REPORT of the EFTA Court 2013

Book 1

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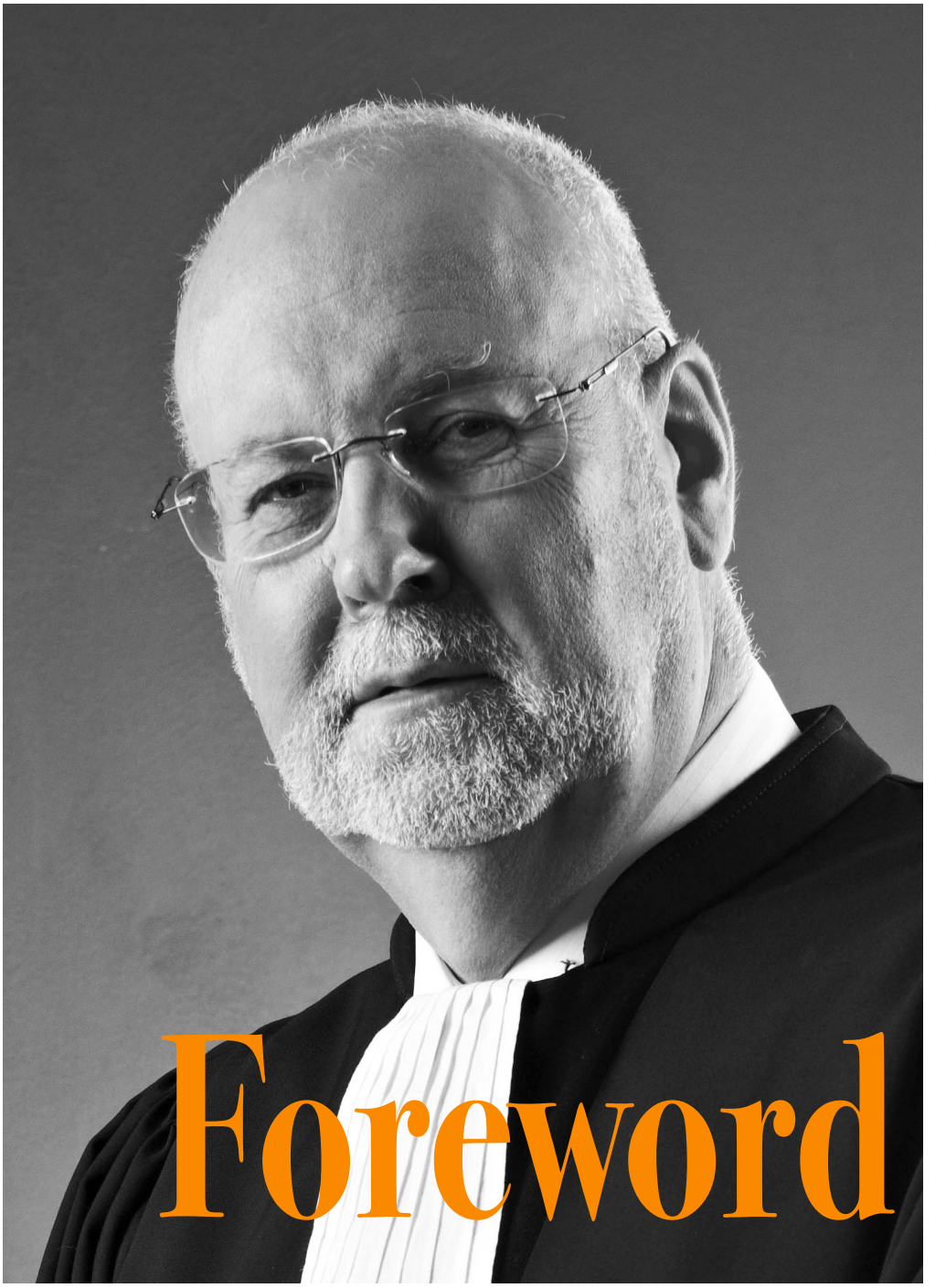

Foreword

The EFTA Court was set up under the Agreement on the European Economic Area (the EEA Agreement) of 2 May 1992. This agreement was concluded between, on the one hand, the European Communities and their then twelve Member States and on the other hand the EFTA States Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland. The treaty entered into force on 1 January 1994, except for Liechtenstein and Switzerland. Accordingly, the EFTA Court took up its functions on 1 January 1994 with five judges nominated by Austria, Finland, Iceland, Norway and Sweden and appointed by common accord of the respective governments. Austria, Finland and Sweden joined the European Union on 1 January 1995 and have since then been EEA Member States on the EU side. On the EFTA side, Liechtenstein became a member of the EEA on 1 May 1995. The EFTA Court continued its work in its original composition of five judges until 30 June 1995 under a Transitional Arrangements Agreement. Since that date, the Court has been composed of three judges appointed by common accord of the Governments of Iceland, Liechtenstein and Norway.

The EEA Agreement aims at extending the EU single market to the participating EFTA States with the exception of certain common policies. Is is based on a two pillar structure, the EU forming one pillar and the EFTA States the other. Currently, the EEA consists of the 27 Member States of the EU (Croatia is expected to join in the Spring of 2014) and of the three EFTA States Iceland, Liechtenstein and Norway.

The present *Report of the EFTA Court* covers the period from *1 January to 31 December 2013* and contains the decisions rendered during that period as well as an overview of the Court's other activities.

The working language of the Court is English, and its Judgments, other decisions and Reports for the Hearing are published in English. Judgments in the form of Advisory Opinions, as well as the respective Reports for the Hearing, are rendered in English and in the language of the requesting national court. Both language versions are authentic and published in the Court Reports. The different language versions are published with corresponding page numbers to facilitate reference.

Decisions of the EFTA Court, which have not yet been published in the Court Report, may be accessed on the EFTA Court website www.eftacourt.int or obtained from the Registry by mail or e-mail registry@eftacourt.int.


EFTA
President
CARL BAUDENBACHER
Judge
PALL HREINSSON

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(Directive 94/19/EC on deposit-guarantee schemes – Obligation of result – Emanation of the State – Discrimination)

Summary of the Judgment

1. A principal characteristic of directives is that they are intended to achieve a specific result whilst leaving it to the EEA States how to achieve this objective. European legislative practice shows that there may be great differences in the types of obligations which directives impose upon EEA States and therefore in the results which must be achieved. There is a general obligation on the EEA States to ensure that the provisions of a directive are fully effective. The nature of the result to be achieved is determined by the substantive provisions of the individual directive in question.

2. The judgment is based on Directive 94/19/EC as it stood at the relevant time; meaning that subsequent revision and amendments - including improved protection of depositors - are not taken into account, as they were not yet part of the EEA Agreement. The Directive has to be considered as one piece of a regulatory framework for banks and financial institutions.

3. The system introduced by Article 3(1) of the Directive is not one of absolute constraint. The Directive does not exhaustively regulate the unavailability of deposits under EEA law. It simply requires EEA States to provide for a harmonised minimum level of deposit protection. They have to introduce and officially recognise a deposit-guarantee scheme and fulfil certain supervisory tasks. However, that provision does not envisage that EEA States have to

ensure the payment of aggregate deposits in all circumstances.

4. Article 7 of the Directive provides inter alia for minimum harmonisation as regards the level of coverage for individual deposits. It does not lay down an obligation on the State and its authorities to ensure compensation if a deposit-guarantee scheme is unable to cope with its obligations in the event of a systemic crisis. The obligation on EEA States under Article 10 of the Directive is limited to provide for a mandatory and effective procedural framework with respect to time limits.

6. Articles 1(3) and 9(3) and recitals 3, 10 and 25 of the Directive show that the Directive deals - at least primarily - with a failure of individual banks and not with a systemic crisis. The wording of recital 4 of the Directive is limited to a failure of a single credit institution that may lead to massive withdrawals also from credit institutions.

7. It is clear from recitals 4, 23 and 25 of the Directive that the cost of financing guarantee schemes must be borne, in principle, by credit institutions and not the EEA States. How to proceed in a case where the guarantee scheme is unable to cope with its payment obligations remains largely unanswered by the Directive. This does not mean that depositors will necessarily remain unprotected in such a case. Depositors may fall within the remit of other parts of the safety net.

8. In recital 16 in the preamble to the Directive it is stated that it would not be appropriate to impose a level of protection "which might in certain cases have the effect of encouraging the unsound management of credit institutions". This points to the concept of moral hazard. In economic literature the lesson of moral hazard has been described with the words that "less is more". Professor Joseph E. Stiglitz has formulated in this respect: "[T]he more and better insurance that is provided against some contingency, the less incentive individuals have to avoid the insured event, because the less they bear the full consequences of their actions".

9. The reservation set out in recital 24 of the Directive aims expressly to preclude an excessive shifting to the State of the costs arising from a major banking failure. Consequently, that recital does not support the existence of the alleged obligation of result.

10. The Directive does not envisage that Iceland itself must

ensure payments to depositors in the Icesave branches in the Netherlands and the UK, in accordance with Articles 7 and 10 of the Directive, in a systemic crisis of the magnitude experienced. The first plea is dismissed.

11. By its second and third pleas, the applicant contends that by covering deposits in Iceland at least to the level prescribed by the Directive, and within the time limits provided therein, and, at the same time, not providing foreign depositors with at least that same minimum guarantee, Iceland has infringed the Directive read in light of Article 4 EEA or has indirectly discriminated on the basis of nationality which is prohibited by Article 4 EEA.

12. The second plea has to be dismissed. The transfer of domestic deposits - whether it leads in general to unequal treatment or not - does not fall within the scope of the non-discrimination principle as set out in the Directive.

13. Having regard to the applicant's self-limitation, the Court is bound to assess under the third plea whether Iceland was under a specific obligation to ensure that payments were made to Icesave depositors in the Netherlands and the UK.

14. According to the findings as regards the first and second pleas, such an obligation of result could only be deemed to exist if it were to follow directly from Article 4 EEA. Were this the case, the transfer of the domestic deposits would have led to an obligation to ensure the payment of minimum compensation.

15. This, however, is not required under the principle of non-discrimination. Article 4 EEA requires that comparable situations must not be treated differently. A specific obligation upon Iceland that, in any event, would not establish equal treatment between domestic depositors and those depositors in Landsbanki's branches in other EEA States cannot be derived from that principle. Consequently, this plea cannot succeed.

16. For the sake of completeness, even if the third plea had been formulated differently, one would have to bear in mind that the EEA States enjoy a wide margin of discretion in making fundamental choices of economic policy in the specific event of a systemic crisis. This would have to be taken into consideration as a possible ground for justification. In the earlier case of Sigmarsson, the applicant itself underlined this point. The third plea has to be dismissed.

JUDGMENT OF THE COURT

28 January 2013

(Directive 94/19/EC on deposit-guarantee schemes – Obligation of result – Emanation of the State – Discrimination)

In Case E-16/11,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Gjermund Mathisen, Officer, Department of Legal & Executive Affairs, acting as Agents,

applicant,

supported by the

European Commission, represented by its Agents Enrico Traversa, Albert Nijenhuis and Karl-Philipp Wojcik,

intervener,

v

Iceland, represented by Kristján Andri Stefánsson, Agent, Tim Ward QC, Lead counsel, Jóhannes Karl Sveinsson, Co-counsel,

defendant,

APPLICATION for a declaration that by failing to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and in the United Kingdom provided for in Article 7(1) of the Act referred to at point 19a of Annex IX to the Agreement on the European Economic Area (Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes) within the time limits laid down in Article 10 of the Act, Iceland has failed to comply with the obligations resulting from that Act, in particular its Articles 3, 4, 7 and 10, and/or Article 4 of the Agreement on the European Economic Area.

THE COURT,

composed of: Carl Baudenbacher, President and Judge Rapporteur, Páll Hreinsson, and Ola Mestad (ad hoc), Judges,

Registrar: Gunnar Selvik,

– having regard to the written pleadings of the parties and the intervener and the written observations of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director of the EEA Coordination Unit, and by Frederique Lambrecht, Legal Officer at the EEA Coordination Unit, acting as Agents;

– the Kingdom of the Netherlands, represented by Corinna Wissels, Mielle Bulterman and Charlotte Schillemans, Head and members of the European Law Division of the Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agents;

– the Kingdom of Norway, represented by Kaja Moe Winther, Senior Adviser, Ministry of Foreign Affairs, and Torje Sunde, advokat, Office of the Attorney General (Civil Affairs), acting as Agents;

– the United Kingdom of Great Britain and Northern Ireland, represented by Heather Walker of the Treasury Solicitor's Department, acting as Agent, and Mark Hoskins QC,

having regard to the Report for the Hearing,

having heard oral argument of the applicant, represented by its Agents Xavier Lewis and Gjermund Mathisen; the defendant, represented by its Agent Kristján Andri Stefánsson, Lead counsel Tim Ward QC, and Co-counsel and Supreme Court Attorney Jóhannes Karl Sveinsson, assisted by Professor Miguel Poiares Maduro, State Attorney General Einar Karl Hallvarðsson, Supreme Court Attorney Reimar Pétursson, Dóra Guðmundsdóttir, Kristín Haraldsdóttir and Þóra M. Hjaltested, advisers; the intervener, represented by its Agents Enrico Traversa and Albert Nijenhuis; Liechtenstein, represented by its Agent Dr Andrea Entner-Koch; the Netherlands, represented by its Agents Corinna Wissels and Charlotte Schillemans, and Gerald Enting, Ministry of Finance, and Sander Timmerman, Netherlands Central Bank; Norway, represented by

its Agents Kaja Moe Winther, Senior Adviser, and Kristin Nordland Hansen, Higher Executive Officer, Ministry of Foreign Affairs; the United Kingdom, represented by its Agent Heather Walker, and Mark Hoskins QC; at the hearing on 18 September 2012,

gives the following

JUDGMENT

I LEGAL CONTEXT

EEA law

1 Article 4 EEA provides:

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

2 The Act referred to at point 19a of Annex IX to the EEA Agreement (Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, OJ 1994 L 135, p. 5), as amended, provides for minimum harmonised rules as regards deposit-guarantee schemes.

3 Recital 1 in the preamble to Directive 94/19 reads:

Whereas, in accordance with the objectives of the Treaty, the harmonious development of the activities of credit institutions throughout the Community should be promoted through the elimination of all restrictions on the right of establishment and the freedom to provide services, while increasing the stability of the banking system and protection for savers;

4 Recital 2 in the preamble to Directive 94/19 reads:

Whereas, when restrictions on the activities of credit institutions are eliminated, consideration should be given to the situation which might arise if deposits in a credit institution that has branches in other Member States become unavailable; whereas it is indispensable to ensure a harmonized minimum level of deposit protection wherever

deposits are located in the Community; whereas such deposit protection is as essential as the prudential rules for the completion of the single banking market;

5 Recital 3 in the preamble to Directive 94/19 reads:

Whereas in the event of the closure of an insolvent credit institution the depositors at any branches situated in a Member State other than that in which the credit institution has its head office must be protected by the same guarantee scheme as the institution's other depositors;

6 Recital 4 in the preamble to Directive 94/19 reads:

Whereas the cost to credit institutions of participating in a guarantee scheme bears no relation to the cost that would result from a massive withdrawal of bank deposits not only from a credit institution in difficulties but also from healthy institutions following a loss of depositor confidence in the soundness of the banking system;

7 Recital 7 in the preamble to Directive 94/19 reads:

Whereas a branch no longer requires authorization in any host Member State, because the single authorization is valid throughout the Community, and its solvency will be monitored by the competent authorities of its home Member State; whereas that situation justifies covering all the branches of the same credit institution set up in the Community by means of a single guarantee scheme; whereas that scheme can only be that which exists for that category of institution in the State in which that institution's head office is situated, in particular because of the link which exists between the supervision of a branch's solvency and its membership of a deposit-guarantee scheme;

8 Recital 16 in the preamble to Directive 94/19 reads:

Whereas, on the one hand, the minimum guarantee level prescribed in this Directive should not leave too great a proportion of deposits without protection in the interest both of consumer protection and of the stability of the financial system; whereas, on the other hand, it would not be appropriate to impose throughout the Community a level of protection which might in certain cases have the effect of encouraging the unsound management of credit institutions; whereas the cost of funding schemes should be taken into account; whereas it

would appear reasonable to set the harmonized minimum guarantee level at ECU 20 000; whereas limited transitional arrangements might be necessary to enable schemes to comply with that figure;

9 Recital 23 in the preamble to Directive 94/10 reads:

Whereas it is not indispensable, in this Directive, to harmonize the methods of financing schemes guaranteeing deposits or credit institutions themselves, given, on the one hand, that the cost of financing such schemes must be borne, in principle, by credit institutions themselves and, on the other hand, that the financing capacity of such schemes must be in proportion to their liabilities; whereas this must not, however, jeopardize the stability of the banking system of the Member State concerned;

10 Recital 24 in the preamble to Directive 94/19 reads:

Whereas this Directive may not result in the Member States' or their competent authorities' being made liable in respect of depositors if they have ensured that one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed in this Directive have been introduced and officially recognized;

11 Recital 25 in the preamble to Directive 94/19 reads:

Whereas deposit protection is an essential element in the completion of the internal market and an indispensable supplement to the system of supervision of credit institutions on account of the solidarity it creates amongst all the institutions in a given financial market in the event of the failure of any of them,

12 Article 1 of Directive 94/19 reads:

1. "deposit" shall mean any credit balance which results from funds left in an account or from temporary situations deriving from normal banking transactions and which a credit institution must repay under the legal and contractual conditions applicable, and any debt evidenced by a certificate issued by a credit institution.

...

3. "unavailable deposit" shall mean a deposit that is due and payable but has not been paid by a credit institution under the legal and contractual conditions applicable thereto, where either:

(i) the relevant competent authorities have determined that in their view the credit institution concerned appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and to have no current prospect of being able to do so.

The competent authorities shall make that determination as soon as possible and at the latest 21 days after first becoming satisfied that a credit institution has failed to repay deposits which are due and payable;

(ii) a judicial authority has made a ruling for reasons which are directly related to the credit institution's financial circumstances which has the effect of suspending depositors' ability to make claims against it, should that occur before the aforementioned determination has been made;

4. "credit institution" shall mean an undertaking the business of which is to receive deposits or other repayable funds from the public and to grant credits for its own account;

5. "branch" shall mean a place of business which forms a legally dependent part of a credit institution and which conducts directly all or some of the operations inherent in the business of credit institutions; any number of branches set up in the same Member State by a credit institution which has its head office in another Member State shall be regarded as a single branch.

13 Article 3 of Directive 94/19 reads:

1. Each Member State shall ensure that within its territory one or more deposit-guarantee schemes are introduced and officially recognized. ...

14 Article 4 of Directive 94/19 reads:

1. Deposit-guarantee schemes introduced and officially recognized in a Member State in accordance with Article 3(1) shall cover the depositors at branches set up by credit institutions in other Member States. ...

15 Article 7 of Directive 94/19 reads:

1. Deposit-guarantee schemes shall stipulate that the aggregate deposits of each depositor must be covered up to ECU 20 000 in the event of deposits' being unavailable.

...

6. Member States shall ensure that the depositor's rights to compensation may be the subject of an action by the depositor against the deposit-guarantee scheme.

16 Article 8 of Directive 94/19 reads:

1. The limits referred to in Article 7(1), (3) and (4) shall apply to the aggregate deposits placed with the same credit institution irrespective of the number of deposits, the currency and the location within the Community.

...

17 Article 9 of Directive 94/19 reads:

1. Member States shall ensure that credit institutions make available to actual and intending depositors the information necessary for the identification of the deposit-guarantee scheme of which the institution and its branches are members within the Community or any alternative arrangement provided for in Article 3(1), second subparagraph, or Article 3(4). The depositors shall be informed of the provisions of the deposit-guarantee scheme or any alternative arrangement applicable, including the amount and scope of the cover offered by the guarantee scheme. That information shall be made available in a readily comprehensible manner.

Information shall also be given on request on the conditions for compensation and the formalities which must be completed to obtain compensation.

2. The information provided for in paragraph 1 shall be made available in the manner prescribed by national law in the official language or languages of the Member State in which the branch is established.

3. Member States shall establish rules limiting the use in advertising of the information referred to in paragraph 1 in order to prevent such use from affecting the stability of the banking system or depositor confidence. In particular, Member States may restrict such advertising to a factual reference to the scheme to which a credit institution belongs.

18 Article 10 of Directive 94/19 reads:

1. Deposit-guarantee schemes shall be in a position to pay duly verified claims by depositors in respect of unavailable deposits within three months of the date on which the competent authorities make the determination described in Article 1(3)(i) or the judicial authority makes the ruling described in Article 1(3)(ii).

2. In wholly exceptional circumstances and in special cases a guarantee scheme may apply to the competent authorities for an extension of the time limit. No such extension shall exceed three months. The competent authorities may, at the request of the guarantee scheme, grant no more than two further extensions, neither of which shall exceed three months.

...

National law

19 Directive 94/19 was implemented into Icelandic law by Act N o 98/1999 on a Deposit Guarantee and Investor Compensation Scheme (lög um innstæðutryggingar og tryggingakerfi fyrir fjárfesta).

20 Article 1 of Act No 98/1999 reads:

The objective of this Act is to guarantee a minimum level of protection to depositors in commercial banks and savings banks, and to customers of companies engaging in securities trading pursuant to law, in the event of difficulties of a given company in meeting its obligations to its customers according to the provisions of this Act.

21 Article 2 of Act No 98/1999 reads:

Guarantees under this Act are entrusted to a special institute named the Depositors' and Investors' Guarantee Fund, hereinafter referred

to as the "Fund". The Fund is a private foundation operating in two independent departments, the Deposit Department and the Securities Department, with separate finances and accounting, cf. however the provisions of Article 12.

22 Article 3 of Act No 98/1999 reads:

Commercial banks, savings banks, companies providing investment services, and other parties engaging in securities trading pursuant to law and established in Iceland shall be members of the Fund. The same shall apply to any branches of such parties within the European Economic Area within the States parties to the EFTA Convention or in the Faroe Islands. Such parties, hereinafter referred to as Member Companies, shall not be liable for any commitments entered into by the Fund beyond their statutory contributions to the Fund, cf. the provisions of Articles 6 and 7. The Financial Supervisory Authority shall maintain a record of Member Companies.

23 Article 6 of Act No 98/1999 reads:

The total assets of the Deposit Department of the Fund shall amount to a minimum of 1% of the average amount of guaranteed deposits in commercial banks and savings banks during the preceding year.

...

24 Article 9 of Act No 98/1999 reads:

If, in the opinion of the Financial Supervisory Authority, a Member Company is unable to render payment of the amount of deposits, securities or cash upon a customer's demand for refunding or return thereof in accordance with applicable terms, the Fund shall pay to the customer of the Member Company the amount of his deposit from the Deposit Department and the value of his securities and cash in connection with securities trading from the Securities Department. The obligation of the Fund to render payment also takes effect if the estate of a Member Company is subjected to bankruptcy proceedings in accordance with the Act on Commercial Banks and Savings Banks and the Act on Securities Trading.

The opinion of the Financial Supervisory Authority shall have been made available no later than three weeks after the Authority first obtains confirmation that the relevant Member Company has not rendered payment to its customer or accounted for his securities in accordance with its obligations. ...

Further specifications regarding payments from the Fund shall be included in a Government Regulation.

25 Article 10 of Act No 98/1999 reads:

In the event that the assets of either department of the Fund are insufficient to pay the total amount of guaranteed deposits, securities and cash in the Member Companies concerned, payments from each Department [i.e. the Fund's deposits department and the Fund's securities department] shall be divided among the claimants as follows: each claim up to ISK 1.7 million shall be paid in full, and any amount in excess of that shall be paid in equal proportions depending on the extent of each Department's assets. This amount shall be linked to the EUR exchange rate of 5 January 1999. No further claims can be made against the Fund at a later stage even if losses suffered by the claimants have not been compensated in full. Should the total assets of the Fund prove insufficient, the Board of Directors may, if it sees compelling reasons to do so, take out a loan in order to compensate losses suffered by claimants.

In the event that payment is effected from the Fund, the claims made on the relevant Member Company or bankruptcy estate will be taken over by the Fund.

II FACTS

26 On 1 January 2000, Iceland implemented Directive 94/19 (hereinafter "the Directive") through the enactment of Act No 98/1999 on a Deposit Guarantee and Investor Compensation Scheme. Act No 98/1999 set up the Depositors' and Investors' Guarantee Fund which started operating on the same day.

27 In October 2006, Landsbanki Íslands hf (hereinafter "Landsbanki") launched a branch in the United Kingdom which provided online savings accounts under the brand name

"Icesave". A similar Icesave online deposit branch was launched in the Netherlands which began accepting deposits in Amsterdam on 29 May 2008. The Icesave accounts drew in substantial deposits both from private and public investors.

28 As a part of a worldwide financial crisis, there was a run on Icesave accounts in the United Kingdom from February to April 2008.

29 In accordance with the division of responsibility laid down under the Directive, deposits at the British and Netherlands branches of Landsbanki were under the responsibility of Iceland's Depositors' and Investors' Guarantee Fund (hereinafter "TIF"), which offered a minimum guarantee of ISK 1 700 000 per depositor pursuant to Article 10 of Act No 98/1999. Iceland did not make use of the option provided for in Article 7(2) of the Directive to exclude certain categories of depositors from the guarantee scheme.

30 From May 2008, Landsbanki opted to take part in the Netherlands deposit-guarantee scheme to supplement its home scheme. At that time, the minimum amount guaranteed under the Netherlands scheme was EUR 40 000 per depositor which was later raised to EUR 100 000 per depositor. Similarly, the Landsbanki branch in the United Kingdom joined the UK deposit-guarantee scheme for additional coverage. Deposits at the British branch of Landsbanki in excess of the minimum amount guaranteed by the Icelandic TIF were later guaranteed by the UK scheme to a maximum of GBP 50 000 for each retail depositor.

31 On 3 October 2008, the UK's Financial Supervisory Authority issued a Supervisory Notice which required Landsbanki to take certain actions with regard to its London branch. The practical effect was to freeze the assets of the Landsbanki branch.

32 On 6 October 2008, Landsbanki's Icesave websites in the Netherlands and in the United Kingdom ceased to work and depositors at those branches lost access to their deposits.

33 On the same day, Althingi, the Icelandic Parliament, adopted Emergency Act No 125/2008. The Emergency Act provided for the creation of new banks and the granting of priority status in the bankruptcy to depositors with claims upon the TIF.

34 On 7 October 2008, Landsbanki collapsed and the Icelandic Financial Supervisory Authority ("Fjármálaeftirlitið", hereinafter "FME") assumed the powers of the meeting of Landsbanki's shareholders and immediately suspended the bank's board of directors. The FME appointed a winding-up committee which, with immediate effect, assumed the full authority of the board.

35 On the same day, the Netherlands Central Bank submitted a petition to the District Court of Amsterdam asking for a ruling that certain emergency regulations of Netherlands law applied.

36 Between 6 and 9 October 2008, the Icelandic Minister of Finance established new banks under the Emergency Act.

37 On 8 October 2008, the UK Government took action under its Anti-Terrorism, Crime and Security Act of 2001 to formally freeze the assets of Landsbanki, and initially also funds relating to Landsbanki owned, held or controlled by the FME and the Central Bank of Iceland (hereinafter "CBI") in the UK.

38 Between 9 and 22 October 2008, domestic deposits in Landsbanki were transferred to the new bank "New Landsbanki" which was established by the Icelandic Government. The transfer was based on a decision of the FME of 9 October 2008 that exercised its powers under the Emergency Act to achieve a restructuring of the Icelandic banks.

39 On 13 October 2008, at the request of the Netherlands Central Bank, the District Court of Amsterdam declared certain emergency regulations of Netherlands law applicable and appointed administrators to handle the affairs of the branch, including all assets and dealings with customers of the branch.

40 On 27 October 2008 and thereafter, the FME made statements that triggered an obligation for the TIF to make payments in accordance with Article 9 of Act No 98/1999 on a Deposit Guarantee and Investor Compensation Scheme to customers of Landsbanki's branches in the UK and the Netherlands. The original three-month time limit for payments was extended in accordance with Article 10(2) of the Directive to 23 October 2009.

41 On 19 November 2008, the IMF approved a two-year Stand-By Arrangement of USD 2.1 billion to Iceland. Under the Arrangement, USD 827 million was made available immediately, with eight further instalments of USD 155 million to follow. An important feature of the IMF Arrangement was the requirement to introduce stringent capital controls to prevent further devaluation of the Icelandic króna. The IMF Arrangement was based upon certain projections as to the balance of payments and sustainability of debt.

42 In late 2008, compensation to depositors was paid under the Netherlands and British deposit-guarantee schemes. All retail account holders in the United Kingdom received (or in a very small number of cases, declined) compensation payments from the UK Government, to the full value of their deposits. In the Netherlands, the Netherlands Government paid all private and wholesale account holders to a maximum of EUR 100 000 per depositor.

43 On 28 November 2008, temporary capital account restrictions were imposed to prevent further depreciation of the Icelandic króna, as an important part of the economic programme Iceland followed during its cooperation with the IMF. The capital controls restricted, in general, all transnational foreign currency movements except those for the purchase of goods and services. A very limited range of other transactions, including those related to emigration, were also exempted from the controls.

44 On the same day, the Icelandic Government presented the EFTA Standing Committee and the EEA Joint Committee with

notifications of protective measures under Article 43 EEA. Neither committee reacted unfavourably to the protective measures.

45 In December 2008, the Icelandic Parliament established a Special Investigation Commission (hereinafter "SIC") to investigate and analyse the processes leading to the collapse of the three main banks in Iceland. The report was delivered on 12 April 2010.

46 By March 2009, 93% of the commercial banking sector in Iceland had failed. The FME estimates that since October 2008 in total banks representing 99% of the Icelandic banking market became subject to either winding up or financial restructuring.

47 On 1 April 2009, the EFTA Standing Committee and the EEA Joint Committee were notified of developments regarding the protective measures.

48 On 9 June 2009, the freezing order in the UK was lifted.

49 On 4 October 2009, the TIF published a notice in the Icelandic Legal Gazette calling for claims to be submitted within two months. The Netherlands and UK Governments submitted claims, as did a small number of other depositors, including four institutional investors. Later the TIF wrote to all institutional investors to inform them that it was beginning to pay compensation under Act No 98/1999, and seeking an assignment of any claim against the banks themselves.

50 On 23 October 2009, the final deadline for payments expired.

51 In the autumn of 2009, controls on capital inflows in Iceland were removed. Other capital controls remained in place. Meanwhile, a strategy for gradual capital account liberalisation was introduced. These controls were in force when the facts relevant to these proceedings took place.

52 On 30 October 2009, 16 June 2010, and 1 July 2010, the EFTA Standing Committee and the EEA Joint Committee were further notified of amendments to the protective measures. None of these notifications resulted in any criticism from the committees.

53 In March 2010, the District Court of Amsterdam lifted the restrictions on the Netherlands branch of Landsbanki.

54 On 14 December 2011, in Case E-3/11 *Sigmarsson* [2011] EFTA Ct. Rep. 432, the Court held that "a national measure which prevents inbound transfer into Iceland of Icelandic krónur purchased on the offshore market is compatible with Article 43(2) and (4) of the EEA Agreement in circumstances such as those in the case before the referring court". Paragraph 50 of that judgment states that "[t]he substantive conditions laid down in Article 43(2) and (4) EEA call for a complex assessment of various macroeconomic factors. EFTA States must therefore enjoy a wide margin of discretion, both in determining whether the conditions are fulfilled, and the choice of measures taken, as those measures in many cases concern fundamental choices of economic policy."

III PRE-LITIGATION PROCEDURE AND PROCEDURE BEFORE THE COURT

55 On 26 May 2010, ESA issued a letter of formal notice to Iceland alleging a failure to ensure that Icesave depositors in the Netherlands and the United Kingdom received payment of the minimum amount of compensation provided for in Article 7(1) of the Directive, as amended, within the time limits laid down in Article 10 of the Directive, in breach of the obligations resulting from the Directive and/or Article 4 EEA.

56 Iceland was requested to submit its observations within two months of the receipt of that letter. At the request of the Icelandic Government, ESA granted extensions to that deadline, first until 8 September 2010, then until 7 December 2010 and finally until 2 May 2011.

57 On 2 May 2011, the Icelandic Government replied to the letter of formal notice. In its reply, the Icelandic Government maintained that it was not in breach of its obligations under the Directive or Article 4 EEA.

58 On 10 June 2011, unconvinced by Iceland's reply to the letter of formal notice, ESA delivered its reasoned opinion to Iceland.

59 On 30 September 2011, Iceland replied to the reasoned opinion.

60 On 13 December 2011, Iceland submitted an additional letter which contained further information on the winding up of the Landsbanki estate including summaries of recent Icelandic Supreme Court judgments concerning the reordering of the priority of creditors in that winding up.

61 By application lodged at the Court on 15 December 2011, 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 (hereinafter "SCA") seeking a declaration that by failing to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and the United Kingdom provided for in Article 7(1) of the Act referred to at point 19a of Annex IX to the Agreement on the European Economic Area within the time limits laid down in Article 10 of the Act, Iceland had failed to comply with the obligations resulting from that Act, in particular its Articles 3, 4, 7 and 10 and/or Article 4 EEA and ordering the defendant to bear the costs of the proceedings.

62 On 3 February 2012, Iceland requested an extension of the period in which to submit its defence. That request was granted by the President on 6 February 2012, setting a time limit for the submission of the defence of 8 March 2012.

63 In its defence, lodged at the Court on 8 March 2012, Iceland contends that the Court should dismiss the application and seeks an order that ESA pay its costs.

64 On 28 March 2012, the European Commission requested leave to intervene in support of ESA.

65 On 10 April 2012, ESA submitted its reply to the defence.

66 On 23 April 2012, following observations submitted by the parties, the European Commission was granted leave to intervene by Order of the President.

67 On 7 May 2012, the Samstaða þjóðar (National Unity Coalition), an association registered in Iceland, sought leave to intervene pursuant to Article 36 of Protocol 5 to the SCA on the Statute of the EFTA Court in support of the form of order sought by Iceland.

68 On 9 May 2012, the Government of the United Kingdom submitted written observations.

69 On 11 May 2012, Iceland submitted its rejoinder. On the same date, the Government of Liechtenstein submitted written observations.

70 On 15 May 2012, the Government of the Netherlands and the Government of Norway submitted written observations. Further, Iceland submitted an urgent request to receive the written observations. This request was granted by the Registrar on 16 May 2012.

71 On 23 May 2012, the European Commission submitted its statement in intervention.

72 On 15 June 2012, the application for leave to intervene by Samstaða þjóðar was dismissed as manifestly inadmissible by Order of the President.

73 On 20 June 2012, Iceland submitted its reply to the statement in intervention by the European Commission.

74 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure, the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

IV THE ACTION

First plea: Obligation of result

Arguments of the parties and of the intervener

The applicant

75 The applicant's first plea is that, in failing to ensure payment of compensation to Icesave depositors holding deposits in Landsbanki's branches in the UK and the Netherlands within the time limits laid down in the Directive, the defendant has breached its obligations under Articles 3, 4, 7 and 10 of the Directive.

76 ESA submits that the Directive imposes an obligation of result on EEA States to ensure that a deposit-guarantee scheme is set up capable of guaranteeing that, in the event of deposits being unavailable, the aggregate deposits of each depositor are covered in all circumstances to the amount laid down in Article 7(1) of the Directive. Further, the obligation of result requires States to ensure that duly verified claims by depositors are paid within the deadline laid down in Article 10 of the Directive.

77 The applicant contends that Iceland has not fulfilled all its obligations simply by transposing the Directive into national law and setting up and recognising a deposit-guarantee scheme without any regard to whether the compensation of depositors is, in fact, ensured under the conditions prescribed in the Directive.

78 According to ESA, this interpretation of the Directive is in line with the case law of the Court of Justice of the European Union (hereinafter "ECJ"). In ESA's view, it follows from Case C-222/02 *Paul and Others* [2004] ECR I-9425, paragraphs 26, 27 and 30, that the ECJ considers Articles 7 and 10 of the Directive to require a clear and precise result to be achieved.

79 The applicant argues further that it is for the national authorities to determine how to achieve the result aimed at by a directive, in the manner which they deem most appropriate. In the present case, if all else fails, in order to discharge its duties under the Directive, the EEA State itself may be held responsible for the

compensation of depositors to the amount provided for in Article 7 of the Directive.

80 In this regard, ESA notes that in the Impact Assessment of 12 July 2010 (see Commission Staff Working Document - Impact Assessment of 12 July 2010, SEC(2010) 834/2; hereinafter "Impact Assessment"), the Commission services set out various means of funding a deposit-guarantee fund, including ex ante contributions, ex post contributions, State loans and direct state interventions. However, the Directive itself does not specify how deposit-guarantee funds should be financed.

81 Moreover, ESA argues that exceptional circumstances, such as a financial crisis of the magnitude experienced in Iceland, cannot alter the obligation to compensate depositors in accordance with Article 7(1) of the Directive. By contrast, Article 10(2) of the Directive expressly mentions "exceptional circumstances" as allowing for certain extensions of the deadline for payment of compensation. Thus, in ESA's view, the effect of "exceptional circumstances" is limited to justifying certain payment delays.

82 ESA submits further that the TIF is an emanation of the Icelandic State within the meaning of the EEA Agreement and, consequently, any default of that institution is directly attributable to the State both in law and in fact.

83 In the applicant's view, the doctrine of *force majeure* does not apply in the present case and, in any event, does not release Iceland from its obligations under the Directive.

84 The applicant accepts that a State injection of capital to refinance a deposit-guarantee scheme may constitute State aid within the meaning of Article 61 EEA. In its view, however, this would appear to be compatible with the State aid rules. The applicant observes further that the Icelandic authorities never approached it to discuss the compatibility of any form of State intervention in this case. Furthermore, it contends that the State aid rules did not constrain the defendant from transferring national deposits to New Landsbanki.

The intervener

85 The Commission emphasises that the Directive is binding upon the EEA States and not on bodies that are created by the Member States in order to comply with their obligations under the directives concerned.

86 In this case, the Directive imposes obligations of result on the EEA States on the basis of the wording of Articles 3, 4, 7 and 10 of the Directive.

87 The intervener asserts that, following the introduction of a scheme, obligations of result include the obligation to ensure that the deposit-guarantee scheme is capable of ensuring the repayment of the covered deposits. In the event of a bank collapse, depositors are covered to a maximum of EUR 20 000. In the view of the intervener, if a deposit-guarantee scheme does not have sufficient funding, the Member State concerned must be regarded as having infringed the Directive.

88 In its view, any other interpretation would render the provision ineffective to ensure the objective of the Directive, that is, to provide a guarantee to depositors when deposits become unavailable, as depositors would not be able to rely on deposit-guarantee schemes. Such an interpretation would also fail to achieve the purpose of ensuring last resort protection.

89 The intervener shares the applicant's assessment, namely, that this interpretation is in line with the case law of the ECJ. In the intervener's view, an obligation of result can be clearly inferred from *Paul and Others* (cited above).

90 The intervener emphasises that EEA States are free to decide how deposit-guarantee schemes are funded in order to pay compensation in accordance with the Directive. In its view, a State could determine, for example, that the remaining banks, as well as newly created banks, be required to contribute to the refinancing of the scheme to the extent necessary for ensuring the repayment of depositors, or that the schemes take out long-term loans at market rates.

91 Such options would reflect the objective expressed in recital 23 in the preamble to the Directive, namely, that the costs of the schemes must, in principle, be borne by credit institutions.

92 According to the intervener, the possibility cannot be excluded, however, that an EEA State has no other choice than to resort to State funding. It reiterates that this is a matter which is within the discretion of the EEA State itself.

93 The intervener asserts that no provision of the Directive allows EEA States to disregard its rules in exceptional circumstances, such as a financial crisis. In its view, the Directive was devised precisely to deal with the exceptional occurrence of a bank failure, including circumstances in which supervision has not proved sufficient to save a bank. The European legislature did not include any additional derogation over and above what is provided for in Article 10(2) of the Directive.

94 Moreover, the intervener considers that, also on the basis of case law, the defendant's *force majeure* plea must be rejected.

95 Finally, the Commission submits that the present case concerns the obligation of an EEA State under the Directive to ensure the compensation prescribed by the Directive. Any State liability vis-à-vis individual depositors for not having ensured the compensation prescribed by the Directive is a different issue. Such liability would have to be established by a national court.

The defendant

96 The defendant submits that the Directive imposes no obligation of result on an EEA State to use its own resources in order to guarantee the pay-out of a deposit-guarantee scheme in the event that "all else fails". The obligations incumbent upon the State are limited to ensuring the proper establishment, recognition and a certain supervision of a deposit-guarantee scheme.

97 Moreover, the defendant argues that no provision of the Directive suggests that any form of State guarantee or State funding is required under the Directive, in particular where a

guarantee scheme is unable to pay compensation. It places an obligation upon the State to set up and to supervise a deposit-guarantee scheme, but there is no suggestion whatsoever that it must pay compensation.

98 Recitals 4, 23 and 25 in the preamble to the Directive make clear that the funding for deposit-guarantee schemes will come from the banks. However, the applicant's case converts the Directive from a measure funded by the banks into a measure that imposes huge potential liabilities on the State.

99 Article 7(6) of the Directive is the only operative provision that deals with the scenario that a deposit-guarantee scheme might be unable to pay duly qualified claims. However, the solution contemplated by this provision in the case of non-payment is an action against the scheme and not the EEA State.

100 The sole purpose of recital 24 in the preamble to the Directive is to exclude State liability if the compensation of depositors is ensured, as confirmed by the ECJ's judgment in *Paul and Others* and in particular by the German version of said recital.

101 With regard to the applicant's claim that it is undisputed between the parties that the TIF could not cope with the almost total failure of Iceland's banks, in the defendant's view, this does not show any failure on its part to implement the Directive properly. It contends – and claims to find particular support for its argument in the Impact Assessment – that no deposit-guarantee scheme could have coped with such a wide-scale banking failure.

102 The defendant submits that, if the obligation of result imposed by the Directive were that the State must ensure the payment of compensation, in whatever circumstances, then, if all else fails, the State would have to step in. That would be the case no matter how many hypothetical choices a State has. The logic of the applicant's argument – so the defendant contends – is that the State is left with no choice at all whether to use its resources to fund a deposit-guarantee scheme – at least where all else fails.

103 The defendant contends that any attempt to underwrite a deposit-guarantee scheme using the resources of the State creates its own problems. These include huge costs for the State, moral hazard on the part of the banks, and a linkage between the liabilities of the banks and the financial exposure of the State. That kind of link can have very serious consequences. A severe financial crisis easily turns to a possible sovereign default.

104 In the defendant's view, where widespread banking failure takes place, other policy tools are required. In that regard, it notes that the Commission is considering a package of reforms to banking supervision in Europe that aims to strengthen the measures available. State aid rules, in particular, would allow the applicant to ensure that any injection of State funds into the banking system is no more extensive than it needs to be, and that the single market is not detrimentally affected.

105 The defendant observes that the interpretation of the Directive advanced by the applicant is based on the goal of consumer protection. However, in its view, consumer protection measures must always strike a balance between costs and benefits. For this very reason, EEA law aims at a high level of consumer protection, but not the highest possible. If the applicant's approach were to prevail, this could create serious risks and burdens for the EEA States, beyond their contemplation when the Directive was adopted. Ultimately, that could be to the detriment of consumers themselves.

106 The defendant contends that whether or not the TIF is an emanation of the State is of no relevance for the present case.

107 The defendant infers from the Impact Assessment that an injection of State resources into the banking system of the kind at issue in the present case amounts to State aid. Consequently, were an EEA State under an obligation to make payments of that kind as an automatic result of the Directive if "all else fails", the State guarantee would fall outside the scope of State aid supervision.

108 In this connection, the defendant notes that the Commission in its proposal for the original Directive and its 2010 Impact Assessment recognised that public sector funding would be subject to State aid rules and that there would be no obligation to provide such. Moreover, it contends that there is obviously scope for serious distortions of competition if a State bails out a deposit-guarantee scheme – in effect subsidising its banks. In its view, State aid rules are there to ensure that this kind of activity is regulated by the applicant.

109 In the alternative, the defendant submits that, even if the Directive were to impose strict obligations upon the State to fund the guarantee scheme in the event of its collapse, it was prevented from doing so by *force majeure*.

Other participants submitting written observations

Liechtenstein

110 Liechtenstein interprets the wording of the proposal for a Council Directive on deposit-guarantee schemes to indicate that the Directive was intended to deal with the failure of individual banks; not with the collapse of an entire banking system. Liechtenstein contends that it was not envisaged that a general and automatic State responsibility covering the costs of the failure of the whole banking system would arise from the Directive.

The Netherlands

111 The Netherlands argues that the obligation to comply with the result sought by the Directive follows both from the general obligations under EEA law and the obligation of the State in relation to a directive. The Netherlands considers that the defence of *force majeure* is not available to Iceland as it can only rely on derogations provided by the Directive itself. But even if the Directive were to allow for a *force majeure* defence, in the view of the Netherlands, Iceland cannot rely on such as it failed to notify ESA of its difficulties and did not suggest appropriate solutions. Furthermore, the Netherlands argues that financial difficulties cannot be accepted as justification under EEA law, as to allow

financial difficulties as a defence would unjustly weaken the effectiveness of the Directive.

112 In the view of the Netherlands, Iceland failed in any event to prove a *force majeure* defence on the merits as it submitted evidence which is largely general in nature and based on assertion rather than proof. Moreover, Iceland also failed to prove that there was an "absolute impossibility" of establishing any form of deposit-guarantee scheme that would have been capable of ensuring the result sought by the Directive.

Norway

113 Norway argues that a general and automatic State responsibility for compensation of depositors as a last resort would impose an extensive financial burden on EEA States. Without a clear and precise wording in the Directive, the existence of such an obligation cannot be assumed. An obligation of such kind on the part of the EEA States does not follow from the preamble to the Directive or the preparatory works. Moreover, recital 24 in the preamble to the Directive appears to exclude automatic State responsibility.

The United Kingdom

114 The United Kingdom interprets the Directive as imposing an obligation on EEA States to ensure that the relevant deposit-guarantee schemes should pay a prescribed compensation to each eligible investor within the applicable time limit in the event of unavailability of deposits within the meaning of the Directive.

115 The United Kingdom asserts that arguments related to *force majeure* should be dismissed as an EEA State may only rely on derogations provided in the Directive itself. Were *force majeure* available as a defence, the defendant would have to inform the applicant of its difficulties and suggest appropriate solutions.

116 The United Kingdom also argues that the defendant failed to prove its defence on the merits in that it failed to show that it would have been absolutely impossible for it to establish any

form of deposit-guarantee scheme under the Directive. The United Kingdom submits further that the evidence offered by the defendant in support of its case was largely general in nature and based on assertions rather than evidence.

Findings of the Court

Introductory remarks

117 For the purposes of the first plea, it has to be assessed whether in a systemic crisis of the magnitude experienced in Iceland the Directive itself envisages that the defendant should have ensured payment to depositors in the Icesave branches in the Netherlands and the United Kingdom in accordance with Articles 3, 4, 7 and 10 of the Directive. Moreover, it must also be assessed whether the defendant has infringed the alleged obligation of result.

118 The Court recalls at the outset that a failure to fulfil obligations can be found only if there is, upon expiry of the period laid down in the reasoned opinion, a situation contrary to EEA law which is objectively attributable to the EEA State concerned (see, for example, Case E-8/11 *ESA* v *Iceland* [2011] EFTA Ct. Rep. 467, paragraph 34).

119 Consequently, the nature of the result to be achieved is determined by the substantive provisions of the individual directive in question.

120 As the first plea concerns the question whether the alleged obligation of result follows directly from the Directive, it must be kept in mind that, as set out in Article 7 EEA, one of the principal characteristics of directives is precisely that they are intended to achieve a specific result whilst leaving it to the EEA States and their national authorities how to achieve this objective. In any case, there is a general obligation on the EEA States to ensure that the provisions of a directive are fully effective.

121 European legislative practice shows that there may be great differences in the types of obligations which directives impose upon EEA States and therefore in the results which must be

achieved. Some directives require legislative measures to be adopted at national level and compliance with those measures to be the subject of judicial or administrative review. Other directives lay down that the EEA States are to take the necessary measures to ensure that certain objectives formulated in general and unquantifiable terms are attained, whilst leaving them some discretion as to the nature of the measures to be taken. Yet other directives require the EEA States to obtain very precise and specific results after a certain period (compare Case C-60/01 *Commission* v *France* [2002] ECR I-5679, paragraphs 26 to 28, and case law and examples cited).

122 It is recalled in this respect that, pursuant to Article 1 of Protocol 1 to the EEA Agreement, preambles of the acts referred to in the Annexes are not adapted for the purposes of the Agreement. They are relevant to the extent necessary for the proper interpretation and application, within the framework of the EEA Agreement, of the provisions contained in such acts (see, for example, Case E-14/11 *DB Schenker* v *ESA*, judgment of 21 December 2012, not yet reported, paragraph 125).

123 Moreover, it should be added that the question whether an EEA State is obliged to provide for compensation for loss and damage caused to individuals as a result of breaches of obligations under the EEA Agreement for which that State can be held responsible (see, for example, Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraphs 62 and 63, and Case E-2/12 *HOB-vín III*, judgment of 11 December 2012, not yet reported, paragraph 117 et seq.) lies outside the scope of the present proceedings.

The Directive

124 At the outset, the Court notes that as a result of the crisis, the regulatory framework of the financial system has been subject to revision and amendment in order to enhance financial stability. As regards the Directive, those amendments dealt, *inter alia*, with the improvement of depositor protection and the maintenance of depositors' confidence in the financial safety net (see Directive

2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the pay-out delay, OJ 2009 L 68, p. 3). However, the judgment in the present case must be based on the Directive as it stood at the relevant time. Then, it did not encompass those amendments and the improved protection of depositors. Those revisions are not yet part of the EEA Agreement.

125 The aim pursued by the Directive is, on the one hand, the freedom of establishment and freedom to provide services in the banking sector, and the stability of the banking system and protection for savers, on the other (compare the Opinion of Advocate General Léger in Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, point 35).

