle of proportionality insofar as it is appropriate to ensure the attainment of the objective pursued and does not go beyond what is necessary for its attainment.

64. The Liechtenstein Government adds that this opinion is shared by the Austrian Supreme Court in a ruling on the interpretation of Section 3(1) second sentence of the former Austrian EEA-Lawyers Act 1992, which contained an obligation to notify comparable to that laid down in Article 59(2) of the Liechtenstein Lawyers Act.[5] The currently applicable Austrian law still includes such an obligation to notify.[6]

65. The Liechtenstein Government proposes in the alternative that the Court should answer the second question as follows:

An obligation on European lawyers to notify the authorities of the host State (as provided for here in Article 59 of the Liechtenstein Lawyers Act) is compatible with Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services and, in particular, with Article 7 of that Directive.

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5 Reference is made to judgment of the Austrian Supreme Court of Justice of 3 November 2003 in case 4Bkd2/03

6 Reference is made to Section 4(1) second sentence of the Austrian EIRAG (*Europäisches Rechtsanwaltsgesetz*), which reads as follows: "*Vor dem erstmaligen Einschreiten im Sprengel einer Rechtsanwaltskammer haben sie die jeweils zuständige Rechtsanwaltskammer (§ 7 Abs. 7) schriftlich zu verständigen*".

EWR-Staat niedergelassenen Rechtsanwälten, die Dienstleistungen in Liechtenstein erbringen, wie von in Liechtenstein niedergelassenen Rechtsanwälten. Nach ihrer Ansicht dient die Meldepflicht gemäss dieser Bestimmung dem öffentlichen Interesse der Gewährleistung einer angemessenen und wirksamen Beaufsichtigung von Rechtsanwälten, die Dienstleistungen in Liechtenstein erbringen. Der Regierung des Fürstentums Liechtenstein zufolge entspricht sie ausserdem insofern dem Grundsatz der Verhältnismässigkeit, als sie zur Erreichung des angestrebten Ziels geeignet ist und sich gleichzeitig auf das hierfür unbedingt notwendige Mass beschränkt.

64. Die Regierung des Fürstentums Liechtenstein fügt hinzu, dass der Oberste Gerichtshof Österreichs diese Ansicht in einem Urteil betreffend die Auslegung von § 3 Absatz 1 zweiter Satz des ehemaligen österreichischen EWR-Rechtsanwaltsgesetzes 1992, der eine mit der in Artikel 59 Absatz 2 des liechtensteinischen Rechtsanwaltsgesetzes vorgesehenen Meldepflicht vergleichbare Verpflichtung enthielt, teilt.[5] Auch das derzeit anwendbare österreichische Gesetz beinhaltet eine solche Meldepflicht.[6]

65. Die Regierung des Fürstentums Liechtenstein schlägt hilfsweise vor, dass der Gerichtshof die zweite Frage folgendermassen beantwortet:

Eine im Aufnahmestaat (wie hier in Artikel 59 des liechtensteinischen Rechtsanwaltsgesetzes) vorgesehene Meldepflicht für dienstleistungserbringende europäische Rechtsanwälte ist mit der Richtlinie 77/249/EWG des Rates vom 22. März 1977 zur Erleichterung der tatsächlichen Ausübung des freien Dienstleistungsverkehrs der Rechtsanwälte und insbesondere mit deren Artikel 7 vereinbar.

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5 Es wird auf das Urteil des Obersten Gerichtshofs Österreichs vom 3. November 2003 in der Rechtssache 4Bkd2/03 verwiesen.

6 Es wird auf § 4 Absatz 1 zweiter Satz des österreichischen Europäischen Rechtsanwaltsgesetzes verwiesen, der folgendermassen lautet: *„Vor dem erstmaligen Einschreiten im Sprengel einer Rechtsanwaltskammer haben sie die jeweils zuständige Rechtsanwaltskammer (§ 7 Abs. 7) schriftlich zu verständigen.“*

EFTA Surveillance Authority

66. ESA submits that the second question should be answered in the negative. In its view, Article 59 of the Lawyers Act goes beyond what it is possible to request from a European lawyer under Directive 77/249.

67. ESA observes that Article 1(2) of Directive 77/249 defines a lawyer as any person entitled to pursue his professional activities under certain national designations, which, in the case of Germany, the home State of the defendant in the main proceedings, is the designation *Rechtsanwalt*.

68. Pursuant to Article 2 of Directive 77/249, each Contracting Party shall recognise as a lawyer for the purpose of pursuing services any person listed in Article 1(2) of that Directive.

69. Specifically, Article 4(1) of Directive 77/249 provides that activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host State under the conditions laid down for lawyers established in that State, with the exception of any condition requiring, *inter alia,* registration with a professional organisation in that State.

70. Finally, Article 7(1) of Directive 77/249 sets out that the competent national authority (in Liechtenstein the Head of the Liechtenstein Chamber of Lawyers) may request the person providing the services to establish his qualifications as a lawyer.

71. Conversely, ESA submits, Articles 59(2) and (3)(a) of the Lawyers Act oblige a European lawyer, prior to providing any legal services in Liechtenstein, (i) to make a declaration informing the Liechtenstein Chamber of Lawyers of his intention to do so; (ii) to attach to that notification a certificate evidencing the fact that the European lawyer lawfully exercises the relevant activity

Die EFTA-Überwachungsbehörde

66. Die EFTA-Überwachungsbehörde trägt vor, dass die zweite Frage abschlägig beantwortet werden sollte. Ihrer Auffassung nach geht Artikel 59 des Rechtsanwaltsgesetzes über das hinaus, was von einem europäischen Rechtsanwalt gemäss Richtlinie 77/249 gefordert werden kann.

67. Die EFTA-Überwachungsbehörde merkt an, dass Artikel 1 Absatz 2 der Richtlinie 77/249 einen Rechtsanwalt als jede Person definiert, die ihre beruflichen Tätigkeiten unter bestimmten nationalen Bezeichnungen auszuüben berechtigt ist, wobei es sich im Falle von Deutschland, des Herkunftsstaats der Beklagten im Ausgangsverfahren, um die Bezeichnung *Rechtsanwalt* handelt.

68. Gemäss Artikel 2 der Richtlinie 77/249 erkennt jede Vertragspartei für die Erbringung der Dienstleistungen alle unter Artikel 1 Absatz 2 dieser Richtlinie fallenden Personen als Rechtsanwalt an.

69. Artikel 4 Absatz 1 der Richtlinie 77/249 sieht insbesondere vor, dass die mit der Vertretung oder der Verteidigung eines Mandanten im Bereich der Rechtspflege oder vor Behörden zusammenhängenden Tätigkeiten des Rechtsanwalts im jeweiligen Aufnahmestaat unter den für die in diesem Staat niedergelassenen Rechtsanwälte vorgesehenen Bedingungen ausgeübt werden, wobei jedoch u. a. das Erfordernis der Zugehörigkeit zu einer Berufsorganisation in diesem Staat ausgeschlossen ist.

70. Abschliessend ist in Artikel 7 Absatz 1 der Richtlinie 77/249 festgelegt, dass die zuständige nationale Stelle (in Liechtenstein: der Vorsitzende der Liechtensteinischen Rechtsanwaltskammer) von dem Dienstleistungserbringer verlangen kann, dass er seine Eigenschaft als Rechtsanwalt nachweist.

71. Im Gegenzug, so die EFTA-Überwachungsbehörde, verpflichten Artikel 59 Absatz 2 und 3a des Rechtsanwaltsgesetzes einen europäischen Rechtsanwalt vor der Erbringung jeglicher juristischer Dienstleistungen in Liechtenstein, (i) seine Absicht der Liechtensteinischen Rechtsanwaltskammer zu melden, (ii) dieser Meldung eine Bescheinigung beizufügen,

in his home State; (iii) to show that, on the date the certificate is submitted, the European lawyer is not prohibited, not even on a temporary basis, from exercising that activity; (iv) to attach evidence of his nationality; (iv) to submit proof that he is covered by professional indemnity insurance; and, where appropriate, (vi) to renew the notification once every year. In ESA's view, this notification obligation exceeds what it is possible to ask of a European lawyer under Directive 77/249.

72. ESA acknowledges that, under Article 7(1) of Directive 77/249, national authorities may request proof of lawyers' status. However, this can in practice be easily done. As many European lawyers carry an identification card issued by the Chamber of Lawyers or Bar Association they are registered with, the exercise is often comparable to that of producing a driver's licence on request in a traffic control. In contrast, ESA continues, Liechtenstein law subjects European lawyers intending to exercise their rights under Article 36 EEA and Directive 77/249 to a systematic prior notification procedure that requires these lawyers to present themselves, on their own motion, to the national authority in writing and to enclose a number of written documents with such declaration, none of which is foreseen under Directive 77/249.

73. ESA asserts that, while such procedure might generally conform with Article 7 of Directive 2005/36, which is not applicable in the circumstances, the prior notification regime does not accord with Directive 77/249.

74. ESA submits that the freedom to provide services under Article 36 EEA entails, in particular, the abolition of any discrimination against a service provider on account of its nationality or the fact

aus der hervorgeht, dass der europäische Rechtsanwalt die betreffende Tätigkeit im Herkunftsstaat rechtmässig ausübt, (iii) nachzuweisen, dass dem europäischen Rechtsanwalt zum Zeitpunkt der Vorlage der Bescheinigung die Ausübung dieser Tätigkeit nicht, auch nicht vorübergehend, untersagt ist, (iv) einen Nachweis über die Staatsangehörigkeit beizufügen, (iv) einen Nachweis über das Bestehen einer Haftpflichtversicherung beizufügen und gegebenenfalls (vi) die Meldung einmal jährlich zu erneuern. Nach Ansicht der EFTA-Überwachungsbehörde geht diese Meldepflicht über das hinaus, was von einem europäischen Rechtsanwalt gemäss Richtlinie 77/249 gefordert werden kann.

72. Die EFTA-Überwachungsbehörde räumt ein, dass nationale Stellen laut Artikel 7 Absatz 1 der Richtlinie 77/249 einen Nachweis der Eigenschaft als Rechtsanwalt verlangen können. In der Praxis sei dieser Nachweis jedoch einfach zu führen und häufig mit dem Vorzeigen des Führerscheins in einer Verkehrskontrolle vergleichbar, da viele europäische Rechtsanwälte einen von ihrer Rechtsanwaltskammer ausgestellten Anwaltsausweis bei sich tragen. Im Gegensatz dazu, führt die EFTA-Überwachungsbehörde weiter aus, müssen sich europäische Rechtsanwälte, die ihre Rechte gemäss Artikel 36 des EWR-Abkommens und Richtlinie 77/249 ausüben wollen, nach liechtensteinischem Recht einem systematischen Verfahren zur Vorabmeldung unterwerfen, das von ihnen verlangt, sich aus eigenem Antrieb schriftlich bei der nationalen Stelle zu melden und dieser Meldung eine Reihe von Schriftstücken beizufügen, von denen keines in Richtlinie 77/249 vorgesehen ist.

73. Die EFTA-Überwachungsbehörde macht geltend, dass ein solches Verfahren zur Vorabmeldung mit Artikel 7 der Richtlinie 2005/36, die unter den vorliegenden Umständen nicht anwendbar ist, im Grundsatz vereinbar sein mag, mit der Richtlinie 77/249 jedoch nicht in Einklang steht.

74. Laut der EFTA-Überwachungsbehörde setzt der freie Dienstleistungsverkehr gemäss Artikel 36 des EWR-Abkommens insbesondere die Beseitigung jeder Diskriminierung eines Dienstleisters aufgrund seiner Staatsangehörigkeit oder des

that it is established in an EEA State other than that in which the service is to be provided.

75. ESA considers that the procedure set out in Article 59 of the Lawyers Act subjects European lawyers to a regime that is substantially more onerous than the rules that apply to the provision of legal services in purely domestic situations. While national lawyers have to be affiliated to the Chamber of Lawyers, nothing suggests that Liechtenstein lawyers are required to undergo (annual) notification procedures comparable to the ones to which European lawyers are subjected.

76. According to ESA, by virtue of Articles 2 and 4(1) of Directive 77/249, there is no objective difference between the situations of Liechtenstein lawyers and their peers from other EEA States that justifies different treatment in this regard. Thus, ESA concludes, Article 59 of the Lawyers Act gives rise to discrimination against foreign service providers contrary to Article 36 EEA.

77. In that regard, ESA submits that it follows from Article 39 EEA that such a rule may only be justified on grounds of an express derogating provision, such as Article 33 EEA.

78. However, in ESA's view, this is not the case as regards Article 59 of the Lawyers Act. The rules set out in Directive 77/249 cater both specifically and sufficiently for public policy objectives that arise in the context of the provision of cross-border legal services. ESA recalls that, to avoid any confusion, European lawyers must use their domestic professional title as expressed in the language of that State and with an indication of the professional organisation by which they are authorised to practise (Article 3 of Directive 77/249). Furthermore, Article 4(2) of Directive 77/249 provides that the rules of professional conduct of the

Umstands voraus, dass er in einem anderen EWR-Staat als dem ansässig ist, in dem die Dienstleistung zu erbringen ist.

75. Die EFTA-Überwachungsbehörde vertritt die Auffassung, dass das in Artikel 59 des Rechtsanwaltsgesetzes festgelegte Verfahren für europäische Rechtsanwälte eine wesentlich beschwerlichere Regelung darstellt als die auf die Erbringung von juristischen Dienstleistungen in rein einzelstaatlichen Situationen anwendbaren Bestimmungen. Während nationale Rechtsanwälte der Rechtsanwaltskammer angehören müssen, liegen keinerlei Hinweise darauf vor, dass sich liechtensteinische Rechtsanwälte (jährlichen) Meldeverfahren unterziehen müssen, die mit jenen vergleichbar sind, die für europäische Rechtsanwälte gelten.

76. Der EFTA-Überwachungsbehörde zufolge bedingen Artikel 2 und Artikel 4 Absatz 1 der Richtlinie 77/249 keinen objektiven Unterschied zwischen der Situation liechtensteinischer Rechtsanwälte und ihrer Kollegen aus anderen EWR-Staaten, der die Ungleichbehandlung in dieser Hinsicht rechtfertigt. Dementsprechend, so die Schlussfolgerung der EFTA-Überwachungsbehörde, führt Artikel 59 des Rechtsanwaltsgesetzes zu einer Diskriminierung ausländischer Dienstleistungsanbieter, die Artikel 36 des EWR-Abkommens widerspricht.

77. In diesem Zusammenhang bringt die EFTA-Überwachungsbehörde vor, dass aus Artikel 39 EWR-Abkommen folge, dass eine solche Regelung nur aufgrund einer ausdrücklich abweichenden Bestimmung, wie Artikel 33 des EWR-Abkommens, gerechtfertigt ist.

78. Nach Ansicht der EFTA-Überwachungsbehörde ist dies in Bezug auf Artikel 59 des Rechtsanwaltsgesetzes jedoch nicht der Fall. Die in Richtlinie 77/249 festgelegten Vorschriften widmen sich spezifisch und in ausreichendem Masse Zielsetzungen im Bereich der öffentlichen Ordnung, die im Zusammenhang mit der grenzüberschreitenden Erbringung von juristischen Dienstleistungen von Bedeutung sind. Die EFTA-Überwachungsbehörde ruft in Erinnerung, dass europäische Rechtsanwälte – um Verwechslungen zu vermeiden – die in der Sprache ihres Herkunftsstaats gültige Berufsbezeichnung

host Member State must be observed in the pursuit of cross-border legal services, without prejudice to the European lawyer's obligations in the Member State from which he comes. Moreover, the European lawyer is subject to supervision by the competent national authority, which is empowered to take all necessary measures (cf. Article 7(1) and (2) of Directive 77/249).

79. ESA proposes that the Court should answer the second question as follows:

Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services precludes a national measure such as Article 59 of the Liechtenstein Lawyers Act that obliges a European lawyer, prior to providing any legal services in that EEA State,

i. to make a declaration informing the Liechtenstein Chamber of Lawyers of his or her intention to do so;

ii. to attach to that notification a certificate evidencing the fact that the European lawyer lawfully exercises the relevant activity in his home State;

iii. to show that, at the date the certificate is submitted, the European lawyer is not prohibited not even on a temporary basis from the exercise of that activity;

iv. to attach evidence of his or her nationality;

v. to submit proof that he or she is covered by professional indemnity insurance; and, where appropriate,

vi. to renew the notification procedure once every year.

unter Angabe der Berufsorganisation, deren Zuständigkeit sie unterliegen, verwenden müssen (Artikel 3 der Richtlinie 77/249). Zudem sieht Artikel 4 Absatz 2 der Richtlinie 77/249 vor, dass bei der grenzüberschreitenden Erbringung rechtlicher Dienstleistungen die Standesregeln des Aufnahmestaats neben den dem europäischen Rechtsanwalt im Herkunftsstaat obliegenden Verpflichtungen einzuhalten sind. Darüber hinaus unterliegt der europäische Rechtsanwalt der Aufsicht der zuständigen nationalen Stelle, die zur Ergreifung aller erforderlichen Massnahmen bevollmächtigt ist (vgl. Artikel 7 Absatz 1 und 2 der Richtlinie 77/249).

79. Die EFTA-Überwachungsbehörde schlägt vor, dass der Gerichtshof die zweite Frage folgendermassen beantwortet:

Die Richtlinie 77/249/EWG vom 22. März 1977 zur Erleichterung der tatsächlichen Ausübung des freien Dienstleistungsverkehrs der Rechtsanwälte steht einer nationalen Massnahme wie Artikel 59 des liechtensteinischen Rechtsanwaltsgesetzes entgegen, die einen europäischen Rechtsanwalt vor der Erbringung jeglicher juristischen Dienstleistungen in diesem EWR-Staat dazu verpflichtet,

i. seine Absicht der Liechtensteinischen Rechtsanwaltskammer zu melden;

ii. dieser Meldung eine Bescheinigung beizufügen, aus der hervorgeht, dass der europäische Rechtsanwalt die betreffende Tätigkeit im Herkunftsstaat rechtmässig ausübt;

iii. nachzuweisen, dass dem europäischen Rechtsanwalt zum Zeitpunkt der Vorlage der Bescheinigung die Ausübung dieser Tätigkeit nicht, auch nicht vorübergehend, untersagt ist;

iv. einen Nachweis über die Staatsangehörigkeit beizufügen;

v. einen Nachweis über das Bestehen einer Haftpflichtversicherung beizufügen und gegebenenfalls

vi. die Meldung einmal jährlich zu erneuern.

European Commission

80. The Commission submits that Article 4(1) of Directive 77/249 expressly precludes a host Member State from requiring registration with a professional organisation as a condition for pursuing activities relating to the representation of a client in legal proceedings. The French version of this article similarly refers to "*inscription à une organisation professionnelle*", while the German version is slightly more specific and refers to "*Zugehörigkeit zu einer Berufsorganisation*", i.e. membership of, or affiliation to, a professional organisation. It follows that the host Member State cannot require a lawyer providing services on a temporary basis to "sign up" to the professional body of that Member State. The logic behind this is essentially that he remains subject to the national rules for practising the profession in his home Member State. It is the qualification as a lawyer in the home State that is crucial.

81. According to the Commission, this underlying principle is further evidenced in the terms of Article 7(1) of Directive 77/249, which permits the competent authority of the host Member State to request the person providing the services to establish his qualifications as a lawyer. Accordingly, the authorities of the host Member State may request the lawyer to prove that he is a qualified lawyer entitled to practise in his home Member State. This can, for example, be achieved by means of a certificate or membership card issued by the professional body of the home State.

82. In the present case, Article 59(2) of the Lawyers Act requires a European lawyer engaging in the provision of services to notify the Liechtenstein Chamber of Lawyers of his intention to do so. A certificate showing his qualification to practise in his home State must be provided, as well as evidence of nationality and professional indemnity insurance.

Die Kommission

80. Der Kommission zufolge schliesst es Artikel 4 Absatz 1 der Richtlinie 77/249 ausdrücklich aus, dass ein Aufnahmestaat die Zugehörigkeit zu einer Berufsorganisation als Voraussetzung für die Ausübung der mit der Vertretung oder der Verteidigung eines Mandanten im Bereich der Rechtspflege zusammenhängenden Tätigkeiten des Rechtsanwalts fordert. Die englische und französische Fassung dieses Artikels beziehen sich auf *„registration with a professional organisation"* bzw. *„inscription à une organisation professionnelle"*, während die deutsche Fassung mit *„Zugehörigkeit zu einer Berufsorganisation"* etwas spezifischer gehalten ist. Daraus lässt sich ableiten, dass der Aufnahmestaat von einem Rechtsanwalt, der vorübergehende Dienstleistungen erbringt, nicht verlangen kann, dass dieser dem Berufsverband dieses Mitgliedstaats beitritt. Die Logik dieses Konzepts besteht im Wesentlichen darin, dass er bei der Berufsausübung weiterhin den nationalen Vorschriften seines Herkunftsstaats unterliegt. Entscheidend ist dabei die Qualifikation als Rechtsanwalt im Herkunftsstaat.

81. Der Kommission zufolge wird dieser Grundsatz durch den Inhalt von Artikel 7 Absatz 1 der Richtlinie 77/249 weiter gestützt, der es der zuständigen Stelle des Aufnahmestaats erlaubt, vom Dienstleistungserbringer zu verlangen, dass er seine Eigenschaft als Rechtsanwalt nachweist. Dementsprechend können die Behörden des Aufnahmestaats vom Rechtsanwalt einen Nachweis dafür fordern, dass er seine Eigenschaft als Rechtsanwalt, dem es gestattet ist, in seinem Herkunftsstaat zu praktizieren, nachweist. Dieser Nachweis kann beispielsweise durch eine Bescheinigung oder eine vom Berufsverband des Herkunftsstaats ausgestellte Mitgliedskarte erbracht werden.

82. Im vorliegenden Fall sieht Artikel 59 Absatz 2 des Rechtsanwaltsgesetzes vor, dass ein dienstleistungserbringender europäischer Rechtsanwalt seine dahingehende Absicht der Liechtensteinischen Rechtsanwaltskammer melden muss. Eine Bescheinigung, aus der seine Zulassung im Herkunftsstaat hervorgeht, sowie Nachweise über die Staatsangehörigkeit und das Bestehen einer Haftpflichtversicherung sind vorzulegen.

83. The Commission recalls that it is well-established that national rules that hinder or render less attractive the provision of cross-border services can only be justified by an overriding public interest objective. They must also be appropriate to achieving the objective and not go beyond what is necessary to attain it.[7]

84. In the Commission's view, the key requirement for the temporary cross-border provision of services as a lawyer is qualification in the home Member State. Article 7(1) of Directive 77/249 envisages that the competent authority of the host Member State may request the lawyer to "establish his qualifications". However, in the Commission's view, a universal rule requiring a lawyer in all circumstances to not only provide documentation but also prior notification to the competent authorities cannot be considered proportionate to the legitimate objective of ensuring that he is a qualified lawyer currently entitled to practise.

85. In this regard, the Commission emphasises that Article 5 of Directive 77/249 contains specific safeguards that apply to the representation of a client in court proceedings, in particular the possibility of requiring the lawyer providing services to work with a local lawyer. The public interest objective of ensuring answerability to the judicial authority concerned and the efficient functioning of the justice system[8] is thus already taken into account, and cannot be used to justify an additional and general rule of notification. As regards the protection of clients, this is already achieved by the use of the

7 Reference is made, *inter alia*, to *Criminal proceedings against A*, cited above, paragraph 27.
8 Reference is made, *inter alia*, to Case 427/85, *Commission* v *Germany* [1988] ECR 1123, paragraph 27.

83. Die Kommission weist darauf hin, dass wiederholt festgestellt wurde, dass nationale Regelungen, welche die Erbringung grenzüberschreitender Dienstleistungen behindern oder weniger attraktiv machen, nur durch ein zwingend im öffentlichen Interesse liegendes Ziel gerechtfertigt werden können. Sie müssen geeignet sein, das Ziel zu erreichen, und sich auf das hierfür unbedingt notwendige Mass beschränken.[7]

84. Nach Auffassung der Kommission besteht die entscheidende Anforderung für die vorübergehende grenzüberschreitende Erbringung von Dienstleistungen in der Eigenschaft als Rechtsanwalt im Herkunftsstaat. Artikel 7 Absatz 1 der Richtlinie 77/249 sieht vor, dass die zuständige Stelle des Aufnahmestaats verlangen kann, dass der Rechtsanwalt seine „Eigenschaft als Rechtsanwalt" nachweist. Allerdings kann nach Einschätzung der Kommission eine allgemeingültige Vorschrift, die von einem Rechtsanwalt unter allen Umständen nicht nur die Vorlage von Schriftstücken, sondern auch eine vorherige Meldung bei den zuständigen Stellen fordert, nicht als verhältnismässig zur Erreichung des legitimen Zieles betrachtet werden, dass es sich um einen Rechtsanwalt handelt, der derzeit seine Tätigkeit ausüben darf.

85. In diesem Zusammenhang hebt die Kommission hervor, dass Artikel 5 der Richtlinie 77/249 spezielle Schutzmassnahmen in Bezug auf die Vertretung und Verteidigung von Mandaten im Bereich der Rechtspflege enthält – insbesondere die Möglichkeit der Verpflichtung zur Zusammenarbeit mit einem ortsansässigen Rechtsanwalt. Die Zielsetzung im öffentlichen Interesse, nämlich die Gewährleistung der Übernahme der Verantwortung gegenüber dem angerufenen Gericht und der wirksamen Funktion des Rechtssystems,[8] wird daher bereits berücksichtigt und kann nicht zur Rechtfertigung einer zusätzlichen und allgemeinen Meldepflicht herangezogen werden. Hinsichtlich des Mandantenschutzes wird dieser bereits durch die Verwendung der Berufsbezeichnung des Herkunftsstaats (unter Angabe

[7] Es wird u. a. auf das *Strafverfahren gegen A*, oben erwähnt, Randnr. 27, verwiesen.
[8] Es wird u. a. auf die Rechtssache 427/85 *Kommission ./. Deutschland,* Slg. 1988, 1123, Randnr. 27, verwiesen.

home title (with an indication of the authorising professional organisation), as part of the background information relevant to the choice of a lawyer.

86. The Commission adds that Article 7 of Directive 2005/36 envisages that Member States may require a cross-border service provider to inform the competent authorities in the host State in advance by means of a written declaration (which may be accompanied by certain documents). However, recital 42 in the preamble to Directive 2005/36 expressly notes that that Directive does not affect the operation of Directive 77/249. In any event, Article 7 of Directive 2005/36 must be read in light of recital 7 in the preamble to that Directive. The recital explains that declaration requirements may only apply where necessary, and without such requirements leading to a disproportionate burden on service providers, or hindering or rendering less attractive the exercise of the freedom to provide services.

87. The Commission also underlines that notification within the sense of Article 7(1) of Directive 2005/36 is in any event purely informative in nature, rather than determinative of the capacity to provide cross-border services. In contrast, the notification requirement imposed by Article 59(2) of the Lawyers Act appears to be a precondition for the cross-border provision of services as a lawyer in Liechtenstein, since, by virtue of Article 59(4), the Head of the Liechtenstein Chamber of Lawyers has responsibility for prohibiting the exercise of the provision of services if the requirements of Article 59(2) are not complied with.

88. The Commission proposes that the Court should answer the second question as follows:

Article 7 of Directive 77/249/EEC precludes a host State from imposing in all circumstances a general prior notification requirement for lawyers providing cross-border services on a temporary basis.

der Berufsorganisation, deren Zuständigkeit sie unterliegt) als Bestandteil der für die Wahl des Rechtsanwalts massgeblichen Hintergrundinformationen erreicht.

86. Die Kommission fügt hinzu, dass die Mitgliedstaaten laut Artikel 7 der Richtlinie 2005/36 verlangen können, dass der Erbringer der grenzüberschreitenden Dienstleistung den zuständigen Behörden im Aufnahmemitgliedstaat vorher schriftlich Meldung erstattet (unter Beifügung bestimmter Schriftstücke). In Erwägungsgrund 42 der Präambel der Richtlinie 2005/36 heisst es jedoch ausdrücklich, dass diese Richtlinie die Anwendung der Richtlinie 77/249 nicht berührt. In jedem Fall ist Artikel 7 der Richtlinie 2005/36 vor dem Hintergrund von Erwägungsgrund 7 der Präambel dieser Richtlinie auszulegen. In diesem Erwägungsgrund wird erläutert, dass Meldevorschriften nur erforderlichenfalls angewendet werden können und nicht zu einer unverhältnismässig hohen Belastung der Dienstleister führen und die Ausübung des freien Dienstleistungsverkehrs nicht behindern oder weniger attraktiv machen sollten.

87. Die Kommission hebt ausserdem hervor, dass die Meldung im Sinne von Artikel 7 Absatz 1 der Richtlinie 2005/36 in jedem Fall rein informativen Charakter besitzt und nicht zur Feststellung der Fähigkeit zur Erbringung grenzüberschreitender Dienstleistungen dient. Im Gegensatz dazu scheint die Meldepflicht nach Artikel 59 Absatz 2 des Rechtsanwaltsgesetzes eine Bedingung für die Erbringung grenzüberschreitender Dienstleistungen als Rechtsanwalt in Liechtenstein zu sein, da es laut Artikel 59 Absatz 4 dem Vorstand der Liechtensteinischen Rechtsanwaltskammer obliegt, die Dienstleistungsausübung zu untersagen, wenn die Voraussetzungen gemäss Artikel 59 Absatz 2 nicht erfüllt sind.

88. Die Kommission schlägt vor, dass der Gerichtshof die zweite Frage folgendermassen beantwortet:

Artikel 7 der Richtlinie 77/249/EWG schliesst aus, dass ein Aufnahmestaat Rechtsanwälten, die vorübergehende grenzüberschreitende Dienstleistungen erbringen, unter allen Umständen eine allgemeine Verpflichtung zur Vorabmeldung auferlegt.

The third question

The Liechtenstein Government

89. The Liechtenstein Government notes that the possible consequences of failure to notify the competent authority are not set out in detail in the Lawyers Act. This means that the legislator imposed on the competent authority an obligation to decide such consequences on a case-by-case basis after having taken due account of all relevant facts and specificities of the individual case at hand.

90. The Liechtenstein Government observes that, in the present case, the competent authority decided that a refusal to allow the defendant to claim lawyers' fees in accordance with the scale of fees provided for in Liechtenstein was an appropriate consequence of failure to notify to the Chamber of Lawyers.

91. The Liechtenstein Government agrees with this decision. The obligation to notify pursues the public interest purpose of guaranteeing adequate and effective supervision of lawyers providing services in Liechtenstein. Such lawyers should have sufficient knowledge of the Liechtenstein legal system, especially since they will normally pursue activities relating to the representation of clients in proceedings and/or the provision of legal advice to such clients, who rely on the lawyer's expertise. Therefore, ignorance or non-observance of legal provisions by such legally trained persons is particularly serious.

92. In the Liechtenstein Government's view, the protection of clients should always be given adequate consideration and acknowledged by the competent authority when taking its decision. However,

Zur dritten Frage

Die Regierung des Fürstentums Liechtenstein

89. Die Regierung des Fürstentums Liechtenstein merkt an, dass die möglichen Konsequenzen einer Unterlassung der Meldung bei der zuständigen Stelle im Rechtsanwaltsgesetz nicht im Detail geregelt sind. Das bedeutet, dass der Gesetzgeber der zuständigen Stelle die Verpflichtung auferlegt hat, über solche Konsequenzen unter angemessener Berücksichtigung des massgeblichen Sachverhalts und der Besonderheiten der jeweiligen Umstände im Einzelfall zu entscheiden.

90. Die Regierung des Fürstentums Liechtenstein führt aus, dass die zuständige Stelle im vorliegenden Fall entschieden hat, dass die angemessene Konsequenz für die Unterlassung der Meldung bei der Rechtsanwaltskammer darin bestand, den Beklagten die Forderung eines Rechtsanwaltshonorars nach dem liechtensteinischen Rechtsanwaltstarif zu verweigern.

91. Die Regierung des Fürstentums Liechtenstein stimmt dieser Entscheidung zu. Die Meldepflicht dient dem öffentlichen Interesse der Gewährleistung einer angemessenen und wirksamen Beaufsichtigung von Rechtsanwälten, die Dienstleistungen in Liechtenstein erbringen. Solche Rechtsanwälte sollten über ausreichende Kenntnisse des liechtensteinischen Rechtssystems verfügen, insbesondere, da sie in der Regel Tätigkeiten im Zusammenhang mit der Vertretung oder der Verteidigung von Mandanten im Bereich der Rechtspflege und/oder deren Rechtsberatung ausüben und sich diese auf die Fachkompetenz des Rechtsanwalts verlassen. Aus diesem Grund fällt die Unkenntnis oder Nichtbeachtung gesetzlicher Vorschriften durch Personen mit einer derartigen juristischen Ausbildung besonders schwer ins Gewicht.

92. Nach Auffassung der Regierung des Fürstentums Liechtenstein muss der Mandantenschutz bei der Entscheidungsfindung durch die zuständige Stelle immer angemessen berücksichtigt werden. Da die Beklagten im gegenständlichen Fall jedoch in

because the defendant was acting on his own behalf in the present case, no clients suffered the potentially negative effects.

93. The Liechtenstein Government submits that the decision of the competent authority is appropriate. A contrary view would be in conflict with the sense of justice because it would lead to preferential treatment of a defendant acting unlawfully, who failed to notify to the (potential) detriment of a plaintiff acting lawfully, and to the defendant then being able to claim lawyers' fees in accordance with the (higher) scale of fees provided for in Liechtenstein.

94. The Liechtenstein Government proposes that the Court should answer the third question as follows:

Having regard to Directive 77/429/EEC, a failure to notify the competent authorities in the host State on the part of a European lawyer engaged in the provision of services must result in the consequence that the lawyer concerned may not claim lawyers' fees in accordance with the scale of fees provided for in the host State (in Liechtenstein the fees provided for in the Lawyers' Fees Act (Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten) and the Lawyers' Fees Regulation (Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten).

EFTA Surveillance Authority

95. ESA submits that, since the national court only posed the third question in the case that the second question is answered in the affirmative, there is no need to answer the third question.

European Commission

96. The Commission observes that the third, fourth and fifth questions concern the consequences that may flow from non-compliance with a notification requirement. This would in principle be a matter for national law.

97. However, the Commission adds that, since such a notification requirement could not in any event be determinative of the right to provide cross-border legal services, any failure to comply

eigener Sache handelten, kamen durch die potenziell negativen Auswirkungen keine Mandanten zu Schaden.

93. Der Regierung des Fürstentums Liechtenstein zufolge ist die Entscheidung der zuständigen Stelle angemessen. Eine gegenteilige Einschätzung widerspräche dem Gerechtigkeitsempfinden, da dadurch ein rechtswidrig handelnder Beklagter bevorzugt würde, der die Meldung zum (potenziellen) Nachteil einer rechtmässig handelnden Klägers unterlassen hat; denn damit wäre ein solcher Beklagte in der Lage, ein Rechtsanwaltshonorar entsprechend dem in Liechtenstein gültigen (höheren) Tarif zu fordern.

94. Die Regierung des Fürstentums Liechtenstein schlägt vor, dass der Gerichtshof die dritte Frage folgendermassen beantwortet:

Die von einem dienstleistungserbringenden europäischen Rechtsanwalt unterlassene Meldung bei der zuständigen Stelle im Aufnahmestaat muss mit Blick auf die Richtlinie 77/249/EWG dazu führen, dass der betroffene Rechtsanwalt den inländischen Rechtsanwaltstarif (in Liechtenstein gemäss dem Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten und der Verordnung über die Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten) nicht beanspruchen kann.

Die EFTA-Überwachungsbehörde

95. Die EFTA-Überwachungsbehörde bringt vor, dass das nationale Gericht die dritte Frage nur für den Fall gestellt hat, dass die zweite Frage bejaht wird, sodass die Beantwortung der dritten Frage entfallen kann.

Die Kommission

96. Die Kommission hält fest, dass die Fragen drei, vier und fünf die Konsequenzen betreffen, die sich aus der Nichteinhaltung einer Meldepflicht ergeben. Im Grunde wäre dies eine Angelegenheit des nationalen Rechts.

97. Die Kommission fügt jedoch hinzu, dass die Unterlassung einer solchen Meldung – da die Meldepflicht auf keinen Fall entscheidend für das Recht zur Erbringung grenzüberschreitender juristischer Dienstleistungen sein kann – die Ablehnung der

could not justify the refusal of a claim for legal fees linked to the provision of such services.

The fourth question

The Liechtenstein Government

98. The Liechtenstein Government sees no grounds for finding that a subsequent notification can result in the consequence that the lawyer may claim fees in accordance with the scale of fees provided for in the host State not only in relation to the period following that notification but also in relation to procedural steps taken prior to that date.

99. According to the Liechtenstein Government, a contrary interpretation could lead to the absurd situation that a lawyer engaged in the provision of services could have benefitted from the favourable conditions in the host EEA State without having been supervised at all by the competent authorities in that State, by notifying these authorities once he was back in his home State.

100. However, once the lawyer engaged in the provision of services has lawfully notified the competent authority in the host EEA State, he should be allowed to claim fees in accordance with the scale of fees provided for in that State for procedural steps taken after the date of notification.

101. The Liechtenstein Government proposes that the Court should answer the fourth question as follows:

Where a European lawyer engaged in the provision of services has notified the authorities in the host State only at a later stage, this subsequent notification must result in the consequence that the lawyer may claim fees in accordance with the scale of fees provided for in the host State only in relation to the period following that notification but not in relation to procedural steps taken prior to that date.

Forderung eines Rechtsanwaltshonorars im Zusammenhang mit der Erbringung solcher Dienstleistungen nicht rechtfertigen kann.

Zur vierten Frage

Die Regierung des Fürstentums Liechtenstein

98. Die Regierung des Fürstentums Liechtenstein sieht keinen Grund für die Feststellung, dass eine nachträgliche Meldung dazu führen kann, dass der Rechtsanwalt den Rechtsanwaltstarif des Aufnahmestaats nicht nur in Bezug auf den auf die Meldung folgenden Zeitraum, sondern auch hinsichtlich vor diesem Datum erfolgter Verfahrenshandlungen beanspruchen kann.

99. Der Regierung des Fürstentums Liechtenstein zufolge könnte eine gegenteilige Auslegung zu der absurden Situation führen, dass ein dienstleistungserbringender Rechtsanwalt von den günstigen Voraussetzungen im EWR-Aufnahmestaat völlig ohne Beaufsichtigung durch die zuständige Stelle in diesem Staat profitieren könnte, nämlich indem er dieser Stelle erst Meldung erstattet, wenn er sich wieder in seinem Herkunftsstaat befindet.

100. Sobald der dienstleistungserbringende Rechtsanwalt jedoch der zuständigen Stelle im EWR-Aufnahmestaat ordnungsgemäss Meldung erstattet hat, sollte er auch die Möglichkeit haben, für nach dem Datum der Meldung erfolgte Verfahrenshandlungen ein Honorar entsprechend dem Rechtsanwaltstarif dieses Staats fordern zu können.

101. Die Regierung des Fürstentums Liechtenstein schlägt vor, dass der Gerichtshof die vierte Frage folgendermassen beantwortet:

Die nachträgliche Meldung eines dienstleistungserbringenden europäischen Rechtsanwalts im Aufnahmestaat muss dazu führen, dass dieser nur für die Zeit ab erfolgter Meldung ein Honorar entsprechend dem Rechtsanwaltstarif des Aufnahmestaats beanspruchen kann, nicht dagegen für zuvor vorgenommene Verfahrenshandlungen.

EFTA Surveillance Authority

102. ESA submits that that it is appropriate to address questions four and five together.

103. ESA recalls that the remuneration of a lawyer is a matter governed by national law. In the absence of harmonisation at EEA level, EEA law in general, and Directive 77/249 in particular, does not predetermine this question in any way as long as European lawyers are not discriminated against compared to their Liechtenstein peers.[9]

104. As regards a situation such as in the main proceedings, ESA continues, the pivotal point will be the Liechtenstein rules on the recovery of legal fees and expenses in situations where a lawyer has represented himself. It is for the national court to assess whether those rules entitle a lawyer to claim recovery of legal fees and expenses that he could have claimed if another lawyer had represented him. However, according to ESA, Article 1(2) of the Lawyers' Fees Act would suggest that this is the case.

105. In any event, ESA continues, Article 3 EEA requires national courts to interpret national law as far as possible in conformity with EEA law.[10]

106. In particular, EEA law requires the avoidance of any discrimination on grounds of nationality. The referring court will therefore have to interpret the Lawyers' Fees Act and Regulation in a manner that ensures that European lawyers representing

[9] Reference is made to Case C-289/02 *AMOK* [2003] ECR I-15059, paragraph 30, and to the Opinion of Advocate General Mischo in that Case, points 43, 49 and 67.

[10] Reference is made to Case E-13/11 *Granville* [2012] EFTA Ct. Rep. 400, paragraph 52.

Die EFTA-Überwachungsbehörde

102. Laut der EFTA-Überwachungsbehörde sollten die vierte und die fünfte Frage gemeinsam beantwortet werden.

103. Die EFTA-Überwachungsbehörde erinnert daran, dass Rechtsanwaltshonorare durch nationales Recht geregelt werden. Aufgrund der fehlenden Harmonisierung auf der Ebene des EWR nehmen das EWR-Recht im Allgemeinen und die Richtlinie 77/249 im Besonderen die Antwort auf diese Frage nicht vorweg, solange europäische Rechtsanwälte im Vergleich zu ihren liechtensteinischen Kollegen nicht diskriminiert werden.[9]

104. Im Hinblick auf eine Situation wie jene im Ausgangsverfahren, so die EFTA-Überwachungsbehörde weiter, bilden die liechtensteinischen Vorschriften über die Erstattung von Honoraren und Auslagen in Fällen, in denen ein Anwalt sich selbst vertritt, den Dreh- und Angelpunkt. Die Entscheidung, ob diese Vorschriften einen Rechtsanwalt in die Lage versetzen, die Erstattung der Honorare und Auslagen zu fordern, die er hätte fordern können, wenn er von einem anderen Rechtsanwalt vertreten worden wäre, obliegt dem nationalen Gericht. Allerdings, bringt die EFTA-Überwachungsbehörde vor, legt Artikel 1 Absatz 2 des Gesetzes über den Tarif für Rechtsanwälte und Rechtsagenten nahe, dass dies der Fall ist.

105. Jedenfalls sind, so die EFTA-Überwachungsbehörde, laut Artikel 3 des EWR-Abkommens die nationalen Gerichte verpflichtet, innerstaatliche Vorschriften soweit wie möglich im Einklang mit dem EWR-Recht auszulegen.[10]

106. Insbesondere verlangt das EWR-Recht die Vermeidung jeder Diskriminierung aus Gründen der Staatsangehörigkeit. Das vorlegende Gericht wird das Gesetz über den Tarif für Rechtsanwälte und Rechtsagenten und die Verordnung über die

[9] Es wird auf die Rechtssache C-289/02 *AMOK*, Slg. 2003, I-15059, Randnr. 30, und die Schlussanträge des Generalanwalts Mischo in dieser Rechtssache, Nrn. 43, 49 und 67, verwiesen.

[10] Es wird auf die Rechtssache E-13/11 *Granville*, EFTA Court Report 2012, 400, Randnr. 52, verwiesen.

themselves are not treated differently from domestic lawyers doing the same.[11]

107. ESA submits that, since Directive 77/249 precludes a national measure such as Article 59 of the Lawyers Act, a lawyer's failure to make a declaration or notification under that provision cannot be a relevant consideration as regards the remuneration of legal services provided within the meaning of Directive 77/249.

108. ESA proposes that the Court should answer the fourth and fifth questions as follows:

It is for the referring court to determine in a non-discriminatory application of national law whether a European lawyer representing him- or herself may claim legal fees and expenses that he or she could have claimed as legal fees and expenses if another lawyer had represented him or her.

The fifth question

The Liechtenstein Government

109. The Liechtenstein Government reiterates that a lawyer providing services in another EEA State should have sufficient knowledge of that State's legal system, especially because he will normally pursue activities relating to the representation of a client in proceedings and/or the provision of legal advice to clients. It is his personal responsibility to comply with the principles and specificities of the legal system of the State in which he intends to provide services.

[11] Reference is made to Article 36 EEA. Compare also the Opinion of Advocate General Mischo in *AMOK*, cited above, point 71.