126 This dual objective is expressed in the first recital of the Directive which states that the harmonious development of the activities of credit institutions throughout the Community should be promoted through the elimination of all restrictions on the right of establishment and the freedom to provide services, while increasing the stability of the banking system and protection for savers. In this regard, the effect of the machinery established by the Directive is to prevent the EEA States from invoking depositor protection in order to impede the activities of credit institutions authorised in other EEA States (see, for comparison, *Germany* v *Parliament and Council*, cited above, paragraph 19).

127 In this regard, it must be recalled that recent European regulatory policies in the relevant field are based on the principles of mutual recognition and a "single passport" mechanism which allows financial services operators lawfully established in one EEA State to establish and/or provide their services in other EEA States without further authorisation requirements (see, for example, recitals 6 and 7 in the preamble to the Directive).

128 In light of the express reference made to the system of single authorisation, the Directive has to be considered as constituting one piece of a regulatory framework for banks and other

financial institutions (see, *mutatis mutandis*, Case E-17/11 *Aresbank*, judgment of 22 November 2012, not yet reported, paragraphs 86 to 95).

129 Soundly regulated and safe financial institutions are of decisive importance for financial stability in the EEA. Therefore, the European strategy aims at establishing a common regulatory framework ensuring prudential oversight and consumer protection throughout the European internal market.

130 It follows from Article 3(1) of the Directive that an EEA State is under an obligation to ensure that within its territory one or more deposit-guarantee schemes are introduced and officially recognised.

131 The system introduced by Article 3(1) of the Directive is not one of absolute constraint. It leaves the EEA States free to introduce and recognise several deposit-guarantee schemes within their territory, thereby allowing the credit institutions to choose the model that will best suit them. The Commission's proposal for the Directive expressly states that "[a]fter receiving the assurance that the financing arrangements were sufficiently sound to pay off all depositors covered, including those at branches in another Member State, it was not considered necessary to harmonize rules which are closely linked with the management of the schemes in question" (Commission proposal for a Council Directive on deposit-guarantee schemes, COM(92) 188 final, p. 8).

132 Pursuant to Article 3(2) to (5) of the Directive, the competent national authorities that have issued authorisations to credit institutions are – in cooperation with the deposit-guarantee scheme – obliged to ensure that the credit institutions comply with their obligations as members of a scheme. Where appropriate, under the conditions specified in Article 3(5) of the Directive, they must adopt a decision revoking the authorisation of the institution in question.

133 As the ECJ held in *Paul and Others*, the purpose of those provisions is to guarantee to depositors that the credit institution

in which they make their deposits belongs to a deposit-guarantee scheme and fulfils its obligations. This shall ensure protection of their right to compensation in the event that their deposits are unavailable, in accordance with the rules laid down in the Directive and more specifically in Article 7 thereof. However, Article 3(2) to (5) of the Directive relate only to the introduction and proper functioning of the deposit-guarantee scheme as provided for by the Directive (*Paul and Others*, cited above, paragraphs 28 to 29).

134 The Directive does not exhaustively regulate the unavailability of deposits under EEA law, but simply requires EEA States to provide for a harmonised minimum level of deposit protection (compare the Opinion of Advocate General Stix-Hackl in *Paul and Others*, cited above, point 117). It is therefore clear that national authorities have considerable discretion in how they organise the schemes.

135 In view of the above, pursuant to Article 3 of the Directive, EEA States have to introduce and officially recognise a deposit-guarantee scheme. Moreover, they have to fulfil certain supervisory tasks in order to ensure the proper functioning of the deposit-guarantee scheme. However, it is not envisaged in that provision that EEA States have to ensure the payment of aggregate deposits in all circumstances.

136 Article 7(1) of the Directive specifies the minimum coverage for aggregate deposits that must be provided in the event of deposits being unavailable (compare *Paul and Others*, cited above, paragraph 27). It provides for minimum harmonisation as regards the level of coverage for individual deposits.

137 It follows from the words "[d]eposit-guarantee schemes shall stipulate..." that an obligation is imposed on EEA States to ensure that national rules are adopted or maintained which require a coverage level of at least EUR 20 000.

138 With the adoption of Directive 2009/14, the wording of Article 7(1) of the Directive has been replaced. The new version states that "Member States shall ensure that the coverage for the

aggregate deposits of each depositor shall be at least EUR 50 000 in the event of deposits being unavailable". Moreover, a new paragraph 1(a) has been introduced in Article 7 which lays down that Member States shall ensure by 31 December 2010 that the coverage for the aggregate deposits of each depositor shall be set at EUR 100 000 in the event of deposits being unavailable.

139 It appears that under the new version of the provision EEA States are obliged to ensure a certain level of coverage. Whether this obligation is limited to a banking crisis of a certain size would require further assessment. However, that question can be left open here since, as mentioned above (see paragraph 124), Directive 2009/14 is not applicable in the present case.

140 At any rate, the rewording of Article 7 of the Directive shows that the European legislature considered substantial change necessary to extend the responsibility of the EEA States beyond the establishment of an effective framework.

141 This supports the view that the obligation on the EEA States under the version of the provision applicable in the case at hand is limited to ensuring that national rules which require a coverage level of at least EUR 20 000 are maintained or adopted.

142 Pursuant to Article 7(6) of the Directive, EEA States have to ensure that the depositor's right to compensation may be the subject of an action by the depositor against the guarantee schemes. The scope of this provision encompasses the scenario that a deposit-guarantee scheme might be unable to pay duly qualified claims.

143 However, the obligation on the EEA States is limited to the maintenance or adoption of rules that provide for an effective right to file an action against the guarantee scheme particularly in the case of non-payment (compare *Paul and Others*, cited above, paragraph 27).

144 Consequently, it must be held that Article 7 of the Directive does not lay down an obligation on the State and its authorities to

ensure compensation if a deposit-guarantee scheme is unable to cope with its obligations in the event of a systemic crisis.

145 Article 10 of the Directive establishes time limits for the payments of guarantee schemes to depositors. This follows from the exceptions provided for in Article 10(3) and (5) which refer expressly to "the time limit laid down in paragraphs (1) and (2)".

146 However, the mandatory language of the English version of Article 10(1) of the Directive, i.e. "[d]eposit-guarantee schemes shall be in a position to pay ... within three months of the date on which the competent authorities ...", establishes merely a procedural obligation, as it refers only to the binding nature of the three-month period prescribed therein.

147 The importance of timely payments by the guarantee scheme is further emphasised in Article 10(2) of the Directive. Under this provision, a guarantee scheme may apply to the competent authorities for an extension of the time limit set out in Article 10(1) of the Directive only in wholly "exceptional circumstances" and in "special cases". The Directive does not contain a definition of those terms.

148 Accordingly, pursuant to Article 10(2) of the Directive, EEA States and their competent authorities are under an obligation to supervise and ensure that deposit-guarantee schemes are, as a rule, not released from the short deadline established in Article 10(1) of the Directive, which forms the general rule. However, an obligation on the State and its national authorities to ensure compensation if a deposit-guarantee scheme is unable to cope with its obligations under exceptional circumstances such as in a systemic crisis cannot be derived from that provision.

149 In view of the above, the Court finds that the obligation on EEA States under Article 10 of the Directive is limited to provide for a mandatory and effective procedural framework with respect to time limits.

150 Furthermore, reference should be had to Articles 1(3) and 9(3) and recitals 3, 10 and 25 in the preamble to the Directive.

However, these provisions show that the Directive deals – at least primarily – with a failure of individual banks and not with a systemic crisis.

151 Even as regards the important objective to avoid bank runs, the wording of recital 4 in the preamble to the Directive is limited to a failure of a single credit institution that may lead to massive withdrawals also from healthy institutions.

152 It must be noted in this respect that in the 2010 Impact Assessment the Commission services stated in relation to a possible harmonised approach to a target level for deposit-guarantee funds that the "choice of a target level for the funds may be related to the capability of deposit-guarantee schemes to handle a bank failure of a specific size based on bank recapitalisation by Member States during the financial crisis..." (Impact Assessment, section 7.8, p. 53). The biggest failure envisaged by the Commission's services is a failure of a large member bank accounting for 7.25% of eligible deposits.

153 Not even this Impact Assessment, made in the light of the financial crisis of 2007/2008 which included the failure of the Icelandic banks, contemplated the extension of the funding of deposit-guarantee schemes to cover a systemic bank failure of the magnitude experienced in Iceland. The Impact Assessment concluded: "Setting a target level for DGS [sc. deposit-guarantee scheme] funds would ensure that schemes are credible and capable to deal with medium sized bank failures. The most cost-efficient target level would be 1.96% (or simply 2%) of eligible deposits (to be achieved within 10 years) because it would increase DGS funds to cope with a medium-sized bank failure; and despite quite substantial increase in contributions, it would, on average, only moderately affect bank profits at EU level (with a stronger impact in some Member States) and lead to very limited costs for depositors. ... It would ensure a sound financing of the DGS but avoid unwanted side-effects if contributions were too high." (Impact Assessment, section 7.8, p. 58)

154 Moreover, the mechanism and level of funding of the schemes have not been harmonised. The Directive does not contain any substantive provision that deals with those organisational matters.

155 Recital 23 in the preamble states that it is not indispensable, in the Directive, to harmonise the methods of financing schemes guaranteeing deposits or credit institutions themselves. According to the same recital, this follows from the fact, *inter alia*, that the financing capacity of such schemes must be in proportion to its liabilities. The Directive contains no definition of what is considered to be proportionate funding.

156 It is clear from recital 23 in the preamble to the Directive as well as from recitals 4 and 25 that the cost of financing such guarantee schemes must be borne, in principle, by credit institutions and not the EEA States.

157 Recital 23 in the preamble to the Directive aims to strike a balance between the cost of funding a deposit-guarantee scheme, the stability of the national banking system and consumer protection. The objective is that the banking system should function in the interests of consumers and the economy as a whole.

158 However, the provision of private funding to enable the guarantee scheme to cover deposits in a systemic crisis up to the maximum coverage level would clearly undermine the objective laid down in recital 23, that is, not to jeopardise the stability of the banking system itself. Accordingly, the cost of the guarantee schemes must not be too onerous for the member credit institutions.

159 The payment obligation thus lies with the deposit-guarantee fund, and the guarantee funds are to be financed entirely by the credit institutions. In circumstances where the fund cannot meet depositors' claims in the event of a default by a member of the scheme, it is for the remaining credit institutions to make up the difference. In other words, the bankruptcy of a financial institution is covered – as in classic insurance systems – by the rest of the institutions active in the market.

160 How to proceed in a case where the guarantee scheme is unable to cope with its payment obligations remains largely unanswered by the Directive. The only operative provision that deals with non-payment is Article 7(6) of the Directive, according to which depositors must have the possibility to bring an action against the relevant scheme. However, an obligation on the State or a possible action against the State in those circumstances is not envisaged in the Directive's provisions.

161 This does not mean that depositors will necessarily remain unprotected in such a case. Depositors may fall within the remit of other parts of the safety net. They may benefit from other provisions of EEA law regarding financial services, as well as the activities of supervisors, central banks, and governments. However, the question in the present case is whether EEA States are legally responsible under the Directive in case of such an enormous event.

162 Reference should be had to the second subparagraph of Article 3(1) of the Directive. Pursuant to that rule, a credit institution may be exempted by an EEA State from its obligation to be a member of a deposit-guarantee scheme where it belongs to a system that ensures, in particular, its liquidity and solvency and it is thereby guaranteed that depositors receive protection at least equivalent to that provided by the guarantee scheme.

163 That possibility to exempt a credit institution from the obligation to belong to a deposit-guarantee scheme requires, in addition, that the alternative system fulfils certain conditions. The third of these requires the system not "to consist of a guarantee granted to a credit institution by a Member State itself or by any of its local or regional authorities". The aim of this provision is to minimise the potential to distort competition, inherent in the very nature of guarantees of that kind.

164 Were an EEA State legally obliged to ensure the compensation of depositors where a recognised deposit-guarantee scheme is unable to cope with its payment obligations, the negative effect on competition would be comparable. Consequently, it is likely that,

had the European legislature sought to adopt a different approach as regards the funding of deposit-guarantee schemes, this would have been expressly stated in the Directive.

165 It is recalled in this regard that the Commission's 1992 proposal for the Directive recognised that any public sector funding would be subject to State aid rules and, moreover, that there would be no obligation to provide such. The proposal states in this respect: "The question of whether the public sector would be able to provide assistance for guarantee schemes in emergency situations of exceptional gravity and when the schemes' resources have been exhausted has been raised in order to enable them to respect their commitments to depositors. It did not seem appropriate, in the proposal for a Directive, to prohibit such assistance, which could prove necessary in practice, although it is not desirable as a general rule and could not be allowed to contravene the rules of the Treaty concerning State aid." (Commission proposal for a Council Directive on deposit-guarantee schemes, COM(92) 188 final, p. 8)

166 Moreover, in its 2010 Impact Assessment, the Commission noted: "DGS [sc. deposit-guarantee schemes] are financed by banks and the Commission intends to maintain this requirement. That means that the budget of Member States is not directly concerned by the DGS Directive. The recent crisis has shown that in a systemic crisis, DGS may reach their limits. However, even if in such cases governments stepped in under strict obedience of state aid rules, this would not be triggered under a legal obligation in the DGS Directive and 'viability for Member States' is therefore not subject of this impact assessment." (Impact Assessment, section 3.2, pp. 8-9.)

167 An additional aspect to which regard must be had is mentioned in recital 16 in the preamble to the Directive. There, the European legislature states that it would not be appropriate to impose a level of protection "which might in certain cases have the effect of encouraging the unsound management of credit institutions". This points to the concept of moral hazard. In economic literature the lesson of moral hazard has been described with the words that "less is more". Professor Joseph E. Stiglitz has formulated

in this respect: "[T]he more and better insurance that is provided against some contingency, the less incentive individuals have to avoid the insured event, because the less they bear the full consequences of their actions". ("Risk, Incentives and Insurance: The Pure Theory of Moral Hazard", *The Geneva Papers on Risk and Insurance*, 8 (No 26, January 1983), 4, at p. 6).

168 It is recalled that, in a crisis of a magnitude such as the one experienced in Iceland, an EEA State would have very limited options to ensure compensation to depositors that is, first, it could provide a State guarantee for a loan taken out by the scheme itself, or, second, it could directly fund the scheme or its depositors. Thus, moral hazard would also occur in the case of State funding, serving to immunise a deposit-guarantee scheme from the costs which have, in principle, to be borne by its members.

169 The alleged obligation of result would further run counter to the aims mentioned in recitals 2 and 3 in the preamble to the Directive, according to which consumer protection is to be achieved by means of the introduction of a minimum level of deposit protection and the guarantee that foreign and domestic deposits are protected by the same guarantee scheme irrespective of where a credit institution has its head office.

170 Accordingly, consumer protection under the Directive does not entail full protection (compare, as regards the coverage level, *Germany* v *Parliament and Council*, cited above, paragraph 48), since increasing consumer protection may reach a point where the costs outweigh the benefits.

171 Finally, the question arises whether recital 24 in the preamble to the Directive can be said to support the alleged obligation of result. That recital states that the liability of EEA States and their competent authorities is excluded if they ensure the compensation or protection of depositors under the conditions prescribed in the Directive. The Court notes that this recital may be necessary to allow for a proper delineation of the scope of the principle of State liability.

172 As the applicant set out in its argument, recital 24 in the preamble to the Directive states that liability of a State and its competent authorities in respect of depositors is precluded "if they have ensured that one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed in this Directive have been introduced and officially recognized."

173 However, "the conditions prescribed in this Directive" are not further defined. As has been stated above, the funding obligation imposed on the members of a guarantee scheme is limited under the Directive and must not be too onerous in order not to jeopardize the stability of the banking system.

174 The result to be achieved by the EEA States themselves follows from their above mentioned general obligation, that is, to ensure that the provisions of the Directive are fully effective, i.e. that the specific obligations are given practical effect.

175 However, in light of the present assessment of the Directive, the result to be achieved is limited, particularly having regard to the fact that the Directive aims at minimum harmonisation in relation to the level of coverage and does not provide for any harmonisation as regards the level and mechanisms of funding.

176 Accordingly, the reservation set out in recital 24 in the preamble to the Directive aims expressly to preclude an excessive shifting to the State of the costs arising from a major banking failure. (See, by way of illustration, Michel Tison, "Do not attack the watchdog! Banking supervisor's liability after *Peter Paul*", Working Paper Series, Financial Law Institute, Universiteit Gent 2005, p. 25, including footnote 81).

177 Consequently, recital 24 in the preamble to the Directive does not support the existence of the alleged obligation of result.

178 In view of the above, the Court holds that the Directive does not envisage that the defendant itself must ensure payments to depositors in the Icesave branches in the Netherlands and the United Kingdom, in accordance with Articles 7 and 10 of the Directive, in a systemic crisis of the magnitude experienced in Iceland.

179 In any event, as the defendant correctly argued, the alleged obligation of result also cannot be derived from the ECJ's ruling in *Paul and Others*. The case at hand must be distinguished from that earlier case on the facts. *Paul and Others* dealt mainly with the alleged liability of the German authorities resulting from negligence in the conduct of banking supervision, and the question whether the supervisory obligation imposed on national authorities under Article 3(2) to (5) of the Directive precluded a limitation of State liability under national law in relation to such supervision. Furthermore, in *Paul and Others*, the national court had already held the State concerned to be liable under the principle of State liability to the amount provided for in Article 7(1) of the Directive.

180 Finally, a comparison with other secondary law also does not confirm the existence of the alleged obligation of result. It is recalled in this regard that the content of the result to be achieved is determined by the substantive provisions of the individual directive. In any event, the ECJ's ruling in *Blödel-Pawlik* (Case C134/11, judgment of 16 February 2012, not yet reported) does not support the applicant's plea. This case concerned the obligations of a travel organiser and its insurer. According to the ECJ, the obligation of result imposed on the State by Directive 90/314 was to ensure that a travel organiser is liable to the consumer for proper performance of the contract. However, the ECJ did not hold that there is an obligation on the State itself to pay compensation if a travel organiser is unable to meet its obligations.

Emanation of the State

181 The applicant and the intervener have argued that the TIF, a private foundation under Icelandic law, is an emanation of the State.

182 However, the case at hand concerns whether there is an obligation of result placed upon the State under the Directive, in the manner described in ESA's application.

183 Hence, the question is of no significance for the assessment of the first plea.

184 For the sake of good order, the Court simply adds that, in any event, the applicant has adduced insufficient evidence to support its claim that the TIF is directly or indirectly operated by public authorities, i.e. under the control of the Icelandic State (see, for comparison, Case C-356/05 *Farrell* [2007] ECR I-3067, paragraph 41).

Conclusion

185 In light of all of the above, the first plea is dismissed.

Second and third pleas: Discrimination contrary to the Directive and/or Article 4 EEA

Arguments of the parties

The applicant and the intervener

186 The applicant and the intervener submit that, even if, contrary to their argument, the provisions of Directive 94/19 are interpreted as not imposing an obligation of result, the defendant is in breach of Articles 4(1) and 7(1) of the Directive and/or Article 4 EEA by having failed to ensure compensation to Icesave depositors in the Netherlands and the United Kingdom as set out in the Directive. In their view, the depositors in Iceland received full protection whereas the depositors in the Netherlands and the United Kingdom were left without any or any comparable protection.187 The applicant and the intervener contend that the Icesave customers in branches in Iceland and their counterparts in branches in other EEA States were, in their capacity as deposit holders in Icelandic banks, in a comparable situation as regards the protection granted to them by the Directive under Article 4 thereof read in light of recital 3 in the preamble to the Directive.

188 The applicant and the intervener state that, when adopting emergency measures in response to the banking crisis in October 2008, the Icelandic Government made a distinction between domestic deposits and deposits in foreign branches. The domestic deposits were moved to new banks and were covered in full.

Meanwhile, foreign depositors did not even enjoy the minimum guarantee laid down in the Directive.

189 Thus, in the view of the applicant and the intervener, the defendant has indirectly discriminated against foreign depositors on the basis of nationality, which is prohibited by the Directive read in the light of Article 4 EEA or by Article 4 EEA itself.

190 In addition, the applicant specifies that the present case does not concern whether the defendant was in breach of the prohibition on discrimination for not moving over the entirety of deposits of foreign Icesave depositors into New Landsbanki, as it did for domestic Landsbanki depositors. The breach is said to lie in the failure of the Icelandic Government to ensure that Icesave depositors in the Netherlands and the United Kingdom received payment of the minimum amount of compensation provided for in the Directive within the time limits prescribed, something it did for domestic depositors. The applicant adds that compensation of domestic and foreign depositors above and beyond that minimum amount has not been and is not at issue in the context of the present proceedings.

191 Moreover, the applicant and the intervener submit that the defendant cannot advance any viable justification for the discriminatory measures taken against the foreign deposits in the circumstances of the case.

The defendant

192 The defendant argues that the discrimination pleas are entirely misconceived and highly contrived. It observes that the applicant seeks a declaration that, in failing to ensure payment of the EUR 20 000 per depositor required under the Directive, the defendant breached EEA law. However, in the defendant's view, this obligation cannot be derived from the principle of non-discrimination.

193 In the defendant's view, the second plea is plainly unsustainable since it would create an obligation upon an EEA State to ensure minimum compensation under the Directive in circumstances in

which the partially harmonised regime created by the Directive does not require such.

194 In the circumstances of a bank failure, the defendant submits, it is legitimate for EEA States to intervene to rescue banks, or branches which are necessary to the functioning of the banking system, but there is no obligation to do so.

195 In the defendant's view, what is regarded as discrimination in the present case are in reality the different consequences that have flowed as a result of the fact that the domestic branches of Landsbanki were essential to the rescue of the Icelandic financial system. Although the Directive is a consumer protection measure, it does not address in any way the regulation of bank insolvency and restructuring – they are entirely beyond its scope.

196 Moreover, as regards a breach of Article 4 EEA alone, the third plea, the defendant submits that such a claim has not been made out. The applicant has simply asserted that Article 4 EEA is applicable without seeking to demonstrate that the legal conditions for its application are satisfied.

197 The defendant contends further that, in claiming that it was discriminatory not to provide the minimum compensation afforded by the Directive to the overseas depositors given that the domestic depositors were "covered" by virtue of a transfer of their deposits to the new banks, the applicant is arguing, in effect, for different treatment. Such a line of argument as a basis for a discrimination claim is, in the defendant's view, incoherent.

198 On the other hand, the defendant notes that it is not part of the applicant's case that the transfer of domestic deposits effected as part of the bank restructuring should have been extended to overseas depositors. The applicant has never questioned the fact that it was not possible to extend this rescue to the overseas branches. Thus, in the defendant's view, the applicant does not argue that the two groups should have been treated equally.

199 In any event, the defendant submits, it is unclear whether the transfer of domestic deposits to the new bank led to a better

position of the depositors holding such accounts. These account holders were subject to strict capital controls, and were unable to convert their (severely depreciating) Icelandic krónur into any other currency. By contrast, the priority claimants in the Landsbanki winding up now stand to be fully reimbursed in a fully convertible currency.

200 Moreover, as regards the second plea, the defendant argues that there has been no discrimination whatsoever in the manner in which the deposit-guarantee fund itself has operated. The two groups compared by ESA, depositors with domestic branches and depositors with foreign branches of Landsbanki, have been treated equally. None has received any payments under the guarantee scheme.

201 In addition, the deposits held with domestic branches never became unavailable within the meaning of Article 1(3) of the Directive. In any event, Iceland continues, any difference in treatment between the two groups would be objectively justified. Although pure economic aims cannot constitute a sufficient justification, clear public interest objectives may constitute a legitimate aim even where that public interest has economic ends.

Other participants submitting written observations

202 The governments which submitted written observations have not addressed the issue of discrimination.

Findings of the Court

203 By its second and third pleas, the applicant contends that by covering deposits in Iceland at least to the level prescribed by the Directive, and within the time limits provided therein, and, at the same time, not providing foreign depositors with at least that same minimum guarantee, the defendant has infringed the Directive read in light of Article 4 EEA or has indirectly discriminated on the basis of nationality which is prohibited by Article 4 EEA.

Discrimination contrary to the Directive read in light of Article 4 EEA

204 Article 4 EEA provides as a general principle that, within the scope of application of the EEA Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

205 Article 4 EEA applies independently only to situations governed by EEA law for which the EEA Agreement lays down no specific rules prohibiting discrimination (see Case E-1/00 Íslandsbanki-*FBA* [2000-2001] EFTA Ct. Rep. 8, paragraphs 35 and 36, and case law cited).

206 Pursuant to Article 4(1) of the Directive, deposit-guarantee schemes introduced and officially recognised in an EEA State in accordance with Article 3(1) of the Directive shall cover depositors at branches set up by credit institutions in other EEA States.

207 Recital 3 in the preamble to the Directive states that in the event of the closure of an insolvent credit institution the depositors at any branches situated in a Contracting Party other than that in which the credit institution has its head office must be protected by the same guarantee scheme as the institution's other depositors.

208 It follows from Article 4 of the Directive read in light of recital 3 in the preamble that depositors at any branches established by credit institutions in other EEA States shall belong to the guarantee scheme introduced and officially recognised in the home EEA State.

209 Moreover, the treatment of foreign and domestic depositors by the deposit-guarantee scheme must be equal as regards payment of minimum compensation under the Directive in the event of the closure of an insolvent credit institution.

210 Thus, the principle of non-discrimination requires that there is no difference in the treatment of depositors by the guarantee scheme itself and the way it uses its funds. Thus, to that extent, discrimination under the Directive is prohibited.

211 In the case at hand, it is undisputed that Landsbanki collapsed on 7 October 2008. Domestic deposits were transferred to New Landsbanki which was established by the Icelandic Government between 9 and 22 October 2008. The transfer was based on an FME decision of 9 October 2008.

212 The TIF was not involved in the transfer of the deposits. The transfer was part of the restructuring of the Icelandic banks that was achieved by a series of measures under the Icelandic Emergency Act.

213 On 27 October 2008, that is, within the 21 days prescribed in Article 1(3) of the Directive, the FME made a statement that triggered an obligation for the TIF to make payments as regards foreign deposits in branches of Landsbanki.

214 Moreover, domestic deposits did not become unavailable within the meaning of Article 1(3) of the Directive. The transfer of domestic deposits to New Landsbanki was made before the FME made its declaration triggering the application of the Directive. Accordingly, depositor protection under the Directive never applied to depositors in Icelandic branches of Landsbanki.

215 As has been stated above, the principle of non-discrimination inherent in the Directive requires that there should be no difference in the way a deposit-guarantee scheme treats depositors, and the way it pays out its funds.

216 In the present case, difference in treatment of this kind was not possible. Consequently, the transfer of domestic deposits – whether it leads in general to unequal treatment or not – does not fall within the scope of the non-discrimination principle as set out in the Directive.

Conclusion

217 The second plea has to be dismissed.

Discrimination contrary to Article 4 EEA

218 As regards the third plea, it is settled case-law that the principle of non-discrimination which has its basis in Article 4 EEA requires

that comparable situations must not be treated differently and that different situations must not be treated in the same way. Discriminatory treatment may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued (see, *inter alia*, Case E-15/11 *Arcade Drilling*, judgment of 3 October 2012, not yet reported, paragraph 60, and case law cited).

219 At the time of the transfer, Icesave customers in the branches in the UK and in the Netherlands, and their counterparts in Iceland found themselves in their capacity as deposit holders in an insolvent Icelandic bank in a comparable situation.

220 As regards the further assessment of the third plea, it must be recalled that the application seeks only one declaration, namely, that, by failing to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and in the United Kingdom provided for in Article 7(1) of the Directive within the time limits laid down in Article 10 of the Directive, the defendant has infringed its obligations under EEA law. This application is based on three pleas: (i) an infringement of the alleged obligation of result under the Directive itself, (ii) an infringement of the Directive and Article 4 EEA and (iii) an infringement of Article 4 EEA alone.

221 The applicant has limited the scope of its application by stating that "the present case does not concern whether Iceland was in breach of the prohibition of discrimination for not moving over the entirety of deposits of foreign Icesave depositors into 'new Landsbanki', as it did for domestic Landsbanki depositors. The breach is constituted by the failure of the Icelandic Government to ensure that Icesave depositors in the Netherlands and the United Kingdom receive payment of the *minimum amount of compensation* provided for in the Directive within the time limits laid down in the Directive, *like it did for the domestic depositors*. The compensation of domestic and foreign depositors above and beyond that minimum amount has not and is not being discussed in the context of the present proceedings."

222 Moreover, in its application, ESA underlines "that this does not prejudge its view as to whether the discrimination relating to the compensation of depositors above and beyond the level foreseen by the Directive is justifiable".

223 Thus, having regard to the applicant's self-limitation, the Court is bound to assess whether the defendant was under a specific obligation to ensure that payments were made to Icesave depositors in the Netherlands and the UK.

224 The Court has already held that the Directive, even read in light of Article 4 EEA, imposes no obligation on the defendant to ensure that payments are made in accordance with the requirements of the Directive to Icesave depositors in the Netherlands and the UK.

225 Thus, such an obligation of result could only be deemed to exist if it were to follow directly from Article 4 EEA itself. Were this the case, the transfer of domestic deposits to New Landsbanki would have led to an obligation to ensure the payment of minimum compensation, as specifically provided for in the Directive.

226 This, however, is not required under the principle of non-discrimination. Article 4 EEA requires that comparable situations must not be treated differently. A specific obligation upon the defendant that, in any event, would not establish equal treatment between domestic depositors and those depositors in Landsbanki's branches in other EEA States cannot be derived from that principle. Consequently, this plea cannot succeed on the basis of Article 4 EEA.

227 For the sake of completeness, the Court adds that even if the third plea had been formulated differently, one would have to bear in mind that the EEA States enjoy a wide margin of discretion in making fundamental choices of economic policy in the specific event of a systemic crisis provided that certain circumstances are duly proven. This would have to be taken into consideration as a possible ground for justification. In the earlier case of *Sigmarsson*, the applicant itself underlined this point (see *Sigmarsson*, cited above, paragraphs 42 and 50).

Conclusion

228 In view of the above, also the third plea has to be dismissed.

229 Accordingly, the Court holds that, by failing to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and in the United Kingdom provided for in Article 7(1) of the Act referred to at point 19a of Annex IX to the Agreement on the European Economic Area (Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes) within the time limits laid down in Article 10 of the Act, Iceland has not failed to comply with the obligations resulting from that Act, in particular Articles 3, 4, 7 and 10 thereof, and/or Article 4 of the Agreement on the European Economic Area.

V COSTS

230 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The defendant has asked that the applicant be ordered to pay the costs. Since the latter has been unsuccessful, it must be ordered to pay the costs. The costs incurred by those who have submitted observations are not recoverable.

231 In accordance with Article 66(4) of the Rules of Procedure, the European Commission, which has intervened in the proceedings, is to bear its own costs.

232 The costs incurred by the Liechtenstein, Netherlands, Norwegian and United Kingdom Governments, which have submitted observations to the Court, are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application.**

2. **Orders the EFTA Surveillance Authority to pay its own costs and the costs incurred by Iceland.**

3. **Orders the European Commission to bear its own costs.**

Carl Baudenbacher Páll Hreinsson Ola Mestad

Delivered in open court in Luxembourg on 28 January 2013.

Thomas Christian Poulsen — Acting Registrar

Carl Baudenbacher — President

ORDER OF THE PRESIDENT

23 April 2012

(Intervention – Application by the European Commission)

In Case E-16/11,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Gjermund Mathisen, Officer, Legal & Executive Affairs, acting as Agents, Brussels, Belgium,

applicant,

v

Iceland, represented by Kristján Andri Stefánsson, Ambassador, Ministry of Foreign Affairs, acting as Agent, Þóra M. Hjaltested, Director, Ministry of Foreign Affairs, acting as Co-Agent and Tim Ward QC, acting as Counsel,

defendant,

APPLICATION seeking a declaration that by failing to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and in the United Kingdom provided for in Article 7(1) of the Act referred to at point 19a of Annex IX to the Agreement on the European Economic Area (*Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes*) within the time-limits laid down in Article 10 of the Act, Iceland has failed to comply with the obligations resulting from that Act, in particular its Articles 3, 4, 7 and 10, and/or Article 4 of the European Economic Area,

THE PRESIDENT

makes the following

ORDER

I MAIN PROCEEDINGS

1 Iceland implemented Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (hereinafter "Directive 94/19/EC" or "the Directive") through the enactment of Act No 98/1999 on Deposit Guarantee and Investor Compensation Scheme. Act No 98/1999 set up the Depositors' and Investors' Guarantee Fund (hereinafter "TIF") which started operations on 1 January 2000.

2 In October 2006, Landsbanki Íslands hf (hereinafter "Landsbanki") launched a branch in the United Kingdom which provided online savings accounts under the brand name "Icesave". A similar Icesave online deposit branch was launched in the Netherlands which began accepting deposits in Amsterdam on 29 May 2008.

3 As a part of a tumultuous worldwide financial crisis, there was a run on the Icesave accounts in the United Kingdom from February to April 2008.

4 In accordance with the division of responsibility laid down under the Directive, deposits at the British and Netherlands branches of Landsbanki were under the responsibility of the Icelandic TIF.

5 From May 2008, Landsbanki opted to take part in the Netherlands deposit-guarantee scheme to supplement its home scheme. At that time, the minimum amount guaranteed under the Netherlands scheme was EUR 40 000 per depositor, later raised to EUR 100 000 per depositor. Similarly, the Landsbanki branch in the United Kingdom joined the UK deposit-guarantee scheme for additional coverage. Deposits at the British branch of Landsbanki in excess of the minimum amount guaranteed by

the Icelandic TIF were later guaranteed by the UK scheme to a maximum of GBP 50 000 for each retail depositor.

6 On 6 October 2008, Landsbanki's Icesave websites in the Netherlands and in the United Kingdom ceased to work and depositors at those branches lost access to their deposits.

7 On 7 October 2008, Landsbanki collapsed and the Icelandic Financial Supervisory Authority (hereinafter "FME") assumed the powers of the meeting of Landsbanki's shareholders and immediately suspended the bank's board of directors. FME appointed a winding-up committee which, with immediate effect, assumed the full authority of the board.

8 In order to avoid a potential run on bank deposits on their markets, the Netherlands and UK authorities organised for depositors with the Landsbanki branches in their respective countries to file claims with the deposit-guarantee scheme in the Netherlands and the United Kingdom. The UK Government arranged for the pay-out of all retail depositors in full, while the Netherlands Government arranged for the compensation of all depositors to a maximum of EUR 100 000.

9 According to Article 10 of the Directive, implemented into Icelandic law by Article 7(1) of Regulation No 120/2000 on Deposit Guarantees and Investor-Compensation Scheme, the payments from TIF to depositors should have been made at the latest within three months of 27 October 2008. On 26 January 2009, 24 April 2009 and 23 July 2009, the Minister of Economic Affairs extended the deadline for payouts from the fund, each time for three months, based on Article 10(2) of the Directive (Article 7(4) of Icelandic Regulation No 120/2000).

10 The final deadline for payments expired on 23 October 2009.

11 On 26 May 2010, the EFTA Surveillance Authority (hereinafter "ESA") sent a letter of formal notice to Iceland alleging failure to ensure that Icesave depositors in the Netherlands and the United Kingdom receive payment of the minimum amount of

compensation provided for in Article 7(1) of the Directive as amended within the time-limits laid down in Article 10 of the Directive, in breach of the obligations resulting from the Directive and/or Article 4 of the EEA Agreement (hereinafter "EEA").

12 Iceland was requested to submit its observations within two months of the receipt of that letter. At the request of the Icelandic Government, ESA granted extensions to that deadline, first until 8 September 2010, then until 7 December 2010 and finally until 2 May 2011.

13 The Icelandic Government replied to the letter of formal notice on 2 May 2011. In that reply, the Icelandic Government maintained that it was not in breach of its obligations under the Directive or Article 4 EEA.

14 ESA was unconvinced by the reply to the letter of formal notice and delivered a reasoned opinion to Iceland on 10 June 2011.

15 Iceland replied to the reasoned opinion on 30 September 2011 and submitted an additional letter of 13 December 2011 which presented further information on the winding-up of the Landsbanki estate and summarised recent judgments of the Icelandic Supreme Court concerning the reordering of the priority of creditors in that winding-up.

16 By application lodged at the Court on 15 December 2011, 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 (hereinafter "SCA") seeking a declaration that by failing to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and in the United Kingdom provided for in Article 7(1) of the Act referred to at point 19a of Annex IX to the Agreement on the European Economic Area within the time-limits laid down in Article 10 of the Act, Iceland has failed to comply with the obligations resulting from that Act, in particular its Articles 3, 4, 7 and 10 and/or Article 4 EEA and ordering the defendant to bear the costs of the proceedings.

17 On 3 February 2012, the Government of Iceland requested an extension of the period in which to submit its defence. That request was granted on 6 February 2012, setting a time-limit for the submission of the defence of 8 March 2012.

18 In its defence, lodged at the Court on 8 March 2012, Iceland contends that the Court should dismiss the application and seeks an order that ESA pay its costs.

II APPLICATION TO INTERVENE

19 By document lodged at the Court's Registry on 28 March 2012, the European Commission sought leave to intervene pursuant to Article 36 of Protocol 5 to the SCA on the Statute of the EFTA Court (hereinafter "the Statute") in support of the form of order sought by ESA. The application to intervene was served on the parties in accordance with Article 89(2) of the Court's Rules of Procedure (hereinafter "RoP").

20 In written observations on the application to intervene, lodged at the Court's Registry on 5 April 2012, ESA asserts that the Commission's application was timely and is admissible under the first paragraph of Article 36 of the Statute. ESA submits that the Commission may lodge a statement of case or written observations pursuant to Article 20 of the Statute or, alternatively, intervene pursuant to the first paragraph of Article 36 of the Statute.

21 ESA notes that the President of the Court of Justice of the European Union (hereinafter "ECJ") has in two recent cases, C-542/09 *Commission* v *Netherlands*, order of 1 October 2010, not reported, and C-493/09 *Commission* v *Portugal*, order of 15 July 2010, not reported, issued orders in which applications for leave to intervene made by the Kingdom of Norway and ESA, respectively, were denied. ESA contends that these orders are regrettable since they impoverish the debate before that Court. However, in ESA's view, the principle of procedural homogeneity does not apply in the instant case as Article 36 of the Statute is not identical in substance to Article 40 of the Statute of the ECJ.

22 In written observations on its application to intervene, lodged at the Court's Registry on 12 April 2012, the Commission deals with Article 40 of the ECJ's Statute. According to the second paragraph of that provision, the bodies, offices and agencies of the Union and any other person which can establish an interest in the result of a case may intervene in cases before the ECJ. Moreover, natural and legal persons may not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union. The third paragraph states that, without prejudice to the second paragraph, the States, other than the Member States, which are parties to the EEA, and also ESA, may intervene in cases before the ECJ where one of the fields of application of the EEA is concerned. The Commission considers it questionable that the phrase "without prejudice to the second paragraph" which introduces the third paragraph of Article 40 of the Statute of the ECJ was intended to refer to both restrictions found in the second paragraph of Article 40 of the Statute of the ECJ. Nonetheless, such a general introductory phrase would appear to leave little scope for a different and less restrictive interpretation than was given by the President of the ECJ in the two abovementioned orders.

23 The Commission submits that there is a difference between the Statutes of the two EEA courts as Article 36 of the Court's Statute does not contain a provision equivalent to the third paragraph of Article 40 of the Statute of the ECJ. Consequently, in the Commission's view, those orders of the President of the ECJ are not relevant in assessing the admissibility of the Commission's application.

24 The Commission asserts that it should be deemed to enjoy an unconditional right to intervene in the present case. This is the first time that the Commission has sought leave to intervene rather than confining itself to the lodging of written observations. The Commission states that it wishes to intervene on account of the importance of the case as well as to provide the Court with the benefit of its experience on Directive 94/19/EC and in the

preparation and negotiations concerning its recent proposal for reform of the Directive.

25 Iceland submitted written observations on the application to intervene, lodged at the Court's Registry on 17 April 2012. Iceland refers to the Declaration by the European Community on the rights for the EFTA States before the EC Court of Justice annexed to the Final Act to the EEA Agreement. The first paragraph of that declaration states that "[i]n order to reinforce the legal homogeneity within the EEA through the opening of intervention possibilities for EFTA States and the EFTA Surveillance Authority before the EC Court of Justice, the Community will amend Articles 20 and 37 of the Statute of the Court of Justice and the Court of First Instance of the European Communities".

26 Iceland contends that the objective of that declaration was to reinforce legal homogeneity within the EEA by opening the possibilities for intervention to all cases in which EU provisions, similar to the provisions of the EEA Agreement, were at issue. Iceland notes that under ex-Article 37 (now Article 40) of the ECJ Statute, Norway was allowed to intervene in two institutional cases before the ECJ. In Joined Cases C-14/06 and C-295/06 *Parliament and Denmark* v *Commission* [2008] ECR I-1649 Norway intervened in support of the European Parliament and Denmark, and in Case C-377/98 *Netherlands* v *Parliament and Council* [2001] ECR I-7079 Norway intervened in support of the Netherlands.

27 Iceland notes further that, following the orders of the President of the Court of Justice of the European Union in the two recent cases mentioned in paragraph 21 of the present order, neither EFTA States nor ESA may intervene in institutional cases before the ECJ. This decreases the possibilities for ensuring homogeneity within the EEA. Whereas before the Court all EEA States, ESA and the Commission may be heard in an institutional case without having to formally intervene pursuant to Article 36 of the Statute, before the ECJ they can only be heard once they have formally intervened. Iceland submits that the principle of procedural homogeneity, and considerations as to the equality

of the Contracting Parties and reciprocity in their benefits, rights and obligations, stated in the fourth recital of the Preamble to the EEA Agreement, point in favour of treating the Commission's application for leave to intervene as ESA's would be treated by the President of the ECJ in a similar case, and dismissed.

28 However, Iceland notes that the recent orders of the President of the ECJ appear to be attributable to the unclear wording of the third paragraph of Article 40 of the Statute of the ECJ, and that such lack of clarity is not reproduced in the wording of Article 36 of the Statute. Iceland considers that it is not clear that those two orders of the President of the ECJ are an example to follow as they are detrimental to the EEA legal order in so far as they decrease the possibilities for ensuring homogeneity and run contrary to the intentions of the Contracting Parties. Moreover, according to Iceland, allowing the intervention may improve the procedural situation of the party not supported by the intervention.

29 In Iceland's view, were the application for intervene to be refused, the consequences would not be the same as before the ECJ, as the Commission would remain entitled to lodge written observations.

30 If the Commission is denied leave to intervene, but then submits written observations, Iceland invites the Court to reconsider the manner in which it applies its procedural rules such as to permit the parties to comment in writing upon observations of that kind. Furthermore, Iceland requests an opportunity to comment in writing on all written observations submitted in the case pursuant to Article 20 of the Statute.

III LAW

31 Pursuant to the first paragraph of Article 36 of the Court's Statute, any EFTA State, ESA, the European Union and the Commission may intervene in cases before the Court.

32 The Court held from the beginning that although it is not required by Article 3(1) SCA to follow the reasoning of the European Union courts when interpreting the main part of that Agreement,

the reasoning which led those courts to their interpretation of expressions in Union law is relevant when those expressions are identical in substance to those which fall to be interpreted by the Court (see Case E-1/94 *Restamark* [1994-1995] EFTA Ct. Rep. 17, paragraphs 32-35). In recent times, the Court has, based on this case-law, recognised the principle of procedural homogeneity (see Cases E-18/10 *ESA* v *Norway* [2011] EFTA Ct. Rep. 202, paragraph 26, and E-15/10 *Posten Norge v ESA*, judgment of 18 April 2012, not yet reported, paragraphs 109 f.; order of the Court in Case E-13/10 *Aleris Ungplan* v *ESA* [2011] EFTA Ct. Rep. 3, paragraph 24; order of the President of 25 March 2011 in Case E-14/10 *Konkurrenten.no AS* v *ESA*, paragraph 9; and order of the President of 15 February 2011 in Case E-15/10 *Posten Norge* v *ESA*, paragraph 8). In this regard, the Court has 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. The application of this principle cannot be restricted to the interpretation of provisions whose wording is identical in substance to parallel provisions of EU law.

33 In the case at hand, consideration must be given to the fact that the capability for any EEA State, ESA, the European Union and its institutions, including the Commission, to intervene in cases before the Court is of paramount significance for the good functioning of the EEA Agreement. Not only from a textual, but also from a teleological and functional perspective, the first paragraph of Article 36 of the Statute must be construed accordingly.

34 Article 89(1) of the Rules of Procedure provides that an application to intervene must be made within six weeks of the publication of the notice referred to in Article 14(6) of the Rules of Procedure. In accordance with Article 14(6) of the Court's Rules of Procedure, notice of the action was given in the EEA Section of the Official Journal of the European Union on 16 February 2012. The time-limit for submission of an application to intervene was 29 March 2012.

35 The present application to intervene was lodged at the Court's Registry on 28 March 2012, and is therefore timely.

36 As for the request of the Icelandic Government for the opportunity to comment in writing on all written observations submitted pursuant to Article 20 of the Statute, it suffices to note that a party cannot make such a request in the context of an application for intervention pursuant to Article 36 of the Statute and Article 89 of the Rules of Procedure.

37 In light of the above, the European Commission is granted leave to intervene in the case in support of the form of order sought by the applicant.

On those grounds,

THE PRESIDENT

hereby orders:

1. **The European Commission is granted leave to intervene in Case E-16/11 in support of the form of order sought by the applicant and shall receive a copy of every document served on the parties.**
2. **Costs are reserved.**

Luxembourg, 23 April 2012.

Skúli Magnússon	Carl Baudenbacher
Registrar	President

ORDER OF THE PRESIDENT

15 June 2012

(Intervention – Interest in the result of case – Inadmissibility – Manifest inadmissibility)

In Case E-16/11,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Gjermund Mathisen, Officer, Legal & Executive Affairs, acting as Agents, Brussels, Belgium,

applicant,

v

Iceland, represented by Kristján Andri Stefánsson, Ambassador, Ministry of Foreign Affairs, acting as Agent, Þóra M. Hjaltested, Director, Ministry of Foreign Affairs, acting as Co-Agent and Tim Ward QC, acting as Counsel,

defendant,

APPLICATION seeking a declaration that by failing to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and in the United Kingdom provided for in Article 7(1) of the Act referred to at point 19a of Annex IX to the Agreement on the European Economic Area (*Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes*) within the time-limits laid down in Article 10 of the Act, Iceland has failed to comply with the obligations resulting from that Act, in particular its Articles 3, 4, 7 and 10, and/or Article 4 of the European Economic Area,

THE PRESIDENT

makes the following

ORDER

I MAIN PROCEEDINGS

1 Iceland implemented Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (hereinafter "Directive 94/19/EC" or "the Directive") through the enactment of Act No 98/1999 on Deposit Guarantee and Investor Compensation Scheme. Act No 98/1999 set up the Depositors' and Investors' Guarantee Fund (hereinafter "TIF") which started operations on 1 January 2000.

2 In October 2006, Landsbanki Íslands hf (hereinafter "Landsbanki") launched a branch in the United Kingdom which provided online savings accounts under the brand name "Icesave". A similar Icesave online deposit branch was launched in the Netherlands which began accepting deposits in Amsterdam on 29 May 2008.

3 As a part of a tumultuous worldwide financial crisis, there was a run on the Icesave accounts in the United Kingdom from February to April 2008.

4 In accordance with the division of responsibility laid down under the Directive, deposits at the British and Netherlands branches of Landsbanki were under the responsibility of the Icelandic TIF.

5 From May 2008, Landsbanki opted to take part in the Netherlands deposit-guarantee scheme to supplement its home scheme. At that time, the minimum amount guaranteed under the Netherlands scheme was EUR 40 000 per depositor, later raised to EUR 100 000 per depositor. Similarly, the Landsbanki branch in the United Kingdom joined the UK deposit-guarantee scheme for additional coverage. Deposits at the British branch of Landsbanki in excess of the minimum amount guaranteed by

the Icelandic TIF were later guaranteed by the UK scheme to a maximum of GBP 50 000 for each retail depositor.

6 On 6 October 2008, Landsbanki's Icesave websites in the Netherlands and in the United Kingdom ceased to work and depositors at those branches lost access to their deposits.

7 On 7 October 2008, Landsbanki collapsed and the Icelandic Financial Supervisory Authority (hereinafter "FME") assumed the powers of the meeting of Landsbanki's shareholders and immediately suspended the bank's board of directors. FME appointed a winding-up committee which, with immediate effect, assumed the full authority of the board.

8 In order to avoid a potential run on bank deposits on their markets, the Netherlands and UK authorities organised for depositors with the Landsbanki branches in their respective countries to file claims with the deposit-guarantee scheme in the Netherlands and the United Kingdom. The UK Government arranged for the pay-out of all retail depositors in full, while the Netherlands Government arranged for the compensation of all depositors to a maximum of EUR 100 000.

9 According to Article 10 of the Directive, implemented into Icelandic law by Article 7(1) of Regulation No 120/2000 on Deposit Guarantees and Investor-Compensation Scheme, the payments from TIF to depositors should have been made at the latest within three months of 27 October 2008. On 26 January 2009, 24 April 2009 and 23 July 2009, the Minister of Economic Affairs extended the deadline for payouts from the fund, each time for three months, based on Article 10(2) of the Directive (Article 7(4) of Icelandic Regulation No 120/2000).

10 The final deadline for payments expired on 23 October 2009.

11 On 26 May 2010, the EFTA Surveillance Authority (hereinafter "ESA") sent a letter of formal notice to Iceland alleging failure to ensure that Icesave depositors in the Netherlands and the United Kingdom receive payment of the minimum amount of compensation provided for in Article 7(1) of the Directive as

amended within the time-limits laid down in Article 10 of the Directive, in breach of the obligations resulting from the Directive and/or Article 4 of the EEA Agreement (hereinafter "EEA").