Tarifansätze der Entlohnung für Rechtsanwälte und Rechtsagenten daher so auszulegen haben, dass europäische Rechtsanwälte, die sich selbst vertreten, nicht anders behandelt werden als innerstaatliche Rechtsanwälte, die dies tun.[11]

107. Da, wie die EFTA-Überwachungsbehörde vorträgt, die Richtlinie 77/249 eine nationalen Massnahme wie Artikel 59 des Rechtsanwaltsgesetzes ausschliesst, kann die Unterlassung einer Erklärung oder Meldung gemäss dieser Bestimmung keine relevante Überlegung im Hinblick auf die Vergütung von im Sinne der Richtlinie 77/249 erbrachten juristischen Dienstleistungen darstellen.

108. Die EFTA-Überwachungsbehörde schlägt vor, dass der Gerichtshof die vierte und fünfte Frage folgendermassen beantwortet:

Es obliegt dem vorlegenden Gericht, durch eine nicht diskriminierende Anwendung des nationalen Rechts festzustellen, ob ein europäischer Rechtsanwalt, der sich selbst vertritt, die Honorare und Auslagen fordern kann, die er als Honorare und Auslagen hätte fordern können, wenn er von einem anderen Rechtsanwalt vertreten worden wäre.

Zur fünften Frage

Die Regierung des Fürstentums Liechtenstein

109. Die Regierung des Fürstentums Liechtenstein wiederholt, dass ein Rechtsanwalt, der Dienstleistungen in einem anderen EWR-Staat erbringt, über ausreichende Kenntnisse des Rechtssystems dieses Staats verfügen sollte, insbesondere, da er in der Regel Tätigkeiten im Zusammenhang mit der Vertretung oder der Verteidigung von Mandanten im Bereich der Rechtspflege und/oder der Rechtsberatung von Mandanten verrichtet. Es liegt in seiner persönlichen Verantwortung, die Grundsätze und Eigenheiten des Rechtssystems des Staats, in dem er die Erbringung von Dienstleistungen beabsichtigt, zu beachten.

[11] Es wird auf Artikel 36 des EWR-Abkommens verwiesen. Vgl. dazu auch die Schlussanträge des Generalanwalts Mischo in der Rechtssache *AMOK*, oben zitiert, Nr. 71.

110. Consequently, the Liechtenstein Government concludes that Liechtenstein courts have no obligation to inform European lawyers engaged in the provision of services in Liechtenstein about their obligation under Liechtenstein law to notify the Liechtenstein Chamber of Lawyers pursuant to Article 59(2) of the Lawyers Act.

111. The Liechtenstein Government proposes that the Court should answer the fifth question as follows:

The answer to the third and fourth questions does not depend on whether at the start of the proceedings the court of the host State referred the European lawyer engaged in the provision of services to the obligation under the law of that State to notify to the authorities.

Per Christiansen

Judge-Rapporteur

110. Dementsprechend gelangt die Regierung des Fürstentums Liechtenstein zu der Schlussfolgerung, dass die liechtensteinischen Gerichte nicht verpflichtet sind, europäische Rechtsanwälte, die in Liechtenstein Dienstleistungen erbringen, auf ihre im liechtensteinischen Recht verankerte Meldepflicht gegenüber der Liechtensteinischen Rechtsanwaltskammer gemäss Artikel 59 Absatz 2 des Rechtsanwaltsgesetzes hinzuweisen.

111. Die Regierung des Fürstentums Liechtenstein schlägt vor, dass der Gerichtshof die fünfte Frage folgendermassen beantwortet:

Die Beantwortung der dritten und vierten Frage hängt nicht davon ab, dass der dienstleistungserbringende europäische Rechtsanwalt zu Beginn des Verfahrens vom Gericht des Aufnahmestaats auf die im Recht dieses Staats verankerte Meldepflicht gegenüber der zuständigen Stelle hingewiesen worden ist.

Per Christiansen

Berichterstatter


EFTA COURT

Case E-13/13

EFTA Surveillance Authority

v

The Kingdom of Norway

CASE E-13/13

EFTA Surveillance Authority

v

The Kingdom of Norway

(Failure by an EEA State to fulfil its obligations – Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing)

Summary of the Judgment

1. Article 3 EEA imposes upon the EEA States the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement. Under Article 7 EEA, the EEA States are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee.

2. The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion. It is undisputed that the Kingdom of Norway has not correctly implemented the Directive.

3. By failing to implement correctly into its national legislation Article 37(1) of the Act referred to at point 23b of Annex IX to the Agreement on the European Economic Area, i.e. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, as adapted to the Agreement by way of Protocol 1 thereto, the Kingdom of Norway has failed to fulfil its obligations arising under that Act and under Article 7 EEA.

JUDGMENT OF THE COURT

2 December 2013

(Failure by an EEA State to fulfil its obligations –Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing)

In Case E-13/13,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Catherine Howdle, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

The Kingdom of Norway, represented by Dag Sørlie Lund, Adviser, Department of Legal Affairs, Ministry of Foreign Affairs, and Torje Sunde, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents,

defendant,

APPLICATION for a declaration that the Kingdom of Norway has failed to fulfil its obligations to implement correctly into its national legislation Article 37(1) of the Act referred to at point 23b of Annex IX of the Agreement on the European Economic Area (Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing) as adapted to the EEA Agreement by Protocol 1 thereto.

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

JUDGMENT

I INTRODUCTION

1 By an application lodged at the Court on 3 July 2013, the EFTA Surveillance Authority ("ESA") brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") seeking a declaration from the Court that the Kingdom of Norway has failed to fulfil its obligations to implement correctly into its national legislation Article 37(1) of the Act referred to at point 23b of Annex IX to the Agreement on the European Economic Area (Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ 2005 L 309, p. 15, ["the Directive"]) as adapted to the EEA Agreement ("EEA") by Protocol 1 thereto.

II FACTS AND PRE-LITIGATION PROCEDURE

2 By Decision No 87/2006 of 7 July 2006, the EEA Joint Committee amended Annex IX to the EEA Agreement by adding the Directive to point 23b of that Annex. The Decision was to enter into force on 8 July 2006, provided that all the notifications under Article 103(1) EEA, regarding the fulfilment of constitutional requirements, had been made to the EEA Joint Committee. As the last notification was made by the Principality of Liechtenstein on 14 February 2007, the decision entered into force on 1 April 2007, pursuant to the second subparagraph of Article 103(1) EEA. The time limit for the EEA/EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

3 By a letter dated 11 May 2009, the Norwegian Government provided ESA with a table of correspondence for the Directive on the basis of which ESA undertook a conformity assessment.

4 By a letter dated 16 November 2009, ESA sent a request for information to the Norwegian Government, setting out the questions raised by the conformity assessment of the national measures implementing the Directive. The Norwegian Government replied to this request by a letter dated 15 January 2010, in which it stated that the scope of the Financial Supervision Act did not cover (i) trust or company service providers; or (ii) other natural or legal persons trading in goods that make payments in cash of 15 000 EUR or more.

5 In this letter, the Norwegian Government conceded that "trust or company service providers not already covered under points (a) or (b) of Article 2 of the Directive and other natural or legal persons trading in goods are not subject to supervision by a public authority". Moreover, it stated that it was intending to follow up the matter, through industry consultation and consultation with other EEA States.

6 ESA sent a second request for information to Norway by a letter of 23 March 2010, in which Norway was invited to provide a full timeframe for implementation of the Directive. The Norwegian Government responded on 20 May 2010, stating that it was in consultation with other EEA States through the Committee on the Prevention of Money Laundering and Terrorist Financing. It further indicated that it intended to consult the Financial Supervisory Authority ("the FSA") following the responses of the EEA States.

7 By a letter dated 21 December 2011, ESA sent a third request for information. The Norwegian Government responded by a letter of 21 March 2012. In that letter, the Norwegian Government indicated that it was trying to find "an appropriate and practical solution for the required monitoring", and noted that the FSA had recommended that such monitoring be carried out by the County Governor (*fylkesmannen*) or the Norwegian Tax Administration.

8 On 28 March 2012, ESA sent the Norwegian Government a letter of formal notice for failure to correctly implement Article 37(1) of the Directive. The Norwegian Government responded

by a letter dated 14 June 2012 from the Ministry of Finance. In that letter it was stated that based on advice from, among others, the Norwegian FSA, the Ministry had decided to go forward and to explore further the possibility to provide the Norwegian Tax Authority with the authority to monitor these two groups of reporting entities for anti-money laundering compliance purposes.

9 The matter was subsequently discussed at a meeting in Oslo on 25 and 26 October 2012. In a follow-up e-mail dated 20 November 2012, the Norwegian Government informed ESA that the Norwegian Tax Authority had requested additional time to consider "the feasibility and of any resource implications" of an arrangement whereby it took on the role of supervisor.

10 In the continuing absence of any legislative proposal to rectify the shortcomings in Norwegian law, ESA sent a reasoned opinion to Norway on 12 December 2012. Pursuant to the first paragraph of Article 31 SCA, ESA concluded that by failing to implement correctly Article 37(1) of the Directive as adapted to the EEA Agreement by Protocol 1 thereto, the Kingdom of Norway had failed to fulfil its obligations arising under that Act and under Article 7 EEA. Pursuant to the second paragraph of Article 31 SCA, ESA accordingly required the Kingdom of Norway to take the measures necessary to comply with its reasoned opinion within a period of two months following notification thereof (i.e. no later than 12 February 2013).

11 The Norwegian Government replied to the reasoned opinion on 12 February 2013, stating that the Norwegian Tax Authority had been requested to assess the organisational and economic implications of an arrangement where it was granted the power to monitor trust and company service providers and other natural or legal persons trading in goods for the purposes of the Directive. However, the Norwegian Government stated that the process was taking longer than was initially expected, and that a conclusion from the Norwegian Tax Authority was expected by the end of February 2013.

III PROCEDURE BEFORE THE COURT AND FORMS OF ORDER SOUGHT

12 ESA lodged the present application at the Court on 3 July 2013. The statement of defence from the Kingdom of Norway was received on 12 September 2013. ESA requests the Court to declare that:

> 1. The Kingdom of Norway, by failing to implement correctly into its national legislation Article 37(1) of the Act referred to at point 23b of Annex IX to the Agreement on the European Economic Area (i.e. Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing) as adapted to the EEA Agreement by Protocol 1 thereto, has failed to fulfil its obligations arising under that Act and under Article 7 of the EEA Agreement.
>
> 2. The Kingdom of Norway bears the *costs of these proceedings.*

13 The Kingdom of Norway requests the Court to:

> Declare the application to be founded.

14 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided to dispense with the oral procedure.

IV ARGUMENTS OF THE PARTIES

15 ESA submits that the Kingdom of Norway's implementation of the Directive, as it stood on 12 February 2013, and at the time the application was lodged, is neither complete nor correct. Moreover, it is submitted that Norwegian law has not ensured the effective monitoring of the activities of certain persons within the scope of the Directive.

16 ESA argues that Article 37(1) of the Directive should be read together with Articles 2(1)(3)(c) and 2(1)(3)(e) of the Directive. While Article 37(1) sets out the obligation for a State to ensure that its competent authorities monitor and ensure compliance with the Directive by all those falling within its scope, it is Article

2 which defines that scope. According to ESA it does so by setting out the entities and persons to which the Directive applies.

17 In ESA's view, when read together, Articles 37(1), 2(1)(3)(c) and 2(1)(3)(e) of the Directive foresee that (i) trust and company service providers and (ii) other natural or legal persons trading in goods that make payments in cash of 15 000 EUR or more, should at least be effectively monitored by the competent authorities. These authorities are also to be required to take the necessary measures to ensure that such persons comply with the Directive's requirements.

18 ESA argues that for the Kingdom of Norway to comply with the requirements of the Directive, a provision reflecting Articles 2(1)(3)(c) and 2(1)(3)(e) must be introduced into national law setting out the scope of the competent financial supervisory authority's powers. Currently under Norwegian law, neither trust nor company service providers, nor other natural or legal persons trading in goods that make payments in cash of EUR 15 000 or more, are subject to any form of supervision by any public authority for the purposes of the Directive.

In ESA's view, the shortcomings in Norwegian law create a vacuum in its implementation of the Directive.

19 The Norwegian Government acknowledges that it has not yet fully adopted the relevant measures in order to implement the Act into its legal order, and thus that it has thereby not fully fulfilled its obligations under Article 45 of the Directive and under Article 7 EEA. Accepting ESA's claim, the Norwegian Government requested that the application be declared to be founded.

V FINDINGS OF THE COURT

20 Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement (see, *inter alia*, Case E-11/13 *ESA* v *Iceland*, judgment of 15 November 2013, not yet reported, paragraph 19, and case law cited). Under Article 7 EEA, the Contracting

Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee.

21 The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion (see, *inter alia*, *ESA* v *Iceland*, cited above, paragraph 21, and case law cited). It is undisputed that the Kingdom of Norway has not correctly implemented the Directive.

22 It must therefore be held that, by failing to implement correctly into its national legislation Article 37(1) of the Act referred to at point 23b of Annex IX to the Agreement on the European Economic Area, i.e. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, as adapted to the Agreement by way of Protocol 1 thereto, the Kingdom of Norway has failed to fulfil its obligations arising under that Act and under Article 7 EEA.

VI COSTS

23 Under Article 66(2) of the Rules of Procedure ("RoP"), the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since ESA has requested that the Kingdom of Norway be ordered to pay the costs and the latter has been unsuccessful, and since none of the exceptions in Article 66(3) RoP apply, the Kingdom of Norway must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that the Kingdom of Norway, by failing to implement correctly into its national legislation Article 37(1) of the Act referred to at point 23b of Annex IX to the Agreement on the European Economic Area (i.e. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing) as adapted to the EEA Agreement by Protocol 1 thereto, has failed to fulfil its obligations arising under that Act and under Article 7 of the EEA Agreement.**

2. **Orders the Kingdom of Norway to bear the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 2 December 2013.

Gunnar Selvik — Registrar

Carl Baudenbacher — President

Case E-14/13

EFTA Surveillance Authority
v
Iceland

CASE E-14/13

EFTA Surveillance Authority

v

Iceland

(Failure by a Contracting Party to fulfil its obligations – Articles 31 and 40 EEA – Different taxation on domestic and cross border mergers within the EEA)

Summary of the Judgment

1. Article 31 EEA prohibits all restrictions on the freedom of establishment within the European Economic Area, whereas Article 40 EEA prohibits all restrictions on the free movement of capital in the area. National measures liable to hinder, or make less attractive the exercise of those fundamental freedoms, are an encroachment upon the freedoms requiring justification.

2. Article 31 EEA is aimed at ensuring that foreign nationals are treated in the same way as nationals of that State. It also prohibits the EEA State of origin from hindering the establishment in another EEA State of a company which is incorporated under its legislation.

3. Even though direct taxation falls within the EEA States' competence, the EEA State must nonetheless exercise that competence consistently with EEA law. In the field of taxation, the prohibition on discrimination, whether it has its basis in Articles 4, 31 or 40 EEA, requires that, for tax purposes, comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

4. National provisions applicable to holdings of the capital of a company which give the owner definite influence on the company's decisions and allow him to determine its activities, fall within the substantive scope of the provision of the freedom of establishment, whereas acquisition of shares below this threshold, by a non-resident, constitutes a capital movement within the meaning of Article 40 EEA.

5. Iceland has failed to fulfil its obligations arising from Articles 31 and 40 of the Agreement on the European Economic Area by maintaining into force a difference in treatment between domestic and cross-border mergers pursuant to Article 51 paragraph 1 of the Icelandic Act No 90/20013 on Income Tax (*lög nr 90/2003 um tekjuskatt*).

JUDGMENT OF THE COURT

2 December 2013

(Failure by a Contracting Party to fulfil its obligations – Articles 31 and 40 EEA – Different taxation on domestic and cross border mergers within the EEA)

In Case E-14/13,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Gjermund Mathisen and Auður Ýr Steinarsdóttir, Officers, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

Iceland, represented by Anna KatrínVilhjálmsdóttir, First Secretary, Ministry for Foreign Affairs, acting as Agent,

defendant,

APPLICATION for a declaration that, by maintaining in force a difference in treatment between domestic mergers and cross-border mergers pursuant to Article 51 paragraph 1 of the Icelandic Act No 90/2003 on Income Tax (*lög nr. 90/2003 um tekjuskatt*), Iceland has failed to fulfil its obligations arising from Articles 31 and 40 of the Agreement on the European Economic Area.

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

JUDGMENT

I THE APPLICATION

1 By application lodged at the Court Registry on 3 July 2013, the EFTA Surveillance Authority ("ESA") brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"). In the application, ESA addresses an alleged failure by Iceland to fulfil its obligations under Articles 31 and 40 EEA by imposing an immediate tax on assets and shares of companies that merge cross-border with companies established in other EEA States and on shareholders of such companies, whereas similar transactions within the Icelandic territory, do not attract any immediate tax consequences. According to ESA, the different treatment between mergers within the Icelandic territory and cross-border mergers is not justified and is therefore incompatible with Articles 31 and 40 EEA.

II LEGAL BACKGROUND

EEA law

2 Article 31 EEA reads:

1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

...

3 Article 34 EEA reads:

Companies or firms formed in accordance with the law of an EC Member State or an EFTA State and having their registered office, central administration or principal place of business within the territory of the Contracting Parties shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States.

'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

4 Article 40 EEA reads:

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

5 Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5), referred to at point 1 of Annex XII to the EEA Agreement, implements Article 40 EEA. Article 1(1) of the Directive obliges the EEA States to abolish restrictions on movements of capital taking place between persons resident in the EEA States. The Article refers to a non-exhaustive Nomenclature in Annex I to the Directive, in which capital movements are classified. Point a) under Heading III of the Nomenclature classifies operations in shares and other securities of a participating nature as capital movements.

National law

6 Under Icelandic law, a cross-border company merger, where the shareholders of the merging company are only paid with shares in the acquiring company as a payment for the liquidated company (merger with exchange of shares), will lead to immediate taxation

on the capital gains for shareholders according to Article 18 paragraph 2 of Act No 90/2003 on Income Tax (*lög nr. 90/2003 um Tekjuskatt*) ("ITA"), if the market price of the shares is higher than the purchase price. The difference between the purchase price and the market price will be taxed as dividends. The same principles applies to a company that is being dissolved without going into liquidation and transfers all its assets and liabilities to a foreign company holding all the securities or shares representing its capital (merger without the exchange of shares).

7 However, pursuant to Article 51 paragraph 1 ITA, domestic mergers, with or without the exchange of shares, are to be exempted from tax in Iceland.

8 In its binding opinion No 1/08 of 4 February 2008, the Directorate of Internal Revenue (*Ríkisskattstjóri*) concluded that the tax exemption in Article 51 paragraph 1 ITA is not to be applied in cross-border mergers.

III FACTS AND PRE-LITIGATION PROCEDURE

9 On 22 March 2010, ESA informed the Icelandic Government that it, on its own initiative, had opened a case regarding the immediate taxation of cross-border mergers, and invited Iceland to provide further information on the matter.

10 By letter of 26 April 2010, Iceland provided the requested information, and the matter was discussed at a meeting in Iceland on 3 and 4 June 2010. Following the meeting, ESA invited Iceland to keep it up-to-date on any development on the issue.

11 On 6 August 2010, ESA received a complaint against Iceland for levying immediate tax on companies exiting Iceland when merging cross-border. By letter of 11 August 2010, ESA informed the Icelandic Government of the complaint, and invited Iceland to provide information. Iceland replied to the request by letter of 13 September 2010.

12 By letter of 28 April 2011, ESA invited Iceland to provide further information. Iceland replied by letter of 26 May 2011. The

immediate tax imposed on cross-border mergers was discussed in a meeting between ESA and Iceland on 7 and 8 June 2011. In a follow-up letter dated 24 June 2011, Iceland was invited to provide further information. Iceland provided information by letter of 14 July 2011.

13 On 8 February 2012, ESA issued a letter of formal notice to Iceland for failing to comply with its obligations pursuant to Articles 31, 34 and 40 EEA. Iceland replied to the letter of formal notice by letter of 7 May 2012, acknowledging that legislative amendments concerning the immediate taxation of cross-border mergers were needed, and that such amendments would be part of the legislative agenda for the autumn of 2012. The case was discussed further at a meeting in Iceland on 7 June 2012.

14 By email of 25 September 2012, confirmed in a letter of 18 October 2012, Iceland informed ESA that the amendments to the Icelandic tax rules on cross-border mergers were not on the parliamentary agenda for the autumn of 2012.

15 On 28 November 2012, ESA delivered its reasoned opinion to Iceland, concluding that, by maintaining into force a difference in treatment between domestic mergers and cross-border mergers as a result of the application of Article 51 paragraph 1 ITA, Iceland has failed to fulfil its obligation arising from Articles 31, 34 und 40 EEA. Pursuant to the second paragraph of Article 31 SCA, ESA requested Iceland to take the measures necessary to comply with the reasoned opinion within two months following notification thereof, that is no later than 28 January 2013.

16 By letter of 23 January 2013, Iceland replied to ESA's reasoned opinion, explaining that a bill amending the current exit tax rules was currently being prepared and the amendments were expected to be approved by the end of March 2013.

17 On 28 February, the Ministry of Finance and Economic Affairs submitted a proposal to the Parliament for amendments to the ITA and the Act on the Withholding of Public Levies at Source No 45/1987 (*lög nr. 45/1987 um staðgreiðslu opinberra*

gjalda). According to the proposal, the intention was to include amendments to the rules on exit taxation of cross-border mergers in Article 51 ITA. However, as Iceland informed ESA by letter of 2 April 2013, the issue turned out to be more complex than expected. Therefore, the proposal for amendments to those rules would not be ready until the autumn of 2013, and would not enter into force until 1 January 2014.

IV PROCEDURE BEFORE THE COURT AND FORMS OF ORDER SOUGHT

18 ESA lodged the present application at the Court Registry on 28 June 2013. On 23 September 2013, Iceland submitted its statement of defence. The reply from ESA was registered at the Court on 26 September 2013. By e-mail of 8 October 2013, Iceland waived its rights to submit a rejoinder.

19 The applicant, ESA, requests the Court to:

1. Declare that by maintaining into force a difference in treatment between domestic mergers and cross-border mergers as a result of the application of Article 51 paragraph 1 of Act No 90/2003 on Income Tax (lög nr. 90/2003 um tekjuskatt), Iceland has failed to fulfil its obligations arising from Articles 31 and 40 of the Agreement on the European Economic Area.

2. Order Iceland to bear the costs of these proceedings.

20 The defendant, Iceland, does not dispute the declaration sought by ESA. Iceland acknowledges that legislative steps will need to be taken in order to address ESA's concerns. A draft bill is expected to be presented to the Parliament during its current legislative session.

21 Due to the circumstances of the case, Iceland requests the Court to:

Order each party to bear its own costs of the proceedings.

22 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided

pursuant to Article 41(2) of the Rules of Procedure ("RoP") to dispense with the oral procedure.

V FINDINGS OF THE COURT

23 Article 31 EEA prohibits all restrictions on the freedom of establishment within the European Economic Area, whereas Article 40 EEA prohibits all restrictions on the free movement of capital in the area. National measures liable to hinder, or make less attractive the exercise of those fundamental freedoms, are an encroachment upon the freedoms requiring justification (see Case E-2/06 *ESA* v *Norway* [2007] EFTA Ct. Rep. 164, paragraph 64, and the case law cited).

24 Article 31 EEA is aimed at ensuring that foreign nationals are treated in the same way as nationals of that State. It also prohibits the EEA State of origin from hindering the establishment in another EEA State of a company which is incorporated under its legislation (see Case E-15/11 *Arcade Drilling* [2012] EFTA Ct. Rep. 676, paragraph 59, and the case law cited).

25 It is settled case law that even though direct taxation falls within the EEA States' competence, the EEA State must nonetheless exercise that competence consistently with EEA law (see Case E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 20, and the case law cited).

26 In the field of taxation, the prohibition on discrimination, whether it has its basis in Articles 4, 31 or 40 EEA, requires that, for tax purposes, comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see *Arcade Drilling*, cited above, paragraph 60, and the case law cited).

27 The Court recalls that national provisions applicable to holdings of the capital of a company which give the owner definite influence on the company's decisions and allow him to determine its activities, fall within the substantive scope of the provision of the freedom of establishment, whereas acquisition of shares

below this threshold, by a non-resident, constitutes a capital movement within the meaning of Article 40 EEA (see Case E-9/11 *ESA* v *Norway* [2012] EFTA Ct. Rep. 442, paragraph 79).

28 Accordingly, the national measure in question, which requires the shareholders of a company established in Iceland to pay tax on the unrealised capital gains, based on increases in the value of those shares when the company merges cross-border, fall to be assessed under the free movement of capital in Article 40 EEA, with regard to situations where shareholders hold shares below the threshold of definite influence, and under the right of establishment in Article 31 when the holding is above the threshold (see *ESA* v *Norway*, cited above, paragraphs 79 to 82, and the case law cited).

29 It is undisputed that the difference in treatment between domestic and cross-border mergers with regard to the tax exemption in Article 51 paragraph 1 ITA represents a restriction on the right to establishment and the free movement of capital pursuant to Articles 31 and 40 EEA. It is also undisputed that the measure cannot be justified.

30 The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion (see, *inter alia*, Case E-11/13 *ESA* v *Iceland*, judgment of 15 November 2013, not yet reported, paragraph 21, and the case law cited).

31 It is not disputed that at the time the period prescribed in the reasoned opinion expired, Iceland had not adopted the measures necessary to rectify these shortcomings.

32 It must therefore be held that, by maintaining in force a difference in treatment between domestic and cross-border mergers as a result of the application of Article 51 paragraph 1 of Act No 90/2003 on Income Tax (*lög nr. 90/2003 um tekjuskatt*), Iceland has failed to fulfil its obligations arising from Articles 31 and 40 EEA.

VI COSTS

33 Under Article 66(2) RoP, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the EFTA Surveillance Authority has requested that Iceland be ordered to pay the costs and the latter has been unsuccessful and since none of the exceptions in Article 66(3) apply, Iceland must therefore be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by maintaining in force a difference in treatment between domestic and cross-border mergers pursuant to Article 51 paragraph 1 of the Icelandic Act No 90/2003 on Income Tax (lög nr. 90/2003 um tekjuskatt), Iceland has failed to fulfil its obligations arising from Articles 31 and 40 of the Agreement on the European Economic Area.**

2. **Orders Iceland to bear the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 2 December 2013.

Gunnar Selvik Carl Baudenbacher

Registrar President

Case E-15/13

EFTA Surveillance Authority
v
Iceland

CASE E-15/13

EFTA Surveillance Authority

v

Iceland

(Failure by an EEA State to fulfil its obligations – Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests)

Summary of the Judgment

1. Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement. Under Article 7 EEA, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee.

2. The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion. It is undisputed that Iceland did not adopt those measures before the expiry of the time limit given in the reasoned opinion.

3. By failing to adopt the measures necessary to implement the Act referred to at point 7d of Annex XIX to the Agreement on the European Economic Area, i.e. Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, as adapted by the Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations arising under that Act and under Article 7 EEA.

JUDGMENT OF THE COURT

6 December 2013

(Failure by an EEA State to fulfil its obligations – Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests)

In Case E-15/13,

EFTA Surveillance Authority, represented by Markus Schneider, Deputy Director, and Catherine Howdle, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

Iceland, represented by Anna Katrín Vilhjálmsdóttir, First Secretary at the Ministry for Foreign Affairs, acting as Agent,

defendant,

APPLICATION for a declaration that by failing to adopt, or to notify the EFTA Surveillance Authority forthwith of, the measures necessary to implement the Act referred to at point 7d of Annex XIX to the Agreement on the European Economic Area (Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests), as adapted by the Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations under the Act and under Article 7 of the EEA Agreement.

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

JUDGMENT

I INTRODUCTION

1 By application lodged at the Court on 9 July 2013, the EFTA Surveillance Authority ("ESA") brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") seeking a declaration from the Court that by failing to adopt, or to notify ESA forthwith of, the measures necessary to implement the Act referred to at point 7d of Annex XIX to the Agreement on the European Economic Area (Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ 2009 L 110, p. 30, ["the Directive" or "the Act"]), as adapted to the EEA Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations under the Act and under Article 7 of the Agreement ("EEA").

II FACTS AND PRE-LITIGATION PROCEDURE

2 By Decision No 35/2010 of 12 March 2010, the EEA Joint Committee amended Annex XIX to the EEA Agreement by adding the Directive to point 7d of that Annex. According to Article 3 of the Decision it was to enter into force on 13 March 2010, provided that all the notifications under Article 103(1) of the EEA Agreement regarding the fulfilment of constitutional requirements had been made to the EEA Joint Committee. As the last notification was made by Iceland on 11 November 2011, the Decision entered into force on 1 January 2012, pursuant to the second paragraph of Article 103(1) EEA.

3 By a letter dated 14 December 2011, ESA reminded the Icelandic Government of its obligation to implement the Directive into the Icelandic legal order by 1 January 2012.

4 The Icelandic Government replied by a letter dated 18 December 2011. The Icelandic Government indicated that the measures necessary to implement the Act had not yet been adopted.

5 ESA issued a formal notice to Iceland by a letter of 28 March 2012. ESA concluded that, by failing to adopt or, in any event, to inform ESA of the measures necessary to ensure the implementation of the Act, Iceland had failed to fulfil its obligations under the Act and under Article 7 EEA.

6 By e-mail of 29 March 2012, the Icelandic Government responded to the letter of formal notice. It informed ESA that Iceland had not yet adopted the measures necessary to implement the Act. The Icelandic Government indicated that the implementation would require amendments to its national law, namely Act No. 141/2001, on Injunction and Litigation to Protect Overall Consumers' Interests (*Lög nr 141/2001 um lögbann og dómsmál til að vernda heildarhagsmuni neytenda*). The Icelandic Government stated that as the Directive had been translated and published in the EEA Supplement, the work on the implementing regulation could start, but it was unable to indicate when the implementing measures would be in place.

7 By further e-mail of 3 September 2012, responding to an informal inquiry by ESA of the same day, the Icelandic Government confirmed that the measures necessary to implement the Act had not yet been adopted.

8 Having received no further information as to the measures the Icelandic Government had taken to implement the Act, ESA delivered a reasoned opinion to Iceland on 5 September 2012. ESA maintained the conclusion set out in its letter of formal notice that by failing to adopt the measures necessary to implement the Act, or in any event, to notify ESA forthwith of the measures it had adopted to implement the Act, Iceland had failed to fulfil its obligations under the Act and under Article 7 of the EEA Agreement. Furthermore, pursuant to Article 31(2) SCA, ESA required Iceland to take the measures necessary to

comply with the reasoned opinion within two months following notification thereof (i.e. no later than 5 November 2012).

9 ESA received no response from the Icelandic Government before the expiry of the time limit to comply with the reasoned opinion.

10 By email of 13 December 2012, responding to an informal inquiry by ESA of the same day, the Icelandic Government expressed its hope that Parliament would adopt the measures necessary to implement the Act before the end of March 2013.

11 By a further e-mail of 2 April 2013, responding to another informal inquiry by ESA of the same day, the Icelandic Government informed ESA that Parliament had not yet adopted the necessary measures and that the Government intended to present relevant bills to Parliament in the autumn of 2013.

12 In light of the fact that the Icelandic Government had not informed ESA of any measures adopted to implement the Act, and ESA was not in possession of any information which could indicate that the Act had nevertheless been implemented, ESA decided on 12 June 2013 to bring the matter before the Court pursuant to Article 31(2) SCA.

III PROCEDURE BEFORE THE COURT AND THE FORMS OF ORDER SOUGHT

13 ESA lodged the present application at the Court on 9 July 2013. The statement of defence from Iceland was received on 26 September 2013.

14 ESA requests the Court to:

1. Declare that by failing (i) to adopt, or (ii) to notify the EFTA Surveillance Authority forthwith of, the measures necessary to implement the Act referred to at point 7d of Annex XIX to the Agreement on the European Economic Area (Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests), as adapted by the Agreement by way of Protocol 1 thereto, within

the time prescribed, Iceland has failed to fulfil its obligations under the Act and under Article 7 of the EEA Agreement.

2. Order Iceland to bear the costs of these proceedings.

15 The Icelandic Government does not contest the declaration sought by ESA but requests the Court to "order each party to bear its own costs of the proceedings, due to the circumstances of the case".

16 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided to dispense with the oral procedure.

IV FINDINGS OF THE COURT

17 Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement (see, *inter alia*, Case E-11/13 *ESA* v *Iceland*, judgment of 15 November 2013, not yet reported, paragraph 19, and case law cited). Under Article 7 EEA, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee.

18 By Decision No 35/2010 of 12 March 2010, the EEA Joint Committee made Directive 2009/22 part of the EEA Agreement. The Decision entered into force on 1 January 2012 and the time limit for EFTA States to adopt the measures necessary to implement the Act expired on the same date.

19 The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion (see, *inter alia*, *ESA* v *Iceland*, cited above, paragraph 21, and case law cited). It is undisputed that Iceland did not adopt those measures before the expiry of the time limit given in the reasoned opinion.

20 As Iceland did not implement the Act within the prescribed period, the Court does not need to examine the alternative

form of order sought for failing to notify ESA of the measures implementing the Act.

21 It must therefore be held that by failing to adopt the measures necessary to implement the Act referred to at point 7d of Annex XIX to the Agreement on the European Economic Area (Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests), as adapted by the Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations arising under that Act and under Article 7 EEA.

V COSTS

22 Under Article 66(2) of the Rules of Procedure ("RoP"), the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since ESA has requested that Iceland be ordered to pay the costs and the latter has been unsuccessful, and since none of the exceptions in Article 66(3) RoP apply, Iceland must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that by failing to adopt the measures necessary to implement the Act referred to at point 7d of Annex XIX to the Agreement on the European Economic Area (Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests), as adapted by the Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations under the Act and under Article 7 of the Agreement.**

2. **Orders Iceland to bear the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 6 December 2013.

Gunnar Selvik Carl Baudenbacher

Registrar President


EFTA COURT

Case E-16/13

EFTA Surveillance Authority
v
Iceland

CASE E-16/13

EFTA Surveillance Authority

v

Iceland

(Failure by a Contracting Party to fulfil its obligations - Failure to implement - Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts)

Summary of the Judgment

1. Under Article 7 EEA, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. Furthermore, Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement.

2. The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion.

3. By failing to adopt the measures necessary to make the Act referred to at point 7b of Annex XIX to the EEA Agreement, i.e. Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange products, as adapted to the EEA Agreement by Protocol 1 thereto, part of its internal legal order within the time prescribed, Iceland has failed to fulfil its obligations under Article 7 EEA.

JUDGMENT OF THE COURT

6 December 2013

(Failure by a Contracting Party to fulfil its obligations – Failure to implement - Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts)

In Case E-16/13,

EFTA Surveillance Authority, represented by Markus Schneider, Deputy Director, and Catherine Howdle, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

Iceland, represented by Anna Katrín Vilhjálmsdóttir, Ministry for Foreign Affairs, acting as Agent,

defendant,

APPLICATION for a declaration that by failing to adopt, or to notify the EFTA Surveillance Authority forthwith of, measures necessary to implement the Act referred to at point 7b of Annex XIX to the Agreement on the European Economic Area (Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts), as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations under the Act and under Article 7 of the Agreement.

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

JUDGMENT

I INTRODUCTION

1 By application lodged at the Court Registry on 9 July 2013. the EFTA Surveillance Authority ("ESA") brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ("SCA"), for a declaration that by failing to adopt, or to notify ESA forthwith, of the measures necessary to implement the Act referred to at point 7b of Annex XIX to the Agreement on the European Economic Area (Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts), ("the Directive"), as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations arising pursuant to that Act and pursuant to Article 7 of the EEA Agreement.

II FACTS AND PRE-LITIGATION PROCEDURE

2 Decision No 86/2009 of 3 July 2009 of the EEA Joint Committee ("Decision 86/2009") amended Annex XIX to the EEA Agreement by replacing Directive 94/47/EC with Directive 2008/122/EC at point 7b of that Annex. Iceland, Norway and Liechtenstein indicated constitutional requirements for the purposes of Article 103 EEA.

3 As Iceland notified ESA on 16 September 2011 that the constitutional requirements had been fulfilled, the last such notification to be received, Decision 86/2009 entered into force on 1 November 2011. The time limit for EFTA States to adopt the measures necessary to implement the Act expired on the same date.

4 By letter of 11 October 2011, ESA reminded Iceland of its obligation to implement Directive 2008/122 into the Icelandic legal order by 1 November 2011.

5 By email of 12 October 2011, Iceland replied to ESA's reminder letter indicating that preparations for the implementing measures had been initiated, although it could not provide an exact time line regarding their adoption.

6 Having received no further information, ESA sent a letter of formal notice to Iceland on 1 February 2012. ESA concluded that, by failing to adopt, or to inform ESA of the national measures it had adopted to implement the Act, Iceland had failed to fulfil its obligations pursuant to the Directive and pursuant to Article 7 EEA.

7 In its reply to the letter of formal notice on 14 February 2012, Iceland stated that the necessary implementing measures were expected to be adopted by the Icelandic Parliament during its 2012 spring session.

8 By email of 4 June 2012, Iceland informed ESA that the implementing measures would not be adopted by the Icelandic Parliament during its 2012 spring session.

9 ESA issued a reasoned opinion on 11 July 2012, in which it maintained the conclusions made in its letter of formal notice that by failing to adopt the measures necessary to implement the Directive, or by failing to notify ESA forthwith of the measures it has adopted to implement the Directive, Iceland had failed to fulfil its obligations pursuant to the Directive and pursuant to Article 7 EEA.

10 Pursuant to the second paragraph of Article 31 SCA, ESA requested Iceland to take the necessary measures to comply with the reasoned opinion within two months following notification thereof, that is no later than 11 September 2012.

11 By emails of 10 October 2012, 21 March 2013, and 2 April 2013, Iceland informed ESA that the Icelandic Parliament had yet to adopt the measures necessary to implement the Directive.

III PROCEDURE BEFORE THE COURT AND FORMS OF ORDER SOUGHT

12 On 9 July 2013, the present application was lodged at the Court's Registry. On 26 September 2013, Iceland lodged its statement of defence. On 2 October 2013, ESA's reply was registered at the Court. On 8 October 2013, Iceland, by way of email, waived its right to submit a rejoinder.

13 The applicant, the EFTA Surveillance Authority, requests the Court to:

(1) Declare that by failing (i) to adopt, or (ii) to notify the EFTA Surveillance Authority forthwith of, the measures necessary to implement the Act referred to at point 7b of Annex XIX to the Agreement on the European Economic Area (Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange products), as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations pursuant to that Act and pursuant to Article 7 of the Agreement.

(2) Order Iceland to bear the costs of these proceedings.

14 The defendant, Iceland, does not dispute the declaration sought by the applicant, and requests the Court to order each party to bear its own costs of the proceedings, due to the circumstances of the case.

15 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided to dispense with the oral procedure in accordance with Article 41(2) of the Rules of Procedure ("RoP").

IV FINDINGS OF THE COURT

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

the EEA Agreement (see, *inter alia*, Case E-11/13 *ESA v Iceland,* judgment of 15 November 2013, not yet reported, paragraph 19 and the case law cited). Under Article 7 EEA, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee.

17 EEA Joint Committee Decision No 86/2009 of 3 July 2009 entered into force on 1 November 2011. The time limit for EFTA States to adopt the measures necessary to implement the Directive expired on the same date. Decision 86/2009 did not set a separate EEA time-limit for the implementation of the Directive into national law.

18 The question of whether an EEA/EFTA State has failed to fulfil its obligations must be determined by reference to the situation in the EFTA State as it stood at the end of the period laid down in the reasoned opinion, that is no later than 11 September 2012 (see, *inter alia*, *ESA* v *Iceland*, cited above, paragraph 21, and the case law cited). It is undisputed that by the expiry of the time limit given in the reasoned opinion, Iceland had not adopted such measures as to implement the Directive.

19 Since Iceland did not implement the Directive within the time limit prescribed, there is no need to examine the alternative form of order sought.

20 It must therefore be held that, by failing, within the time limit prescribed, to adopt the measures necessary to implement into its national legislation the Act referred to at point 7b of Annex XIX to the Agreement on the European Economic Area (Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange products), as adapted to the EEA Agreement by way of Protocol 1 thereto, Iceland has failed to fulfil its obligations pursuant to the Act, as well as pursuant to Article 7 EEA.

V COSTS

21 Under Article 66(2) RoP, the unsuccessful party is to be ordered to bear the costs of the proceedings if it has been applied for in the successful party's pleadings, and none of the exceptions set out in Article 66(3) RoP apply to the case.

22 Iceland has requested the Court to order that each party should bear its own costs of the proceedings, with reference to the circumstances of the case.

23 Since Iceland has neither specified what circumstances of the case, nor set out any other reason as to why any of the exceptions set out in Article 66(3) RoP should apply, and being the unsuccessful party, Iceland is ordered to pay the costs of the proceedings in accordance with Article 66(2) RoP.

On those grounds,

THE COURT

hereby:

1. **Declares that, by failing to correctly implement the Act referred to at point 7b of Annex XIX to the Agreement on the European Economic Area (Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange products), as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations pursuant to that Act and pursuant to Article 7 of the Agreement.**

2. **Orders Iceland to bear the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 6 December 2013.

Gunnar Selvik Carl Baudenbacher

Registrar President

Case E-17/13

EFTA Surveillance Authority
v
Iceland

CASE E-17/13

EFTA Surveillance Authority

v

Iceland

(Failure by a Contracting Party to fulfil its obligations – Directive 2009/44/EC – Failure to implement)

Summary of the Judgment

1. Under Article 7 EEA, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. Furthermore, Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement.

2. The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion.

3. Iceland failed to fulfil its obligations under the Act referred to at point 16b, first indent, of Annex IX and point 4, first indent, of Annex XII to the Agreement on the European Economic Area, that is Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims, as adapted to the Agreement by way of Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt all the measures necessary to implement Article 2 of the Act within the time prescribed.

JUDGMENT OF THE COURT

6 December 2013

(Failure by a Contracting Party to fulfil its obligations – Directive 2009/44/EC – Failure to implement)

In Case E-17/13,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Clémence Perrin, Officer, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

Iceland, represented by Anna Katrín Vilhjálmsdóttir, First Secretary, Ministry for Foreign Affairs, acting as Agent,

defendant,

APPLICATION for a declaration that by failing, within the time prescribed, to adopt or to notify the EFTA Surveillance Authority forthwith of all measures necessary to implement Article 2 of the Act referred to at point 16b, first indent, of Annex IX and point 4, first indent, of Annex XII to the Agreement on the European Economic Area, that is Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims, as adapted to the Agreement by way of Protocol 1 thereto, Iceland has failed to fulfil its obligations under the Act and under Article 7 EEA.

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

JUDGMENT

I INTRODUCTION

1 By application lodged at the Court Registry on 10 July 2013, the EFTA Surveillance Authority ("ESA") brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), for a declaration that, by failing, within the time limit prescribed, to adopt, or to notify ESA forthwith of all the measures necessary to implement Article 2 of the Act referred to at point 16b, first indent, of Annex IX and point 4, first indent, of Annex XII to the Agreement on the European Economic Area, that is Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims (OJ 2009 L 146, p. 37) ("the Directive"), as adapted to the Agreement by way of Protocol 1 thereto, Iceland has failed to fulfil its obligations under the Act and under Article 7 EEA.

II FACTS AND PRE-LITIGATION PROCEDURE

2 Decision No 50/2010 of 30 April 2010 of the EEA Joint Committee ("Decision 50/2010") amended Annexes IX and XII to the EEA Agreement by adding the Directive to points 16b and 4 of those Annexes respectively. Iceland, Liechtenstein and Norway all indicated constitutional requirements for the purposes of Article 103 EEA.

3 As Norway notified on 7 December 2011 that the constitutional requirements had been fulfilled, the last such notification to be received, Decision 50/2010 entered into force on 1 February 2012. The time limit for EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

4 By letter of 15 December 2011, ESA reminded the Icelandic Government of its obligations to implement the Directive into its legal order by 1 February 2012. Having received no further information from Iceland, ESA issued a letter of formal notice on 16 May 2012. ESA concluded that, by failing to adopt or, in any event, to inform ESA of the national measures it had adopted to implement the Directive, Iceland had failed to fulfil its obligations under the Act and under Article 7 EEA.

5 In its observations on the letter of formal notice, Iceland indicated that it was preparing a bill. The bill was to be submitted to the Parliament in the autumn of 2012. However, Iceland did not provide a detailed time frame.

6 Not having received any further information, ESA delivered a reasoned opinion to Iceland on 12 September 2012 wherein ESA maintained the conclusion set out in its letter of formal notice. Pursuant to Article 31(2) SCA, ESA required Iceland to take the measures necessary to comply with the reasoned opinion within two months following the notification thereof, that is no later than 12 November 2012.

7 By its observations on the reasoned opinion of 25 October 2012, Iceland provided information concerning the implementation of Article 1 of the Directive. However, no information was provided regarding Article 2 of the Directive. As a result, the time limit prescribed in the reasoned opinion expired without any measure having been adopted to implement Article 2 of the Directive.