12 Iceland was requested to submit its observations within two months of the receipt of that letter. At the request of the Icelandic Government, ESA granted extensions to that deadline, first until 8 September 2010, then until 7 December 2010 and finally until 2 May 2011.

13 The Icelandic Government replied to the letter of formal notice on 2 May 2011. In that reply, the Icelandic Government maintained that it was not in breach of its obligations under the Directive or Article 4 EEA.

14 ESA was unconvinced by the reply to the letter of formal notice and delivered a reasoned opinion to Iceland on 10 June 2011.

15 Iceland replied to the reasoned opinion on 30 September 2011 and submitted an additional letter of 13 December 2011 which presented further information on the winding-up of the Landsbanki estate and summarised recent judgments of the Icelandic Supreme Court concerning the reordering of the priority of creditors in that winding-up.

16 By application lodged at the Court on 15 December 2011, 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 (hereinafter "SCA") seeking a declaration that by failing to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and in the United Kingdom provided for in Article 7(1) of the Act referred to at point 19a of Annex IX to the Agreement on the European Economic Area within the time- limits laid down in Article 10 of the Act, Iceland has failed to comply with the obligations resulting from that Act, in particular its Articles 3, 4, 7 and 10 and/or Article 4 EEA and ordering the defendant to bear the costs of the proceedings.

17 On 3 February 2012, the Government of Iceland requested an extension of the period in which to submit its defence. That request was granted on 6 February 2012, setting a time-limit for the submission of the defence of 8 March 2012.

18 In its defence, lodged at the Court on 8 March 2012, Iceland contends that the Court should dismiss the application and seeks an order that ESA pay its costs.

19 On 28 March 2012, the European Commission requested leave to intervene in support of ESA.

20 On 10 April 2012, ESA submitted its reply to the defence.

21 Following observations submitted by the parties, the Commission was granted leave to intervene by Order of the President on 23 April 2012.

22 On 9 May 2012, the Government of the United Kingdom submitted written observations.

23 On 11 May 2012, the Government of Iceland submitted its rejoinder. On the same date, the Government of Liechtenstein submitted written observations.

24 On 15 May 2012, the Government of the Netherlands and the Government of Norway submitted written observations. Further, the Government of Iceland submitted an urgent request to receive the written observations. This request was granted by the Registrar on 16 May 2012.

25 On 23 May 2012, the European Commission submitted its statement in intervention.

II APPLICATION TO INTERVENE

26 By document lodged at the Court's Registry on 7 May 2012, the Samstaða þjóðar (National Unity Coalition) sought leave to intervene pursuant to Article 36 of Protocol 5 to the SCA on the

Statute of the EFTA Court (hereinafter "the Statute") in support of the form of order sought by Iceland.

27 The National Unity Coalition is an association registered in Iceland. It submits that its application to intervene in support of Iceland should be granted on the basis that Article 36(2) of the Statute cannot apply in the instant case.

III LAW

28 Pursuant to Article 36(2) of the Statute, any person establishing an interest in the result of any case submitted to the Court, save in cases between EFTA States or between EFTA States and the EFTA Surveillance Authority may intervene in that case.

29 The present proceedings are between an EFTA State and the EFTA Surveillance Authority. Accordingly, it is not open to the National Unity Coalition to establish an interest in the result of the case. The National Unity Coalition therefore lacks standing pursuant to Article 36(2) of the Statute and its application for leave to intervene is inadmissible (see by way of analogy: order of the President of the ECJ of 26 February 1996 in Case C-181/95 *Biogen Inc* v *Smithkline Beecham Biological SA* [1996] ECR I-717).

30 Article 89(1) of the Rules of Procedure (hereinafter "RoP") provides that the intervener shall be represented in accordance with Article 17 of the Statute and that Articles 32 and 33 RoP shall apply.

31 In that regard, no instrument or instruments constituting or regulating the National Unity Coalition or a recent extract from the register of companies, firms or associations or any other proof of its existence in law has been submitted as required pursuant to Article 33(5)(a) RoP. Nor is it apparent that the applicant intervener is represented by a lawyer authorized to practice before a court of an EEA State as required by Article 17 of the Statute. No proof of properly conferred authority to such a lawyer has been received by the Registry pursuant to Article 33(5)(b) RoP.

32 Moreover, Article 89(1) RoP provides that an application to intervene must be made within six weeks of the publication of the notice referred to in Article 14(6) RoP. In accordance with Article 14(6) RoP, notice of the action was given in the EEA Section of the Official Journal of the European Union on 16 February 2012. The time-limit for submission of an application to intervene was 29 March 2012.

33 The present application to intervene was lodged at the Court's Registry on 7 May 2012, and is therefore out of time.

34 Additionally, no description of the case has been submitted as required by Article 89(1)(a) RoP nor has an address for service at the place where the Court has its seat has been provided, as required by Article 89(1)(d) RoP.

35 In view of the inadmissibility of the application and its serious formal and procedural deficiencies, it is clear from Article 89(1) RoP read in the light of Article 88(1) RoP that the application for leave to intervene is manifestly inadmissible.

36 Therefore, in light of the above, and without being obliged to take any further steps pursuant to Article 89(2) RoP, the application for leave to intervene by Samstaða þjóðar should therefore be dismissed as manifestly inadmissible.

37 There is no need to rule on costs as none have been incurred.

On those grounds,

THE PRESIDENT

hereby orders:

1. **The application for leave to intervene by Samstaða þjóðar is dismissed as manifestly inadmissible.**

2. **There is no need to rule on costs.**

Luxembourg, 15 June 2012.

Skúli Magnússon	Carl Baudenbacher
Registrar	President

REPORT FOR THE HEARING

in Case E-16/11

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

supported by the

European Commission

and

Iceland

seeking a declaration that by failing to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and in the United Kingdom provided for in Article 7(1) of the Act referred to at point 19a of Annex IX to the Agreement on the European Economic Area (Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes) within the time limits laid down in Article 10 of the Act, Iceland has failed to comply with the obligations resulting from that Act, in particular its Articles 3, 4, 7 and 10, and/or Article 4 of the Agreement on the European Economic Area.

I INTRODUCTION

1. As a part of a tumultuous worldwide financial crisis, Landsbanki's depositors at the branches in the Netherlands and the United Kingdom lost access to their deposits on 6 October 2008. Consequently, Iceland's Depositors' and Investors' Guarantee Fund (hereinafter "TIF" or "Fund") was obliged, in principle, to pay out the minimum guarantee per depositor in accordance with the rules and time-limits set out in the Icelandic law implementing Directive 94/19/EC (hereinafter "Directive 94/19" or "the Directive"). However, no such payments were made to those depositors.

2. By its application, ESA seeks to establish that Iceland has failed to comply with its obligations resulting from the Directive as it failed to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and in the United Kingdom within the given time-limits. At the heart of the dispute is whether there is an obligation of result upon Iceland to ensure that depositors are compensated as set out in the Directive if all else should fail. The parties also dispute whether, in the event that such an obligation exists, Iceland is excused by virtue of *force majeure*.

3. The other matter at dispute is whether by treating depositors with domestic accounts differently from depositors holding accounts at Landsbanki branches in other EEA States, Iceland has infringed Articles 4(1) and 7(1) of the Directive and/or Article 4 EEA. In the event of such an infringement, the parties also dispute whether this difference in treatment must be regarded as objectively justified.

II FACTS

4. Iceland implemented Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes through the enactment of Act No 98/1999 on a Deposit Guarantee and Investor Compensation Scheme. Act No 98/1999 set up the Depositors' and Investors' Guarantee Fund which started operating on 1 January 2000.

5. In October 2006, Landsbanki Íslands hf (hereinafter "Landsbanki") launched a branch in the United Kingdom which provided online savings accounts under the brand name "Icesave". A similar Icesave online deposit branch was launched in the Netherlands which began accepting deposits in Amsterdam on 29 May 2008.

6. As a part of a worldwide financial crisis, there was a run on Icesave accounts in the United Kingdom from February to April 2008.

7. In accordance with the division of responsibility laid down under the Directive, deposits at the British and Netherlands branches

of Landsbanki were under the responsibility of the Icelandic TIF, which offered a minimum guarantee of ISK 1.7 million per depositor pursuant to Article 10 of Act No 98/1999. Iceland did not make use of the option provided for in Article 7(2) of the Directive to exclude certain categories of depositors from the guarantee scheme.

8. From May 2008, Landsbanki opted to take part in the Netherlands deposit-guarantee scheme to supplement its home scheme. At that time, the minimum amount guaranteed under the Netherlands scheme was EUR 40 000 per depositor, later raised to EUR 100 000 per depositor. Similarly, the Landsbanki branch in the United Kingdom joined the UK deposit-guarantee scheme for additional coverage. Deposits at the British branch of Landsbanki in excess of the minimum amount guaranteed by the Icelandic TIF were later guaranteed by the UK scheme to a maximum of GBP 50 000 for each retail depositor.

9. On 6 October 2008, Landsbanki's Icesave websites in the Netherlands and in the United Kingdom ceased to work and depositors at those branches lost access to their deposits.

10. On 6 October 2008, the Althingi, the Icelandic Parliament, adopted Emergency Act No 125/2008. The Emergency Act provided for the creation of new banks and the granting of priority status in the bankruptcy to depositors with claims upon the TIF.

11. On 7 October 2008, Landsbanki collapsed and the Icelandic Financial Supervisory Authority ("Fjármálaeftirlitið", hereinafter "FME") assumed the powers of the meeting of Landsbanki's shareholders and immediately suspended the bank's board of directors. The FME appointed a winding-up committee which, with immediate effect, assumed the full authority of the board.

12. Between 6 and 9 October 2008, the Icelandic Minister of Finance established new banks under the Emergency Act.

13. Between 9 and 22 October 2008, the FME transferred all domestic deposits and loans to the new banks.

14. In order to avoid a potential run on bank deposits in their markets, the Netherlands and UK authorities organised for depositors with the Landsbanki branches in their respective countries (hereinafter "Icesave depositors") to file claims with the deposit-guarantee scheme in the Netherlands and the United Kingdom. The UK Government arranged for the pay-out of all retail depositors in full, while the Netherlands Government arranged for the compensation of all depositors to a maximum of EUR 100 000.

15. The Icelandic Parliament established a Special Investigation Commission (hereinafter "SIC") in December 2008 to investigate and analyse the processes leading to the collapse of the three main banks in Iceland.

16. According to Article 10 of the Directive, implemented into Icelandic law by Article 7(1) of Regulation No 120/2000 on a Deposit Guarantee and Investor Compensation Scheme, payments from the TIF to depositors should have been made, at the latest, within three months of 27 October 2008. On 26 January 2009, 24 April 2009 and 23 July 2009, the Minister of Economic Affairs extended the deadline for payouts from the Fund, on each occasion for three months, on the basis of Article 10(2) of the Directive (Article 7(4) of Icelandic Regulation No 120/2000).

17. On 4 October 2009, the TIF published a notice in the Icelandic Legal Gazette calling for claims to be submitted within two months. The Netherlands and UK Governments submitted claims, as did a small number of other depositors, including four institutional investors. Later the TIF wrote to all institutional investors to inform them that it was beginning to pay compensation under Act No 98/1999, and seeking an assignment of any claim against the banks themselves.

18. On 23 October 2009, the final deadline for payments expired. The SIC delivered its report on 12 April 2010.

19. On 14 December 2011, the Court ruled in Case E-3/11 *Pálmi Sigmarsson* v *Seðlabanki Íslands* that "a national measure which

prevents inbound transfer into Iceland of Icelandic krónur purchased on the offshore market is compatible with Article 43(2) and (4) of the EEA Agreement in circumstances such as those in the case before the referring court."

III LEGAL BACKGROUND

EEA law

20. Article 4 EEA provides:

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

21. The Act referred to at point 19a of Annex IX to the EEA Agreement (*Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes),*[1] as amended, provides for minimum harmonised rules as regards deposit-guarantee schemes.

22. Recital 1 in the preamble to Directive 94/19 reads:

Whereas, in accordance with the objectives of the Treaty, the harmonious development of the activities of credit institutions throughout the Community should be promoted through the elimination of all restrictions on the right of establishment and the freedom to provide services, while increasing the stability of the banking system and protection for savers;

23. Recital 2 in the preamble to Directive 94/19 reads:

Whereas, when restrictions on the activities of credit institutions are eliminated, consideration should be given to the situation which might arise if deposits in a credit institution that has branches in other Member States become unavailable; whereas it is indispensable to ensure a harmonized minimum level of deposit protection wherever deposits are located in the Community; whereas such deposit protection is as essential as the prudential rules for the completion of the single banking market;

[1] OJ 1994 L 135, p. 5.

24. Recital 3 in the preamble to Directive 94/19 reads:

Whereas in the event of the closure of an insolvent credit institution the depositors at any branches situated in a Member State other than that in which the credit institution has its head office must be protected by the same guarantee scheme as the institution's other depositors;

25. Recital 4 in the preamble to Directive 94/19 reads:

Whereas the cost to credit institutions of participating in a guarantee scheme bears no relation to the cost that would result from a massive withdrawal of bank deposits not only from a credit institution in difficulties but also from healthy institutions following a loss of depositor confidence in the soundness of the banking system;

26. Recital 7 in the preamble to Directive 94/19 reads:

Whereas a branch no longer requires authorization in any host Member State, because the single authorization is valid throughout the Community, and its solvency will be monitored by the competent authorities of its home Member State; whereas that situation justifies covering all the branches of the same credit institution set up in the Community by means of a single guarantee scheme; whereas that scheme can only be that which exists for that category of institution in the State in which that institution's head office is situated, in particular because of the link which exists between the supervision of a branch's solvency and its membership of a deposit-guarantee scheme;

27. Recital 8 in the preamble to Directive 94/19 reads:

Whereas harmonization must be confined to the main elements of deposit-guarantee schemes and, within a very short period, ensure payments under a guarantee calculated on the basis of a harmonized minimum level;

28. Recital 16 in the preamble to Directive 94/19 reads:

Whereas, on the one hand, the minimum guarantee level prescribed in this Directive should not leave too great a proportion of deposits without protection in the interest both of consumer protection and of the stability of the financial system; whereas, on the other hand, it would not be appropriate to impose throughout the Community a

level of protection which might in certain cases have the effect of encouraging the unsound management of credit institutions; whereas the cost of funding schemes should be taken into account; whereas it would appear reasonable to set the harmonized minimum guarantee level at ECU 20 000; whereas limited transitional arrangements might be necessary to enable schemes to comply with that figure;

29. Recital 23 in the preamble to Directive 94/10 reads:

Whereas it is not indispensable, in this Directive, to harmonize the methods of financing schemes guaranteeing deposits or credit institutions themselves, given, on the one hand, that the cost of financing such schemes must be borne, in principle, by credit institutions themselves and, on the other hand, that the financing capacity of such schemes must be in proportion to their liabilities; whereas this must not, however, jeopardize the stability of the banking system of the Member State concerned;

30. Recital 24 in the preamble to Directive 94/19 reads:

Whereas this Directive may not result in the Member States' or their competent authorities' being made liable in respect of depositors if they have ensured that one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed in this Directive have been introduced and officially recognized;

31. Recital 25 in the preamble to Directive 94/19 reads:

Whereas deposit protection is an essential element in the completion of the internal market and an indispensable supplement to the system of supervision of credit institutions on account of the solidarity it creates amongst all the institutions in a given financial market in the event of the failure of any of them,

32. Article 1 of Directive 94/19 reads:

1. "deposit" shall mean any credit balance which results from funds left in an account or from temporary situations deriving from normal banking transactions and which a credit institution must repay

under the legal and contractual conditions applicable, and any debt evidenced by a certificate issued by a credit institution. ...

3. "unavailable deposit" shall mean a deposit that is due and payable but has not been paid by a credit institution under the legal and contractual conditions applicable thereto, where either:

(i) the relevant competent authorities have determined that in their view the credit institution concerned appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and to have no current prospect of being able to do so.

The competent authorities shall make that determination as soon as possible and at the latest 21 days after first becoming satisfied that a credit institution has failed to repay deposits which are due and payable;

(ii) a judicial authority has made a ruling for reasons which are directly related to the credit institution's financial circumstances which has the effect of suspending depositors' ability to make claims against it, should that occur before the aforementioned determination has been made;

4. "credit institution" shall mean an undertaking the business of which is to receive deposits or other repayable funds from the public and to grant credits for its own account;

5. "branch" shall mean a place of business which forms a legally dependent part of a credit institution and which conducts directly all or some of the operations inherent in the business of credit institutions; any number of branches set up in the same Member State by a credit institution which has its head office in another Member State shall be regarded as a single branch. 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 purpose of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States.

33. Article 3 of Directive 94/19 reads:

1. Each Member State shall ensure that within its territory one or more deposit-guarantee schemes are introduced and officially recognized. ...

34. Article 4 of Directive 94/19 reads:

1. Deposit-guarantee schemes introduced and officially recognized in a Member State in accordance with Article 3(1) shall cover the depositors at branches set up by credit institutions in other Member States. ...

35. Article 7 of Directive 94/19 reads:

1. Deposit-guarantee schemes shall stipulate that the aggregate deposits of each depositor must be covered up to ECU 20 000 in the event of deposits' being unavailable. ...

6. Member States shall ensure that the depositor's rights to compensation may be the subject of an action by the depositor against the deposit-guarantee scheme.

36. Article 8 of Directive 94/19 reads:

1. The limits referred to in Article 7(1), (3) and (4) shall apply to the aggregate deposits placed with the same credit institution irrespective of the number of deposits, the currency and the location within the Community.

...

37. Article 10 of Directive 94/19 reads:

1. Deposit-guarantee schemes shall be in a position to pay duly verified claims by depositors in respect of unavailable deposits within three months of the date on which the competent authorities make the determination described in Article 1(3)(i) or the judicial authority makes the ruling described in Article 1(3)(ii).

2. In wholly exceptional circumstances and in special cases a guarantee scheme may apply to the competent authorities for an extension of the time limit. No such extension shall exceed three months. The competent

authorities may, at the request of the guarantee scheme, grant no more than two further extensions, neither of which shall exceed three months.

...

National law

38. Directive 94/19 was implemented into Icelandic law by Act No 98/1999 on a Deposit Guarantee and Investor Compensation Scheme (lög um innstæðutryggingar og tryggingakerfi fyrir fjárfesta).

39. Article 1 of Act No 98/1999 reads:

The objective of this Act is to guarantee a minimum level of protection to depositors in commercial banks and savings banks, and to customers of companies engaging in securities trading pursuant to law, in the event of difficulties of a given company in meeting its obligations to its customers according to the provisions of this Act.

40. Article 2 of Act No 98/1999 reads:

Guarantees under this Act are entrusted to a special institute named the Depositors' and Investors' Guarantee Fund, hereinafter referred to as the "Fund". The Fund is a private foundation operating in two independent departments, the Deposit Department and the Securities Department, with separate finances and accounting, cf. however the provisions of Article 12.

41. Article 3 of Act No 98/1999 reads:

Commercial banks, savings banks, companies providing investment services, and other parties engaging in securities trading pursuant to law and established in Iceland shall be members of the Fund. The same shall apply to any branches of such parties within the European Economic Area within the States parties to the EFTA Convention or in the Faroe Islands. Such parties, hereinafter referred to as Member Companies, shall not be liable for any commitments entered into by the Fund beyond their statutory contributions to the Fund, cf. the provisions of Articles 6 and 7. The Financial Supervisory Authority shall maintain a record of Member Companies.

42. Article 6 of Act No 98/1999 reads:

The total assets of the Deposit Department of the Fund shall amount to a minimum of 1% of the average amount of guaranteed deposits in commercial banks and savings banks during the preceding year. ...

43. Article 9 of Act No 98/1999 reads:

If, in the opinion of the Financial Supervisory Authority, a Member Company is unable to render payment of the amount of deposits, securities or cash upon a customer's demand for refunding or return thereof in accordance with applicable terms, the Fund shall pay to the customer of the Member Company the amount of his deposit from the Deposit Department and the value of his securities and cash in connection with securities trading from the Securities Department. The obligation of the Fund to render payment also takes effect if the estate of a Member Company is subjected to bankruptcy proceedings in accordance with the Act on Commercial Banks and Savings Banks and the Act on Securities Trading.

The opinion of the Financial Supervisory Authority shall have been made available no later than three weeks after the Authority first obtains confirmation that the relevant Member Company has not rendered payment to its customer or accounted for his securities in accordance with its obligations. ...

Further specifications regarding payments from the Fund shall be included in a Government Regulation.

44. Article 10 of Act No 98/1999 reads:

In the event that the assets of either department of the Fund are insufficient to pay the total amount of guaranteed deposits, securities and cash in the Member Companies concerned, payments from each Department [i.e. the Fund's deposits department and the Fund's securities department] shall be divided among the claimants as follows: each claim up to ISK 1.7 million shall be paid in full, and any amount in excess of that shall be paid in equal proportions depending on the extent of each Department's assets. This amount shall be linked to the EUR exchange rate of 5 January 1999. No further claims can be made against the Fund at a later stage even if losses suffered by the claimants have not been compensated in full. Should the total assets

of the Fund prove insufficient, the Board of Directors may, if it sees compelling reasons to do so, take out a loan in order to compensate losses suffered by claimants.

In the event that payment is effected from the Fund, the claims made on the relevant Member Company or bankruptcy estate will be taken over by the Fund.

IV PRE-LITIGATION PROCEDURE AND PROCEDURE BEFORE THE COURT

45. On 26 May 2010, ESA issued a letter of formal notice to Iceland alleging a failure to ensure that Icesave depositors in the Netherlands and the United Kingdom received payment of the minimum amount of compensation provided for in Article 7(1) of the Directive, as amended, within the time-limits laid down in Article 10 of the Directive, in breach of the obligations resulting from the Directive and/or Article 4 of the EEA Agreement (hereinafter "EEA").

46. Iceland was requested to submit its observations within two months of the receipt of that letter. At the request of the Icelandic Government, ESA granted extensions to that deadline, first until 8 September 2010, then until 7 December 2010 and finally until 2 May 2011.

47. The Icelandic Government replied to the letter of formal notice on 2 May 2011. In that reply, the Icelandic Government maintained that it was not in breach of its obligations under the Directive or Article 4 EEA.

48. ESA was unconvinced by Iceland's reply to the letter of formal notice and delivered its reasoned opinion to Iceland on 10 June 2011.

49. Iceland replied to the reasoned opinion on 30 September 2011 and submitted an additional letter on 13 December 2011 which presented further information on the winding-up of the Landsbanki estate including summaries of recent Icelandic Supreme Court judgments concerning the reordering of the priority of creditors in that winding-up.

50. By application lodged at the Court on 15 December 2011, 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 (hereinafter "SCA") seeking a declaration that by failing to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and the United Kingdom provided for in Article 7(1) of the Act referred to at point 19a of Annex IX to the Agreement on the European Economic Area within the time-limits laid down in Article 10 of the Act, Iceland had failed to comply with the obligations resulting from that Act, in particular its Articles 3, 4, 7 and 10 and/or Article 4 EEA and ordering the defendant to bear the costs of the proceedings.

51. On 3 February 2012, the Government of Iceland requested an extension of the period in which to submit its defence. That request was granted on 6 February 2012, setting a time-limit for the submission of the defence of 8 March 2012.

52. In its defence, lodged at the Court on 8 March 2012, Iceland contends that the Court should dismiss the application and seeks an order that ESA pay its costs.

53. On 28 March 2012, the European Commission requested leave to intervene in support of ESA.

54. On 10 April 2012, ESA submitted its reply to the defence.

55. Following observations submitted by the parties, the Commission was granted leave to intervene by Order of the President of 23 April 2012.

56. On 7 May 2012, the Samstaða þjóðar (National Unity Coalition), an association registered in Iceland, sought leave to intervene pursuant to Article 36 of Protocol 5 to the SCA on the Statute of the EFTA Court in support of the form of order sought by Iceland.

57. On 9 May 2012, the Government of the United Kingdom submitted written observations.

58. On 11 May 2012, the Government of Iceland submitted its rejoinder. On the same date, the Government of Liechtenstein submitted written observations.

59. On 15 May 2012, the Government of the Netherlands and the Government of Norway submitted written observations. Further, the Government of Iceland submitted an urgent request to receive the written observations. This request was granted by the Registrar on 16 May 2012.

60. On 23 May 2012, the European Commission submitted its statement in intervention.

61. On 15 June 2012, the application for leave to intervene by Samstaða þjóðar was dismissed as manifestly inadmissible by Order of the President.

62. On 20 June 2012, the Government of Iceland submitted its reply to the statement in intervention by the European Commission.

V FORMS OF ORDER SOUGHT BY THE PARTIES

63. The EFTA Surveillance Authority requests the Court to:

    1) Declare that by failing to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and in the United Kingdom provided for in Article 7(1) of the Act referred to at point 19a of Annex IX to the Agreement on the European Economic Area (Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes) within the time limits laid down in Article 10 of the Act, Iceland has failed to comply with the obligations resulting from that Act, in particular its Articles 3, 4, 7 and 10, and/or Article 4 of the Agreement on the European Economic Area;

    2) Order Iceland to bear the costs.

64. The Icelandic Government requests the Court to:

    1) Dismiss the application;

    2) Order the EFTA Surveillance Authority to pay the costs of these proceedings.

VI WRITTEN PROCEDURE BEFORE THE COURT

65. Written arguments have been received from the parties:

- EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Gjermund Mathisen, Officer, Department of Legal & Executive Affairs, acting as Agents;
- Iceland, represented by Kristján Andri Stefánsson, Ambassador, acting as Agent, Þóra M. Hjaltested, Director, as Co-Agent, and Tim Ward QC, as Counsel;
- The European Commission, as intervener, represented by Enrico Traversa, Legal Adviser, Albert Nijenhuis and Karl-Philipp Wojcik, members of its Legal Service, acting as Agents.

66. 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 Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director of the EEA Coordination Unit, and by Frederique Lambrecht, Legal Officer at the EEA Coordination Unit, acting as Agents;
- The Netherlands, represented by Corinna Wissels, Mielle Bulterman and Charlotte Schillemans, head and staff members of the European Law Division of the Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agents;
- The Kingdom of Norway, represented by Kaja Moe Winther, Senior Adviser, Ministry of Foreign Affairs, and Torje Sunde, Advocate, Office of the Attorney General (Civil Affairs), acting as Agents;
- The United Kingdom of Great Britain and Northern Ireland, represented by Heather Walker of the Treasury Solicitor's Department, acting as Agent, and by Mark Hoskins QC.

VII SUMMARY OF THE PLEAS IN LAW AND ARGUMENTS OF THE PARTIES

The applicant

67. The application is based on the plea that, by failing to ensure payment of compensation to Icesave depositors holding deposits in Landsbanki's branches in other EEA States within the time-limits laid down in the Directive, Iceland is in breach of its obligations under Articles 3(1), 4(1) and 7(1) of the Directive and/or under Article 4 EEA.

Obligation of result

68. ESA submits that the Directive imposes an obligation of result on EFTA States to ensure that a deposit-guarantee scheme is set up capable of guaranteeing that, in the event of deposits being unavailable, the aggregate deposits of each depositor are covered in all circumstances up to the amount laid down in Article 7(1) of the Directive. Further, the obligation of result requires EFTA States to ensure that duly verified claims by depositors are paid within the deadline laid down in Article 10 of the Directive.

69. ESA submits that, as regards harmonisation measures, an obligation of result is a well-established technique of EU law.[2] It submits that this obligation of result follows from the wording of the Directive. The Directive does not provide for a derogation or exemption from such. It is simply possible to exclude certain types of deposits from the coverage and to limit coverage up to 90%.[3] Further, even in wholly exceptional circumstances, the time-limit in which necessary procedures have to be completed cannot be extended beyond 12 months after the recognition of the unavailability of the deposits.

70. ESA submits that this interpretation of the Directive is consonant with the case-law of the Court of Justice of the European Union ("the ECJ"). In its view, it is evident from Case C-222/02 *Paul and*

2 Reference is made to Case C-134/11 *Jürgen Blödel-Pawlik* v *HanseMerkur Reiseversicherung*, judgment of 16 February 2012, not yet reported, paragraphs 20 and 22.

3 Article 7(2) and (4) of the Directive.

Others that, although the facts of the case did not require it to rule on the matter, the ECJ considers that Articles 7 and 10 of the Directive require a clear and precise result to be achieved.[4]

71. ESA submits that Article 7 of Directive 94/19 does not impose an obligation only on the deposit-guarantee fund, but also on the EFTA State itself. These obligations were clear and precise prior to the amendment of Article 7 of the Directive by Directive 2009/14,[5] not implemented in the EEA thus far. In its view, the mere fact that the EU legislative bodies have underlined through the amendment that the obligations set out in Article 7 of the Directive are addressed to the Member States does not lead to a different conclusion. There are no indications that Directive 2009/14 was intended to introduce any substantive changes to Article 7 of the Directive.

72. In this respect, ESA argues further that it follows directly from Article 7 EEA that the obligations set out in directives are addressed to EEA States and not to the bodies that States are obliged to establish or designate in order to comply with their obligations under those directives. Therefore, ESA concludes, the change to the wording of Article 7 of the Directive, introduced by Directive 2009/14, cannot alter the legal obligation laid down in that provision.

73. ESA submits that is also clear from the Directive's wording, context, and from the objectives it pursues that it imposes an obligation of result as described above on the EEA States.

74. ESA argues in this respect that, according to its preamble, the Directive seeks to ensure a high level of protection of retail deposits paid into bank accounts within the common market.[6] According to ESA, notwithstanding the ECJ's finding that the Directive's objective is to remove obstacles to free movement

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4 Reference is made to Case C-222/02 *Paul and Others* [1994] ECR I-9425, paragraphs 26 to 27 and 30.

5 See Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay, OJ 2009 L 68, p. 3.

6 Reference is made in particular to recitals 7 and 8 in the preamble to the Directive and Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, paragraph 48.

of credit institutions across the internal market,[7] it follows from case-law that the protection of depositors is central to the scheme and aim of the Directive.

75. Further, ESA submits that the system laid down in the Directive rests on the protection of depositors by the schemes of the home state of credit institutions, both for deposits made in the home state and for deposits made in their branches in other Member States.[8] To safeguard financial stability within a European cross-border network of depositor protection, EEA States and depositors must be able to trust that the level of protection will be the same, whatever credit institution is chosen.

76. ESA doubts whether EEA States would have agreed to adopt a directive and thereby to renounce their right to restrict the activities of credit institutions established in another EEA State with insufficient depositor protection, had such a directive required only the establishment of some sort of deposit-guarantee scheme. In its view, the installation of a credible European cross-border network of depositor protection, which is an indispensible condition for a single market of credit institutions, can only be ensured if it is guaranteed that in the event of a bank failure a certain amount will be paid out within a specified deadline. ESA concludes, therefore, that Articles 7 and 10 of the Directive impose an obligation of result, which alone can ensure the credibility of the system and enable the efficient functioning of the single market for credit institutions.

77. In this respect, ESA argues, finally, that it also follows from case-law that the aim and purpose of the Directive is to oblige EEA States to introduce a uniform standard of minimum protection for depositors throughout the internal market. As a result, EEA States can no longer invoke depositor protection in order to impede the activities of credit institutions authorised in other Member States.[9]

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7 Again reference is made to *Germany* v *Parliament and Council*, cited above, paragraph 13.
8 As regards the latter, reference is made to *Germany* v *Parliament and Council*, cited above, paragraph 18.
9 Ibid., paragraphs 17 to 19.

78. Furthermore, according to ESA, the fact that guarantee schemes of other EEA States stepped in to compensate depositors of Landsbanki's foreign branches has no bearing on the breach committed by Iceland. Article 4 of the Directive provides that a deposit-guarantee fund established in an EEA State must cover depositors at branches set up by banks in other EEA States. However, Iceland did not ensure that the depositors in Icesave accounts received compensation from the TIF. In ESA's view, this is the breach which is directly attributable to the Icelandic State.

79. In this regard, ESA adds that the procedures required under Article 10(1) of the Directive were not observed. Following the unavailability of Icesave deposits on 6 October 2008, the FME issued its finding of unavailability of deposits regarding those deposits on 27 October 2008. The deadline for payment under the Directive was extended by the Icelandic authorities until 23 October 2009. However, further steps were not taken and the relevant procedures provided for under national law were not completed.

80. ESA further argues that the TIF forms part of the Icelandic State within the meaning of the EEA Agreement. The TIF was established by law with the sole purpose of providing a public service. It acts within a narrowly defined framework which leaves no genuine margin for independent decisions by its board and has special powers beyond those which result from the normal rules applicable in relations between individuals.

81. None the less, even if the TIF fund were considered to be an independent entity, according to ESA, the State remains under an obligation to ensure full compliance with the Directive and proper compensation of depositors in accordance with the Directive's terms.[10]

[10] Reference is made to Case C-356/05 *Elaine Farrell* v *Alan Whitty and Others* [2007] ECR I-3067, paragraph 40, and the case law cited therein, and Case C-157/02 *Rieser Internationale Transporte GmbH* v *Asfinag* [2004] ECR I-1477.

82. Moreover, in ESA's view, the facts of the present case show that the TIF and the Icelandic administration were linked to a degree that the TIF cannot be considered a wholly separate entity. This follows from the various factual links between the TIF and the Icelandic State, regardless of the TIF's legal structure under Icelandic law.

83. Having regard to Chapter 17 of the Icelandic Parliament's SIC Report, ESA notes that an agreement between the Fund and the Central Bank of Iceland (hereinafter "CBI") had been in force since the establishment of the Fund until the failure of the large Icelandic banks at the beginning of October 2008. According to the SIC Report, that agreement provided that an officer of the CBI should be employed as the Fund's managing director.[11] It follows also from that report that the Ministry of Business Affairs exercised supervision over the activities of the Fund and had appointed a staff member as Chairman of the Board of Directors of the Fund ever since the TIF's establishment.[12] As a consequence, in ESA's view, any breach of the Directive by the Fund is attributable directly to the Icelandic State, both in law and in fact.

84. ESA concludes that Iceland has failed to comply with its obligations under Articles 7 and 10 of the Directive as it has not ensured payment directly or through the Fund to those depositors in the Netherlands and the United Kingdom whose deposits became unavailable within the meaning of the Directive.

Obligation of transposition

85. ESA contends that Iceland has not fulfilled all its obligations simply by transposing the Directive into national law and setting up and recognising a deposit-guarantee scheme, regardless of whether compensation of depositors is, in fact, ensured under the conditions prescribed in the Directive.

86. ESA argues that EEA States are obliged to ensure the full application of a directive even after the adoption of

[11] Reference is made to the SIC Report, Chapter 17, p. 30.
[12] Ibid., p. 66.

such measures.[13] This entails in the present case that the compensation of the aggrieved depositors must be ensured under the conditions laid down in the Directive, i.e. that the Directive imposes such an obligation of result on EEA States.

87. ESA notes that in its Staff Working Document of 12 July 2010 the Commission has described various means of funding a deposit-guarantee fund, including ex ante contributions, ex post contributions, State loans or direct state interventions. In this connection, ESA observes, however, that the Directive does not specify how the funds should be financed. Moreover, it notes that it is for the national authorities to determine how to achieve the result given in a directive, in the manner in which they deem most appropriate.

88. ESA submits further that by amending national insolvency law through the adoption of the Emergency Act Iceland cannot be regarded as having fulfilled its obligations under the Directive. As a result of the Emergency Act, depositors' claims were given priority status in insolvency proceedings. However, the adjustment of domestic bankruptcy law cannot be deemed to amount to compliance with the Directive since the latter's very purpose is to avoid the situation that depositors have to rely on bankruptcy proceedings in order to receive the minimum amount of EUR 20 000.

89. In that regard, ESA also argues that, as a matter of law, it is irrelevant whether Iceland's transposition of the Directive was comparable to the manner in which other EEA States have implemented it.[14] Moreover, in its view, the measures taken by Iceland were, in fact, not comparable to those taken by other EEA States during the financial crisis that struck in the autumn of 2008. The other EEA States took measures to avoid deposits from becoming unavailable by recapitalising banks. In addition, no other EEA State made a distinction between domestic depositors and

[13] Reference is made to Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 27, and Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraphs 116 to 117.
[14] Reference is made to Case E-1/03 *ESA* v *Iceland* [2003] EFTA Ct. Rep. 143, paragraph 33.

depositors with accounts at foreign branches. ESA notes that it was only the depositors holding Icesave accounts with Landsbanki's branches in the Netherlands and the United Kingdom that did not receive minimum compensation from the deposit-guarantee scheme responsible for those deposits under the Directive.

State responsibility

90. ESA finds fault with Iceland for not having taken any measures at all to ensure that depositors protected by the Fund receive the minimum amount that is guaranteed by the Directive. However, in response to Iceland's submissions on the point, it avers that it never claimed that the Directive requires EEA States to guarantee the amount set out in Article 7 of the Directive. In its view, EEA States have an obligation to achieve the result envisaged by the Directive and to take all appropriate measures to ensure the fulfilment of that obligation. If all else should fail, it may be the case that the EEA State will be responsible for the compensation of depositors up to the amount provided for in Article 7 of the Directive, in order to discharge its duties under the Directive.

91. ESA submits that the Icelandic authorities themselves contemplated a number of different measures including the facilitation of a loan, as envisaged by Article 10 of Act No 98/1999, or even the provision of a State guarantee to ensure the payment of the minimum guaranteed amount within the time-limit specified by Article 10 of the Directive. It observes that, in practice, however, nothing was done.

92. ESA argues further that the Directive cannot be interpreted as precluding the provision of a State guarantee should a deposit-guarantee fund have inadequate resources to meet its minimum obligations.

93. In this regard, ESA refers to recital 24 in the preamble to the Directive. In its view, it follows from that recital that an EEA State may be liable to depositors if it has not ensured the introduction of one or more schemes that are capable of guaranteeing the compensation or protection of depositors under the conditions

prescribed by the Directive. In ESA's view, it does not suffice to set up and officially recognise a deposit-guarantee scheme.

94. ESA contends that its view is also confirmed by case-law.[15] ESA notes from the ECJ's judgment in *Paul and Others* that, if the compensation of depositors prescribed by the Directive is ensured, the EEA State in question cannot be held liable for further damages under the Directive, e.g. for a failure to properly supervise banks. From this, it infers that compensation must be ensured by the EEA State and their competent authorities. How this is achieved in practice is left to them and is not limited to the grant of a State guarantee.

95. Furthermore, ESA refutes Iceland's submissions that it follows from the Commission Staff Working Document of 12 July 2010[16] that the Directive does not require a State guarantee. In ESA's view, the Commission Staff Working Document is based on the presumption that deposit-guarantee schemes are adequately financed to meet their obligations. It observes further that the Working Document mentions *ex ante* and *ex post* contributions, State loans and direct state interventions as means of financing guarantee schemes.[17]

96. ESA accepts that a State injection of capital to refinance a deposit-guarantee scheme may constitute State aid within the meaning of Article 61 EEA. In ESA's view, however, this would appear to be compatible with the State aid rules.

97. ESA adds in this respect that the Icelandic authorities never approached it to discuss the compatibility of any form of State intervention in this case. Furthermore, it observes that the State aid rules did not constrain Iceland from transferring national deposits to the new Landsbanki.[18]

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15 Reference is made to *Paul and Others*, cited above, paragraphs 30 to 31.

16 Commission Staff Working Document of 12 July 2010, SEC(2010) 834 final.

17 Ibid., p. 19. Reference is also made to Chapter 17, pp. 71-73, of the Report of the SIC, according to which the issue of a state guarantee was discussed at various points within the Icelandic administration were the Fund to have inadequate monies to meet its legal obligations. ESA observes that, according to the Report, no clear position was taken on this issue.

18 Reference is made to Commission Decision in Case N 17/2009 SoFFin guarantee for Sicherungseinrichtungsgesellschaft deutscher Banken – Germany, paragraphs 18 and 28.

98. In response to concerns raised that a State guarantee for the Fund might distort competition, ESA submits that the minimum harmonisation provided for in the Directive, even prior to its amendment by Directive 2009/14, mitigates the distortion of competition caused by varying levels of protection in different EEA States. Were there no harmonisation in place to guarantee a minimum payment, EEA States would compete over the best form of guarantee in order to attract deposits. That form of competition is reduced, however, if deposits are ensured at least to the minimum amount set in the Directive.

99. ESA disagrees with the assertion that a comparison between the obligations imposed under Directive 80/987/EC[19] and the Directive leads to the conclusion that EEA States are not obliged under the Directive to make payments themselves.[20] ESA also denies that such a conclusion follows from the ECJ's case-law on Directive 80/987.[21] ESA emphasises in particular that this cannot be inferred from the judgment in *Francovich and Bonifaci* v *Italy* since the circumstances there and the claims sought by those plaintiffs were different to those in the present case.[22] In that case, Italy had already failed to implement Directive 80/987, whereas, here, Iceland has implemented the Directive in question. Moreover, as there was no fund available, the plaintiffs sought a subrogation of their claim. This was rejected, however, because Directive 80/987 did not provide that the fund to be established must be financed entirely by public funds.

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19 Directive 80/987/EEC of the Council of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ 1980 L *283, p. 23*.

20 Reference is made to Case C-477/09 *Charles Defossez* v *Christian Wiart and Others*, judgment of 10 March 2011, not yet reported, paragraph 32.

21 ESA rejects the view that such a conclusion can be drawn from the findings of the ECJ in Case C-278/05 *Robins and Others* [2007] ECR I-1053, arguing that there were differences in the questions addressed and in the scope of the provisions at issue. Reference is made to paragraphs 42 and 45 of the judgment.

22 Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* v *Italy* [1991] ECR I-5357. Particular reference is made to paragraph 25 of that judgment. Reference is also made to the Opinion of Advocate General Geelhoed in Case C-494/01 *Commission* v *Ireland*, cited above.

Exceptional circumstances and force majeure

100. ESA argues that the Directive is also applicable in a financial crisis including one of the magnitude experienced in Iceland in the autumn of 2008. Exceptional circumstances are already catered for in the provisions of the Directive itself.

101. ESA argues that the EU legislative bodies made a conscious choice as regards the effect of possible exceptional circumstances. Such circumstances were not to alter the obligation to compensate depositors in accordance with Article 7(1) of the Directive. In contrast, Article 10(2) of the Directive expressly mentions "exceptional circumstances" as allowing for certain extensions of the deadline to pay compensation. Thus, in ESA's view, the effect of "exceptional circumstances" is limited to justify certain payment delays.

102. In ESA's view, it could not have been the intention of the legislative bodies that the greater the risk for depositors, the lower the protection provided by the national guarantee schemes.

103. ESA argues that the ECJ has held that an EU State cannot plead exceptional circumstances to justify non-compliance with a directive in the absence of a specific legislative provision in the directive to that effect.[23]

104. Moreover, ESA continues, neither the reaction of the EU legislative bodies to the financial crisis nor the Commission Staff Working Document support the view that the Directive cannot apply in the event of a systemic banking crisis, whether as a matter of principle or because of the way different funds are financed. Even following the experience of the financial crisis, the Directive has been largely left unchanged. In fact, the Directive has been strengthened with an increase in the coverage afforded to depositors and a reduction in the pay-out time. In ESA's view, the legislative objective was to maintain the Directive as an important stabilising factor in times of exceptional circumstances, such as a

[23] Reference is made to Joined Cases C-19/90 and C-20/90 *Karella and Karellas* [1991] ECR I-2691, paragraphs 26 to 27.

financial crisis. As for the conclusions reached in the Commission Staff Working Document, ESA simply notes that the document expressly takes the view that the Directive is applicable regardless of whether there is a systemic crisis.[24]

105. ESA argues further that the doctrine of *force majeure* does not apply in the present case and, in any event, does not release Iceland from its obligations under the Directive.[25]

106. ESA submits that, according to consistent case-law, EEA States may not plead financial difficulties to justify non-compliance with obligations laid down in directives.[26] It asserts that is only when there is a total physical impossibility, for reasons beyond all control of the State that a Member State is not in breach of its obligations under secondary law.[27] Further, it continues, that exoneration may be limited in time.[28]

107. In the present case, ESA points out that, while Iceland was faced with an unprecedented situation in October 2008, there was no general declaration of unavailability of all deposits throughout the whole of the banking sector in Iceland. The Icelandic Government took measures to avert a general run on the banks in the domestic market and a general loss of access to domestic deposits.

108. ESA notes that as regards deposits held in Icesave accounts of Landsbanki's UK and Netherlands branches Iceland relied on Article 10(2) of the Directive, as it was entitled to, in order to extend the deadline for payment until 23 October 2009, a year after the crisis had unfolded.

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24 Reference is made to Staff Working Document of 12 July 2010, Document SEC(2010) 834 final, page 20.

25 Reference is made to the Opinion of Advocate General Jacobs in Case C-236/99 *Commission* v *Belgium* [2000] ECR I-5657, points 16 and 22.

26 Reference is made to Case 309/84 *Commission* v *Italy* [1986] ECR 599, paragraph 17, Case C-42/89 *Commission* v *Belgium* [1990] ECR I-2821, paragraph 24, and Case C-375/02 *Commission* v *Italy*, judgment of 9 September 2004, not published in English, paragraphs 36 to 37.

27 Reference is made to Case 101/84 *Commission* v *Italy* [1985] ECR 2629.

28 Ibid., paragraph 16.

109. At that time, ESA observes, the situation in Iceland was very different to that in autumn 2008. It doubts whether the circumstances in which Iceland found itself on 23 October 2009 were unforeseeable. In ESA's view, given the manner and circumstances in which the Icelandic authorities extended the deadline for payment in accordance with Article 10 of Directive 94/19, it was certainly clear that the TIF was under an obligation to make the minimum payments to depositors by that date.

110. Furthermore, ESA contends that the Icelandic Government cannot argue that it did not have access to the funds necessary to fulfil its obligations under the Directive at the time. In ESA's view, this is proven by the Icesave Agreement of June 2009.

111. According to that Agreement, so ESA submits, the Governments of the United Kingdom and the Netherlands were ready to provide the necessary funds to Iceland. Had this Agreement been ratified, it would have allowed the Icelandic State to fulfil its obligations under the Directive within the time-limits provided for in Article 10 of the Directive. Even though the terms might have been regarded as unfavourable, in ESA's view, it is clear that it was not impossible to obtain the necessary funds to comply with the requirements of the Directive.

112. In this respect, ESA adds that the assets to be realised in Landsbanki's winding-up were estimated in 2009 to cover a substantial part of the amount owed by the TIF to the depositors. Consequently, Iceland would have had the possibility to use those assets,[29] together with the TIF's improved position as preferred creditor in the winding-up process, to refinance the TIF once payments to depositors had been made. ESA contends, therefore, that Iceland has failed to show that it was impossible, despite the exercise of all due care, to raise the capital that was required to enable the TIF to meets its payment obligations at the proper time.

[29] Reference is made to the procedure laid down in Article 10 of Act No 98/1999.

113. ESA notes that Iceland has still not paid the depositors in the United Kingdom and the Netherlands, or their successors in title, in accordance with the requirements of the Directive, even though Iceland appears to claim that the assets in liquidation of Landsbanki are now sufficient to do so.

Non-discrimination

114. ESA submits that, even if, contrary to its argument, the provisions of Directive 94/19 are interpreted as not imposing obligations of result, Iceland is in breach of Articles 4(1) and 7(1) of the Directive and/or Article 4 EEA by treating depositors with domestic accounts differently to depositors with accounts held at Landsbanki branches in other EEA States. The former received full protection while the latter were left without any or any comparable protection.

115. ESA notes that, when emergency measures were taken in response to the banking crisis in October 2008, the Icelandic Government made a distinction between domestic deposits and deposits in foreign branches. The domestic deposits were moved to the new banks and were covered in full. Meanwhile, foreign depositors did not even enjoy the minimum guarantee laid down in the Directive.

116. ESA argues that the principle of equal treatment laid down in Article 4 EEA is applicable in the present case. Moreover, it submits that within the EFTA pillar all secondary legislation must be interpreted in accordance with primary law as a whole, including the principle of equal treatment.[30] Consequently, in its view, the Directive only allows domestic depositors to be treated differently to depositors at branches in other EEA States if those two groups are not regarded as being in a comparable position.

117. ESA submits that, as a matter of law and fact, both groups are in a comparable situation. It follows from Article 4(1) and the

[30] As regards the applicability of that principle, see Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923. For its applicability under the EEA Agreement, see Case E-3/02 *Paranova AS* v *Merck & Co., Inc. and Others* [2003] EFTA Ct. Rep. 101, paragraph 33.

third recital in the preamble to the Directive that depositors with savings in branches in other EEA States enjoy the same protection as domestic depositors in the event of the closure of an insolvent credit institution. Further, all relevant depositors were in the same factual situation on or before 5 October 2008. All were depositors in a failing bank, likely to lose access to their deposits.

118. ESA considers that the treatment accorded to the foreign depositors amounts to indirect discrimination on the basis of nationality and residence as only domestic deposits were moved to the new banks and depositors holding accounts in foreign branches were not provided with at least the minimum guarantee specified under the Directive. In this regard, ESA observes that Iceland took two measures in favour of depositors with domestic accounts but none for depositors holding accounts in Landsbanki's EEA branches. First, all domestic deposits were transferred to the "new Landsbanki", even those of depositors that had no special connection to the Icelandic payment system. Second, the Icelandic Government issued a declaration on 6 October 2008 that it would guarantee domestic deposits in full.

119. ESA submits further that nothing in the Directive suggests that any distinction may be made based on the location of the deposits. Such a distinction would run counter to the entire concept underlying the internal market. Consequently, to differentiate between depositors protected under the Directive by providing protection for some depositors while leaving others without any or any comparable protection constitutes an infringement of the Directive's provisions.

120. ESA contends that the measures taken by the Icelandic Government cannot be regarded as justified by the need to restore the functioning and credibility of the domestic banking system and thereby Iceland's entire financial system. It disagrees with the Icelandic Government's assessment that it was both necessary and proportionate not to transfer the non-domestic deposits as to have done so could have undermined the credibility of the rescue and rendered the stabilising efforts meaningless.