8 On 8 January 2013, Iceland provided ESA with a list notifying partial implementation of the Directive through the adoption of Act No 159/2012 on Security of Transfer Orders in Payment Systems. The Act fully implemented Article 1 of the Directive. By email of 26 February 2013, Iceland informed ESA that the Ministry of the Interior, which has the competence to fully implement Article 2 of the Directive, would not be in a position to present its draft legislation to Parliament until the autumn session of 2013.

9 On 12 June 2013, neither having received information on any measures adopted to implement Article 2 of the Act, nor being in possession of any information which could indicate that Article 2 had nevertheless been implemented, ESA decided to bring the matter before the Court pursuant to Article 31(2) SCA.

III PROCEDURE AND FORMS OF ORDER SOUGHT

10 On 10 July 2013, ESA lodged the present application at the Court Registry. Iceland submitted a statement of defence which was registered at the Court on 26 September 2013. The reply from ESA was registered at the Court on 2 October 2013. By email of 8 October 2013, Iceland waived its right to submit a rejoinder.

11 The applicant, ESA, requests the Court to:

1. Declare that by failing (i) to adopt, or (ii) to notify the EFTA Surveillance Authority forthwith, of all the measures necessary to implement Article 2 of the Act referred to at point 16b, first indent, of Annex IX and point 4, first indent, of Annex XII to the Agreement on the European Economic Area (Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims), as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations under the Act and under Article 7 of the Agreement.

2. Order Iceland to bear the costs of these proceedings.

12 Iceland does not dispute the declaration sought by the applicant. However, in the defendant's view, the delay in implementation results from legislative procedure. The Icelandic Government intends to introduce a draft bill to fully implement Article 2 of the Directive to the Parliament during the legislative session which was scheduled to start on 1 October 2013. Iceland, requests the Court to order each party to bear its own costs of the proceedings, due to the circumstances of the case.

13 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided pursuant to Article 41(2) of the Rules of Procedure ("RoP") to dispense with the oral procedure.

IV FINDINGS OF THE COURT

14 Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement (see, *inter alia*, Case E-11/13 *ESA* v *Iceland*, judgment of 15 November 2013, not yet reported, paragraph 19, and the case law cited). Under Article 7 EEA, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. An obligation to implement the Directive, and to notify ESA thereof, also follows from Article 3 of the Directive.

15 Decision No 50/2010 of the EEA Joint Committee of 30 April 2010 entered into force on 1 February 2012. The time limit for EFTA States to adopt the measures necessary to implement the Directive expired on the same date. Decision No 50/2010 did not set a separate EEA time limit for the implementation of the Directive into national law.

16 The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion (see, *inter alia*, *ESA* v *Iceland*, cited above, paragraph 21, and the case law cited). It is undisputed that Iceland did not adopt measures necessary to implement correctly Article 2 of the Directive before the expiry of the time limit given in the reasoned opinion.

17 Since Iceland did not implement Article 2 of the Directive within the time limit prescribed, there is no need to examine the alternative form of order sought against Iceland for failing to notify ESA of the measures implementing Article 2 of the Directive.

18 It must therefore be held that Iceland has failed to fulfil its obligations under the Directive, and under Article 7 EEA, by

failing, within the time limit prescribed, to adopt the measures necessary to implement into its national legislation the provisions of Article 2 of the Directive.

V COSTS

19 Under Article 66(2) RoP, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the EFTA Surveillance Authority has requested that Iceland be ordered to pay the costs, and the latter has been unsuccessful, and none of the exceptions in Article 66(3) apply, Iceland must therefore be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that Iceland has failed to fulfil its obligations under the Act referred to at point 16b, first indent, of Annex IX and point 4, first indent, of Annex XII to the Agreement on the European Economic Area (Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims), as adapted to the Agreement by way of Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt all the measures necessary to implement Article 2 of the Act within the time prescribed.**

2. **Orders Iceland to bear the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 6 December 2013.

Gunnar Selvik Carl Baudenbacher

Registrar President

Case E-18/13

EFTA Surveillance Authority
v
Iceland

CASE E-18/13

EFTA Surveillance Authority

v

Iceland

(Failure by a Contracting Party to fulfil its obligations – Directive 2001/81/EC – Failure to implement)

Summary of the Judgment

1. Under Article 7 EEA, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. Furthermore, Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement.

2. The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion.

3. Iceland failed to fulfil its obligations under the Act referred to at point 21ar of Annex XX to the Agreement on the European Economic Area, that is Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants, as adapted to the Agreement by way of Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt all the measures necessary to implement the Act within the time prescribed.

JUDGMENT OF THE COURT

6 December 2013

(Failure by a Contracting Party to fulfil its obligations – Directive 2001/81/EC – Failure to implement)

In Case E-18/13,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Auður Ýr Steinarsdóttir and Maria Moustakali, Officers, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

Iceland, represented by Anna Katrín Vilhjálmsdóttir, First Secretary, Ministry for Foreign Affairs, acting as Agent,

defendant,

APPLICATION for a declaration that by failing, within the time prescribed to adopt or to notify the EFTA Surveillance Authority forthwith of all measures necessary to implement the Act referred to at point 21ar of Annex XX to the Agreement on the European Economic Area, that is Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants, as adapted to the Agreement by way of Protocol 1 thereto, Iceland has failed to fulfil its obligations under the Act and under Article 7 EEA.

THE COURT,

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

Registrar: Gunnar Selvik,

having regard to the written pleadings of the parties,

having decided to dispense with the oral procedure,

gives the following

JUDGMENT

I INTRODUCTION

1 By application lodged at the Court Registry on 10 July 2013, the EFTA Surveillance Authority ("ESA") brought an action under the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), for a declaration that by failing, within the time limit prescribed, to adopt or to notify ESA forthwith of all measures necessary to implement the Act referred to at point 21ar of Annex XX to the Agreement on the European Economic Area, that is Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants (OJ 2001 L 309, p. 22) ("the Directive"), as adapted to the Agreement by way of Protocol 1 thereto, Iceland has failed to fulfil its obligations under the Act and under Article 7 EEA.

II FACTS AND PRE-LITIGATION PROCEDURE

2 Decision No 149/2009 of 4 December 2009 of the EEA Joint Committee ("Decision 149/2009") amended Annex XX to the EEA Agreement by adding the Directive to point 21ar of the Annex. Iceland indicated constitutional requirements for the purposes of Article 103 EEA.

3 As Iceland notified ESA on 10 November 2011 that the constitutional requirements had been fulfilled, Decision 149/2009 entered into force on 1 January 2012. The time limit for EEA/EFTA States to adopt the measures necessary to implement the Directive expired on the same date.

4 By letter of 15 November 2011, ESA reminded the Icelandic Government of its obligations to implement the Directive into its legal order by 1 January 2012. On 16 May 2012, having received no further information from Iceland, ESA issued a letter of formal notice. ESA concluded that, by failing to adopt or, in any event, to

inform ESA of the national measures it had adopted to implement the Directive, Iceland had failed to fulfil its obligations under the Act and under Article 7 EEA.

5 Iceland did not reply to the letter of formal notice.

6 On 3 October 2012, ESA delivered a reasoned opinion to Iceland, maintaining the conclusion set out in its letter of formal notice. Pursuant to Article 31(2) SCA, ESA required Iceland to take the measures necessary to comply with the reasoned opinion within two months following the notification thereof, that is no later than 3 December 2012.

7 On 6 December 2012, Iceland submitted observations on the reasoned opinion. It was explained that a bill which included provisions to transpose the Directive was presented to the Parliament during the 2011-2012 parliamentary session. However, the bill had not been adopted by the Parliament during that session and had therefore been put forward again in the 2012-2013 session. It was expected that the bill would be adopted before that session came to an end in mid-March of 2013.

8 On 3 April 2013, in response to an informal inquiry by ESA, Iceland informed ESA that the Parliament had not adopted the bill and thatthe bill would be presented again at the following parliamentary session. Due to the upcoming election in Iceland, it was not possible to predict whether there would be a summer session. On 15 May 2013, it was still not clear whether there would be a summer parliamentary session.

9 On 12 June 2013, having neither received information on any measures adopted to implement the Directive, nor being in possession of any information which could indicate that the Directive had nevertheless been implemented, ESA decided to bring the matter before the Court pursuant to Article 31(2) SCA.

III PROCEDURE AND FORMS OF ORDER SOUGHT

10 ESA lodged the present application at the Court Registry on 10 July 2013. Iceland submitted a statement of defence which was

registered at the Court on 26 September 2013. The reply from ESA was registered at the Court on 2 October 2013. By email of 8 October 2013, Iceland waived its right to submit a rejoinder.

11 The applicant requests the Court to:

1. Declare that by failing (i) to adopt, or (ii) to notify the EFTA Surveillance Authority forthwith of, all the measures necessary to implement the Act referred to at point 21ar of Annex XX to the Agreement on the European Economic Area (Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants), as adapted to the Agreement by way of Protocol 1 thereto, within the time prescribed, Iceland has failed to fulfil its obligations under the Act and under Article 7 of the Agreement.

2. Order Iceland to bear the costs of these proceedings.

12 Iceland does not dispute the declaration sought by the applicant. However, in the defendant's view the delay in implementation results from legislative procedure and requests the Court to order each party to bear its own costs of the proceedings, due to the circumstances of the case.

13 After having received the express consent of the parties, the Court, acting on a report from the Judge-Rapporteur, decided pursuant to Article 41(2) of the Rules of Procedure ("RoP") to dispense with the oral procedure.

IV FINDINGS OF THE COURT

14 Article 3 EEA imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement (see, *inter alia*, Case E-11/13 *ESA* v *Iceland*, judgment of 15 November 2013, not yet reported, paragraph 19, and the case law cited). Under Article 7 EEA, the Contracting Parties are obliged to implement all acts referred to in the Annexes to the EEA Agreement, as amended by decisions of the EEA Joint Committee. An obligation to implement the

Directive, and to notify ESA thereof, also follows from Article 15 of the Directive.

15 Decision No 149/2009 of the EEA Joint Committee of 4 December 2009 entered into force on 1 January 2012. The time limit for EFTA States to adopt the measures necessary to implement the Directive expired on the same date. Decision No 149/2009 did not set a separate EEA time limit for the implementation of the Directive into national law.

16 The question of whether an EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion (see, *inter alia*, *ESA* v *Iceland*, cited above, paragraph 21, and the case law cited). It is undisputed that Iceland did not adopt measures necessary to implement the Directive before the expiry of the time limit given in the reasoned opinion.

17 Since Iceland did not implement the Directive within the time limit prescribed, there is no need to examine the alternative form of order sought against Iceland for failing to notify ESA of the measures implementing the Directive.

18 It must therefore be held that Iceland has failed to fulfil its obligations under the Directive, and under Article 7 EEA, by failing, within the time limit prescribed, to adopt the measures necessary to implement the Directive.

V COSTS

19 Under Article 66(2) RoP, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the EFTA Surveillance Authority has requested that Iceland be ordered to pay the costs, and the latter has been unsuccessful, and none of the exceptions in Article 66(3) apply, Iceland must therefore be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that Iceland has failed to fulfil its obligations under the Act referred to at point 21ar of Annex XX to the Agreement on the European Economic Area (Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants), as adapted to the Agreement by way of Protocol 1 thereto, and under Article 7 of the Agreement, by failing to adopt all the measures necessary to implement the Act within the time prescribed.**

2. **Orders Iceland to bear the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 6 December 2013.

Gunnar Selvik — Registrar

Carl Baudenbacher — President

Case E-7/13

Creditinfo Lánstraust hf.

v

Registers Iceland and the Icelandic State

CASE E-7/13

Creditinfo Lánstraust hf.

v

Registers Iceland and the Icelandic State

(Directive 2003/98/EC on the re-use of public sector information – Principles governing charging – Transparency – Notion of cost – Self-financing requirements)

Summary of the Judgment

1. Public sector information is a key resource for industry in the information society. A main goal of the European legislature was to put European firms on an equal footing with their American counterparts, which, since the enactment of the Freedom of Information Act in 1966, have benefited from a highly developed, efficient public information system at all levels of the administration. The Commission has highlighted that the US government's active policy of ensuring both access to and commercial exploitation of public sector information has greatly stimulated the development of the US information industry.

2. According to its Article 1, Directive 2003/98/EC ("the Directive") establishes a minimum set of rules governing re-use and the practical means of facilitating the re-use of existing documents held by public sector bodies. In Article 2(4) of the Directive, re-use is defined as use for any commercial or non-commercial purpose other than the initial purpose within the public task for which the documents were produced.

3. Where re-use is authorised, and where charges are made for that purpose, it is an objective of the Directive, as set out in recital 14 of its preamble, to preclude excessive pricing. It must be borne in mind in this context that the public bodies in question are normally monopolies.

MÁL E-7/13

Creditinfo Lánstraust hf.

gegn

Þjóðskrá Íslands og íslenska ríkinu

(Tilskipun 2003/98/EB um endurnotkun upplýsinga frá hinu opinbera – Meginreglur um gjaldtöku – Gagnsæi – Hugtakið „kostnaður“ – Kröfur um að opinber aðili standi undir sér fjárhagslega)

Samantekt

1. Upplýsingar frá hinu opinbera eru lykilþáttur í atvinnugreinum upplýsingasamfélagsin. Eitt meginmarkmiða lagasetningar á þessu sviði var að jafna stöðu evrópskra fyrirtækja gagnvart bandarískum keppinautum þeirra, sem notið hafa góðs af háþróuðu, skilvirku kerfi upplýsinga frá hinu opinbera á öllum stigum stjórnsýslunnar, allt frá gildistöku laga um aðgang að upplýsingum 1966. Framkvæmdastjórnin leggur áherslu á að markviss stefna stjórnvalda í Bandaríkjunum til tryggja aðgang og notkun upplýsinga frá hinu opinbera í ábataskyni hefur mjög örvað þróun bandaríska upplýsingaiðnaðarins.

2. Samkvæmt 1. gr. tilskipunar 2003/98/EB (“tilskipunin”) eru í henni settar lágmarksreglur um endurnotkun og hagnýtar leiðir til að auðvelda endurnotkun gagna sem til eru og eru í vörslu opinberra aðila. Í 4. mgr. 2. gr. er „endurnotkun“ skilgreind sem öll notkun á gögnunum í viðskiptaskyni eða tilgangi sem ekki er viðskiptalegs eðlis, sem er annar en upphaflegur tilgangur hins opinbera með því að búa gögnin til.

3. Þegar endurnotkun er heimiluð og tekið er gjald vegna hennar, er það markmið tilskipunarinnar, eins og fram kemur í 14. lið formálsorða hennar, að koma í veg fyrir of háa verðlagningu. Í þessu samhengi verður að hafa í huga að þeir opinberu aðilar sem um ræðir starfa jafnan í skjóli einokunar

4. Article 6 of the Directive therefore states that charges may not exceed the cost of collection, production, reproduction and dissemination of the documents in question, together with a reasonable return on investment.

5. Pricing is a crucial issue in relation to the exploitation of public sector information by the digital content industries. It largely determines whether they will find an interest in investing in value added products and services based on public sector information. American companies benefit from the fact that they can obtain US public sector information free of charge. If European companies are to be put on an equal footing with their competitors in other parts of the world, the cost elements and return on investment cannot be calculated in a way that would put them at a significant disadvantage.

6. Pursuant to Article 7 of the Directive, standard charges for the re-use of documents shall be pre-established and published. The public sector body shall indicate the calculation basis for the published charge if requested to do so. This should be done in order to enable individuals and economic operators charged for re-use of public information to verify whether the charges in question are compatible with Article 6 of the Directive. The Directive does not require that the calculation basis be made available at the time when the charge is fixed. Nevertheless, the requirement that standard charges within the limit set by Article 6 shall be pre-established presupposes that a substantive examination has been undertaken at the time when the charge is fixed. This must apply irrespective of whether the charge is set in legislation, by the relevant public authority or by other means.

7. If the factors relevant to performing a calculation are uncertain, the public body in question must at least make a reasonable estimate, for example in the form of the average cost of enabling re-use. If experience shows that the estimate was incorrect, and if that entails that set charges are incompatible with Article 6 of the Directive, the calculation must be adjusted accordingly.

4. Í 6. gr. kemur því fram að gjaldtakan skuli ekki vera hærri en sem nemur kostnaðinum við söfnun, framleiðslu, fjölföldun og dreifingu auk sanngjarns hagnaðarhlutar af fjárfestingunni.

5. Verðlagning skiptir miklu máli þegar fjallað er um notkun stafræna upplýsingageirans á upplýsingum frá hinu opinbera. Hún ræður mestu um hvort fyrirtæki innan hans sýni áhuga á að fjárfesta í virðisaukandi vörum og þjónustu sem byggir á upplýsingum frá hinu opinbera. Bandarísk fyrirtæki hagnast á þeirri staðreynd að þau hafa ókeypis aðgang að upplýsingum hins opinbera þar í landi. Ef evrópsk fyrirtæki eiga að standa jafnfætis keppinautum sem starfa annars staðar í heiminum geta útreikningar kostnaðarþátta og hagnaðarhluta af fjárfestingu ekki verið þannig að þau standi talsvert verr að vígi.

6. Samkvæmt 7. gr. tilskipunarinnar skulu stöðluð gjöld fyrir endurnotkun á gögnum ákveðin fyrirfram og birt. Ef þess er óskað, skal opinber aðili tilgreina grundvöll útreikninga á gjaldinu sem birt er. Þetta skal gert til að gera einstaklingum og rekstraraðilum kleift að sannreyna hvort umrædd gjöld samrýmist 6. gr. tilskipunarinnar. Ekki er gerð sú krafa samkvæmt tilskipuninni að grundvöllur útreikninganna sé gerður aðgengilegur á þeim tímapunkti sem fjárhæð gjaldsins er ákveðin. Krafan um að stöðluð gjöld, innan þeirra marka sem sett eru í 6. gr., skuli vera ákveðin fyrirfram gerir engu að síður ráð fyrir því að efnisleg skoðun hafi farið fram á þeim tíma sem fjárhæð gjaldsins er ákveðin. Sú krafa hlýtur að gilda hvort sem fjárhæð gjaldsins er ákveðin með lagasetningu þar til bærra yfirvalda, eða með öðrum hætti

7. Ef óvissa ríkir um einhverja þætti útreikningsins, verður hinn opinberi aðili hið minnsta að gera sanngjarna áætlun, til dæmis í formi meðaltals af kostnaði við að heimila endurnotkun, líkt og framkvæmdastjórnin hefur bent á. Ef áætlunin reynist röng, og slíkt felur í sér að gjaldtakan er í ósamræmi við 6. gr. tilskipunarinnar, verður að leiðrétta útreikningana.

8. Individuals and economic operators are entitled to obtain repayment of charges levied in an EEA State in breach of EEA law provisions. That is a consequence of the rights conferred on them. The EEA State in question is therefore required, in principle, to repay charges levied in breach of EEA law. An exception to the repayment obligation applies when repayment entails unjust enrichment. Repayment is not required if it is established that the person required to pay unlawful charges has actually passed them on to other persons.

9. Whether a charge levied in violation of EEA law is passed on, depends on the circumstances of the case, in particular the market structure. For example, a monopoly operator can be expected to pass on the entire charge. If there is competition, an operator may not be able to pass on any part of it. Moreover, even where it is established that the charge has been passed on in whole or in part to customers, repayment does not necessarily entail unjust enrichment. The charged person may still suffer a loss, in particular as a result of a fall in the volume of his sales.

10. It follows from the wording of Article 6 of the Directive that cost within the meaning of this provision is not limited to the cost of facilitating re-use, that is, reproduction and dissemination. Account may be taken of the cost incurred by a public sector body in connection with the initial collection and production of the documents in question. However, under the Directive, if account is taken of cost incurred by a public sector body in connection with the initial collection and production of documents, any income accrued in that respect, for example fees or taxes such as stamp duties, which reduce or offset that cost, must also be taken into account. Consequently, the cost within the meaning of Article 6 must be construed as the net cost. If only the cost incurred as a result of collection were to be taken into account and not the income accrued in that connection, this would undermine the effectiveness of the Directive's objective of precluding excessive pricing.

8. Einstaklingar og atvinnurekendur eiga rétt á endurgreiðslu gjalda sem innheimt hafa verið í EES-ríki, ef innheimtan reynist brot á reglum EES-réttar. Það leiðir af réttindum sem þeim hafa verið veitt. EES-ríkinu sem um ræðir er því að meginstefnu skylt að endurgreiða gjöld sem innheimt hafa verið í trássi við EES-rétt. Undantekning er gerð frá endurgreiðsluskyldunni þegar endurgreiðsla hefði í för með sér óréttmæta auðgun. Endurgreiðsluskyldan á ekki við ef sannað er að sá, sem skyldaður var til að greiða ólögmæt gjöld, hafi í reynd velt þeim yfir á aðra.

9. Hvort gjöldum, sem innheimt hafa verið í andstöðu við reglur EES-réttar, hafi verið velt áfram yfir á aðra, fer eftir atvikum hvers máls, sérstaklega aðstæðum á markaði. Vænta má þess að aðili sem hefur í reynd einokunarstöðu á markaði velti gjöldunum að fullu yfir á viðskiptavini. Ef um samkeppni er að ræða getur verið að rekstraraðili geti ekki velt neinum hluta gjaldanna yfir á aðra með sama hætti. Enn fremur skal þess gætt, að í þeim tilvikum þar sem gjöldunum hefur verið velt yfir á viðskiptavini, að fullu eða að hluta, þá þarf slíkt ekki nauðsynlega að fela í sér óréttmæta auðgun. Sá sem þurfti að greiða gjöldin getur engu að síður hafa orðið fyrir tapi, einkum vegna minnkandi sölu.

10. Það leiðir af orðalagi 6. gr. tilskipunarinnar, að kostnaður í merkingu ákvæðisins takmarkist ekki við kostnaðinn við að auðvelda endurnotkun, það er, fjölföldun og dreifingu. Heimilt er að telja með kostnað sem opinber aðili hefur af upphaflegri söfnun og framleiðslu umræddra gagna. Hins vegar er gert ráð fyrir því í tilskipuninni, ef talinn er með kostnaður sem opinber aðili hefur af upphaflegri söfnun og framleiðslu gagna, að tekjur sem verða til vegna þeirra, til dæmis gjöld og skattar eins og stimpilgjöld, sem lækka eða koma til móts við þann kostnað, séu einnig teknar með í reikninginn. Þar af leiðandi verður að skilja kostnaðarhugtak 6. gr. með þeim hætti að það vísi til nettókostnaðar. Ef einungis væri tekið tillit til kostnaðar vegna söfnunar en ekki til tekna sem verða til vegna hennar, myndi það grafa undan áhrifum þess markmiðs tilskipunarinnar að koma í veg fyrir of háa verðlagningu

11. General or specific self-financing requirements for public sector bodies may be taken into account when determining the cost pursuant to Article 6 of the Directive. Nonetheless, the cost within the meaning of Article 6, together with a reasonable return on investment, must relate to the handling of documents, either their initial collection or production, or the actual facilitation of re-use through reproduction and dissemination. Consequently, when charges are made, cost elements and investments that are unrelated to the document processing necessary for re-use set out in Article 6 may not be taken into account. These principles governing charging in Article 6 must be the same irrespective of any self-financing requirement to which the public body in question is subject.

11. Líta má til almennra eða sértækra krafna um að opinber aðili standi undir sér fjárhagslega þegar kostnaður er ákveðinn samkvæmt 6. gr. tilskipunarinnar. Engu að síður verður kostnaður í skilningi 6. gr., ásamt sanngjörnum hagnaðarhluta, að tengjast meðferð gagnanna, hvort sem það er vegna upphaflegrar söfnunar eða framleiðslu þeirra eða þess að liðkað sé fyrir endurnotkun þeirra með fjölföldun og dreifingu, eins og ESA og framkvæmdastjórnin hafa bent á. Við innheimtu gjalda má því ekki líta til kostnaðarþátta og fjárfestinga sem eru ótengd þeirri gagnavinnslu sem óhjákvæmileg er í tengslum við endurnotkun í skilningi 6. gr. Þessar meginreglur um gjaldtöku samkvæmt 6. gr. eru hinar sömu, óháð kröfum um að umræddur opinber aðili standi undir sér fjárhagslega.

JUDGMENT OF THE COURT

16 December 2013*

(Directive 2003/98/EC on the re-use of public sector information – Principles governing charging – Transparency – Notion of cost – Self-financing requirements)

In Case E-7/13,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Héraðsdómur Reykjavíkur (Reykjavík District Court), in the case of

Creditinfo Lánstraust hf.

and

Registers Iceland and the Icelandic State

concerning the interpretation of Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information,

THE COURT,

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

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Creditinfo Lánstraust hf. ("the plaintiff"), represented by Reimar Pétursson, Supreme Court Attorney;
- Registers Iceland and the Icelandic State ("the defendants"), represented by Einar Karl Hallvarðsson, State Attorney, Office of the Attorney General (Civil Affairs), acting as Agent;
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Auður Ýr Steinarsdóttir and Catherine

* Language of the request: Icelandic.

DÓMUR DÓMSTÓLSINS

16. desember 2013*

(Tilskipun 2003/98/EB um endurnotkun upplýsinga frá hinu opinbera – Meginreglur um gjaldtöku – Gagnsæi – Hugtakið „kostnaður" – Kröfur um að opinber aðili standi undir sér fjárhagslega)

Mál E-7/13,

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

Creditinfo Lánstraust hf.

gegn

Þjóðskrá Íslands og íslenska ríkinu

varðandi túlkun á tilskipun Evrópuþingsins og ráðsins 2003/98/EB frá 17. nóvember 2003 um endurnotkun upplýsinga frá hinu opinbera.

DÓMSTÓLLINN,

skipaður dómurunum: Carl Baudenbacher, forseta, Per Christiansen, framsögumanni, og Páli Hreinssyni,

dómritari: Gunnar Selvik,

hefur, með tilliti til skriflegra greinargerða frá:

– Stefnanda, í fyrirsvari er Reimar Pétursson, hrl.

– Stefndu, í fyrirsvari sem umboðsmaður er Einar Karl Hallvarðsson, ríkislögmaður.

– Eftirlitsstofnun EFTA (ESA), í fyrirsvari sem umboðsmenn eru Xavier Lewis, framkvæmdastjóri lögfræði- og framkvæmdasviðs,

* Beiðni um ráðgefandi álit á íslensku.

Howdle, Officers, Department of Legal & Executive Affairs, acting as Agents; and

– the European Commission ("the Commission"), represented by Gerald Braun and Nicola Yerrell, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the plaintiff, represented by Reimar Pétursson; the defendants, represented by Einar Karl Hallvarðsson; ESA, represented by Catherine Howdle; and the Commission, represented by Nicola Yerrell, at the hearing on 23 October 2013,

gives the following

JUDGMENT

I LEGAL BACKGROUND

EEA law

1 Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (OJ 2003 L 345, p. 90) ("the Directive") was added to point 5k of Annex XI to the EEA Agreement by Decision 105/2005 of 8 July 2005 of the EEA Joint Committee (OJ 2005 L 306, p. 41). The Decision entered into force on 1 September 2006.

2 Recitals 5, 9 and 14 of the preamble to the Directive read:

(5) One of the principal aims of the establishment of an internal market is the creation of conditions conducive to the development of Community-wide services. Public sector information is an important primary material for digital content products and services and will become an even more important content resource with the development of wireless content services. Broad cross-border geographical coverage will also be essential in this context. Wider possibilities of re-using public sector information should inter alia allow European companies to exploit its potential and contribute to economic growth and job creation.

Auður Ýr Steinarsdóttir og Catherine Howdle, lögfræðingar á lögfræði- og framkvæmdasviði.

– Framkvæmdastjórn Evrópusambandsins, í fyrirsvari sem umboðsmenn eru Gerald Braun og Nicola Yerrell, hjá lagaskrifstofu framkvæmdastjórnarinnar.

með tilliti til skýrslu framsögumanns,

og munnlegs málflutnings lögmanns stefnanda, Reimars Péturssonar, umboðsmanns stefndu, Einars Karls Hallvarðssonar, fulltrúa ESA, Catherine Howdle, og fulltrúa framkvæmdastjórnarinnar, Nicola Yerrell, sem fram fór 23. október 2013,

kveðið upp svofelldan

DÓM

I LÖGGJÖF

EES-réttur

1 Tilskipun Evrópuþingsins og ráðsins 2003/98/EB frá 17. nóvember 2003 um endurnotkun upplýsinga frá hinu opinbera (Stjtíð. ESB 2003 L 345, bls. 90) (tilskipunin) var tekin upp í XI. viðauka EES-samningsins, lið 5k, samkvæmt ákvörðun Sameiginlegu EES-nefndarinnar 105/2005 frá 8. júlí 2005 (Stjtíð. ESB 2005 L 306, bls 41). Ákvörðunin tók gildi 1. september 2006.

2 Í 5., 9. og 14. lið formálsorða tilskipunarinnar segir:

(5) Eitt af meginmarkmiðunum með því að koma á fót innri markaði er að skapa skilyrði sem stuðla að þróun þjónustu sem nær til alls Bandalagsins. Upplýsingar frá hinu opinbera eru mikilvægur efniviður í stafrænar vörur og þjónustu og verða jafnvel enn mikilvægari uppspretta efnis eftir því sem þráðlaus efnisþjónusta þróast. Víðtæk landfræðileg útbreiðsla yfir landamæri mun einnig skipta sköpum í þessu samhengi. Auknir möguleikar á að endurnota upplýsingar frá hinu opinbera ættu m.a. að gera evrópskum fyrirtækjum kleift að hagnýta möguleika þeirra og stuðla að hagvexti og atvinnusköpun.

(9) This Directive does not contain an obligation to allow re-use of documents. The decision whether or not to authorise re-use will remain with the Member States or the public sector body concerned. This Directive should apply to documents that are made accessible for re-use when public sector bodies license, sell, disseminate, exchange or give out information.

(14) Where charges are made, the total income should not exceed the total costs of collecting, producing, reproducing and disseminating documents, together with a reasonable return on investment, having due regard to the self-financing requirements of the public sector body concerned, where applicable. Production includes creation and collation, and dissemination may also include user support. Recovery of costs, together with a reasonable return on investment, consistent with applicable accounting principles and the relevant cost calculation method of the public sector body concerned, constitutes an upper limit to the charges, as any excessive prices should be precluded. The upper limit for charges set in this Directive is without prejudice to the right of Member States or public sector bodies to apply lower charges or no charges at all, and Member States should encourage public sector bodies to make documents available at charges that do not exceed the marginal costs for reproducing and disseminating the documents.

3 According to its Article 1, the Directive establishes a minimum set of rules governing re-use and the practical means of facilitating the re-use of existing documents held by public sector bodies.

4 Article 2(4) of the Directive defines re-use as follows:

the use by persons or legal entities of documents held by public sector bodies, for commercial or non-commercial purposes other than the initial purpose within the public task for which the documents were produced. Exchange of documents between public sector bodies purely in pursuit of their public tasks does not constitute re-use.

5 Article 6 of the Directive on principles governing charges reads:

Where charges are made, the total income from supplying and allowing re-use of documents shall not exceed the cost of

(9) Þessi tilskipun felur ekki í sér skyldu til að heimila endurnotkun gagna. Það er áfram ákvörðun aðildarríkisins eða hlutaðeigandi opinbers aðila hvort heimila skuli slíka endurnotkun eða ekki. Þessi tilskipun gildir um gögn sem gerð eru aðgengileg til endurnotkunar þegar opinberir aðilar gefa út leyfi fyrir upplýsingum, selja, dreifa, skiptast á eða gefa út upplýsingar. [...]

(14) Ef gjald er tekið fyrir skulu heildartekjurnar ekki vera meiri en sem nemur heildarkostnaðinum við að safna, framleiða, fjölfalda og dreifa gögnunum auk sanngjarns hagnaðarhlutar af fjárfestingunni að teknu tilhlýðilegu tilliti til þeirra krafna sem gerðar eru til viðkomandi opinbers aðila, þar sem það á við, um að hann standi undir sér fjárhagslega. Framleiðsla felur í sér að búa til gögnin og setja þau saman, og dreifing getur einnig falið í sér stuðning við notendur. Þar eð koma ber í veg fyrir of háa verðlagningu skulu efri mörk gjalds miðast við endurheimt kostnaðar, auk sanngjarns hagnaðarhlutar af fjárfestingunni, í samræmi við gildandi reikningsskilareglur og viðeigandi aðferðir við kostnaðarútreikninga hlutaðeigandi opinberra aðila. Efri mörk gjalda, sem eru sett í þessari tilskipun, eru með fyrirvara um rétt aðildarríkjanna eða opinberra aðila til að innheimta lægri gjöld eða engin gjöld og aðildarríkin skulu hvetja opinbera aðila til að gera gögn aðgengileg gegn gjaldi sem er ekki hærra en lágmarkskostnaður við að fjölfalda gögnin og dreifa þeim.

3 Samkvæmt 1. gr. eru í tilskipuninni settar lágmarksreglur um endurnotkun og hagnýtar leiðir til að auðvelda endurnotkun gagna sem til eru og eru í vörslu opinberra aðila.

4 Í 4. mgr. 2. gr. tilskipunarinnar er endurnotkun skilgreind með eftirfarandi hætti:

„endurnotkun“: notkun einstaklinga eða lögaðila á gögnum í vörslu opinberra aðila í viðskiptaskyni eða tilgangi sem ekki er viðskiptalegs eðlis, sem er annar en upphaflegur tilgangur hins opinbera með því að búa gögnin til. Skipti á gögnum milli opinberra aðila sem einungis eru til að sinna opinberu starfssviði þeirra er ekki endurnotkun,

5 Í 6. gr. tilskipunarinnar segir, um meginreglur um gjaldtöku:

Ef gjald er tekið skulu heildartekjurnar af því að láta í té og leyfa

collection, production, reproduction and dissemination, together with a reasonable return on investment. Charges should be cost-oriented over the appropriate accounting period and calculated in line with the accounting principles applicable to the public sector bodies involved.

6 Article 7 of the Directive on transparency reads:

Any applicable conditions and standard charges for the re-use of documents held by public sector bodies shall be pre-established and published, through electronic means where possible and appropriate. On request, the public sector body shall indicate the calculation basis for the published charge. The public sector body in question shall also indicate which factors will be taken into account in the calculation of charges for atypical cases. Public sector bodies shall ensure that applicants for re-use of documents are informed of available means of redress relating to decisions or practices affecting them.

National law

7 The Directive was implemented into Icelandic law by Act No 161/2006, amending the Information Act No 50/1996 by adding a new chapter (Chapter VIII on the re-use of public information). On 1 January 2013, after the commencement of the proceedings in the present case before the national court, the current Information Act No 140/2012 entered into force. Chapter VII of the current Act, on the re-use of public information, corresponds to Chapter VIII of the previous Act as amended.

8 Pursuant to the sixth paragraph of Article 27 of the Information Act No 50/1996, it is permissible to charge for the provision of access to information from public files. The public authority concerned shall establish a schedule of fees, to be confirmed by the Minister.

9 Registers Iceland is a governmental institution that operates under the supervision of the Minister of the Interior. The tasks carried out by Registers Iceland include registration of a range of information about residents and real properties. Registers Iceland provides services such as assessment, electronic access to its registers and the issuing of certificates, passports and ID cards. Sale prices and

endurnotkun gagna ekki vera meiri en kostnaðurinn við söfnun, framleiðslu, fjölföldun og dreifingu auk sanngjarns hagnaðarhlutar af fjárfestingunni. Gjöld skulu vera kostnaðartengd á viðkomandi uppgjörstímabili og reiknuð út í samræmi við þær reikningsskilareglur sem gilda um þann opinbera aðila sem málið varðar.

6 Í 7. gr. tilskipunarinnar segir, um gagnsæi:

Öll skilyrði sem gilda um endurnotkun á gögnum í vörslu opinberra aðila og stöðluð gjöld fyrir hana skulu ákveðin fyrir fram og birt með rafrænum hætti ef unnt er og við á. Ef þess er óskað skal opinber aðili tilgreina grundvöll útreikninga á gjaldinu sem birt er. Hlutaðeigandi opinberir aðilar skulu einnig tilgreina til hvaða þátta er tekið tillit við útreikninga á gjöldum í undantekningartilvikum. Opinberir aðilar skulu tryggja að umsækjendum um endurnotkun gagna sé gerð grein fyrir þeim leiðum sem tiltækar eru til að leggja fram kvartanir varðandi úrskurði eða venjur sem hafa áhrif á þá.

Landsréttur

7 Tilskipun 2003/98/EB var innleidd í íslenska löggjöf með lögum nr. 161/2006 sem breyttu upplýsingalögum nr. 50/1996 og bættu við þau nýjum kafla (VIII. kafla um endurnot opinberra upplýsinga). Þann 1. janúar 2013, eftir að málaferli þau sem hér um ræðir voru hafin fyrir héraðsdómi tóku núverandi upplýsingalög nr. 140/2012 gildi. VII. kafli gildandi upplýsingalaga, um endurnot opinberra upplýsinga, svarar til VIII. kafla fyrri laga með áorðnum breytingum.

8 Samkvæmt 6. mgr. 27. gr. upplýsingalaga nr. 50/1996 er heimilt að taka gjald fyrir að veita aðgang að upplýsingum úr opinberum skrám. Skal hlutaðeigandi stjórnvald setja sér gjaldskrá sem ráðherra staðfestir.

9 Þjóðskrá Íslands er ríkisstofnun sem heyrir undir innanríkisráðuneytið. Meðal verkefna sem Þjóðskrá hefur með höndum eru skráning margvíslegra upplýsinga um íbúa landsins og fasteignir. Þjóðskrá veitir ýmsa þjónustu sem við kemur matsgerðum, rafrænum aðgangi að skrám hennar og útgáfu

the methods of payment for every sale of land are collected in the Land Registry Database, and they are used for the calculation of economic indicators, such as the real estate price index.

10 Pursuant to Article 24, read together with paragraph 2 of Article 9, of Act No 6/2001 on the Registration and Assessment of Property, Registers Iceland may process and disseminate to third parties information from the Land Registry Database.

11 The same provision entitles Registers Iceland to charge fees for such processing and dissemination, in accordance with a special tariff of fees that is approved by the Minister of the Interior. Under Article 9 of Act No 6/2001, the cost of running individual parts of the institution shall be taken into account when deciding the amounts in the tariff, and they must be presented separately in the accounts. It also provides that the tariff of fees shall be reviewed annually.

12 Article 14 of the Additional Treasury Revenue Act No 88/1991 provides for the level of fees that can be charged for information related to registered deeds.

II FACTS AND PROCEDURE BEFORE THE NATIONAL COURT

13 The plaintiff is engaged in recording and communicating information on financial matters and creditworthiness, and related services. In the course of its business, it seeks information and data from public sector bodies, including the first defendant, Registers Iceland.

14 Between 2004 and 2007, the plaintiff entered into a series of contracts with the National Land Registry concerning access to information. In 2010, the National Land Registry merged with the National Registry to form Registers Iceland.

15 Registers Iceland has charged the plaintiff fees for the disclosure of information and data. The plaintiff has brought an action before the national court for the repayment of fees for the period between 11 January 2008 and 31 December 2011. Since the tariffs were approved by the Minister of Finance, the plaintiff also brings its action against the Icelandic State.

vottorða, vegabréfa og nafnskírteina. Söluverð og greiðslumáti eru skráð í fasteignaskrá við hverja sölu lands og þær upplýsingar notaðar við útreikning hagvísa, á borð við vísitölu fasteignaverðs.

10 Í samræmi við 24. gr., samanber. 2. mgr. 9. gr., laga nr. 6/2001 um skráningu og mat fasteigna, er Þjóðskrá heimilt að vinna úr og láta þriðja aðila í té upplýsingar úr fasteignaskrá.

11 Í sömu grein er Þjóðskrá veitt heimild til gjaldtöku vegna slíkrar vinnslu og upplýsingagjafar, samkvæmt sérstakri gjaldskrá sem staðfest er af innanríkisráðherra. Samkvæmt 9. gr. laganna skal taka mið af kostnaði einstakra rekstrarþátta við ákvörðun fjárhæða gjaldskrárinnar, og skulu þeir aðgreindir í bókhaldi. Í greininni er jafnframt kveðið á um að gjaldskráin skuli endurskoðuð árlega.

12 Í 14. gr. laga nr. 88/1991 um aukatekjur ríkissjóðs er kveðið á um fjárhæðir sem innheimta má vegna upplýsingagjafar úr þinglýsingarbók.

II MÁLAVEXTIR OG MEÐFERÐ MÁLSINS FYRIR LANDSDÓMSTÓLNUM

13 Stefnandi hefur með höndum skráningu og miðlun upplýsinga um fjárhagsmálefni og lánstraust og ýmsa þjónustu í tengslum við þá starfsemi. Vegna viðskipta sinna sækir hann um aðgang að gögnum og upplýsingum hjá opinberum aðilum, þar á meðal hjá stefnda, Þjóðskrá Íslands.

14 Á árunum 2004 til 2007 gerði stefnandi röð samninga við Fasteignamat ríkisins um aðgang að upplýsingum. Árið 2010 var Fasteignamat ríkisins sameinað Þjóðskrá og mynduð var stofnunin Þjóðskrá Íslands.

15 Þjóðskrá Íslands krafði stefnanda um gjöld vegna aðgangs að upplýsingum og gögnum og stefnandi gerir þá kröfu fyrir Héraðsdómi Reykjavíkur að honum verði endurgreiddar þær greiðslur sem hann hafi innt af hendi á tímabilinu 11. janúar 2008 til 31. desember 2011. Þar sem gjaldskráin var samþykkt af fjármálaráðherra stefnir hann einnig íslenska ríkinu

16 In its request, registered at the Court on 29 April 2013, Reykjavík District Court has referred the following questions:

1. *Is it compatible with EEA law, and specifically with Article 6 of Council Directive 2003/98/EC, on the re-use of public sector information (cf. the Decision of the EEA Joint Committee, No 105/2005, amending Annex XI (Telecommunication services) to the EEA Agreement), to charge a fee on account of each mechanical enquiry for information from the register if no calculation of the 'total income' and the 'cost', in the sense of Article 6 of the Directive, is available at the time of the determination of the fee?*

2. *Is it compatible with Article 6 of the Directive if, when the 'cost' subject to Article 6 of the Directive is determined, no account is taken of:*

   a. *income accruing to the State when documents are collected, in the form of fees paid by individuals and undertakings for the recording of contracts in the registers of legal deeds, and*

   b. *income accruing to the State when documents are collected, in the form of taxes which are levied as stamp duties on recorded legal deeds at the time when individuals and undertakings apply to have them recorded in the registers of legal deeds?*

3. *Is it compatible with Article 6 of the Directive if, when the 'cost' pursuant to Article 6 of the Directive is determined, account is taken of costs incurred by a public sector body in connection with the collection of documents which it is legally obliged to collect, irrespective of whether or not individuals or undertakings request to re-use them?*

4. *Is it compatible with Article 6 of the Directive if, when the 'cost' pursuant to the article is determined, the legislature sets the amount of the fee in legislation without any particular amount being made subject to substantive examination?*

5. *Would it be compatible with Article 6 of the Directive if, when the 'cost' pursuant to the Directive is determined, appropriate account were taken of a general requirement in national legislation that public sector bodies be self-financing?*

16 Með beiðni, sem skráð var í málaskrá dómstólsins 29. apríl 2013, bar Héraðsdómur Reykjavíkur eftirfarandi spurningar undir dómstólinn:

1. *Er það samrýmanlegt EES-rétti, sérstaklega 6. gr. tilskipunar nr. 2003/98/EB um endurnotkun opinberra upplýsinga, sbr. ákvörðun sameiginlegu EES-nefndarinnar nr. 105/2005 um breytingu á XI. viðauka (Fjarskiptaþjónusta) við EES-samninginn, að innheimta gjald fyrir hverja vélræna fyrirspurn úr þinglýsingarbók ef þannig háttar til að við ákvörðun gjaldsins hefur ekki legið fyrir útreikningur á „heildartekjum“ og „kostnaði“ í skilningi 6. gr. tilskipunarinnar?*

2. *Samrýmist það 6. gr. tilskipunarinnar ef við ákvörðun „kostnaðar“ í skilningi hennar er horft fram hjá:*

   a. *tekjum hins opinbera, sem verða til við söfnun gagna, í formi gjalda sem einstaklingar og fyrirtæki greiða fyrir skráningu löggerninga í þinglýsingarbók, og*

   b. *tekjum hins opinbera, sem verða til við söfnun gagna, í formi skatta sem eru innheimtir sem stimpilgjöld af skráðum löggerningum samtímis því að einstaklingar og fyrirtæki leita eftir skráningu þeirra í þinglýsingarbók?*

3. *Samrýmist það 6. gr. tilskipunarinnar ef við ákvörðun „kostnaðar“ í skilningi hennar er talinn með kostnaður sem opinber aðili hefur af söfnun gagna, sem honum er lögskylt að safna óháð því hvort einstaklingar og fyrirtæki óska eftir endurnotkun þeirra?*

4. *Samrýmist það 6. gr. tilskipunarinnar ef við ákvörðun „kostnaðar“ í skilningi hennar væri löggjafanum játuð heimild til að ákveða með lögum fjárhæð gjaldsins án þess að ákveðin fjárhæð sæti efnislegri skoðun?*

5. *Samrýmist það 6. gr. tilskipunarinnar ef við ákvörðun „kostnaðar“ í skilningi hennar væri tekið tilhlýðilegt tillit til almennra krafna landslaga um að stofnanir ríkisins standi undir sér fjárhagslega?*

6. *If the answer to Question No 5 is in the affirmative, what does this involve in further detail and what cost elements in public sector operations may be taken into account in this context?*

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

III THE FIRST AND FOURTH QUESTIONS

18 The first and fourth questions both concern the methods used to calculate charges for the re-use of public sector information, and transparency requirements in this regard under Article 6 of the Directive. By its first question, the national court asks whether it is compatible with that provision to charge a fee for each mechanical enquiry for information if no calculation of the total income or cost is available when the fee is determined. By its fourth question, the national court asks whether it is compatible with the same provision for the legislature to set the amount of the fee in legislation without any particular amount being made subject to substantive examination. The Court finds it appropriate to assess these two questions together.