121. ESA argues that the harmonisation of the protection of depositors envisaged by the Directive deprives EEA States from the possibility of justifying rules which discriminate between depositors on the basis of residence where deposits become unavailable. It observes that EEA States cannot rely on any mandatory requirements as a reason for deviating from the harmonisation laid down in a directive in the absence of any express provision which permits the State to do so.[31] The level of harmonisation does not alter that. If the contested measures fall within the harmonised field, as is the case in the present proceedings, an EEA State cannot rely on mandatory requirements to justify an infringement of the directive in question.

122. ESA reiterates that according to settled case-law mere economic grounds cannot serve to justify restrictions on the fundamental freedoms. In its view, under the Icesave Agreements, Iceland had access to the necessary funds to meet its obligations under the Directive without jeopardising the functioning of the domestic banking system and the real economy. The fact that the Agreements may have entailed high costs cannot be advanced to justify Iceland's breach of its obligations.

123. In ESA's view, given the magnitude of the financial crisis, there is no reason why that case-law should not apply. It contends that Iceland cannot argue by reference to the decision in *Campus Oil*[32] that its actions were justified for the maintenance of the overall economy, society's institutions, essential public services, public policy and public security. Iceland has failed to indicate why the basic fabric of Icelandic institutions, public life and security could only be preserved by leaving foreign depositors in Icesave branches without the minimum protection required by the Directive.

124. Furthermore, ESA contends that its submission on this point is not undermined by its correspondence and Decision concerning a complaint lodged by commercial creditors of the Icelandic

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31 Reference is made to Case 5/77 *Tedeschi* v *Denkavit Commerciale s.r.l.* [1977] ECR 1555, paragraph 35, and Case C-323/93 *Centre d'insémination de la Crespelle* [1994] ECR I-5077, paragraph 31.

32 See Case 72/83 *Campus Oil Ltd and Others* [1984] ECR 2727.

banks.[33] That case deals with a different issue, namely the Emergency Act adopted on 6 October 2008 and the administrative decision adopted pursuant thereto.

125. Accordingly, ESA submits that, in the circumstances of the present case, the Icelandic Government cannot advance any viable justification for the discriminatory measures taken against the foreign deposits.

The European Commission

126. The Commission emphasises that the Directive is binding upon the Member States (Article 288(3) TFEU) and not on bodies that are created by the Member States in order to comply with their obligations under the relevant directives.

127. In this case, the Commission submits that Directive 94/19 imposes obligations of result on the EEA States on the basis of the wording of Articles 3, 4, 7 and 10 of the Directive. In its view, that conclusion is supported by the objectives established in recitals 2, 8 and 9 of the preamble to the Directive.

128. The Commission asserts that, following the introduction of a scheme, obligations of result include the obligation to ensure that the deposit-guarantee scheme is capable of ensuring the repayment of the covered deposits. In the event of a bank collapse, depositors are covered up to EUR 20 000. In its view, if a deposit-guarantee scheme does not have sufficient funding, the Member State concerned is regarded as having infringed the Directive.

129. In the Commission's view, any other interpretation would render the provision ineffective to ensure the objective of the Directive which is to provide a guarantee to depositors when deposits become unavailable, as depositors would not be able to rely on deposit-guarantee schemes. Such an interpretation would also fail the purpose of ensuring last resort protection.

[33] Reference is made to the correspondence and Decision of ESA mentioned in footnote 6 on page 10 of Iceland's reply of 30 September 2011 to the reasoned opinion.

130. The Commission asserts further that its interpretation is in line with the case-law of the ECJ. In its view, Case C-222/02 *Paul and Others* confirmed that there is an obligation to ensure compensation under the terms of the Directive.[34]

131. The Commission underlines the fact that EEA States are free to decide how deposit-guarantee schemes are funded in order to pay compensation in accordance with the Directive. In its view, a State could determine, for example, that the remaining banks as well as newly created banks are required to contribute to the refinancing of the scheme to the extent necessary for ensuring the repayment of depositors, or that the schemes take out long-term loans at market rates. Such options would reflect the objective expressed in recital 23 in the preamble of the Directive, namely, that the costs of the schemes must in principle be borne by credit institutions.

132. According to the Commission, the possibility cannot be excluded, however, that an EEA State has no other choice than to resort to State funding. It reiterates that this is a matter which is within the discretion of the EEA State itself.

133. The Commission wishes to emphasise the fact that the present case concerns the obligation of an EEA State under the Directive to ensure the compensation prescribed by the Directive, and hence involves an action brought by ESA against an EFTA State.

134. Any State liability vis-à-vis individual depositors for not having ensured the compensation prescribed by the Directive is a different issue. Such liability has to be established by a national court. The Commission refers in this respect to Case C-6/90 *Francovich* and Case 22/87 *Commission v Italy* which set out the conditions under which State liability for breach of EU law is to be established.[35]

Absence of force majeure

135. The Commission asserts that no provision of the Directive allows Member States to disregard its rules in exceptional

[34] Reference is made to *Paul and Others*, cited above.
[35] Reference is made to *Francovich*, cited above, and Case 22/87 *Commission* v *Italy* [1989] ECR 143.

circumstances, such as a financial crisis. It observes that the Directive was devised precisely to deal with the exceptional occurrence of a bank failure, including circumstances in which supervision has not proved sufficient to save a bank. It notes that the legislature did not include any additional derogation over and above what is provided for in Article 10(2) of the Directive.

136. Moreover, the Commission considers that also on the basis of case-law Iceland's *force majeure* plea must be rejected.

137. The Commission notes by reference to the report drafted by the SIC that, while most financial markets and economies in the world were affected in autumn 2008 by an almost unprecedented financial crisis, the particular intensity of the collapse of the Icelandic banking system was alleged to be due to pre-existing domestic shortcomings in the banking sector, and made possible by "mistakes and negligence" committed by the Icelandic authorities.[36]

138. The Commission notes further that balance sheets of the Icelandic banks grew quickly to nine fold of Iceland's gross domestic product. According to experts, such growth was not sustainable and should have alerted Icelandic supervisory bodies. The capacity of the FME and the CBI was outgrown by the booming banking sector and not reinforced. Even within the reach of their capacity, the SIC highlights that the FME and the CBI did not use their authority.

139. Consequently, the Commission concludes that it is not possible for Iceland to argue that it could not have avoided the consequences brought about by the crisis by exercising due care, in accordance with the obligations arising from Directive 2006/48/EC, to regulate and supervise banks.[37]

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[36] Reference is made to the SIC Report.

[37] Reference is made to recitals 21, 36, 43, 46, 48 and 50 in the preamble to Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ 2006 L 177, p. 1.

Discrimination

140. The Commission supports ESA's view that by transferring the deposits of domestic depositors only, thereby covering domestic deposits at least to the level prescribed by, and within the time-limits specified by the Directive, without providing foreign depositors with at least the minimum guarantee, Iceland has discriminated indirectly against foreign depositors on the basis of nationality, prohibited by the Directive read in the light of Article 4 EEA.

141. The Commission asserts that nothing in the Directive suggests that any distinction may be made between depositors based on the location of the deposits. Article 4 of the Directive does not contain any derogation to the obligation to cover the depositors of branches of banks in other Member States.

142. The Commission notes that, although the deposit-guarantee scheme did not pay out any of the depositors of Landsbanki, by transferring domestic deposits to the new bank, *de facto* continuous access to covered deposits was preserved for domestic depositors only. As a result, Iceland has discriminated between domestic and foreign depositors and consequently infringed Article 4 of the Directive.

143. The Commission also supports ESA's position that the difference in treatment is not justified. The Directive created a harmonised regime for the protection of depositors, thus depriving States of the possibility to justify rules which discriminate between depositors on the basis of residence in the event that deposits become unavailable. In addition, it is settled case-law that mere economic grounds cannot serve as justification for restrictions on the fundamental freedoms.

144. The Commission argues that, after setting up new and re-capitalised banks, Iceland should, and could, have imposed upon such new and financially sound banks the obligation to pay appropriate contributions to the deposit-guarantee scheme in order to enable it to fulfil its obligations under the Directive.

Thus, the difference in treatment between domestic and foreign depositors was neither proportionate nor necessary.

Iceland's arguments arising out of the Impact Assessment (Commission Staff Working Document)

145. The Commission refutes the assertion that its 2010 Impact Assessment indicates that in the event of a systemic crisis the EEA States are not obliged to compensate depositors within the time frame laid down in the Directive.

146. The Commission notes that, after it learned that European deposit-guarantee schemes were not sufficiently funded prior to the financial crisis in 2008, it proposed to review the Directive in order to strengthen the funding of the schemes. In light of that review, the Commission concludes that deposit-guarantee schemes should have at their disposal funds equivalent to at least a minimum target level of 1.5% of eligible deposits of their member banks (*ex ante* funds), and if necessary, some *ex post* funds collected during a crisis situation.

147. The Commission argues further that if a Member State considers the minimum target level of 1.5% too low, it can set a higher target level that better reflects their specific situation. This means that a scheme is responsible not only for reaching a given target level, but ultimately for protecting depositors irrespective of the target fund level.

148. The Commission adds in this context that section 4.1.1. on page 9 of the Impact Assessment does not concern competitive distortions resulting from the funding of deposit-guarantee schemes in order to ensure compensation to depositors. It concerns distortions of competition resulting from divergences between coverage levels, which is a different matter.

The Government of Iceland

149. In essence, Iceland contends that the Directive imposes no obligation of result on the State to use its own resources in order to guarantee the pay-out of a deposit-guarantee scheme in the event that "all else fails". The obligations

incumbent upon the State are limited to ensuring the proper establishment, recognition and a certain supervision of a deposit-guarantee scheme.

150. In the alternative, Iceland submits that even if the Directive did impose strict obligations upon the State to fund the guarantee scheme in the event of its collapse, which is disputed, Iceland was prevented from doing so by *force majeure*.

151. Moreover, Iceland submits that it did not breach the principle of non-discrimination. Iceland contends that ESA's application does not argue for equal treatment. Instead ESA argues for different treatment of allegedly comparable situations. As such the basis of the claim is incoherent. ESA has also failed to identify the legal basis for the application of the rules on non-discrimination contained in the EEA Agreement to the specific facts of this case. Furthermore, ESA's argument amounts to an impermissible attempt to extend the specific requirements of the Directive. Even if any *prima facie* discrimination occurred, which Iceland disputes, it was none the less justified.

The operation of the Directive in practice

152. Iceland infers from a comparison with the information given in the Commission Staff Working Document (Impact Assessment) on how funding is provided in practice within the EU that the funding of the TIF was well within the range of EEA norms.[38]

153. In this respect, Iceland argues further that such a comparison with the implementation of the Directive in other EEA States is relevant as regards the interpretation of EEA law.[39] Iceland adds, however, that the Commission's assessment is not to be considered binding upon the Court in any way.

154. According to Iceland, the Impact Assessment further shows that the existing system of deposit-guarantee schemes across the EU

[38] Reference is made to Commission Staff Working Document of 12 July 2010, section 4.4.1.

[39] Reference is made to Case E-2/95 *Eilert Eidesund* v *Stavanger Catering A/S* [1995/1996] EFTA Ct. Rep. 1, paragraph 15.

proved insufficient to deal with the worldwide financial crisis.[40] Even after the amendments proposed by the Commission, the harmonisation achieved by the Directive would protect only against a mid-sized bank failure.[41]

155. It also follows from the Impact Assessment, Iceland continues, that the costs of the deposit-guarantee schemes have to be borne by the banks and not the EEA States. There is no obligation under the Directive for EEA State intervention, and, in any event, such State intervention has to be in accordance with State aid rules.[42]

156. Iceland refers in that regard to the Commission's original 1992 proposal for the Directive[43] and submits that this proposal anticipated that State assistance might be required in case the resources of a deposit-guarantee scheme were exhausted. However, Iceland argues, the Commission made clear that this was not desirable as a general rule and is subject to compliance with State aid rules. Thus, it cannot be that an automatic obligation arises by virtue of the Directive itself.

157. In Iceland's view, the Impact Assessment also makes clear that the provision of a State guarantee was not an automatic or anticipated consequence of the Directive. Rather, it was a source of concern, as it gave rise to significant distortions of competition.[44]

158. Iceland argues further that the Commission's Impact Assessment illustrates that the mechanism established under the Directive does not provide the means to tackle system-wide banking failure. However, in the present proceedings the Commission is arguing that through the adoption of the Directive the EEA States have committed to ensure that compensation is paid even in the event of a complete bank failure of 100% of covered deposits. Yet it previously recognised

40 Reference is made to Commission Staff Working Document of 12 July 2010, p. 5, paragraph 3, and p. 20, paragraph 3.
41 Ibid., p. 53, paragraph 2, and p. 58, final paragraph.
42 Ibid., pp. 8-9.
43 Proposal for a Council directive on deposit-guarantee schemes COM(92) 188 final, pp. 5 and 8.
44 Reference is made to Commission Staff Working Document of 12 July 2010, p. 9.

in its Impact Assessment that even a funding for 7.25% of deposits was too costly to be politically acceptable.[45]

159. Thus, Iceland rejects the Commission's argument that the Directive is the "last element in a chain of measures established in EU law against bank failure". Iceland regards the Directive as only one "element in the safety net", as the Commission itself described it in its proposal for the Directive. A systemic crisis requires a set of measures that lie far beyond the scope of the Directive.

160. In addition, Iceland contends that the Commission's arguments fail to acknowledge that even States may not be capable of guaranteeing a deposit-guarantee fund during economic crises. Costs of the guarantee would be extremely high for consumers and/or the EEA State and even a State guarantee may not be entirely reliable as the falling credit ratings of some EEA States demonstrate.

The provisions of the Directive

161. Iceland submits that it follows from an analysis of the Directive's provisions that an EEA State's obligation is limited to establishing, recognising and supervising the deposit-guarantee scheme.

162. With reference to the first three recitals in the preamble to the Directive, Iceland submits that the Directive pursues linked objectives of eliminating obstacles to the right of establishment and freedom to provide services by means of consumer protection. It observes that the ECJ held in *Germany* v *Parliament and Council* that the Directive only seeks to ensure a high level and not an absolute level of consumer protection even where "all else fails".[46] In its view, it is not possible for a deposit-guarantee scheme to borrow sufficient funds to meet a substantial banking crisis, or for the surviving banks to provide such funds.[47]

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45 Ibid., pp. 7-8 and pp. 52 to 58.
46 Reference is made to *Germany* v *Parliament and Council*, cited above, paragraph 47.
47 Reference is made to the Report of the University of Iceland, Institute of Economic Studies, 6 March 2012, pp. 3 to 7.

163. Having regards to recital 16 in the preamble to the Directive, Iceland contends that the Directive strikes a balance between the cost of funding a deposit-guarantee scheme and the benefits of consumer protection. Such a balance must be struck if the banking system is to function in the interests of consumers and the economy. A less onerous scheme may, in fact, serve consumers better.

164. Iceland submits further that recital 23 in the preamble to the Directive recognises the need for proportionate funding, but again cautions against the risk that might arise if the requirements of a scheme were too onerous. Moreover, the moral hazard that might occur if the level of protection were as high as to encourage unsound management of credit institutions must also be avoided.

165. Thus, Iceland concludes, nothing in those objectives justifies a conclusion that an EEA State must bear financial responsibility for the functioning of a deposit-guarantee scheme.

166. Iceland submits further that it follows from recitals 4, 23 and 25 in the preamble to the Directive that the cost of guarantee schemes has to be borne by credit institutions.

167. Moreover, Iceland asserts, the Directive does not contain any provision that expressly imposes on the EEA States an obligation of result as ESA appears to suggest. Instead, the reality is that the Directive does not deal at all with the circumstances in which a guarantee scheme is unable to pay compensation.

168. In this regard, Iceland observes that recital 4 in the preamble to the Directive deals with a widespread failure in financial markets. However, that recital is limited to highlighting the schemes' deterrent effect on depositors in relation to their assumed loss of confidence.

169. Article 7(6) of the Directive, Iceland submits, is the only operative provision that deals with the scenario that a deposit-guarantee scheme might be unable to pay duly qualified claims. However, the solution contemplated by this provision in the case of non-payment is an action against the scheme and not the EEA State.

170. As regards recital 24 in the preamble to the Directive, Iceland argues that its sole purpose is to exclude State liability if the compensation of depositors is ensured. Iceland notes that this is confirmed by the ECJ's judgment in *Paul* v *Germany*.[48] There, Iceland notes, the ECJ dealt explicitly with the circumstances in which liability is excluded and not those in which liability occurs. Such liability arises only where the three conditions specified in *Brasserie du Pêcheur*[49] are met, that also apply in the EFTA pillar of the EEA.[50] Further, in the judgment in *Paul* v *Germany*, having regard to recital 24, the ECJ held that the first condition is not satisfied if the compensation of depositors is ensured.[51] Thus, as has been stated before, recital 24 is limited to establishing an exception to the general rule of liability.

171. In that regard, Iceland refers also to the German version of recital 24 in the preamble to the Directive. That language version makes clear that the schemes are responsible for ensuring the compensation of depositors, whereas an EEA State cannot be held liable if it has provided for the introduction and recognition of the scheme. Iceland observes that, according to settled case-law, where the different language versions diverge, the most liberal interpretation must prevail as long as it is sufficient to achieve the objectives pursued.[52] In Iceland's view, the German version is sufficient to achieve the objectives pursued by the Directive.

172. Iceland continues its assessment with Article 3(1) of the Directive. In its view, it follows from that provision that the duty on EEA States is to ensure that a guarantee scheme is introduced and recognised. It is not for the EEA State itself to provide such a guarantee. Iceland concedes in that respect that, pursuant to Article 3(2) to (5) of the Directive, EEA States have certain supervisory obligations. However, it notes that a breach of this duty is not alleged.

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48 See *Paul and Others*, cited above. Particular reference is made to paragraphs 25 to 32 of that judgment.

49 Reference is made to Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 51.

50 Case E-9/97 *Sveinbjörnsdottir* v *Iceland* [1998] EFTA Ct. Rep. 95, paragraph 66.

51 Reference is made to *Paul and Others*, cited above, paragraph 50.

52 Reference is made to Case 29/69 *Stauder* v *City of Ulm* [1969] ECR 419, paragraph 4.

173. It also does not follow from Article 7, Iceland continues, that EEA States should cover the minimum guarantee sum "if all else fails". It concedes, however, that a purely formal deposit-guarantee scheme would clearly contradict the Directive's objectives, *inter alia*, because it would not provide for the necessary assurance to other EEA States and consumers envisaged in recitals 1 to 3 in the preamble to the Directive.

174. In the present case, Iceland submits that its Government ensured that a scheme was established, recognised and supervised that could offer a guarantee of substance and was pre-funded at a level that was entirely in accordance with international and EEA norms.

175. Ultimately, Iceland concedes, the TIF was unable to cope with the demands placed upon it, but no scheme could have done so. In addition, it was not required to do so, since the EU legislature placed a much more limited obligation upon the State. An obligation of result, as contended by ESA and the Commission, would require the clearest possible language, but the Directive is silent on this matter.

176. Iceland adds in this regard that it does not claim that the Directive provides for an exception in the case of a systemic collapse of the banking system. However, in Iceland's view, the State's obligation of result is limited to ensuring the proper establishment, recognition and supervision of a deposit-guarantee scheme.

177. In Iceland's view, ESA confuses the obligation of result involved in the full and proper transposition and implementation of a Directive's provisions with an obligation to guarantee the results which those provisions are intended to produce.

178. It is not in dispute, Iceland submits, that the obligation of result is a well-known and well-used technique in EU harmonisation measures. What is crucial is the nature and extent of the obligations of result placed on the State itself, and not the obligations of institutions established under such a directive.

179. The fact that ESA relies on the ECJ's judgment in Case C-134/11 *Blödel-Pawlik* in this respect, Iceland continues, demonstrates its confusion in relation to these two very different aspects.[53] In that case, the obligation of result that was imposed on the State by Directive 90/314 was to ensure that the travel organiser was liable to the consumer for proper performance of the contract. However, it did not involve an obligation upon the State itself to pay compensation if a travel organiser cannot meet its obligations.

180. Finally, Iceland argues as regards Article 10 of the Directive that this provision is limited in scope to imposing procedural obligations upon the deposit-guarantee schemes. That view is supported by the German version of the Directive which refers only to the schemes "taking precautions" in order to make such payments within the period specified in the Directive. Again, Iceland submits, the most liberal interpretation has to prevail.[54]

Directive 80/987 and Francovich

181. Iceland submits that a comparison between the Directive and Directive 80/987[55] and the case-law on the latter demonstrate that there is no obligation on Iceland to fund the TIF in the present case, even if "all else fails".

182. Iceland notes that Directive 80/987, which has now been repealed and replaced, was a harmonisation measure adopted on the basis of Article 100 EEC[56] that served in particular to guarantee employees the payment of their outstanding claims in the event of the insolvency of their employer.[57]

183. Iceland submits that, pursuant to Article 1 of Directive 80/987, that directive applied to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency, as

53 Reference is made to *Blödel-Pawlik*, cited above, in particular paragraph 21.
54 Reference is made to *Stauder* v *City of Ulm*, cited above, paragraph 4.
55 Directive 80/987/EEC has been repealed and replaced by Directive 2009/94/EC.
56 Now Article 115 TFEU.
57 Reference is made to recital 1 in the preamble and Article 1 of Directive 80/987.

defined in that directive. Moreover, Directive 80/987 envisaged that the required guarantee would be provided through a guarantee institution and that Member States should ensure that institution's guarantee.[58]

184. Iceland notes that the wording of the latter imposes an explicit obligation on the Member State to "ensure that guarantee institutions guarantee", unlike the wording of Article 3 of the Directive, which requires only that Member States ensure that guarantee schemes are "introduced and officially recognised".

185. Furthermore, Iceland explains, Article 5(b) of Directive 80/987 specifically provided for the option that guarantee institutions might be funded by public authorities, although it imposed no requirement to that effect. In the present case, however, the Directive does not harmonise the rules for funding deposit-guarantee schemes. It plainly proceeds on the expectation that deposit-guarantee schemes will be funded by credit institutions.

186. Iceland also refers to the judgments of the ECJ in *Francovich and Bonifaci* v *Italy*[59] and *Robins* v *Secretary of State for Work and Pensions*.[60] In Iceland's view, the judgments demonstrate that even under the regime of Directive 80/987 a State could only be held directly liable for employees' claims if the state chose to undertake the liability of the guarantee institution itself. Thus, Iceland asserts, it is impossible to imply an obligation of result on the EEA States under a directive such as the one at issue in the present case that neither places an express obligation of guarantee upon an EEA State nor provides explicitly for an option in that regard. The only express requirements under Directive 94/19 are to set up, recognise, and supervise a guarantee scheme.

187. Moreover, Iceland argues, seeking to imply an obligation on the State to fund the guarantee scheme, where no such obligation appears on the face of the Directive, is an attempt to circumvent

58 Ibid., Articles 2 and 3.
59 Reference is made to *Francovich*, cited above, paragraphs 9, 18, 25 and 26.
60 Reference is made to *Robins*, cited above, paragraph 35.

the liability system established in *Francovich* and to undermine the clear principles repeatedly applied by the European courts.

188. In this respect, Iceland notes also that ESA does not seek to rely upon a claim of liability against the Icelandic State for failure to properly implement the Directive in accordance with the principles established in *Francovich* or *Sveinbjörnsdottir*.[61] Instead, ESA appears to seek to establish the responsibility of the EEA State as an automatic consequence of the terms of the Directive itself.

Emanation of the State

189. In Iceland's view, whether or not the TIF was an emanation of the State is of relevance neither in relation to the present case nor for the question whether there was an obligation on the State to fund the guarantee scheme after it became impossible for the TIF to make the guaranteed payments.

190. Iceland notes that the issue of an emanation of State arises where an individual seeks to demonstrate that a directive gives rise to directly effective rights against a particular entity under certain conditions. According to case-law, "the entities against which the provisions of a directive that are capable of having direct effect may be relied upon include a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals".[62]

191. Iceland contends that ESA's case is not concerned with direct effect and, in any event, the test for "emanation of the State" is not satisfied, i.e. the entity at issue is not under the control of the State.[63]

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61 See *Francovich* and *Sveinbjörnsdóttir*, both cited above.
62 *Farrell*, cited above, paragraph 40.
63 Ibid., paragraph 41.

192. It appears to Iceland undisputed that, pursuant to Articles 2 and 4 of Act No 98/1999, the TIF is a private fund. Private institutions nominate four and the Minister of Commerce two of the six members of its board. Thus, the State does not have the required majority to exercise control over the board.

193. Iceland argues further that even if the SIC Report were treated as having probative value in this regard it might show at most that the Ministry of Business Affairs had an influence in the running of the TIF. However, given the facts mentioned above, it contends that ESA has failed to demonstrate that any influence of that kind amounted to State control to a degree sufficient to render the TIF an emanation of State.

State aid

194. Iceland infers from the Commission's Impact Assessment[64] that an injection of State resources into the banking system of the kind discussed in the present case would amount to State aid. The Commission makes clear that if States are required to intervene in a systemic crisis where deposit-guarantee schemes may reach their limits then the State aid rules must be observed. Therefore, in Iceland's view, such use of State resources must be subject to supervision by the Commission or ESA, to ensure that it does not distort competition.[65]

195. Consequently, Iceland concludes that the submissions that an EEA State is obliged to make payments of that kind as an automatic result of the Directive if "all else fails" is plainly incompatible with the Commission's earlier position. It observes that, according to case-law, payments made by a State as a requirement of EU legislation are not to be considered State aid.[66] Thus, if a payment obligation on Iceland were to arise from the Directive itself, such payments could not be regarded as State aid.

64 Commission Staff Working Document of 12 July 2010.
65 Reference is made to Commission Decision in Case N 17/2009 SoFFin guarantee for Sicherungseinrichtungsgesellschaft deutscher Banken – Germany, paragraph 28.
66 Reference is made to Case T-351/02 *Deutsche Bahn* v *Commission* [2006] ECR II-1047, paragraphs 99 to 102.

196. In that respect, Iceland underlines the fact that the obligation of result for which ESA contends would remove the State guarantee from the scope of State aid supervision. In the absence of an express wording that such an obligation of result arises from the Directive, Iceland cautions against drawing a conclusion of that kind. Furthermore, the true construction of the Directive reveals that there is no such obligation.

197. In this connection, Iceland stresses the fact that in its proposal for the Directive and its Impact Assessment the Commission recognised that public sector funding would be subject to State aid rules and that there would be no obligation to provide such. Currently, however, the Commission argues that there is a duty on States to ensure that compensation is paid if all else has failed. Consequently, Iceland considers the Commission to be incoherent in its assessment.

198. Moreover, Iceland continues, a further outcome of ESA's position is that large injections of State funds into the banking system would fall entirely outside the scope of State aid supervision. Yet the ability of such injections to seriously distort competition is self-evident. Bearing in mind the wide implications of State funding of that kind, Iceland doubts that the Commission's concern can be limited to the impact on competition of different levels of protection between Member States, as ESA appears to suggest. Having regard to the major impact on competition that would result, Iceland submits that had the legislature intended an exclusion of that kind, it would have expressly provided for such.

199. Iceland also denies that its case entails a risk of regulatory competition to provide the best guarantee. As the Commission's Impact Assessment has demonstrated, material differences in the level of funding for deposit-guarantee schemes already exist as a result of a lack of harmonisation in this field. Moreover, Article 3(1) of the Directive itself seeks to forestall any competition of that kind by specifically precluding the Contracting Parties from implementing the Directive by means of a State guarantee system.

200. With reference to the Commission's submissions, Iceland notes that if an automatic responsibility arises from the Directive in the present case, it must also arise in a range of other cases where directives require the EEA States to guarantee that certain market operators provide benefits to a particular group, whether consumers, workers or others. Iceland considers that such an interpretation is not desirable.

Force majeure

201. Iceland notes that the Icelandic State was under no obligation to compensate depositors in light of the failure of the deposit-guarantee scheme. However, even had there been such an obligation, which is disputed, it would have been defeated by virtue of *force majeure*.

202. In Iceland's view, it is not only when there is a total physical impossibility, for reasons beyond all control of the EEA State, that it is accepted that an EEA State is not in breach of its obligations under secondary law. Case-law shows that the doctrine is far broader and more flexible than ESA seeks to suggest.[67] In fact, case-law does not preclude the possibility that the circumstances giving rise to *force majeure* may be essentially economic, if they are sufficiently severe.[68]

203. Iceland argues further that the decisive question is essentially the same whether circumstances are financial or otherwise, namely, could the State have overcome those difficulties by adopting "appropriate measures" and without "unreasonable sacrifices"?[69] In the present case, Iceland's response is that it wholly lacked the resources to do so.

204. Iceland submits that although the circumstances of the present case are wholly exceptional, it nevertheless falls squarely within

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67 Reference is made to the Opinion of Advocate General Jacobs in Case C-236/99 *Commission* v *Belgium*, cited above, point 17.

68 Reference is made to Case C-42/89 *Commission* v *Belgium*, cited above, paragraph 24.

69 Reference is made to Case C-314/06 *Société Pipeline Méditerranée et Rhône (SPMR)* v *Administration des douanes et droits indirects and Direction nationale du renseignement et des enquêtes douanières (DNRED)* [2007] ECR I-12273, paragraph 24.

the established case-law. According to that case-law, *force majeure* contains an objective element and a subjective element.[70] The objective element requires only "abnormal and unforeseeable" events and not "physical impossibility". The subjective element is fulfilled if the abnormal and unforeseeable events could not have been avoided even if all due care had been taken. Iceland asserts that "all due care" is not equivalent to "strict liability". Instead, it requires "appropriate steps" that can be taken "without making unreasonable sacrifices".

205. Iceland argues that the worldwide financial turmoil in 2008 and the collapse of the Icelandic banking system plainly satisfy the objective element.

206. As to the subjective element, Iceland contends that ESA has not sought to argue that the Icelandic State should or could have prevented the Icelandic bank crash. Moreover, in its view, nor could any deposit-guarantee scheme have been devised that was capable of withstanding such a collapse, at least without making unreasonable sacrifices in terms of the banks' ability to conduct their business. ESA's argument that by the conclusion of the Icesave Agreements the Icelandic Government could have had access to the funds necessary to fulfil its obligations under the Directive within the time-limits provided therein entirely mischaracterises the nature of the Icesave Agreements. They were not agreements to provide funds to Iceland at all. They were simply agreements governing repayment to those states for the compensation that they were providing. They provided for repayment to take place long after the period of one year allowed by the Directive.

207. In Iceland's view, there were no appropriate steps that the Icelandic Government could have taken to pay the depositors without making unreasonable sacrifices. Iceland did not have the financial resources to pay the depositors nor could it have raised that money on the capital markets.

[70] Ibid., paragraph 23, and the case law cited.

208. Iceland did not have ISK 659 billion to pay to depositors. That represented approximately one and a half years' tax revenue of the Icelandic State. Nor could it have raised that money on the capital markets.

209. Iceland submits that, at the end of October 2009, the gross size of the foreign reserves of the Central Bank amounted to ISK 451 billion. When taking into account the Central Bank's external liabilities, the net foreign assets amounted to ISK 169 billion. In addition, the central government's foreign debt amounted to ISK 356 billion at the end of 2009.

210. Moreover, Iceland notes that it is now anticipated that 100% of all outstanding claims will paid out of the assets of Landsbanki itself. However, those are not the assets of the Icelandic State, or even under its control, but are subject to an independent winding-up process governed by Directive 2001/24/EC.

211. According to Iceland, therefore, it cannot be seriously suggested that it should have appropriated those assets. They are to be paid out to creditors (including the United Kingdom and Netherlands Governments) as soon as the winding-up board judges the time right to ensure a 100% return. No other option is realistically open.

212. Iceland also denies that a crash on the scale that occurred, within a very short period of days, was "foreseeable", or indeed foreseen.

213. Iceland contends that Article 10(2) of the Directive is not relevant to the present case as it is a procedural rule imposed upon deposit-guarantee schemes, and not the EEA States. Thus, Iceland argues that the limitation in Article 10(2) addresses only the circumstances in which the deposit-guarantee scheme itself may approach the national authorities to seek an extension of time. It does not address the obligation of the national authorities themselves.

214. Finally, Iceland submits that the applicability of the doctrine of *force majeure* is not precluded in the present case simply because

Article 10(2) of the Directive provides for what may happen in "wholly exceptional circumstances".

215. Iceland observes that Article 10(2) of the Directive permits a deposit-guarantee scheme "in wholly exceptional circumstances" to apply to the competent authorities for an extension of time of up to nine months in which to pay verified claims. However, it notes that that provision is addressed to deposit-guarantee schemes, not the Contracting Parties.

216. If, as contended by ESA and the Commission, the Directive were to place an obligation on the State to provide compensation "if all else fails", this obligation is not included in the express provisions of the Directive. In fact, those provisions do not address this situation at all. Thus, Iceland asserts, Article 10(2) cannot be invoked to preclude a State from relying upon *force majeure* if it is unable to meet such an obligation.

Non-discrimination

217. Iceland denies that it breached the principle of non-discrimination by failing to ensure payment of the minimum amount of compensation to Icesave depositors in the Netherlands and the United Kingdom. In its view, such a claim is entirely misconceived.

218. Iceland contends that the alleged difference in treatment falls outside the scope of the Directive. In the circumstances of a bank failure, it is legitimate for Member States to intervene to rescue banks, or branches which are necessary to the functioning of the banking system, but there is no obligation to do so.

219. Iceland argues that there has been no discrimination at all in the manner in which the deposit-guarantee fund itself has been operated. The two groups that are compared by ESA, i.e. depositors with domestic branches and depositors with foreign branches of Landsbanki, have been treated equally. None has received any payments under the guarantee scheme.

220. Iceland notes further that ESA is arguing for different treatment by claiming that it was discriminatory not to provide the minimum

compensation afforded by the Directive to the overseas depositors because the domestic depositors were "covered" by virtue of a transfer of their deposits to the new banks. That is not to argue for equal treatment. As a basis for a discrimination claim, it is, in Iceland's view, incoherent.

221. Furthermore, Iceland argues, what is regarded as discrimination in the present case are in reality the different consequences that have flowed as a result of the fact that the domestic branches of Landsbanki were essential to the rescue of the Icelandic financial system and have formed part of the restructuring of the domestic banks. However, as, indeed, ESA has never questioned, it was not possible to extend this rescue to the overseas branches.

222. Iceland contends that the restructuring of the Icelandic banks had no link to the payment of compensation by the TIF for the purposes of the Directive. Although the Directive is a consumer protection measure, it does not address in any way the regulation of bank insolvency and restructuring – they are entirely beyond its scope. Moreover, it notes that the deposits held with domestic branches also never became unavailable within the meaning of the Directive.

223. Iceland concedes that the principle of equality entails that a deposit-guarantee scheme must be set up, and must function, in a non-discriminatory manner. However, such a form of unequal treatment has not been pleaded in the present case. On the other hand, Iceland asserts, other forms of different treatment, arising from measures which are outside the scope of the Directive, are not precluded.

224. Furthermore, Iceland submits that if ESA's first plea is accepted, i.e. that the Directive itself requires the State to make payments, which Iceland denies, the question of discrimination never arises.

225. In any event, Iceland adds, it is unclear whether the transfer of domestic deposits to the new banks led to a better position of the depositors holding such accounts. These account holders were made subject to strict capital controls, and were unable

to convert their (severely depreciating) Icelandic krónur into any other currency. By contrast, the priority claimants in the Landsbanki winding up now stand to be fully reimbursed in a fully convertible currency.

226. Thus, Iceland concludes, ESA has failed to establish a legal basis under the Directive for its claim of discrimination. It has not been demonstrated that the difference in treatment it alleges falls within the scope of the Directive.

227. As regards a breach of Article 4 EEA alone, the second legal basis identified by Iceland in relation to the non-discrimination plea, Iceland submits that such a claim has not been made out. It has been simply asserted that Article 4 EEA is applicable without seeking to demonstrate that the legal conditions for its application are made out.

228. Moreover, Iceland argues, the plea is plainly unsustainable since it would create an obligation upon an EEA State to ensure minimum compensation under the Directive in circumstances in which the partially harmonised regime created by the Directive does not require it.

229. In any event, Iceland continues, any difference in treatment between the two groups was objectively justified.[71] It asserts that although pure economic aims cannot constitute sufficient justification, clear public interest objectives may constitute a legitimate aim even where that public interest has economic ends.[72]

230. As to the nature of the objective pursued in the present case, Iceland notes that, in a dismissal of a complaint about the Emergency Act, ESA held "... the objective of the emergency

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71 Reference is made to Case E-5/10 *Kottke* v *Präsidial Anstalt und Sweetyle Stiftung* [2009/2010] EFTA Ct. Rep. 320, paragraph 40.

72 Reference is made to ESA Decision No 501/10/COL of 15 December 2010 to close seven cases against Iceland commenced following the receipt of complaints against the State in the field of capital movements and financial services; to the Opinion of Advocate General Tesauro in Case C-158/96 *Raymond Kohll* v *Union des caisses de maladie* [1998] ECR I-1931, point 53, and Case E-1/09 *EFTA Surveillance Authority* v *Liechtenstein* [2009/2010] EFTA Ct. Rep. 46, paragraph 36.

measures not [to be] merely economic but rather to safeguard the functioning of the domestic banking system and the real overall economy in Iceland". It continued: "The functioning of a country's banking system is of systemic significance for the proper functioning of the State's real overall economy and that of society... Therefore, the objective of the emergency measures is an overriding requirement in the general interest capable of justifying restrictions to the free movement of capital, provided that the measures taken can be regarded as proportionate to the attainment of the objective pursued."[73]

231. Iceland concurs with that assessment. Although the issue that arose in those complaints was not precisely the same as that at issue in the present proceedings, the same objective was at stake. It was plainly legitimate, and the measures adopted were suitable to the attainment thereof.

232. Iceland adds that the rescue was carried out through a package of measures including the creation of new banks and the granting of priority in the bankruptcy to depositors with claims upon the TIF. The practical effect of this rescue was to save the domestic branches of the failed banks, but not the Icesave branches in the UK and the Netherlands.

233. The reason for the difference in treatment, Iceland adds, was the fact that the failure of the domestic branches posed a systemic risk to the Icelandic economy through the collapse of the banking system, whereas a collapse of the banks' overseas branches did not pose the same risk.

234. In Iceland's view, what ESA is attacking is its wide margin of appreciation to determine what was necessary to safeguard its banking system.[74]

235. On the question of proportionality, Iceland argues that the assessment reached by ESA in Decision No 501/10/COL and

[73] Reference is made to ESA's Decision No 501/10/COL of 15 December 2010, paragraph 89.
[74] Reference is made to Case E-3/11 *Sigmarsson* v *Central Bank of Iceland*, judgment of 14 December 2011, not yet reported, paragraph 50.

Decision No 493/10/COL approved the proportionality of the emergency measures[75] and, in its view, essentially the same considerations apply in the present case.

236. In this respect, Iceland submits further that the Icelandic Government carried out a wholly exceptional form of intervention designed to secure the functioning of the Icelandic banking system. The stakes for Icelandic society in the rescue were enormously high. The Icelandic Government had very few resources. It was in no position to pay out the sums guaranteed by the TIF. It was simply not possible to move the overseas accounts to the new banks. Any attempt to have done so would have undermined the rescue of the domestic branches.

237. According to Iceland, in assessing the proportionality of this approach, it is also necessary to have regard to the fact that the Emergency Act granted the depositors and the United Kingdom and Netherlands Governments priority claims. The practical effect is that they will recover far more than the sums guaranteed by the Directive, albeit rather later than the Directive requires.

238. As regards ESA's argument that the Icelandic Government did not go far enough in its actions, as it did not extend additional measures to the overseas branches, Iceland submits that such exceptional measures of State intervention have the potential to distort competition, and must conform to EEA law, and in particular, the State aid rules.[76] As a result, such measures must not exceed what is strictly necessary to achieve the State's legitimate purpose. Consequently, it is simply mistaken to suggest that Iceland needs to justify its failure to go further and extend the scope of its intervention.

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[75] Reference is made to ESA Decision No 501/10/COL of 15 December 2010, paragraphs 94 to 97; Decision No 493/10/COL of 15 December 2010 opening the formal investigation procedure into State aid granted in the restoration of certain operations of (old) Landsbanki Islands hf. and the establishment and capitalisation of New Landsbanki Islands (NBI hf.), paragraph 3.1.2.

[76] Reference is made in that regard to ESA's guidance on "The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis", paragraph 15.

239. As regards the Commission's submissions that the justification fails because the difference in treatment was not "necessary", Iceland contends that ESA has not sought to advance such an argument. The Commission proposed that Iceland should have imposed an obligation upon the "new and financially sound banks". Iceland observes that such a suggestion is inconsistent with recital 23 in the preamble to the Directive, which states that the cost of financial deposit-guarantee schemes "must not jeopardise the stability of the banking system of the Member State concerned".

240. Consequently, viewed in the context of the factual situation, Iceland concludes that its approach satisfied the requirements of proportionality.

The Kingdom of Norway

241. Norway emphasises that a general and automatic State responsibility for the compensation of depositors as a last resort would impose an extensive financial burden on EEA States, require substantial contingency planning, and would potentially have a major impact on the national budget and the taxpayers. Thus, in Norway's view, such an onerous obligation cannot be imposed on EEA States without a clear and precise wording in the Directive.

242. Norway agrees with the submission that Article 7(1) of the Directive expressly places the obligation of compensation upon the deposit-guarantee schemes. However, in its view, this is an obligation on the deposit-guarantee schemes and not the EEA States.

243. Norway argues that an obligation on States of that kind does not follow from the preamble to the Directive or the Directive's preparatory works. On the contrary, the wording of recital 24 in the preamble to the Directive appears to exclude automatic state responsibility. Furthermore, Norway makes reference to the Commission's comments in its 2010 Staff Working Document (Impact Assessment), in which it stressed that there is no legal obligation on the EEA States to intervene if

a systemic crisis results in the deposit-guarantee schemes' funding proving insufficient.[77]

The Netherlands

244. The Netherlands contends that Directive 94/19 is applicable notwithstanding the "system-wide banking failure". Even with the experience of the financial crisis, the EU legislative bodies have left the Directive largely unchanged, and have even strengthened its rules.

245. The Netherlands argues further that the obligation to comply with the result sought by the Directive follows from general obligations under EEA law and the obligation of the State in relation to a directive.

246. The Netherlands regards the case as focusing on Iceland's obligations as an EEA/EFTA State. In its view, the present proceedings seek to determine whether Iceland is in breach of the relevant obligations under EEA law.

247. The Netherlands considers that the defence of *force majeure* is not available to Iceland because the Directive itself provides for an express derogation in Article 10(2) and a Member State may only rely on the derogations provided by the Directive itself.[78] The Netherlands emphasises that the wording of Article 10(2) provides only for an extension of the deadline for payment of compensation in special and exceptional circumstances, but does not justify a complete failure to ensure payment under the deposit-guarantee scheme.

248. The Netherlands further considers that, even if the Directive were to allow for *force majeure* as a defence for a complete failure, Iceland cannot successfully rely on *force majeure* as it failed to inform ESA of its difficulties and did not suggest appropriate solutions as is required by the case-law of the ECJ.[79]

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77 Reference is made to Commission Staff Working Document of 12 July 2010, p. 8.

78 Reference is made to Case C-56/90 *Commission* v *United Kingdom* [1993] ECR I-4109, paragraphs 40 to 46, Case C-92/96 *Commission* v *Spain* [1998] ECR I-505, paragraphs 27 to 28, and Case C-307/98 *Commission* v *Belgium* [2000] ECR I-3933, paragraphs 47 to 54.

79 Reference is made to Case C-217/88 *Commission* v *Germany* [1990] ECR I-2879, paragraph 33, and Case C-99/02 *Commission* v *Italy* [2004] ECR I-3353, paragraphs 16 to 18.

249. Furthermore, the Netherlands argues that Iceland's defence cannot succeed as financial difficulties are not accepted as justification under EEA law.[80] The Directive provides a set of rules specifically intended for financial difficulties encountered by banks and seeks to ensure compensation for depositors. To allow financial difficulties as a defence would unjustly weaken the effectiveness of the Directive.

250. In the view of the Netherlands, Iceland has also failed to prove a *force majeure* defence on the merits. In order to prove the existence of *force majeure*, "specific evidence" concerning "wholly exceptional" circumstances,[81] which are beyond the control of the State, should be provided.[82] The Netherlands considers that Iceland's statements fail to meet this requirement as the evidence provided is largely general in nature and based on assertion rather than proof.

251. The Netherlands submits further that Iceland has not proven that there was an "absolute impossibility" to establish any form of deposit-guarantee scheme that would have been able to ensure the result sought by the Directive.

252. The Netherlands and the United Kingdom were ready to provide financial assistance to cover protected deposits, as evidenced, for example, by the Memorandum of Understanding between the Netherlands and Iceland and the subsequent loan agreements. Therefore, the Netherlands is not convinced by Iceland's statement that it simply lacked the resources to pay the sums in question by 23 October 2009.

253. In this respect, the Netherlands contends that it is irrelevant that Iceland (or the TIF) itself would not have received funds under the Agreements. In the view of the Netherlands, a pre-financed pay-out on behalf of the responsible party is also a method of providing funds.

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80 Reference is made to Case C-42/89 *Commission* v *Belgium*, cited above, paragraph 24.
81 Reference is made to the Opinion of Advocate General Fennelly in Case C-52/95 *Commission* v *France* [1995] ECR I-4443, point 32.
82 Reference is made to *Commission* v *Spain*, cited above, paragraph 32.

The Principality of Liechtenstein

254. The Principality of Liechtenstein wishes to bring to the attention of the Court certain elements that, in its view, are essential for the assessment of the obligations arising from Directive 94/19.

255. The Principality of Liechtenstein strongly supports the dual objective of Directive 94/19, as formulated in the proposal for a Council Directive on deposit-guarantee schemes, namely "to protect the depositors of each credit institution and to ensure the stability of the banking system as a whole".[83]

256. The Principality of Liechtenstein emphasises, however, that this dual objective clearly has to be seen within the limitations inherent to the Directive accepted at that time and to deposit-guarantee schemes, which are neither intended nor able to deal with systemic banking crises. Furthermore, it notes that recital 24 in the preamble to the Directive makes clear that no general and automatic state liability can be derived from the Directive.

257. The Principality of Liechtenstein interprets the wording used in the proposal for a Council Directive on deposit-guarantee schemes[84] to indicate that Directive 94/19 was intended to deal with the failure of individual banks, not with the collapse of an entire banking system.

258. Thus, the Principality of Liechtenstein asserts that the EU legislature failed at the time to establish an adequate legal framework to ensure sound and effective deposit-guarantee schemes.

259. The Principality of Liechtenstein contends that the Commission confirmed this view in its 2010 Staff Working Document "Impact Assessment accompanying a proposal for a recast directive on Deposit Guarantee Schemes".[85]

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83 Reference is made to the proposal for a Council directive on deposit-guarantee schemes COM(92) 188 final, p. 2.

84 Ibid.

85 Reference is made to Commission Staff Working Document of 12 July 2010, p. 8.

260. The Principality of Liechtenstein also emphasises that, despite the fact that deposit-guarantee schemes in some Member States were not able to cover the costs of the failure of a large bank, let alone to deal with a comprehensive system crisis, the Commission confirmed that every Member State had implemented the Directive. It observes that the Commission did not take any action against Member States for failure to comply with their obligations resulting from the Directive.

261. In the view of the Principality of Liechtenstein, this illustrates that, at the time, a general and automatic state liability covering the costs of the failure of the whole banking system was not considered to arise from the Directive.

262. The Principality of Liechtenstein observes further that even under the new financing requirements proposed by the Commission in July 2010 it is envisaged that each deposit-guarantee scheme should have enough funds in place to deal only with a medium size bank failure, and that these levels of funding will have to be achieved by 2020 only.[86]

263. The Principality of Liechtenstein finally concludes by observing that any other interpretation would go against the clear intention of the EU legislature.

The United Kingdom

264. The United Kingdom submits that EEA legislation, case-law and highly recognised legal publications have established and recognised a continuing obligation on EEA States to ensure the effective application in practice of the rights and obligations established by the transposed Directive.[87]

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86 Reference is made to the Commission proposal of July 2010 for a recast directive on deposit-guarantee schemes, COM(2010) 368 final.

87 Reference is made to Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraphs 19 to 23, and Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraphs 52 and 58 to 60. Reference is also made to Prechal, *Directives in EC Law* (Oxford, 2nd ed.), pp. 51-54 and the cases cited therein.

265. The United Kingdom interprets the Directive as imposing an obligation on EEA States to ensure that, in specific cases, the relevant deposit-guarantee scheme should pay, within the applicable time-limit, a sum of up to EUR 20 000 to each eligible depositor in the event of their deposit becoming unavailable within the meaning of the Directive.

266. The United Kingdom further claims that arguments relating to *force majeure* should be dismissed, as an EEA State may only rely on the derogations provided in the Directive itself. An EEA State is not entitled to rely on particular circumstances to justify a failure to fulfil its obligations.[88]

267. In the present case, the United Kingdom acknowledges that Article 10(2) of the Directive provides for derogation "in wholly exceptional circumstances and in special cases". It follows, therefore, that, as a matter of law, the defence of *force majeure* is not available to Iceland in this case.

268. The United Kingdom contends further that, were force majeure available as a defence in relation to this Directive, where a Member State wishes to rely on such a defence, it must, in accordance with the obligation of cooperation, inform ESA of its difficulties and suggest appropriate solutions.[89] The United Kingdom notes that Iceland has failed to take any such steps.

269. The United Kingdom also underlines the fact that Iceland's purported defence is based on financial difficulties, circumstances that are not available as a defence to infraction proceedings.[90]

270. The United Kingdom argues that Iceland has also failed to prove its defence on the merits. Such a defence could only be

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88 Reference is made to *Commission* v *United Kingdom*, paragraphs 40 to 46, *Commission* v *Spain*, paragraphs 27 to 28, and Case C-307/98 *Commission* v *Belgium*, paragraphs 47 to 54, all cited above.

89 Case C-217/88 *Commission* v *Germany*, paragraph 33, and Case C-99/02 *Commission* v *Italy*, paragraphs 16 to 18, both cited above.