19 The national court has limited its questions to the interpretation of Article 6 of the Directive. However, in order to provide a useful reply, the Court finds that the references in the first and fourth questions to Article 6 of the Directive should be read as also including a reference to Article 7 of the Directive.

Observations submitted to the Court

20 The plaintiff submits that the first and fourth questions must be answered in the negative. The Directive imposes a duty on Member States to calculate the charges levied for the re-use of information. Pursuant to Article 6 of the Directive, charges shall be calculated in line with the accounting principles applicable to the public sector bodies involved. Thus, determining a charge for re-use without a basis in cost calculations cannot be compatible with Article 6.

6. *Ef svarið við spurningu fimm er já, hvað felst í því nánar tiltekið og til hvaða kostnaðarþátta í rekstri hins opinbera má taka tillit í þessu samhengi?*

17 Vísað er til skýrslu framsögumanns um frekari lýsingu löggjafar, málsatvika, meðferðar málsins og skriflegra greinargerða sem dómstólnum bárust, sem verða ekki nefnd eða rakin nema að því leyti sem forsendur dómsins krefjast.

III FYRSTA OG FJÓRÐA SPURNINGIN

18 Fyrsta og fjórða spurningin varða báðar þær aðferðir sem beitt er við útreikning gjaldtöku vegna endurnotkunar upplýsinga frá hinu opinbera og kröfur um gagnsæi þar að lútandi samkvæmt 6. gr. tilskipunarinnar. Með fyrstu spurningunni leitar landsdómstóllinn svars við því hvort það samrýmist ákvæðinu að innheimta gjald fyrir hverja vélræna fyrirspurn ef útreikningur á heildartekjum eða kostnaði hefur ekki legið fyrir við ákvörðun gjaldsins. Með fjórðu spurningunni leitar landsdómstóllinn svars við því hvort það samrýmist sama ákvæði að löggjafinn mæli fyrir um fjárhæð gjaldsins í lögum, án þess að nein ákveðin fjárhæð sæti efnislegri skoðun. Dómstóllinn telur rétt að taka afstöðu til þessara tveggja spurninga í einu lagi.

19 Landsdómstóllinn hefur takmarkað spurningar sínar við túlkun á 6. gr. tilskipunarinnar. Í því skyni að svar dómstólsins til landsdómstólsins komi að sem mestu gagni, telur dómstóllinn rétt að líta svo á að tilvísanir landsdómstólsins til 6. gr. tilskipunarinnar í fyrstu og fjórðu spurningu taki einnig til 7. gr. tilskipunarinnar.

Athugasemdir bornar fram við EFTA-dómstólinn

20 Stefnandi heldur því fram að fyrstu og fjórðu spurningunni verði að svara neitandi. Hann telur að tilskipunin leggi þá skyldu á aðildarríki að þau reikni út gjöld sem innheimt eru vegna endurnotkunar upplýsinga. Í 6. gr. sé kveðið á um að gjöld skuli reiknuð út í samræmi við þær reikningsskilareglur sem gilda um þann opinbera aðila er málið varðar. Ákvörðun gjalds vegna endurnotkunar sem á sér ekki stoð í útreikningi kostnaðar sé því ekki samþýðanleg 6. gr.

21 According to the plaintiff, this view is supported by Article 7 of the Directive. This Article imposes a transparency obligation on the Member States, since standard charges for re-use shall be pre-established. Furthermore, the public sector body involved shall, on request, indicate the calculation basis for the published charge and also which factors will be taken into account in the calculation of charges for atypical cases.

22 The plaintiff observes that scenarios are conceivable, in particular where digital data are concerned, where EEA States could determine charges on a marginal-cost basis that are manifestly lower than the upper limit set by Article 6. Only in such scenarios would a calculation not be necessary.

23 In the defendants' view, Article 6 stipulates that the total income from supplying and allowing re-use of documents should not exceed the cost incurred in producing the information. The calculation of the cost must to some extent be based on a reasonable estimate, in line with the accounting principles applicable to the public body in question. However, the provision does not state that calculations of the estimated cost and income should be provided to the user or made available at the time of determination of the fee.

24 According to the defendants, there is no doubt that, in the present case, information about the total income from supplying and allowing re-use of the information is readily available and verifiable, that is, the total income from the charges collected for the services in question. In general, the total cost calculations have been based on the estimated financing needs of Registers Iceland. Examination of the cost can be carried out ex-ante by the public authorities, subject to ex-post judicial review. Calculations of the cost of collection, production, reproduction and dissemination of the information are available and have been presented to the national court.

25 ESA asserts that Articles 6 and 7 of the Directive should be read together. Article 6 establishes the limits on the level of fees that may be charged, while Article 7 ensures that the charges made are transparent.

21 Að mati stefnanda eiga þessi sjónarmið hans stoð í 7. gr. tilskipunarinnar. Ákvæðið skyldi aðildarríki til að viðhafa gagnsæ vinnubrögð með áskilnaði um að gjöld fyrir endurnotkun skuli ákveðin fyrirfram. Enn fremur skuli sá opinberi aðili sem málið varðar tilgreina grundvöll útreikninga fyrir þeirri fjárhæð sem birt er, sé þess óskað, og þá einnig til hvaða þátta tekið er tillit við útreikninga á gjöldum sem eru frábrugðin þeim sem almennt tíðkast.

22 Stefnandi bendir á að hugsa megi sér aðstæður, einkum þegar stafræn gögn eiga í hlut, þar sem aðildarríki geti ákveðið gjöld á grundvelli jaðarkostnaðaraðferðar sem væru mun lægri en efri mörkin sem kveðið er á um í 6. gr. tilskipunarinnar. Það sé einungis við þess háttar aðstæður sem engin þörf er á útreikningi.

23 Að mati stefndu kveður 6. gr. á um að heildartekjur af því að láta gögn í té og leyfa endurnotkun þeirra skuli ekki vera umfram þann kostnað sem fellur til við að búa til upplýsingarnar. Útreikningur kostnaðar verði að einhverju marki að byggjast á sanngjarnri áætlun, í samræmi við þær reikningsskilareglur sem gilda um þann opinbera aðila sem í hlut á. Hins vegar sé ekki gerð krafa um það í 6. gr. að notandi fái útreikninga kostnaðaráætlunar í hendur eða þeir séu gerðir aðgengilegir á þeim tímapunkti sem fjárhæð gjaldsins er ákveðin.

24 Að mati stefndu leikur enginn vafi á því að upplýsingar um heildartekjur af því að láta upplýsingarnar í té og leyfa endurnotkun, þ.e. heildartekjur af gjaldtöku vegna þeirrar þjónustu sem um ræðir, liggja fyrir í máli þessu með þeim hætti að unnt er að sannreyna þær. Almennt séð hafi kostnaðarútreikningar verið gerðir á grundvelli áætlana um fjárþörf Þjóðskrár Íslands. Opinber yfirvöld geti kannað kostnaðinn fyrir fram og ákvörðunin sé háð endurskoðunarvaldi dómstóla eftir gildistöku. Útreikningar á kostnaði vegna söfnunar, framleiðslu, fjölföldunar og dreifingar upplýsinganna eru tiltækir og hafa verið lagðir fram fyrir héraðsdómi.

25 ESA heldur því fram að 6. og 7. gr. tilskipunarinnar verði að túlka hvora með hliðsjón af annarri. Í ákvæði 6. gr. sé kveðið á um efri mörk gjaldtökunnar, en ákvæði 7. gr. tryggi gagnsæi hennar.

26 In ESA's view, Article 6 precludes a situation in which the total income exceeds the cost of collection, production, reproduction and dissemination of the documents for re-use, together with a reasonable return on investment. The Article must be interpreted as imposing a burden of proof on the public sector body to demonstrate that the charges are compatible with the Directive.

27 Article 7 obliges the State to ensure transparency by two means: first, through the publication of standard charges, and, second, by obliging the public sector body to show how these standard charges are calculated. The calculation basis must be indicated upon request, but it need not have been disclosed before that time.

28 ESA suggests that it would be open to the national court to conclude that the fact that Registers Iceland bases fee levels on provisions that provide exact amounts for specific types of information fulfils the requirement in Article 7 that the fees must be pre-established and published.

29 However, it is clear from the wording of the Directive that, on request, Registers Iceland must be able to specify the calculation basis for the published charges. The national court does not state whether the defendants have fully explained the calculation basis for the published charges. ESA notes in this connection that the national court may ask Registers Iceland to justify the application of the tariffs in question to its practices and charges.

30 The Commission submits that, by virtue of Article 6, any charges must be calculated in such a way as to ensure that the total income does not exceed the defined ceiling. It follows that, when fixing a charge, a substantive examination must be carried out of the total cost and income over an appropriate accounting period.

31 The Commission admits that this may give rise to certain practical difficulties, particularly in the first accounting period after the release of information for re-use, when there may be very little evidence of how many re-users are likely to be interested in

26 Að mati ESA girðir 6. gr. tilskipunarinnar fyrir aðstæður þar sem heildartekjur fara fram úr kostnaði við söfnun, framleiðslu, fjölföldun og dreifingu gagna til endurnotkunar, auk sanngjarns hagnaðarhlutar af fjárfestingunni. Greinina verði að túlka svo að hún leggi sönnunarbyrðina á hinn opinbera aðila um að sýna fram á að gjaldtaka sé í samræmi við tilskipunina.

27 ESA telur 7. gr. skylda aðildarríki til að tryggja gagnsæi með tvennum hætti: Annars vegar með því að birta stöðluð gjöld, og hins vegar með því að skylda opinbera aðila til að tilgreina grundvöll útreikninga á gjöldum. Upplýsa beri um grundvöll útreikninganna þegar um er beðið, en slíkur útreikningur þurfi ekki að liggja fyrir áður en slík beiðni berst.

28 ESA telur að landsdómstóllinn geti komist að þeirri niðurstöðu að sú staðreynd, að Þjóðskrá byggi gjaldskrá sína á ákvæðum sem kveða nákvæmlega á um fjárhæð gjalda vegna tiltekinna upplýsinga, uppfylli kröfu 7. gr. tilskipunarinnar um að gjald sé ákveðið fyrir fram og upplýsingar um það birtar.

29 ESA telur þó ljóst af orðalagi tilskipunarinnar að ef fyrirspurn þar að lútandi berst Þjóðskrá Íslands beri henni skylda til að gera grein fyrir grundvelli útreikninganna að baki hinum birtu gjöldum. Landsdómstóllinn lætur þó ekkert uppi um það hvort stefndu hafi útskýrt til hlítar hver grundvöllur útreikninganna að baki gjöldunum sé. Í þessu sambandi bendir ESA á að landsdómstóllinn geti farið fram á það við Þjóðskrá Íslands, að hún rökstyðji notkun umræddrar gjaldskrár, með hliðsjón af starfseminni og gjöldunum.

30 Framkvæmdastjórnin telur að samkvæmt 6. gr. verði að reikna öll gjöld með þeim hætti að þau tryggi að heildartekjur vegna þeirra fari ekki fram úr skilgreindu þaki. Þar af leiðandi verður, við ákvörðun fjárhæðar gjaldsins, að fara fram efnisleg skoðun á heildarkostnaði og heildartekjum yfir ákveðið uppgjörstímabil.

31 Framkvæmdastjórnin viðurkennir að þetta geti skapað vandamál í framkvæmd, sérstaklega á fyrsta uppgjörstímabilinu eftir útgáfu upplýsinga til endurnotkunar, þegar lítil merki eru um þann fjölda notenda sem kann að hafa áhuga á upplýsingunum. Að mati

that information. However, an estimate of total income must at least be made in order to comply with the requirements of Article 6. This conclusion is further reinforced by the transparency obligations in Article 7, since this provision requires not only that charges be pre-established, but also that the calculation basis is available upon request – which necessarily implies that a value has been placed upon both the total income and cost. If estimates were used as the basis for the calculation and were later found to be incorrect, Article 6 would require an appropriate adjustment to be made to the charges.

32 Finally, the Commission submits that there must be an appropriate mechanism for revising set charges.

Findings of the Court

33 Recital 5 of the preamble to the Directive states that public sector data are an important primary material for digital content products and services. European companies should be able to exploit their potential and contribute to economic growth and job creation.

34 Public sector information is a key resource for industry in the information society (see the Commission's Green Paper, COM(1998)585). A main goal of the European legislature was to put European firms on an equal footing with their American counterparts, which, since the enactment of the Freedom of Information Act in 1966, have benefited from a highly developed, efficient public information system at all levels of the administration. The Commission has highlighted that the US government's active policy of ensuring both access to and commercial exploitation of public sector information has greatly stimulated the development of the US information industry (see the Commission's Green Paper, cited above, p. 1).

35 According to its Article 1, the Directive establishes a minimum set of rules governing re-use and the practical means of facilitating the re-use of existing documents held by public sector bodies. In Article 2(4) of the Directive, re-use is defined as use for any commercial or non-commercial purpose other than the

framkvæmdastjórnarinnar verður að minnsta kosti að gera áætlun um heildartekjur til að uppfylla kröfur 6. gr. tilskipunarinnar. Sú ályktun styðst einnig við skyldur um gagnsæi samkvæmt 7. gr., úr því að þar sé ekki einungis kveðið á um að gjöldin skuli fyrirfram ákveðin, heldur einnig að grundvöllur útreikninganna skuli tilgreindur, ef þess er óskað. Það gerir óhjákvæmilega ráð fyrir því að mat hafi farið fram, bæði á heildartekjum og kostnaði. Ef útreikningurinn byggist á áætlunum sem síðar reynast rangar, er sú krafa gerð samkvæmt 6. gr. að gjaldtakan verði leiðrétt í samræmi við nýjar upplýsingar.

32 Loks telur framkvæmdastjórnin að viðeigandi kerfi verði að vera til staðar til að endurskoða fjárhæð gjaldsins.

Álit dómstólsins

33 Í 5. lið formálsorða tilskipunarinnar segir að gögn frá hinu opinbera séu mikilvægur efniviður í stafrænar vörur og þjónustu. Gera eigi evrópskum fyrirtækjum kleift að hagnýta möguleika sína og stuðla að hagvexti og atvinnusköpun.

34 Upplýsingar frá hinu opinbera eru lykilþáttur í atvinnugreinum upplýsingasamfélagsins (sjá grænbók framkvæmdastjórnarinnar, COM(1998)585). Eitt meginmarkmiða lagasetningar á þessu sviði var að jafna stöðu evrópskra fyrirtækja gagnvart bandarískum keppinautum þeirra, sem notið hafa góðs af háþróuðu, skilvirku kerfi upplýsinga frá hinu opinbera á öllum stigum stjórnsýslunnar, allt frá gildistöku laga um aðgang að upplýsingum (e. Freedom of Information Act) 1966. Framkvæmdastjórnin leggur áherslu á að markviss stefna stjórnvalda í Bandaríkjunum til tryggja aðgang og notkun upplýsinga frá hinu opinbera í ábataskyni hefur mjög örvað þróun bandarísku upplýsingaiðnaðarins (sjá áður tilvitnaða grænbók framkvæmdastjórnarinnar, bls. 1).

35 Samkvæmt 1. gr. tilskipunarinnar eru í henni settar lágmarksreglur um endurnotkun og hagnýtar leiðir til að auðvelda endurnotkun gagna sem til eru og eru í vörslu opinberra aðila. Í 4. mgr. 2. gr. er „endurnotkun“ skilgreind sem öll notkun á gögnunum í viðskiptaskyni eða tilgangi sem ekki er viðskiptalegs

initial purpose within the public task for which the documents were produced.

36 It is clear from recital 9 of the preamble that, although the Directive does not contain any obligation to allow re-use, public sector bodies should be encouraged to make any documents held by them available for re-use.

37 Where re-use is authorised, and where charges are made for that purpose, it is an objective of the Directive, as set out in recital 14 of its preamble, to preclude excessive pricing. It must be borne in mind in this context that the public bodies in question are normally monopolies.

38 Article 6 of the Directive therefore states that charges may not exceed the cost of collection, production, reproduction and dissemination of the documents in question, together with a reasonable return on investment.

39 Pricing is a crucial issue in relation to the exploitation of public sector information by the digital content industries. It largely determines whether they will find an interest in investing in value added products and services based on public sector information. American companies benefit from the fact that they can obtain US public sector information free of charge (the Commission's Green Paper, cited above, p. 14). If European companies are to be put on an equal footing with their competitors in other parts of the world, the cost elements and return on investment cannot be calculated in a way that would put them at a significant disadvantage. It is for the national court to assess the facts in that respect, in particular with regard to the relevant interest level. It must therefore take into account that Article 6 of the Directive does not aim to provide public sector bodies with a profit.

40 Moreover, pursuant to Article 7 of the Directive, standard charges for the re-use of documents shall be pre-established and published. The public sector body shall indicate the calculation basis for the published charge if requested to do so. This should be done in order to enable individuals and economic

eðlis, sem er annar en upphaflegur tilgangur hins opinbera með því að búa gögnin til.

36 Það er ljóst af 9. lið formálsorðanna, að þótt tilskipunin feli ekki í sér skyldu til að heimila endurnotkun gagna, skulu opinberir aðilar hvattir til að gera öll gögn í vörslu sinni aðgengileg til endurnotkunar.

37 Þegar endurnotkun er heimiluð og tekið er gjald vegna hennar, er það markmið tilskipunarinnar, eins og fram kemur í 14. lið formálsorðanna, að koma í veg fyrir of háa verðlagningu. Í þessu samhengi verður að hafa í huga að þeir opinberu aðilar sem um ræðir starfa jafnan í skjóli einokunar.

38 Í 6. gr. kemur því fram að gjaldtakan skuli ekki vera hærri en sem nemur kostnaðinum við söfnun, framleiðslu, fjölföldun og dreifingu auk sanngjarns hagnaðarhlutar af fjárfestingunni.

39 Verðlagning skiptir miklu máli þegar fjallað er um notkun stafræna upplýsingageirans á upplýsingum frá hinu opinbera. Hún ræður mestu um hvort fyrirtæki innan hans sýni áhuga á að fjárfesta í virðisaukandi vörum og þjónustu sem byggir á upplýsingum frá hinu opinbera. Bandarísk fyrirtæki hagnast á þeirri staðreynd að þau hafa ókeypis aðgang að upplýsingum hins opinbera þar í landi (sjá áður tilvitnaða grænbók framkvæmdastjórnarinnar, bls. 14). Ef evrópsk fyrirtæki eiga að standa jafnfætis keppinautum sem starfa annars staðar í heiminum geta útreikningar kostnaðarþátta og hagnaðarhluta af fjárfestingu ekki verið þannig að þau standi talsvert verr að vígi. Það er landsdómstólsins að meta staðreyndir þar að lútandi, sérstaklega með tilliti til þess hvaða vaxtastig á við hverju sinni. Landsdómstóllinn verður því að hafa í huga að 6. gr. tilskipunarinnar miðar ekki að því að opinberir aðilar hagnist.

40 Enn fremur skulu stöðluð gjöld fyrir endurnotkun á gögnum ákveðin fyrirfram og birt í samræmi við 7. gr. tilskipunarinnar. Ef þess er óskað, skal opinber aðili tilgreina grundvöll útreikninga á gjaldinu sem birt er. Þetta skal gert til að gera einstaklingum og rekstraraðilum kleift að sannreyna hvort

operators charged for re-use of public information to verify whether the charges in question are compatible with Article 6 of the Directive. The Directive does not require that the calculation basis be made available at the time when the charge is fixed. Nevertheless, the requirement that standard charges within the limit set by Article 6 shall be pre-established presupposes that a substantive examination has been undertaken at the time when the charge is fixed. This must apply irrespective of whether the charge is set in legislation, by the relevant public authority or by other means.

41 As pointed out by the Commission, if the factors relevant to performing a calculation are uncertain, the public body in question must at least make a reasonable estimate, for example in the form of the average cost of enabling re-use. If experience shows that the estimate was incorrect, and if that entails that set charges are incompatible with Article 6 of the Directive, the calculation must be adjusted accordingly.

42 It is for the national court to determine whether the methods used to calculate the charges relevant to the case before it, and the transparency of those methods, comply with the requirements of the Directive. However, the national court must keep in mind that the public sector body bears the burden of proof in this regard.

43 For the sake of completeness, the Court notes that individuals and economic operators are entitled to obtain repayment of charges levied in an EEA State in breach of EEA law provisions. That is a consequence of the rights conferred on them. The EEA State in question is therefore required, in principle, to repay charges levied in breach of EEA law (see, for comparison, most recently, Case C-191/12 *Alakor*, judgment of 16 May 2013, not yet reported, paragraphs 22 and 23, and case law cited).

44 An exception to the repayment obligation applies when repayment entails unjust enrichment. Repayment is not required if it is established that the person required to pay unlawful charges has actually passed them on to other persons (see, for comparison, *Alakor*, cited above, paragraph 25, and case law cited). Such

umrædd gjöld samrýmist 6. gr. tilskipunarinnar. Ekki er gerð sú krafa samkvæmt tilskipuninni að grundvöllur útreikninganna sé gerður aðgengilegur á þeim tímapunkti sem fjárhæð gjaldsins er ákveðin. Krafan um að stöðluð gjöld, innan þeirra marka sem sett eru í 6. gr., skuli vera ákveðin fyrirfram gerir engu að síður ráð fyrir því að efnisleg skoðun hafi farið fram á þeim tíma sem fjárhæð gjaldsins er ákveðin. Sú krafa hlýtur að gilda hvort sem fjárhæð gjaldsins er ákveðin með lagasetningu þar til bærra yfirvalda, eða með öðrum hætti.

41 Ef óvissa ríkir um einhverja þætti útreikningsins, verður hinn opinberi aðili hið minnsta að gera sanngjarna áætlun, til dæmis í formi meðaltals af kostnaði við að heimila endurnotkun, líkt og framkvæmdastjórnin hefur bent á. Ef áætlunin reynist röng, og slíkt felur í sér að gjaldtakan er í ósamræmi við 6. gr. tilskipunarinnar, verður að leiðrétta útreikningana.

42 Það er landsdómstólsins að ákveða hvort aðferðirnar sem notaðar eru til að reikna gjöldin, og gagnsæi þeirra, uppfylli kröfur tilskipunarinnar í máli því sem rekið er fyrir honum. Landsdómstóllinn verður hins vegar að hafa í huga að sönnunarbyrðin um þetta atriði hvílir á hinu opinbera.

43 Til að öllu sé til haga haldið, bendir dómstóllinn á að einstaklingar og atvinnurekendur eiga rétt á endurgreiðslu gjalda sem innheimt hafa verið í EES-ríki, ef innheimtan reynist brot á reglum EES-réttar. Það leiðir af réttindum sem þeim hafa verið veitt. EES-ríkinu sem um ræðir er því að meginstefnu skylt að endurgreiða gjöld sem innheimt hafa verið í trássi við EES-rétt (sjá, til samanburðar, nýlegt mál, C-191/12 *Alakor*, dómur frá 16. maí 2013, enn óbirtur, 22. og 33. málsgrein og dómaframkvæmd sem þar er vitnað til).

44 Undantekning er gerð frá endurgreiðsluskyldunni þegar endurgreiðsla hefði í för með sér óréttmæta auðgun. Endurgreiðsluskyldan á ekki við ef sannað er að sá, sem skyldaður var til að greiða ólögmæt gjöld, hafi í reynd velt þeim yfir á aðra (sjá, til samanburðar, áður tilvitnað mál, *Alakor*, 25. mgr. og dómaframkvæmd sem þar er vitnað til). Slík

an exception must however be interpreted restrictively (see, for comparison, most recently, Case C-398/09 *Lady & Kid and Others* [2011] ECR I-7375, paragraph 20).

45 It is for the domestic legal system of each EEA State to lay down the procedural rules governing such repayments. However, these rules must not be less favourable than those governing similar domestic actions (the principle of equivalence), and must not render practically impossible or excessively difficult the exercise of rights conferred by EEA law (the principle of effectiveness) (compare *Alakor*, cited above, paragraph 26, and case law cited). Consequently, the question of whether a charge levied in violation of EEA law has or has not been passed on is a question of fact to be determined by the national court, taking all relevant circumstances into account.

46 Whether a charge levied in violation of EEA law is passed on, depends on the circumstances of the case, in particular the market structure. For example, a monopoly operator can be expected to pass on the entire charge. If there is competition, an operator may not be able to pass on any part of it (compare with regard to this conclusion the judgment by the Supreme Court of Norway of 28 May 2008 in case 2007/1738, Rt. 2008 p. 738, paragraph 52). Moreover, even where it is established that the charge has been passed on in whole or in part to customers, repayment does not necessarily entail unjust enrichment. The charged person may still suffer a loss, in particular as a result of a fall in the volume of his sales (see, for comparison, *Lady & Kid and Others*, cited above, paragraph 21, and case law cited).

47 As regards the specific situation where a charge for the re-use of public information set out in legislation has proven to be excessive, the court recalls that the national courts must apply the methods of interpretation recognised by national law as far as possible in order to achieve the result sought by the relevant EEA law rule (see, *inter alia*, Case E-7/11 *Grund* [2012] EFTA Ct. Rep. 191, paragraph 83, and case law cited).

undantekning verður hins vegar að sæta þröngri túlkun (sjá, til samanburðar, nýlegt mál, C-398/09 *Lady & Kid and Others* [2011] ECR I-7375, 20. mgr.).

45 Það er réttarkerfis hvers EES-ríkis að útfæra málsmeðferðarreglur varðandi slíkar endurgreiðslur. Hins vegar mega þær reglur hvorki vera óhagstæðari þeim sem gilda um sambærileg innlend mál (meginreglan um jafnræði við málsmeðferð), né með þeim hætti að það sé í reynd ómögulegt eða óhæfilega erfitt að sækja réttindi sem veitt eru samkvæmt EES-rétti (meginreglan um skilvirk áhrif EES-réttar) (sjá, til samanburðar, áður tilvitnað mál *Alakor*, 26. mgr. og dómaframkvæmd sem þar er vitnað til). Þar af leiðandi er það landsdómstólsins að meta hvort hinum innheimtu gjöldum hafi verið velt yfir á aðra, með hliðsjón af öllum atvikum málsins.

46 Hvort gjöldum, sem innheimt hafa verið í andstöðu við reglur EES-réttar, hafi verið velt áfram yfir á aðra, fer eftir atvikum hvers máls, sérstaklega aðstæðum á markaði. Vænta má þess að aðili sem hefur í reynd einokunarstöðu á markaði velti gjöldunum að fullu yfir á viðskiptavini. Ef um samkeppni er að ræða getur verið að rekstraraðili geti ekki velt neinum hluta gjaldanna yfir á aðra með sama hætti (sjá, til samanburðar, dóm Hæstaréttar Noregs frá 28. maí 2008 í málinu 2007/1738, Rt. 2008, bls. 738, 52. mgr.). Enn fremur skal þess gætt, að í þeim tilvikum þar sem gjöldunum hefur verið velt yfir á viðskiptavini, að fullu eða að hluta, þá þarf slíkt ekki nauðsynlega að fela í sér óréttmæta auðgun. Sá sem þurfti að greiða gjöldin getur engu að síður hafa orðið fyrir tapi, einkum vegna minnkandi sölu (sjá, til samanburðar, áður tilvitnað mál *Lady & Kid and Others*, 21. mgr., og dómaframkvæmd sem þar er vitnað til).

47 Hvað varðar hinar sérstöku aðstæður þar sem gjaldtaka vegna endurnotkunar upplýsinga frá hinu opinbera, sem ákveðin er með lögum, telst óhófleg, bendir dómstóllinn á að dómstólar aðildarríkis verða eftir fremsta megni að beita hverjum þeim lögskýringaraðferðum sem viðurkenndar eru samkvæmt landsrétti, í því skyni að niðurstaðan verði í samræmi við viðeigandi EES-reglu (sjá, meðal annars, mál E-7/11 *Grund* [2012] EFTA Ct. Rep. 191, 83. mgr., og dómaframkvæmd sem þar er vísað til).

48 The answer to the first and fourth questions must therefore be that Articles 6 and 7 of the Directive require that, when charges are made for the re-use of public sector information, a substantive examination must have been undertaken at the time when the charge was fixed. The examination must show that the total income from such charges does not exceed the cost of collection, production, reproduction and dissemination of documents, plus a reasonable return on investment. If the factors relevant to performing a calculation are uncertain, an estimate must at least be made. However, the calculation basis for the charges need only be made available upon request. This applies irrespective of whether the charge is set in legislation, by the relevant public authority or by other means.

IV THE SECOND AND THIRD QUESTIONS

49 The second and third questions both concern the notion of cost in Article 6 of the Directive. By the third question, the national court essentially asks whether, when determining the cost, account may be taken of the cost incurred by a public sector body in connection with the collection of documents it was legally obliged to collect. In its second question, the national court wants to know whether income accruing to the State when documents are collected, through for example fees and taxes such as stamp duties, has any relevance when determining the cost pursuant to Article 6. The Court finds it appropriate to consider these two questions together.

Observations submitted to the Court

50 The plaintiff's primary position is that only cost and income relating to supplying and allowing re-use shall be taken into account when determining the cost pursuant to Article 6. As a result, cost and income generated in the production of existing documents for their original purpose can be disregarded.

51 In the alternative, if the Court finds it compatible with Article 6 to charge for cost incurred prior to the supplying and allowing of re-use, the plaintiff submits that prior generated income must

48 Fyrstu og fjórðu spurningunni verður því að svara á þann veg, að samkvæmt 6. og 7. gr. tilskipunarinnar sé gerð krafa um það, í þeim tilvikum þar sem gjald er innheimt vegna endurnotkunar upplýsinga frá hinu opinbera, að efnisleg athugun hafi farið fram þegar fjárhæð gjaldsins er ákveðin. Athugunin verður að sýna fram á að heildartekjur af slíkri gjaldtöku fari ekki fram úr kostnaði við söfnun, framleiðslu, fjölföldun og dreifingu gagna, auk sanngjarns hagnaðarhlutar af fjárfestingunni. Ef óvissa ríkir um þá þætti sem máli skipta fyrir útreikningana, verður í það minnsta að gera áætlun. Grundvöll útreikninganna verður þó aðeins að gera aðgengilegan þegar um hann er beðið. Það gildir óháð því hvort fjárhæð gjaldsins er ákveðin með lögum af þar til bæru yfirvaldi, eða með öðrum hætti.

IV ÖNNUR OG ÞRIÐJA SPURNINGIN

49 Önnur og þriðja spurningin varða báðar kostnaðarhugtak 6. gr. tilskipunarinnar. Með þriðju spurningunni leitar landsdómstóllinn í meginatriðum svars við því, hvort taka megi tillit til þess kostnaðar sem opinber aðili hefur af söfnun gagna sem honum er lögskylt að safna við ákvörðun kostnaðar í skilningi ákvæðisins. Með annarri spurningunni leitar landsdómstóllinn svars við því hvort tekjur hins opinbera, sem verða til við söfnun gagna, t.d. í formi gjalda og skatta, svo sem stimpilgjöld, hafi áhrif þegar kostnaður er ákveðinn í skilningi 6. gr. Dómstóllinn telur rétt að svara þessum spurningum í einu lagi.

Athugasemdir bornar fram við EFTA-dómstólinn

50 Afstaða stefnanda er fyrst og fremst sú að einungis beri að líta til kostnaðar og tekna sem tengjast því að láta gögn í té og leyfa endurnotkun þeirra þegar kostnaður í skilningi 6. gr. er ákveðinn. Þar af leiðandi megi líta fram hjá kostnaði og tekjum sem skapast hafa við að útbúa gögn, sem til staðar eru, í upphaflegum tilgangi.

51 Ef dómstóllinn kemst hins vegar að þeirri niðurstöðu að það samrýmist 6. gr. að innheimta gjöld vegna kostnaðar sem kominn er til áður en gögnin eru látin í té og endurnotkun þeirra leyfð, telur hann að einnig beri að taka fyrri tekjur með í

also be taken into account. The cost referred to in Article 6 should thus be construed as net of such income.

52 The defendants submit that Article 6 recognises the cost of collection. Conversely, the levying of taxes, such as stamp duties, has no bearing on the principles enshrined in that Article. Registration taxes and stamp duties are not income from supplying and allowing re-use of documents and should not be taken into account.

53 ESA submits that, when the cost pursuant to Article 6 is determined, account may be taken of cost incurred by a public sector body in connection with the collection of documents which it is legally obliged to collect, irrespective of whether or not individuals or undertakings request to re-use them.

54 Moreover, Article 6 precludes no account being taken of income accruing as a result of the collection of the documents. If income accrues to the State during the course of collection, it will clearly have the effect of reducing or offsetting the cost of collection.

55 The Commission rejects the plaintiff's argument that cost within the meaning of Article 6 must be linked to the production of the documents for the purposes of re-use alone. At the oral hearing, it emphasised that the wording of Article 6 explicitly mentions income from re-use, but, at the same time, the provision refers much more broadly to the cost of collection and production as well as reproduction and dissemination. If the European legislature had wished to circumscribe the relevant cost more narrowly, it would have done so. Article 6 has recently been amended by Directive 2013/37/EU (OJ 2013 L 175, p. 1). Once the new Article 6 has entered into force, the general rule will be that the cost of collection and production cannot be taken into account. In the Commission's view, the Directive makes no distinction between the re-use of information collected as part of a legal obligation and other types of information.

56 Although the text of Article 6 is silent on the relevance of income accruing to the State through fees for registration or stamp duties when documents are collected, it is clear that the total income

reikninginn. Kostnaðinn sem vísað er til í 6. gr. verði því að skilja sem nettókostnað.

52 Stefndu telja að 6. gr. viðurkenni kostnaðinn af söfnun upplýsinga. Á hinn bóginn hafi skattheimta, eins og innheimta stimpilgjalds, engin áhrif á meginreglurnar sem ákvæðið hefur að geyma. Skráningargjöld og stimpilgjöld séu ekki tekjur sem orðið hafa til við að láta skjöl í té og leyfa endurnotkun þeirra og þau ættu því ekki að vera tekin með í útreikningana.

53 ESA telur að við ákvörðun kostnaðar í skilningi 6. gr. sé heimilt að telja með kostnað sem opinber aðili hefur af söfnun gagna sem honum er lögskylt að safna óháð því hvort einstaklingar og fyrirtæki óska eftir endurnotkun þeirra.

54 Enn fremur er það álit ESA, að 6. gr. útiloki að líta megi framhjá tekjum sem til verði við söfnun gagnanna. Ef tekjur verða til á meðan á söfnuninni stendur muni það augljóslega hafa þau áhrif að þær lækki eða vegi á móti kostnaðinum af söfnuninni.

55 Framkvæmdastjórnin hafnar röksemdum stefnanda um að kostnaður, í skilningi 6. gr., verði eingöngu að tengjast framleiðslu gagnanna í þeim tilgangi að leyfa endurnotkun þeirra. Við munnlegan flutning málsins lagði framkvæmdastjórnin áherslu á að orðalag 6. gr. viki sérstaklega að tekjum af endurnotkun, en ákvæðið vísi jafnframt með mun almennari hætti til kostnaðar við söfnun, framleiðslu, fjölföldun og dreifingu. Ef Evrópulöggjöfinni hefði verið ætlað að þrengja umfang kostnaðarhugtaksins, hefði löggjafinn séð til þess. Framkvæmdastjórnin benti á að 6. gr. hafi nýlega verið breytt með tilskipun 2013/37/EU (Stjtíð. ESB 2013 L 175, p. 1). Um leið og nýtt ákvæði 6. gr. tekur gildi verði meginreglan sú að ekki megi taka kostnað af söfnun og framleiðslu með í reikninginn. Að mati framkvæmdastjórnarinnar gerir tilskipunin engan greinarmun á upplýsingum sem lögskylt er að safna og öðrum upplýsingum.

56 Þótt ekkert komi fram í texta 6. gr. um vægi tekna sem ríkið hefur af skráningargjöldum og stimpilgjöldum við söfnun gagna, telur framkvæmdastjórnin ljóst að heildartekjur af

from charges for re-use cannot exceed the cost of collection, production, reproduction and dissemination of those documents, plus a reasonable return on investment.

57 Therefore, the Commission takes the view that Article 6 precludes a public sector body from fully recovering the total cost through a charge on re-use, and, in addition, collecting separate fees or charges related to the initial collection. Such a situation would not only breach the ceiling laid down by Article 6, it would also be contrary to the objective of keeping the charges for re-use as low as possible in order to foster innovation and the development of digital content services, as stated in Article 1(1) and in recital 5 of the preamble to the Directive.

Findings of the Court

58 As mentioned above, Article 6 of the Directive provides that, where charges are made, they may not exceed the cost of collection, production, reproduction and dissemination of the documents in question, together with a reasonable return on investment.

59 It follows from the wording that cost within the meaning of this provision is not limited to the cost of facilitating re-use, that is, reproduction and dissemination. Account may be taken of the cost incurred by a public sector body in connection with the initial collection and production of the documents in question. This must apply irrespective of whether the public sector body was legally obliged to collect the documents, as the Directive makes no such distinction.

60 Recital 14 of the preamble emphasises that States should encourage public sector bodies to make documents available at charges that do not exceed the marginal cost of reproducing and disseminating them. It should also be kept in mind that the Directive has recently been amended by Directive 2013/37/EU. Once the amendment has entered into force, the main rule under the new Article 6 will be that the cost of collection and production cannot be taken into account.

endurnotkun geti ekki verið umfram kostnað við söfnun, framleiðslu, fjölföldun og dreifingu þessara gagna, auk sanngjarns hagnaðar af fjárfestingunni.

57 Framkvæmdastjórnin er því þeirrar skoðunar að 6. gr. útiloki opinbera aðila frá því að endurheimta kostnað að fullu með gjaldtöku vegna endurnotkunar samhliða sérstakri gjaldtöku vegna upphaflegu söfnunarinnar. Slíkar aðstæður væru ekki einungis brot á þakinu sem sett er í 6. gr., heldur væru þær einnig í andstöðu við það markmið tilskipunarinnar að halda gjöldum vegna endurnotkunar eins lágum og kostur er til að styðja við nýsköpun og þróun stafrænnar efnisþjónustu, eins og fram kemur í 1. mgr. 1. gr. tilskipunarinnar og 5. lið formálsorða hennar.

Álit dómstólsins

58 Eins og fram er komið, kveður 6. gr. tilskipunarinnar á um að ef gjald er tekið skulu heildartekjurnar ekki fara fram úr kostnaðinum við söfnun, framleiðslu, fjölföldun og dreifingu umræddra gagna, auk sanngjarns hagnaðarhlutar af fjárfestingunni.

59 Það leiðir af orðalaginu, að kostnaður í merkingu ákvæðisins takmarkist ekki við kostnaðinn við að auðvelda endurnotkun, það er, fjölföldun og dreifingu. Heimilt er að telja með kostnað sem opinber aðili hefur af upphaflegri söfnun og framleiðslu umræddra gagna. Þetta gildir óháð því hvort hinum opinbera aðila hafi verið skylt að safna gögnunum samkvæmt lögum, þar sem enginn slíkur greinarmunur er gerður í tilskipuninni.

60 Í 14. lið formálsorðanna er lögð á það áhersla að aðildarríkin hvetji opinbera aðila til að gera gögn aðgengileg gegn gjaldi sem nemi ekki meira en lágmarkskostnaði við að fjölfalda gögnin og dreifa þeim. Einnig ber að hafa í huga að tilskipuninni var nýlega breytt með tilskipun 2013/37/EB. Um leið og sú breyting tekur gildi verður meginreglan samkvæmt hinni nýju 6. gr. að ekki megi telja með kostnað vegna söfnunar og fjölföldunar.

61 However, under the Directive, if account is taken of cost incurred by a public sector body in connection with the initial collection and production of documents, any income accrued in that respect, for example fees or taxes such as stamp duties, which reduce or offset that cost, must also be taken into account. Consequently, the cost within the meaning of Article 6 must be construed as the net cost. If only the cost incurred as a result of collection were to be taken into account and not the income accrued in that connection, this would undermine the effectiveness of the Directive's objective of precluding excessive pricing.

62 It is for the national court to examine the facts of the case before it in order to determine the cost that may, on the basis of the above, be taken into consideration pursuant to Article 6.

63 The answer to the second and third questions must therefore be that, when the cost pursuant to Article 6 of the Directive is determined, account may be taken of the cost incurred by a public sector body in connection with the initial collection and production of the documents in question. In such case, any income accrued in that connection, for example fees or taxes such as stamp duties, which reduce or offset that cost, must also be taken into account.

V THE FIFTH AND SIXTH QUESTIONS

64 The fifth and sixth questions from the national court concern the issue of whether and, if so, to what extent, a self-financing requirement for public sector bodies, whether general or specific, may be taken into account when determining the cost pursuant to Article 6 of the Directive. The Court finds it appropriate to assess these two questions together.

Observations submitted to the Court

65 The plaintiff submits that self-financing requirements are relevant when determining the required rate of return, provided that such requirements do not lead to charges in excess of the ceiling laid down in Article 6 of the Directive.

66 The defendants observe that appropriate account may be taken of self-financing requirements where they are imposed, and that this

61 Hins vegar er gert ráð fyrir því í tilskipuninni, ef talinn er með kostnaður sem opinber aðili hefur af upphaflegri söfnun og framleiðslu gagna, að tekjur sem verða til vegna þeirra, til dæmis gjöld og skattar eins og stimpilgjöld, sem lækka eða koma til móts við þann kostnað, séu einnig teknar með í reikninginn. Þar af leiðandi verður að skilja kostnaðarhugtak 6. gr. með þeim hætti að það vísi til nettókostnaðar. Ef einungis væri tekið tillit til kostnaðar vegna söfnunar en ekki til tekna sem verða til vegna hennar, myndi það grafa undan áhrifum þess markmiðs tilskipunarinnar að koma í veg fyrir of háa verðlagningu.

62 Það er landsdómstólsins að taka afstöðu til atvika málsins sem rekið er fyrir honum og ákveða til hvaða kostnaðarhluta beri, samkvæmt framansögðu, að líta til í samræmi við 6. gr.

63 Annarri og þriðju spurningunni verður því að svara á þann veg að þegar kostnaður í skilningi 6. gr. tilskipunarinnar er ákveðinn, sé heimilt að telja með kostnað sem opinber aðili hefur af upphaflegri söfnun og framleiðslu þeirra gagna sem um ræðir. Skulu þá allar tekjur sem verða til vegna þeirra, til dæmis gjöld og skattar eins og stimpilgjöld, sem lækka eða koma til móts við þann kostnað, einnig teknar með í reikninginn.

V FIMMTA OG SJÖTTA SPURNINGIN

64 Fimmta og sjötta spurning héraðsdóms varða það hvort, og þá að hve miklu leyti, beri að taka tillit til krafna sem gerðar eru til opinbers aðila um að hann standi undir sér fjárhagslega, hvort sem þær eru almennar eða sértækar, þegar kostnaður er ákveðinn samkvæmt 6. gr. tilskipunarinnar. Dómstóllinn telur rétt að taka afstöðu til þessara tveggja spurninga í einu lagi.

Athugasemdir bornar fram við EFTA-dómstólinn

65 Stefnandi telur að skipt geti máli við ákvörðun hagnaðarhlutar, hvort gerðar séu kröfur um það að opinber stofnun standi undir sér fjárhagslega, að því gefnu að slíkar kröfur leiði ekki til gjaldtöku sem er hærri en þakið sem kveðið er á um í 6. gr. tilskipunarinnar.

66 Stefndu benda á að taka megi tilhlýðilegt tillit til krafna um að opinber stofnun standi undir sér fjárhagslega, þar sem þær

is compatible with the Directive. Article 6 does not prescribe to what extent eligible cost shall be recovered and to what extent it is covered by public funds, as long as the upper limit provided for by that provision is estimated.

67 No general self-financing requirement exists under Icelandic law. In Iceland, public sector bodies are financed by public funding, by own revenues or by a mixture of the two. Revenues stemming from charges and other sources of income received by the public body in question can be taken into account unless they accrue to the Treasury. In the case at hand, a specific self-financing requirement has been imposed on Registers Iceland. The cost of producing the information is thus placed on re-users rather than taxpayers.

68 ESA argues that the Directive does not preclude a general requirement that public sector bodies be self-financing. The purpose of the Directive is to encourage such bodies to disseminate information. These bodies are also given an incentive in the form of a reasonable return on investment in facilitating the re-use of documents. However, self-financing requirements must be related to the handling of the documents themselves. The cost of operating a public sector body as a whole cannot be taken into account.

69 The Commission submits that the ceiling laid down by Article 6 includes a reasonable return on investment. As explained in recital 14 of the preamble to the Directive, this permits due account to be taken of the self-financing requirements of the public sector body concerned, where applicable. A reasonable return on investment must be linked to the cost elements that are directly related to the collection, production, reproduction and dissemination of documents. Any broader interpretation would be contrary to the objective underlying the Directive to promote the creation of digital content services based on information held by public sector bodies, and to facilitate re-use, as set out in Article 1(1) and also in recital 5 of the preamble.

eru gerðar, og telja það í samræmi við tilskipunina. Í 6. gr. tilskipunarinnar sé hvorki kveðið á um að hvaða marki skuli endurheimta viðurkenndan kostnað, né að hvaða marki slíkt skuli gert með almannafé, að því gefnu að efri mörkin sem sett eru í ákvæðinu séu virt.

67 Að sögn stefndu er hvergi í íslenskri löggjöf gerð almenn krafa um að stofnanir ríkisins standi undir sér fjárhagslega. Starfsemi opinberra aðila á Íslandi sé fjármögnuð með opinberu fé, með eigin tekjum eða blöndu af þessu tvennu. Hægt sé að taka tillit til tekna af gjaldtöku og annarra tekjulinda viðkomandi opinbers aðila, ef þær renna ekki beint til ríkissjóðs. Í máli því sem rekið er fyrir héraðsdómi eru aðstæður með þeim hætti að gerð hefur verið sérstök krafa til Þjóðskrár Íslands um að hún standi undir sér fjárhagslega. Það eru því endurnotendur, í stað skattborgara, sem látnir eru bera kostnaðinn af framleiðslu upplýsinganna.

68 ESA heldur því fram að tilskipunin útiloki ekki að gerð sé almenn krafa um að opinberar stofnanir standi undir sér fjárhagslega. Markmið tilskipunarinnar sé að hvetja opinbera aðila til að dreifa upplýsingum. Einnig sé það opinberum aðilum hvati til að auðvelda endurnotkun gagna, að þeir geti vænst sanngjarns hagnaðarhlutar af fjárfestingu sinni. Þær kröfur sem gerðar eru um að stofnun standi undir sér fjárhagslega verði þó að tengjast meðferð gagnanna. Ekki sé hægt að líta til kostnaðar við alla starfsemi opinbers aðila.

69 Framkvæmdastjórnin telur að þakið sem sett er í 6. gr. taki mið af sanngjörnum hagnaðarhluta fjárfestingar. Eins og komi fram í 14. lið formálsorða tilskipunarinnar sé heimilt að taka tilhlýðilegt tillit til krafna um að viðkomandi opinber aðili standi undir sér fjárhagslega, þegar það á við. Við mat á því hvað telst sanngjarn hagnaðarhlutur af fjárfestingunni ber að líta til þeirra kostnaðarþátta sem tengjast með beinum hætti söfnun, framleiðslu, fjölföldun og dreifingu gagna. Rýmri túlkanir væru andstæðar meginmarkmiði tilskipunarinnar um að hvatt skuli til að þjónustu með stafrænu efni sem byggist á upplýsingum í vörslu opinberra aðila verði komið á fót, og að auðvelda endurnotkun þeirra, eins og segir í 1. mgr. 1. gr. og 5. tölul. formálsorða tilskipunarinnar.

Findings of the Court

70 Article 6 of the Directive provides that charges may not exceed the cost of collection, production, reproduction and dissemination of the documents in question, together with a reasonable return on investment, having due regard to any self-financing requirements of the public sector body concerned, as stated in recital 14 of the preamble to the Directive.

71 Accordingly, general or specific self-financing requirements for public sector bodies may be taken into account when determining the cost pursuant to Article 6 of the Directive. Nonetheless, as argued by both ESA and the Commission, the cost within the meaning of Article 6, together with a reasonable return on investment, must relate to the handling of documents, either their initial collection or production, or the actual facilitation of re-use through reproduction and dissemination. Consequently, when charges are made, cost elements and investments that are unrelated to the document processing necessary for re-use set out in Article 6 may not be taken into account. These principles governing charging in Article 6 must be the same irrespective of any self-financing requirement to which the public body in question is subject.

72 At the oral hearing, the defendants implied, in response to a question put to them, that the charges for re-use in dispute in the case before the national court are also used to cover the cost of services that the plaintiff itself has not received from Registers Iceland. If it is established that the charges are used to cover cost other than that related to the collection, production, reproduction and dissemination of the documents in question, together with a reasonable return on investment in the facilitation of re-use, those charges are contrary to Article 6. It is for the national court to make the assessment.

73 The answer to the fifth and sixth questions must therefore be that self-financing requirements for public sector bodies may be taken into account when determining the cost under Article 6 of the Directive. This applies insofar as only cost elements, together

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70 Í 6. gr. tilskipunarinnar segir að tekjur megi ekki vera hærri en sem nemur kostnaðinum við söfnun, framleiðslu, fjölföldun og dreifingu þeirra gagna sem um ræðir, auk sanngjarns hagnaðarhlutar af fjárfestingunni, að virtum þeim kröfum sem kunna að vera gerðar til viðkomandi opinbers aðila um að standa undir sér fjárhagslega, eins og kveðið er á um í 14. lið formálsorða tilskipunarinnar.

71 Í samræmi við framangreint má taka tillit til almennra eða sértækra krafna um að opinber aðili standi undir sér fjárhagslega þegar kostnaður er ákveðinn samkvæmt 6. gr. tilskipunarinnar. Engu að síður verður kostnaður í skilningi 6. gr., ásamt sanngjörnum hagnaðarhluta, að tengjast meðferð gagnanna, hvort sem það er vegna upphaflegrar söfnunar eða framleiðslu þeirra eða þess að liðkað sé fyrir endurnotkun þeirra með fjölföldun og dreifingu, eins og ESA og framkvæmdastjórnin hafa bent á. Við innheimtu gjalda má því ekki líta til kostnaðarþátta og fjárfestinga sem eru ótengd þeirri gagnavinnslu sem óhjákvæmileg er í tengslum við endurnotkun í skilningi 6. gr. Þessar meginreglur um gjaldtöku samkvæmt 6. gr. eru hinar sömu, óháð kröfum um að umræddur opinber aðili standi undir sér fjárhagslega.

72 Við munnlegan málflutning gáfu stefndu í skyn, í svari við spurningu sem beint var til þeirra, að gjöldin sem innheimt eru vegna endurnotkunar gagna í málinu sem rekið er fyrir héraðsdómi, séu notuð til að standa straum af kostnaði við þjónustu Þjóðskrár Íslands sem stefnandi hefur ekki sjálfur notið. Ef sannreynt er að gjöldin séu notuð til að mæta öðrum kostnaði en þeim sem til fellur vegna söfnunar, framleiðslu, fjölföldun og dreifingar umræddra gagna, ásamt sanngjörnum hagnaðarhluta af því að auðvelda endurnotkun, er slík gjaldtaka andstæð 6. gr. Það er landsdómstólsins að meta hvort svo sé.

73 Fimmtu og sjöttu spurningunni verður því að svara á þann veg, að líta megi til krafna sem gerðar eru til opinberra stofnana um að þær standi undir sér fjárhagslega þegar lagt er mat á kostnað samkvæmt 6. gr. tilskipunarinnar. Þetta á við að því

with a reasonable return on investment, that are related to the document processing necessary for re-use set out in Article 6 are taken into account.

VI COSTS

74 The costs incurred by ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Reykjavík District Court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Héraðsdómur Reykjavíkur hereby gives the following Advisory Opinion:

1. **Articles 6 and 7 of Directive 2003/98/EC require that, when charges are made for the re-use of public sector information, a substantive examination must have been undertaken at the time when the charge is fixed. The examination must show that the total income from such charges does not exceed the cost of collection, production, reproduction and dissemination of documents, plus a reasonable return on investment. If the factors relevant to performing a calculation are uncertain, an estimate must at least be made. However, the calculation basis for the charges need only be made available upon request. This applies irrespective of whether the charge is set in legislation, by the relevant public authority or by other means.**

2. **When the cost pursuant to Article 6 of the Directive is determined, account may be taken of the cost incurred by a public sector body in connection with the initial collection and production of the documents in question. In such case, any income accrued in that respect, for example fees or taxes such as stamp duties, which reduce or offset that cost, must also be taken into account.**

3. **Self-financing requirements for public sector bodies may be taken into account when determining the cost under Article 6 of the Directive.**

marki að einungis sé litið til kostnaðarþátta, ásamt sanngjörnum hagnaðarhluta, sem tengjast þeirri gagnavinnslu sem nauðsynleg er til að gera endurnotkun mögulega í samræmi við 6. gr.

VI MÁLSKOSTNAÐUR

74 ESA og framkvæmdastjórn Evrópusambandsins, sem skilað hafa greinargerðum til EFTA-dómstólsins, skulu hvor bera sinn málskostnað. Þar sem um er að ræða mál sem er hluti af málarekstri fyrir Héraðsdómi Reykjavíkur kemur það í hlut þess dómstóls að kveða á um kostnað málsaðila.

Með vísan til framangreindra forsenda lætur,

DÓMSTÓLLINN

uppi svohljóðandi ráðgefandi álit um spurningar þær sem Héraðsdómur Reykjavíkur beindi til dómstólsins:

1. **Samkvæmt 6. og 7. gr. tilskipunar 2003/98/EB er gerð krafa um það, í þeim tilvikum þar sem gjald er innheimt vegna endurnotkunar upplýsinga frá hinu opinbera, að efnisleg athugun hafi farið fram þegar fjárhæð gjaldsins er ákveðin. Athugunin verður að sýna fram á að heildartekjur af slíkri gjaldtöku fari ekki fram úr kostnaði við söfnun, framleiðslu, fjölföldun og dreifingu gagna, auk sanngjarns hagnaðarhlutar af fjárfestingunni. Ef óvissa ríkir um þá þætti sem máli skipta fyrir útreikningana, verður í það minnsta að gera áætlun. Grundvöll útreikninganna verður þó aðeins að gera aðgengilegan þegar um hann er beðið. Það gildir óháð því hvort fjárhæð gjaldsins er ákveðin með lögum af þar til bæru yfirvaldi, eða með öðrum hætti.**

2. **Þegar kostnaður í skilningi 6. gr. tilskipunarinnar er ákveðinn, er heimilt að telja með kostnað sem opinber aðili hefur af upphaflegri söfnun og framleiðslu þeirra gagna sem um ræðir. Skulu þá allar tekjur sem verða til vegna þeirra, til dæmis gjöld og skattar eins og stimpilgjöld, sem lækka eða koma til móts við þann kostnað, einnig teknar með í reikninginn.**

3. **Líta má til krafna sem gerðar eru til opinberra stofnana um að þær standi undir sér fjárhagslega þegar lagt er mat á kostnað samkvæmt**

This applies insofar as only cost elements, together with a reasonable return on investment, that are related to the document processing necessary for re-use set out in Article 6 are taken into account.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 16 December 2013.

Gunnar Selvik Carl Baudenbacher

Registrar President

6. gr. tilskipunarinnar. Þetta á við að því marki að einungis sé litið til kostnaðarþátta, ásamt sanngjörnum hagnaðarhluta, sem tengjast þeirri gagnavinnslu sem nauðsynleg er til að gera endurnotkun mögulega í samræmi við 6. gr.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Kveðið upp í heyranda hljóði í Lúxemborg 16. desember 2013.

Gunnar Selvik Carl Baudenbacher

Dómritari Forseti

REPORT FOR THE HEARING

in Case E-7/13

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

Creditinfo Lánstraust hf.

and

Registers Iceland and the Icelandic State

on the interpretation of Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information.

I INTRODUCTION

1. In a letter of 16 April 2013, registered at the EFTA Court on 29 April 2013, Reykjavík District Court made a request for an Advisory Opinion in a case pending before it between Creditinfo Lánstraust hf., a company registered in Iceland ("the plaintiff"), and Registers Iceland and the Icelandic State ("the defendants").

2. The case concerns which factors can or should be taken into account when calculating the level of fees chargeable by public bodies for the re-use of public sector information.

II LEGAL BACKGROUND

EEA law

3. Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (OJ 2003 L 345, p. 90) ("the Directive), was incorporated into Annex XI to the EEA Agreement at point 5k by Decision 105/2005 of 8 July 2005 of the EEA Joint Committee (OJ 2005 L 306, p. 41). The Decision entered into force on 1 September 2006.

SKÝRSLA FRAMSÖGUMANNS

í máli E-7/13

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

Creditinfo Lánstrausts hf.

gegn

Þjóðskrá Íslands og íslenska ríkinu

varðandi túlkun á tilskipun Evrópuþingsins og ráðsins 2003/98/EB frá 17. nóvember 2003 um endurnotkun upplýsinga frá hinu opinbera.

I INNGANGUR

1. Með bréfi dagsettu 16. apríl 2013, sem skráð var í málaskrá dómstólsins 29. apríl sama ár, óskaði Héraðsdómur Reykjavíkur eftir ráðgefandi áliti í máli sem rekið er fyrir dómstólnum, milli Creditinfo Lánstrausts hf. (stefnanda), og Þjóðskrár Íslands og íslenska ríkisins (stefndu).

2. Mál þetta snýst um það, til hvaða þátta megi eða beri að líta við útreikning fjárhæðar gjalda sem opinberir aðilar innheimta vegna endurnotkunar upplýsinga frá hinu opinbera.

II LÖGGJÖF

EES-réttur

3. Tilskipun Evrópuþingsins og ráðsins 2003/98/EB frá 17. nóvember 2003 um endurnotkun upplýsinga frá hinu opinbera (Stjtíð. ESB 2003 L 345, bls. 90) (tilskipunin) var tekin upp í XI. viðauka EES-samningsins, lið 5k, samkvæmt ákvörðun Sameiginlegu EES-nefndarinnar 105/2005 frá 8. júlí 2005 (Stjtíð. ESB 2005 L 306, bls 41). Ákvörðunin tók gildi 1. september 2006.

4. Recitals 9 and 14 of the preamble to the Directive read as follows:

(9) This Directive does not contain an obligation to allow re-use of documents. The decision whether or not to authorise re-use will remain with the Member States or the public sector body concerned. This Directive should apply to documents that are made accessible for re-use when public sector bodies license, sell, disseminate, exchange or give out information. ...

(14) Where charges are made, the total income should not exceed the total costs of collecting, producing, reproducing and disseminating documents, together with a reasonable return on investment, having due regard to the self-financing requirements of the public sector body concerned, where applicable. Production includes creation and collation, and dissemination may also include user support. Recovery of costs, together with a reasonable return on investment, consistent with applicable accounting principles and the relevant cost calculation method of the public sector body concerned, constitutes an upper limit to the charges, as any excessive prices should be precluded. The upper limit for charges set in this Directive is without prejudice to the right of Member States or public sector bodies to apply lower charges or no charges at all, and Member States should encourage public sector bodies to make documents available at charges that do not exceed the marginal costs for reproducing and disseminating the documents.

5. In its Article 1, the Directive establishes a minimum set of rules governing re-use and the practical means of facilitating the re-use of existing documents held by public sector bodies.

6. Article 2(4) of the Directive defines re-use as follows:

the use by persons or legal entities of documents held by public sector bodies, for commercial or non-commercial purposes other than the initial purpose within the public task for which the documents were produced. Exchange of documents between public sector bodies purely in pursuit of their public tasks does not constitute re-use.

4. Í 9. og 14. lið formálsorða tilskipunarinnar segir:

(9) Þessi tilskipun felur ekki í sér skyldu til að heimila endurnotkun gagna. Það er áfram ákvörðun aðildarríkisins eða hlutaðeigandi opinbers aðila hvort heimila skuli slíka endurnotkun eða ekki. Þessi tilskipun gildir um gögn sem gerð eru aðgengileg til endurnotkunar þegar opinberir aðilar gefa út leyfi fyrir upplýsingum, selja, dreifa, skiptast á eða gefa út upplýsingar. [...]

(14) Ef gjald er tekið fyrir skulu heildartekjurnar ekki vera meiri en sem nemur heildarkostnaðinum við að safna, framleiða, fjölfalda og dreifa gögnunum auk sanngjarns hagnaðarhlutar af fjárfestingunni að teknu tilhlýðilegu tilliti til þeirra krafna sem gerðar eru til viðkomandi opinbers aðila, þar sem það á við, um að hann standi undir sér fjárhagslega. Framleiðsla felur í sér að búa til gögnin og setja þau saman, og dreifing getur einnig falið í sér stuðning við notendur. Þar eð koma ber í veg fyrir *of háa verðlagningu skulu efri mörk gjalds miðast við endurheimt kostnaðar, auk sanngjarns hagnaðarhlutar af fjárfestingunni, í samræmi við gildandi reikningsskilareglur og viðeigandi aðferðir við kostnaðarútreikninga hlutaðeigandi opinberra aðila. Efri mörk gjalda, sem eru sett í þessari tilskipun, eru með fyrirvara um rétt aðildarríkjanna eða opinberra aðila til að innheimta lægri gjöld eða engin gjöld og aðildarríkin skulu hvetja opinbera aðila til að gera gögn aðgengileg gegn gjaldi sem er ekki hærra en lágmarkskostnaður við að fjölfalda gögnin og dreifa þeim.*

5. Samkvæmt 1. gr. eru í tilskipuninni settar lágmarksreglur um endurnotkun og hagnýtar leiðir til að auðvelda endurnotkun gagna sem til eru og eru í vörslu opinberra aðila.

6. Í 4. mgr. 2. gr. tilskipunarinnar er endurnotkun skilgreind með eftirfarandi hætti:

„endurnotkun“: notkun einstaklinga eða lögaðila á gögnum í vörslu opinberra aðila í viðskiptaskyni eða tilgangi sem ekki er viðskiptalegs eðlis, sem er annar en upphaflegur tilgangur hins opinbera með því að búa gögnin til. Skipti á gögnum milli opinberra aðila sem einungis eru til að sinna opinberu starfssviði þeirra er ekki endurnotkun,

7. Article 6 of the Directive reads:

Principles governing charging

Where charges are made, the total income from supplying and allowing re-use of documents shall not exceed the cost of collection, production, reproduction and dissemination, together with a reasonable return on investment. Charges should be cost-oriented over the appropriate accounting period and calculated in line with the accounting principles applicable to the public sector bodies involved.

8. Article 7 of the Directive reads:

Transparency

Any applicable conditions and standard charges for the re-use of documents held by public sector bodies shall be pre-established and published, through electronic means where possible and appropriate. On request, the public sector body shall indicate the calculation basis for the published charge. The public sector body in question shall also indicate which factors will be taken into account in the calculation of charges for atypical cases. Public sector bodies shall ensure that applicants for re-use of documents are informed of available means of redress relating to decisions or practices affecting them.

National law[1]

9. The Directive was implemented into Icelandic law by Act No 161/2006, amending the Information Act No 50/1996 by adding a new chapter (Chapter VIII on the re-use of public information). On 1 January 2013, after the commencement of the proceedings in the present case before the national court, the current Information Act No 140/2012 entered into force. Chapter VII of the current Act, on the re-use of public information, corresponds to Chapter VIII of the previous Act as amended. However, it appears that it is the Information Act No 50/1996 that is relevant to the case before the national court.

[1] Translations of national provisions are unofficial and based on those contained in the documents of the case.

7. Í 6. gr. tilskipunarinnar segir:

Meginreglur um gjaldtöku

Ef gjald er tekið skulu heildartekjurnar af því að láta í té og leyfa endurnotkun gagna ekki vera meiri en kostnaðurinn við söfnun, framleiðslu, fjölföldun og dreifingu auk sanngjarns hagnaðarhlutar af fjárfestingunni. Gjöld skulu vera kostnaðartengd á viðkomandi uppgjörstímabili og reiknuð út í samræmi við þær reikningsskilareglur sem gilda um þann opinbera aðila sem málið varðar.

8. Í 7. gr. tilskipunarinnar segir:

Gagnsæi

Öll skilyrði sem gilda um endurnotkun á gögnum í vörslu opinberra aðila og stöðluð gjöld fyrir hana skulu ákveðin fyrir fram og birt með rafrænum hætti ef unnt er og við á. Ef þess er óskað skal opinber aðili tilgreina grundvöll útreikninga á gjaldinu sem birt er. Hlutaðeigandi opinberir aðilar skulu einnig tilgreina til hvaða þátta er tekið tillit við útreikninga á gjöldum í undantekningartilvikum. Opinberir aðilar skulu tryggja að umsækjendum um endurnotkun gagna sé gerð grein fyrir þeim leiðum sem tiltækar eru til að leggja fram kvartanir varðandi úrskurði eða venjur sem hafa áhrif á þá.

Landsréttur[1]

9. Tilskipun 2003/98/EB var innleidd í íslenska löggjöf með lögum nr. 161/2006 sem breyttu upplýsingalögum nr. 50/1996 og bættu við þau nýjum kafla (VIII. kafla um endurnot opinberra upplýsinga). Þann 1. janúar 2013, eftir að málaferli þau sem hér um ræðir voru hafin fyrir héraðsdómi tóku núverandi upplýsingalög nr. 140/2012 gildi. VII. kafli gildandi upplýsingalaga, um endurnot opinberra upplýsinga, svarar til VIII. kafla fyrri laga með áorðnum breytingum. Þó virðist sem líta beri til upplýsingalaga nr. 50/1996 í máli því sem rekið er í héraði.

[1] Þessi neðanmálsgrein á einungis við í enskum texta skýrslunnar.

10. The sixth and seventh paragraphs of Article 27 of the Information Act No 50/1996 read as follows:

It is permissible to charge for providing access to information from public files, pursuant to the third and fourth paragraphs of Art. 12. The public authority concerned shall establish a schedule of fees, to be confirmed by the Minister. The schedule of fees shall be advertised in Section B of the Law and Ministerial Gazette, as well as being accessible on the government authority's website.

No more must be paid for re-using information that comes under the provisions of this Chapter and is subject to a copyright of the State or of municipalities than what is indicated in the sixth paragraph, unless specifically dictated by law.

11. The third and fourth paragraphs of Article 12 of the Information Act No 50/1996 read as follows:

When the number of documents is great, the government authority may decide to assign their photocopying to other parties. The same applies when the government authority does not have facilities for photocopying documents. In such cases, the requester shall pay the cost entailed in photocopying the documents. The same applies, where relevant, to copies of material other than documents.

By means of a list of fees, the Prime Minister shall decide what is to be paid for copies and photocopies of material provided pursuant to this Act. It is permissible to allow for all of the costs entailed.

12. Registers Iceland is a governmental institution that operates under the supervision of the Minister of the Interior of Iceland. The tasks carried out by Registers Iceland include registration of a range of information on Iceland's residents and real properties. Registers Iceland provides services such as assessment, electronic access to its registers and the issuing of certificates, passports and ID cards. Sale prices and the methods of payment for every sale of land are collected in the Land Registry Database, and they are used for the calculation of economic indicators, such as the real estate price index.

10. Í 6. og 7. mgr. 27. gr. upplýsingalaga nr. 50/1996 segir:

Heimilt er að taka gjald fyrir að veita aðgang að upplýsingum úr opinberum skrám á grundvelli 3. og 4. mgr. 12. gr. Skal hlutaðeigandi stjórnvald setja sér gjaldskrá sem ráðherra staðfestir. Gjaldskrána skal birta í B-deild Stjórnartíðinda auk þess sem hún skal vera aðgengileg á heimasíðu stjórnvaldsins.

Ekki þarf að greiða fyrir endurnot á upplýsingum, sem falla undir ákvæði þessa kafla og eru háðar höfundarétti ríkis og sveitarfélaga, umfram það sem segir í 6. mgr., nema lög mæli sérstaklega svo fyrir.

11. Í 3. og 4. mgr. 12. gr. upplýsingalaga nr. 50/1996 segir:

Þegar fjöldi skjala er mikill getur stjórnvald ákveðið að fela öðrum að sjá um ljósritun þeirra. Hið sama á við hafi stjórnvald ekki aðstöðu til að ljósrita skjöl. Aðili skal þá greiða þann kostnað sem hlýst af ljósritun skjalanna. Hið sama gildir um afrit af öðrum gögnum en skjölum eftir því sem við á.

Ráðherra ákveður með gjaldskrá hvað greiða skuli fyrir ljósrit og afrit gagna sem veitt eru samkvæmt lögum þessum. Heimilt er að mæta öllum þeim kostnaði sem af því hlýst.

12. Þjóðskrá Íslands er ríkisstofnun sem heyrir undir innanríkisráðuneytið. Meðal verkefna sem Þjóðskrá hefur með höndum eru skráning margvíslegra upplýsinga um íbúa landsins og fasteignir. Þjóðskrá veitir ýmsa þjónustu sem við kemur matsgerðum, rafrænum aðgangi að skrám hennar og útgáfu vottorða, vegabréfa og nafnskírteina. Söluverð og greiðslumáti eru skráð í fasteignaskrá við hverja sölu lands og þær upplýsingar notaðar við útreikning hagvísa, á borð við vísitölu fasteignaverðs.

13. In accordance with Article 24, read together with paragraph 2 of Article 9, of Act No 6/2001 on the Registration and Assessment of Property, Registers Iceland may process and disseminate to third parties information from the Land Registry Database.

14. The same article of Act No 6/2001 entitles Registers Iceland to charge fees in return for such processing and dissemination, in accordance with a special tariff of fees that is approved by the Minister of the Interior.[2] Under Article 9 of Act No 6/2001, the costs of running individual parts of the institution shall be taken into account when deciding the amounts in the tariff and they must be presented separately in the accounts. It also provides that the tariff of fees shall be reviewed annually.

15. Article 14 of the Additional Treasury Revenue Act No 88/1991 provides for the level of fees that can be charged for information from the registration of deeds.

III FACTS AND PROCEDURE

16. The plaintiff is engaged in recording and communicating information on financial matters and creditworthiness, and related services. In the course of its business, it applies to public sector bodies, including the first defendant, Registers Iceland, for information and data.

17. Between 2004 and 2007, the plaintiff entered into a series of contracts with the National Land Registry concerning access to information. In 2010, the National Land Registry merged with the National Registry, to form Registers Iceland.

18. The essence of the case before the national court is that Registers Iceland has charged the plaintiff fees for the disclosure of information and data, and the plaintiff has brought an action before the national court for the repayment of fees for the period between 11 January 2008 and 31 December 2011. Since the

[2] Tariff of fees No 17/2001 of the National Land Registry (now Registers Iceland) for information from the National Land Registry's database (repealed by Tariff of fees No 1174/2008).

13. Í samræmi við 24. gr., sbr. 2. mgr. 9. gr., laga nr. 6/2001 um skráningu og mat fasteigna, er Þjóðskrá heimilt að vinna úr og láta þriðja aðila í té upplýsingar úr fasteignaskrá.

14. Í sömu grein laganna er Þjóðskrá veitt heimild til gjaldtöku vegna slíkrar vinnslu og upplýsingagjafar, samkvæmt sérstakri gjaldskrá sem staðfest er af innanríkisráðherra.[2] Samkvæmt 9. gr. laganna skal taka mið af kostnaði einstakra rekstrarþátta við ákvörðun fjárhæða gjaldskrárinnar, og skulu þeir aðgreindir í bókhaldi. Í greininni er jafnframt kveðið á um að gjaldskráin skuli endurskoðuð árlega.

15. Í 14. gr. laga nr. 88/1991 um aukatekjur ríkissjóðs er kveðið á um fjárhæðir sem innheimta má vegna upplýsingagjafar úr þinglýsingarbók.

III MÁLAVEXTIR OG MEÐFERÐ MÁLSINS

16. Stefnandi hefur með höndum skráningu og miðlun upplýsinga um fjárhagsmálefni og lánstraust og ýmsa þjónustu í tengslum við þá starfsemi. Vegna viðskipta sinna sækir hann um aðgang að gögnum og upplýsingum hjá opinberum aðilum, þar á meðal hjá stefnda, Þjóðskrá Íslands.

17. Á árunum 2004 til 2007 gerði stefnandi röð samninga við Fasteignamat ríkisins um aðgang að upplýsingum. Árið 2010 var Fasteignamat ríkisins sameinað Þjóðskrá og mynduð var stofnunin Þjóðskrá Íslands.

18. Kjarni þess máls sem rekið er fyrir landsdómstólnum er sá að Þjóðskrá Íslands krafði stefnanda um gjöld vegna aðgangs að upplýsingum og gögnum og stefnandi gerir þá kröfu fyrir Héraðsdómi Reykjavíkur að honum verði endurgreiddar þær

[2] Gjaldskrá Fasteignamats ríkisins fyrir upplýsingar úr Landskrá fasteigna (nú Þjóðskrá Íslands) o.fl. nr. 17/2001 (felld úr gildi með gjaldskrá 1174/2008)

tariffs were approved by the Minister of Finance, the plaintiff also brings its case against the Icelandic State.

19. Reykjavík District Court has referred the following questions to the Court:

1. Is it compatible with EEA law, and specifically with Article 6 of Council Directive 2003/98/EC, on the re-use of public sector information (cf. the Decision of the EEA Joint Committee, No 105/2005, amending Annex XI (Telecommunication services) to the EEA Agreement), to charge a fee on account of each mechanical enquiry for information from the register if no calculation of the "total income" and the "cost", in the sense of Article 6 of the Directive, is available at the time of the determination of the fee?

2. Is it compatible with Article 6 of the Directive if, when the "cost" subject to Article 6 of the Directive is determined, no account is taken of:

a. income accruing to the State when documents are collected, in the form of fees paid by individuals and undertakings for the recording of contracts in the registers of legal deeds, and

b. income accruing to the State when documents are collected, in the form of taxes which are levied as stamp duties on recorded legal deeds at the time when individuals and undertakings apply to have them recorded in the registers of legal deeds?

3. Is it compatible with Article 6 of the Directive if, when the "cost" pursuant to Article 6 of the Directive is determined, account is taken of costs incurred by a public sector body in connection with the collection of documents which it is legally obliged to collect, irrespective of whether or not individuals or undertakings request to re-use them?

4. Is it compatible with Article 6 of the Directive if, when the "cost" pursuant to the article is determined, the legislature sets the amount of the fee in legislation without any particular amount being made subject to substantive examination?

greiðslur sem hann hafi innt af hendi á tímabilinu 11. janúar 2008 til 31. desember 2011. Þar sem gjaldskráin var samþykkt af fjármálaráðherra stefnir hann einnig íslenska ríkinu.

19. Héraðsdómur Reykjavíkur beindi eftirfarandi spurningum til dómstólsins:

1. Er það samrýmanlegt EES-rétti, sérstaklega 6. gr. tilskipunar nr. 2003/98/EB um endurnotkun opinberra upplýsinga, sbr. ákvörðun sameiginlegu EES-nefndarinnar nr. 105/2005 um breytingu á XI. viðauka (Fjarskiptaþjónusta) við EES-samninginn, að innheimta gjald fyrir hverja vélræna fyrirspurn úr þinglýsingarbók ef þannig háttar til að við ákvörðun gjaldsins hefur ekki legið fyrir útreikningur á „heildartekjum“ og „kostnaði“ í skilningi 6. gr. tilskipunarinnar?

2. Samrýmist það 6. gr. tilskipunarinnar ef við ákvörðun „kostnaðar“ í skilningi hennar er horft fram hjá:

a. tekjum hins opinbera, sem verða til við söfnun gagna, í formi gjalda sem einstaklingar og fyrirtæki greiða fyrir skráningu löggerninga í þinglýsingarbók, og

b. tekjum hins opinbera, sem verða til við söfnun gagna, í formi skatta sem eru innheimtir sem stimpilgjöld af skráðum löggerningum samtímis því að einstaklingar og fyrirtæki leita eftir skráningu þeirra í þinglýsingarbók?

3. Samrýmist það 6. gr. tilskipunarinnar ef við ákvörðun „kostnaðar“ í skilningi hennar er talinn með kostnaður sem opinber aðili hefur af söfnun gagna, sem honum er lögskylt að safna óháð því hvort einstaklingar og fyrirtæki óska eftir endurnotkun þeirra?

4. Samrýmist það 6. gr. tilskipunarinnar ef við ákvörðun „kostnaðar“ í skilningi hennar væri löggjafanum játuð heimild til að ákveða með lögum fjárhæð gjaldsins án þess að ákveðin fjárhæð sæti efnislegri skoðun?

5. Would it be compatible with Article 6 of the Directive if, when the "cost" pursuant to the Directive is determined, appropriate account were taken of a general requirement in national legislation that public sector bodies be self-financing?

6. If the answer to Question No 5 is in the affirmative, what does this involve in further detail and what cost elements in public sector operations may be taken into account in this context?

IV WRITTEN OBSERVATIONS

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

- the plaintiff, represented by Reimar Pétursson, Supreme Court Attorney;
- the defendants, represented by Einar Karl Hallvarðsson, State Attorney, Office of the Attorney General (Civil Affairs), acting as Agent;
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Auður Ýr Steinarsdóttir and Catherine Howdle, Officers, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Gerald Braun and Nicola Yerrell, Members of its Legal Service, acting as Agents.

V SUMMARY OF THE ARGUMENTS SUBMITTED

The plaintiff

General remarks/the first question

21. The plaintiff submits that Article 6 of the Directive only concerns costs stemming from supplying and allowing the re-use of documents.

22. First, the wording of Article 6 refers to the activity of supplying and allowing the re-use of documents. Article 6 thus expressly

5. Samrýmist það 6. gr. tilskipunarinnar ef við ákvörðun „kostnaðar“ í skilningi hennar væri tekið tilhlýðilegt tillit til almennra krafna landslaga um að stofnanir ríkisins standi undir sér fjárhagslega?

6. Ef svarið við spurningu fimm er já, hvað felst í því nánar tiltekið og til hvaða kostnaðarþátta í rekstri hins opinbera má taka tillit í þessu samhengi?

IV SKRIFLEGAR GREINARGERÐIR

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

– Stefnanda, í fyrirsvari er Reimar Pétursson, hrl.

– Stefndu, í fyrirsvari sem umboðsmaður er Einar Karl Hallvarðsson, ríkislögmaður.

– Eftirlitsstofnun EFTA (ESA), í fyrirsvari sem umboðsmenn eru Xavier Lewis, framkvæmdastjóri lögfræði- og framkvæmdasviðs, Auður Ýr Steinarsdóttir og Catherine Howdle, lögfræðingar á lögfræði- og framkvæmdasviði.

– Framkvæmdastjórn Evrópusambandsins, í fyrirsvari sem umboðsmenn eru Gerald Braun og Nicola Yerrell, hjá lagaskrifstofu framkvæmdastjórnarinnar.

V SAMANTEKT YFIR MÁLSÁSTÆÐUR OG RÖK AÐILA

Stefnandi

Almennar athugasemdir / fyrsta spurningin

21. Stefnandi heldur því fram að 6. gr. tilskipunarinnar varði einungis kostnað sem tilkominn er af því að láta í té og leyfa endurnotkun gagna.

22. Í fyrsta lagi vísi orðalag 6. gr. til þeirrar starfsemi að láta í té og leyfa endurnotkun gagna. 6. gr. skilgreini því skýrlega tekjurnar sem endurgjald vegna þeirrar tilteknu starfsemi. Hins vegar er

defines income as the measure of revenues generated *from* that activity. However, Article 6 defines the costs without making express reference to an activity.

23. According to the plaintiff the concepts of income and cost are logically related. As concepts they both measure a defined activity: income in terms of revenues generated and cost in terms of costs incurred in connection with that activity. In the plaintiff's view, the cost and income must thus relate to the same activity. A different reading gives rise to a mismatch, where income is interpreted restrictively and cost is interpreted expansively. Such a reading is unfair and illogical.

24. The plaintiff submits that the former reading conforms to the Directive's scope and structure. It contains no obligation to allow re-use.[3] The Directive thus imposes no financial burden on the Member States to make documents re-usable.

25. Second, Article 2(4) of the Directive defines re-use as the use of documents held by public sector bodies for purposes other than the initial purpose for which the documents were produced. The initial purpose is therefore important in determining whether use constitutes re-use. For instance, the initial purpose of registration of a legal deed is to protect ownership interests.

26. Furthermore, it follows from recital 13 of its preamble that the Directive recognises that the re-use of existing documents may require certain steps to be taken by public sector bodies, *inter alia* digitising paper-based documents or preparing extracts. However, Article 5 of the Directive underlines that this implies neither an obligation to create or adapt documents nor an obligation to provide extracts if that entails more than a simple operation. The plaintiff submits that this shows that the Directive only addresses the production of documents for the purpose of re-use. Consequently, it would be illogical if Article 6 were to be interpreted to include costs incurred outside the process addressed by the Directive.

[3] Reference is made to Case C-138/11 *Compass-Datenbank*, judgment of 12 July 2012, not yet reported, paragraph 50.

kostnaðurinn skilgreindur í sama ákvæði án þess að vísað sé sérstaklega til neinnar starfsemi.

23. Að sögn stefnanda eru rökrétt tengsl á milli tekju- og kostnaðarhugtaks tilskipunarinnar. Hugtökin skírskoti bæði til skilgreindrar starfsemi: þannig vísi tekjur til gjaldtöku, en kostnaður til útgjalda sem leiða af starfseminni. Að mati stefnanda verða tekjur og kostnaður að tengjast sömu starfseminni. Sé annar skilningur lagður í hugtökin leiði það til misræmis, þar sem tekjur eru skýrðar þröngt en kostnaður skýrður rúmt. Slík túlkun væri ósanngjörn og órökrétt.

24. Stefnandi heldur því fram að fyrri túlkunin sé í samræmi við gildissvið og uppbyggingu tilskipunarinnar. Hún felur ekki í sér neina skyldu til að leyfa endurnotkun. [3] Tilskipunin leggur því engar fjárhagslegar kvaðir á aðildarríki þess efnis að þau verði að gera gögn endurnýtanleg.

25. Í öðru lagi sé endurnotkun skilgreind í 4. mgr. 2. gr. tilskipunarinnar sem notkun á gögnum í vörslu opinbera aðila í tilgangi sem er annar en upphaflegur tilgangur með því að búa gögnin til. Upphaflegur tilgangur skiptir því máli þegar ákveðið er hvort notkun falli undir endurnotkun. Upphaflegur tilgangur þinglýsingar er til dæmis sá, að vernda eignarréttarlega hagsmuni.

26. Enn fremur, leiðir það af 13. lið formálsorðanna að í tilskipuninni er viðurkennt að endurnotkun gagna sem til staðar eru geti krafist ákveðinna aðgerða af opinberum aðilum, meðal annars færslu gagna sem eru á pappírsformi yfir á stafrænt form eða með gerð útdrátta. Hins vegar er lögð á það áhersla í 5. gr. tilskipunarinnar, að þetta feli hvorki í sér skyldu til að útbúa eða aðlaga gögn, né skyldu til að gera útdrætti, ef það felur í sér meiri fyrirhöfn en einföld aðgerð. Stefnandi telur að framangreint sýni að tilskipunin taki einungis til framleiðslu gagna með endurnotkun í huga. Þar af leiðandi væri órökrétt ef 6. gr. yrði túlkuð með þeim hætti að hún taki til alls kostnaðar sem fellur til utan þess ferlis sem tilskipunin tekur til.

[3] Vísað er til máls C-138/11 *Compass-Datenbank*, óbirtur dómur frá 12. júlí 2012, 50. mgr.

27. This reading is also supported by the Directive's purpose. According to recital 14 of the preamble to the Directive, its purpose is to set an upper limit on charges. It would be incompatible with this objective to allow re-use to be charged for based on the cost of producing the existing document, prepared for an initial purpose. Such an interpretation would therefore render Article 6 of the Directive devoid of purpose, effectively eliminating the intended upper limit on charges and inviting the Member States to levy excessive prices.

28. The plaintiff stresses that it is not arguing in favour of a marginal-cost approach. Such an approach would only cover the costs of reproducing and disseminating the documents. Rather, it is arguing for a re-use facilitation cost approach. That is a known, but different charging model.[4]

29. In the main proceedings, the Icelandic State has noted the reference to self-financing requirements in recital 14 of the preamble to the Directive in support of its position. The plaintiff considers this to be misguided, as it would effectively eliminate the upper limit on costs intended by the Directive. In its view, the self-financing requirements only have relevance when determining the reasonable return on investment. A self-financed public sector body may thus require a higher return than a body financed by the Member State itself.

30. The plaintiff submits that the Directive also imposes a duty on Member States to calculate the charges levied for the re-use of information. Pursuant to Article 6, charges shall be "calculated" in line with the accounting principles applicable to the public sector bodies involved. Thus, determining a charge for re-use without a basis in cost calculations cannot be compatible with Article 6.

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4 Reference is made to Pricing of Public Sector Information Study, October 2011, p.14 (available at http://ec.europa.eu/information_society/policy/psi/docs/pdfs/report/11_2012/models.pdf). The models include "profit", "cost", "re-use facilitation cost", "marginal cost", and "zero cost".

27. Þessa skilnings sjái, að mati stefnanda, einnig stað í tilgangi tilskipunarinnar. Samkvæmt 14. lið formálsorða tilskipunarinnar er tilgangur hennar að ákveða efri mörk gjaldtöku. Það væri andstætt þessu markmiði að heimila gjaldtöku vegna endurnotkunar til þess að standa undir kostnaði af gerð fyrirliggjandi gagna sem upphaflega voru útbúin í öðrum tilgangi. Slík túlkun myndi því gera 6. gr. tilskipunarinnar tilgangslausa og afnema efri mörk gjaldtökunnar sem þar er gert ráð fyrir og láta aðildarríkjum eftir að krefjast hárra gjalda.

28. Stefnandi leggur áherslu á að hann aðhyllist ekki aðferð sem byggir á lágmarkskostnaði. Slík aðferð myndi einungis taka tillit til kostnaðar af því að fjölfalda gögn og dreifa þeim. Hann telur þess í stað að stefna eigi að kostnaðaraðferð sem auðveldi endurnotkun. Það sé önnur en þekkt leið við gjaldtöku. [4]

29. Í málinu sem rekið er fyrir landsdómstólnum hefur íslenska ríkið vísað til 14. liðar formálsorða tilskipunarinnar máli sínu til stuðnings, þar sem fram kemur að tillit skuli tekið til krafna um að opinber aðili standi undir sér fjárhagslega. Stefnandi telur þetta rangtúlkun, þar sem slíkt myndi í reynd afnema efri mörk gjalda sem stefnt er að með tilskipuninni. Að mati stefnanda komi kröfur um að opinber aðili standi undir sér fjárhagslega einungis til álita þegar lagt er mat á hver sé sanngjarn hagnaðarhluti af fjárfestingunni. Opinber stofnun sem stendur undir eigin rekstri gæti þannig krafist meiri hagnaðar en stofnun sem rekin er af aðildarríkinu sjálfu.

30. Stefnandi telur að tilskipunin leggi einnig þá skyldu á aðildarríki að þau reikni út gjöld sem innheimt eru vegna endurnotkunar upplýsinga. Í 6. gr. er kveðið á um að gjöld skuli reiknuð út í samræmi við þær reikningsskilareglur sem gilda um þann opinbera aðila er málið varðar. Ákvörðun gjalds vegna endurnotkunar sem á sér ekki stoð í útreikningi kostnaðar er því ekki samþýðanleg 6. gr.

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[4] Vísað er til rannsóknarinnar *Pricing of Public Sector Information* (í. *Verðlagning upplýsinga hjá hinu opinbera)*, birt í október 2011, bls. 14 (aðgengileg á slóðinni: http://ec.europa.eu/information_society/policy/psi/docs/pdfs/report/11_2012/models.pdf). Líkön fyrir kostnaðaraðferðir eru m.a. profit (í. hagnaður), cost (í. kostnaður), re-use facilitation cost (í. auðveldun endurnotkunar), marginal-cost (í. jaðarkostnaður) og zero-cost (í. enginn kostnaður).