90 Reference is made to Case C-42/89 *Commission* v *Belgium*, cited above, paragraph 24.

made out "in wholly exceptional" circumstances.[91] In order to prove the existence of absolute impossibility, Iceland would be required to show that it would have been absolutely impossible for Iceland to establish any form of deposit-guarantee scheme under the Directive.

271. The United Kingdom further submits that the defence of absolute impossibility must be established by reference to "specific evidence".[92] The "evidence" offered by Iceland in support of its case is, in the view of the United Kingdom, largely general in nature and based on assertion rather than evidence.

272. The United Kingdom also underlines the fact that specific evidence in this case wholly precludes reliance on a defence of absolute impossibility as the United Kingdom was prepared to lend the TIF sufficient funds to fulfil its obligations under the Directive towards depositors in the Landsbanki branch in the United Kingdom. This is clear from the terms of the Loan Agreement dated 5 June 2009 between the TIF, Iceland and the United Kingdom Treasury.[93]

273. Furthermore, the United Kingdom argues that Iceland has failed to prove the defence of "absolute impossibility" as Iceland only alleged that it was not possible to pay depositors "without making unreasonable sacrifices".

Carl Baudenbacher

Judge-Rapporteur

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91 Reference is made to the Opinion of Advocate General Fennelly in *Commission v France*, cited above, point 32.

92 Reference is made to *Commission v Spain*, cited above, paragraph 32.

93 These conditions were met by means of an Acceptance and Amendment Agreement dated 19 October 2009 between TIF, Iceland and the United Kingdom Treasury.


EFTA COURT

Case E-3/12

The Norwegian State, represented by the Ministry of Labour

v

Stig Arne Jonsson

CASE E-3/12

The Norwegian State, represented by the Ministry of Labour

v

Stig Arne Jonsson

(Regulation (EEC) No 1048/71 - 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)

Summary of the Judgment

1. The EEA Rules relating to labour law are characterised by leaving a margin of appreciation to the EEA States and the social partners in their application. This may go beyond the mere liberty to choose the form and method of implementation under Article 7(b) EEA. Nevertheless, it is important, in order to render the EEA Agreement effective, that EEA States apply the margin of appreciation in respect *inter alia* of the right of EEA workers to move freely and the economic operators to exercise their freedom to provide services.

2. It Is incompatible with Article 71(1)(b) of the Regulation for the national legislation of the State of last employment to impose on unemployed persons other than frontier workers a requirement of actual presence in that State for entitlement to unemployment benefits. The choice of the unemployed person pursuant to Article 71(1)(b) of the Regulation is intended to facilitate that migrant workers receive unemployment benefit under the most favourable conditions for seeking new employment. With a requirement of actual presence that choice is seriously compromised and rendered nugatory, as it will deter the person concerned from returning to his State of residence. Moreover, such a requirement would make it unduly difficult for an unemployed person to seek employment opportunities in another EEA State. In this context, a requirement of actual presence for entitlement to unemployment benefits is in fact more onerous than a residence requirement.

SAK E-3/12

Den norske stat v/Arbeidsdepartementet

v

Stig Arne Jonsson

(Forordning (EØF) nr. 1408/71 – Trygd for vandrearbeidere – Ytelser ved arbeidsledighet – Bosted på territoriet til en annen EØS-stat – Vilkår om faktisk opphold i siste arbeidsstat for rett til ytelser ved arbeidsledighet)

Domssammendrag

1. EØS-rettens arbeidsrettsregler kjennetegnes av at de gir EØS-statene og partene i arbeidslivet en viss skjønnsmargin i anvendelsen av dem. Denne skjønnsmargin kan gå lenger enn bare friheten til å bestemme formen og midlene for gjennomføringen etter EØS-avtalen artikkel 7 bokstav b. For at EØS-avtalen skal virke effektivt, er det ikke desto mindre viktig at EØS-statene anvender skjønnsmarginen i samsvar med blant annet EØS-arbeidstakeres rett til fri bevegelighet og markedsdeltageres adgang til å yte tjenester.

2. Det vil det være i strid med artikkel 71 nr. 1 bokstav b) i forordningen om nasjonal lovgivning i siste arbeidsstat krever at arbeidsledige personer som ikke er grensearbeidere, må være faktisk til stede i denne stat for å ha rett på ytelser ved arbeidsledighet. Valget den arbeidsledige har etter artikkel 71 nr. 1 bokstav b) i forordningen er ment å sikre ham de vilkår som er gunstigst for å søke nytt arbeid. Et krav om faktisk tilstedeværelse gjør at dette valg blir alvorlig svekket og uten praktisk betydning, ettersom det vil være til hinder for at vedkommende reiser tilbake til sin bostedsstat. Videre ville et slikt krav gjøre det urimelig vanskelig for den arbeidsledige å søke arbeid i en annen EØS-stat. I denne sammenheng vil et krav om faktisk tilstedeværelse for å ha rett til ytelser ved arbeidsledighet være mer byrdefullt enn et bostedskrav.

3. Whether an unemployed person lives in a country near the State of last employment, so that it is possible in practice for that person to appear at the employment office in that State even if he does not stay there is not of relevance. Such an interpretation is not supported by the provisions of the Regulation. Moreover, it could affect the predictability and effectiveness of the application of the coordination rules of the Regulation negatively and disproportionately.

4. An interpretation cannot be maintained that would effectively entail that an applicant who, following a rejection of his application for unemployment benefits in the State of last employment, has been forced to seek unemployment benefits in his State of residence in order to secure a means of subsistence, would have no choice as to where he seeks his unemployment benefits.

5. Such an interpretation would also run contrary to the aim of Article 71(1)(b) of the Regulation, which is to guarantee unemployment benefits to migrant workers under the most favourable conditions for seeking new employment, and to enable the workers to make a choice in that respect.

6. Article 71(1)(b)(i) of Regulation No 1408/71 precludes a provision of national law pursuant to which entitlement to payment of unemployment benefits is conditional on actual presence in the EEA State concerned. Such a provision may not be relied upon against the persons referred to In Article 71(1)(b)(i) of that regulation. It is not relevant for the answer to this question whether the unemployed person lives in a country near the State of last employment. Moreover, in circumstances such as those of the defendant in the main proceedings, it is of no consequence for the application of Article 71(1)(b)(i) that an unemployed person registers as a job seeker and applies for unemployment benefits in his State of residence.

3. Om den arbeidsledige bor i et land i nærheten av siste arbeidsstat slik at det er praktisk mulig for vedkommende å møte ved arbeidsformidlingen i denne stat selv om vedkommende ikke har opphold der, er uten betydning. En slik tolkning har ikke støtte i forordningens bestemmelser. Videre ville en slik tolkning kunne få en negativ og uforholdsmessig virkning på forutsigbarheten og effektiviteten i anvendelsen av samordningsreglene i forordningen.

4. En tolkning som i realiteten ville innebære at en person som etter å ha fått avslag på sin søknad om dagpenger i siste arbeidsstat og som tvinges til å søke ytelser ved arbeidsledighet i sin bostedsstat for å sikre seg midler til livsopphold, ikke vil ha noe valg med hensyn til hvor han kan søke ytelser ved arbeidsledighet, kan ikke legges til grunn.

5. En slik tolkning ville også være i strid med formålet med artikkel 71 nr. 1 bokstav b) i forordningen, som er å sikre vandrearbeidere ytelser ved arbeidsledighet på de vilkår som er gunstigst for å søke nytt arbeid, og å gi arbeidstakerne mulighet til å treffe et valg i den anledning.

6. Artikkel 71 nr. 1 bokstav b) i) i forordning nr. 1408/71 er til hinder for en bestemmelse i nasjonal lovgivning som setter faktisk tilstedeværelse i den berørte EØS-stat som vilkår for utbetaling av ytelser ved arbeidsledighet. En slik bestemmelse kan ikke anvendes overfor personene nevnt i artikkel 71 nr. 1 bokstav b) i) i forordningen. Det er uten betydning for svaret på spørsmålet om den arbeidsledige bor i et land i nærheten av siste arbeidsstat. I et tilfelle som saksøkte i hovedsaken vil det videre være uten betydning for anvendelsen av artikkel 71 nr. 1 bokstav b) i) om den arbeidsledige melder seg som arbeidssøkende og søker om dagpenger i bostedsstaten.

JUDGMENT OF THE COURT

20 March 2013 *

(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)

In Case E-3/12,

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 Borgarting lagmannsrett ("Court of Appeal"), in the case of

the Norwegian State, represented by the Ministry of Labour,

and

Stig Arne Jonsson

concerning the rules on free movement of workers within the European Economic Area,

THE COURT,

composed of: Per Christiansen, Acting President, and Páll Hreinsson (Judge-Rapporteur) and Martin Ospelt (ad hoc), Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

– the Norwegian State ("the plaintiff"), represented by Ketil Bøe Moen, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent;

– Mr Stig Arne Jonsson ("the defendant"), represented by Lars Edvard Landsverk, advokat;

* Language of the request: Norwegian.

EFTA-DOMSTOLENS DOM

20. mars 2013 *

(Forordning (EØF) nr. 1408/71 – Trygd for vandrearbeidere – Ytelser ved arbeidsledighet – Bosted på territoriet til en annen EØS-stat – Vilkår om faktisk opphold i siste arbeidsstat for rett til ytelser ved arbeidsledighet)

I sak E-3/12,

ANMODNING til EFTA-domstolen i medhold av artikkel 34 i Avtalen mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol fra Borgarting lagmannsrett i en sak for denne domstol mellom

Den norske stat v/Arbeidsdepartementet,

og

Stig Arne Jonsson

om reglene for fri bevegelighet for arbeidstakere i Det europeiske økonomiske samarbeidsområde avsier

DOMSTOLEN,

sammensatt av: Per Christiansen, fungerende president, og Páll Hreinsson (saksforberedende dommer) og Martin Ospelt (ad hoc), dommere,

justissekretær: Gunnar Selvik,

etter å ha tatt i betraktning de skriftlige innlegg inngitt på vegne av:

– den norske stat ("saksøker"), representert ved advokat Ketil Bøe Moen, Regjeringsadvokaten,

– Stig Arne Jonsson ("saksøkte"), representert ved advokat Lars Edvard Landsverk,

* Språket i anmodningen om rådgivende uttalelse: norsk.

– the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Maria Moustakali, Temporary Officer, Department of Legal and Executive Affairs, acting as Agents;

– the European Commission ("the Commission"), represented by Julie Samnadda and Viktor Kreuschitz, 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 Ketil Bøe Moen; the defendant, represented by Lars Edvard Landsverk; ESA, represented by Maria Moustakali and Xavier Lewis; and the Commission, represented by Julie Samnadda and Viktor Kreuschitz, at the hearing on 11 January 2013,

gives the following

JUDGMENT

I INTRODUCTION

1 Mr Jonsson is a Swedish national living in Sweden. From 1983 he has frequently worked in Norway, where he also held his last job, for a Norwegian company on Svalbard, before he became unemployed in November 2008. During his last employment, Mr Jonsson stayed in Norway during work periods and normally travelled back home to Sweden during off-duty periods. After becoming unemployed, he returned to his home in Sweden where he currently resides.

2 Following the termination of his employment relationship, Mr Jonsson applied for unemployment benefits in Norway as a wholly unemployed person. His application was rejected. The case before the national court concerns the legality of that rejection.

– EFTAs overvåkningsorgan ("ESA"), representert ved Xavier Lewis, Director, og Maria Moustakali, Temporary Officer, Department of Legal and Executive Affairs,

– Europakommisjonen ("Kommisjonen"), representert ved Julie Samnadda og Viktor Kreuschitz, medlemmer av Kommisjonens juridiske tjeneste,

med henvisning til rettsmøterapporten

og etter å ha hørt muntlige innlegg fra saksøkeren, representert ved Ketil Bøe Moen, saksøkte, representert ved Lars Edvard Landsverk, ESA, representert ved Maria Moustakali og Xavier Lewis, og Kommisjonen, representert ved Julie Samnadda og Viktor Kreuschitz, i rettsmøte 11. januar 2013,

slik

DOM

I INNLEDNING

1 Stig Arne Jonsson er svensk statsborger og bosatt i Sverige. Siden 1983 har han ofte arbeidet i Norge, der han også hadde sitt siste arbeid, i et norsk selskap på Svalbard, før han ble arbeidsledig i november 2008. I sitt siste arbeidsforhold oppholdt Jonsson seg i Norge i arbeidsperiodene, mens han i friperiodene normalt reiste hjem til Sverige. Etter at han ble arbeidsledig, reiste han hjem til Sverige og er for tiden bosatt der.

2 Etter ansettelsesforholdets slutt fremmet Jonsson krav om dagpenger i Norge som helt arbeidsledig. Søknaden ble avslått. Saken for den nasjonale domstol gjelder lovligheten av dette avslag.

II LEGAL BACKGROUND

EEA law

3 Paragraph 1 of Protocol 40 to the EEA Agreement on Svalbard provides:

When ratifying the EEA Agreement, the Kingdom of Norway shall have the right to exempt the territory of Svalbard from the application of the Agreement.

4 The Kingdom of Norway availed itself of this right.

5 Council Regulation (EEC) No 1408/71 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 (OJ, English Special Edition 1971 (II), p. 416) ("Regulation No 1408/71" or "the Regulation") is referred to at point 1 of Annex VI to the EEA Agreement. Unless otherwise indicated, the following provisions are quoted with the wording applicable, subject to Protocol 1 of the EEA Agreement and the adaptations contained in Annex VI, at the time when the facts giving rise to the main proceedings took place.

6 Article 1(b) of the Regulation, which under the EEA Agreement applied in the relevant period, provides:

"frontier worker" means any employed or self-employed person who pursues his occupation in the territory of a Member State and resides in the territory of another Member State to which he returns as a rule daily or at least once a week; however, a frontier worker who is posted elsewhere in the territory of the same or another Member State by the undertaking to which he is normally attached, or who engages in the provision of services elsewhere in the territory of the same or another Member State, shall retain the status of frontier worker for a period not exceeding four months, even if he is prevented, during that period, from returning daily or at least once a week to the place where he resides;

7 Article 1(h) of the Regulation provides:

"residence" means habitual residence;

II RETTSLIG BAKGRUNN

EØS-rett

3 Første ledd i protokoll 40 til EØS-avtalen om Svalbard lyder:

Ved ratifikasjon av denne avtale skal Kongedømmet Norge ha rett til å unnta Svalbards territorium fra anvendelsen av denne avtale.

4 Dette er en rett Norge har benyttet seg av.

5 I punkt 1 i vedlegg VI til EØS-avtalen vises det til rådsforordning (EØF) nr. 1408/71 av 14. juni 1971 om anvendelse av trygdeordninger på arbeidstakere, selvstendig næringsdrivende og deres familier som flytter innenfor Fellesskapet (EFT, engelsk spesialutgave 1971 (II), s. 416) ("forordning nr. 1408/71" eller "forordningen"). Med mindre annet er angitt, siteres følgende bestemmelser i gjeldende ordlyd – med forbehold for protokoll 1 til EØS-avtalen og tilpasningene i vedlegg VI – på det tidspunkt da de faktiske forhold i saken fant sted.

6 Artikkel 1 bokstav b) i forordningen, som etter EØS-avtalen gjaldt i den aktuelle periode, fastsetter:

"grensearbeider" [betyr] en arbeidstaker eller selvstendig næringsdrivende som utfører inntektsgivende arbeid på en medlemsstats territorium og er bosatt på territoriet til en annen medlemsstat som han som regel reiser tilbake til daglig eller minst en gang i uken; en grensearbeider som av foretaket han vanligvis er tilknyttet, utsendes til den samme medlemsstats eller til en annen medlemsstats territorium, eller som utfører tjenester på samme medlemsstats eller en annen medlemsstats territorium, skal likevel fortsatt anses som grensearbeider i et tidsrom som ikke må overstige fire måneder, selv om vedkommende i dette tidsrommet ikke kan reise tilbake til sitt bosted daglig eller minst en gang i uken,

7 Artikkel 1 bokstav h) i forordningen lyder:

"bosted" [betyr] vanlig oppholdssted,

8 Article 13(2)(a) of the Regulation provides:

a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

9 Article 71(1) of the Regulation provides:

An unemployed person who was formerly employed and who, during his last employment, was residing in the territory of a Member State other than the competent State shall receive benefits in accordance with the following provisions:

(a) (i) a frontier worker who is partially or intermittently unemployed in the undertaking which employs him, shall receive benefits in accordance with the provisions of the legislation of the competent State as if he were residing in the territory of that State; these benefits shall be provided by the competent institution;

(ii) a frontier worker who is wholly unemployed shall receive benefits in accordance with the provisions of the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed, these benefits shall be provided by the institution of the place of residence at its own expense;

(b) (i) an employed person, other than a frontier worker, who is partially, intermittently or wholly unemployed and who remains available to his employer or to the employment services in the territory of the competent State shall receive benefits in accordance with the provisions of the legislation of that State as though he were residing in its territory; these benefits shall be provided by the competent institution;

(ii) an employed person, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of

8 Artikkel 13 nr. 2 bokstav a) i forordningen lyder:

en arbeidstaker som er ansatt på en medlemsstats territorium, skal omfattes av denne statens lovgivning selv om vedkommende er bosatt på en annen medlemsstats territorium, eller foretaket eller arbeidsgiveren der vedkommende er ansatt, har sitt forretningskontor eller sin bopel på en annen medlemsstats territorium,

9 Artikkel 71 nr. 1 i forordningen lyder:

Arbeidsløse arbeidstakere som under sitt siste arbeid var bosatt på territoriet til en annen medlemsstat enn den kompetente stat, skal motta ytelser etter følgende bestemmelser:

a) i) grensearbeidere som er delvis eller periodevis arbeidsløse i det foretaket der de er ansatt, skal motta ytelser i henhold til bestemmelsene i den kompetente stats lovgivning som om de var bosatt på denne statens territorium; ytelsene skal utbetales av den kompetente institusjon,

ii) grensearbeidere som er helt arbeidsløse, skal motta ytelser i henhold til bestemmelsene i lovgivningen i den medlemsstat på hvis territorium de er bosatt, som om de under sitt siste arbeid hadde vært omfattet av denne lovgivningen; ytelsene skal utbetales av institusjonen på bostedet for dens egen regning,

b) i) arbeidstakere unntatt grensearbeidere som er delvis, periodevis eller helt arbeidsløse, og som fortsatt er til rådighet for arbeidsgiver eller for arbeidsformidlingen på den kompetente stats territorium, skal motta ytelser i henhold til bestemmelsene i denne statens lovgivning som om de var bosatt på dens territorium; ytelsene skal utbetales av den kompetente institusjon,

ii) arbeidstakere unntatt grensearbeidere som er helt arbeidsløse, og som stiller seg til rådighet for arbeidsformidlingen i den medlemsstat på hvis territorium de er bosatt, eller som reiser tilbake til denne statens territorium, skal motta ytelser i henhold til bestemmelsene i denne statens lovgivning som om de sist hadde utført arbeid der; ytelsene skal utbetales av institusjonen

the place of residence shall provide such benefits at its own expense. However, if such an employed person has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, he shall receive benefits under the provisions of Article 69. Receipt of benefits under the legislation of the State in which he resides shall be suspended for any period during which the unemployed person may, under the provisions of Article 69, make a claim for benefits under the legislation to which he was last subject.

10 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 (OJ, English Special Edition 1972 (I), p. 159) ("Regulation No 574/72"). Regulation No 574/72 is referred to at point 2 of Annex VI to the EEA Agreement. Unless otherwise indicated, the following provisions are quoted with the wording applicable, subject to Protocol 1 of the EEA Agreement and the adaptations contained in Annex VI, at the time when the facts giving rise to the main proceedings took place.

11 Article 84 of Regulation No 574/72 reads:

1. In the cases referred to in Article 71(1)(a)(ii) and in the first sentence of Article 71(1)(b)(ii) of the Regulation, the institution of the place of residence shall be considered to be the competent institution, for the purposes of implementing the provisions of Article 80 of the implementing Regulation.

2. In order to claim benefits under the provisions of Article 71(1)(b)(ii) of the Regulation, an unemployed person who was formerly employed shall submit to the institution of his place of residence, in addition to the certified statement provided for in Article 80 of the implementing Regulation, a certified statement from the institution of the Member State to whose legislation he was last subject, indicating that he has no right to benefits under Article 69 of the Regulation.

på bostedet for dens egen regning. Dersom arbeidstakeren allerede har oppnådd rett til ytelser for den kompetente institusjons regning i den medlemsstat hvis lovgivning vedkommende sist var omfattet av, skal vedkommende likevel motta ytelser i samsvar med bestemmelsene i artikkel 69. Rett til ytelser i henhold til lovgivningen i den stat på hvis territorium den arbeidsløse er bosatt, skal suspenderes for det tidsrom vedkommende i henhold til artikkel 69 kan gjøre krav på ytelser etter lovgivningen vedkommende sist var omfattet av.

10 Forordning nr. 1408/71 er ledsaget av en gjennomføringsforordning, rådsforordning (EØF) nr. 574/72 av 21. mars 1972 om regler for gjennomføring av forordning (EØF) nr. 1408/71 om anvendelse av trygdeordninger på arbeidstakere, selvstendig næringsdrivende og deres familiemedlemmer som flytter innenfor Fellesskapet (EFT, engelsk spesialutgave 1972 (I), s. 159) ("forordning nr. 574/72"). Det vises til forordning nr. 574/72 i nr. 2 i vedlegg VI til EØS-avtalen. Med mindre annet er angitt, siteres følgende bestemmelser i gjeldende ordlyd – med forbehold for protokoll 1 til EØS-avtalen og tilpasningene i vedlegg VI – på det tidspunkt da de faktiske forhold i saken fant sted.

11 Artikkel 84 i forordning nr. 574/72 lyder:

1. I tilfellene omhandlet i forordningens artikkel 71 nr. 1 bokstav a) ii) og bokstav b) ii) første punktum, skal institusjonen på bostedet anses som den kompetente institusjon ved anvendelse av bestemmelsene i gjennomføringsforordningens artikkel 80.

2. For at bestemmelsene i forordningens artikkel 71 nr. 1 bokstav b) ii) skal kunne påberopes, skal en arbeidsløs arbeidstaker i tillegg til bekreftelsen omhandlet i gjennomføringsforordningens artikkel 80, fremlegge for institusjonen på bostedet en bekreftelse fra institusjonen i den medlemsstat hvis lovgivning han sist var omfattet av, som viser at han ikke har rett til ytelser etter forordningens artikkel 69.

3. For the purposes of implementing the provisions of Article 71(2) of the Regulation, the institution of the place of residence shall ask the competent institution for any information relating to the entitlements, from the latter institution, of the unemployed person who was formerly an employed person.

12 By Decision No 76/2011 of the EEA Joint Committee of 1 July 2011, Regulation No 1408/71 was replaced by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, (OJ 2004 L 200, p. 1), as amended by Regulation (EC) No 988/2009 (OJ 2009 L 284, p. 43), Regulation (EU) No 1244/2010 (OJ 2010 L 338, p. 35) and Regulation (EU) No 465/2012 (OJ 2012 L 149, p. 4) ("Regulation No 883/2004"). The Decision entered into force on the day following the last notification to the EEA Joint Committee pursuant to Article 103(1) of the Agreement. That day was 1 June 2012.

National law

13 Under Sections 2-1 and 2-2 of the Norwegian National Insurance Act (Act relating to National Insurance of 28 February 1997 No 19) it is a general condition for entitlement to benefits pursuant to the Norwegian national insurance system that the claimant is a member of the Norwegian National Insurance Scheme. According to these provisions, membership is granted, inter alia, to individuals who reside or work lawfully in Norway.

14 For employment on Svalbard, a special provision is set out in Section 2-3 of the National Insurance Act. As a result of that provision, during his employment on Svalbard as an employee of a Norwegian company, the defendant was a member of the National Insurance Scheme.

15 In addition, it is a condition for entitlement to unemployment benefit that the unemployed person stays in Norway. The provision reads as follows:

3. Ved anvendelse av bestemmelsene i forordningens artikkel 71 nr. 2, skal institusjonen på bostedet kunne be den kompetente institusjon om alle opplysninger om de rettigheter den arbeidsløse arbeidstakeren har overfor sistnevnte institusjon.

12 Ved EØS-komiteens beslutning nr. 76/2011 av 1. juli 2011 ble forordning nr. 1408/71 erstattet med europaparlaments- og rådsforordning (EF) nr. 883/2004 av 29. april 2004 om samordning av trygdeordninger (EUT 2004 L 200, s. 1), som endret ved forordning (EF) nr. 988/2009 (EUT 2009 L 284, s. 43), forordning (EU) nr. 1244/2010 (EUT 2010 L 338, s. 35) og forordning (EU) nr. 465/2012 (EUT 2012 L 149, s. 4) ("forordning nr. 883/2004"). Beslutningen trådte i kraft dagen etter at EØS-komiteen hadde mottatt alle meddelelser etter avtalens artikkel 103 nr. 1. Den dagen var 1. juni 2012.

Nasjonal rett

13 Etter §§ 2-1 og 2-2 i folketrygdloven (lov 28. februar 1997 nr. 19 om folketrygd) er det et generelt vilkår for å ha rett til ytelser etter det norske trygdesystem at søkeren er medlem i folketrygden. Medlemskap får blant annet de som enten bor eller arbeider lovlig i Norge.

14 For arbeid på Svalbard er det gitt en særregel i § 2-3. Denne regel medfører at saksøkte var medlem i folketrygden som ansatt i et norsk selskap.

15 I tillegg er det et vilkår for å ha rett til ytelser ved arbeidsledighet at den arbeidsledige har opphold i Norge. Bestemmelsen lyder som følger:

Section 4-2. Stay in Norway

To be entitled to unemployment benefit, the member must stay in Norway.

The Ministry may issue regulations pertaining to exemption from the requirement to stay in Norway.

16 Section 4-5 first paragraph and Section 4-8 of the National Insurance Act read as follows:

Section 4-5. Genuine job seekers

To be entitled to unemployment benefits, the member must be a genuine job seeker. By genuine job seeker is meant a person who is able to work, and willing to

a) take any type of employment that is paid in accordance with a collective wage agreement or common practice,

b) take employment anywhere in Norway,

c) take employment regardless of whether it is full-time or part-time,

d) to participate in labour market schemes.

Section 4-8. Duty to report and appear in person

In order to be entitled to unemployment benefit, the member must register as a job seeker with the Norwegian Labour and Welfare Administration.

The member must report every two weeks (the reporting period). The Norwegian Labour and Welfare Administration decides how such reporting shall take place.

...

Nordic Convention on Social Security

17 Article 4 of the Nordic Convention on Social Security of 18 August 2003 reads:

Article 4 Extended application of the Regulation

Unless it otherwise follows from this Convention, the application of the Regulation and the Implementing Regulation shall be extended to include all persons covered by this Convention who reside in a Nordic country.

§ 4-2. Opphold i Norge

For å ha rett til dagpenger må medlemmet oppholde seg i Norge.

Departementet kan gi forskrifter om unntak fra kravet om opphold i Norge.

16 Folketrygdloven § 4-5 første ledd og § 4-8 lyder:

§ 4-5. Reelle arbeidssøkere

For å *ha rett til dagpenger må medlemmet være reell arbeidssøker. Som reell arbeidssøker regnes den som er arbeidsfør, og er villig til*

a) å ta ethvert arbeid som er lønnet etter tariff eller sedvane,

b) å ta arbeid hvor som helst i Norge,

c) å ta arbeid uavhengig av om det er på heltid eller deltid,

d) å delta på arbeidsmarkedstiltak.

§ 4-8. Meldeplikt og møteplikt

For å ha rett til dagpenger må medlemmet melde seg som arbeidssøker til Arbeids- og velferdsetaten.

Medlemmet må melde seg hver fjortende dag (meldeperioden). Arbeids- og velferdsetaten bestemmer hvordan melding skal skje.

...

Nordisk konvensjon om trygd

17 Artikkel 4 i Nordisk konvensjon om trygd av 18. august 2003 lyder:

Artikkel 4 Utvidet anvendelse av forordningen

Dersom ikke annet følger av denne konvensjonen, utvides anvendelsen av forordningen og gjennomføringsforordningen til alle personer som omfattes av denne konvensjon og som er bosatt i et nordisk land.

18 As noted above, the EEA Agreement is not applicable on Svalbard. However, Article 4 of the Nordic Convention on Social Security of 18 August 2003 ("the Convention") contains a specific clause pursuant to which Regulation No 1408/71 shall apply to persons covered by the Convention who reside in a Nordic country. As the defendant was a member of the Norwegian National Insurance Scheme during his employment on Svalbard, he was covered by the Convention. He was also resident in a Nordic country. Accordingly, by virtue of the Convention, the Regulation thus applies to the circumstances of the present case.

III FACTS AND PROCEDURE

19 On 21 January 2009, the EEA Department of the Norwegian Labour and Welfare Administration ("NAV") rejected Mr Jonsson's claim for unemployment benefits on the grounds that he was not staying in Norway and, therefore, having regard to Article 71 of Regulation No 1408/71 and the Norwegian National Insurance Act Section 4-2, failed to meet the conditions for entitlement to unemployment benefits.

20 Mr Jonsson then filed an administrative appeal against the decision of NAV. By a decision of 22 May 2009, the appellate body upheld the rejection of his claim.

21 While his appeal case was being processed, Mr Jonsson registered with the employment service in Sweden in February 2009 and applied for unemployment benefits there.

22 By decision of 31 March 2009 of the Swedish Construction Workers' Unemployment Insurance Fund, Mr Jonsson was granted unemployment benefits in Sweden starting on 2 March 2009. The benefit amount paid in Sweden was lower than unemployment benefits under Norwegian rules would have been on account of the fact, inter alia, that Mr Jonsson had not been a member of the relevant unemployment insurance fund in Sweden.

23 Mr Jonsson appealed against the decision of the appellate body to the Norwegian National Insurance Court, which, in its decision of 1 June 2010, ruled in his favour. The National Insurance Court

18 Som nevnt over kommer EØS-avtalen ikke til anvendelse på Svalbard. Imidlertid inneholder artikkel 4 i Nordisk konvensjon om trygd av 18. august 2003 ("konvensjonen") en egen bestemmelse som fastsetter at forordning nr. 1408/71 får anvendelse på personer som omfattes av konvensjonen og som er bosatt i et nordisk land. Ettersom saksøkte var medlem i folketrygden under sitt ansettelsesforhold på Svalbard, var han omfattet av konvensjonen. Han var også bosatt i et nordisk land. Som følge av konvensjonen får forordningen dermed anvendelse på den foreliggende sak.

III FAKTUM OG SAKSGANG

19 Den 21. januar 2009 fattet NAV EØS-forvaltning ("NAV") vedtak hvor Jonssons krav om dagpenger ble avslått med den begrunnelse at han ikke oppholdt seg i Norge og derfor ikke oppfylte vilkårene for rett til dagpenger ved arbeidsledighet, jf. artikkel 71 i forordning nr. 1408/71 og folketrygdloven § 4-2.

20 Jonsson påklagde vedtaket. I vedtak av 22. mai 2009 stadfestet klageinstansen avslaget på dagpenger.

21 Mens hans klagesak var til behandling, meldte Jonsson seg for arbeidsformidlingen i Sverige i februar 2009 og søkte om ytelser ved arbeidsledighet der.

22 Ved vedtak av 31. mars 2009 av Byggnadsarbetarnas arbetslöshetskassa ble Jonsson innvilget dagpenger i Sverige fra og med 2. mars 2009. Beløpet som ble utbetalt i Sverige, var lavere enn ytelsene ved arbeidsledighet fra Norge ville vært, blant annet fordi Jonsson ikke hadde vært medlem i den aktuelle arbetslöshetskassa i Sverige.

23 Jonsson brakte vedtaket fra klageinstansen inn for Trygderetten, som i kjennelse av 1. juni 2010 ga ham medhold. Trygderetten

concluded that the requirement of actual stay in Norway could not be applied in Mr Jonsson's case. It held that the requirement was incompatible with Article 71 of the Regulation.

24 In line with the National Insurance Court's ruling, Mr Jonsson received unemployment benefits from Norway from 1 January 2009 until 12 December 2009.

25 The Norwegian State subsequently brought an action before Borgarting lagmannsrett challenging the National Insurance Court's ruling in which it seeks to have that ruling set aside. Mr Jonsson is seeking an order dismissing the State's action.

26 Having heard the parties' views on the substance of the questions, Borgarting lagmannsrett decided to request the Court's opinion on the following questions:

When national legislation requires, inter alia, actual stay in the State in order to be entitled to unemployment benefits, is it then compatible with Council Regulation (EEC) No 1408/71 Article 71(1)(b) to require continued stay in the competent State (the State of last employment) in order to be granted such benefits from this State, also in the case of a wholly unemployed person who, during his/her last employment, has stayed there as a "non-genuine" frontier worker?

Is it relevant to the answer to this question whether:

1. *the unemployed person lives in a country near the competent State (the State of last employment), so that it is possible in practice for that person to appear at the employment office in that State even if he/she does not stay there?*
2. *the unemployed person, after having returned to the State of residence, registers as a job seeker with the employment service and also applies for unemployment benefits in that State?*

27 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.

kom til at kravet om faktisk opphold i Norge ikke kunne komme til anvendelse i Jonssons tilfelle. Den la til grunn av kravet var uforenlig med artikkel 71 i forordningen.

24 I tråd med Trygderettens kjennelse mottok Jonsson dagpenger fra Norge fra 1. januar 2009 til 12. desember 2009.

25 Den norske stat brakte så Trygderettens kjennelse inn for Borgarting lagmannsrett, med påstand om at Trygderettens kjennelse er ugyldig. Jonsson har påstått seg frifunnet.

26 Etter å ha hørt partenes syn på saken, besluttet Borgarting lagmannsrett å anmode EFTA-domstolen om en rådgivende uttalelse om følgende spørsmål:

Når det i henhold til den nasjonale lovgivningen blant annet stilles krav om faktisk opphold i landet for å få ytelser ved arbeidsledighet, er det da forenlig med rådsforordning (EØF) nr. 1408/71 art. 71 nr. 1 b) å stille vilkår om fortsatt opphold i den kompetente stat (siste arbeidsstat) for å få slike ytelser fra denne staten, også for en helt arbeidsledig person som under siste arbeid har hatt opphold her som såkalt "uekte grensearbeider"?

Har det betydning for svaret på dette spørsmålet om:

1. *Den arbeidsledige bor i et land i nærheten av den kompetente stat (siste arbeidsstat) slik at det er praktisk mulig for vedkommende å møte ved arbeidsformidlingen i denne staten selv om vedkommende ikke har opphold her?*
2. *Den arbeidsledige, etter å ha reist tilbake til sin bostedsstat, melder seg som arbeidssøkende ved arbeidsformidlingen og søker om ytelser ved arbeidsløshet også i bostedsstaten?*

27 Det henvises til rettsmøterapporten for en mer utførlig redegjørelse for den rettslige ramme, de faktiske forhold, saksgangen og de skriftlige innlegg fremmet for EFTA-domstolen, som i det følgende bare vil bli nevnt eller drøftet så langt dette er nødvendig for domstolens begrunnelse.

IV THE QUESTION

Observations submitted to the Court

28 It is common ground between the parties that Mr Jonsson is subject to the provisions of Article 71(1)(b) of the Regulation. It sets out two different rules for the category of unemployed persons who are wholly unemployed, not frontier workers, and who, during their last employment, resided in an EEA State other than the State of last employment (hereinafter also "the competent State").

29 The parties disagree on the interpretation of this Article, in particular whether it precludes the possibility that national law may require an unemployed worker to stay in the State of last employment for entitlement to unemployment benefits.

30 The Norwegian State submits that there is a general requirement of actual stay in national law which applies equally to both Norwegian nationals and nationals of other EEA States. It argues that the concept of stay under the National Insurance Act differs from the concept of residence as defined in Article 1(h) of the Regulation in the sense that it refers to physical presence in the territory of Norway, whereas the concept of residence refers to a person's habitual centre of interests, that is, where he normally lives and where he has his family.

31 According to the Norwegian State, this requirement implies that unemployment benefits are awarded only for the periods in which the unemployed person is actually present in Norway irrespective of his place of residence. It argues that the requirement established in Section 4-2 of the National Insurance Act is compatible with the Regulation and that it may be applied to "non-genuine" frontier workers in the circumstances set out in the questions to Court. In its view, that conclusion applies irrespective of the distance between the competent State and the State of residence.

32 The Norwegian State contends that Article 71(1)(b)(i) of the Regulation establishes the conditions under which an unemployed

IV SPØRSMÅLET

Innlegg inngitt til EFTA-domstolen

28 Det er enighet mellom partene om at Jonsson er underlagt bestemmelsene i artikkel 71 nr. 1 bokstav b) i forordningen. Her fastsettes to forskjellige regler for den kategori personer som er helt arbeidsledige, som ikke er grensearbeidere, og som under siste arbeid var bosatt i en annen EØS-stat enn siste arbeidsstat (heretter også kalt "den kompetente stat").

29 Partene er uenige om hvordan denne artikkel skal tolkes, da særlig om den er til hinder for at nasjonal lovgivning kan sette som vilkår for at en arbeidsledig person skal få rett til dagpenger, at han oppholder seg i siste arbeidsstat.

30 Den norske stat gjør gjeldende at norsk rett fastsetter et generelt krav om faktisk opphold som får anvendelse på både norske borgere og borgere av andre EØS-stater. Det anføres at begrepet opphold ("stay") i folketrygdloven ikke er det samme som begrepet bosted ("residence") slik det er definert i artikkel 1 bokstav h) i forordningen, i den forstand at opphold viser til fysisk tilstedeværelse på norsk territorium, mens bosted viser til der en persons vanlige interessesentrum befinner seg, det vil si der han normalt bor og har sin familie.

31 Ifølge den norske stat innebærer dette krav at ytelser ved arbeidsledighet bare kan gis for perioder der den arbeidsledige faktisk befinner seg i Norge, uavhengig av hvor han har sitt bosted. Det gjøres gjeldende at kravet hjemlet i folketrygdloven § 4-2 er forenlig med forordningen, og at det kan anvendes på "uekte" grensearbeidere under de omstendigheter som er beskrevet i spørsmålene til EFTA-domstolen. Den norske stat er av den oppfatning at dette må gjelde uavhengig av hvor stor avstand det er mellom den kompetente stat og bostedsstaten.

32 Den norske stat hevder at artikkel 71 nr. 1 bokstav b) i) i forordningen oppstiller vilkårene for at en arbeidsledig person som

worker, other than a frontier worker, shall be subject to the legislation of the competent State. The conditions are (i) that the unemployed person is available to the employment services in this State and (ii) that the provisions of that State's legislation are satisfied.

33 As regards the latter condition, the Norwegian State points out that, under Section 4-2 of the National Insurance Act, stay or presence in Norway is a general requirement for payment of unemployment benefits in Norway. This requirement applies to all unemployed workers and clearly belongs to the "legislation of [the competent State]" within the meaning of Article 71 of the Regulation. This requirement must therefore be satisfied before the defendant is entitled to benefits from Norway.

34 The Norwegian State also argues that, by applying for and receiving unemployment benefits in Sweden, Mr Jonsson has exercised his choice pursuant to Article 71(1)(b) of the Regulation to receive benefits from Sweden as his State of residence, and only from there.

35 The Norwegian State submits that such an unemployed person exercises his choice by either making himself available to the employment services in the State of employment or simply returning to his State of residence. In each case, the relevant national provisions governing entitlement to unemployment benefits have to be satisfied. It argues that this follows from Article 71(1)(b)(ii) of the Regulation and is further confirmed by the more precise provision in Article 65 of Regulation No 883/2004 which has now replaced the Regulation applicable in this case.

36 The defendant, ESA and the Commission disagree with the contention of the Norwegian State that it is compatible with Article 71 of the Regulation to require stay in the State of last employment for wholly unemployed persons who worked in Norway, but who were resident in another EEA State. They also contest its submission that a person who returns to the State of residence has thus chosen, for the purposes of Article 71(1)(b) of the Regulation, to be subject to the rules of his State of residence.

ikke er en grensearbeider, skal være underlagt lovgivningen i den kompetente stat, i dette tilfelle siste arbeidsstat. Vilkårene er i) at den arbeidsledige står til rådighet for arbeidsformidlingen i denne stat, og ii) at bestemmelsene i denne stats lovgivning er oppfylt.

33 Når det gjelder det andre vilkår, peker den norske stat på at opphold eller tilstedeværelse i Norge er et generelt krav etter folketrygdloven § 4-2 for utbetaling av dagpenger i Norge. Dette krav gjelder for alle arbeidsledige personer og er klart en del av "[den kompetente stats] lovgivning" etter artikkel 71 i forordningen. Derfor må det også oppfylles før saksøkte har rett på ytelser fra Norge.

34 Den norske stat anfører også at Jonsson, ved å ha søkt om og mottatt ytelser ved arbeidsledighet i Sverige, har truffet det valg han har etter artikkel 71 nr. 1 bokstav b) i forordningen, om å motta ytelser fra Sverige som sin bostedsstat, og bare derfra.

35 Den norske stat gjør gjeldende at en arbeidsledig person treffer dette valg ved enten å stille seg til rådighet for arbeidsformidlingen i arbeidsstaten, eller ved bare å reise tilbake til sin bostedsstat. I begge tilfeller må de relevante nasjonale bestemmelser om retten til ytelser ved arbeidsledighet følges. Den norske stat anfører at dette følger av artikkel 71 nr. 1 bokstav b) ii) i forordning nr. 1408/71, og det bekreftes ytterligere i den mer detaljerte bestemmelse i artikkel 65 i forordning nr. 883/2004, som nå har erstattet trygdeforordningen som kommer til anvendelse i den foreliggende sak.

36 Saksøkte, ESA og Kommisjonen bestrider den norske stats anførsel om at det er forenlig med artikkel 71 i forordningen å kreve opphold i siste arbeidsstat for helt arbeidsledige personer som har arbeidet i Norge, men som er bosatt i en annen EØS-stat. De bestrider også anførselen om at en person som reiser tilbake til bostedsstaten dermed har valgt, innenfor rammen av artikkel 71 nr. 1 bokstav b) i forordningen, å underkaste seg reglene i sin bostedsstat.

37 According to the defendant, ESA and the Commission, for the purposes of Article 71(1)(b) of the Regulation, the choice available to the wholly unemployed person is exercised by making oneself available to the employment services in the territory where the benefits are claimed. The provision in question requires the competent State to create a legal fiction of residence and to provide unemployment benefits to such person in accordance with its legislation as if he resided on its territory. If, on the other hand, the person claims benefits in the State of residence, the latter is required to create a legal fiction of previous employment and provide unemployment benefits in accordance with its legislation as though the person had last been employed there.

38 In the view of the defendant, a requirement for actual stay in Norway such as that established in Section 4-2 of the National Insurance Act is precluded by Article 71 of Regulation No 1408/71. Although the defendant can be required to register with the Labour and Welfare Administration and comply with its control procedures, it is clear that Norway's control requirement cannot extend so far as to require the unemployed person to change his place of residence. Consequently, in the defendant's view, it may be concluded that he is permitted to reside and stay in Sweden.

39 The defendant submits that, in order to achieve this, the requirements of the National Insurance Act must be interpreted in line with the Regulation, and relies in this respect on Section 1-3 of the National Insurance Act and the Regulation concerning the incorporation of Regulation No 1408/71 into the EEA Agreement, pursuant to which the rules of the Regulation take precedence over the National Insurance Act.

40 As regards the condition for stay or presence in Norway, ESA submits that such a requirement constitutes an even more onerous requirement than a requirement of residence which has already been found incompatible with EEA rules by the Court of Justice of the European Union. ESA argues that if a requirement of continued stay were allowed, the choice of the wholly unemployed person set out in Article 71(1)(b) of the Regulation

37 Ifølge saksøkte, ESA og Kommisjonen treffer en helt arbeidsledig person det valg han har etter artikkel 71 nr. 1 bokstav b) i forordningen, ved å stille seg til rådighet for arbeidsformidlingen på det territorium der ytelsene kreves. Den aktuelle bestemmelse innebærer at den kompetente stat må skape en juridisk fiksjon om bosted og betale ytelser ved arbeidsledighet til vedkommende etter intern rett som om han var bosatt på statens territorium. Dersom vedkommende på den annen side krever ytelser i bostedsstaten, har sistnevnte plikt til å skape en juridisk fiksjon om tidligere arbeidsforhold og utbetale ytelser ved arbeidsledighet i samsvar med intern rett som om vedkommende sist hadde vært ansatt der.

38 Slik saksøkte ser det, er et krav om faktisk opphold i Norge som det som er fastsatt i folketrygdloven § 4-2, forbudt etter artikkel 71 i forordning nr. 1408/71. Selv om det kan kreves at saksøkte melder seg for NAV og overholder NAVs kontrollprosedyrer, er det klart at Norges kontrollkrav ikke kan strekke seg så langt som til å kreve at den arbeidsledige skifter bosted. Følgelig kan det sluttes, slik saksøkte ser det, at han kan bo og oppholde seg i Sverige.

39 Saksøkte gjør gjeldende at for å oppnå dette må kravene i folketrygdloven tolkes i samsvar med forordningen, jf. folketrygdloven § 1-3 og forskrift om inkorporasjon av forordning nr. 1408/71 i EØS-avtalen, som fastsetter at forordningens regler har forrang fremfor folketrygdloven.

40 Når det gjelder vilkåret om opphold eller tilstedeværelse i Norge, anfører ESA at et slikt krav vil være enda mer bebyrdende enn et bostedskrav, som EU-domstolen allerede har funnet å være i strid med EØS-reglene. ESA gjør gjeldende at dersom kravet om fortsatt opphold var tillatt, ville valget som den helt arbeidsledige

would be seriously compromised and rendered nugatory from a practical point of view.

41 First, ESA contends, it would be restrictive, discriminatory and disproportionate to require a person seeking to make use of the possibilities available within the internal EEA labour market either to move his residence to the EEA State of employment or to remain in the territory of that State after the termination of his employment relationship in order to be entitled to receive unemployment benefits from the latter State. Second, a requirement of continued stay does not take into account the personal situation and the actual intentions of the wholly unemployed person.

42 ESA asserts further that the requirement of continuous physical presence in the territory of the State of last employment constitutes a restrictive condition as it fails to reflect the rationale of Article 71(1)(b)(i) of the Regulation. In its view, the phrase "remains available to his employer or to the employment services in the territory of the competent State" does not aim to preclude all possibility for a wholly unemployed person to seek job opportunities in other EEA States during the period that he receives benefits from the State of last employment, taking advantage of the possibilities offered by the internal labour market.

43 The Commission submits that the fundamental freedoms established under EEA law render it neither justified nor proportionate to require a person falling within the scope of Article 71(1)(b) of the Regulation to remain continuously present in the territory of that EEA State. This would go beyond what is necessary to ensure compliance with obligations on job seekers and would effectively prevent the person concerned from returning, on a regular basis, to his State of residence. In its view, the Norwegian State has not provided any justification for requiring the continuous presence of Mr Jonsson in Norway in order to comply with the obligations on job seekers and the monitoring measures which are in place there.

har etter artikkel 71 nr. 1 bokstav b) i forordningen, være alvorlig svekket og uten praktisk betydning.

41 ESA anfører for det første at det ville være en restriksjon, innebære forskjellsbehandling og være uforholdsmessig å kreve at en person som søker å utnytte de muligheter som finnes på det indre marked i EØS, enten flytter sitt bosted til EØS-arbeidsstaten eller blir værende på territoriet til denne stat etter ansettelsesforholdets slutt for å ha rett til dagpenger fra denne stat. Dernest vil et krav om fortsatt opphold ikke ta hensyn til den helt arbeidslediges personlige situasjon og faktiske intensjoner.

42 Videre gjør ESA gjeldende at kravet om kontinuerlig fysisk tilstedeværelse på territoriet til siste arbeidsstat er et restriktivt vilkår da det ikke gjenspeiler formålet med artikkel 71 nr. 1 bokstav b) i) i forordningen. Etter ESAs oppfatning tar formuleringen "fortsatt er til rådighet for sin arbeidsgiver eller for arbeidsformidlingen på den kompetente stats territorium" ikke sikte på å utelukke enhver mulighet for en helt arbeidsledig til å søke jobbmuligheter i andre EØS-stater i den perioden han mottar ytelser fra siste arbeidsstat, og utnytte de muligheter som det felles arbeidsmarked byr på.

43 Kommisjonen anfører at i betraktning av de grunnleggende friheter fastsatt ved EØS-retten, vil et krav om at en person som faller inn under artikkel 71 nr. 1 bokstav b) i forordningen hele tiden skal være til stede på territoriet til nevnte EØS-stat, verken være berettiget eller forholdsmessig. Et slikt krav ville gå lenger enn det som er nødvendig for å sikre at arbeidssøkende overholder sine forpliktelser og ville i praksis hindre vedkommende fra å reise regelmessig tilbake til sin bostedsstat. Etter Kommisjonens syn har den norske stat ikke lagt frem noen begrunnelse for å kreve at Jonsson skal være kontinuerlig til stede i Norge for å overholde de forpliktelser som hviler på arbeidssøkende, og det tilsyn som er på plass der.

44 With regard to the national court's first variation on the main question, ESA and the Commission submit that neither the place of residence nor the actual distance between the States concerned should be relevant for the unemployed person's entitlement, as long as the person complies with the statutory conditions for the grant of unemployment benefits in the competent State.

45 As regards the national court's second variation on the main question, the defendant, ESA and the Commission all stress the fact that Mr Jonsson only applied for and was granted unemployment benefits in the State of residence after his claim for unemployment benefits was refused in Norway on the grounds that he was not resident there. Contrary to the arguments advanced by the Norwegian State, the defendant and the Commission submit that it cannot be assumed that, in seeking unemployment benefits in his State of residence following the refusal in the competent State, Mr Jonsson exercised his choice under Article 71(1)(b) of the Regulation. In their view, this step was necessary in order to obtain some means of subsistence. Therefore, this claim cannot be considered an application for unemployment benefits for the purposes of Article 71(1)(b) of the Regulation.