31. According to the plaintiff, this view is supported by Article 7 of the Directive. This Article imposes a transparency obligation on the Member States, since standard charges for re-use shall be pre-established. Furthermore, the public sector body involved shall indicate the calculation basis for the published charge on request, and also which factors will be taken into account in the calculation of charges for atypical cases.

32. The plaintiff submits that the Icelandic State initially determined the fees charged for mechanical inquiries to the registry of local deeds based on the benefit such inquiries brought to the user and a prediction of the expected revenues. Later charge increases were justified by an increase in consumer prices, but took no account of the actual cost involved.

33. According to the plaintiff, such a determination of charges without a basis in a calculation is incompatible with the Directive. It precludes the attainment of the Directive's objective and its full effectiveness. In this regard, the plaintiff refers to the Commission's letter of formal notice to Sweden concerning the implementation of the Directive. The Commission was not satisfied with the implementation, noting, *inter alia*, that certain charges levied were determined in accordance with market judgments rather than on the basis of calculated costs.

34. The plaintiff submits that recital 14 of the preamble to the Directive shows that there is a preference in the Directive for no-cost or marginal-cost charges. This preference is based on the demonstrated superiority of such charging models.[5] In relation to digital data, there is essentially no difference between a no-cost and marginal-cost approach.[6] Consequently, scenarios are conceivable, in particular where digital data are concerned, where Member States could determine charges on a marginal-cost basis that are manifestly lower than the upper limit set by Article 6 of the Directive. Only in such scenarios could a calculation not be necessary.

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5 Reference is made to the Commission's proposal for a directive of the European Parliament and of the Council on the re-use and commercial exploitation of public sector documents, COM(2002) 207 Final, p. 5.

6 Reference is made to Pricing of Public Sector Information Study, cited above, p.15.

31. Að mati stefnanda styður 7. gr. tilskipunarinnar þetta sjónarmið hans. Greinin skyldar aðildarríki til að viðhafa gagnsæ vinnubrögð með kröfu um að gjöld fyrir endurnotkun skuli ákveðin fyrir fram. Enn fremur skuli opinber aðili tilgreina grundvöll útreikninga fyrir þeirri fjárhæð sem birt er, sé þess óskað, og einnig til hvaða þátta er tekið tillit við útreikninga á gjöldum í undantekningartilvikum.

32. Stefnandi heldur því fram að íslenska ríkið hafi upphaflega ákveðið fjárhæð gjaldtöku vegna vélrænna fyrirspurna úr þinglýsingarbók á grundvelli þess hvaða hag notandi hefði af slíkri fyrirspurn og á grundvelli áætlunar um væntanlegar tekjur hans af henni. Síðari hækkanir gjalda hafi verið rökstuddar með hækkun neysluverðs, án þess að tekið hafi verið tillit til raunkostnaðar.

33. Stefnandi telur að slík ákvörðun gjaldtöku án stoðar í útreikningum sé andstæð tilskipuninni. Hún komi í veg fyrir að markmið tilskipunarinnar náist og að áhrif hennar verði sem skyldi. Stefnandi vísar um þetta atriði til formlegrar viðvörunar framkvæmdastjórnarinnar til Svíþjóðar varðandi innleiðingu tilskipunarinnar. Framkvæmdastjórnin taldi innleiðinguna ekki fullnægjandi og benti meðal annars á að tiltekin gjaldtaka væri fremur ákveðin með hliðsjón af mati markaðarins en á grundvelli kostnaðarútreikninga.

34. Stefnandi bendir á að 14. liður formálsorða tilskipunarinnar sýni að samkvæmt henni séu aðferðir þar sem ekki er litið til kostnaðar eða litið til lágmarkskostnaðar teknar fram yfir aðrar. Sú forgangsröðun byggist á því að sýnt hafi verið fram á yfirburði slíkra kostnaðarlíkana.[5] Varðandi stafræn gögn er í reynd enginn munur á því hvort ekki sé litið til kostnaðar eða hvort litið sé til lágmarkskostnaðar.[6] Þar af leiðandi megi hugsa sér tilvik, sérstaklega þegar stafræn gögn eiga í hlut, þar sem aðildarríki geti ákveðið gjöld á grundvelli jaðarkostnaðaraðferðar sem væru mun lægri en efri mörkin sem kveðið er á um í 6. gr. tilskipunarinnar. Aðeins í slíkum tilvikum væri engin þörf á útreikningi.

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5 Vísað er til frumvarps framkvæmdastjórnarinnar um tilskipun Evrópuþingsins og ráðsins um endurnotkun og notkun opinberra gagna í viðskiptalegum tilgangi, COM(2002) 207, bls 5.

6 Vísað er til áður tilvitnaðrar skýrslu *Pricing of Public Sector Information (Verðlagning upplýsinga hjá hinu opinbera)* bls. 15.

35. Consequently, the plaintiff proposes that the Court should answer the first question as follows:

No, unless the proposed charges are none or manifestly lower than the upper limit set by the Directive, Article 6.

The second and third questions

36. The plaintiff's primary position is that the second and third questions must be answered in the affirmative and negative, respectively. It reiterates that, in its view, only income and costs relating to supplying and allowing re-use shall be taken into account. As a result, cost and income generated in the production of existing documents for their original purpose may be disregarded.

37. In the alternative, if the Court finds it compatible with Article 6 of the Directive to charge for costs incurred prior to the supplying and allowing of re-use, the plaintiff submits that prior generated income must also be taken into account. The cost referred to in Article 6 should thus be construed as net of such income.

38. The plaintiff observes that all public activities generate information. It submits that disregarding income from such activities, but counting costs, in effect removes the upper limit envisioned by Article 6 of the Directive. Where activities generating information are themselves the source of major public revenues, such revenues must be taken into account.

39. The plaintiff proposes that the Court should answer the second and third questions as follows:

2. Yes.

In the alternative:

No.

3. No. Only costs from the supplying and allowing of re-use of documents may be taken into account.

In the alternative:

Yes.

35. Samkvæmt framansögðu leggur stefnandi til að dómstóllinn svari fyrstu spurningunni með eftirfarandi hætti:

Nei, ekki nema umrædd gjöld séu umtalsvert lægri en efri mörkin sem sett eru í 6. gr. tilskipunarinnar.

Önnur og þriðja spurningin

36. Afstaða stefnanda er fyrst og fremst sú að svara beri annarri spurningunni játandi en þriðju spurningunni neitandi. Hann ítrekar að hann telji að einungis beri að líta til tekna og kostnaðar sem tengjast því að láta gögn í té og leyfa endurnotkun þeirra. Þar af leiðandi megi líta fram hjá kostnaði og tekjum sem skapast hafa við að útbúa gögn, sem til eru, í upphaflegum tilgangi.

37. Ef dómstóllinn kemst hins vegar að þeirri niðurstöðu að það samræmist 6. gr. tilskipunarinnar að innheimta gjöld vegna kostnaðar sem kominn er til áður en gögnin eru látin í té og endurnotkun þeirra leyfð, telur hann að einnig beri að taka fyrri tekjur með í reikninginn. Kostnaðinn sem vísað er til í 6. gr. verði því að skilja sem nettó kostnað að frádregnum tekjum.

38. Stefnandi bendir á að öll starfsemi hins opinbera skapi upplýsingar. Hann heldur því fram að ef ekki sé tekið tillit til tekna af slíkri starfsemi, en aðeins talinn kostnaður, hafi það í för með sér að efri mörkin sem 6. gr. tilskipunarinnar mæli fyrir um séu í reynd afnumin. Þegar starfsemi sem skapar upplýsingar er í sjálfri sér andlag mikilla tekna hins opinbera, verði að taka þær tekjur með í reikninginn.

39. Stefnandi leggur því til að dómstóllinn svari annarri og þriðju spurningunni með eftirfarandi hætti:

2. Já.

Til vara:

Nei.

3. Nei. Aðeins má taka tillit til kostnaðar sem leiðir af því að gögn séu látin í té og endurnotkun þeirra leyfð.

Til vara:

Já.

The fourth question

40. The plaintiff submits that the fourth question must be answered in the negative.

41. In its view, this follows from the application of two principles of EEA law. First, a national court must as far as possible interpret statutory provisions in conformity with Article 6 of the Directive.[7] This entails that the national court in the main proceedings has a duty to satisfy itself, in the particular circumstances, that Article 6 of the Directive has been complied with.[8] The mere existence of a national statutory provision determining the amount of a particular charge does not remove this duty. The national court must in any event carry out an appropriate examination of the facts to ensure the effectiveness of the relevant directive.[9]

42. Second, the plaintiff recalls that Protocol 35 EEA obliges the EEA EFTA States to introduce, if necessary, a statutory provision to the effect that, under their national legal order, implemented EEA rules prevail in cases of possible conflict with other statutory provisions.[10]

43. In the present case, the Directive has been implemented in Iceland by Article 24(7) of the Information Act No 140/2012. Consequently, the Directive, as an implemented EEA rule, must prevail in cases of conflict with other statutory provisions in Icelandic law.[11]

44. However, as expressly provided for in Article 7 EEA, the Member States are left with the choice of form and method of implementation. Nevertheless, that discretion cannot alleviate the Member States from applying a directive's provisions. This applies, in particular, where a directive lays down an unconditional and sufficiently precise

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7 Reference is made to Case E-1/07 *Criminal Proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 39.

8 Reference is made to Case C-287/05 *Hendrix* [2007] ECR I-6934, paragraph 57.

9 Reference is made to Article 3 EEA, and Case E-11/12 *Koch and Others*, judgment of 13 June 2013, not yet reported, paragraph 91.

10 Reference is made to *Criminal Proceedings against A*, cited above, paragraph 38.

11 Reference is made to Cases E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 77, and E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraph 28.

Fjórða spurningin

40. Stefnandi heldur því fram að fjórðu spurningunni beri að svara neitandi.

41. Hann telur þá niðurstöðu leiða af tveimur meginreglum EES-réttar. Í fyrsta lagi verður landsdómstóllinn að túlka lagaákvæði til samræmis við 6. gr. tilskipunarinnar, eins og frekast er unnt.[7] Þetta felur í sér að landsdómstólnum ber skylda til að ganga úr skugga um hvort kröfum 6. gr. tilskipunarinnar hafi verið fylgt í þeim tilteknu aðstæðum sem mál þetta varðar.[8] Tilvist innlends lagaákvæðis sem inniheldur ákvörðun um fjárhæð gjalds, ein og sér, breytir ekki þeirri skyldu. Landsdómstóllinn verður í öllu falli að framkvæma viðeigandi skoðun á staðreyndum málsins til að ganga úr skugga um skilvirkni viðeigandi tilskipunar.[9]

42. Í öðru lagi, minnir stefnandi á að bókun 35 við EES-samninginn leggi skyldu á EFTA-ríki innan EES-svæðisins að setja, ef þörf krefur, lagaákvæði þess efnis að EES-reglur gildi í þeim tilvikum sem komið getur til árekstra milli þeirra og annarra settra laga.[10]

43. Í máli þessu sé sú staða uppi að tilskipunin hefur verið leidd í lög með 7. mgr. 24. gr. upplýsingalaga nr. 140/2012. Þar af leiðandi skuli tilskipunin, sem innleidd EES-regla, ganga öðrum settum ákvæðum íslensks réttar framar ef þær stangast á.[11]

44. Hins vegar hafi aðildarríkin val um form og aðferð við innleiðingu, eins og kveðið er skýrt á um í 7. gr. EES-samningsins. Slíkt val getur þó ekki undanþegið aðildarríkin frá skyldu til að beita ákvæðum tilskipunarinnar. Þetta á sérstaklega við þegar tilskipun kveður á um skilyrðislausa og nægilega

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7 Vísað er til máls E-1/07 *Ákæruvaldið gegn A* [2007] EFTA Ct. Rep. 246, 39. mgr.
8 Vísað er til máls C-287/05 *Hendrix* [2007] ECR I-6934, 57. mgr.
9 Vísað er til 3. gr. EES-samningsins og máls E-11/12 *Koch and Others*, óbirtur dómur frá 13. júní 2013, 91. mgr.
10 Vísað er til áður tilvitnaðs máls *Ákæruvaldið gegn A*, 38. mgr.
11 Vísað er til mála E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct. Rep. 15, 77. mgr., og E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, 28.mgr.

obligation.[12] According to the plaintiff, there is no doubt that Article 6 of the Directive constitutes an obligation of this nature. It lays down a substantive rule fixing an upper limit on charges.

45. The plaintiff proposes that the Court should answer the fourth question as follows:

No. The Directive, which has been implemented by reference, must prevail in conflicts with other statutory law. A national court must satisfy itself, in the circumstances of the case, that a statutory provision is compatible with the Directive, Article 6. If a national court finds the statutory provision incompatible with the Directive, it must use the interpretative methods recognised by national law as far as possible to achieve the result sought by the Directive.

The fifth question

46. The plaintiff submits that self-financing requirements are relevant in determining the required rate of return. However, such relevance cannot alter the meaning of Article 6 of the Directive.[13]

47. The plaintiff proposes that the Court should answer the fifth question as follows:

Yes, provided that such account does not lead to charges in excess of the cost from supplying and allowing re-use.

The sixth question

48. Given its proposed answers to the previous five questions, the plaintiff does not propose an answer to the sixth question.

The defendants

49. The defendants submit that the wording of the first question is misleading. It follows from the wording of Article 6 of the Directive that calculations in the sense of that provision are calculations that are in line with the accounting principles applicable to the public sector bodies involved.

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12 Reference is made to *Ravintoloitsijain Liiton Kustannus Oy Restamark*, cited above, paragraph 77.

13 Reference is made to Case E-16/11 *ESA* v *Iceland*, judgment of 28 January 2013, not yet reported, paragraph 122.

skýra skyldu.[12] Stefndi telur engum vafa undirorpið að 6. gr. tilskipunarinnar hafi slíka skyldu að geyma. Í henni er að finna efnisreglu um efri mörk gjaldtöku.

45. Stefnandi leggur til að dómstóllinn svari fjórðu spurningunni með eftirfarandi hætti:

Nei. Tilskipunin sem innleidd var með tilvísun verður að ganga öðrum settum lagaákvæðum framar ef þær stangast á. Landsdómstóll verður að ganga úr skugga um að sett lagaákvæði samrýmist 6. gr. tilskipunarinnar. Ef landsdómstóllinn kemst að þeirri niðurstöðu að lagaákvæðið samrýmist ekki tilskipuninni verður hann að beita viðurkenndum lögskýringaraðferðum landsréttar eins og honum er frekast unnt til að ná fram því markmiði sem tilskipunin felur í sér.

Fimmta spurningin

46. Stefnandi telur að skipt geti máli við ákvörðun hagnaðarhlutar, hvort gerðar séu kröfur um það að opinber stofnun standi undir sér fjárhagslega. Það hafi þó engin áhrif á inntak 6. gr. tilskipunarinnar.[13]

47. Stefnandi leggur til að dómstóllinn svari fimmtu spurningunni með eftirfarandi hætti:

Já, að því gefnu að slíkt tillit leiði ekki til *gjaldtöku umfram kostnaðar við að láta gögn í té og leyfa endurnotkun þeirra.*

Sjötta spurningin

48. Að svörunum við fyrri fimm spurningunum virtum leggur stefnandi ekki til neitt svar við sjöttu spurningunni.

Stefndu

49. Stefndu telja að orðalag fyrstu spurningarinnar sé villandi. Það leiði af orðalagi 6. gr. tilskipunarinnar að útreikningar í skilningi ákvæðisins séu útreikningar í samræmi við þær reikningsskilareglur sem gilda um þá opinberu aðila sem málið varðar.

[12] Vísað er til áður tilvitnaðs máls *Ravintoloitsijain Liiton Kustannus Oy Restamark*, 77. mgr.
[13] Vísað er til málsins E-16/11 *ESA* v *Iceland*, óbirtur dómur frá 28. janúar 2013, 122. mgr.

50. In the view of the defendants, there is no doubt that information about the total income from supplying and allowing re-use of the information is readily available and verifiable, i.e. the total income from the charges collected for the services in question. In general, the total cost calculations have been based on the estimated financing needs of Registers Iceland. Calculations of the cost of collection, production, reproduction and dissemination of the information are available and have been presented to the national court.

51. The defendants submit that Article 6 of the Directive stipulates that the total income should not exceed the costs incurred to produce the information. In cases where the calculation of the costs is to some extent based on a reasonable estimate, which is in line with the accounting principles applicable to the public body in charge of the collection and distribution of the information, the article provides that such costs must nevertheless be within the upper limit on charging.

52. The defendants reject the suggestion by the plaintiff that the total income calculation should include stamp duties collected by the State. The defendants take the view that this suggestion has no basis in the provisions of the Directive. This is income that is not collected in order to supply and allow re-use of the information in question.

53. Furthermore, the defendants submit that Article 6 does not provide that calculations of the estimated costs and income should be provided to the user or made available at the time of determination of the fee.

54. The defendants have not proposed a reply to the first question.

The second question

55. According to the defendants, the second question clarifies somewhat why the first question has such limited relevance to the proceedings in the case before the national court. In their view, the plaintiff argues that the public revenues described in items a) and b) of the second question should be deducted from the total cost of collection, production, reproduction and

50. Að mati stefndu leikur enginn vafi á því að upplýsingar um heildartekjur af því að láta í té upplýsingarnar og leyfa endurnotkun þeirra eru fyrirliggjandi og sannreynanlegar, það er, heildartekjur af gjaldtöku vegna þeirrar þjónustu sem um ræðir. Almennt séð hafa kostnaðarútreikningar verið gerðir á grundvelli áætlaðrar fjárþarfar Þjóðskrár Íslands. Kostnaðarútreikningar vegna söfnunar, framleiðslu, fjölföldunar og dreifingar upplýsinganna eru tiltækar og hafa verið kynntar fyrir héraðsdómi.

51. Stefndu telja að 6. gr. tilskipunarinnar kveði á um að heildartekjur skuli ekki fara fram úr þeim kostnaði sem framleiðsla upplýsinganna hefur haft í för með sér. Í tilvikum þar sem kostnaðarútreikningar eru að einhverju marki byggðir á sanngjarnri áætlun, sem sé í samræmi við þær reikningsskilareglur sem gilda um þann opinbera aðila sem hefur umsjón með söfnun og dreifingu upplýsinganna, er kveðið á um það í greininni að slíkur kostnaður verði engu að síður að teljast innan efri marka gjaldtökunnar.

52. Stefndu hafna tillögu stefnanda um að telja skuli stimpilgjöld sem ríkið innheimti með við útreikning heildartekna. Stefndu líta svo á, að tillagan eigi sér enga stoð í ákvæðum tilskipunarinnar. Stimpilgjöld séu ekki innheimt til að láta í té og leyfa endurnotkun á umræddum upplýsingum.

53. Enn fremur telja stefndu að ekki sé gerð krafa um það í 6. gr. að notandi fái útreikninga kostnaðaráætlunar í hendur eða þeir séu gerðir aðgengilegir á þeim tímapunkti sem fjárhæð gjaldsins er ákveðin.

54. Stefndu hafa ekki gert tillögu um svar við fyrstu spurningunni.

Önnur spurningin

55. Að mati stefndu varpar önnur spurningin nokkru ljósi á það hvers vegna fyrri spurningin hefur lítið vægi við úrlausn málsins sem rekið er fyrir landsdómstólnum. Þau telja að stefnandi haldi því fram, að tekjur hins opinbera sem útlistaðar eru í a. og b.-hluta annarrar spurningar skuli dregnar frá heildarkostnaði við söfnun, framleiðslu, fjölföldun og dreifingu

dissemination of the information and data in question, before assessing whether the upper limit prescribed by Article 6 of the Directive is exceeded.

56. The defendants submit that the levying of taxes, such as those collected on the basis of the Stamp Duty Act No 36/1978 and Additional Treasury Revenue Act No 88/1991, has no bearing on the principles enshrined in Article 6 of the Directive. Registration taxes and stamp duties are not income from supplying and allowing re-use of documents and should not be taken into account when determining whether the provisions of Article 6 are complied with.

57. The defendants thus propose that the second question should be answered in the affirmative.

The third question

58. The defendants submit that the third question can be answered by direct reference to the purpose of the Directive, i.e. to provide a framework for the conditions governing re-use of public sector documents. As stipulated in recital 8 of the preamble to the Directive, public sector documents are documents collected, produced, reproduced and disseminated by public sector bodies to fulfil their public tasks. The public tasks of public sector bodies in Iceland are prescribed by law, including the task of collecting documents and information.

59. According to the defendants, Article 6 of the Directive implicitly recognises the cost of collection. Consequently, the defendants propose that the question should be answered in the affirmative.

The fourth question

60. The defendants submit that Article 6 provides that the total income from supplying and allowing the re-use of documents and data shall not exceed the cost of collection, production etc. While costs should be calculated in an appropriate manner, the legislator can estimate the cost and the fee as set out in the Directive. Moreover, the upper limit provided for in the Directive is without prejudice to the right of the public sector body to apply

þeirra upplýsinga og gagna sem um ræðir, áður en lagt er mat á það hvort farið hafi verið fram úr efri mörkunum sem kveðið er á um í 6. gr. tilskipunarinnar.

56. Stefndu telja að skattheimta, eins og sú sem framkvæmd er á grundvelli laga um stimpilgjald nr. 36/1978 og laga um aukatekjur ríkissjóðs nr. 88/1991, hafi engin áhrif á meginreglurnar sem 6. gr. tilskipunarinnar hefur að geyma. Skráningargjöld og stimpilgjöld séu ekki tekjur sem séu tilkomnar af því að láta skjöl í té og leyfa endurnotkun þeirra og ættu ekki að vera tekin með í útreikningum sem gerðir eru til að skera úr um hvort ákvæðum 6. gr. hafi verið fylgt.

57. Stefndu leggja því til að annarri spurningunni verði svarað játandi.

Þriðja spurningin

58. Stefndu telja að þriðju spurningunni megi svara með beinni skírskotun til markmiðs tilskipunarinnar, það er, að setja almennan ramma um skilyrði fyrir endurnotkun gagna frá hinu opinbera. Opinber gögn séu gögn sem opinberir aðilar safni, framleiði, fjölfaldi og dreifi við opinber störf sín, eins og segir í 8. lið formálsorða tilskipunarinnar. Opinber starfsemi stjórnvalda á Íslandi stjórnist af lögum og það eigi einnig við um söfnun gagna og upplýsinga.

59. Samkvæmt stefndu er kostnaðurinn samfara slíkri söfnun viðurkenndur með beinum hætti í 6. gr. tilskipunarinnar. Þar af leiðandi leggja stefndu til að dómstóllinn svari spurningunni játandi.

Fjórða spurningin

60. Stefndu halda því fram að 6. gr. kveði á um að heildartekjur af því að láta gögn og upplýsingar í té og leyfa endurnotkun þeirra skuli ekki fara fram úr kostnaði við söfnun, framleiðslu o.s.frv. Þótt gera beri viðeigandi kostnaðarútreikninga geti löggjafinn áætlað kostnaðinn og gjaldið, líkt og fram komi í tilskipuninni. Efri mörkin sem sett eru í tilskipuninni hafi enn fremur engin áhrif á rétt opinbers aðila til að innheimta lægri

lower charges or no charges at all, as explained in recital 8 of the preamble to the Directive.

61. According to the defendants, the question lacks clarity in that it presumes that the fee determined is not subject to substantive examination. On the contrary, they submit, in the event of the fee being determined by law, examination of the cost can be done ex-ante by the public authorities and the legislator and is subject to ex-post judicial review. This method of fixing the tariff does not preclude charges being cost-oriented and below the upper limit on charges provided for in Article 6.

62. However, the Directive does not impose detailed requirements for the timing and method of calculation, but leaves it to the public sector body to choose the relevant cost calculation method. In the case before the national court, the defendants have demonstrated that charges are based on appropriate estimates of costs, respecting the self-financing requirements imposed on Registers Iceland, and well within the margin of appreciation conferred by the Directive.

63. The defendants thus propose that the fourth question should be answered in the affirmative.

The fifth question

64. The defendants submit that this question is unclear as regards what general requirement is referred to. In their view, no general self-financing requirement exists under Icelandic law. In Iceland, public sector bodies are financed by public funding, by own revenue or by a mixture of the two. The funding of public bodies is prescribed by the State Budget, in which revenues stemming from charges and other sources of income received by the public body in question, not accrued to the Treasury, can be taken into account.

65. It is likewise unclear, they continue, what it would entail to take appropriate account of such general requirements in the determination of what costs are to be recovered and what bearing that would have on the provisions of Article 6 of the

gjöld eða sleppa gjaldtöku alfarið, eins og fram komi í 8. lið formálsorða tilskipunarinnar.

61. Að mati stefndu er spurningin ekki nægilega skýr að því leyti að í henni er gert ráð fyrir að fjárhæð gjaldsins hafi verið ákveðin án efnislegrar skoðunar. Þvert á móti, segja stefndu, að í þeim tilvikum þar sem gjöld eru ákveðin með lögum, geti opinber yfirvöld og löggjafinn kannað kostnaðinn fyrir fram og jafnframt sé ákvörðunin háð endurskoðunarvaldi dómstóla eftir gildistöku. Þessi aðferð við að ákveða fast gjald útilokar ekki að tekið sé mið af kostnaði og að gjaldið sé innan efri marka 6. gr.

62. Hins vegar er ekki finna sérstök skilyrði um tímasetningu og reikningsaðferð í tilskipuninni, en hún lætur opinbera aðilanum eftir val um reikningsaðferðina. Í málinu sem rekið er fyrir landsdómstólnum hafa stefndu sýnt fram á að gjöldin séu byggð á viðeigandi kostnaðaráætlunum, að teknu tilliti til þeirrar kröfu sem gerð er til Þjóðskrár Íslands, að hún standi undir sér fjárhagslega, og að þau séu vel innan viðmiðunarmarka tilskipunarinnar.

63. Stefndu leggja því til að dómstóllinn svari fjórðu spurningunni játandi.

Fimmta spurningin

64. Stefndu halda því fram að þessi spurning sé óljós hvað snertir þá almennu kröfu sem hún vísar til. Að þeirra mati er hvergi í íslenskri löggjöf gerð almenn krafa um að stofnanir ríkisins standi undir sér fjárhagslega. Á Íslandi er starfsemi opinberra aðila fjármögnuð með opinberu fé, með eigin tekjum eða blöndu af þessu tvennu. Kveðið er á um fjármögnun opinberra aðila í fjárlögum. Í þeim er hægt að taka tillit til tekna af gjaldtöku og annarra tekjulinda viðkomandi opinbers aðila, sem ekki renna beint til ríkissjóðs.

65. Að sama skapi telja stefndu óskýrt hvaða afleiðingar það hefði ef tekið yrði viðeigandi tillit til slíkra almennra krafna þegar ákveðið er hvaða kostnað beri að endurheimta og áhrif þess á ákvæði 6. gr. tilskipunarinnar. Stefndu telja að þess í stað sé mögulegt að

Directive. Rather, they submit that appropriate account can be taken of self-financing requirements where they are imposed. In the case at hand, a specific self-financing requirement has been imposed on Registers Iceland. The cost of producing the information is thus placed on re-users rather than taxpayers.

66. With reference to the clear wording of the Directive as regards both the calculation of costs and the scope of the State to determine whether or not charges are applied, the defendants fail to see the relevance of requesting an advisory opinion on the determination of the costs to be recovered.

67. First, the determination of the extent of the costs to be recovered and whether a reasonable return on investment is required relies on a calculation of eligible costs, not on the existence of possible requirements for public sector bodies to finance their operation.

68. Second, the Directive leaves no doubt as to the right of the States or public sector bodies to decide whether to recover all eligible costs, to apply lower charges or to apply no charges at all.

69. Third, recital 14 of the preamble to the Directive prescribes that, where charges are imposed, the total income should not exceed the total costs, having due regard to the self-financing requirements of the public sector body concerned, where applicable. In cases where public sector bodies are required to be self-financing, taking account of such requirements is therefore compatible with the Directive.

70. Consequently, the defendants submit that the answer to the fifth question should be that Article 6 of the Directive does not prescribe to what extent eligible costs are recovered and to what extent they are covered by public funds, as long as the upper limit provided for by the article is estimated.

taka viðeigandi tillit til krafna um að opinberir aðilar standi undir sér í þeim tilvikum sem slík krafa er gerð. Í máli því sem rekið er fyrir héraðsdómi eru aðstæður með þeim hætti að gerð hefur verið sérstök krafa til Þjóðskrár Íslands um að hún standi undir sér fjárhagslega. Það séu því endurnotendur, í stað skattborgara, sem látnir eru bera kostnaðinn af framleiðslu upplýsinganna.

66. Með vísan til hins skýra orðalags tilskipunarinnar, bæði varðandi kostnaðarútreikninga og val aðildarríkis um að ákveða hvort gjöld skuli innheimt, geta stefndu ekki séð að þörf sé á ráðgefandi áliti um útreikning á þeim kostnaði sem þarf að mæta.

67. Í fyrsta lagi, byggist umfang þess kostnaðar sem þarf að mæta og hvort ætlast megi til sanngjarns hagnaðarhlutar af fjárfestingunni á útreikningum viðeigandi kostnaðarþátta, en ekki á kröfu sem kann að vera gerð til opinberra aðila um að þeir standi undir starfsemi sinni fjárhagslega.

68. Í öðru lagi, gefur tilskipunin ekki tilefni til vafa um þann rétt aðildarríkis eða opinberra stofnana til að ákveða hvort þau reyni að mæta öllum kostnaði, hvort þau innheimti gjöld sem eru lægri en því nemur eða sleppi gjaldtöku alfarið.

69. Í þriðja lagi, er kveðið á um það í 14. lið formálsorða tilskipunarinnar að ef gjald er tekið skulu heildartekjurnar ekki vera meiri en sem nemur heildarkostnaðinum, að teknu tilliti til krafna um að opinber aðili standi undir sér fjárhagslega þar sem það á við. Það er því í samræmi við tilskipunina að tekið sé tillit til þess í tilvikum þar sem þess er krafist af opinberum aðilum að þeir standi undir sér fjárhagslega.

70. Samkvæmt framansögðu leggja stefndu til að fimmtu spurningunni verði svarað með þeim hætti að 6. gr. tilskipunarinnar kveði hvorki á um, að hvaða marki skuli endurheimta viðurkenndan kostnað, né að hvaða marki slíkt skuli gert með almannafé, að því gefnu að efri mörkin sem sett eru í ákvæðinu séu virt.

The sixth question

71. The defendants submit that it follows from the clear wording of the Directive, in particular its Article 6 and recital 14 of the preamble, what cost elements may be taken into account and that it is for the national courts to determine whether cost allocation and calculations are adequate and in line with the accounting principles applicable to the public sector body involved. As previously mentioned, where the public body concerned is required to be self-financing, account can be taken of such requirements when determining the charges.

72. The defendants further submit that the relevant cost elements are not limited to marginal costs, i.e. the costs of reproducing and disseminating. Rather, pursuant to Article 6 and recital 14 of the preamble to the Directive, the costs taken into account shall be the costs incurred in the collection, production, reproduction and dissemination of the information in question.

73. As regards the Directive's reference to applicable accounting principles, the defendants submit that it is for the national courts to determine whether such principles, and, in the case of Iceland, national law concerning service charges imposed by public sector bodies, are correctly applied and that charges calculated are in accordance with them.

74. The defendants have not proposed an answer to the sixth question.

EFTA Surveillance Authority

Preliminary remarks

75. ESA observes that the national court only makes reference to Article 6 of the Directive. However, ESA considers that the first and fourth questions referred cannot be answered without reference also to Article 7 of the Directive. The Court should thus interpret the references to Article 6 in those questions as referring to Articles 6 and 7.

Sjötta spurningin

71. Stefndu telja skýrt samkvæmt orðalagi tilskipunarinnar, þá sérstaklega 6. gr. og 14. lið formálsorða hennar, hvaða kostnaðarliða megi líta til og að það sé dómstóla aðildarríkjanna að ákveða hvort dreifing kostnaðarins og útreikningar samrýmist þeim reikningsskilareglum sem gilda um þann opinbera aðila sem málið varðar. Eins og áður segi megi líta til þess við ákvörðun gjalda að gerð sé krafa til opinbers aðila um að hann standi undir sér fjárhagslega.

72. Stefndu halda því einnig fram að viðeigandi kostnaðarliðir takmarkist ekki við lágmarkskostnað, það er kostnað af fjölföldun og dreifingu. Þess í stað beri að taka tillit til kostnaðar sem söfnun, framleiðsla, fjölföldun og dreifing umræddra upplýsinga hafi haft í för með sér, í samræmi við 6. gr. og 14. lið formálsorða tilskipunarinnar.

73. Varðandi tilvísun tilskipunarinnar til reikningsskilareglna sem við eiga, telja stefndu að það sé landsdómstólsins að ákveða hvort slíkum reglum, og í tilviki Íslands, reglum landsréttar um þjónustugjöld innheimt af opinberum aðilum hafi verið réttilega beitt, og hvort útreiknuð gjöld samrýmist þeim.

74. Stefndu hafa ekki gert tillögu um hvernig svara skuli sjöttu spurningunni.

Eftirlitsstofnun EFTA

Almennar athugasemdir

75. ESA bendir á að landsdómstóllinn vísi einungis til 6. gr. tilskipunarinnar. ESA telur þó að fyrstu og fjórðu spurningunni sem hann leitar ráðgefandi álits á verði ekki svarað nema með hliðsjón af 7. gr. tilskipunarinnar. EFTA-dómstóllinn ætti því að túlka tilvísanir til 6. gr. með þeim hætti að með þeim sé vísað bæði til 6. og 7. gr.

76. ESA observes that the Directive provides for a minimum harmonisation as regards basic conditions for making public sector information available to re-users, for instance provisions on non-discriminatory charging and transparency. Member States are encouraged, however, to go beyond the minimum level and adopt measures that favour re-use.

77. ESA therefore submits that the Court should interpret the Directive in such a way that the re-use of documents is not unduly restricted.

78. ESA submits that it is clear from Article 6 of the Directive that bodies may charge a fee for access to information which they hold in circumstances falling within the scope of the Directive. However, Article 6 does not set out detailed rules for how much public sector bodies should be allowed to charge in exchange for information.

79. According to ESA, Article 6 sets out a model for the calculation of the maximum levels of charges that may be charged by public sector bodies. This calculation is to be carried out by looking at the documents themselves – on balance, the income from supplying and allowing re-use of documents shall not exceed the cost (to the public body, logically) of collection, production, reproduction and dissemination.

80. ESA submits that this should be the essential reference point for the calculation of permissible charges. It also reflects the principle that the steps involved in supplying documents for re-use should result in neither an advantage nor a disadvantage for public bodies. This interpretation is further borne out in the (non-mandatory) second sentence in Article 6, which provides that a "cost-oriented" model of calculating fees should be used.

81. With regard to how the fees should be calculated, ESA submits that, although Article 6 gives States the possibility of carrying out this calculation on a document-by-document basis, this interpretation could result in a charging system that is too complex to be workable. ESA therefore takes the view that a generally set fee level is not only permitted by the Directive, but is in fact preferable.

76. ESA bendir á að tilskipunin kveði á um lágmarkssamhæfingu varðandi grunnskilyrði þess að upplýsingar séu gerðar aðgengilegar endurnotendum, til dæmis með ákvæðum um gagnsæi og bann við mismunun í gjaldtöku. Aðildarríki eru hvött til þess að ganga lengra en að uppfylla einungis lágmarkskröfur og gera ráðstafanir sem greiða fyrir endurnotkun.

77. ESA telur því að dómstólnum beri að túlka tilskipunina með þeim hætti að endurnotkun gagna verði ekki óþarflega takmörkuð.

78. ESA telur að skýrt sé samkvæmt 6. gr. tilskipunarinnar að opinberir aðilar megi taka gjald fyrir aðgang að upplýsingum í þeirra vörslu í þeim tilvikum sem undir gildissvið tilskipunarinnar falla. Hins vegar sé engar skýrar reglur að finna um það í 6. gr. hversu hátt gjald opinberir aðilar megi innheimta í skiptum fyrir upplýsingar.

79. Samkvæmt ESA hefur 6. gr. að geyma fyrirmynd að útreikningum sem gilda skulu um efri mörk þeirra gjalda sem opinberum aðilum er heimilt að innheimta. Þá útreikninga beri að gera með hliðsjón af gögnunum sjálfum. Þegar allt er tekið með í reikninginn, skulu tekjur af því að láta gögnin í té og heimila endurnotkun þeirra ekki fara fram úr kostnaði opinbers aðila af söfnun, framleiðslu, fjölföldun og dreifingu þeirra.

80. ESA telur þetta atriði eiga að vera grundvallarviðmið þegar leyfileg gjaldtaka er reiknuð út. Það sé einnig í samræmi við þá meginreglu að ráðstafanir sem gera þurfi til að láta gögnin í té eigi hvorki að vera opinberum aðila í hag eða óhag. Þessi túlkun styðst einnig við tilmæli síðari hluta 6. gr., hvar segir að notast beri við aðferð sem geri ráð fyrir því að gjöld séu „kostnaðartengd“.

81. Um útreikning gjaldanna segir ESA að þótt 6. gr. gefi aðildarríkjum kost á að framkvæma slíkan útreikning í tengslum við hvert skjal fyrir sig þá gæti slík útfærsla leitt til þess að kerfi vegna gjaldtökunnar yrði of flókið til að virka sem skyldi. ESA er því þeirrar skoðunar að ákvörðun um fjárhæð gjaldanna sé ekki aðeins heimilt að taka fyrirfram samkvæmt tilskipuninni, heldur sé æskilegt að svo sé gert.

82. ESA further submits that the fee levels should be calculated with reference to the process of handling the documents, taking into account all costs and all revenues in that connection.

83. According to ESA, the purpose of this provision (indeed the whole Directive) is to encourage public sector bodies to disseminate information. The logic behind provisions aimed at establishing cost neutrality must be to ensure that public sector bodies are not discouraged from making available documents they have in their possession. These bodies are also given an incentive in the form of a reasonable return on their investment in facilitating the re-use of documents.

84. ESA observes that recital 14 of the preamble to the Directive provides that any excessive prices should be precluded, as this would undermine the effectiveness of the Directive. The recital also emphasises that public sector bodies are entitled to apply lower charges or no charges at all, and that States should encourage public sector bodies to make documents available at charges that do not exceed the marginal costs of reproducing and disseminating the documents.

85. ESA contends that, given the minimum levels of harmonisation in the Directive, it must be for the national court to decide what constitutes a reasonable return on investment on the basis of the facts of the case at hand. In assessing these facts, the national court should require the public sector body to show that its fee levels are in compliance with the Directive. Referring to recital 14 of the preamble to the Directive, ESA further submits that the national court should also take account of whether the public sector body in question is required to be self-financing.

86. ESA asserts that Articles 6 and 7 of the Directive should be read together. Article 7 ensures that the charges made are transparent, while Article 6 establishes the limits on the level of fees that may be charged.

87. According to ESA, Article 7 of the Directive obliges the State to ensure transparency by two means: first, through the publication

82. ESA telur jafnframt að reikna verði fjárhæð gjaldanna með hliðsjón af ferlinu við meðferð skjalanna og taka með í reikninginn allan kostnað og allar tekjur sem því tengjast.

83. Að sögn ESA er markmið ákvæðisins (og raunar tilskipunarinnar allrar) að hvetja opinbera aðila til að dreifa upplýsingum. Rökin að baki ákvæðunum sem miða að fjárhagslegu hlutleysi hljóti að vera þau, að ákvæðin tryggi að opinberir aðilar séu hvattir til þess að gera gögn sem þeir hafa í vörslum sínum aðgengileg. Einnig sé það opinberum aðilum hvati til að auðvelda endurnotkun gagna að þeir geti vænst sanngjarns hagnaðarhlutar af fjárfestingu sinni.

84. ESA bendir á að kveðið sé á um það í 14. lið formálsorða tilskipunarinnar að koma beri í veg fyrir of háa verðlagningu, þar eð hún geti grafið undan áhrifum tilskipunarinnar. Í sama lið er lögð á það áhersla að opinberum aðilum sé heimilt að innheimta lægri gjöld eða engin gjöld og að aðildarríkin skuli hvetja opinbera aðila til að gera gögn aðgengileg gegn gjaldi sem ekki sé hærra en lágmarkskostnaður við að fjölfalda gögnin og dreifa þeim.

85. Í ljósi þess að ekki sé gengið langt í átt að samræmingu með tilskipuninni, telur ESA að það verði að vera landsdómstólsins að ákveða hvað teljist sanngjarn hagnaðarhluti af fjárfestingu opinbers aðila, með hliðsjón af atvikum málsins. Þegar landsdómstóllinn leggur mat á málsatvik eigi hann að fara fram á það við hinn opinbera aðila að hann sýni fram á fjárhæðir gjaldsins sem hann innheimti samrýmist tilskipuninni. Með vísan til 14. liðs formálsorða tilskipunarinnar, telur ESA að héraðsdómur eigi einnig að kanna hvort sú skylda hvíli á umræddum opinberum aðila að hann standi undir sér fjárhagslega.

86. ESA heldur því fram að 6. og 7. gr. tilskipunarinnar verði að túlka með hliðsjón hvora af annarri. 7. gr. tryggi að gjaldtakan sé gagnsæ, en 6. gr. kveði á um efri mörk hennar.

87. Samkvæmt ESA er í 7. gr. tilskipunarinnar lögð sú skylda á aðildarríki að tryggja gagnsæi með tvennum hætti: Annars vegar

of standard charges; and second, by obliging the public sector body to show how these standard charges are calculated. The wording of this article further supports the construal of Article 6 as imposing a burden of proof on the public sector body to demonstrate that the charges are compatible with the Directive. However, Article 7 does not require a public body to indicate or make available, before receiving a request, the details of the way in which the standard charges are calculated.

The first question

88. Based on its interpretation set out above, ESA submits that Article 6 of the Directive precludes a situation in which the total income exceeds the cost of collection, production, reproduction and dissemination of the documents for re-use, together with a reasonable return on investment. It is for the national court to verify that this is the case on the basis of the facts before it.

89. ESA notes that, in the present instance, standard charges are applied for the re-use of the documents concerned. It submits that Article 7 of the Directive obliges the public sector body in question to indicate the calculation basis for the published charges. The calculation basis must be indicated upon request, but it does not have to be disclosed at any time before that point.

90. ESA observes that, according to the request from the national court, the plaintiff has argued that there is nothing to indicate that an examination was carried out of the cost of collecting, producing, reproducing and disseminating the information in question. On the other hand, the defendants have argued that the fees for enquiries to the register of deeds, certificates of ownership status and of ownership history were based on a reasonable estimate of the institution's operating budget and the estimated allocation of costs between individual aspects of operations. They have also referred to the fact that the levy was based on Act No 6/2001. However, the national court does not state whether the defendants have fully explained the calculation basis for the published charges.

með því að birta stöðluð gjöld, og hins vegar með því að skylda opinbera aðila til að tilgreina grundvöll útreikninga á gjaldinu. Orðalag greinarinnar rennir jafnframt stoðum undir þá túlkun 6. gr. að hún leggi sönnunarbyrðina á hinn opinbera aðila um að sýna fram á að gjaldtaka sé í samræmi við tilskipunina. 7. gr. skyldar þó ekki opinberan aðila, áður en hann fær beiðni, til að gefa til kynna eða gera aðgengilegar nákvæmar upplýsingar um hvernig hin stöðluðu gjöld eru reiknuð út.

Fyrsta spurningin

88. Á grundvelli ofangreindrar túlkunar telur ESA að 6. gr. tilskipunarinnar girði fyrir aðstæður þar sem heildartekjur fara fram úr kostnaði við söfnun, framleiðslu, fjölföldun og dreifingu gagna til endurnotkunar, auk sanngjarns hagnaðarhlutar af fjárfestingunni. Það sé því landsdómstólsins að ganga úr skugga um að svo sé í máli því sem rekið er fyrir honum.

89. ESA bendir á að í því tilviki sem hér um ræðir séu stöðluð gjöld innheimt fyrir endurnotkun viðkomandi gagna. Hún heldur því fram að 7. gr. tilskipunarinnar skyldi þann opinbera aðila sem í hlut á til að gefa til kynna hvaða útreikningar liggi að baki þeirri gjaldskrá sem birt er. Upplýsa ber um grundvöll útreikninganna þegar um er beðið, en slíkur útreikningur þarf ekki að liggja fyrir áður en beiðni berst.

90. ESA telur að samkvæmt beiðni landsdómstólsins haldi stefnandi því fram að ekkert bendi til þess að fram hafi farið könnun á því hver kostnaðurinn sé við söfnun, framleiðslu, fjölföldun og dreifingu umræddra upplýsinga. Stefndu hafa hins vegar borið því við að gjaldtaka vegna fyrirspurna úr þinglýsingarbók, eignastöðuvottorð og eignasöguvottorð hafi byggst á skynsömu mati þar sem tekið var tillit til rekstraráætlunar stofnunarinnar og áætlaðrar skiptingar kostnaðar á einstaka rekstrarþætti. Stefndu hafa einnig vísað til þess að gjaldtakan hafi byggst á lögum nr. 6/2001. Landsdómstóllinn lætur þó ekkert uppi um það hvort stefndu hafi útskýrt til hlítar hver grundvöllur útreikninganna að baki gjöldunum sé.

91. ESA proposes that the Court should answer the first question as follows:

Article 6 of the Directive does not preclude public sector bodies from charging a fee on account of each mechanical enquiry for information from the register, provided that the total income from such charges does not exceed the costs of collection, production, reproduction and dissemination of documents plus a reasonable return on investment. Article 7 requires the calculation basis for standard charges to be indicated upon request.

The second question

92. ESA submits that Article 6 of the Directive, as interpreted above, precludes circumstances in which no account is taken of income accruing as a result of the collection of the documents. ESA takes the view that, if income accrues to the State during the course of collection, it will clearly have the effect of reducing or offsetting the cost of collection.

93. ESA proposes that the Court should answer the second question as follows:

When determining the "cost" subject to Article 6 of the Directive, the EEA EFTA States are obliged to take into account:

a. income accruing to the State when documents are collected, in the form of fees paid by individuals and undertakings for the recording of contracts in the registers of legal deeds, and

b. income accruing to the State when documents are collected, in the form of taxes which are levied as stamp duties on recorded legal deeds at the time when individuals and undertakings apply to have them recorded in the registers of legal deeds.

insofar as those income streams reduce or offset the cost of collection of documents to be re-used.

The third question

94. ESA interprets Article 6 as being intended to enable and stimulate public bodies to provide documents in a cost-neutral way. In this light, the Directive should not, ESA submits, be interpreted so

91. ESA leggur til að dómstóllinn svari fyrstu spurningunni með eftirfarandi hætti:

6. gr. útilokar ekki að opinberir aðilar innheimti fé fyrir hverja vélræna fyrirspurn úr þinglýsingarbók, að því gefnu að heildartekjur af slíkri gjaldtöku fari ekki fram úr kostnaði af söfnun, framleiðslu, fjölföldun og dreifingu gagna auk sanngjarns hagnaðarhlutar af fjárfestingunni. Samkvæmt 7. gr. er gerð krafa um að grundvöllur útreikninga að baki stöðluðum gjöldum sé gefinn til kynna þegar um það er beðið.

Önnur spurningin

92. ESA telur að 6. gr. tilskipunarinnar, eins og hún er skýrð að framan, útiloki kringumstæður þar sem ekkert tillit er tekið til tekna sem til verða við söfnun gagnanna. ESA er þeirrar skoðunar að ef tekjur verða til á meðan á söfnuninni stendur muni það augljóslega hafa þau áhrif að þær lækki eða komi til móts við kostnaðinn af söfnuninni.

93. ESA leggur til að dómstóllinn svari annarri spurningunni með eftirfarandi hætti:

Við ákvörðun „kostnaðar" í skilningi 6. gr. tilskipunarinnar ber aðildarríkjunum að líta til:

a. tekna hins opinbera, sem verða til við söfnun gagna, í formi gjalda sem einstaklingar og fyrirtæki greiða fyrir skráningu löggerninga í þinglýsingarbók, og

*b. tekna hins opinbera, sem verða til við söfnun gagna, í formi skatta sem eru innheimtir sem stimpilgjöld af skráðum löggerningum samtímis því að einstaklingar og fyrirtæki leita eftir skr*áningu þeirra í þinglýsingarbók.

Að því marki sem þessar tekjur dragi úr eða vegi upp á móti kostnaði við gögnin sem á að endurnota.

Þriðja spurningin

94. ESA leggur þann skilning í 6. gr., að henni sé ætlað að auðvelda opinberum aðilum að veita aðgang að gögnum og hvetja þá til þess án aukinna útgjalda. Í ljósi þessa telur

as to preclude a calculation that is based on the activities of a public sector body as a whole, balancing total income against total costs. However, the use of the word "documents" in the first sentence of Article 6 implies that this calculation should be based on the activities of the public sector body that relate to the documents themselves.

95. Thus, ESA considers that the Directive, properly interpreted, precludes fees that go beyond the costs related to the documents (together with a reasonable return on the investment made by the public sector body in supplying and allowing the re-use of documents) and instead go towards covering the cost of operating the National Property Registry itself.

96. ESA proposes that the Court should answer the third question as follows:

Article 6 of the Directive does not preclude an evaluation made on the basis of the general activities of a particular public sector body. When the "cost" pursuant to Article 6 of the Directive is determined, account may be taken of costs incurred by a public sector body in connection with the collection of documents which it is legally obliged to collect irrespective of whether or not individuals or undertakings request to re-use them. However, the Directive precludes fees which go above and beyond the costs linked to the documents (together with a reasonable return on investment) and instead go to meet the cost of operating the public sector body itself.

The fourth question

97. ESA submits that it is clear from Article 6 that any legislation setting the fee must first be compatible with the requirements of that article. Furthermore, Article 7 requires standard charges to be pre-established and published. That article also requires that public sector bodies are able to indicate the calculation basis for the published charge.

98. ESA suggests that it would be open to the national court to conclude that the fact that Registers Iceland bases fee levels on provisions that provide exact amounts for specific types of

ESA að ekki beri að túlka tilskipunina þannig að hún útiloki að útreikningar byggist á jafnvægi milli heildartekna og heildarkostnaðar við alla starfsemi opinbers aðila. Hins vegar bendir orðið „gögn“ í fyrstu setningu 6. gr. til þess að grundvöllur slíkra útreikninga skuli vera sú starfsemi hins opinbera aðila sem lúti að sjálfum gögnunum.

95. ESA telur því rétta túlkun tilskipunarinnar girða fyrir að fjárhæð gjalda sé umfram kostnað við þau, auk sanngjarns hagnaðarhlutar af fjárfestingu hins opinbera aðila við að láta gögnin í té og leyfa endurnotkun þeirra og að andvirði gjaldanna sé þess í stað varið til að standa straum af rekstri Fasteignaskrár Íslands.

96. ESA leggur því til að dómstóllinn svari þriðju spurningunni með eftirfarandi hætti:

6. gr. tilskipunarinnar girðir ekki fyrir að almenn starfsemi tiltekin opinbers aðila liggi til grundvallar mati. Við ákvörðun „kostnaður“ í skilningi *6. gr. tilskipunarinnar er heimilt að telja með kostnað sem opinber aðili hefur af söfnun gagna sem honum er lögskylt að safna óháð því hvort einstaklingar og fyrirtæki óska eftir endurnotkun þeirra. Tilskipunin útilokar* þó að fjárhæð gjalda sé umfram kostnað við þau (auk sanngjarns hagnaðarhlutar *af fjárfestingu hins opinbera aðila) og að gjaldið sé* þess í stað *notað til að standa straum af rekstri hins opinbera aðila.*

Fjórða spurningin

97. ESA telur að skýrt sé samkvæmt 6. gr. að lagaákvæði sem hefur að geyma ákvörðun um fjárhæð gjaldsins verði fyrst að samrýmast kröfum þeim sem gerðar eru í 6. gr. Enn fremur er gerð sú krafa í 7. gr. að stöðluð gjöld séu ákveðin fyrir fram og birt. Í sömu grein er gerð krafa um að opinberir aðilar gefi til kynna grundvöll útreikninganna sem liggja að baki gjaldinu.

98. ESA telur að landsdómstóllinn geti komist að þeirri niðurstöðu að sú staðreynd, að Þjóðskrá byggi gjaldskrá sína á ákvæðum sem kveða nákvæmlega á um fjárhæð gjalda vegna tiltekinna

information fulfils the requirement in Article 7 of the Directive that the fees must be pre-established and published.

99. However, it is clear from the wording of the Directive that, on request, Registers Iceland must be able to specify the calculation basis for the published charges. ESA notes in this connection that the national court may ask Registers Iceland to justify the application of the tariffs in question to its practices and charges.

100. ESA proposes that the Court should answer the fourth question as follows:

Without prejudice to the requirements of Article 6, Article 7 of the Directive permits the legislature to set the amount of the fee in legislation without any particular amount being made subject to substantive examination. Such amounts must be pre-established and published. Moreover, on request the public sector body must indicate the basis of calculation for the published charge.

The fifth question

101. ESA submits that the answer to the fifth question should plainly be in the affirmative: the Directive does not preclude a general requirement that such bodies be self-financing.

The sixth question

102. ESA submits that it follows that from the interpretation of the Directive set out above that permitted self-financing requirements must be related to the handling of the documents themselves.

103. ESA proposes that the Court should answer the sixth question as follows:

It is for the national court to take into account the specific facts of each set of circumstances in determining the "cost" pursuant to Article 6 of the Directive. However, the cost elements in public sector operations which may be taken into account must be connected to the collection, production, reproduction and dissemination of documents. A self-financing obligation which has no connection to these processes cannot be taken into account.

upplýsinga, uppfylli kröfu 7. gr. tilskipunarinnar um að gjald sé ákveðið fyrirfram og upplýsingar um það birtar.

99. Það er þó ljóst af orðalagi tilskipunarinnar að ef fyrirspurn þar að lútandi berst Þjóðskrá Íslands ber henni skylda til að gera grein fyrir grundvelli útreikninganna að baki hinum birtu gjöldum. Í þessu sambandi bendir ESA á að landsdómstóllinn geti farið fram á það við Þjóðskrá Íslands að hún rökstyðji notkun umræddrar gjaldskrár með hliðsjón af starfseminni og gjöldunum.

100. ESA leggur til að dómstóllinn svari fjórðu spurningunni með eftirfarandi hætti:

Með fyrirvara um kröfur 6. gr., er löggjafanum heimilt, samkvæmt 7. gr. tilskipunarinnar, að ákveða fjárhæð gjaldsins með lögum án þess að ákveðin fjárhæð sæti efnislegri skoðun. Slíkar fjárhæðir verða að vera fyrir fram ákveðnar og birtar. Jafnframt ber hinum opinbera aðila skylda til að gera grein fyrir grundvelli útreikninganna að baki hinum birtu gögnum ef fyrirspurn þar að lútandi berst.

Fimmta spurningin

101. ESA telur að svara beri fimmtu spurningunni játandi. Tilskipunin útiloki ekki að gerð sé almenn krafa um að slíkar stofnanir standi undir sér fjárhagslega.

Sjötta spurningin

102. ESA telur að það leiði af framangreindri túlkun tilskipunarinnar að þær kröfur sem gerðar eru um að stofnun standi undir sér fjárhagslega verði að tengjast meðferð þeirra gagna sem um ræðir.

103. ESA leggur til að dómstóllinn svari sjöttu spurningunni með eftirfarandi hætti:

Það er landsdómstólsins að taka mið af *atvikum málsins í hverju tilviki fyrir sig þegar hann ákvarðar „kostnað" samkvæmt 6. gr. tilskipunarinnar. Þeir kostnaðarþættir í rekstri hins opinbera sem taka má tillit til verða að tengjast söfnun, framleiðslu, fjölföldun og dreifingu gagnanna. Ekki má líta til kröfu um að stofnun standi undir sér fjárhagslega ef hún tengist ekki fyrrgreindri starfsemi.*

European Commission

Preliminary remarks

104. The Commission submits that several key principles can be derived from Articles 6 and 7, read in light of recital 14 of the preamble to the Directive. First, public sector bodies can charge for the re-use of information. Second, they are encouraged to fix charges as low as possible. Third, the total amount of revenue a public sector body can collect in a given accounting period through charging re-users is limited to the costs incurred in connection with the collection, processing, reproduction and dissemination of the information during that period, together with a reasonable return on its investment (this latter element being intended to reflect the fact that many public sector bodies have to generate a substantial part of their operating budget from own income). Fourth, public sector bodies must pre-establish and publish charges for re-use, so that potential re-users can assess whether a request for such data is economically interesting. Finally, upon request, public sector bodies must specify the calculation basis for those charges.

The first question

105. The Commission reiterates that, by virtue of Article 6, any charges must be calculated in such a way as to ensure that the total income does not exceed the defined ceiling. It follows that, when fixing a charge, the public sector body must previously have identified any relevant costs as referred to in Article 6 and also assessed the income it expects to generate thereby.

106. The Commission accepts that this may give rise to certain practical difficulties, particularly in the first accounting period after the release of information for re-use, when there may be very little evidence of how many re-users are likely to be interested in that information. However, it takes the view that an estimate of total income must at least be made in order to comply with the requirements of Article 6 of the Directive. This is further reinforced by the transparency obligations in Article 7, since this

Framkvæmdastjórn Evrópusambandsins

Almennar athugasemdir

104. Framkvæmdastjórnin telur að þegar 6. og 7. gr. tilskipunarinnar eru túlkaðar með hliðsjón af 14. lið formálsorða hennar sé ljóst að þessar greinar hafa nokkrar meginreglur að geyma. Í fyrsta lagi, að opinberum aðilum sé heimil gjaldtaka vegna endurnotkunar upplýsinga. Í öðru lagi, að þeir skuli hvattir til að hafa stöðluð gjöld eins lág og mögulegt er. Í þriðja lagi, að heildartekjur opinbers aðila af gjöldum sem innheimt eru af endurnotendum á tilteknu uppgjörstímabili skuli takmarkaðar við kostnaðinn sem hann hefur af söfnun, vinnslu, fjölföldun og dreifingu upplýsinganna á því tímabili, auk sanngjarns hagnaðarhlutar af fjárfestingu (síðastnefnda atriðið tekur mið af þeirri staðreynd, að margir opinberir aðilar verða að standa undir stórum hluta rekstraráætlunar með eigin tekjum). Í fjórða lagi, að opinberir aðilar verði að ákveða fjárhæð gjalds vegna endurnotkunar og birta hana, svo að mögulegir endurnotendur geti metið hvort það sé fýsilegt út frá fjárhagslegu sjónarmiði að biðja um að fá gögnin afhent. Að síðustu, að opinberir aðilar verði að tilgreina grundvöll útreikninga gjaldtökunnar, ef þeir eru beðnir um það.

Fyrsta spurningin

105. Framkvæmdastjórnin ítrekar að samkvæmt 6. gr. verði að reikna öll gjöld með þeim hætti að þau tryggi að heildartekjur vegna þeirra fari ekki fram úr skilgreindu þaki. Af þessu leiðir að þegar fjárhæð gjalds er ákveðin, verður hinn opinberi aðili að hafa kannað viðeigandi kostnaðarliði, sem vísað er til í 6. gr., og auk þess metið hverjar tekjurnar af starfseminni verði.

106. Framkvæmdastjórnin viðurkennir að þetta geti skapað vandamál í framkvæmd, sérstaklega á fyrsta uppgjörstímabilinu eftir útgáfu upplýsinga til endurnotkunar, þegar fáar vísbendingar finnast um þann fjölda notenda sem gæti haft áhuga á þeim. Að minnsta kosti verði að gera áætlun um heildartekjur til að uppfylla kröfur 6. gr. tilskipunarinnar, að mati framkvæmdastjórnarinnar. Sá skilningur styðjist einnig við skyldur um gagnsæi samkvæmt 7. gr. tilskipunar, úr því að þar sé ekki einungis kveðið á um

provision requires not only that charges be pre-established, but also that the calculation basis is available upon request – which necessarily implies that a value has been placed upon both total income and cost.

The second question

107. The Commission submits that although the text of Article 6 is silent on the relevance of income accruing to the State via fees for registration or stamp duties when documents are collected, it is clear that the total income from charges for re-use cannot exceed the cost of collection, production, reproduction and dissemination of those documents (as well as a reasonable return on investment).

108. Since the initial collection of the documents is itself part of the overall process referred to in Article 6, the Commission takes the view that it precludes a public sector body from fully recovering total costs through a charge on re-use, and, in addition, collecting separate fees or charges related to initial collection. Such a situation would not only breach the ceiling laid down by Article 6, but would also be contrary to the objective of keeping charges for re-use as low as possible in order to foster innovation and the development of digital content services, as stated in Article 1(1) of the Directive, and also in recital 5 of the preamble to the Directive.

The third question

109. The Commission submits that the Directive makes no distinction between the re-use of information collected as part of a legal obligation, and other types of information. This is further illustrated by the general definition of re-use set out in Article 2(4) of the Directive.

The fourth question

110. In the Commission's view, the fourth question is very closely linked to the first question, since it asks whether a charge may be fixed in legislation without the amount being subject to substantive examination. As for question 1, the Commission emphasises that charges made for the re-use of information must

að gjöldin skuli fyrirfram ákveðin, heldur einnig að grundvöllur útreikninganna skuli tilgreindur ef þess er óskað. Það gerir óhjákvæmilega ráð fyrir því að mat hafi farið fram, bæði á heildartekjum og kostnaði.

Önnur spurningin

107. Framkvæmdastjórnin telur að þótt ekkert komi fram í texta 6. gr. um vægi tekna sem ríkið hefur af skráningargjöldum og stimpilgjöldum við söfnun gagna, sé ljóst að heildartekjur af endurnotkun geti ekki verið umfram kostnað við söfnun, framleiðslu, fjölföldun og dreifingu þessara gagna, auk sanngjarns hagnaðar af fjárfestingunni.

108. Þar sem upphafleg söfnun gagnanna er sjálf hluti þess heildarferlis sem vísað er til í 6. gr, er framkvæmdastjórnin þeirrar skoðunar að það útiloki opinbera aðila frá því að endurheimta kostnað að fullu með gjaldtöku vegna endurnotkunar samhliða sérstakrar gjaldtöku vegna upphaflegu söfnunarinnar. Slíkar aðstæður væru ekki einungis brot á þakinu sem sett er í 6. gr., heldur væru þær einnig í andstöðu við það markmið, að halda gjöldum vegna endurnotkunar eins lágum og kostur er til að styðja við nýsköpun og þróun stafrænnar efnisþjónustu eins og fram kemur í 1. mgr. 1. gr. tilskipunarinnar og 5. lið formálsorða hennar.

Þriðja spurningin

109. Framkvæmdastjórnin heldur því fram að tilskipunin geri engan greinarmun á endurnotkun upplýsinga sem safnað er samkvæmt lagalegri skyldu og öðrum tegundum upplýsinga. Það sjáist jafnframt á almennri skilgreiningu á endurnotkun í 4. mgr. 2. gr. tilskipunarinnar.

Fjórða spurningin

110. Að mati framkvæmdastjórnarinnar er fjórða spurningin nátengd hinni fyrstu, úr því að spurt er hvort ákveða megi fjárhæð gjalds í lögum, án þess að fjárhæðin sæti efnislegri skoðun. Hvað fyrstu spurninguna varðar, leggur framkvæmdastjórnin áherslu á að gjaldtaka vegna endurnotkunar upplýsinga verði

respect the upper limit laid down in Article 6 of the Directive, and be calculated on the basis of actual costs incurred (as well as a reasonable return on investment). It follows that a substantive examination must be carried out of the total costs and total income over an appropriate accounting period, even though this is necessarily based on estimates. (The Commission would add that, if estimates were used as the basis for the calculation, and were later found to be incorrect, Article 6 would require an appropriate adjustment to be made to the charges, cf. also the duty of loyal cooperation laid down in Article 3 of the EEA Agreement). At the same time, the legal mechanism for the fixing of the charges remains a matter for the EEA States.

The fifth and sixth questions

111. The Commission simply underlines that the ceiling laid down by Article 6 is based not only on the costs of collecting, producing, reproducing and disseminating documents, but also on a reasonable return on investment. As explained in recital 14 of the preamble to the Directive, this permits due account to be taken of the self-financing requirements of the public sector body concerned, where applicable. In other words, Article 6 already envisages the means by which a self-financing requirement may be taken into account in the setting of charges. As a matter of detail, the Commission takes the view that the notion of a reasonable return on investment must be interpreted as being linked to the cost elements that are directly related to the collection, production, reproduction and dissemination of documents, since any broader interpretation would be contrary to the underlying objective of promoting the creation of digital content services based on information held by public sector bodies, and facilitating re-use, as set out in Article 1(1) and also in recital 5 of the preamble to the Directive.

112. The Commission proposes that the Court should answer the questions as follows:

When a charge is made for the re-use of documents held by a public sector body, Article 6 of Directive 2003/98 requires this to be based

að vera í samræmi við efri mörkin sem kveðið er á um í 6. gr. tilskipunarinnar og reiknast á grundvelli raunverulegs kostnaðar (auk sanngjarns hagnaðarhlutar af fjárfestingunni). Þar af leiðandi verður að fara fram efnisleg skoðun á heildarkostnaði og heildartekjum yfir ákveðið uppgjörstímabil, jafnvel þótt slík skoðun verði að byggjast á áætlunum. Framkvæmdastjórnin vill koma því á framfæri, að ef útreikningurinn byggist á áætlunum sem síðar reynast rangar, er sú krafa gerð samkvæmt 6. gr. að viðeigandi lagfæringar verði gerðar á gjaldtökunni, samanber einnig trúnaðarskylduna sem kveðið er á um í 3. gr. EES-samningsins. Að því frátöldu sé regluverkið varðandi það hvernig gjöldin eru ákveðin á forræði aðildarríkja.

Fimmta og sjötta spurningin

111. Framkvæmdastjórnin leggur einfaldlega á það áherslu að þakið sem sett er í 6. gr. tekur ekki aðeins mið af kostnaði við söfnun, framleiðslu, fjölföldun og dreifingu gagna, heldur einnig af sanngjörnum hagnaðarhluta af fjárfestingunni. Eins og kemur fram í 14. lið formálsorða tilskipunarinnar er heimilt að taka tilhlýðilegt tillit til krafna um að viðkomandi opinber aðili standi undir sér fjárhagslega, þegar það á við. Með öðrum orðum, er þegar í 6. gr. gert ráð fyrir þeim leiðum sem fara má til að taka slíkar kröfur með í reikninginn við ákvörðun gjalda. Framkvæmdastjórnin lítur, nánar tiltekið, svo á að hugmyndin um sanngjarnan hagnaðarhluta af fjárfestingunni beri að túlka með hliðsjón af þeim kostnaðarþáttum sem tengjast, með beinum hætti, söfnun, framleiðslu, fjölföldun og dreifingu gagna, þar sem rýmri túlkanir væru andstæðar hinu undirliggjandi markmiði, að hvatt sé til að þjónustu með stafrænu efni sem byggist á upplýsingum í vörslu opinberra aðila verði komið á fót, og að auðvelda endurnotkun þeirra, eins og segir í 1. mgr. 1. gr. og 5. tölul. formálsorða tilskipunarinnar.

112. Framkvæmdastjórnin leggur til að fimmtu og sjöttu spurningu verði svarað með eftirfarandi hætti:

Þegar gjöld eru innheimt vegna endurnotkunar gagna sem eru í vörslu opinbers aðila, er gerð sú krafa samkvæmt 6. gr. tilskipunar 2003/98

on a calculation of the costs incurred and of the total income to be generated.

In determining the "cost" for the purposes of Article 6:

i) any fees or charges already imposed in relation to the collection of the relevant documents must be taken into account; and

ii) it is irrelevant that the documents were collected in the context of a legal obligation to do so.

The notion of a "reasonable return on investment" within the meaning of Article 6 permits a self-financing requirement of the public sector body in question to be taken into account. It must however be interpreted as referring to cost elements directly related to the collecting, producing, reproducing and disseminating of documents.

Per Christiansen

Judge-Rapporteur

að þau byggist á útreikningum á þeim kostnaði og þeim heildartekjum sem gert er ráð fyrir að skapist.

Um skilgreiningu „kostnaðar“ í skilningi 6. gr:

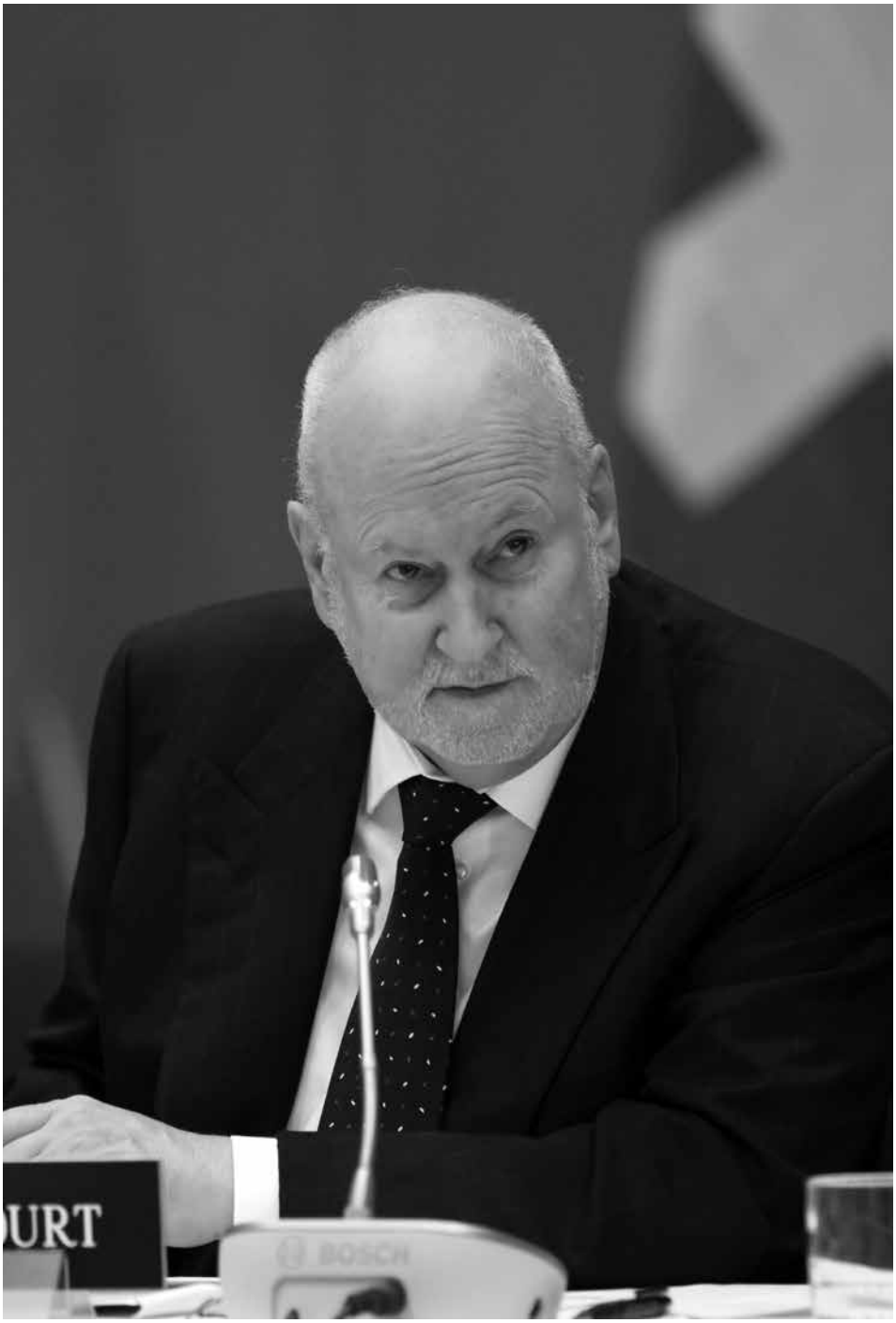
i) öll gjöld sem lögð hafa verið á í tengslum við söfnun viðeigandi gagna skal taka með í reikninginn, og

ii) ekki skiptir máli hvort lagaleg skylda hafi legið að baki söfnun gagnanna.

Hugmyndin um „sanngjarnan hagnaðarhluta af fjárfestingu“ í skilningi 6. gr. heimilar að litið sé til krafna um að opinber aðili standi undir sér. Hana verður þó að skýra með þeim hætti að hún vísi til kostnaðarþátta sem tengjast söfnun, framleiðslu, fjölföldun og dreifingu gagnanna með beinum hætti.

Per Christiansen

Framsögumaður



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II. Administration and Activities of the Court

ADMINISTRATION AND ACTIVITIES OF THE COURT

The Court took up its functions on 4 January 1994 in Geneva with five Judges nominated by Austria, Finland, Iceland, Norway, and Sweden. Due to the accession of Austria, Finland and Sweden to the European Union and the ratification of the EEA Agreement by Liechtenstein, the Court has since mid-1995 consisted of three Regular Judges and six Ad hoc Judges. The Governments of the EEA/EFTA States decided on 14 December 1994 that the seat of the Court should be moved to Luxembourg. Since 1 September 1996, the Court has had its premises at 1, Rue du Fort Thüngen, Kirchberg, Luxembourg.

As provided for in Article 14 of Protocol 5 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (ESA/Court Agreement), the Court remains permanently in session. Its offices are open from Monday to Friday each week, except for official holidays

Provisions regarding the legal status of the Court are to be found in Protocol 7 to the ESA/Court Agreement which bears the title: Legal Capacity, Privileges and Immunities of the EFTA Court. The Court has concluded a Headquarters Agreement with the Grand Duchy of 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 judges and staff as well as privileges and immunities of persons appearing before the Court. 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 the 4th of January 1994, and as later amended.

The ESA/Court Agreement also contains provisions on the role of the Governments of the EFTA/EEA States in the administration of the Court. Thus, Article 43 of the Agreement stipulates that the Rules of Procedure shall be approved by the Governments. 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 was established and is charged with the task of determining the annual budget. This body, the ESA/Court Committee, is composed of the heads of the Icelandic, Liechtenstein and Norwegian Missions to the European Union in Brussels.

The Court held regular meetings with the three Courts of the European Union and participated in the official functions of these Courts. It also participated in the official functions of the Grand Duchy of Luxembourg. On the other hand, members of the EU and the Luxembourg judiciary, the diplomatic corps and the Luxembourg civil society took part in the official functions of the Court. Ambassadors from the EFTA States, EU States and other countries visited the Court. The Court was visited, during the period covered by this Report, inter alia by a delegation from the Swiss Federal Administrative Court, led by its President, Mr Markus Metz, accompanied by Judge Michael Beusch and the Norwegian Federation of Trade Unions. Law professors, assistants, researchers and students from several European universities, as well as trainees from the EFTA institutions in Brussels, Luxembourg and Geneva, attended oral hearings and seminars on the Court's jurisdiction and case law. In the framework of the Court's lunch-time talks on European and international issues, Mr Fergal Anthony O'Regan, Head of Unit at the office of the European Ombudsman, gave a talk on the subject of "Access to documents in competition cases and the role of the European Ombudsman" and Ms Catherine Barnard, Professor of European Union Law, University of Cambridge spoke on the subject of "The Posting of Workers Directive – recent developments".

Judges, the Court's registrar and legal secretaries have given speeches on the EEA and the Court and on European integration in general in all the EFTA States, as well as in a number of EU countries and in the United States, Japan, China and Russia. The Court's annual Spring Conference was held on 21 June 2013 featuring renowned speakers from EEA institutions and private practice. The conference was dedicated to EEA law and the EEA judiciary and was very well attended by members from all branches of the legal profession. As every year, judges from Norway attended a seminar at the Court on 4 November 2013. The President of the Court paid visits to the Governments of Iceland and Liechtenstein.

The website of the Court is found via the following Internet address: www.eftacourt.int. It contains general information on the Court, its case law, reports for the hearing and press releases, publications, news, and the main legal texts governing the activities of the Court.

The Court's e-mail address is: eftacourt@eftacourt.int

III. Judges and Staff

JUDGES AND STAFF

The members of the Court in 2013 were as follows:

Mr Carl BAUDENBACHER (nominated by Liechtenstein)

Mr Per CHRISTIANSEN (nominated by Norway)

Mr Páll HREINSSON (nominated by Iceland)

The judges are appointed by common accord of the Governments of the EFTA States.

The Registrar of the Court is Mr Gunnar Selvik.

Ad hoc Judges of the Court are:

Nominated by Iceland:

Mr Benedikt Bogason, hæstaréttardómari (Supreme Court Judge)

Ms Ása Ólafsdóttir, University of Iceland (Associate Professor)

Nominated by Liechtenstein:

Ms Nicole Kaiser, Rechtsanwältin (lawyer)

Mr Martin Ospelt, Rechtsanwalt (lawyer)

Nominated by Norway:

Mr Ola Mestad, University of Oslo (Professor)

Ms Siri Teigum, Advokat, (lawyer)

In addition to the Judges, the following persons were employed by the Court in 2013:

Mr Kjartan BJÖRGVINSSON, Legal Secretary

Ms Harriet BRUHN, Senior Financial and Administrative Officer

Mr Michael-James CLIFTON, Legal Secretary (temporary officer)

Ms Mary COX, Information and Communication Coordinator

Ms Hrafnhildur EYJÓLFSDÓTTIR, Personal Assistant

Mr Salim GUETTAF, Manager of premises

Ms Silje NÆSHEIM, Personal Assistant

Ms Bryndís PÁLMARSDÓTTIR, Senior Officer

Mr Thomas POULSEN, Legal Secretary

Mr Magnus SCHMAUCH, Legal Secretary (temporary officer until 1 September)

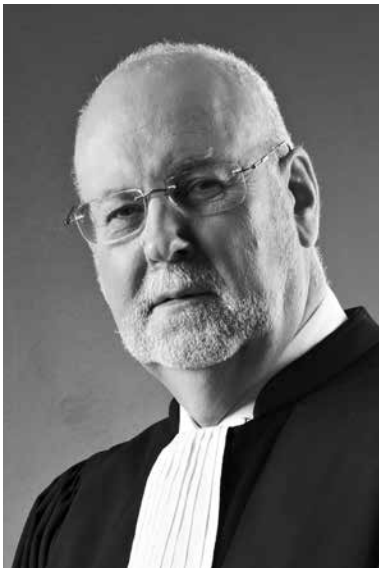
Ms Kerstin SCHWIESOW, Personal Assistant

Mr Gunnar SELVIK, Registrar

Mr Philipp SPEITLER, Legal Secretary

Ms Sharon WORTELBOER, Administrative Assistant

CURRICULA VITAE OF THE JUDGES AND THE REGISTRAR



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Carl BAUDENBACHER

Born: 1 September 1947,
in Basel, Switzerland, citizen of Murten.

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

Professional career: Universities of Berne and Zurich, Assistant, 1972–1978; Legal Secretary, Bülach 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 1987-2013; Director of the University of St. Gallen Institute of European Law since 1991; Visiting Professor, University of Geneva, 1989-1990; Visiting Professor University of Texas School of Law 1993-2004; Chairman of the St. Gallen International Competition Law Forum since 1994; Co-Chairman of the Grigory Tunkin Readings at Moscow State (Lomonosov) University; Member of the Board of the Center for Global Energy, International Arbitration, and Environmental Law of the University of Texas School of Law; Member of the Supreme Court of the Principality of Liechtenstein, 1994–1995; Expert advisor to the Governments of the Principality of Liechtenstein, Israel, the Russian Federation and the Swiss Confederation as well as to both chambers of the Parliament of the Swiss Confederation; Judge of the EFTA Court since 6 September 1995; President of the EFTA Court since 15 January 2003; Dr. rer. pol. h.c. of Leuphana University 2012.

Publications: Over 40 books and over 200 articles on European and International law, law of obligations, labour law, law of unfair competition, antitrust law, company law, intellectual property law, comparative law and the law of international courts.

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Per CHRISTIANSEN

Born in 1949 in Larvik, Norway.

Studies: Cand jur (University of Oslo), 1976; studies at the University of Glasgow, 1978-1979; Dr Juris (University of Oslo),1988; Fulbright Scholar (George Washington University, Washington DC), 2005-2006.

Professional career: Legal Counsellor, Norges Bank, 1976-1982; Head of Division and Deputy Director in the Economic Policy Department, Ministry of Finance, 1982-1985; Head of Office and Secretary to the Board of Governors, Norges Bank, 1985-1986; Assistant Director General of the Economic Policy Department, Ministry of Finance, 1986-1988; Counsellor, Norwegian Mission to the European Communities (Brussels), 1988-1994; Director General in the Economic Policy Department, Ministry of Finance, 1994; Director General of the Financial Markets Department, Ministry of Finance, 1994-1995; Registrar at the EFTA Court, 1995-1998; Advocate at Advokatfirmaet Pricewaterhouse Coopers DA, 1998-2002; Professor of Law at the University of Tromsø, Norway since 2001; Judge at the EFTA Court since 2011.

Publications: various publications in the field of international law, EU and EEA law and financial law.

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Páll HREINSSON

Born 20 February 1963, in Reykjavík, Iceland

Studies: Cand. Juris 1988 from the University of Iceland. Visitor student in Administrative Law and Public Administration at the University of Copenhagen 1990-1991. Doctor Juris 2005 from the University of Iceland.

Professional career: Assistant Judge, City Court of Reykjavik, 1988-1991; Special Assistant, The Althing Ombudsman (The Parliamentary Ombudsman's Office), 1991-1998; Member of the committees of specialists which wrote the legislative bills on the Administrative Act from 1993 and the Freedom of Information Act from 1996; Associate Professor, Faculty of Law, University of Iceland, 1998-1999; Professor of Law, University of Iceland, 1999-2007; Vice-Dean, Faculty of Law, University of Iceland, 2002-2005; Dean, Faculty of Law, University of Iceland, 2005 – 2007; Chairman of the Commission for access to administrative documentation from the 1st of January 2005 to the 1st of September 2007. Justice at Supreme Court of Iceland, 2007-2011. Chairman of the Special Investigation Commission which was established with Act no. 142/2008 on an Investigation of the Events Leading To, and the Causes Of, the Downfall of the Icelandic Banks in 2008, and Related Events, from the 1st of January 2009 to the 1st of September 2010. Chairman of the Board of The Data Protection Authority 1999-2011. Chairman of the Committee on the Evaluation of the Judicial Candidates in Iceland 2010-2011. Judge at the EFTA Court since 2011.

Publications: books and articles on Administrative law, constitutional law, Data Protection and Information Privacy, financial law and EU and EEA law.

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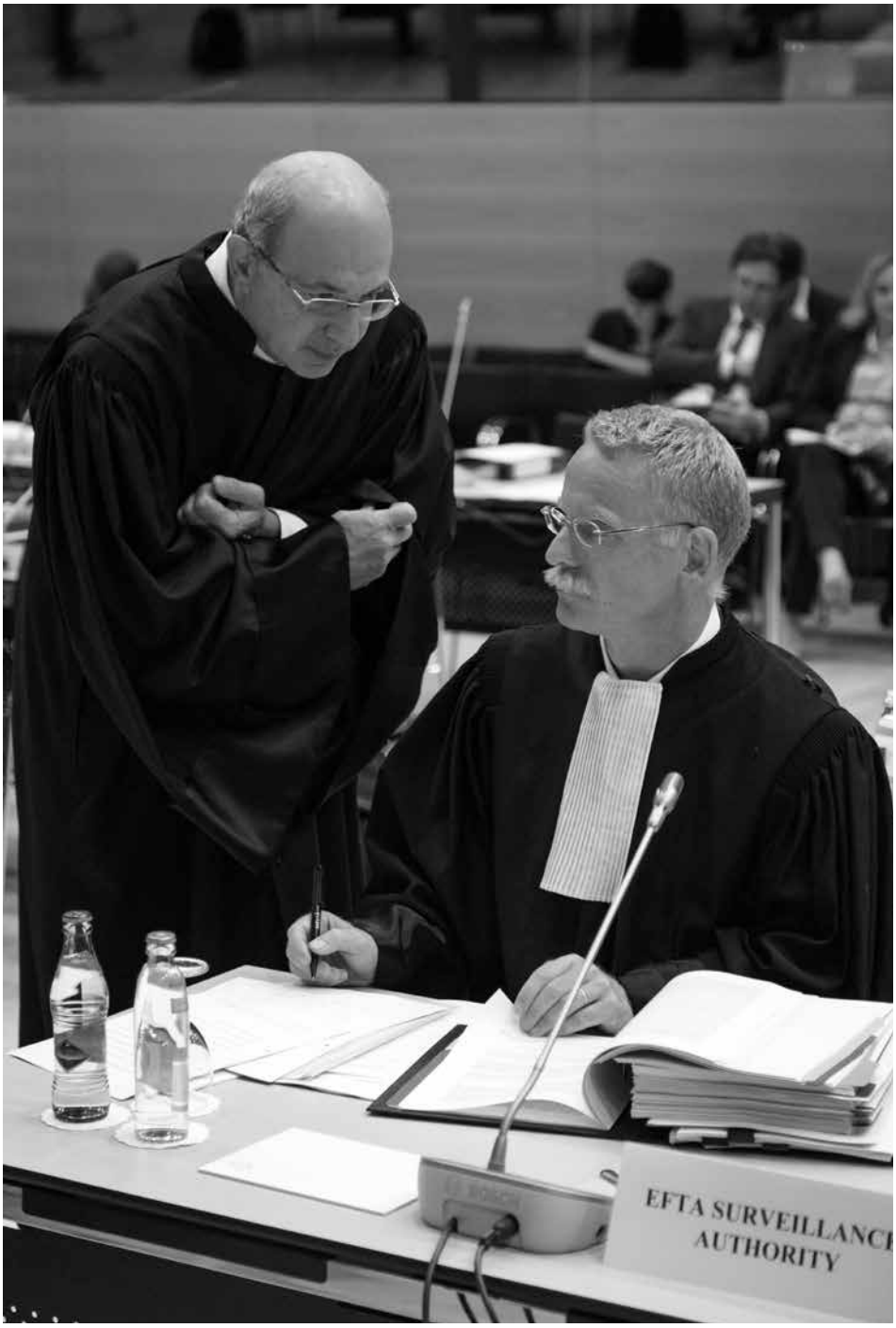
GUNNAR SELVIK

Born: 13 November 1963, in Bergen, Norway

Studies: Master's degree in Economics, Royal Norwegian Naval Academy, 1986; Norwegian Law Degree, University of Oslo, 1992; Special subject EEA law, University of Oslo, 1994.

Professional career: Miscellaneous posts as officer in the Norwegian Navy, 1986-92; Financial Officer/Treasury Officer, NACMA (NATO), Brussels, Belgium, 1992-98; Registrar, EFTA-Court, Luxemburg 1998-2001; Senior Project leader/lawyer, Interpro AS, Bergen, Norway, 2001-03; Director, West Norway Office, Brussels, Belgium/Bergen, Norway, 2003-06; Director, Goods Division, EFTA Secretariat, Brussels, Belgium, 2006-12; Appointed Registrar of the EFTA Court in September 2012

Publications: The development and planning of the Haukeland University Hospital, Bergen, Norway; The academic status of officers graduated from the Norwegian Naval Academy.