46 Moreover, according to the Commission, Mr Jonsson was entitled to claim unemployment benefits in Norway when he made himself available to the employment services there. This entitlement which is provided for in EEA law is not invalidated in circumstances in which the application for benefits was unlawfully rejected by the competent EEA State, that is, the State of last employment. In the Commission's view, where a worker makes a claim for benefits in the State of residence following a rejection of his claim for benefits in the competent EEA State on the basis of a requirement contrary to EEA law, it would clearly contradict the *effet utile* of the social security coordination rules to prohibit that worker from exercising his entitlement under Article 71(1)(b) of the Regulation.

47 Furthermore, the Commission rejects the argument of the Norwegian State to the effect that a wholly unemployed person, other than frontier worker, who registers with the employment

44 Til den nasjonale domstols første underspørsmål gjør ESA og Kommisjonen gjeldende at verken bosted eller faktisk avstand mellom de berørte stater bør ha betydning for om den arbeidsledige har krav på dagpenger, så lenge vedkommende overholder lovens vilkår for å få ytelser ved arbeidsledighet i den kompetente stat.

45 Når det gjelder den nasjonale domstols annet underspørsmål, understreker både saksøkte, ESA og Kommisjonen at Jonsson først søkte om og fikk dagpenger i bostedsstaten etter å ha fått avslag på dagpenger i Norge med den begrunnelse at han ikke var bosatt der. Saksøkte og Kommisjonen bestrider den norske stats argumenter og anfører at det ikke kan antas at Jonsson, da han søkte om dagpenger i bostedsstaten etter å ha fått avslag i den kompetente stat, foretok et valg etter artikkel 71 nr. 1 bokstav b) i forordningen. Etter deres oppfatning var dette et nødvendig skritt for å få midler til livsopphold. Derfor kan ikke denne søknad anses som en søknad om ytelser ved arbeidsledighet etter artikkel 71 nr. 1 bokstav b) i forordningen.

46 Ifølge Kommisjonen hadde Jonsson rett til å kreve dagpenger i Norge da han stilte seg til rådighet for arbeidsformidlingen der. Dette er en rett som er hjemlet i EØS-retten, og den faller ikke bort når en søknad om dagpenger urettmessig blir avslått av den kompetente EØS-stat, det vil si siste arbeidsstat. Kommisjonen mener at dersom en arbeidstaker fremmer krav om dagpenger i bostedsstaten etter å ha fått avslag på søknad om dagpenger i den kompetente EØS-stat med grunnlag i et krav som er i strid med EØS-retten, ville det klart være i strid med prinsippet om en effektiv virkning for reglene om trygdesamordning å hindre nevnte arbeidstaker i å utøve sin rett etter artikkel 71 nr. 1 bokstav b) i forordningen.

47 Videre avviser Kommisjonen den norske stats argument om at en helt arbeidsledig person som ikke er en grensearbeider, og som melder seg for arbeidsformidlingen i sin bostedsstat, ikke lenger kan kreve dagpenger etter lovgivningen i den kompetente stat.

services in his State of residence can no longer claim benefits under the legislation of the competent State. It asserts that no provision of the Regulation lays down conditions limiting the application of Article 71(1)(b)(i) of the Regulation. Moreover, the interpretation favoured by the Norwegian State would conflict with the aim of that provision, which is to optimise a worker's chances of resuming employment. In the Commission's view, such aim would not be attained if the persons concerned were deprived of their entitlement to benefits under the legislation of one State as a result of having opted initially for benefits in another.

48 However, the Commission underlines the fact that a worker can neither aggregate the amounts of unemployment benefits from the two States, nor, if he is available solely to the employment services in the territory of the State of residence, claim unemployment benefits from the State of last employment. In this regard, the Commission submits that entitlement to unemployment benefits presupposes that the unemployed person is available to the employment office where he is registered.

49 ESA and the Commission submit that, pursuant to Article 71(1)(b)(ii) of the Regulation, where a wholly unemployed person receives benefits in accordance with the legislation of the State of residence and has become entitled to benefits at the expense of the competent institution of the EEA State to whose legislation he was last subject, receipt of benefits under the legislation of the State of residence shall be suspended. In the view of ESA and the Commission, this provision confirms that a person may remain entitled to unemployment benefits in the competent State even where he has received unemployment benefits under the legislation of the State of residence. They point out that provision of unemployment benefits by the competent State takes priority, as receipt of benefits under the legislation of the State of residence is suspended. This reflects the principle that the competent State for unemployed workers is the State of last employment and that Article 71 of the Regulation introduces a derogation from that principle only in so far as the unemployed worker claims unemployment benefits in the State of residence.

Kommisjonen anfører at ingen andre bestemmelser i forordningen fastsetter vilkår som begrenser anvendelsen av artikkel 71 nr. 1 bokstav b) i) i forordningen. Den norske stats tolkning ville også være i strid med bestemmelsens formål, nemlig å optimere arbeidstakerens muligheter til å finne nytt arbeid. Slik Kommisjonen ser det, ville ikke dette mål kunne nås dersom vedkommende var fratatt sin rett til ytelser etter lovgivningen i en stat fordi han først hadde valgt å søke om ytelser i en annen stat.

48 Kommisjonen understreker imidlertid at en arbeidstaker verken kan motta dagpenger fra begge stater samtidig eller, dersom han bare står til rådighet for arbeidsformidlingen på territoriet til bostedsstaten, kreve dagpenger fra siste arbeidsstat. I denne sammenheng gjør Kommisjonen gjeldende at rett til dagpenger ved arbeidsledighet forutsetter at den arbeidsledige står til rådighet for arbeidsformidlingen der han er registrert.

49 ESA og Kommisjonen gjør gjeldende at etter artikkel 71 nr. 1 bokstav b) ii) i forordningen skal ytelser som en helt arbeidsledig person mottar etter lovgivningen i bostedsstaten, suspenderes dersom han har fått rett til ytelser fra den kompetente institusjon i den EØS-stat hvis lovgivning han sist var underlagt. Etter ESAs og Kommisjonens oppfatning bekrefter denne bestemmelse at en person kan beholde sin rett til ytelser ved arbeidsledighet i den kompetente stat selv om han har mottatt ytelser etter lovgivningen i bostedsstaten. De peker på at ytelser ved arbeidsledighet fra den kompetente stat får forrang ettersom ytelsene etter lovgivningen i bostedsstaten blir suspendert. Dette gjenspeiler prinsippet om at den kompetente stat for arbeidsledige arbeidstakere er deres siste arbeidsstat, og at artikkel 71 i forordningen tillater unntak fra dette prinsipp bare i den utstrekning den arbeidsledige krever ytelser ved arbeidsledighet i bostedsstaten.

Findings of the Court

50 By its question, the national court essentially asks whether it is compatible with Article 71(1)(b) of Regulation No 1408/71 for the national legislation of the State of last employment to require "continued stay" as phrased by the referring court, or "actual stay" as phrased by the Norwegian State, that is, actual presence in that State from a worker subject to the scheme of Article 71(1)(b) in order to be entitled to unemployment benefits.

51 In addition, the national court asks whether it is relevant to the answer to this question, that the unemployed person lives in a country near the State of last employment, even if he does not stay there, and, whether it is relevant that the unemployed person, after having returned to the State of residence, registers as a job seeker with the employment service in the State of residence and also applies for unemployment benefits in that State.

52 In the case pending before the national court, it is not disputed that Mr Jonsson had his last employment in Norway prior to becoming unemployed and that he resided in Sweden during the period of his last employment. Consequently, he comes within the scope of Article 71(1)(b) of the Regulation. Moreover, it is common ground between the parties to the main proceedings that the Regulation is applicable to the defendant's situation.

53 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 legislations. The overall goal is to prevent migrant workers from being deterred from exercising their right to freedom of movement under the EEA Agreement.

54 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

Rettens bemerkninger

50 Ved sitt spørsmål søker den nasjonale domstol i hovedsak å bringe på det rene om et krav etter nasjonal lovgivning om "fortsatt opphold", slik den anmodende domstol har ordlagt seg, eller "faktisk opphold", som den norske stat kaller det, dvs. faktisk tilstedeværelse i staten for en arbeidstaker som er underlagt ordningen i artikkel 71 nr. 1 bokstav b) for å få ytelser ved arbeidsledighet, er forenlig med artikkel 71 nr. 1 bokstav b) i forordning nr. 1408/71.

51 Den nasjonale domstol spør videre om det har betydning for svaret på dette spørsmål om den arbeidsledige bor i et land i nærheten av siste arbeidsstat, selv om vedkommende ikke har opphold der, og om det har betydning at den arbeidsledige, etter å ha reist tilbake til sin bostedsstat, melder seg som arbeidssøkende ved arbeidsformidlingen i bostedsstaten og også søker om ytelser ved arbeidsledighet der.

52 I saken for den nasjonale domstol bestrides det ikke at Jonsson hadde sitt siste arbeidsforhold i Norge før han ble arbeidsledig, og at han under sitt siste arbeidsforhold var bosatt i Sverige. Følgelig faller han inn under virkeområdet for artikkel 71 nr. 1 bokstav b) i forordningen. Videre er det enighet mellom partene i saken om at forordningen får anvendelse på saksøktes tilfelle.

53 Ifølge fortalen ble forordningen vedtatt for å fremme fri bevegelighet for arbeidstakere, som fastsatt i EØS-avtalen artikkel 28. Den innfører et system for samordning av trygdelovgivningen og er ment å sikre likebehandling under de ulike lovgivninger. Det overordnede mål er å hindre at vandrearbeidere blir forhindret fra å utøve den rett til fri bevegelighet de har etter EØS-avtalen.

54 For dette formål gir forordningen i avdeling II et fullstendig og ensartet sett med lovvalgsregler. Reglene er ment å forhindre at mer enn én trygdeordning kommer til anvendelse samtidig på personer som omfattes av forordningen, og å sikre at de ikke står uten trygderettigheter fordi det ikke er noen lovgivning som

because there is no legislation applicable to them (see Case E-3/05 *ESA* v *Norway* [2006] EFTA Ct. Rep. 102, paragraph 46).

55 It follows from settled case law that the Regulation provides for coordination of the applicable national law and not harmonisation of the social security legislations of the EEA States (see Case E-3/04 *Tsomakas and Others* [2004] EFTA Ct. Rep. 95, paragraph 27). 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, in particular the freedom to provide services and the freedom of movement for workers, when exercising that power (see, Joined Cases E-11/07 and E-1/08 *Rindal and Slinning* [2008] EFTA Ct. Rep. 322, paragraph 43, and for comparison, Cases C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, paragraph 100, and C-347/10 *Salemink*, judgment of 17 January 2012, not yet reported, paragraphs 38 and 39).

56 In this sense, the Regulation is similar to other instruments of secondary legislation seeking to coordinate rather than to harmonise national law, such as Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1). This directive lays down in its Article 3(1) an exhaustive list of terms and conditions of employment that host EEA States in national law must require undertakings established in other EEA States to observe when they post workers to their territory. However, the directive does not harmonise the material content of those terms and conditions. Their content may thus be freely defined by the EEA States, in compliance with the EEA Agreement, in particular the freedom to provide services, and the general principles of EEA law (see Cases E-2/11 *STX Norway and Others*, judgment of 23 January 2012, not yet reported, paragraphs 27 to 31, and E-12/10 *ESA* v *Iceland* [2011] EFTA Ct. Rep. 117,

kommer til anvendelse på dem (se sak E-3/05 *ESA* mot *Norge*, Sml. 2006 s. 102, avsnitt 46).

55 Det følger av fast rettspraksis at forordningen samordner hvilken nasjonal rett som kommer til anvendelse, ikke at den harmoniserer EØS-statenes trygdelovgivninger (se sak E-3/04 *Tsomakas m.fl.*, Sml. 2004 s. 95, avsnitt 27). Forordningen begrenser ikke EØS-statenes myndighet til å organisere sine trygdeordninger. I mangel av harmonisering på EØS-nivå kan den enkelte EØS-stat fastsette vilkårene for rett til trygdeytelser i nasjonal lovgivning. Når EØS-statene utøver denne myndighet, må de likevel overholde EØS-retten, særlig friheten til å yte tjenester og retten til fri bevegelighet for arbeidstakere (se forente saker E-11/07 og E-1/08 *Rindal og Slinning*, Sml. 2008 s. 322, avsnitt 43, og for sammenligning, sak C-385/99 *Müller-Fauré og van Riet*, Sml. 2003 s. I-4509, avsnitt 100, og C-347/10 *Salemink*, dom av 17. januar 2012, ennå ikke i Sml., avsnitt 38 og 39).

56 I så måte kan forordningen sammenlignes med annen sekundærlovgivning som har som mål å samordne snarere enn å harmonisere nasjonal lovgivning, slik som europaparlaments- og rådsdirektiv 96/71/EF av 16. desember 1996 om utsending av arbeidstakere i forbindelse med tjenesteyting (EFT 1997 L 18, s. 1). Artikkel 3 nr. 1 i dette direktiv inneholder en uttømmende liste over de arbeids- og ansettelsesvilkår som den nasjonale lovgivning i vertsstaten må kreve at foretak etablert i andre EØS-stater overholder når de sender arbeidstakere til deres territorium. Direktivet harmoniserer imidlertid ikke vilkårenes materielle innhold. EØS-statene kan dermed fritt definere vilkårenes innhold, så sant man overholder EØS-avtalen, særlig friheten til å yte tjenester, og de generelle prinsipper i EØS-retten (se sak E-2/11 *STX Norway m.fl.*, dom av 23. januar 2012, ennå ikke i Sml., avsnitt 27 til 31, og E-12/10 *ESA* mot *Island*, Sml. 2011 s. 117, avsnitt 40 og 45, og for sammenligning, sak C-341/05 *Laval un Partneri*, Sml. 2007 s. I-11767, avsnitt 60, og C-490/04

paragraphs 40 and 45, and, by comparison, Cases C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 60, and C-490/04 *Commission* v *Germany* [2007] ECR I-6095, paragraph 19; see also Catherine Barnard, *EU Employment Law*, fourth edition, Oxford 2012, pp. 226 and 227).

57 This situation is different from situations where technical and regulatory issues are exhaustively harmonised in secondary law. One such example is the case for the collection of waste oil, which until recently was regulated by Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils (OJ 1975 L 194, p. 23). Where a question has been regulated in a harmonised manner at EEA level by a directive, any national measure relating thereto must be assessed in the light of the provisions of the directive and not of primary EEA law (see Case E-9/11 *ESA* v *Norway*, judgment of 16 July 2012, not yet reported, paragraph 72, and for comparison, Case C-37/92 *Vanacker* [1993] ECR I-4947, paragraph 9).

58 Where the national legislation of the host State defines restrictive terms and conditions of employment that undertakings established in other EEA States must observe when they post workers to their territory, such restrictions may be justified where it meets overriding requirements relating to the public interest, including the social protection of workers (see *STX and Others*, cited above, paragraph 80). However, the fact that the legal basis for Directive 96/71 is Article 56 of the Treaty on the Functioning of the European Union ("TFEU"), which is equivalent to Article 36 EEA, entails that Directive 96/71 primarily intends to protect the free movement of services rather than the protection of workers. Nevertheless, this freedom must not be abused in order to manifestly circumvent the protection of workers, *inter alia* through social dumping, while measures intended to address such abuse must be justified and proportionate (see Case E-15/11 *Arcade Drilling*, judgment of 3 October 2012, not yet reported, paragraph 88; and for comparison, Case C-577/10 *Commission* v *Belgium*, judgment of 19 December 2012, not yet reported, paragraph 45).

Kommisjonen mot *Tyskland*, Sml. 2007 s. I-6095, avsnitt 19; se også Catherine Barnard, *EU Employment Law*, fjerde utgave, Oxford 2012, s. 226 og 227).

57 Denne situasjon skiller seg fra situasjoner der tekniske og regulatoriske forhold er uttømmende harmonisert i sekundærlovgivningen. Et slikt eksempel er innsamlingen av spillolje, som inntil nylig var regulert i rådsdirektiv 75/439/EØF av 16. juni 1975 om håndtering av spillolje (EFT 1975 L 194, s. 23). Når et spørsmål er regulert ved harmonisering på EØS-nivå gjennom et direktiv, må ethvert nasjonalt tiltak som vedrører saken, vurderes i lys av bestemmelsene i direktivet, ikke primærretten i EØS (se sak E-9/11 *ESA* mot *Norge*, dom av 16. juli 2012, ennå ikke i Sml., avsnitt 72, og for sammenligning, sak C-37/92 *Vanacker*, Sml. 1993 s. I-4947, avsnitt 9).

58 Dersom nasjonal lovgivning i vertsstaten fastsetter restriktive arbeids- og ansettelsesvilkår som foretak etablert i andre EØS-stater må overholde når de sender arbeidstakere til deres territorium, kan slike restriksjoner være berettiget dersom de er begrunnet i tvingende allmenne hensyn, herunder sosial trygghet for arbeidstakerne (se *STX m.fl.*, som omtalt over, avsnitt 80). Men da det rettslige grunnlag for direktiv 96/71 er artikkel 56 i traktaten om Den europeiske unions virkemåte ("TEUV"), som tilsvarer EØS-avtalen artikkel 36, innebærer dette at formålet med direktiv 96/71 primært er å verne om den frie bevegelighet for tjenester snarere enn å beskytte arbeidstakere. Friheten må likevel ikke misbrukes for åpenbart å omgå arbeidstakervernet, for eksempel ved sosial dumping, men samtidig må tiltak for å motvirke slikt misbruk være berettigede og forholdsmessige (se sak E-15/11 *Arcade Drilling*, dom av 3. oktober 2012, ennå ikke i Sml., avsnitt 88, og for sammenligning, sak C-577/10 *Kommisjonen* mot *Belgia*, dom av 19. desember 2012, ennå ikke i Sml., avsnitt 45).

59 Even though coordination directives in the field of labour law contain certain aspects which must be made part of the national legal order (see, by comparison, Case C-341/02 *Commission* v *Germany* [2005] ECR I-2733), the EEA rules relating to labour law are also characterised by leaving a margin of appreciation to the EEA States and the social partners in their application. This may go beyond the mere liberty to choose the form and method of implementation under Article 7(b) EEA. This is particularly true in the case of directives incorporating in EEA law the framework agreements agreed by the European Social Partners including its Norwegian members, such as Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 143).

60 Nevertheless, it is important, in order to render the EEA Agreement effective, that EEA States apply the margin of appreciation mentioned in paragraph 59 above in respect *inter alia* of the right of EEA workers to move freely and the economic operators to exercise their freedom to provide services, as the case may be. It is equally important that such questions are referred to the Court under the procedure provided for in Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority if the legal situation lacks clarity (Case E-18/11 *Irish Bank*, judgment of 28 September 2012, not yet reported, paragraphs 57 and 58). Thereby unnecessary mistakes in the interpretation and application of EEA law are avoided and the coherence and reciprocity in relation to rights of EEA citizens, including EFTA nationals, in the EU are ensured (see, in this respect, *Irish Bank*, cited above, paragraph 122, and Case E-14/11 *DB Schenker and Others*, judgment of 21 December 2012, not yet reported, paragraph 118).

61 Returning to the Regulation, the Court recalls that Article 13(2)(a) in Title II of the Regulation lays down the general rule that a worker employed in the territory of one EEA State shall be subject to the legislation of that State even if he resides in the territory of another EEA State. This applies also with regard to unemployment benefits. That arrangement stems from the objective of the

59 Selv om samordningsdirektivene på arbeidsrettens område inneholder visse forhold som må innlemmes i nasjonal rettsorden (se, for sammenligning, sak C-341/02 *Kommisjonen* mot *Tyskland*, Sml. 2005 s. I-2733), kjennetegnes EØS-rettens arbeidsrettsregler også av at de gir EØS-statene og partene i arbeidslivet en viss skjønnsmargin i anvendelsen av dem. Denne skjønnsmargin kan gå lenger enn bare friheten til å bestemme formen og midlene for gjennomføringen etter EØS-avtalen artikkel 7 bokstav b). Dette gjelder særlig direktiver som innarbeider i EØS-retten rammeavtaler inngått mellom de europeiske arbeidslivsparter, herunder deres norske medlemmer, som rådsdirektiv 99/70/EF av 28. juni 1999 om rammeavtalen om midlertidig ansettelse inngått mellom EFF, UNICE og CEEP (EFT 1999 L 175, s. 143).

60 For at EØS-avtalen skal virke effektivt, er det ikke desto mindre viktig at EØS-statene anvender skjønnsmarginen nevnt i avsnitt 59 i samsvar med blant annet EØS-arbeidstakeres rett til fri bevegelighet og markedsdeltageres adgang til å yte tjenester. Det er like viktig at slike spørsmål forelegges for EFTA-domstolen etter fremgangsmåten fastsatt i artikkel 34 i Avtalen mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol dersom rettstilstanden er uklar (se sak E-18/11 *Irish Bank*, dom av 28. september 2012, ennå ikke i Sml., avsnittene 57 og 58). Derved unngås unødvendige feil i tolkningen og anvendelsen av EØS-retten, og man sikrer konsekvens og gjensidighet når det gjelder EØS-borgernes, herunder EFTA-borgernes, rettigheter i EU (se *Irish Bank*, som omtalt over, avsnitt 122, og E-14/11 *DB Schenker m.fl.*, dom av 21. desember 2012, ennå ikke i Sml., avsnitt 118).

61 For å vende tilbake til forordningen, minner EFTA-domstolen om at artikkel 13 nr. 2 bokstav a) i avdeling II i forordningen fastsetter som en generell regel at en arbeidstaker som er ansatt på en EØS-stats territorium, skal omfattes av denne stats lovgivning selv om vedkommende er bosatt på en annen EØS-stats territorium. Dette gjelder også ytelser ved arbeidsledighet. Ordningen er et utslag

Regulation, set out in recital 9 of its preamble, to guarantee all workers who are EEA nationals, and who move within the EEA, equal treatment under the various national legislations and the enjoyment of social security benefits irrespective of the place of their employment or of their residence (see Case E-3/05 *ESA* v *Norway*, cited above, paragraph 47).

62 However, Article 71(1)(b) of the Regulation lays down specific provisions for unemployed persons other than frontier workers who, during their last employment, resided in an EEA State other than that in which they had been employed.

63 These provisions are intended to guarantee that migrant workers receive unemployment benefit under the most favourable conditions for seeking new employment (see, to that effect, Case 227/81 *Aubin* [1982] ECR 1991, paragraph 19, and Case C-102/91 *Knoch* [1992] ECR I-4341 paragraph 14). Thus, by virtue of Article 71(1)(b) of the Regulation, workers other than frontier workers who are wholly unemployed are entitled to make a choice between the benefits offered by the EEA State in which they were last employed (see Article 71(1)(b)(i) of the Regulation) and those offered by the EEA State in which they reside (see Article 71(1)(b)(ii) of the Regulation). They exercise that choice by making themselves available either to the relevant employment services in the State of last employment or the State of residence, as the case may be (see, for comparison, Case 1/85 *Miethe* [1986] ECR 1837, paragraph 9).

64 The Norwegian State has argued that it follows from the wording of Article 71(1)(b)(ii) of the Regulation that a choice to be subject to the legislation of the State of residence, and only this State, is made simply by returning to that State. However, it follows from case law that the phrase "who returns to that territory" in Article 71(1)(b)(ii) merely implies that the concept of residence does not necessarily exclude non-habitual residence in another EEA State (see, for comparison, Case 76/76 *Di Paolo* [1977] ECR 315, paragraph 21). Thus, in order to be subject to the legislation of the State of residence, the unemployed person must make himself available to the employment services in that State.

av forordningens formål, som er beskrevet i punkt 9 i fortalen, og som er å sikre alle arbeidstakere som er EØS-borgere, og som flytter innenfor EØS-området, likebehandling under de ulike nasjonale lovgivninger og rett til trygdeytelser uansett hvor de har sitt arbeidssted eller bosted (se sak E-3/05 *ESA* mot *Norge*, som omtalt over, avsnitt 47).

62 Artikkel 71 nr. 1 bokstav b) i forordningen fastsetter imidlertid spesifikke bestemmelser for arbeidsledige som ikke er grensearbeidere, og som under sitt siste arbeidsforhold var bosatt i en annen EØS-stat enn den de var ansatt i.

63 Disse bestemmelser er ment å sikre at vandrearbeidere skal motta ytelser ved arbeidsledighet på de vilkår som er gunstigst for å søke nytt arbeid (se sak 227/81 *Aubin*, Sml. 1982 s. 1991, avsnitt 19, og sak C-102/91 *Knoch*, Sml. 1992 s. I-4341, avsnitt 14). Etter artikkel 71 nr. 1 bokstav b) i forordningen har altså arbeidstakere som ikke er grensearbeidere, ved full arbeidsledighet anledning til å velge mellom de ytelser som tilbys av den EØS-stat der de hadde sitt siste arbeid (se artikkel 71 nr. 1 bokstav b) i)), og de ytelser som tilbys av den EØS-stat de er bosatt i (se artikkel 71 nr. 1 bokstav b) ii)). De treffer dette valg når de stiller seg til rådighet for arbeidsformidlingen enten i siste arbeidsstat eller i bostedsstaten, alt etter som (se, for sammenligning, sak 1/85 *Miethe*, Sml. 1986 s. 1837, avsnitt 9).

64 Den norske stat har anført at det følger av ordlyden i artikkel 71 nr. 1 bokstav b) ii) i forordningen at valget om å underkaste seg lovgivningen i bostedsstaten, og bare denne, treffes ved simpelthen å reise tilbake til denne stat. Imidlertid følger det av rettspraksis at formuleringen "som reiser tilbake til denne statens territorium" i artikkel 71 nr. 1 bokstav b) ii) ikke innebærer annet enn at begrepet bosted ikke nødvendigvis utelukker et midlertidig bosted i en annen EØS-stat (se, for sammenligning, sak 76/76 *Di Paolo*, Sml. 1977 s. 315, avsnitt 21). For å kunne være underkastet lovgivningen i bostedsstaten må den arbeidsledige følgelig stille seg til rådighet for arbeidsformidlingen i denne stat.

65 Article 71(1)(b)(ii) of the Regulation provides that an employed person, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there. This choice – being an exception for wholly unemployed persons from the main rule of Article 71(1)(b)(i) of the Regulation – enables such persons to be accorded the best conditions for finding new employment in the State of residence. It is true that Article 71(1)(b)(ii) thus allows wholly unemployed persons to receive unemployment benefits from an EEA State in which they had not paid contributions during their last employment. However, that is a consequence intended by the legislature, meant to ensure that unemployed persons were given the best chance of finding new employment (see, for comparison, Case C-454/93 *van Gestel* [1995] ECR I-1707, paragraphs 22 and 26).

66 The sole purpose of Article 71(1)(b) of the Regulation is to determine the national legislation applicable to persons who have worked in an EEA State, without being frontier workers, and become unemployed. As such, and as noted in paragraph 55 above, the provision is not intended to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme. It is for the legislation of each EEA State to lay down those conditions.

67 However, as set out in paragraph 55 above, although EEA States retain the power to organise the conditions of affiliation to their social security schemes, they must none the less, when exercising that power, comply with EEA law. In particular, those conditions may not have the effect of excluding from the scope of the legislation at issue persons to whom that legislation applies pursuant to the Regulation (see, to that effect, Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 20, and *Salemink*, cited above, paragraph 40).

65 Artikkel 71 nr. 1 bokstav b) ii) i forordningen fastsetter at arbeidstakere unntatt grensearbeidere som er helt arbeidsledige, og som stiller seg til rådighet for arbeidsformidlingen i den medlemsstat på hvis territorium de er bosatt, eller som reiser tilbake til denne stats territorium, skal motta ytelser etter bestemmelsene i denne stats lovgivning som om de sist hadde utført arbeid der. Dette valg – som er et unntak for helt arbeidsledige personer fra hovedregelen i artikkel 71 nr. 1 bokstav b) i) – muliggjør at slike personer gis de beste forutsetninger for å søke nytt arbeid i bostedsstaten. Det er rett at artikkel 71 nr. 1 bokstav b) ii) dermed gir helt arbeidsledige personer mulighet til å få dagpenger fra en EØS-stat som de under sitt seneste arbeidsforhold ikke har betalt trygdeavgift til. Men dette er en ønsket konsekvens fra lovgivers side og er ment å sikre at arbeidsledige personer gis de beste muligheter til å finne nytt arbeid (se, for sammenligning, sak C-454/93 *van Gestel*, Sml. 1995 s. I-1707, avsnittene 22 og 26).

66 Det eneste formål med artikkel 71 nr. 1 bokstav b) i forordningen er å fastslå hvilken nasjonal lovgivning som skal få anvendelse på personer som ikke er grensearbeidere, og som har arbeidet i en EØS-stat og så blir arbeidsledige. Som nevnt i avsnitt 55 over, er ikke bestemmelsen i seg selv ment å fastsette vilkår som skaper en rett eller plikt til å bli medlem i en trygdeordning eller en bestemt del av en slik ordning. Slike vilkår skal fastsettes i lovgivningen i den enkelte EØS-stat.

67 Men som nevnt i avsnitt 55 over, må EØS-statene, selv om de beholder myndigheten til å fastsette vilkårene for medlemskap i sine trygdeordninger, likevel overholde EØS-retten når de utøver denne myndighet. Særlig kan vilkårene ikke ha den konsekvens at de utelukker fra den aktuelle lovgivnings virkeområde personer som etter forordningen er underlagt denne lovgivning (se for sammenligning sak C-2/89 *Kits van Heijningen*, Sml. 1990 s. I-1755, avsnitt 20, og *Salemink*, som omtalt over, avsnitt 40).

68 Article 71(1)(b)(i) of the Regulation expressly provides that a person who is partially, intermittently or wholly unemployed and who remains available to the employment services in the territory of the State of his last employment shall receive benefits in accordance with the provisions of the legislation of that State as though he were residing in its territory. Accordingly, since it is a precondition for the application of that provision that the unemployed person resides in the territory of an EEA State other than the State of last employment, the legislation of the latter State cannot have the direct or indirect effect of requiring the person concerned to reside in that State as a precondition for benefits (see, for comparison, Case C-308/94 *Naruschawicus* [1996] ECR I-207, paragraphs 25 and 26, and, with regard to the general provision in Article 13(2)(a) of the Regulation, *Kits van Heijningen*, cited above, paragraph 21).

69 Information submitted to the Court makes it clear that the condition of stay under Section 4-2 of the National Insurance Act amounts to a condition of actual presence for any entitlement to the payment of unemployment benefits in Norway. Even though this condition will often overlap with being resident in the country, residents going abroad will also be disqualified for unemployment benefits during periods they are not present on Norwegian territory. Therefore, the condition of stay is not necessarily synonymous with the meaning of the term "residing" for the purposes of subparagraph (i) of Article 71(1)(b) of the Regulation or the term "resides" for the purposes of subparagraph (ii) of the same provision.

70 None the less, according to case law, a person remains available to the employment services in the territory of the State of last employment within the meaning of Article 71(1)(b)(i) of the Regulation if he registers with those services as a person seeking employment and undergoes the checks by the competent services of that State (see, to that effect, *Naruschawicus*, cited above, paragraph 27 and case law cited). It must therefore be held that Article 71(1)(b)(i) precludes a condition as to availability laid down in the legislation of the EEA State of last employment which

68 Artikkel 71 nr. 1 bokstav b) i) i forordningen fastsetter uttrykkelig at en person som er delvis, periodevis eller helt arbeidsledig, og som fortsatt står til rådighet for arbeidsformidlingen på siste arbeidsstats territorium, skal motta ytelser etter bestemmelsene i denne stats lovgivning som om han var bosatt på dens territorium. Ettersom det er en forutsetning for at denne bestemmelse skal komme til anvendelse, at den arbeidsledige er bosatt på territoriet til en annen EØS-stat enn siste arbeidsstat, kan lovgivningen i sistnevnte stat følgelig ikke ha den direkte eller indirekte konsekvens at vedkommende må være bosatt i denne stat for å kunne motta dagpenger (se, for sammenligning, sak C-308/94 *Naruschawicus*, Sml. 1996 s. I-207, avsnittene 25 og 26, og hva angår den generelle bestemmelse i artikkel 13 nr. 2 bokstav a) i forordningen, *Kits van Heijningen*, som omtalt over, avsnitt 21).

69 På grunnlag av opplysninger forelagt EFTA-domstolen, er det klart at vilkåret om opphold i folketrygdloven § 4-2 innebærer et krav om faktisk tilstedeværelse for å ha rett til utbetaling av dagpenger i Norge. Selv om dette vilkår ofte vil overlappe kravet om å være bosatt i landet, vil personer som er bosatt der og som drar til utlandet, heller ikke ha rett til dagpenger i perioder der de ikke er til stede på norsk territorium. Derfor vil vilkåret om opphold ikke nødvendigvis være synonymt med begrepet "bosatt" etter punkt i) i artikkel 71 nr. 1 bokstav b) i forordningen eller "bosatt" etter punkt ii) i samme bestemmelse.

70 Ifølge rettspraksis vil en person likevel fortsatt stå til rådighet for arbeidsformidlingen på territoriet til siste arbeidsstat etter artikkel 71 nr. 1 bokstav b) i) i forordningen dersom han melder seg der som arbeidssøkende og underkaster seg kompetente tjenesters kontroll i denne stat (se *Naruschawicus*, som omtalt over, avsnitt 27, og den rettspraksis som det vises til der). Artikkel 71 nr. 1 bokstav b) i) må derfor sies å være til hinder for at lovgivningen i siste EØS-arbeidsstat fastsetter et krav om å være

entails that an unemployed worker residing in another EEA State must be physically present in the competent State.

71 The Norwegian State submits that the condition of actual stay under Section 4-2 of the National Insurance Act applies irrespective of whether the unemployed person is "available to the employment service" in the competent State. The condition is a substantive and general one and must be fulfilled in order to receive unemployment benefits in Norway.

72 However, it is incompatible with Article 71(1)(b) of the Regulation for the national legislation of the State of last employment to impose on unemployed persons other than frontier workers a requirement of actual presence in that State for entitlement to unemployment benefits. The choice of the unemployed person pursuant to Article 71(1)(b) of the Regulation is intended to facilitate that migrant workers receive unemployment benefit under the most favourable conditions for seeking new employment. With a requirement of actual presence that choice is seriously compromised and rendered nugatory, as it will deter the person concerned from returning to his State of residence. Moreover, such a requirement would make it unduly difficult for an unemployed person to seek employment opportunities in another EEA State. In this context, a requirement of actual presence for entitlement to unemployment benefits is in fact more onerous than a residence requirement.

73 Furthermore, the general aim of the Regulation to contribute to the establishment of the greatest possible freedom of movement for migrant workers would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed them by the legislation of one EEA State, especially where those advantages represent a counterpart of contributions paid (see, to that effect, for example, Case 284/84 *Spruyt* [1986] ECR 685, paragraphs 18 and 19).

74 Finally, legislation such as that at issue in the main proceedings, which makes acquisition of the right to unemployment benefits

til rådighet som innebærer at en arbeidsledig person bosatt i en annen EØS-stat, må være fysisk til stede i den kompetente stat.

71 Den norske stat gjør gjeldende at vilkåret om faktisk opphold etter folketrygdloven § 4-2 kommer til anvendelse uten hensyn til om den arbeidsledige står "til rådighet for arbeidsformidlingen" i den kompetente stat. Vilkåret er grunnleggende og allment og må oppfylles for å kunne få dagpenger i Norge.

72 Imidlertid vil det være i strid med artikkel 71 nr. 1 bokstav b) i forordningen om nasjonal lovgivning i siste arbeidsstat krever at arbeidsledige personer som ikke er grensearbeidere, må være faktisk til stede i denne stat for å ha rett på ytelser ved arbeidsledighet. Valget den arbeidsledige har etter artikkel 71 nr. 1 bokstav b) i forordningen er ment å sikre ham de vilkår som er gunstigst for å søke nytt arbeid. Et krav om faktisk tilstedeværelse gjør at dette valg blir alvorlig svekket og uten praktisk betydning, ettersom det vil være til hinder for at vedkommende reiser tilbake til sin bostedsstat. Videre ville et slikt krav gjøre det urimelig vanskelig for den arbeidsledige å søke arbeid i en annen EØS-stat. I denne sammenheng vil et krav om faktisk tilstedeværelse for å ha rett til ytelser ved arbeidsledighet være mer byrdefullt enn et bostedskrav.

73 Dessuten ville forordningens overordnede mål om å bidra til størst mulig bevegelsesfrihet for vandrearbeidere ikke kunne nås dersom arbeidstakere skulle miste trygderettigheter de er sikret etter lovgivningen i én EØS-stat som en følge av at de utøver sin rett til fri bevegelighet, spesielt dersom disse rettigheter representerer en motytelse for innbetalte trygdeavgifter (se for eksempel sak 284/84 *Spruyt*, Sml. 1986 s. 685, avsnitt 18 og 19).

74 Endelig vil en slik lovgivning som er hovedsakens gjenstand, som gjør retten til ytelser ved arbeidsledighet betinget av

subject to actual presence is likely, by its very nature, to operate to a particular disadvantage for unemployed workers residing outside the territory of Norway.

75 In light of this and having regard to the first variation on the main question of the national court, it cannot be of relevance to the answer to the main question whether the unemployed person lives in a country near the State of last employment, so that it is possible in practice for that person to appear at the employment office in that State even if he does not stay there. Such an interpretation is not supported by the provisions of the Regulation. Moreover, it could affect the predictability and effectiveness of the application of the coordination rules of the Regulation negatively and disproportionately.

76 With regard to the second variation on the main question, the Norwegian State argues that, by applying for unemployment benefits in Sweden in February 2009, after his application for unemployment benefits in Norway was turned down in January 2009, the defendant in the main proceedings effectively has opted to be subject to the system of unemployment benefits in Sweden, as the EEA State in which he resides.

77 The Court notes that it appears from the case file that the aim of the benefit at issue in the main proceedings is essentially to replace the remuneration lost by reason of unemployment and thereby provide for the maintenance of the unemployed person.

78 Therefore, the interpretation advocated by the Norwegian State cannot be maintained. Such an interpretation would effectively entail that an applicant who, following a rejection of his application for unemployment benefits in the State of last employment, has been forced to seek unemployment benefits in his State of residence in order to secure a means of subsistence, would have no choice as to where he seeks his unemployment benefits.

79 The Norwegian State's interpretation would also run contrary to the aim of Article 71(1)(b) of the Regulation, which is, as the Court has observed in paragraph 63 above, to guarantee

faktisk tilstedeværelse, etter sin art være til spesiell ulempe for arbeidsledige personer som er bosatt utenfor Norges territorium.

75 Når det gjelder det første underspørsmål den nasjonale domstol har stilt, kan det etter det ovenstående ikke være av betydning for svaret på hovedspørsmålet om den arbeidsledige bor i et land i nærheten av siste arbeidsstat slik at det er praktisk mulig for vedkommende å møte ved arbeidsformidlingen i denne stat selv om vedkommende ikke har opphold der. En slik tolkning har ikke støtte i forordningens bestemmelser. Videre ville en slik tolkning kunne få en negativ og uforholdsmessig virkning på forutsigbarheten og effektiviteten i anvendelsen av samordningsreglene i forordningen.

76 Når det gjelder det annet underspørsmål, anfører den norske stat at saksøkte i saken for den nasjonale domstol, ved å søke om dagpenger i Sverige i februar 2009 etter at hans søknad om dagpenger i Norge ble avslått i januar 2009, i realiteten valgte å underkaste seg ordningen for ytelser ved arbeidsledighet i Sverige, som den EØS-stat han er bosatt i.

77 EFTA-domstolen bemerker at det fremgår av sakens dokumenter at formålet med ytelsen saken gjelder, hovedsakelig er å kompensere for inntektstap som følge av arbeidsledighet og derved gi den arbeidsledige midler til livsopphold.

78 Derfor kan den tolkning den norske stat har tatt til orde for, ikke legges til grunn. En slik tolkning ville i realiteten innebære at en person som etter å ha fått avslag på sin søknad om dagpenger i siste arbeidsstat og som tvinges til å søke ytelser ved arbeidsledighet i sin bostedsstat for å sikre seg midler til livsopphold, ikke vil ha noe valg med hensyn til hvor han kan søke ytelser ved arbeidsledighet.

79 Den norske stats tolkning ville også være i strid med formålet med artikkel 71 nr. 1 bokstav b) i forordningen, som er – som EFTA-domstolen har bemerket i avsnitt 63 over – å sikre

unemployment benefits to migrant workers under the most favourable conditions for seeking new employment, and to enable the workers to make a choice in that respect. That aim would not be attained if, after having had an application for unemployment benefits in the EEA State of last employment turned down, the person concerned were deprived of all right to benefits in the same State solely as a result of subsequently applying for unemployment in the State of residence. Indeed, the first application for unemployment benefits made by an applicant, such as the defendant in the main proceedings, may be generally presumed to constitute his choice as to where to receive those benefits pursuant to Article 71(1)(b) of the Regulation.

80 Moreover, pursuant to Article 71(1)(b)(ii) of the Regulation, where a wholly unemployed person receives benefits in accordance with the legislation of the State of residence and has become entitled to benefits at the expense of the competent State, receipt of benefits under the legislation of the State of residence shall be suspended (see also in this respect Article 69 of the Regulation). This provision thus presupposes that a person may remain entitled to unemployment benefits in the competent State even where he has received unemployment benefits under the legislation of the State of residence.

81 It must be underlined, however, that an unemployed person can neither aggregate the amounts of unemployment benefits from the two States, nor, if he is available solely to the employment services in the territory of the State of residence, claim unemployment benefits from the State of last employment (compare *Aubin*, paragraph 19, and *van Gestel*, paragraph 23, both cited above).

82 Therefore, the answer to the question of Borgarting lagmannsrett must be that Article 71(1)(b)(i) of Regulation No 1408/71 precludes a provision of national law pursuant to which entitlement to payment of unemployment benefits is conditional on actual presence in the EEA State concerned. Such a provision may not be relied upon against the persons referred to in Article 71(1)(b)(i) of that regulation. It is not relevant for the answer to

vandrearbeidere ytelser ved arbeidsledighet på de vilkår som er gunstigst for å søke nytt arbeid, og å gi arbeidstakerne mulighet til å treffe et valg i den anledning. Dette mål vil ikke kunne nås dersom vedkommende, etter å ha fått avslag på sin søknad om ytelser ved arbeidsledighet i siste arbeidsstat, var fratatt enhver rettighet til ytelser i samme stat bare fordi han senere hadde søkt om dagpenger i bostedsstaten. Faktisk kan den første søknad om dagpenger som en arbeidsledig fremmer, slik saksøkte i hovedsaken gjorde, generelt antas å utgjøre hans valg med hensyn til hvor han ønsker å motta disse ytelser etter artikkel 71 nr. 1 bokstav b) i forordningen.

80 Etter artikkel 71 nr. 1 bokstav b) ii) i forordningen skal dessuten ytelser som en helt arbeidsledig person mottar etter lovgivningen i bostedsstaten, suspenderes dersom han har fått rett til ytelser fra den kompetente stat (se i denne sammenheng også artikkel 69 i forordningen). Denne bestemmelse forutsetter dermed at en person kan beholde sin rett til ytelser ved arbeidsledighet i den kompetente stat selv om han har mottatt ytelser etter lovgivningen i bostedsstaten.

81 Det må imidlertid understrekes at en arbeidsledig person verken kan motta dagpenger fra begge stater samtidig eller, dersom han bare står til rådighet for arbeidsformidlingen på territoriet til bostedsstaten, kreve dagpenger fra siste arbeidsstat (se, for sammenligning, *Aubin*, avsnitt 19, og *van Gestel*, avsnitt 23, begge som omtalt over).

82 Derfor må svaret på spørsmålet fra Borgarting lagmannsrett være at artikkel 71 nr. 1 bokstav b) i) i forordning nr. 1408/71 er til hinder for en bestemmelse i nasjonal lovgivning som setter faktisk tilstedeværelse i den berørte EØS-stat som vilkår for utbetaling av ytelser ved arbeidsledighet. En slik bestemmelse kan ikke anvendes overfor personene nevnt i artikkel 71 nr. 1 bokstav b) i) i forordningen. Det er uten betydning for svaret på spørsmålet om

this question whether the unemployed person lives in a country near the State of last employment. Moreover, in circumstances such as those of the defendant in the main proceedings, it is of no consequence for the application of Article 71(1)(b)(i) that an unemployed person registers as a job seeker and applies for unemployment benefits in his State of residence.

V COSTS

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

den arbeidsledige bor i et land i nærheten av siste arbeidsstat. I et tilfelle som saksøkte i hovedsaken vil det videre være uten betydning for anvendelsen av artikkel 71 nr. 1 bokstav b) i) om den arbeidsledige melder seg som arbeidssøkende og søker om dagpenger i bostedsstaten.

V SAKSOMKOSTNINGER

83 Omkostninger som er påløpt for ESA og Kommisjonen, som har inngitt innlegg for EFTA-domstolen, kan ikke kreves dekket. Ettersom foreleggelsen for EFTA-domstolen utgjør ledd i behandlingen av saken som står for Borgarting lagmannsrett, ligger det til lagmannsretten å ta en eventuell avgjørelse om saksomkostninger for partene.

On those grounds,

THE COURT

in answer to the question referred to it by Borgarting lagmannsrett hereby gives the following Advisory Opinion:

1. **Article 71(1)(b)(i) of Regulation No 1408/71 precludes a provision of national law pursuant to which entitlement to payment of unemployment benefits is conditional on actual presence in the EEA State concerned. Such a provision may not be relied upon against the persons referred to in Article 71(1)(b)(i) of that regulation.**

    a. **It is not relevant for the answer to this question whether the unemployed person lives in a country near the State of last employment.**

    b. **Moreover, in circumstances such as those of the defendant in the main proceedings, it is of no consequence for the application of Article 71(1)(b)(i) that an unemployed person registers as a job seeker and applies for unemployment benefits in his State of residence.**

Per Christiansen Páll Hreinsson Martin Ospelt

Delivered in open court in Luxembourg on 20 March 2013.

Gunnar Selvik — Registrar

Per Christiansen — Acting President

På dette grunnlag avgir

EFTA-DOMSTOLEN

som svar på spørsmålet forelagt den av Borgarting lagmannsrett, følgende rådgivende uttalelse:

1. **Artikkel 71 nr. 1 bokstav b) i) i forordning nr. 1408/71 er til hinder for en bestemmelse i nasjonal lovgivning som setter faktisk tilstedeværelse i den berørte EØS-stat som vilkår for utbetaling av ytelser ved arbeidsledighet. En slik bestemmelse kan ikke anvendes overfor personene nevnt i artikkel 71 nr. 1 bokstav b) i) i forordningen.**

   a. **Det er uten betydning for svaret på spørsmålet om den arbeidsledige bor i et land i nærheten av siste arbeidsstat.**

   b. **I et tilfelle som saksøktes i hovedsaken er det videre uten betydning for anvendelsen av artikkel 71 nr. 1 bokstav b) i) om den arbeidsledige melder seg som arbeidssøkende og søker om dagpenger i bostedsstaten.**

Per Christiansen Páll Hreinsson Martin Ospelt

Avsagt i åpen rett i Luxembourg den 20. mars 2013.

Gunnar Selvik
Justissekretær

Per Christiansen
Fungerende president

REPORT FOR THE HEARING

in Case E-3/12

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 from Borgarting lagmannsrett ("Court of Appeal") in a case between

the Norwegian State, represented by the Ministry of Labour,

and

Stig Arne Jonsson

concerning the rules on the free movement of workers within the EEA.

I FACTS AND PROCEDURE

1. Stig Arne Jonsson ("the Defendant") is a Swedish national living in Sweden. From 1983 he has frequently worked in Norway, where he also held his last job, at the Norwegian company Leonhard Nilsen & Sønner AS on Svalbard, before he became unemployed in November 2008. In this job, Mr Jonsson stayed in Norway during work periods and normally travelled back home to Sweden during off-duty periods. After becoming unemployed, he returned to his home in Sweden and has not had any actual residence in Norway since.

2. Following the termination of his employment relationship, Mr Jonsson applied for unemployment benefits in Norway in January 2009 as a wholly unemployed person.

3. On 21 January 2009, the EEA Department of the Norwegian Labour and Welfare Administration ("NAV") rejected the claim for unemployment benefits on the grounds that the Defendant did not reside in Norway and, therefore, having regard to Article 71 of Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416, "the Social Security Regulation" or the "Regulation"), failed to meet the conditions for entitlement to unemployment benefits.

RETTSMØTERAPPORT

i sak E-3/12

ANMODNING til EFTA-domstolen i henhold til artikkel 34 i Avtalen mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol fra Borgarting lagmannsrett i en sak mellom

Staten v/Arbeidsdepartementet,

og

Stig Arne Jonsson

om reglene for fri bevegelighet for arbeidstakere i EØS-området.

I FAKTUM OG SAKSGANG

1. Stig Arne Jonsson ("saksøkte") er svensk statsborger og bosatt i Sverige. Siden 1983 har han ofte påtatt seg arbeidsoppdrag i Norge, hvor han også hadde sitt siste arbeid, for det norske selskap Leonhard Nilsen & Sønner AS på Svalbard, før han ble arbeidsledig i november 2008. Under dette arbeidsforhold oppholdt Jonsson seg i Norge i arbeidsperiodene, mens han normalt reiste hjem til Sverige i friperiodene. Etter han ble arbeidsledig, reiste han hjem til Sverige og har siden ikke hatt faktisk opphold i Norge.

2. Etter ansettelsesforholdets slutt fremmet Jonsson i januar 2009 krav om dagpenger i Norge som helt arbeidsledig.

3. Den 21. januar 2009 fattet NAV EØS-forvaltning ("NAV") vedtak hvor krav om dagpenger ble avslått med den begrunnelse at saksøker ikke oppholdt seg i Norge og derfor ikke oppfylte vilkårene for rett til dagpenger ved arbeidsledighet, jf. artikkel 71 i rådsforordning (EØF) nr. 1408/71 om anvendelse av trygdeordninger på arbeidstakere, selvstendig næringsdrivende og deres familiemedlemmer som flytter innenfor Fellesskapet (EFT, engelsk spesialutgave 1971 (II), s. 416, "trygdeforordningen" eller "forordningen").