EFTA SURVEILLANCE
AUTHORITY

IV. List of Court Decisions published in the EFTA Court Reports

CASES 1994 – 2013

	Case	Parties	Type of Case	EFTA Court Report
1	*E-1/94*	*Ravintoloitsijain Liiton Kustannus Oy Restamark*	**Request for an Advisory Opinion from Tullilautakunta, Finland** *Admissibility – Free movement of goods – State monopolies of a commercial character – Import monopoly – Articles 11, 13 and 16 of the EEA Agreement – Unconditional and sufficiently precise*	*[1994-1995] p. 15*
2	*E-2/94*	*Scottish Salmon Growers Association Ltd v EFTA Surveillance Authority*	**Direct Action** *Decision of the EFTA Surveillance Authority – Constituent Elements – Judicial Review – Statement of Reasons – Admissibility – Locus standi – Direct and Individual Concern*	*[1994-1995] p. 59*
3	*E-3/94*	*Alexander Flandorfer Friedmann and Others v Republic of Austria*	*Jurisdiction – Procedure – Admissibility – Legal aid*	*[1994-1995] p. 83*
4	*E-4/94*	*Konsument-ombudsmannen v De Agostini (Svenska) Förlag AB*	**Request for an Advisory Opinion from Marknadsdomstolen, Sweden** *Withdrawn*	*[1994-1995] p. 89*
5	*E-5/94*	*Konsumentombuds-mannen v TV-shop i Sverige AB*	**Request for an Advisory Opinion from Marknadsdomstolen, Sweden** *Withdrawn*	*[1994-1995] p. 93*
6	*E-6/94*	*Reinhard Helmers v EFTA Surveillance Authority and Kingdom of Sweden*	**Direct Action** *Procedure – Admissibility – Application for revision*	*[1994-1995] p. 97 and 103*
7	*E-7/94*	*Data Delecta Aktiebolag and Ronnie Forsberg v MSL Dynamics Ltd*	**Request for an Advisory Opinion from Högsta domstolen, Sweden** *Withdrawn*	*[1994-1995] p. 109*
8	*Joined Cases E-8/94 and E-9/94*	*Forbrukerombudet v Mattel Scandinavia A/S and Lego Norge A/S*	**Request for an Advisory Opinion from Markedsrådet, Norway** *Admissibility – Free movement of services – Council Directive 89/552/EEC – Transmitting State principle – Televised advertising targeting children – Broadcasters/ Advertisers – Circumvention – Directed advertising – Council Directive 84/450/ EEC*	*[1994-1995] p. 113*

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9	*E-1/95*	*Ulf Samuelsson v Svenska staten*	**Request for an Advisory Opinion from Varbergs tingsrätt, Sweden** *Admissibility – Council Directive 80/987/EEC – National measures to counter abuse – Proportionality*	*[1994-1995] p. 145*
10	*E-2/95*	*Eilert Eidesund v Stavanger Catering A/S*	**Request for an Advisory Opinion from Gulating lagmannsrett, Norway** *Council Directive 77/187/EEC – Transfer of part of a business – Transfer of rights to pension benefits*	*[1995-1996] p. 1*
11	*E-3/95*	*Torgeir Langeland v Norske Fabricom A/S*	**Request for an Advisory Opinion from Stavanger byrett, Norway** *Council Directive 77/187/EEC – Transfer of rights to pension benefits*	*[1995-1996] p. 36*
12	*E-1/96*	*EFTA Surveillance Authority v Republic of Iceland*	*Discontinuance of proceedings*	*[1995-1996] p. 63*
13	*E-2/96*	*Jørn Ulstein and Per Otto Røiseng v Asbjørn Møller*	**Request for an Advisory Opinion from Inderøy herredsrett, Norway** *Council Directive 77/187/EEC – Transfer of rights to pension benefits*	*[1995-1996] p. 65*
14	*E-3/96*	*Tor Angeir Ask and Others v ABB Offshore Technology AS and Aker Offshore Partner AS*	**Request for an Advisory Opinion from Gulating lagmannsrett, Norway** *Council Directive 77/187/EEC – Transfer of part of a business*	*[1997] p. 1*
15	*E-4/96*	*Fridtjof Frank Gundersen v Oslo kommune*	**Request for an Advisory Opinion from Oslo byrett, Norway** *Withdrawn*	*[1997] p. 28*
16	*E-5/96*	*Ullensaker kommune and Others v Nille AS*	**Request for an Advisory Opinion from Borgarting lagmannsrett, Norway** *Admissibility – Free movement of goods – Licensing scheme*	*[1997] p. 30*
17	*E-6/96*	*Tore Wilhelmsen AS v Oslo kommune*	**Request for an Advisory Opinion from Oslo byrett, Norway** *Alcohol sales – State monopolies of a commercial character – Free movement of goods*	*[1997] p. 53*
18	*E-7/96*	*Paul Inge Hansen v EFTA Surveillance Authority*	**Direct Action** *Action for failure to act – Admissibility*	*[1997] p. 100*

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19	*E-1/97*	*Fridtjof Frank Gundersen v Oslo kommune, supported by Norway*	**Request for an Advisory Opinion from Oslo byrett, Norway** *Alcohol sales – State monopolies of a commercial character – Free movement of goods*	*[1997] p. 108*
20	*E-2/97*	*Mag Instrument Inc v California Trading Company Norway, Ulsteen*	**Request for an Advisory Opinion from Fredrikstad byrett, Norway** *Exhaustion of trade mark rights*	*[1997] p. 127*
21	*E-3/97*	*Jan and Kristian Jæger AS, supported by Norwegian Association of Motor Car Dealers and Service Organisations v Opel Norge AS*	**Request for an Advisory Opinion from Nedre Romerike herredsrett, Norway** *Competition – Motor vehicle distribution system – Compatibility with Article 53(1) EEA – Admission to the system – Nullity*	*[1998] p. 1*
22	*E-4/97*	*The Norwegian Bankers' Association v EFTA Surveillance Authority, supported by Kingdom of Norway*	**Direct Action** *State Aid – Action for annulment of a decision of the EFTA Surveillance Authority – Admissibility – Exceptions under Article 59(2) EEA – Procedures*	*[1998] p. 38 and [1999] p. 1*
23	*E-5/97*	*European Navigation Inc v Star Forsikring AS, under offentlig administrasjon (under public administration)*	**Request for an Advisory Opinion from Høysteretts kjæremålsutvalg, Norway** *Withdrawn*	*[1998] p. 59*
24	*E-7/97*	*EFTA Surveillance Authority v Kingdom of Norway*	**Direct Action** *Failure of a Contracting Party to fulfil its obligations – Safety and health protection of workers in surface and underground mineral – extracting industries – Council Directive 92/104/EEC*	*[1998] p. 62*
25	*E-8/97*	*TV 1000 Sverige AB v Norwegian Government*	**Request for an Advisory Opinion from Oslo byrett, Norway** *Council Directive 89/552/EEC – Transfrontier television broadcasting – Pornography*	*[1998] p. 68*

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26	E-9/97	Erla María Sveinbjörnsdóttir v Government of Iceland	**Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland** *Council Directive 80/987/EEC – Incorrect implementation of a directive – Liability of an EFTA State*	[1998] p. 95
27	E-10/97	EFTA Surveillance Authority v Kingdom of Norway	**Direct Action** *Failure of a Contracting Party to fulfill its obligations – Health protection for workers exposed to vinyl chloride monomer – Council Directive 78/610/EEC*	[1998] p. 134
28	E-1/98	Norwegian Government v Astra Norge AS	**Request for an Advisory Opinion from Borgarting lagmannsrett, Norway** *Free movement of goods – Copyright – Disguised restriction on trade*	[1998] p. 140
29	E-2/98	Federation of Icelandic Trade (Samtök verslunarinnar – Félag íslenskra stórkaupmanna, FIS) v Government of Iceland and the Pharmaceutical Pricing Committee (Lyfjaverðsnefnd)	**Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland** *Pricing of pharmaceutical products – General price decrease – Price control system*	[1998] p. 172
30	E-3/98	Herbert Rainford-Towning	**Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein** *Right of establishment – Residence requirement for managing director of a company*	[1998] p. 205
31	E-4/98	Blyth Software Ltd v AlphaBit AS	**Request for an Advisory Opinion from Oslo byrett, Norway** *Withdrawn*	[1998] p. 239
32	E-5/98	Fagtún ehf v Byggingarnefnd Borgarholtsskóla, Government of Iceland, City of Reykjavík and Municipality of Mosfellsbær	**Request for an Advisory Opinion from Hæstiréttur Íslands, Iceland** *General prohibition on discrimination – Free movement of goods – Post-tender negotiations in public procurement proceedings*	[1999] p. 51

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33	*E-6/98 R & E-6/98*	*Government of Norway v EFTA Surveillance Authority*	**Direct Action** *State aid – Suspension of operation of a measure – Action for annulment of a decision of the EFTA Surveillance Authority – General measures – Effect on trade – Aid schemes*	*[1998] p. 242 and [1999] p. 74*
34	*E-1/99*	*Storebrand Skadeforsikring AS v Veronika Finanger*	**Request for an Advisory Opinion from Norges Høyesterett, Norway** *Motor Vehicle Insurance Directives – Driving under the influence of alcohol – Compensation for passengers*	*[1999] p. 119*
35	*E-2/99*	*EFTA Surveillance Authority v Kingdom of Norway*	**Direct Action** *Failure of a Contracting Party to fulfil its obligations - Council Directive 92/51/EEC on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC*	*[2000-2001] p. 1*
36	*E-1/00*	*State Debt Management Agency v Íslandsbanki-FBA hf.*	**Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland** *Free movement of capital – State guarantees issued on financial loans – Different guarantee fees for foreign and domestic loans*	*[2000-2001] p. 8*
37	*E-2/00*	*Allied Colloids and Others v Norwegian State*	**Request for an Advisory Opinion from Oslo byrett, Norway** *Free movement of goods – Directives on dangerous substances and preparations – Joint Statements of the EEA Joint Committee*	*[2000-2001] p. 35*
38	*E-3/00*	*EFTA Surveillance Authority v Kingdom of Norway*	**Direct Action** *Failure of a Contracting Party to fulfil its obligations – Fortification of foodstuffs with iron and vitamins – Protection of public health – Precautionary principle*	*[2000-2001] p. 73*
39	*E-4/00*	*Dr Johann Brändle*	**Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein** *Right of establishment – Single practice rule – Justification by overriding reasons of general interest*	*[2000-2001] p. 123*
40	*E-5/00*	*Dr Josef Mangold*	**Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein** *Right of establishment – Single practice rule – Justification by overriding reasons of general interest*	*[2000-2001] p. 163*

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41	E-6/00	Dr Jürgen Tschannet	**Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein** *Right of establishment – Single practice rule – Justification by overriding reasons of general interest*	[2000-2001] p. 203
42	E-7/00	Halla Helgadóttir v Daníel Hjaltason and Iceland Insurance Company Ltd	**Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland** *Motor Vehicle Insurance Directives – Standardised compensation system – Compensation for victims*	[2000-2001] p. 246
43	E-8/00	Landsorganisasjonen i Norge v Kommunenes Sentralforbund and Others	**Request for an Advisory Opinion from Arbeidsretten, Norway** *Competition rules – Collective agreements – Transfer of occupational pension scheme*	[2002] p. 114
44	E-9/00	EFTA Surveillance Authority v Norway	**Direct Action** *Failure of a Contracting Party to fulfil its obligations – State retail alcohol monopoly – licensed serving of alcohol beverages – discrimination*	[2002] p. 72
45	E-1/01	Hörður Einarsson v The Icelandic State	**Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland** *Differentiated value-added tax on books – Article 14 EEA – Competing products – Indirect protection of domestic products*	[2002] p. 1
46	E-2/01	Dr Franz Martin Pucher	**Request for an Advisory Opinion from Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein** *Right of establishment – Residence requirement for at least one board member of a domiciliary company*	[2002] p. 44
47	E-3/01	Alda Viggósdóttir v Íslandspóstur hf.	**Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland** *Council Directive 77/187/EEC – Transfer of a State administrative entity to a State owned limited liability company*	[2002] p. 202
48	E-4/01	Karl K. Karlsson hf. v The Icelandic State	**Request for an Advisory Opinion from Héraðsdómur Reykjavíkur, Iceland** *State alcohol monopoly – incompatibility with Article 16 EEA – State liability in the event of a breach of EEA law – Conditions of liability*	[2002] p. 240

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49	*E-5/01*	*EFTA Surveillance Authority v Principality of Liechtenstein*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations - Council Directive 87/344/EEC on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance*	*[2000-2001] p. 287*
50	*E-6/01*	*CIBA and Others v The Norwegian State*	**Request for an Advisory Opinion from Oslo byrett, Norway** *Rules of procedure – Admissibility – Jurisdiction of the Court – Competence of the EEA Joint Committee*	*[2002] p. 281*
51	*E-7/01*	*Hegelstad and Others v Hydro Texaco AS*	**Request for an Advisory Opinion from Gulating lagmannsrett, Norway** *Competition – Exclusive purchasing agreement – Service-station agreement – Article 53 EEA – Regulation 1984/83 – Nullity*	*[2002] p. 310*
52	*E-8/01*	*Gunnar Amundsen AS and Others v Vectura AS*	**Request for an Advisory Opinion from Borgarting lagmannsrett, Norway** *Withdrawn*	*[2002] p. 236*
53	*E-1/02*	*EFTA Surveillance Authority v Norway*	**Direct Action** *Failure of a Contracting Party to fulfil its obligations – Equal Rights Directive - Reservation of academic positions for women*	*[2003] p. 1*
54	*E-2/02*	*Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v EFTA Surveillance Authority*	**Direct Action** *Action for annulment of a decision of the EFTA Surveillance* *Authority-State aid-Admissibility-Locus standi*	*[2003] p. 52*
55	*E-3/02*	*Paranova AS v Merck & Co., Inc. and Others*	**Request for an Advisory Opinion from Norges Høyesterett, Norway** *Parallel imports – Article 7(2) of Directive 89/104/EEC – Use of coloured stripes on the parallel importer's repackaging design – Legitimate reasons*	*[2003] p. 101*
56	*E-1/03*	*EFTA Surveillance Authority v Iceland*	**Direct Action** *Failure of a Contracting Party to fulfil its obligations – free movement of services -higher tax on intra-EEA flights than on domestic flights*	*[2003] p. 143*

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57	E-2/03	Ákæruvaldið (The Public Prosecutor) v Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson	**Request for an Advisory Opinion from Héraðsdómur Reykjaness, Iceland** Jurisdiction – Admissibility – Fish products – Protocol 9 to the EEA Agreement – rules of origin – Protocol 4 to the EEA Agreement – Free Trade Agreement EEC-Iceland	[2003] p. 185
58	E-3/03	Transportbedriftenes Landsforening and Nor-Way Bussekspress AS v EFTA Surveillance Authority	**Direct Action** Withdrawal of an application	[2004] p. 1
59	E-4/03	EFTA Surveillance Authority v Norway	**Direct Action** Failure of a Contracting Party to fulfil its obligations – Article 8 of Directive 98/34/EC	[2004] p. 3
60	E-1/04	Fokus Bank ASA v The Norwegian State, represented by Skattedirektoratet (the Directorate of Taxes)	**Request for an Advisory Opinion from Frostating lagmannsrett, Norway** Free movement of capital – taxation of dividends – tax credit granted exclusively to shareholders resident in a Contracting Party – denial of procedural rights to shareholders resident in other Contracting Parties	[2004] p. 11
61	E-2/04	Reidar Rasmussen, Jan Rossavik, and Johan Käldman, v Total E&P Norge AS, v/styrets formann	**Request for an Advisory Opinion from Gulating lagmannsrett, Norway** Transfer of undertakings - Council Directive 77/187/EEC – time of transfer – objection to transfer of employment relationship	[2004] p. 57
62	E-3/04	Tsomakas Athanasios and Others with Odfjell ASA as an accessory intervener v The Norwegian State, represented by Rikstrygdeverket	**Request for an Advisory Opinion from Gulating lagmannsrett, Norway** Freedom of movement for workers - social security for migrant workers - Title II of Regulation 1408/71 – form E 101 - Article 3 EEA	[2004] p. 95

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63	*E-4/04*	*Pedicel AS v Sosial- og helsedirektoratet (Directorate for Health and Social Affairs*	**Request for an Advisory Opinion from Markedsrådet, Norway** *Free movement of goods and services - prohibition against alcohol advertisement - trade in wine – Articles 8(3) and 18 EEA - "other technical barriers to trade"- advertisement of wine – restriction – protection of public health – principle of proportionality – applicability of the precautionary principle*	*[2005] p. 1*
64	*Joined Cases E-5/04 E-6/04 and E-7/04*	*Fesil and Finnfjord, PIL and others and The Kingdom of Norway v EFTA Surveillance Authority*	**Direct Action** *State aid – Exemptions from energy tax for the manufacturing and mining industries – Admissibility – Selectivity – Effect on trade and distortion of competition – Existing aid and new aid – Recovery – Legal certainty – Legitimate expectations – Proportionality*	*[2005] p. 117*
65	*E-8/04*	*EFTA Surveillance Authority v The Principality of Liechtenstein*	**Direct Action** *Right of establishment – Residence requirement for one member of management board and one member of executive management in banks*	*[2005] p. 46*
66	*E-9/04*	*The Bankers' and Securities' Dealers Association of Iceland v EFTA Surveillance Authority*	**Direct Action** *Action for annulment of a decision of the EFTA Surveillance Authority – State guarantee for a publicly owned institution – State aid – Services of General Economic Interest – Decision not to raise objections – Initiation of the formal investigation procedure – Admissibility*	*[2006] p. 42*
67	*E-9/04 COSTS*	*The Bankers' and Securities' Dealers Association of Iceland v EFTA Surveillance Authority*	**Direct Action** *Taxation of costs*	*[2007] p. 74*
68	*E-9/04 COSTS II*	*Bankers´and Securities´Dealers Association of Iceland v EFTA Surveillance Authority*	**Direct Action** *Taxation of costs*	*[2007] p. 220*

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69	*E-10/04*	*Paolo Piazza v Paul Schurte AG*	**Request for an Advisory Opinion from Fürstliches Landgericht (Princely Court of Justice), Liechtenstein** *Admissibility –security for costs before national courts – free movement of capital – freedom to provide services*	*[2005] p. 76*
70	*E-1/05*	*EFTA Surveillance Authority v The Kingdom of Norway*	**Direct Action** *Failure of a Contracting Party to fulfil its obligations – life assurance services – freedom to provide services and right of establishment – Article 33 of Directive 2002/83/EC – justification of restriction based on general good – proportionality*	*[2005] p. 234*
71	*E-2/05*	*EFTA Surveillance Authority v The Republic of Iceland*	**Direct Action** *State aid - Failure of a Contracting Party to fulfil its obligations – Second subparagraph of Article 1(2) of Part I of Protocol 3 SCA – Validity of a decision by the EFTA Surveillance Authority – Termination of tax measures and recovery of aid - Absolute impossibility to implement a decision of the EFTA Surveillance Authority*	*[2005] p. 202*
72	*E-3/05*	*EFTA Surveillance Authority v The Kingdom of Norway*	**Direct Action** *Failure of a Contracting Party to fulfil its obligations – free movement of workers – social security for migrant workers with family members residing in an EEA State other than the State of employment – regional residence requirement for family benefits – Article 73 of Regulation EEC 1408/71 – Article 7(2) of Regulation EEC 1612/68 – discrimination – justification on grounds of promoting sustainable settlement*	*[2006] p. 102*
73	*E-4/05*	*HOB-vín v The Icelandic State and Áfengis- og tóbaksverslun ríkisins (the State Alcohol and Tobacco Company of Iceland)*	**Request for an Advisory Opinion from Héraðsdómur Reykjavíkur (Reykjavík District Court), Iceland** *Free movement of goods – State monopolies of a commercial character – requirements to supply goods on pallets and to include the pallet price in the price of the goods – discrimination against importers of alcoholic beverages – abuse of a dominant position*	*[2006] p. 4*

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74	*Joined Cases E-5/05 E-6/05 E-7/05 E-8/05 and E-9/05*	*EFTA Surveillance Authority v The Principality of Liechtenstein*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services – Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) – Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) – Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) – Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)*	*[2006] p. 142*
75	*E-1/06*	*EFTA Surveillance Authority v The Kingdom of Norway*	**Direct Action** *National legislation transferring the operation of gaming machines to a State-owned monopoly – restriction of freedom of establishment and freedom to provide services – justification – legitimate aims – consistency of national legislation – necessity of national legislation*	*[2007] p. 8*
76	*E-2/06*	*EFTA Surveillance Authority v The Kingdom of Norway*	**Direct Action** *Conditions for concession for acquisition of hydropower resources – scope of the EEA Agreement – free movement of capital – right of establishment – indirect discrimination – public ownership – security of energy supply – environmental protection – proportionality*	*[2007] p. 164*
77	*E-3/06*	*Ladbrokes Ltd. v Staten v/Kultur- og kirkedepartementet and Staten v/ Landbruks- og matdepartementet*	**Request for an Advisory Opinion from Oslo tingrett (Oslo District Court), Norway** *Right of establishment – freedom to provide services – national restrictions on gambling and betting – legitimate aims – suitability/ consistency – necessity – provision and marketing of gaming services from abroad*	*[2007] p. 86*

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78	*E-4/06*	*KLM Royal Dutch Airlines v Staten v/ Finansdepartementet (The Norwegian State, represented by the Ministry of Finance)*	**Request for an Advisory Opinion from Borgarting lagmanssrett (Borgarting Court of Appeal), Norway** *Withdrawn*	*[2007] p. 4*
79	*E-5/06*	*EFTA Surveillance Authority v The Principality of Liechtenstein*	**Direct Action** *(Failure by a Contracting Party to fulfil its obligations – Article 4(1) and (2a) of Regulation EEC 1408/71 – social security benefits and special non-contributory benefits – legal effect of Annex IIa to Regulation EEC 1408/71 listing special non-contributory benefits – Decision 1/95 of the EEA Council on the entry into force of the EEA Agreement for Liechtenstein)*	*[2007] p. 296*
80	*E-6/06*	*EFTA Surveillance Authority v The Principality of Liechtenstein*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise*	*[2007] p. 238*
81	*E-1/07*	*Criminal proceedings against A*	**Request for an Advisory Opinion from Fürstliches Landgericht (Princely Court of Justice), Liechtenstein** *Lawyers' freedom to provide services – Council Directive 77/249/EEC – Article 7 EEA – Protocol 35 EEA – principles of primacy and direct effect – conforming interpretation*	*[2007] p. 246*
82	*E-2/07*	*EFTA Surveillance Authority v The Kingdom of Norway*	**Direct Action** *Widow's and widower's pension rights – Equal treatment of women and men – Article 69 EEA – Directive 79/7/EEC – Directive 86/378/EEC*	*[2007] p. 280*
83	*E-3/07*	*EFTA Surveillance Authority v The Republic of Iceland*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2002/88/EC of the European Parliament and of the Council of 9 December 2002 amending Directive 97/68/EC on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery*	*[2007] p. 356*

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84	*E-4/07*	*Jón Gunnar Þorkelsson* *v Gildi-lífeyrissjóður*	**Request for an Advisory Opinion from Héraðsdómur Reykjavíkur (Reykjavík District Court), Iceland** *Invalidity pension rights – free movement of workers – Regulation (EEC) No 1408/71 – Regulation (EEC) No 574/72*	*[2008] p. 3*
85	*E-5/07*	*Private Barnehagers Landsforbund v EFTA Surveillance Authority*	**Direct Action** *Action for annulment of a decision of the EFTA Surveillance Authority – Municipal kindergartens – State aid – Notion of undertaking – Decision not to raise objections – Initiation of the formal investigation procedure – Admissibility*	*[2008] p. 62*
86	*E-6/07*	*HOB vín ehf. v Faxaflóahafnir sf.*	**Request for an Advisory Opinion from Hæstiréttur Íslands (the Supreme Court of Iceland), Iceland** *Port charges – charges having equivalent effect to customs duties – internal taxation – free movement of goods*	*[2008] p. 128*
87	*E-7/07*	*Seabrokers AS v The Norwegian State, represented by Skattedirektoratet (the Directorate of Taxes)*	**Request for an Advisory Opinion from Stavanger tingrett (Stavanger District Court), Norway** *Freedom of establishment – double taxation agreement – calculation of maximum credit allowance for tax paid in another EEA State – debt interest and group contributions*	*[2008] p. 172*
88	*E-8/07*	*Celina Nguyen v The Norwegian State, represented by Justis- og politidepartementet (the Ministry of Justice and the Police)*	**Request for an Advisory Opinion from Oslo tingrett (Oslo District Court), Norway** *Compulsory insurance for civil liability in respect of motor vehicles – Directives 72/166/EEC, 84/5/EEC and 90/232/EEC – compensation for non-economic injury – conditions for State liability – sufficiently serious breach*	*[2008] p. 224*
89	*Joined Cases E-9/07 and E-10/07*	*L'Oréal Norge AS (Case E-9/07 and Case E-10/07); L'Oréal SA (Case E-10/07) v Per Aarskog AS (Case E-9/07); Nille AS (Case E-9/07); Smart Club AS (Case E-10/07)*	**Request for an Advisory Opinion from Follo tingrett (Follo District Court) and Oslo tingrett (Oslo District Court), Norway** *Exhaustion of trade mark rights*	*[2008] p. 259*

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90	*Joined Cases E-11/07 and E-1/08*	*Olga Rindal (Case E-11/07); Therese Slinning, represented by legal guardian Olav Slinning (Case E-1/08) v The Norwegian State, represented by the Board of Exemptions and Appeals for Treatment Abroad*	**Request for an Advisory Opinion from Borgarting lagmannsrett (Borgarting Court of Appeal) and Oslo tingrett (Oslo District Court), Norway** *Social security – Freedom to provide services – National health insurance systems – Hospital treatment costs incurred in another EEA State – Experimental and test treatment*	*[2008] p. 320*
91	*E-2/08*	*EFTA Surveillance Authority v The Republic of Iceland*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2004/26/EC relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery*	*[2008] p. 301*
92	*E-3/08*	*EFTA Surveillance Authority v The Republic of Iceland*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Regulation (EC) No 648/2004 on detergents*	*[2008] p. 308*
93	*E-4/08*	*Claudia Sebjanic v Christian Peters*	**Request for an Advisory Opinion from Fürstliches Landgericht (Princely Court of Justice),** *Liechtenstein* *Withdrawn*	*[2008] p. 299*
94	*E-5/08*	*Yannike Bergling v EFTA Surveillance Authority*	**Direct Action** *Inadmissable*	*[2008] p. 316*
95	*E-6/08*	*EFTA Surveillance Authority v The Kingdom of Norway*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2002/91/EC on the energy performance of buildings*	*[2009-2010] p. 4*
96	*E-1/09*	*EFTA Surveillance Authority v The Principality of Liechtenstein*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Freedom of establishment – Residence requirements*	*[2009-2010] p. 46*

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97	*E-2/09*	*EFTA Surveillance Authority v The Republic of Iceland*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Commission Regulation (EC) No 593/2007 on the fees and charges levied by the European Aviation Safety Agency – judgment by default*	*[2009-2010] p. 12*
98	*E-3/09*	*EFTA Surveillance Authority v The Principality of Liechtenstein*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as* *Directives 98/78/EC and 2002/83/EC*	*[2009-2010] p. 20*
99	*E-4/09*	*Inconsult v the Financial Market Authority (Finanz-marktaufsicht)*	**Request for an Advisory Opinion from the Appeals Commission of the Financial Market Authority (Beschwerdekommission der Finanzmarktaufsicht), Liechtenstein,** Admissibility – Directive 2002/92/EC on insurance mediation – Concept of a "durable medium	*[2009-2010] p. 86*
100	*E-5/09*	*EFTA Surveillance Authority v The Republic of Iceland*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC*	*[2009-2010] p. 30*
101	*E-6/09*	*Magasin- og Uke-presseforeningen v EFTA Surveillance Authority*	**Direct Action** *Action for failure to act – State aid – Existing aid – Admissibility*	*[2009-2010] p. 144*
102	*E-7/09*	*EFTA Surveillance Authority v The Principality of Liechtenstein*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies*	*[2009-2010] p. 38*

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103	E-8/09	EFTA Surveillance Authority v Republic of Iceland	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC on the approximation of the laws of the Member States relating to lifts – Judgment by default	[2009-2010] p. 180
104	E-1/10	Periscopus AS v Oslo Børs ASA and Erik Must AS	**Request for an Advisory Opinion from Oslo District Court (Oslo tingrett)** Directive 2004/25/EC – Acquisition of control – Mandatory bid – Adjustment of the bid price – Clearly determined circumstances and criteria – Reference to market price	[2009-2010] p. 198
105	E-2/10	Thor Kolbeinsson v The Icelandic State	**Direct Action** Safety and health of workers – Directives 89/391/EEC and 92/57/EEC – Article 3 EEA – Employers' and employees' liability for work accidents – State liability	[2009-2010] p. 234
106	E-3/10	EFTA Surveillance Authority v The Republic of Iceland	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Directive 2002/87/EC on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate	[2009-2010] p. 188
107	E-5/10	Dr. Joachim Kottke v Präsidial Anstalt and Sweetyle Stiftung	**Request for an Advisory Opinion from Fürstliches Obergericht (Princely Court of Appeal)** Security for costs before national courts – Discrimination – Article 4 EEA – Justification	[2009-2010] p. 320
108	E-4,6,7/10	The Prinicipality of Liechtenstein, REASSUR Aktiengesellschaft and Swisscom RE Aktiengesellschaft v EFTA Surveillance Authority	**Direct Action** Action for annulment of ESA decision 97/10/COL regarding the taxation of captive insurance companies under the Liechtenstein Tax Act	[2011] p. 16

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109	*E-8/10*	*EFTA Surveillance Authority v The Republic of Iceland*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2005/36/EC on the recognition of professional qualifications*	*[2009-2010] p. 296*
110	*E-9/10*	*EFTA Surveillance Authority v The Principality of Liechtenstein*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2005/36/EC on the recognition of professional qualifications*	*[2009-2010] p. 304*
111	*E-10/10*	*EFTA Surveillance Authority v The Republic of Iceland*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2005/36/EC on the recognition of professional qualifications*	*[2009-2010] p. 312*
112	*E-11/10*	*EFTA Surveillance Authority v The Principality of Liechtenstein*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2006/54/EC on implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation*	*[2009-2010] p. 368*
113	*E-12/10*	*EFTA Surveillance Authority v The Republic of Iceland*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 96/71/EC concerning the posting of workers in the framework of provision of services*	*[2011] p.117*
114	*E-13/10*	*Aleris Ungplan AS v Surveillance Authority*	**Direct Action** *Refusal by ESA to commence proceedings for alleged failure of an EEA State to fulfil its obligations in the field of procurement*	*[2011] p. 3*
115	*E-14/10*	*Konkurrenten.no AS v EFTA Surveillance Authority*	**Direct Action** *Application for the annulment of ESA decision 254/10/COL of 21 June 2010, to close case without opening formal investigation procedure*	*[2011] p. 266*

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116	E-16/10	*Philip Morris Norway AS v Staten v/Helse- og omsorgsdepartementet*	**Request for an Advisory Opinion from Oslo District Court (Oslo tingrett)** *Free movement of goods – Prohibition on the visual display of tobacco products – Articles 11 and 13 EEA – Measures having equivalent effect to quantitative restrictions –Selling arrangements – Protection of public health – Proportionality*	*[2011] p. 330*
117	E-18/10	*EFTA Surveillance Authority v The Kingdom of Norway*	**Direct Action** *Non-compliance with a judgment of the Court establishing a failure to fulfil obligations - Article 33 SCA - Measures necessary to comply with the judgment of the Court*	*[2011] p. 202*
118	E-1/11	*Norwegian Appeal Board for Health Personnel - appeal from A*	**Request for an Advisory Opinion from Appeal Board for Health Personnel (Statens helsepersonellnemnd)** *Free movement of persons – Directive 2005/36/EC – Recognition of professional qualifications – Protection of public health – Non-discrimination - Proportionality*	*[2011] p. 484*
119	E-3/11	*Pálmi Sigmarsson v the Central Bank of Iceland*	**Request for an Advisory Opinion from Reykjavik District Court (Héraðsdómur Reykjavíkur)** *Free movement of capital – Article 43 EEA – National restrictions on capital movements – Jurisdiction – Proportionality – Legal certainty*	*[2011] p. 430*
120	E-4/11	*Arnulf Clauder*	**Request for an Advisory Opinion from Verwaltungsgerichtshof des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein)** *Directive 2004/38/EC – Family reunification – Right of residence for family members of EEA nationals holding a right of permanent residence – Condition to have sufficient resources*	*[2011] p. 216*

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121	*E-5/11*	*EFTA Surveillance Authority v The Kingdom of Norway*	**Direct Action** *Non-compliance with a judgment of the Court establishing a failure to fulfil obligations - Article 33 SCA - Failure by a Contracting Party to fulfil its obligations – Regulation (EC) No 1406/2002 establishing a* *European Maritime Safety Agency – Regulation (EC) No 1891/2006 on multiannual funding for the action of the European Maritime Safety Agency in the field of response to pollution caused by ships and amending Regulation (EC) No 1406/2002*	*[2011] p. 418*
122	*E-8/11*	*EFTA Surveillance Authority v The Republic of Iceland*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2002/49/EC on the assessment and management of environmental noise*	*[2011] p. 467*
123	*E-14/10 COSTS*	*Konkurrenten.no AS v EFTA Surveillance Authority*	**Direct Action** **(Taxation of costs)**	*[2012] p. 900*
124	*E-15/10*	*Posten Norge AS v EFTA Surveillance Authority*	**Direct Action** *Action for annulment of a decision of the EFTA Surveillance Authority – Competition – Abuse of a dominant position – Market for business-to-consumer over-the-counter parcel delivery – Distribution network – Exclusivity agreements – Conduct liable to eliminate competition on the market – Justification – Duration of infringement – Fine*	*[2012] p. 246*
125	*Joined Cases E-17/10 E-6/11*	*The Principality of Liechtenstein and VTM Fund-management v EFTA Surveillance Authority*	**Direct Action** *Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Special tax rules applicable to investment companies – Selectivity – Existing aid and new aid – Recovery – Legitimate expectations – Legal certainty – Obligation to state reasons*	*[2012] p. 114*

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126	E-2/11	STX Norway Offshore AS m.fl. v Staten v/ Tariffnemnda	**Request for an Advisory Opinion from Borgarting lagmannsrett (Borgarting Court of Appeal)** *Freedom to provide services – Directive 96/71/EC – Posting of workers – Minimum rates of pay – Maximum working hours – Remuneration for work assignments requiring overnight stay – Compensation for expenses*	[2012] p. 4
127	E-7/11	Grund, elli- og hjúkrunarheimili v Lyfjastofnun	**Request for an Advisory Opinion from Héraðsdómur Reykjavíkur (Reykjavík District Court)** *Directive 2001/83/EC – Free movement of goods – Pharmaceuticals – Parallel import – Control reports – Protection of public health – Justification – Language requirements for labelling and package leaflets*	[2012] p.188
128	E-9/11	Surveillance Authority v The Kingdom of Norway	**Direct Action** *Failure of an EEA State to fulfil obligations –Right of establishment – Free movement of capital – Ownership limitations and voting right restrictions in financial services infrastructure institutions – Proportionality – Legal certainty*	[2012] p. 442
129	Joined Cases E-10/11 and E-11/11	Hurtigruten ASA and The Kingdom of Norway v EFTA Surveillance Authority	**Direct Action** *Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Maritime transport – Article 61(1) EEA – Article 59(2) EEA – Services of general economic interest – Public service compensation – Overcompensation – Principle of good administration – Legal certainty – Obligation to state reasons*	[2012] p. 758
130	E-12/11	Asker Brygge AS v EFTA Surveillance Authority	**Direct Action** *Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Sale of land by public authorities – Market investor principle – Option agreement – Relevant time of assessment for considering the market value*	[2012] p. 536

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131	E-13/11	Granville Establishment v Volker Anhalt, Melanie Anhalt and Jasmin Barbaro, née Anhalt	**Request for an Advisory Opinion from the Fürstliches Landgericht (Princely Court of Justice)** Jurisdiction agreements – Freedom to provide and receive services – Discrimination on grounds of nationality – Justification – Remedies for non-conformity with EEA law	[2012] p. 400
132	E-14/11	DB Schenker v EFTA Surveillance Authority	**Direct Action** Action for annulment of a decision of the EFTA Surveillance Authority – Access to documents – Admissibility – Measures of Organization of Procedure – Reopening of oral procedure	[2012] p. 1178
133	E-15/11	Arcade Drilling AS v Staten v/Skatt Vest	**Request for an Advisory Opinion from Oslo tingrett (Oslo District Court)** Freedom of establishment – Articles 31 and 34 EEA – Taxation – Anti-avoidance principles – Proportionality	[2012] p. 676
134	E-17/11	Aresbank SA v Landsbankinn hf., Fjármálaráðuneytið and the Icelandic State	**Request for an Advisory Opinion from Hæstiréttur Íslands (Supreme Court of Iceland)** Directive 94/19/EC – Directive 2000/12/EC – Directive 2006/48/EC – Admissibility – National legislation adopting provisions of EEA law to regulate purely internal situations – Notion of deposit – Interbank loans – Mutual recognition of an authorisation for the taking up and pursuit of the business of credit institutions – Applicability of decisions of the EEA Joint Committee	[2012] p. 916
135	E-18/11	Irish Bank Resolution Corporation Ltd v Kaupþing hf.	**Request for an Advisory Opinion from Héraðsdómur Reykjavíkur (Reykjavík District Court)** Article 34 SCA – Appeal against a decision making a request for an Advisory Opinion – Reorganisation and winding up of credit institutions – Directive 2001/24/EC – Conform interpretation	[2012] p. 592

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136	E-19/11	*Vín Tríó ehf. v the Icelandic State*	**Request for an Advisory Opinion from Héraðsdómur Reykjavíkur (Reykjavík District Court)** *Free movement of goods – Admissibility – Product coverage – Articles 11 and 16 EEA - State monopolies of a commercial character – Rules concerning the existence and operation of a monopoly – Product selection rules – Refusal to sell alcoholic beverages containing stimulants such as caffeine – Discrimination between domestic and imported products – Absence of domestic production*	*[2012] p. 974*
137	E-1/12	*Den norske Forleggerforening v EFTA Surveillance Authority*	**Direct Action** *Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Alleged aid granted to Nasjonal digital læringsarena (NDLA) – Decision not to open the formal investigation procedure – Notion of economic activity – Notion of doubts – Obligation to state reasons*	*[2012] p. 1040*
138	E-2/12	*HOB-vín ehf. v Áfengis- og tóbaksverslun ríkisins*	**Request for an Advisory Opinion from Héraðsdómur Reykjavíkur (Reykjavík District Court)** Free movement of goods – Directive 2000/13/EC – Product coverage – Labelling of foodstuffs – Misleading labelling – Lack of notification to ESA of a national measure – Justification – State liability	*[2012] p. 1092*
139	E-16/11	*EFTA Surveillance Authority v Iceland*	**Direct Action** *Directive 94/19/EC on deposit-guarantee schemes – Obligation of result – Emanation of the State – Discrimination*	*[2013] p. 4*
140	E-3/12	*Staten v/ Arbeidsdepartementet v Stig Arne Jonsson*	**Request for an Advisory Opinion from Borgarting lagmannsrett (Borgarting Court of Appeal)** *Regulation (EEC) No 1408/71 – Social security for migrant workers – Unemployment benefits – Residence in the territory of another EEA State – Condition of actual presence in the State of last employment for entitlement to unemployment benefits*	*[2013] p. 136*

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141	E-10/12	Yngvi Harðarson v Askar Capital hf.	**Request for an Advisory Opinion from Héraðsdómur Reykjavíkur (Reykjvik District Court)** *Directive 91/533/EEC – Obligation to inform employees – Amendments to a written contract of employment – Effect of non-notification of amendments*	[2013] p. 204
142	E-12/12	EFTA Surveillance Authority v Iceland	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC*	[2013] p. 240
143	E-13/12	EFTA Surveillance Authority v Iceland	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Council Directive 90/167/EEC of 26 March 1990 laying down the conditions governing the preparation, placing on the market and use of medicated feedingstuffs in the Community*	[2013] p. 248
144	E-14/12	EFTA Surveillance Authority v the Principality of Liechtenstein	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Freedom of establishment – Freedom to provide services – Articles 31 and 36 EEA – Obligation on temporary work agencies to deposit a guarantee – Indirect and direct discrimination – Residence requirement – Justification*	[2013] p. 256
145	E-11/12	Beatrix Koch, Lothar Hummel and Stefan Müller v Swiss Life (Liechtenstein) AG	**Request for an Advisory Opinion from Fürstliche Landgericht des Fürstentums Liechtenstein (Princely Court of the Principality of Liechtenstein)** *Directive 90/619/EEC – Directive 92/96/EEC – Directive 2002/83/EC – Directive 2002/92/EC – Life assurance – Unit-linked benefits – Obligation to provide fair advice – Information to be communicated to the policy holder before the contract is concluded – Principle of equivalence – Principle of effectiveness*	[2013] p. 272
146	E-7/12	DB Schenker v EFTA Surveillance Authority	**Direct Action** *Action for failure to act – Non-contractual liability of the EFTA Surveillance Authority – Access to documents – Legitimate expectations – Principle of good administration – Failure of the EFTA Surveillance Authority to take a decision within a self-imposed time limit*	[2013] p. 356

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147	E-9/12	Iceland v EFTA Surveillance Authority	**Direct Action** Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Sale of land by public authorities – Market investor principle – State Aid Guidelines – Well-publicised bidding procedure comparable to an auction – Manifest error of assessment – Principle of sound administration – Obligation to state reason**S**	[2013] p. 454
148	E-15/12	Jan Anfinn Wahl v the Icelandic State	**Request for an Advisory Opinion from Hæstiréttur Íslands (the Supreme Court of Iceland)** Article 3 EEA – Article 7 EEA – Form and method of implementation of directives – Directive 2004/38/EC – Free movement of EEA nationals – Restrictions on right of entry – Procedural safeguards	[2013] p. 534
149	E-6/12	EFTA Surveillance Authority v the Kingdom of Norway	**Direct Action** Failure by an EEA/EFTA State to fulfil its obligations – Regulation (EEC) No 1408/71 – Regulation (EEC) No 574/72 – Social security for migrant worker	[2013] p. 618
150	Joined Cases E-4/12 and E-5/12	Risdal Touring AS and Konkurrenten.no AS v EFTA Surveillance Authority	**Direct Action** Action for annulment of a decision of the EFTA Surveillance Authority – Access to documents – Admissibility – No need to adjudicate	[2013] p. 668
151	E-2/13	Bentzen Transport AS v EFTA Surveillance Authority	**Direct Action** Refusal to commence proceedings for alleged failure of an EEA State to fulfil its obligations in the field of procurement – Actionable measures – Admissibility	[2013] p. 802
152	E-2/12 INT	HOB-vín ehf.	**Direct Action** Interpretation of a judgment – Advisory Opinion – Application manifestly inadmissible	[2013] p. 816
153	E-22/13	Íslandsbanki hf. v Gunnar V. Engilbertsson	**Request for an Advisory Opinion from Hæstiréttur Íslands (the Supreme Court of Iceland)** Withdrawal of a request for an Advisory Opinion	[2013] p. 826
154	E-9/13	EFTA Surveillance Authority v the Kingdom of Norway	**Direct Action** Failure by an EEA State to fulfil its obligations – Commission Directive 2010/48/EU of 5 July 2010 adapting to technical progress Directive 2009/40/EC of the European Parliament and of the Council on roadworthiness tests for motor vehicles and their trailers	[2013] p. 830

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155	E-10/13	EFTA Surveillance Authority v Iceland	**Direct Action** Failure by an EEA/EFTA State to fulfil its obligations – Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle for equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)	[2013] p. 840
156	E-11/13	EFTA Surveillance Authority v Iceland	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Directive 2002/92/EC of 9 December 2002 on insurance mediation	[2013] p. 848
157	E-6/13	Metacom AG v Rechtsanwälte Zipper & Collegen	**Request for an Advisory Opinion from Fürstliche Landgericht des Fürstentums Liechtenstein (Princely Court of the Principality of Liechtenstein)** Lawyers' freedom to provide cross-border services – Directive 77/249/EEC – Self-representation – Notification requirement in national law – Consequences of failure to notify	[2013] p. 856
158	E-13/13	EFTA Surveillance Authority v the Kingdom of Norway	**Direct Action** Failure by an EEA State to fulfil its obligations – Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing	[2013] p. 914
159	E-14/13	EFTA Surveillance Authority v Iceland	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Articles 31 and 40 EEA – Different taxation on domestic and cross border mergers within the EEA	[2013] p. 924
160	E-15/13	EFTA Surveillance Authority v Iceland	**Direct Action** Failure by an EEA State to fulfil its obligations – Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests	[2013] p. 936
161	E-16/13	EFTA Surveillance Authority v Iceland	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Failure to implement - Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts	[2013] p. 946
162	E-17/13	EFTA Surveillance Authority v Iceland	**Direct Action** Failure by a Contracting Party to fulfil its obligations – Directive 2009/44/EC – Failure to implement	[2013] p. 954

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163	*E-18/13*	*EFTA Surveillance Authority v Iceland*	**Direct Action** *Failure by a Contracting Party to fulfil its obligations – Directive 2001/81/EC – Failure to implement*	*[2013] p. 962*
164	*E-7/13*	*Creditinfo Lánstraust hf. v Register Iceland and the Icelandic State*	**Request for an Advisory Opinion from Héraðsdómur Reykjavíkur (Reykjvik District Court)** *Directive 2003/98/EC on the re-use of public sector information – Principles governing charging – Transparency – Notion of cost – Self-financing requirements*	*[2013] p. 970*

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The EFTA Court was set up under the Agreement on the European Economic Area (the EEA Agreement) of 2 May 1992. The EEA Agreement entered into force on 1 January 1994. The EFTA Court is composed of three judges. The EFTA States which are parties to the EEA Agreement are Iceland, Liechtenstein and Norway.

This report contains information on the EFTA Court and the administration of the Court for the period from 1 January to 31 December 2013. In addition, it has a short section on the Judges and the staff and the Court's activities in 2013.

The report includes the full texts of the decisions of the EFTA Court as well as the reports for the hearing prepared by the Judge-Rapporteurs during this period. This Report also contains an index of decisions printed in prior editions of the EFTA Court Report.


EFTA COURT