4. Mr Jonsson then filed an administrative appeal against the decision. However, by a decision of 22 May 2009, the appellate body upheld the rejection of his claim. While his appeal case was being processed, he also applied for unemployment benefits in Sweden and registered with the employment service there.

5. Mr Jonsson then appealed against the decision of the appellate body to the Norwegian National Insurance Court, which, in its decision of 1 June 2010, ruled in his favour. The National Insurance Court concluded that the requirement of residence in Norway could not be applied in the case of the Defendant because, in its view, that requirement was incompatible with Article 71 of the Social Security Regulation.

6. In line with the National Insurance Court's ruling, Mr Jonsson received unemployment benefits from Norway from 1 January 2009 until 12 December 2009.

7. Following the National Insurance Court's decision, the Norwegian authorities requested further information from Mr Jonsson. It then became apparent that he had registered with the employment service in Sweden in February 2009 and applied for unemployment benefits there as well. By a decision of the Swedish Construction Workers' Unemployment Insurance Fund of 31 March 2009, Mr Jonsson was granted unemployment benefits in Sweden starting on 2 March 2009. However, the benefit amount paid in Sweden was much lower than unemployment benefits from Norway would have been on account of the fact, inter alia, that Mr Jonsson had not been a member of the relevant unemployment insurance fund.

8. The Norwegian State subsequently brought an action before the Court of Appeal challenging the National Insurance Court's ruling in which it seeks to have the ruling of the National Insurance Court set aside. Mr Jonsson is seeking an order dismissing the State's action.

4. Jonsson påklagde vedtaket. Klageinstansen stadfestet imidlertid avslaget på dagpenger ved vedtak av 22. mai 2009. Mens hans klagesak var til behandling, søkte han også om ytelser ved arbeidsledighet i Sverige og meldte seg ved arbeidsformidlingen der.

5. Jonsson brakte vedtaket fra ankeinstansen inn for Trygderetten, som i kjennelse av 1. juni 2010 ga saksøkte medhold. Trygderetten la til grunn at kravet om opphold i Norge ikke kunne anvendes i saksøktes tilfelle fordi det ifølge Trygderetten var uforenlig med trygdeforordningen artikkel 71.

6. I tråd med Trygderettens kjennelse mottok Jonsson dagpenger fra Norge fra 1. januar 2009 til 12. desember 2009.

7. I forbindelse med oppfølgningen av Trygderettens kjennelse anmodet norske myndigheter om ytterligere informasjon fra Jonsson. Denne informasjonen viste at Jonsson i februar 2009 hadde meldt seg ved arbeidsformidlingen i Sverige og søkt om ytelser ved arbeidsledighet også der. Ved vedtak av 31. mars 2009 fra Byggnadsarbetarnas arbetslöshetskassa var Jonsson blitt innvilget dagpenger fra og med 2. mars 2009. Beløpet som ble utbetalt i Sverige, var imidlertid langt lavere enn ytelsene ved arbeidsledighet fra Norge ville vært, bl.a. fordi saksøkte ikke hadde vært medlem i den aktuelle arbetslöshetskassa.

8. Staten brakte Trygderettens kjennelse inn for lagmannsretten, med påstand om at Trygderettens kjennelse er ugyldig. Jonsson har påstått seg frifunnet.

9. Having heard the parties' views on the substance of the questions, Borgarting lagmannsrett decided to request the Court's opinion on the following questions:

When national legislation requires, inter alia, actual stay in the State in order to be entitled to unemployment benefits, is it then compatible with Council Regulation (EEC) No 1408/71 Article 71(1)(b) to require continued stay in the competent State (the State of last employment) in order to be granted such benefits from this State, also in the case of a wholly unemployed person who, during his/her last employment, has stayed there as a "non-genuine" frontier worker?

Is it relevant to the answer to this question whether:

1. *the unemployed person lives in a country near the competent State (the State of last employment), so that it is possible in practice for that person to appear at the employment office in that State even if he/she does not stay there?*
2. *the unemployed person, after having returned to the State of residence, registers as a job seeker with the employment service and also applies for unemployment benefits in that State?*

II LEGAL BACKGROUND

EEA law

10. Paragraph 1 of Protocol 40 to the EEA Agreement on Svalbard provides:

When ratifying the EEA Agreement, the Kingdom of Norway shall have the right to exempt the territory of Svalbard from the application of the Agreement.

11. The Kingdom of Norway availed itself of this right.

9. Borgarting lagmannsrett besluttet å anmode EFTA-domstolen om en rådgivende uttalelse om følgende spørsmål:

Når det i henhold til den nasjonale lovgivningen blant annet stilles krav om faktisk opphold i landet for å få ytelser ved arbeidsledighet, er det da forenlig med rådsforordning (EØF) nr. 1408/71 art. 71 nr. 1 b) å stille vilkår om fortsatt opphold i den kompetente stat (siste arbeidsstat) for å få slike ytelser fra denne staten, også for en helt arbeidsledig person som under siste arbeid har hatt opphold her som såkalt "uekte grensearbeider"?

Har det betydning for svaret på dette spørsmålet om:

1. *Den arbeidsledige bor i et land i nærheten av den kompetente stat (siste arbeidsstat) slik at det er praktisk mulig for vedkommende å møte ved arbeidsformidlingen i denne staten selv om vedkommende ikke har opphold her?*

2. *Den arbeidsledige, etter å ha reist tilbake til sin bostedsstat, melder seg som arbeidssøkende ved arbeidsformidlingen og søker om ytelser ved arbeidsløshet også i bostedsstaten?*

II RETTSLIG BAKGRUNN

EØS-rett

10. Første ledd i protokoll 40 til EØS-avtalen om Svalbard lyder:

Kongeriket Norge skal i forbindelse med ratifikasjon av EØS-avtalen ha rett til å unnta Svalbard fra anvendelse av avtalen.

11. Dette er en rett Norge har benyttet seg av.

12. Article 1(b) of Regulation No 1408/71, which under the EEA Agreement applied in the relevant period, provides:

"frontier worker" means any employed or self-employed person who pursues his occupation in the territory of a Member State and resides in the territory of another Member State to which he returns as a rule daily or at least once a week; however, a frontier worker who is posted elsewhere in the territory of the same or another Member State by the undertaking to which he is normally attached, or who engages in the provision of services elsewhere in the territory of the same or another Member State, shall retain the status of frontier worker for a period not exceeding four months, even if he is prevented, during that period, from returning daily or at least once a week to the place where he resides;

13. Article 71(1) of Regulation No 1408/71 provides:

1. An unemployed person who was formerly employed and who, during his last employment, was residing in the territory of a Member State other than the competent State shall receive benefits in accordance with the following provisions:

(a) (i) a frontier worker who is partially or intermittently unemployed in the undertaking which employs him, shall receive benefits in accordance with the provisions of the legislation of the competent State as if he were residing in the territory of that State; these benefits shall be provided by the competent institution;

(ii) a frontier worker who is wholly unemployed shall receive benefits in accordance with the provisions of the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed, these benefits shall be provided by the institution of the place of residence at its own expense;

(b) (i) an employed person, other than a .frontier worker, who is partially, intermittently or wholly unemployed and who remains available to his employer or to the employment services in the territory of the competent State shall receive benefits in accordance with the provisions of the legislation of that State as though he were residing in its territory; these benefits shall be provided by the competent institution;

12. Artikkel 1 bokstav b) i forordning nr. 1408/71, som i henhold til EØS-avtalen gjaldt i den aktuelle periode, fastsetter:

"grensearbeider" [betyr] en arbeidstaker eller selvstendig næringsdrivende som utfører inntektsgivende arbeid på en medlemsstats territorium og er bosatt på territoriet til en annen medlemsstat som han som regel reiser tilbake til daglig eller minst en gang i uken; en grensearbeider som av foretaket han vanligvis er tilknyttet, utsendes til den samme medlemsstats eller til en annen medlemsstats territorium, eller som utfører tjenester på samme medlemsstats eller en annen medlemsstats territorium, skal likevel fortsatt anses som grensearbeider i et tidsrom som ikke må overstige fire måneder, selv om vedkommende i dette tidsrommet ikke kan reise tilbake til sitt bosted daglig eller minst en gang i uken,

13. Artikkel 71 nr. 1 i forordning nr. 1408/71 fastsetter:

1. Arbeidsløse arbeidstakere som under sitt siste arbeid var bosatt på territoriet til en annen medlemsstat enn den kompetente stat, skal motta ytelser etter følgende bestemmelser:

a) i) grensearbeidere som er delvis eller periodevis arbeidsløse i det foretaket der de er ansatt, skal motta ytelser i henhold til bestemmelsene i den kompetente stats lovgivning som om de var bosatt på denne statens territorium; ytelsene skal utbetales av den kompetente institusjon,

ii) grensearbeidere som er helt arbeidsløse, skal motta ytelser i henhold til bestemmelsene i lovgivningen i den medlemsstat på hvis territorium de er bosatt, som om de under sitt siste arbeid hadde vært omfattet av denne lovgivningen; ytelsene skal utbetales av institusjonen på bostedet for dens egen regning,

b) i) arbeidstakere unntatt grensearbeidere som er delvis, periodevis eller helt arbeidsløse, og som fortsatt er til rådighet for arbeidsgiver eller for arbeidsformidlingen på den kompetente stats territorium, skal motta ytelser i henhold til bestemmelsene i denne statens lovgivning som om de var bosatt på dens territorium; ytelsene skal utbetales av den kompetente institusjon,

(ii) an employed person, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits at its own expense. However, if such an employed person has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, he shall receive benefits under the provisions of Article 69. Receipt of benefits under the legislation of the State in which he resides shall be suspended for any period during which the unemployed person may, under the provisions of Article 69, make a claim for benefits under the legislation to which he was last subject.

14. Regulation No 1408/71 is accompanied by an implementing regulation, that is, Council Regulation (EEC) No 574/72 fixing the procedure for implementing Regulation (EEC) No 1408/71 (OJ, English Special Edition 1972 (I), p. 159, "Regulation No 574/72").

15. Article 84 of Regulation No 574/72 reads:

1. In the cases referred to in Article 71(1)(a)(ii) and in the first sentence of Article 71(1)(b)(ii) of the Regulation, the institution of the place of residence shall be considered to be the competent institution, for the purposes of implementing the provisions of Article 80 of the implementing Regulation.

2. In order to claim benefits under the provisions of Article 71(1)(b)(ii) of the Regulation, an unemployed person who was formerly employed shall submit to the institution of his place of residence, in addition to the certified statement provided for in Article 80 of the implementing Regulation, a certified statement from the institution of the Member State to whose legislation he was last subject, indicating that he has no right to benefits under Article 69 of the Regulation.

ii) arbeidstakere unntatt grensearbeidere som er helt arbeidsløse, og som stiller seg til rådighet for arbeidsformidlingen i den medlemsstat på hvis territorium de er bosatt, eller som reiser tilbake til denne statens territorium, skal motta ytelser i henhold til bestemmelsene i denne statens lovgivning som om de sist hadde utført arbeid der; ytelsene skal utbetales av institusjonen på bostedet for dens egen regning. Dersom arbeidstakeren allerede har oppnådd rett til ytelser for den kompetente institusjons regning i den medlemsstat hvis lovgivning vedkommende sist var omfattet av, skal vedkommende likevel motta ytelser i samsvar med bestemmelsene i artikkel 69. Rett til ytelser i henhold til lovgivningen i den stat på hvis territorium den arbeidsløse er bosatt, skal suspenderes for det tidsrom vedkommende i henhold til artikkel 69 kan gjøre krav på ytelser etter lovgivningen vedkommende sist var omfattet av.

14. Forordning nr. 1408/71 er ledsaget av en gjennomføringsforordning, dvs. rådsforordning (EØS) nr. 574/72 om regler for gjennomføring av forordning (EØS) nr. 1408/71 (EFT, engelsk spesialutgave 1972 (I), s. 159, "forordning nr. 574/72").

15. Artikkel 84 i forordning nr. 574/72 lyder:

1. I tilfellene omhandlet i forordningens artikkel 71 nr. 1 bokstav a) ii) og bokstav b) ii) første punktum, skal institusjonen på bostedet anses som den kompetente institusjon ved anvendelse av bestemmelsene i gjennomføringsforordningens artikkel 80.

2. For at bestemmelsene i forordningens artikkel 71 nr. 1 bokstav b) ii) skal kunne påberopes, skal en arbeidsløs arbeidstaker i tillegg til bekreftelsen omhandlet i gjennomføringsforordningens artikkel 80, fremlegge for institusjonen på bostedet en bekreftelse fra institusjonen i den medlemsstat hvis lovgivning han sist var omfattet av, som viser at han ikke har rett til ytelser etter forordningens artikkel 69.

3. For the purposes of implementing the provisions of Article 71(2) of the Regulation, the institution of the place of residence shall ask the competent institution for any information relating to the entitlements, from the latter institution, of the unemployed person who was formerly an employed person.

16. In relation to Norway, Regulation No 1408/71 was replaced from 1 June 2012 by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, (OJ 2004 L 200, p. 1), as amended by Regulation (EC) No 988/2009 (OJ 2009 L 284, p. 43), Regulation (EU) No 1244/2010 (OJ 2010 L 338, p. 35) and Regulation (EU) No 465/2012 (OJ 2012 L 149, p. 4) ("Regulation No 883/2004").

National law

17. It is a general condition for entitlement to benefits pursuant to the Norwegian national insurance system that the claimant is a member of the Norwegian National Insurance Scheme. Membership is granted, inter alia, to individuals who reside or work lawfully in Norway, see Sections 2-1 and 2-2 of the Norwegian National Insurance Act (Act relating to National Insurance of 28 February 1997 No 19). For employment on Svalbard, a special provision is set out in Section 2-3. As a result of that provision, during his employment on Svalbard as an employee of a Norwegian company, the Defendant was a member of the National Insurance Scheme.

18. In addition, it is a condition for entitlement to unemployment benefit that the unemployed person resides in Norway. The provision reads as follows:

Section 4-2. Residence in Norway

To be entitled to unemployment benefit, the member must reside in Norway.

The Ministry may issue regulations pertaining to exemption from the requirement for residence in Norway.

3. Ved anvendelse av bestemmelsene i forordningens artikkel 71 nr. 2, skal institusjonen på bostedet kunne be den kompetente institusjon om alle opplysninger om de rettigheter den arbeidsløse arbeidstakeren har overfor sistnevnte institusjon.

16. For Norges vedkommende ble forordning nr. 1408/71 den 1. juni 2012 erstattet med Europaparlaments- og rådsforordning (EF) nr. 883/2004 av 29. april 2004 om koordinering av trygdeordninger (EUT 2004 L 200, s. 1), som endret ved forordning (EF) nr. 988/2009 (EUT 2009 L 284, s. 43), forordning (EU) nr. 1244/2010 (EUT 2010 L 338, s. 35) og forordning (EU) nr. 465/2012 (EUT 2012 L 149, s. 4) ("forordning nr. 883/2004").

Nasjonal rett

17. Det er et generelt vilkår for å ha rett til ytelser etter det norske trygdesystem at søkeren er medlem i folketrygden. Medlemskap får blant annet de som enten bor eller arbeider lovlig i Norge, jf. folketrygdloven (lov 28. februar 1997 nr. 19 om folketrygd) §§ 2-1 og 2-2. For arbeid på Svalbard er det gitt en særregel i § 2-3 som medfører at saksøkte var medlem i folketrygden som ansatt i et norsk selskap.

18. I tillegg er det et vilkår for å ha rett til dagpenger at den arbeidsledige har opphold i Norge. Bestemmelsen lyder som følger:

§ 4-2. Opphold i Norge

For å ha rett til dagpenger må medlemmet oppholde seg i Norge.

Departementet kan gi forskrifter om unntak fra kravet om opphold i Norge.

19. This is a general requirement of actual residence in Norway that applies to both Norwegian and foreign nationals.

20. Section 4-5 first paragraph and Section 4-8 of the National Insurance Act read as follows:

Section 4-5. Genuine job seekers

To be entitled to unemployment benefits, the member must be a genuine job seeker. By genuine job seeker is meant a person who is able to work, and willing to

a) take any type of employment that is paid in accordance with a collective wage agreement or common practice,

b) take employment anywhere in Norway,

c) take employment regardless of whether it is full-time or part-time,

d) to participate in labour market schemes.

Section 4-8. Duty to report and appear in person

In order to be entitled to unemployment benefit, the member must register as a job seeker with the Norwegian Labour and Welfare Administration.

The member must report every two weeks (the reporting period). The Norwegian Labour and Welfare Administration decides how such reporting shall take place.

...

21. Article 4 of the Nordic Convention on Social Security of 18 August 2003 contains a specific clause on the application of the Social Security Regulation which reads as follows:

Article 4 Extended application of the Regulation

Unless it otherwise follows from this Convention, the application of the Regulation and the Implementing Regulation shall be extended to include all persons covered by this Convention who reside in a Nordic country.

22. The Defendant was subject to Norwegian national insurance law when he worked on Svalbard and resided in another Nordic country (Sweden). Consequently, pursuant to the Nordic Convention, the provisions of the Social Security Regulation are applicable to the situation that arose in this case.

19. Dette er et generelt krav om faktisk opphold i Norge som får anvendelse for både norske og utenlandske statsborgere.

20. Folketrygdloven § 4-5 første ledd og § 4-8 lyder:

§ 4-5. Reelle arbeidssøkere

For å ha rett til dagpenger må medlemmet være reell arbeidssøker. Som reell arbeidssøker regnes den som er arbeidsfør, og er villig til

a) å ta ethvert arbeid som er lønnet etter tariff eller sedvane,

b) å ta arbeid hvor som helst i Norge,

c) å ta arbeid uavhengig av om det er på heltid eller deltid,

d) å delta på arbeidsmarkedstiltak.

§ 4-8. Meldeplikt og møteplikt

For å ha rett til dagpenger må medlemmet melde seg som arbeidssøker til Arbeids- og velferdsetaten.

Medlemmet må melde seg hver fjortende dag (meldeperioden). Arbeids- og velferdsetaten bestemmer hvordan melding skal skje.

...

21. Artikkel 4 i Nordisk konvensj`on om trygd av 18. august 2003 inneholder en egen bestemmelse om anvendelsen av trygdeforordningen, som lyder som følger:

Artikkel 4 Utvidet anvendelse av forordningen

Dersom ikke annet følger av denne konvensjonen, utvides anvendelsen av forordningen og gjennomføringsforordningen til alle personer som omfattes av denne konvensjon og som er bosatt i et nordisk land.

22. Saksøkte var underlagt norsk trygdelovgivning da han arbeidet på Svalbard, og var bosatt i et annet nordisk land (Sverige). Gjennom den nordiske konvensjon får dermed reglene i trygdeforordningen anvendelse i den situasjon som oppstod i saken.

III WRITTEN OBSERVATIONS

23. 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 Norwegian State ("the Plaintiff"), represented by Ketil Bøe Moen, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent;
- the Defendant, represented Lars Edvard Landsverk, Advocate at the law firm Ness Lundin, Oslo;
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Maria Moustakali, Temporary Officer, Department of Legal and Executive Affairs, acting as Agents;
- the European Commission ("the Commission"), represented by Julie Samnadda and Viktor Kreuschitz, members of its Legal Service, acting as Agents.

IV THE QUESTION

The Plaintiff

24. The Plaintiff submits that there is general requirement of actual stay in Norway that applies equally to both Norwegian and foreign nationals. It simply means that unemployment benefits are only awarded for the periods in which the unemployed person is actually present in Norway.

25. The Plaintiff states that this is not a requirement to have a registered address or habitual residence in Norway. For instance, a "non-genuine" frontier worker, such as the Defendant, may be entitled to unemployment benefits from Norway to the extent that he or she remains present in Norway after becoming unemployed, despite still residing (formally and habitually) in Sweden. In these circumstances, the Plaintiff argues that it would be more appropriate to translate the term "opphold i Norge" with "stay" or "actual stay" in Norway and not with "residence", the term chosen in the Court's translation of the request for an advisory opinion.[1]

[1] The Norwegian Government points out that the term in Norwegian is "opphold i Norge".

III SKRIFTLIGE INNLEGG

23. I medhold av artikkel 20 i EFTA-domstolens vedtekter og artikkel 97 i rettergangsordningen er skriftlige innlegg inngitt av:

- staten ("saksøker"), representert ved advokat Ketil Bøe Moen, Regjeringsadvokaten,
- saksøkte, representert ved advokat Lars Edvard Landsverk, Advokatfirmaet Ness Lundin, Oslo,
- EFTAs overvåkningsorgan ("ESA"), representert ved Xavier Lewis, Director, og Maria Moustakali, Temporary Officer, Department of Legal and Executive Affairs,
- Europakommisjonen ("Kommisjonen"), representert ved Julie Samnadda og Viktor Kreuschitz, medlemmer av Kommisjonens juridiske tjeneste.

IV SPØRSMÅLET

Saksøker

24. Saksøker gjør gjeldende at det er et generelt krav om faktisk opphold i Norge som får anvendelse for både norske og utenlandske statsborgere. Det innebærer ganske enkelt at dagpenger bare gis for de perioder da den arbeidsløse faktisk oppholder seg i Norge.

25. Saksøker fastslår at det ikke er noe krav om å ha registrert adresse eller sedvanlig bopel i Norge. For eksempel kan en "uekte" grensearbeider, som saksøkte, ha rett til dagpenger fra Norge i den utstrekning vedkommende oppholder seg i Norge etter å ha blitt arbeidsledig, selv om han eller hun fortsatt har sin (formelle og sedvanlige) bopel i Sverige. Under disse omstendigheter gjør saksøker gjeldende at det ville være bedre å oversette uttrykket "opphold i Norge" med "stay" eller "actual stay" i Norge, og ikke med "residence", som er det begrepet EFTA-domstolen valgte i sin oversettelse av anmodningen om rådgivende uttalelse.[1]

[1] Staten peker på at uttrykket på norsk er "opphold i Norge".

26. In the Plaintiff's view, a requirement for actual stay in the State, such as the requirement established in Section 4-2 of the National Insurance Act, is compatible with Regulation No 1408/71, and may be applied to "non-genuine" frontier workers in the circumstances set out in the questions to Court. It submits that two main lines of reasoning lead to this conclusion.

27. First, according to the Plaintiff, "non-genuine" frontier workers have the choice to apply for unemployment benefits in the competent State (in this case the State of last employment) if they are available to the employment service in that State. The Plaintiff argues that such an application is to be treated "in accordance with the provisions of the legislation of that State", see Article 71(1)(b)(i) of the Regulation.

28. The Plaintiff submits that the obligation to stay in the State is a general rule of the Norwegian legislation. Neither the Regulation nor EEA law in general prohibits such a provision. Hence, it may also be applied to "nongenuine" frontier workers. In its view, that conclusion applies irrespective of the distance between the competent State and the State of residence.

29. Second, if the unemployed person chooses to travel to the State of residence and apply for (and receive) unemployment benefits in that State, the Plaintiff argues that such person has made a choice to receive benefits from the State of residence, and only from this State. In the Plaintiff's view, this follows from Article 71(1)(b)(ii) of Regulation No 1408/71, and is further confirmed by the more precise provision in Article 65 of Regulation No 883/2004 which has now replaced the Social Security Regulation applicable in this case.

30. The Plaintiff argues that these two lines of reasoning lead to the same conclusion where the State concerned, in this case Norway, requires as a condition of entitlement to unemployment benefits actual stay in the State and the facts are such as those in the case at hand. It points out, however, that the first line of reasoning applies irrespective of whether the unemployed person

26. Slik saksøker ser det, er et krav om faktisk opphold i staten, som kravet i folketrygdloven § 4-2, forenlig med forordning nr. 1408/71 og kan anvendes på "uekte" grensearbeidere under de omstendigheter som er beskrevet i spørsmålene til EFTA-domstolen. Saksøker anfører at to ulike resonnementer fører til denne konklusjon.

27. For det første, ifølge saksøker, kan "uekte" grensearbeidere velge å søke om ytelser ved arbeidsledighet i den kompetente stat (i dette tilfelle siste arbeidsstat) forutsatt at de står til rådighet for arbeidsformidlingen i denne stat. Saksøker gjør gjeldende at en slik søknad skal behandles "i henhold til bestemmelsene i denne stats lovgivning", jf. artikkel 71 nr. 1 bokstav b) i) i nevnte forordning.

28. Saksøker anfører at kravet om opphold i staten er en generell regel i norsk trygdelovgivning. Verken forordningen eller EØS-retten generelt er til hinder for en slik bestemmelse. Følgelig må regelen også kunne anvendes på "uekte" grensearbeidere. Dette må gjelde uavhengig av hvor stor avstand det er mellom den kompetente stat og bostedsstaten.

29. Dernest, dersom den arbeidsledige velger å reise til bostedsstaten og søke om (og motta) ytelser ved arbeidsledighet der, gjør saksøker gjeldende at vedkommende da har truffet et valg om å motta ytelser fra bostedsstaten, og bare fra bostedsstaten. Etter saksøkers oppfatning følger dette av artikkel 71 nr. 1 bokstav b) ii) i forordning nr. 1408/71, og det bekreftes ytterligere i den mer detaljerte bestemmelse i artikkel 65 i forordning 883/2004, som nå har erstattet trygdeforordningen som kom til anvendelse i denne sak.

30. Saksøker gjør gjeldende at disse to resonnementer fører til samme konklusjon når den berørte stat, i dette tilfelle Norge, setter faktisk opphold i landet som et vilkår for rett til dagpenger ved arbeidsledighet, og de faktiske forhold er som i den foreliggende sak. Saksøker peker imidlertid på at det første resonnement gjelder uten hensyn til om den arbeidsledige

may be regarded as "available to the employment service" in the competent State. In contrast, the second line of reasoning applies irrespective of whether the competent State has made benefits dependant on stay in the State or not.

31. As regards its first line of reasoning, the Plaintiff submits that the Defendant, as an unemployed worker other than a frontier worker, has a choice between being subject to the legislation of the competent State and that of the State of residence. The choice is made by the unemployed person as a function of whether he makes himself available to the employment services in the State of employment, on the one hand, or whether he, on the other hand, makes himself available to the employment services in his State of residence or simply returns to that State, see Article 71(1)(b)(i) and (ii) of the Regulation. In both cases, he has to comply with the relevant national provisions governing entitlement to unemployment benefits.

32. According to the Plaintiff, Article 71(1)(b)(i) of the Regulation establishes the conditions under which an unemployed worker, other than a frontier worker, shall be subject to the legislation of the competent State, in this case the State of last employment. The conditions are (i) that the unemployed person is available to the employment services in this State and (ii) that the provisions of that State's legislation are satisfied.

33. As regards the condition of compliance with the legislation of the competent State, in the view of the Plaintiff, it follows directly from the wording of the provision that benefits can only be required "in accordance with the legislation of [the competent State]". In this connection, the Plaintiff points out that, under Section 4-2 of the National Insurance Act, stay or presence in Norway is a general requirement for the payment of unemployment benefits in Norway.

34. According to the Plaintiff, under the Norwegian legislation, this requirement applies to all unemployed workers. Consequently, this requirement is clearly a part of the "legislation of [the competent State]" within the meaning of Article 71 of the

kan anses å stå "til rådighet for arbeidsformidlingen" i den kompetente stat. Derimot gjelder det andre resonnement uavhengig av om den kompetente stat har gjort ytelsene avhengig av opphold i landet eller ikke.

31. Når det gjelder det første resonnement, gjør saksøker gjeldende at saksøkte, som en arbeidstaker som ikke er en grensearbeider, har valget mellom å forholde seg til lovgivningen i den kompetente stat eller i bostedsstaten. Valget gjøres av den arbeidsledige ut fra om han på den ene side stiller seg til rådighet for arbeidsformidlingen i arbeidsstaten, eller om han på den annen side stiller seg til rådighet for arbeidsformidlingen i bostedsstaten eller bare reiser tilbake til denne stat, jf. artikkel 71 nr. 1 bokstav b) i) og ii) i forordningen. Uansett må han overholde de relevante nasjonale bestemmelser om retten til ytelser ved arbeidsledighet.

32. Ifølge saksøker oppstiller artikkel 71 nr. 1 bokstav b) i) i forordningen vilkårene for at en arbeidsledig person som ikke er en grensearbeider, skal være underlagt lovgivningen i den kompetente stat, i dette tilfelle siste arbeidsstat. Vilkårene er i) at den arbeidsledige står til rådighet for arbeidsformidlingen i denne stat, og ii) at bestemmelsene i denne stats lovgivning er oppfylt.

33. Når det gjelder vilkåret om overholdelse av lovgivningen i den kompetente stat, følger det etter saksøkers oppfatning direkte av bestemmelsens ordlyd at ytelser bare kan kreves "i henhold til bestemmelsene i [den kompetente stats] lovgivning". I denne sammenheng peker saksøker på at opphold ("stay or presence") i Norge er et generelt vilkår etter folketrygdloven § 4-2 for utbetaling av dagpenger i Norge.

34. Ifølge saksøker oppstiller norsk lovgivning dette krav for alle arbeidsledige. Følgelig er dette vilkår klart en del av "[den

Regulation and must therefore be satisfied before the Defendant is entitled to benefits from Norway.

35. To this end, the Plaintiff emphasises that the condition of a stay or presence in Norway is not the same as a residence requirement. It stresses, furthermore, that, as Regulation No 1408/71 aims at the coordination and not harmonisation of social security legislation, a substantially more precise provision of EEA law would be necessary before the competent State could be prevented from applying its general conditions governing entitlement to unemployment benefits.

36. Moreover, according to the Plaintiff, it follows from case law that, as a general rule, a residence requirement is compatible with the Regulation.[2] Consequently, in its view, if a residence requirement is, as a general rule, compatible with Regulation No 1408/71, the requirement of presence in the State must, as a general rule, also be compatible with the Regulation. The Plaintiff concedes that Article 71(1)(b)(i) of the Regulation presupposes that a "non-genuine" frontier worker may be subject to the legislation of the competent State without residence in that state. However, as it has already argued, that provision cannot preclude national provisions other than residence requirements such as the general condition of presence in the State at issue here.

37. The Plaintiff also submits that other parts of the EEA rules on unemployment benefits underscore the view that the competent State must be able to apply a general condition of stay in the country. In the Plaintiff's view, an opposite interpretation would imply a lack of coherence within the Chapter of the Regulation on unemployment benefits.

38. According to the Plaintiff, its interpretation creates, first, a better internal coherence between the position of "genuine" and "non-genuine" frontier workers under Article 71(1) of the Regulation. It contends that genuine frontier workers who are wholly unemployed do not have any choice under the scheme established

[2] Reference is made to Case C-406/04 *De Cuyper* [2006] ECR I-6947, paragraph 37.

kompetente stats] lovgivning" etter artikkel 71 i forordningen, og må derfor oppfylles før saksøkte har rett på ytelser fra Norge.

35. Saksøker understreker derfor at vilkåret om opphold eller tilstedeværelse ("stay or presence") i Norge ikke er det samme som et bostedskrav ("residence requirement"). Saksøker understreker videre at siden forordning nr. 1408/71 har som mål å samordne trygdelovgivningen, ikke harmonisere den, måtte bestemmelsen i EØS-regelverket ha vært formulert klarere dersom den kompetente stat skulle kunne hindres i å anvende sine generelle vilkår for rett til ytelser ved arbeidsledighet.

36. Videre følger det, ifølge saksøker, av rettspraksis at et bostedskrav som en generell regel er forenlig med forordningen.[2] Dersom et bostedskrav som en generell regel er forenlig med forordning nr. 1408/71, er det saksøkers oppfatning at et krav om tilstedeværelse i landet som en hovedregel også må være forenlig med forordningen. Saksøker medgir at artikkel 71 nr. 1 bokstav b) i) i forordningen forutsetter at en "uekte" grensearbeider kan være underlagt den kompetente stats lovgivning uten å bo der. Som allerede anført, kan denne bestemmelse imidlertid ikke være til hinder for andre nasjonale bestemmelser enn bostedskrav, som det generelle krav om opphold i landet som denne sak gjelder.

37. Saksøker anfører også at andre deler av EØS-regelverket om ytelser ved arbeidsledighet underbygger synspunktet om at den kompetente stat må kunne oppstille et generelt vilkår om opphold i landet. Sik saksøker ser det, ville en motsatt tolkning medføre lite sammenheng i forordningens kapittel om ytelser ved arbeidsledighet.

38. Ifølge saksøker skaper saksøkers tolkning for det første bedre sammenheng mellom status for "ekte" og "uekte" grensearbeidere etter artikkel 71 nr. 1 i forordningen. Saksøker gjør gjeldende at ekte grensearbeidere som er helt arbeidsledige,

[2] Det vises til sak C-406/04 *De Cuyper*, Sml. 2006 s. I-6947 (avsnitt 37).

by Article 71(1)(a), that is, they are subject to the legislation of the State of residence. This remains the case even if the frontier worker only fulfils the conditions for unemployment benefits in the State of last employment, because the State of residence has other and stricter conditions, or would have received considerably higher benefits had he been subject to the legislation of the State of last employment. According to case law, only in exceptional circumstances may genuine frontier workers remain under the jurisdiction of the State of last employment, that is, where they are regarded as "atypical" or "false" genuine frontier workers.

39. In contrast, according to the Plaintiff, pursuant to Article 71(1)(b) of the Regulation, only "non-genuine" frontier workers have a general choice concerning the State whose legislation governs their claim for unemployment benefits. This choice gives this group considerable flexibility, presumably because it is difficult to decide generally which State should have jurisdiction.

40. The Plaintiff contends that this flexibility ensures that such unemployed persons do not risk falling outside both States' systems. The rationale for that flexibility does not imply, however, that the non-genuine frontier worker is exempted from the general conditions governing entitlement to unemployment benefits in the State in which he chooses to make a claim. Indeed, the Plaintiff continues, it would create an unsubstantiated difference between the position of genuine and non-genuine frontier workers if the latter group could choose the State whose legislation they wished to satisfy – typically choosing the State with liberal conditions and high benefits – and at the same time stay in a different State – typically a State with lower cost levels.

41. Second, the Plaintiff argues that Article 71(1)(b)(ii) of the Regulation regulates the consequences if the unemployed worker "makes himself available for work to the employment services in the territory of the Member State in which he resides, *or who returns to that territory*" (emphasis added by the Plaintiff). In its view, this provision appears to presuppose that the unemployed person is no longer subject to the legislation of the State of competence if he no longer stays there. Consequently, it would

ikke har noe valg under ordningen etablert ved artikkel 71 nr. 1 bokstav a), det vil si, de er underlagt lovgivningen i bostedsstaten. Dette vil være tilfellet selv om grensearbeideren bare oppfyller vilkårene for dagpenger i siste arbeidsstat, fordi bostedsstaten har andre og strengere krav, eller ville ha mottatt vesentlig høyere ytelser om han hadde vært underlagt lovgivningen i siste arbeidsstat. Det følger av rettspraksis at det bare er under ekstraordinære omstendigheter at ekte grensearbeidere fortsetter å være underlagt lovgivningen i siste arbeidsstat, det vil si når de betraktes som "atypiske" eller "falske" ekte grensearbeidere.

39. Derimot er det ifølge saksøker bare "uekte" grensearbeidere som etter artikkel 71 nr. 1 bokstav b) i forordningen har et generelt valg med hensyn til hvilken lovgivning deres krav om ytelser ved arbeidsledighet skal være underlagt. Dette valg gir denne gruppe arbeidsledige stor fleksibilitet, og skyldes formodentlig at det er vanskelig å avgjøre generelt hvilken stat som skal ha jurisdiksjon i slike tilfeller.

40. Saksøker anfører at denne fleksibilitet sikrer at slike arbeidsledige personer ikke risikerer å falle utenfor ordningene i begge stater. Begrunnelsen for fleksibiliteten innebærer imidlertid ikke at en uekte grensearbeider er unntatt fra de generelle vilkår for å motta ytelser ved arbeidsledighet i staten der han velger å fremme et krav. Det ville i så fall, fortsetter saksøker, medføre en ubegrunnet forskjell mellom ekte og uekte grensearbeideres stilling dersom sistnevnte gruppe kunne velge hvilken stats lovgivning de ønsket å påberope seg – idet de da typisk ville velge den stat som har de lempeligste krav og høyeste ytelser – og samtidig oppholde seg i en annen stat, typisk en stat med et lavere kostnadsnivå.

41. Dernest gjør saksøker gjeldende at artikkel 71 nr. 1 bokstav b) ii) i forordningen regulerer konsekvensene dersom den arbeidsledige "stiller seg til rådighet for arbeidsformidlingen i den medlemsstat på hvis territorium de er bosatt, *eller som reiser tilbake til denne statens territorium*" (saksøkers utheving). Etter saksøkers oppfatning synes denne bestemmelse å forutsette at den arbeidsledige ikke lenger er underlagt lovgivningen i den

imply a lack of coherence were the competent State not entitled to apply a condition of stay in the State when that is a general condition applicable under its legislation.

42. Third, the Plaintiff contends that also Article 69 of the Regulation, on the export of unemployment benefit, appears to rest on the premise that actual stay in the State of competence constitutes the basic principle and that particular legal requirements must be satisfied in order to deviate from this principle. Article 69 regulates the situation in which an unemployed person satisfies the conditions for unemployment benefits in one State and goes to another State in search of employment. It allows the person to leave the State without losing the benefits, but only under strict conditions. For instance, the person must actively seek employment in the State to which he goes, and may export benefits in this way only once during a period of benefit entitlement and only for a maximum of three months. In the Plaintiff's view, the fact that unemployment benefit is the only kind of benefit with a provision for export, and the strict conditions for such export of rights to another State appears to suggest that normally the recipient of unemployment benefits must seek employment and be present in the competent State. Were States to be precluded from applying a general condition requiring an actual stay on the national territory, the limitations set out in Article 69 would be of limited relevance, as in those circumstances an unemployed person could in any event receive unemployment benefits without being present in the competent State.

43. In the Plaintiff's view, there is no case law that leads to the conclusion that the condition requiring the unemployed person to stay in the country is incompatible with the Regulation. In this regard, the Plaintiff contests the relevance of the judgments in *Miethe* and *Naruschawicus*, to which the Defendant referred in the proceedings before the national court.[3]

[3] Reference is made to Case 1/85 *Miethe* [1986] ECR 1837, paragraphs 6 and 11, and Case C-308/94 *Naruschawicus* [1996] ECR I-207, paragraphs 3, 4, and 26.

kompetente stat om han ikke lenger oppholder seg der. Følgelig ville det ikke være logisk om den kompetente stat ikke hadde anledning til å stille krav om opphold i staten når dette er et generelt vilkår i dens lovgivning.

42. For det tredje anfører saksøker at også artikkel 69 i forordningen, om eksport av ytelser ved arbeidsledighet, synes å forutsette at faktisk opphold i den kompetente stat er grunnprinsippet, og at visse oppstilte vilkår må oppfylles for å kunne fravike dette prinsipp. Artikkel 69 regulerer situasjonen hvor en arbeidsledig oppfyller vilkårene for å få ytelser ved arbeidsledighet i én stat, og drar til en annen stat for å søke arbeid. Bestemmelsen gjør det mulig for vedkommende å forlate staten uten å tape sine rettigheter, men bare på strenge vilkår. For eksempel må vedkommende aktivt søke arbeid i den stat han reiser til, og han kan bare overføre rettighetene én gang i løpet av perioden han har rett til dagpenger og bare i inntil tre måneder. Etter saksøkers oppfatning synes det forhold at dagpenger er den eneste ytelse som det er fastsatt en bestemmelse om eksport for, og at det gjelder strenge vilkår for slik eksport av rettigheter til en annen stat, å tilsi at mottakeren av dagpenger normalt må søke arbeid og være til stede i den kompetente stat. Dersom statene ikke skulle kunne sette et generelt vilkår om faktisk opphold på nasjonalt territorium, ville begrensningene fastsatt i artikkel 69 være av begrenset betydning, ettersom en arbeidsledig da uansett ville kunne motta dagpenger uten å være til stede i den kompetente stat.

43. Saksøker ser det slik at det ikke finnes rettspraksis som tilsier at kravet om at den arbeidsledige skal oppholde seg i landet er uforenlig med forordningen. Her bestrider saksøker at dommene i *Miethe* og *Naruschawicus*, som saksøkte viste til i rettergangen for den nasjonale domstol, er relevante.[3]

[3] Det vises til sak 1/85 *Miethe*, Sml. 1986 s. 1837 (avsnittene 6 og 11), og sak C-308/94 *Naruschawicus*, Sml. 1996 s. I-207 (avsnittene 3, 4 og 26).

44. As regards the issue of justification, the Plaintiff stresses that the provision on stay in Norway applies generally, without any kind of discrimination. However, were the Court to find elements of indirect discrimination, in the Plaintiff's view, this is, in any event, objectively justified due, in particular, to control considerations. Case law has established that in certain matters outside the scope of Article 71 of the Regulation a residence requirement is justified as suitable and necessary in ensuring an effective control of the conditions laid down in national legislation.[4] In the view of the Plaintiff, the same must apply to situations falling within the scope of the said provision.

45. In addition to its first line of argument, namely, that, pursuant to Article 71(1)(b)(i) of the Regulation, a person may be subject to a national condition requiring stay or presence in the State of last employment, the Plaintiff also submits that, pursuant to Article 71(1)(b)(ii), the competent State may decline an application for unemployment benefits when the non-genuine frontier worker has chosen to return to the State of residence and apply for (and receive) unemployment benefits in that State.

46. According to the Plaintiff, it follows directly from the wording of Article 71(1)(b)(ii) of the Regulation that an unemployed worker shall receive benefits from the State of residence as if the last employment had taken place there, provided that the unemployed person either "makes himself available to the employment services" in the State of residence or "returns to that territory". It argues that the latter alternative necessarily presupposes that the unemployed worker changes his actual stay or presence from the competent State to the State of residence.

47. According to the Plaintiff, the provision thus sets up two alternatives, both of which imply that the person concerned is subject to the legislation of the State of residence. In its view, the unemployed person shall be subject to the legislation of the State of residence where that person either has made himself available

[4] Reference is made to *De Cuyper*, cited above, paragraphs 45 to 47.

44. Når det gjelder spørsmålet om rettferdiggjøring, understreker saksøker at bestemmelsen om opphold i Norge gjelder generelt og ikke innebærer noen form for forskjellsbehandling. Skulle EFTA-domstolen imidlertid finne elementer som innebærer indirekte forskjellsbehandling, er dette etter saksøkers oppfatning uansett objektivt begrunnet, spesielt med kontrollhensyn. I henhold til rettspraksis vil et oppholdskrav i enkelte tilfeller som faller utenfor virkeområdet til artikkel 71 i forordningen, anses som egnet og nødvendig for å sikre effektiv kontroll med vilkårene fastsatt i nasjonal lovgivning.[4] Etter saksøkers oppfatning må det samme gjelde i situasjoner som ligger innenfor nevnte bestemmelses virkeområde.

45. I tillegg til saksøkers første argument, nemlig om at en person etter artikkel 71 nr. 1 bokstav b) i) i forordningen kan være underlagt et nasjonalt vilkår om opphold eller tilstedeværelse i siste arbeidsstat, gjør saksøker gjeldende at den kompetente stat etter artikkel 71 nr. 1 bokstav b) ii) kan avslå en søknad om dagpenger når en uekte grensearbeider har valgt å reise tilbake til bostedsstaten og søke om (og motta) dagpenger i denne stat.

46. Ifølge saksøker følger det direkte av ordlyden i artikkel 71 nr. 1 bokstav b) ii) i forordningen at en arbeidsledig arbeidstaker skal motta ytelser fra bostedsstaten som om vedkommende hadde sitt siste arbeid der, forutsatt at den arbeidsledige enten "stiller seg til rådighet for arbeidsformidlingen" i bostedsstaten eller "reiser tilbake til denne statens territorium". Saksøker anfører at sistnevnte alternativ nødvendigvis innebærer at den arbeidsledige skifter faktisk oppholdssted ("actual stay or presence") fra den kompetente stat til bostedsstaten.

47. Ifølge saksøker setter bestemmelsen dermed opp to alternativer som begge innebærer at den berørte person er underlagt lovgivningen i bostedsstaten. Saksøker mener at den arbeidsledige skal være underlagt lovgivningen i bostedsstaten

[4] Det vises til *De Cuyper*, som omtalt over (avsnittene 45 til 47).

to the employment services in the State of residence or has returned to that State.

48. The Plaintiff submits that under those circumstances the worker cannot choose to be subject to the legislation of the competent State. Instead, he has chosen to be subject to the legislation of the State of residence. In the view of the Plaintiff, this does not preclude the possibility, however, that the unemployed worker may also seek jobs in the State of last employment by being available to the employment services in that State. It entails simply that it is the State of residence that is responsible for unemployment benefits. In this connection, the Plaintiff notes that, in determining whether the conditions for benefits are satisfied and in calculating benefits, the State of residence is obliged to include periods of employment in the other State.

49. The Plaintiff submits that its interpretation results in a clear and practical solution. Conversely, if, after having returned to his State of residence, an unemployed person could still elect to be subject to the legislation of the State of last employment, difficult cross-border cases would immediately arise.

50. The Norwegian Government proposes that the first question be answered as follows:

When national legislation requires actual stay in the state as a general condition to be entitled to unemployment benefits, it is compatible with Article 71(1)(b) of Council Regulation (EEC) No 1408/71 for the competent state (the state of last employment) to apply this condition also to a wholly unemployed worker that is not a frontier worker (a "non-genuine" frontier worker). The conclusion is the same irrespective of the distance between the competent state and the state of residence.

The competent state is also entitled to refuse unemployment benefits for a "non-genuine" frontier worker who has registered as a job seeker also with the employment service in the state of residence and applied for unemployment benefits in that state as well.

når vedkommende enten har stilt seg til rådighet for arbeidsformidlingen i bostedsstaten eller har reist tilbake dit.

48. Saksøker gjør gjeldende at under disse omstendigheter kan arbeidstakeren ikke velge å være underlagt lovgivningen i den kompetente stat. Han må i disse tilfeller anses for å ha valgt å underkaste seg lovgivningen i bostedsstaten. Etter saksøkers oppfatning er dette likevel ikke til hinder for muligheten for at den arbeidsledige også kan søke arbeid i siste arbeidsstat ved å stå til rådighet for arbeidsformidlingen der. Det innebærer bare at det er bostedsstaten som er ansvarlig for ytelsene ved arbeidsledighet. I denne sammenheng bemerker saksøker at bostedsstaten, når den skal fastslå om vilkårene for ytelser er oppfylt, og skal beregne ytelsene, er nødt til å inkludere arbeidsperioder i den andre stat.

49. Saksøker anfører at en slik tolkning gir en klar og praktisk løsning. Motsatt ville det umiddelbart oppstå vanskelige grenseoverskridende saker dersom en arbeidsledig etter å ha reist tilbake til sin bostedsstat fortsatt kunne velge å være underlagt lovgivningen i siste arbeidsstat.

50. Den norske regjering foreslår at det første spørsmål besvares på følgende måte:

Når nasjonal lovgivning har faktisk opphold i staten som et generelt vilkår for rett til ytelser ved arbeidsledighet, er det i samsvar med artikkel 71 nr. 1 bokstav b) i rådsforordning (EØF) nr. 1408/71 for den kompetente stat (siste arbeidsstat) å anvende dette vilkår også på helt arbeidsledige personer som ikke er grensearbeidere ("uekte" grensearbeidere). Konklusjonen vil være den samme uansett hvor stor avstand det er mellom den kompetente stat og bostedsstaten.

Den kompetente stat har også rett til å avslå ytelser ved arbeidsledighet for en "uekte" grensearbeider som har meldt seg som arbeidssøker også ved arbeidsformidlingen i bostedsstaten og søkt om ytelser ved arbeidsledighet også i denne stat.

The Defendant

51. The Defendant contends that, for Article 71 of the Social Security Regulation to apply, it suffices that he "resided" in Sweden while he was working on Svalbard. In his assessment, the parties agree that this condition is met. Furthermore, the Defendant points out that for the whole period he was working in Norway his family remained in Sweden. Although he has worked in Norway for several years, he has returned home whenever this has been practically possible. His place of residence in Sweden has been his base and the centre for his interests.

52. According to the Defendant, it is also common ground that he does not come within the scope of the term "frontier worker". Consequently, as a "non-genuine" frontier worker, he is subject to the provisions of Article 71(1)(b) of the Regulation, which, in subparagraphs (i) and (ii), sets out two different rules for persons who are wholly unemployed, not frontier workers and who, during their last employment, resided in a Member State other than the competent State.

53. The Defendant submits that the question of whether he is entitled to unemployment benefit from the NAV must be decided on the basis of Article 71(1)(b)(i) of the Regulation, which exhaustively regulates when an unemployed worker is entitled to benefits from the competent State. In his view, what is decisive under that provision is whether the worker remains available to the employer or the employment service. As long as this is the case, so the Defendant argues, where to submit a claim for unemployment benefit remains a matter of choice for the worker. It is only when the unemployed person ceases to "remain available" that the alternative rule in Article 71(1)(b)(ii) applies to the exclusion of the rule in Article 71(1)(b)(i).

54. In response to the argument of the Norwegian State that an unemployed person who returns to his State of residence is entitled to unemployment benefit from that State alone, which, in his view, is mainly based on a purely linguistic understanding of Article 71(1)(b)(ii) of the Regulation, the Defendant submits that

Saksøkte

51. Saksøkte gjør gjeldende at for at artikkel 71 i trygdeforordningen skal komme til anvendelse, er det nok at han var "bosatt" i Sverige mens han arbeidet på Svalbard. Etter hans vurdering er partene enige om at dette vilkår er oppfylt. Videre peker saksøkte på at familien hans forble i Sverige hele den tid han arbeidet i Norge. Selv om han arbeidet i Norge i mange år, har han reist hjem hver gang det var praktisk mulig. Hans bosted i Sverige har vært hans base og interessesentrum.

52. Ifølge saksøkte er det også enighet om at han ikke kommer inn under begrepet "grensearbeider". Følgelig er han som "uekte" grensearbeider underlagt bestemmelsene i artikkel 71 nr. 1 bokstav b) i forordningen, som i punkt i) og ii) fastsetter to forskjellige regler for personer som er helt arbeidsledige, som ikke er grensearbeidere, og som under sitt siste arbeidsforhold var bosatt i en annen medlemsstat enn den kompetente stat.

53. Saksøkte anfører at spørsmålet om han har rett til dagpenger fra NAV, må avgjøres på grunnlag av artikkel 71 nr. 1 bokstav b) i) i forordningen, som uttømmende regulerer når en arbeidsledig person har rett til ytelser fra den kompetente stat. Det som etter hans oppfatning er avgjørende etter denne bestemmelse, er om arbeidstakeren står til rådighet for arbeidsgiveren eller arbeidsformidlingen. Så lenge dette er tilfelle, er det ifølge saksøkte opp til arbeidstakeren å velge hvor han vil fremme krav om dagpenger. Det er bare dersom den arbeidsledige ikke lenger "står til rådighet", at den alternative regelen i artikkel 71 nr. 1 bokstav b) ii) kommer til anvendelse, og ikke regelen i artikkel 71 nr. 1 bokstav b) i).

54. Til statens argument om at en arbeidsledig person som reiser tilbake til sin bostedsstat, har rett til arbeidsledighetsytelser bare fra denne stat, noe som etter hans oppfatning hovedsakelig er basert på en rent språklig forståelse av artikkel 71 nr. 1 bokstav b) ii) i forordningen, anfører saksøkte at en slik tolkning ville

such an interpretation would considerably narrow the scope of the rule in Article 71(1)(b)(i), as it would entail that the rule only applies as long as the unemployed person physically stays in the competent State.

55. Since the unemployed person has his residence in another State, in the Defendant's view, it would be normal in this situation to return to the State of residence. Consequently, so he argues, this must be understood as an assumption which underpins the structure of the provision. If, however, a return to the State of residence entails not only that the rule in Article 71(1)(b)(ii) of the Regulation applies but, at the same time, excludes the application of the alternative rule in Article 71(1)(b)(i), the latter provision has, in fact, very limited application. In the Defendant's view, the relationship between the two alternatives does not support an interpretation of that kind.

56. Based on the above arguments, the Defendant submits that, when viewed in isolation, the wording of Article 71(1)(b) of the Regulation supports the interpretation that an unemployed person has a choice as regards the State where he is entitled to claim unemployment benefit.

57. The Defendant contends that general purposive and consequential considerations suggest that the assessment for benefit entitlement has to be based on Article 71(1)(b)(i) of the Regulation. In this regard, the Defendant refers to the background to the Social Security Regulation and the specific principles on which the rules are based, and the fact that the opposite solution would be contrary to the consistency and coherence of the set of rules. In his view, the rationale underlying the assessment whether an unemployed person should be treated as a non-genuine frontier worker is the presumption that such a person has the greatest chance of finding new employment in the competent State. Therefore, it would hardly be expedient and would come into conflict with the considerations underlying these rules, if the unemployed person was obliged to make himself available to the employment services in his State of residence.

medføre en betydelig innskrenking av virkeområdet for regelen i artikkel 71 nr. 1 bokstav b) i), da det ville bety at regelen bare gjelder så lenge den arbeidsledige fysisk oppholder seg i den kompetente stat.

55. Siden den arbeidsledige har sitt bosted i en annen stat, er det saksøkers oppfatning at det i denne situasjon ville være normalt å reise tilbake til bostedsstaten. Følgelig, hevder han, må dette forstås som en forutsetning som underbygger bestemmelsens struktur. Hvis derimot retur til bostedsstaten innebærer ikke bare at regelen i artikkel 71 nr. 1 bokstav b) ii) i forordningen kommer til anvendelse, men samtidig utelukker anvendelse av den alternative regel i artikkel 71 nr. 1 bokstav b) i), har sistnevnte bestemmelse faktisk svært begrenset anvendelse. Det er saksøktes oppfatning at forholdet mellom de to alternativer ikke underbygger en slik tolkning.

56. På grunnlag av ovenstående argumenter gjør saksøkte gjeldende at ordlyden i artikkel 71 nr. 1 bokstav b) i forordningen isolert sett underbygger den tolkning at en arbeidsledig person har et valg når det gjelder hvilken stat han ønsker å fremme krav om ytelser ved arbeidsledighet fra.

57. Saksøker gjør gjeldende at generelle formåls- og konsekvensbetraktninger tilsier at vurderingen av retten til ytelser må baseres på artikkel 71 nr. 1 bokstav b) i) i forordningen. I så henseende viser saksøkte til bakgrunnen for trygdeforordningen og de særlige prinsipper som reglene er basert på, samt det faktum at regelsettet i motsatt fall ville mangle konsekvens og sammenheng. Etter hans oppfatning er tankegangen bak vurderingen av om en arbeidsledig person skal behandles som en uekte grensearbeider formodningen om at en slik person vil ha størst sjanse til å finne nytt arbeid i den kompetente stat. Derfor ville det knapt være hensiktsmessig, og det ville være i strid med de hensyn som disse regler er basert på, om den arbeidsledige var nødt til å stille seg til rådighet for arbeidsformidlingen i sin bostedsstat.

58. The Defendant contends that his situation is a very good illustration of this point. He has had considerable work assignments in Norway since the 1980s, and it has been appropriate for him to seek employment there. Were he now to be required to apply for unemployment benefit in Sweden, his opportunities for finding new employment would be drastically reduced.

59. The Defendant rejects the submission of the Norwegian State to the effect that the rules of Regulation No 883/2004 (the new Social Security Regulation) warrant an interpretation of Regulation No 1408/71 which differs from what the Defendant has submitted above. In his view, there is, in effect, no difference as to the legal rule prescribed by the two texts. Alternatively, should the Court find that the two texts differ, the Defendant submits that this constitutes a change in the law that cannot have any bearing on the interpretation of Article 71 of Regulation No 1408/71 for the purposes of this case.

60. In the Defendant's view, in the same way as is provided for in Article 71 of Regulation No 1408/71, Article 65 of Regulation No 883/2004 also sets out two different rules for unemployed persons who, during their last employment, resided in a Member State other than the competent State, without falling under the definition of a frontier worker. The system established in Article 65(2) of Regulation No 883/2004 is thus the same as that set out in Article 71(1)(b) of Regulation No 1408/71. However, in his view, there are also differences. Article 71(1)(b) of Regulation No 1408/71 regulates from which Member State the non-genuine frontier worker shall receive unemployment benefit, while the rules in Article 65(2) of Regulation No 883/2004 regulate where the unemployed person shall make himself available to the employment services. In practice, the Defendant continues, the difference is not so great, since Article 65 of Regulation No 883/2004 thereby also regulates which State is to pay unemployment benefits. Such benefits shall be paid by the Member State in which the unemployed person makes himself available to the employment services.

58. Saksøkte hevder at hans situasjon illustrerer dette poeng spesielt godt. Han har hatt store arbeidsoppdrag i Norge siden 1980-tallet, og det har vært hensiktsmessig for ham å søke arbeid der. Om han nå skulle måtte søke dagpenger i Sverige, ville hans muligheter til å finne nytt arbeid bli drastisk mye dårligere.

59. Saksøker avviser statens påstand om at reglene i forordning nr. 883/2004 (den nye trygdeforordning) tilsier en annen tolkning av forordning nr. 1408/71 enn saksøkte har gitt i det ovenstående. Etter hans syn er det faktisk ingen forskjell med hensyn til hvilken rettsregel de to tekster fastsetter. Skulle EFTA-domstolen derimot finne at de to tekster er forskjellige, gjør saksøkte gjeldende at dette vil utgjøre en endring i rettstilstanden som ikke kan få konsekvenser for tolkningen av artikkel 71 i forordning nr. 1408/71 i den foreliggende sak.

60. Etter saksøktes syn inneholder artikkel 65 i forordning nr. 883/2004, akkurat som artikkel 71 i forordning nr. 1408/71, to forskjellige regler for arbeidsledige personer som under sitt siste arbeidsforhold var bosatt i en annen stat enn den kompetente stat, uten å høre inn under definisjonen av grensearbeider. Systemet opprettet ved artikkel 65 nr. 2 i forordning nr. 883/2004 er dermed det samme som det som er fastsatt i artikkel 71 nr. 1 bokstav b) i forordning nr. 1408/71. Imidlertid er det etter hans oppfatning også forskjeller. Artikkel 71 nr. 1 bokstav b) i forordning nr. 1408/71 regulerer hvilken medlemsstat den uekte grensearbeider skal motta dagpenger fra, mens reglene i artikkel 65 nr. 2 i forordning nr. 883/2004 regulerer hvor den arbeidsledige skal stille seg til rådighet for arbeidsformidlingen. I praksis, fortsetter saksøkte, er forskjellen ikke så stor, da artikkel 65 i forordning nr. 883/2004 dermed også regulerer hvilken stat som skal utbetale ytelser ved arbeidsledighet. Slike ytelser skal betales av den medlemsstat der den arbeidsledige stiller seg til rådighet for arbeidsformidlingen.

61. According to the Defendant, it is in relation to the act which distinguishes the first and second subparagraphs of Article 65(2) of Regulation No 883/2004 that a difference might be inferred in comparison to the scheme established by Article 71(1)(b) of Regulation No 1408/71. In his view, the wording of Article 65(2) of Regulation No 883/2004 could be understood to mean that it is decisive whether or not the unemployed person returns to his State of residence. This would entail that, as a result of returning to his home, the unemployed person must make himself available to the employment services in his State of residence. For the unemployed person, this interpretation would mean that the element of choice is whether he returns to his State of residence or remains in the State of employment. Through making this choice, the person in question would decide also from which State he is to receive unemployment benefit.

62. However, the Defendant rejects such an interpretation. In his view, the social security administrations of the Member States will not know whether the unemployed person has chosen to return before reporting to the employment service. Consequently, the decisive factor is not whether the unemployed person has returned, but whether he makes himself available to the employment services in the State of employment or the State of residence. Based on this understanding of Article 65 of Regulation No 883/2004, there is no real difference between that provision and Article 71 of Regulation No 1408/71.[5]

63. According to the Defendant, the question to be determined in the main proceedings is whether, for the purposes of Article 71(1)(b)(i) of the Regulation, the Defendant remains available to the NAV when he resides/stays in Sweden. In his view, Article 71(1)(b)(i) does not specify what is required to remain available to the employment services in the territory of the competent State. He contends, however, that the wording of the provision

[5] Reference is made to R. Cornelissen (2007), "The new EU coordination system for workers who become unemployed", *European Journal of Social Security*, Vol. 9, p. 187, at p. 214.

61. Ifølge saksøkte er det i forbindelse med den handling som skiller første og annet ledd i artikkel 65 nr. 2 i forordning nr. 883/2004, at det er mulig å utlede en forskjell i forhold til ordningen opprettet ved artikkel 71 nr. 1 bokstav b) i forordning nr. 1408/71. Etter hans oppfatning kan ordlyden i artikkel 65 nr. 2 i forordning nr. 883/2004 forstås slik at det er avgjørende om den arbeidsledige reiser tilbake til sin bostedsstat eller ikke. Dette vil innebære at fordi den arbeidsledige reiser hjem, vil han måtte stille seg til rådighet for arbeidsformidlingen i sin bostedsstat. For den arbeidsledige ville en slik tolkning innebære at valget ville være mellom å reise tilbake til bostedsstaten eller blir værende i arbeidsstaten. Ved å ta dette valg bestemmer vedkommende altså også hvilken stat han skal motta dagpenger fra.

62. Imidlertid avviser saksøkte en slik tolkning. Han mener at trygdeforvaltningene i medlemsstatene ikke vil kunne vite om den arbeidsledige har valgt å reise tilbake før han melder seg for arbeidsformidlingen. Følgelig er den avgjørende faktor ikke om den arbeidsledige har reist tilbake, men om han stiller seg til rådighet for arbeidsformidlingen i arbeidsstaten eller i bostedsstaten. Ut fra denne forståelse av artikkel 65 i forordning nr. 883/2004 er det ingen reell forskjell mellom denne bestemmelse og artikkel 71 i forordning nr. 1408/71.[5]

63. Ifølge saksøkte er spørsmålet saken gjelder om saksøkte etter artikkel 71 nr. 1 bokstav b) i) fortsatt står til rådighet for NAV når han bor/oppholder seg i Sverige. Etter hans oppfatning presiserer ikke artikkel 71 nr. 1 bokstav b) i) hva som kreves for å stå til rådighet for arbeidsformidlingen på territoriet til den kompetente stat. Han anfører imidlertid at bestemmelsens ordlyd kan være til en viss hjelp. Saksøkte har stilt seg til rådighet for NAV og skal etter den aktuelle bestemmelse på

[5] Det vises til R. Cornelissen (2007), "The new EU coordination system for workers who become unemployed", *European Journal of Social Security*, Vol. 9 s. 214.

offers some guidance. The Defendant has made himself available to NAV and, on that basis, pursuant to the provision in question, he shall receive unemployment benefit "as though he were residing" in Norway.

64. In the Defendant's view, it follows from this phrase that, pursuant to the rules, it is acceptable for the unemployed person to reside in a State other than the competent State. As a consequence, this must be understood to mean that, in order to remain available to the employment services in the competent State, one does not have to reside in that State. In the Defendant's view, the wording indicates that it is also not necessary to stay in the competent State. Where, pursuant to Article 71(1)(b)(i) of the Regulation, it is acceptable for an unemployed person to reside in a State other than the competent State, this implies, at the same time, that that is where he habitually stays when not working, see Article 1(h) of the Regulation. In this case, it must also be acceptable that he actually stays there without this infringing the requirement to remain available to the employer or the employment services of the competent State.[6]

65. The Defendant submits that this interpretation does not conflict with purposive or consequential considerations. He argues that the purpose of the Regulation is mainly to limit the scope of national social security rules insofar as they are in conflict with the free movement of workers. Thus, national rules requiring an unemployed person to stay permanently in the competent State would, in effect, prevent the cross-border element on which the right to freedom of movement for workers is based. In his view, it follows from case law that an unemployed person must subject himself to the national authorities' control measures only in so far as this does not require a change of residence.

66. The Defendant rejects the view of the Norwegian State that this interpretation conflicts with general control considerations. He contends that the employment services in the competent State

[6] In support of this argument, reference is made to *Naruschawicus*, cited above, paragraphs 25 to 27.

dette grunnlag, motta ytelser ved arbeidsledighet "som om [han] var bosatt" i Norge.

64. Etter saksøkers oppfatning følger det av dette at det ifølge reglene kan godtas at en arbeidsledig bor i en annen stat enn den kompetente stat. Følgelig må dette forstås slik at for å stå til rådighet for arbeidsformidlingen i den kompetente stat, trenger man ikke bo i samme stat. Slik saksøkte ser det, tilsier ordlyden at det heller ikke er nødvendig å oppholde seg i den kompetente stat. Når det etter artikkel 71 nr. 1 bokstav b) i) i forordningen kan godtas at en arbeidsledig bor i en annen stat enn den kompetente stat, innebærer dette samtidig at dette er hvor han vanligvis oppholder seg når han ikke arbeider, jf. artikkel 1 bokstav h) i forordningen. I så tilfelle må det også kunne godtas at han faktisk oppholder seg der uten dermed å bryte med kravet om å stå til rådighet for arbeidsgiveren eller arbeidsformidlingen i den kompetente stat.[6]

65. Saksøkte gjør gjeldende at denne tolkning ikke er i strid med formåls- eller konsekvensbetraktninger. Han anfører at formålet med forordningen hovedsakelig er å begrense virkeområdet for nasjonale trygderegler i den utstrekning de er til hinder for den frie bevegelighet for arbeidstakere. Dermed ville nasjonale regler som krever at en arbeidsledig oppholder seg permanent i den kompetente stat, faktisk hindre det grenseoverskridende element som retten til fri bevegelighet for arbeidstakere er basert på. Etter hans oppfatning følger det av rettspraksis at en arbeidsledig må forholde seg til de nasjonale myndigheters kontrolltiltak bare i den utstrekning dette ikke forutsetter skifte av bosted.

66. Saksøkte avviser statens oppfatning om at denne tolkning strider mot generelle kontrollhensyn. Han gjør gjeldende at arbeidsformidlingen i den kompetente stat vil ha tilstrekkelige

[6] Til støtte for dette argument vises det til *Naruschawicus*, som omtalt over, (avsnittene 25 til 27).

will have adequate and real possibilities of exercising control in relation to the unemployed person even if he lives in another State. It is quite possible, for example, to submit the employment status registration card electronically. Moreover, in light of the actual control procedures used in Norway, this consideration must be assumed to be of limited significance.

67. In the view of the Defendant, a residence requirement such as that established in Section 4-2 of the National Insurance Act is precluded by Article 71 of the Social Security Regulation.[7] Instead, what can be required is that he registers with NAV and complies with NAV's control procedures. None the less, it is clear that the competent State's control requirement cannot extend so far as to require the unemployed person to change his place of residence. Consequently, it may be concluded that the Defendant is permitted to reside and stay in Sweden. In order to achieve this, the Defendant asserts, the requirements of the National Insurance Act must be interpreted in line with the Social Security Regulation, see Section 1-3 of the National Insurance Act and the Regulation concerning incorporation of the Social Security Regulation into the EEA Agreement, pursuant to which the rules of the Social Security Regulation take precedence over the National Insurance Act.

68. As for the relevance of the fact that the unemployed person lives in a country near the competent State, so that it is possible in practice for that person to appear at the employment office in that State, even if he or she does not reside there, the Defendant cannot see that the interpretation of Article 71 of the Regulation should, in principle, be influenced by where the unemployed person lives.

69. According to the Defendant, it is conceivable that the opportunity to find work in the competent State may be greater for unemployed persons living in Member States near to the competent State than for unemployed persons living in Member States far away. This may influence the outcome in specific cases.

7 Reference is made to *Naruschawicus*, cited above.

og reelle muligheter for å utøve kontroll med den arbeidsledige selv om han bor i en annen stat. Det er for eksempel mulig å sende inn meldekortet elektronisk. I betraktning av gjeldende kontrollprosedyrer i Norge må dette hensyn videre antas å være av begrenset betydning.

67. Slik saksøkte ser det, er et bostedskrav som det som er fastsatt i folketrygdloven § 4-2 uforenlig med artikkel 71 i trygdeforordningen.[7] Det som derimot kan kreves, er at han melder seg for NAV og overholder NAVs kontrollprosedyrer. Likevel er det klart at den kompetente stats kontrollkrav ikke kan strekke seg så langt som til å kreve at en arbeidsledig skifter bosted. Følgelig kan det sluttes at det er tillatt for saksøker å bo og oppholde seg i Sverige. Saksøker gjør gjeldende at for å oppnå dette må kravene i folketrygdloven tolkes i samsvar med trygdeforordningen, jf. folketrygdloven § 1-3 og forskrift om inkorporasjon av trygdeforordningene i EØS-avtalen, som fastsetter at trygdeforordningen har forrang fremfor folketrygdloven.

68. Når det gjelder betydningen av at den arbeidsledige bor i et land i nærheten av den kompetente stat, slik at det i praksis er mulig for vedkommende å møte på arbeidskontoret i denne stat selv om han eller hun ikke er bosatt der, kan ikke saksøkte se at tolkningen av forordningens artikkel 71 i prinsippet burde være påvirket av hvor den arbeidsledige bor.

69. Ifølge saksøkte kan det tenkes at muligheten for å finne arbeid i den kompetente stat kan være større for arbeidsledige som bor i medlemsstater som ligger i nærheten av den kompetente stat, enn for arbeidsledige som bor i en medlemsstat lenger unna. Dette kan påvirke utfallet i den enkelte sak. Imidlertid er dette

[7] Det vises til *Naruschawicus*, som omtalt over.

However, these are considerations that relate to the application of Article 71 of the Regulation to a specific case and cannot influence how Article 71 should be understood in general.

70. In relation to the possible significance of the fact that the unemployed person, after having returned to the State of residence, registers as a job seeker with the employment service and also applies for unemployment benefits in that State, the Defendant submits that the fact that an unemployed person submits a claim for unemployment benefit in his State of residence after having had his application rejected by the employment services in the competent State cannot have any bearing on the interpretation of Article 71 of the Regulation.

71. The Defendant argues that the reason for his application was the fact that he needed support for subsistence as he had not received unemployment benefit from Norway and that this clearly cannot have a bearing on the assessment whether he should have received benefits from Norway.

72. In conclusion, the Defendant submits that the Court should give the following answer to the question submitted:

1. In relation to non-genuine frontier workers, it is incompatible with Article 71(1)(b) of Council Regulation (EEC) No 1408/71 to impose a national requirement for actual stay in the competent State in order to be entitled to unemployment benefit.

2. Whether the unemployed person lives close enough to the employment services of the competent State to be able to attend in person when required has no bearing on the interpretation of Article 71(1)(b).

3. Whether a person has been granted unemployment benefit from the State of residence has no bearing on the interpretation of Article 71(1)(b) provided that he first applied for unemployment benefit in the competent State.

betraktninger som gjelder anvendelsen av forordningens artikkel 71 i en bestemt sak, og som ikke kan ha betydning for hvordan artikkel 71 skal forstås generelt.

70. Når det gjelder den mulige betydning av det forhold at den arbeidsledige, etter å ha reist tilbake til bostedsstaten, melder seg som arbeidssøkende ved arbeidsformidlingen og også søker om dagpenger i samme stat, gjør saksøkte gjeldende at det at en arbeidsledig person fremmer et krav om dagpenger i sin bostedsstat etter å ha fått søknaden avslått av arbeidsformidlingen i den kompetente stat, ikke kan ha betydning for tolkningen av artikkel 71 i forordningen.

71. Saksøkte viser til at grunnen for søknaden var at han trengte midler til livsopphold ettersom han ikke hadde fått dagpenger fra Norge, og at dette selvfølgelig ikke kan ha betydning for vurderingen av om han burde ha fått ytelser fra Norge.

72. Som konklusjon anmoder saksøkte EFTA-domstolen om å besvare spørsmålet den er forelagt, på følgende måte:

1. Når det gjelder uekte grensearbeidere, er det i strid med artikkel 71 nr. 1 bokstav b) i rådsforordning (EØF) nr. 1408/71 å fastsette et nasjonalt krav om faktisk opphold i den kompetente stat for å ha rett til ytelser ved arbeidsledighet.

2. Om den arbeidsledige bor tilstrekkelig nær arbeidsformidlingen i den kompetente stat til om nødvendig å kunne møte personlig, har ingen betydning for tolkningen av artikkel 71 nr. 1 bokstav b).

3. Om en person er gitt rett til ytelser ved arbeidsledighet fra bostedsstaten, har ingen betydning for tolkningen av artikkel 71 nr. 1 bokstav b), forutsatt at han først har søkt om ytelser ved arbeidsledighet i den kompetente stat.

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73. According to ESA, it is undisputed in the main proceedings that Mr Jonsson was a "non-genuine" frontier worker, who after the termination of his employment relationship became wholly unemployed. Therefore, his case falls within the scope of Article 71(1)(b) of the Regulation and is to be decided either in accordance with subparagraph (i) or (ii) of that provision, depending on his choice as an unemployed person.

74. ESA argues that the choice the wholly unemployed person is entitled to and needs to make under Article 71(1)(b) of the Regulation is either to remain available to his employer or to the employment services in the territory of the competent State, and thus fall under subparagraph (i), or make himself available for work to the employment services in the territory of the EEA State where he resides, or return to this territory, and thus fall under the scope of subparagraph (ii).

75. In this regard, ESA submits that it has long been recognised that the rationale behind the rules of Article 71(1)(b) of the Regulation is to ensure that a migrant worker receives unemployment benefits in the conditions most favourable to the search for new employment.[8] Their objective is to offer a choice to the worker, who is in the best position to know what the possibilities of finding new employment are. Recitals 24 and 25 in the preamble to Regulation No 1408/71 point to the importance of securing mobility of labour under improved conditions and of facilitating the search for employment in the various EEA States by granting to the unemployed worker the benefits provided for by the legislation of the EEA State to which he was last subject.

76. ESA argues that the benefit is not merely pecuniary but includes the assistance in finding new employment which the employment services provide for workers who have made themselves

8 Reference is made to Case 39/76 *Mouthaan* [1976] ECR 1901, paragraph 13; Case 227/81 *Aubin* [1982] ECR 1991, paragraph 12; *Miethe*, cited above, paragraph 16; Case 236/87 *Bergemann* [1988] ECR 5125, paragraph 18; Case C-454/93 *Van Gestel* [1995] ECR I-1707, paragraph 20; and Case C-444/98 *De Laat* [2001] ECR I-2229, paragraph 32.

EFTAs overvåkningsorgan

73. Ifølge ESA er det ikke omtvistet i saken at Jonsson var en "uekte" grensearbeider, som etter ansettelsesforholdets slutt ble helt arbeidsledig. Derfor faller saken hans inn under virkeområdet for artikkel 71 nr. 1 bokstav b) i forordningen og skal avgjøres i samsvar med enten i) eller ii) i denne bestemmelse, avhengig av hans valg som arbeidsledig.

74. ESA anfører at valget en helt arbeidsløs person har rett og plikt til å gjøre etter artikkel 71 nr. 1 bokstav b) i forordningen, er enten å fortsette å stå til rådighet for sin arbeidsgiver eller for arbeidsformidlingen på den kompetente stats territorium, og dermed omfattes av i), eller stille seg til rådighet for arbeidsformidlingen på territoriet til den EØS-stat der han er bosatt, eller reise tilbake til dette territorium, og dermed komme inn under virkeområdet til ii).

75. I dette henseende anfører ESA at det lenge har vært anerkjent at formålet med reglene i artikkel 71 nr. 1 bokstav b) i forordningen er å sikre at vandrearbeidere mottar ytelser ved arbeidsledighet på de vilkår som er gunstigst med tanke på å søke nytt arbeid.[8] Målet med reglene er å gi arbeidstakeren et valg, da han selv vet best hvilke muligheter det er for å finne nytt arbeid. I punkt 24 og 25 i fortalen til forordning nr. 1408/71 pekes det på betydningen av å sikre bedre forutsetninger for arbeidstakermobilitet og legge til rette for arbeidssøking i de ulike EØS-stater ved å gi arbeidsledige de ytelser som er fastsatt i lovgivningen i den EØS-stat de sist var underlagt.

76. ESA anfører at ytelsen ikke bare er pengemessig men også omfatter den bistand til å finne nytt arbeid som arbeidsformidlingen yter arbeidstakere som har stilt seg til

[8] Det vises til sak 39/76 *Mouthaan*, Sml. 1976 s. 1901 (avsnitt 13), sak 227/81 *Aubin*, Sml. 1982 s. 1991 (avsnitt 12), *Miethe*, som omtalt over (avsnitt 16), sak 236/87 *Bergemann*, Sml. 1988 s. 5125 (avsnitt 18), sak C-454/93 *Van Gestel,* Sml. 1995 s. I-1707 (avsnitt 20) og sak C-444/98 *De Laat*, Sml. 2001 s. I-2229 (avsnitt 32).

available to them.[9] However, the worker may not aggregate the unemployment benefits from both States or, if he has made himself available only to the employment office in the territory of the EEA State where he resides, claim unemployment benefits from the State in which he was last employed.[10]

77. In ESA's view, the referring court in essence asks whether the EEA State of last employment, that is Norway in the present case, may require continued stay in its territory from the wholly unemployed person in order to consider that the person is making himself available to the employment services of that State.

78. In ESA's view, it follows from the wording of Article 71(1)(b)(i) of the Regulation and case law that residence cannot constitute a condition in order to satisfy the criterion of making oneself "available". According to established case law, the State of residence refers to the EEA State in which the person concerned habitually resides and where the habitual centre of their interests is to be found.[11]

79. According to ESA, the professional and personal situation of a wholly unemployed person has frequently been held to be a relevant factor in assessing where he has his residence in order to determine whether the person may fall under the exception of Article 71(1)(b)(ii) of the Regulation and not the general rule of Article 67 of the Regulation. However, this search for connecting factors indicating the EEA State of residence never compromises the choice that the wholly unemployed person has under Article 71(1)(b) of the Regulation and which is indisputable once it is established that the wholly unemployed person was previously a non-genuine frontier worker.[12]

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9 Reference is made to *Miethe*, cited above, paragraph 16.

10 Reference is made to *Aubin*, cited above, paragraph 19, and *Van Gestel*, cited above, paragraph 23.

11 Reference is made to *Naruschawicus*, paragraphs 24 and 27.

12 Reference is made to Case C-102/91 *Knoch* [1992] ECR I-4341, paragraph 14, Case C-90/97 *Swaddling* [1999] ECR I-1075, paragraph 30, and Case 76/76 *Di Paolo* [1977] ECR 315, paragraph 21. In addition, reference is made also to *Van Gestel*, paragraph 23; *Bergemann*, paragraph 21; *Miethe*, paragraph 18; *Naruschawicus*, paragraph 28; and *Aubin*, paragraph 19, all cited above.

rådighet for dem.[9] Imidlertid kan ikke arbeidstakeren kumulere ytelser fra begge stater, eller, dersom han har stilt seg til rådighet bare for arbeidsformidlingen på territoriet til den EØS-stat der han er bosatt, kreve ytelser ved arbeidsledighet fra den stat der han sist var ansatt.[10]

77. Slik ESA ser det, spør den anmodende domstol egentlig om den siste EØS-arbeidsstat, det vil si Norge i foreliggende tilfelle, kan kreve at en helt arbeidsledig person fortsatt skal oppholde seg på dens territorium for å kunne anse at vedkommende har stilt seg til rådighet for arbeidsformidlingen i denne stat.

78. Etter ESAs oppfatning følger det av ordlyden i artikkel 71 nr. 1 bokstav b) i) i forordningen og av rettspraksis at bosted ikke kan være et vilkår for å oppfylle kriteriet om å stå "til rådighet". Ifølge fast rettspraksis viser bostedsstat til den EØS-stat der vedkommende har sin sedvanlige bopel, og der hans vanlige interessesentrum befinner seg.[11]

79. Ifølge ESA har det hyppig blitt lagt til grunn at en helt arbeidsledig persons yrkessituasjon og personlige situasjon er en relevant faktor i vurderingen av hvor han har sitt bosted, for å fastslå om vedkommende kan omfattes av unntaket i artikkel 71 nr. 1 bokstav b) ii) i forordningen og ikke den generelle regel i artikkel 67 i forordningen. Imidlertid skal denne søken etter tilknytning som bestemmer EØS-bostedsstat, aldri gå ut over det valg den helt arbeidsledige har etter artikkel 71 nr. 1 bokstav b) i forordningen, og som er uomtvistelig når det er brakt på det rene at den helt arbeidsledige tidligere var en uekte grensearbeider.[12]

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9 Det vises til *Miethe*, som omtalt over (avsnitt 16).
10 Det vises til *Aubin*, som omtalt over (avsnitt 19) og *Van Gestel*, som omtalt over (avsnitt 23).
11 Det vises til *Naruschawicus*, som omtalt over (avsnitt 24 og 27).
12 Det vises til sak C-102/91 *Knoch*, Sml. 1992 s. I-4341 (avsnitt 14), sak C-90/97 *Swaddling*, Sml. 1999 s. I-1075 (avsnitt 30), og sak 76/76 *Di Paolo*, Sml. 1977 s. 315 (avsnitt 21). Det vises dessuten til *Van Gestel* (avsnitt 23), *Bergemann* (avsnitt 21), *Miethe* (avsnitt 18), *Naruschawicus* (avsnitt 28) og *Aubin* (avsnitt 19), alle som omtalt over.

80. ESA rejects the view of the Norwegian State to the effect that a person who returns to his State of residence and who no longer resides in the State of last employment (the competent State) has chosen, for the purposes of Article 71(1)(b) of the Regulation, to be subject to the rules in his State of residence. In this regard, ESA submits that the phrase "who returns to that territory" has been held merely to imply that the concept of residence does not necessarily exclude non-habitual residence in another Member State. Consequently, in its view, the Norwegian Government can derive no comfort from that phrase.

81. As for the requirement of physical presence/continued stay in the State of last employment in order to make oneself available and the compatibility of that requirement with Article 71(1)(b) of Regulation No 1408/71, ESA submits that such a requirement actually constitutes an even more onerous requirement than the requirement of residence which has been found incompatible with EEA rules by the Court of Justice of the European Union ("the ECJ").

82. ESA submits that, if continued stay were required, the choice of the wholly unemployed person set out in Article 71(1)(b) of the Regulation would be seriously compromised and rendered nugatory from a practical point of view.

83. First, so ESA contends, it would be restrictive, discriminatory and disproportionate to require a person seeking to make use of the possibilities available in the internal EEA labour market either to move his residence to the EEA State of employment or to remain in the territory of that State after the termination of his employment relationship in order to be entitled to receive unemployment benefits from the latter State.

84. Second, ESA stresses that a requirement of continued stay would not take into account the personal situation and the actual intentions of the wholly unemployed person. In certain cases, leaving the territory of the State of last employment might indicate the interruption of any link to that State and a choice to become re-established in another State. In other cases, however, a wholly unemployed person might leave the territory of the State

80. ESA avviser statens oppfatning om at en person som reiser tilbake til sin bostedsstat og ikke lenger oppholder seg i siste arbeidsstat (den kompetente stat) , har valgt, innenfor rammen av artikkel 71 nr. 1 bokstav b) i forordningen, å underkaste seg reglene i sin bostedsstat. I denne sammenheng anfører ESA at det er blitt fremholdt at formuleringen "som reiser tilbake til denne statens territorium" bare innebærer at begrepet bosted ikke nødvendigvis utelukker et midlertidig bosted ("non-habitual residence") i en annen medlemsstat. Etter ESAs oppfatning kan Norges regjering følgelig ikke finne støtte i denne formulering.

81. Når det gjelder kravet om fysisk tilstedeværelse/fortsatt opphold i siste arbeidsstat for å kunne stå til rådighet, og dette kravs forenlighet med artikkel 71 nr. 1 bokstav b) i forordning nr. 1408/71, anfører ESA at et slikt krav faktisk vil være enda mer bebyrdende enn kravet om opphold, som EU-domstolen har funnet å være i strid med EØS-reglene.

82. ESA gjør gjeldende at dersom fortsatt opphold var et krav, ville valget som den helt arbeidsledige har etter artikkel 71 nr. 1 bokstav b) i forordningen, være alvorlig svekket og uten praktisk betydning.

83. ESA anfører for det første at det ville være en restriksjon, innebære forskjellsbehandling og være uforholdsmessig å kreve at en person som søker å utnytte de muligheter som finnes på det indre marked i EØS, enten flytter sitt bosted til EØS-arbeidsstaten eller blir værende på territoriet til denne stat etter ansettelsesforholdets slutt for å ha rett til dagpenger fra denne stat.

84. Dernest understreker ESA at et krav om fortsatt opphold ikke vil ta hensyn til den helt arbeidslediges personlige situasjon og faktiske intensjoner. I visse tilfeller kan det å forlate territoriet til den siste arbeidsstat tyde på brudd i tilknytningen til denne stat og et valg om å etablere seg i en annen stat. I andre tilfeller vil imidlertid en helt arbeidsledig person kunne forlate den siste arbeidsstats territorium av flere grunner (for eksempel kan

of last employment for several reasons (for example the cost of living there might be extremely high for an unemployed person or the unemployed person might have personal links in another State) in order to return once he finds employment.

85. Third, ESA asserts that the requirement of continuous physical presence in the territory of the State of last employment constitutes a restrictive condition as it does not reflect the rationale of Article 71(1)(b)(i) of the Regulation. In its view, the phrase "remain available to his employer or to the employment services in the territory of the competent State" does not aim to exclude all possibility for a wholly unemployed person to seek job opportunities in other EEA States during the period that he receives benefits from the State of last employment, taking advantage of the possibilities offered by the internal labour market.

86. Although the requirement for a continuous physical presence in the territory of the State of last employment is precluded by Article 71(1)(b)(i) of the Regulation, ESA submits that the requirement to report periodically to the competent authorities in that State may in principle be compatible with that provision, depending on the circumstances of the case. However, the reporting requirement should not render it unduly difficult in practice or practically impossible for a claimant to seek employment opportunities in any other EEA State. Indeed, Section 4-8 of the Norwegian National Insurance Act requires the claimant to report in principle every two weeks. Such a requirement falls short, ESA submits, of a requirement for continuous physical presence in Norway.

87. Finally, ESA submits that the control considerations relevant in Case C-406/04 *De Cuyper* cannot be of any assistance to Norway's arguments in the present case as that case concerned a different category of migrant workers, who do not fall under Article 71 of Regulation No 1408/71.

88. In ESA's view, the non-genuine frontier worker who becomes unemployed cannot be deprived, therefore, of his choice pursuant

levekostnadene være ekstremt høye for en arbeidsledig, eller den arbeidsledige kan ha personlige bånd i en annen stat) for så å reise tilbake når han finner arbeid.

85. For det tredje gjør ESA gjeldende at kravet om kontinuerlig fysisk tilstedeværelse på territoriet til siste arbeidsstat er et restriktivt vilkår da det ikke gjenspeiler formålet med artikkel 71 nr. 1 bokstav b) i) i forordningen. Etter ESAs oppfatning tar formuleringen "fortsatt er til rådighet for sin arbeidsgiver eller for arbeidsformidlingen på den kompetente stats territorium" ikke sikte på å utelukke enhver mulighet for en helt arbeidsledig til å søke jobbmuligheter i andre EØS-stater i perioden han mottar ytelser fra siste arbeidsstat, og utnytte de muligheter som det felles arbeidsmarked byr på.

86. Selv om artikkel 71 nr. 1 bokstav b) i) er til hinder for et krav om kontinuerlig fysisk tilstedeværelse på territoriet til siste arbeidsstat, gjør ESA gjeldende at kravet om å melde seg jevnlig for kompetente myndigheter i denne stat i prinsippet kan være forenlig med bestemmelsen, avhengig av omstendighetene i det enkelte tilfelle. Meldeplikten burde imidlertid ikke gjøre det urimelig vanskelig eller umulig i praksis for vedkommende å søke arbeid i en hver annen EØS-stat. Folketrygdloven § 4-8 krever at medlemmet i prinsippet må melde seg hver fjortende dag. ESA gjør gjeldende at et slikt krav ikke er det samme som et krav om stadig fysisk tilstedeværelse i Norge.

87. Endelig gjør ESA gjeldende at kontrollhensynene som var relevante i saken C-406/04 *De Cuyper* ikke kan understøtte Norges argumenter i denne sak siden den gjaldt en annen kategori vandrearbeidere som ikke omfattes av artikkel 71 i forordning nr. 1408/71.

88. Slik ESA ser det, kan en uekte grensearbeider som blir arbeidsledig, derfor ikke fratas valgmuligheten etter artikkel 71 nr.

to Article 71(1)(b) of the Regulation. He will decide which country offers the most favourable financial or non-financial conditions for him for the period he remains unemployed with a view to finding new employment. Furthermore, given that the choice is a benefit accorded to the wholly unemployed person, the fact that he qualifies for one of the options under Article 71(1)(b) does not disqualify him from pursuing another.

89. As has already been stated, ESA's view is that a requirement for residence or continued stay in Norway as a condition for receipt of unemployment benefits is incompatible with Article 71(1)(b) of the Regulation and, consequently, any other requirement imposed by national law which amounts to and is more onerous than a residence requirement must also be incompatible with that provision.

90. In ESA's view, it is, in principle, possible, pursuant to Article 71(1)(b)(i) of the Regulation, for an EEA State to lay down a requirement to report periodically to the competent authorities in the State of last employment. That reporting obligation should not, however, in the circumstances of a given case, amount to an obligation equivalent to a requirement of permanent residence or stay. In particular, the reporting requirement should not render it practically impossible or unduly difficult for the claimant to seek employment opportunities in any other EEA State, whether close or distant.

91. Thus, in ESA's view, it is generally irrelevant whether the claimant lives in an EEA State that is close or distant to the State of last employment. Nevertheless, there may be circumstances that arise in a particular case which indicate that is practically impossible for the claimant to reside in the EEA State of his choice and to comply with the reporting requirements in Norway. In such circumstances, ESA argues that it is for the national court to determine whether the Defendant complied with or has the practical possibility to comply with the other conditions set by the Norwegian legislation in order to determine whether he is entitled to receive the benefit.

1 bokstav b) i forordningen. Han vil bestemme hvilken stat som gir ham de gunstigste økonomiske eller ikke-økonomiske vilkår i tiden han er arbeidsledig, med sikte på å finne nytt arbeid. Og videre, ettersom valgmuligheten er en fordel som innrømmes helt arbeidsledige personer, vil ikke det faktum at han har adgang til å benytte et av alternativene i artikkel 71 nr. 1 bokstav b), innebære at han ikke kan velge et annet alternativ.

89. Som allerede nevnt, er ESA av den oppfatning at et krav om bosted eller fortsatt opphold i Norge som et vilkår for å motta ytelser ved arbeidsledighet, er i strid med artikkel 71 nr. 1 bokstav b) i forordningen, og følgelig må ethvert annet krav hjemlet i nasjonal lovgivning som innebærer og som er mer bebyrdende enn et bostedskrav, også være i strid med nevnte bestemmelse.

90. Etter ESAs syn er det etter artikkel 71 nr. 1 bokstav b) i) i forordningen i prinsippet mulig for en EØS-stat å oppstille et krav om å melde seg jevnlig til kompetente myndigheter i siste arbeidsstat. Meldeplikten bør imidlertid ikke i noe tilfelle utgjøre en forpliktelse som innebærer krav om fast bosted eller opphold. Særlig bør meldekravet ikke gjøre det praktisk umulig eller urimelig vanskelig å søke arbeid i en hver annen EØS-stat, enten den er nær eller fjern.

91. ESA mener derfor at det generelt er uten betydning om vedkommende bor i en EØS-stat som ligger nær eller fjernt fra siste arbeidsstat. Likevel kan det i bestemte tilfeller foreligge omstendigheter som tilsier at det i praksis er umulig for vedkommende å bo i den EØS-stat han ønsker, og samtidig overholde meldekravene i Norge. ESA anfører at det under slike omstendigheter er opp til den nasjonale domstol å vurdere om saksøkte har oppfylt eller har praktisk mulighet for å oppfylle de andre vilkår fastsatt i norsk lovgivning for å avgjøre om han har krav på ytelsene.

92. ESA submits that in the assessment of a new claim for benefits in Norway it would be inappropriate to hold it against Mr Jonsson that he was granted unemployment benefits in Sweden after he had been initially refused such benefits in Norway. In ESA's view, Mr Jonsson clearly claimed benefits in Sweden because he had been denied them in Norway and was in need of means of subsistence.

93. In this regard, ESA observes that Article 71(1)(b)(ii) of the Regulation provides for the suspension of the benefits a wholly unemployed person receives from the State of residence when he has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject. Therefore, that provision makes clear that it is not the benefits from the State of last employment that must be suspended and, moreover, that those benefits take priority over the benefits received from the State of residence.

94. In ESA's view, it is also clear from that provision that a person is entitled to unemployment benefits in the State of last employment even where he has received unemployment benefits under the legislation of the State of residence. This is also in line with the principle that it is the State of last employment that is the competent State for unemployed workers and Article 71 of the Regulation introduces a derogation from this principle only in so far as the unemployed worker claims unemployment benefits in the State of residence pursuant to Article 71(1)(a)(ii) or Article 71(1)(b)(ii) of Regulation No 1408/71.

95. ESA submits further that account must be taken of the fact that an unemployed person might have limited knowledge of social security law while at the same time being in need of means of subsistence. It reiterates, however, that an unemployed person may not aggregate the unemployment benefits of two different States, that is, Norway and Sweden in the present case.

96. ESA submits that the question should be answered as follows:

    1. *It is incompatible with Article 71(1)(b) of Council Regulation (EEC) No 1408/71 on the application of social security schemes*

92. ESA gjør gjeldende at det i vurderingen av et nytt krav om ytelser i Norge ville være upassende å bruke mot Jonsson at han fikk dagpenger i Sverige etter at han opprinnelig var blitt nektet slike ytelser i Norge. Etter ESAs syn søkte Jonsson åpenbart ytelser i Sverige fordi han var blitt nektet ytelser i Norge, og trengte midler til livsopphold.

93. I denne sammenheng nevner ESA at artikkel 71 nr. 1 bokstav b) ii) i forordningen fastsetter at ytelsene som en helt arbeidsledig person mottar fra bostedsstaten, skal suspenderes når han kan gjøre krav på ytelser fra den kompetente institusjon i den medlemsstat hvis lovgivning vedkommende sist var underlagt. Derfor gjør denne bestemmelse det klart at det ikke er ytelsene fra den siste arbeidsstat som må suspenderes, og videre at disse ytelser går foran ytelser fra bostedsstaten.

94. Etter ESAs oppfatning er det også klart ut fra denne bestemmelse at en person har rett til ytelser ved arbeidsledighet i den siste arbeidsstat også om han har mottatt ytelser etter lovgivningen i bostedsstaten. Dette er også i tråd med prinsippet om at det er siste arbeidsstat som er den kompetente stat for en arbeidsledig. Artikkel 71 i forordningen fastsetter et unntak fra dette prinsipp bare i den utstrekning den arbeidsledige krever ytelser ved arbeidsledighet i bostedsstaten etter artikkel 71 nr. 1 bokstav a) ii) eller artikkel 71 nr. 1 bokstav b) ii) i forordning nr. 1408/71.

95. ESA gjør videre gjeldende at det må tas hensyn til det forhold at en arbeidsledig kan ha begrenset kunnskap om trygderett, samtidig som han kan trenge midler til livsopphold. ESA påminner imidlertid om at en arbeidsledig person ikke kan motta ytelser ved arbeidsledighet fra to forskjellige stater samtidig, i dette tilfelle Norge og Sverige.

96. ESA foreslår følgende som svar på spørsmålet:

    1. *Det er uforenlig med artikkel 71 nr. 1 bokstav b) i rådsforordning (EØF) nr. 1408/71 om anvendelse av trygdeordninger*

to employed persons, to self-employed persons and to members of their families moving within the Community to require continued stay or residence in the competent State (the State of last employment) in order to grant the unemployment benefit in the case of a wholly unemployed person who, during his last employment, has stayed there as a "non-genuine" frontier worker;

2. *(i) The EEA State of last employment (the competent State) is not precluded by Article 71(1)(b)(i) of Regulation (EEC) No 1408/71 from requiring the unemployed person to report periodically to the competent authorities there so that the claimant is available to the employment services in that State provided that those reporting requirements do not render it practically impossible or unduly difficult to seek employment opportunities in another EEA State. It is for the referring court to assess, in the light of all of the circumstances of the case, whether the complainant can in practice comply with the reporting requirements laid down by the EEA State of last employment.*

   (ii) A wholly unemployed person, other than a frontier worker, who registers as a job seeker with the employment service and applies for unemployment benefits in the State of residence, remains entitled to claim unemployment benefits pursuant to Article 71(1)(b)(i) of Regulation (EEC) No 1408/71 in the State of last employment (the competent EEA State) after registering with the employment service there. The receipt of benefits under the legislation of the State of residence is suspended for any period during which the unemployed person receives unemployment benefits from the competent EEA State.

The European Commission

97. In the Commission's view, it is uncontested that Mr Jonsson fell within the scope of Article 71 of Regulation No 1408/71. Having returned less frequently than once per week to his country of residence, Mr Jonsson was an employed person, other than a frontier worker, within the meaning of Article 71(1)(b) of the Regulation.

på arbeidstakere, selvstendig næringsdrivende og deres familiemedlemmer som flytter innenfor Fellesskapet å kreve fortsatt opphold eller bosted i den kompetente stat (siste arbeidsstat) for å kunne få ytelser ved arbeidsledighet for en helt arbeidsledig person som under sitt siste arbeid har hatt opphold der som "uekte" grensearbeider.

2. *i) Artikkel 71 nr. 1 bokstav b) i) i forordning (EØS) nr. 1408/71 er ikke til hinder for at den siste EØS-arbeidsstat (den kompetente stat) kan kreve at den arbeidsledige person melder seg regelmessig for de kompetente myndigheter der slik at vedkommende står til rådighet for arbeidsformidlingen i denne stat, forutsatt at meldekravene ikke i praksis gjør det umulig eller urimelig vanskelig å søke arbeid i en annen EØS-stat. Det er opp til den anmodende domstol å vurdere, i lys av alle sakens omstendigheter, om vedkommende i praksis kan overholde meldekravene fastsatt av den siste EØS-arbeidsstat.*

   ii) En helt arbeidsledig person som ikke er en grensearbeider, som melder seg som arbeidssøkende ved arbeidsformidlingen og søker om ytelser ved arbeidsløshet i bostedsstaten, har fortsatt rett til å kreve ytelser ved arbeidsledighet etter artikkel 71 nr. 1 bokstav b) i) i forordning (EØS) nr. 1408/71 i siste arbeidsstat (den kompetente EØS-stat) etter å ha meldt seg ved arbeidsformidlingen der. Utbetalingen av ytelser etter lovgivningen i bostedsstaten skal suspenderes for det tidsrom den arbeidsledige mottar ytelser ved arbeidsledighet fra den kompetente EØS-stat.

Europakommisjonen

97. Etter Kommisjonens oppfatning er det uomtvistet at Jonsson falt inn under artikkel 71 i forordning nr. 1408/71. Siden han reiste tilbake til sin bostedsstat mindre enn en gang i uken, var Jonsson en arbeidstaker som ikke var grensearbeider etter artikkel 71 nr. 1 bokstav b) i forordningen.

98. As regards the application of Article 71(1)(b) of the Regulation, the Commission submits that, according to case law, the decisive element in applying Article 71 of the Regulation, as a whole, is the residence of the person concerned in a Member State other than the State to whose legislation he was subject during his last employment.[13] In the Commission's view, the concept of "the Member State in which he resides" within the meaning of Article 71 must be limited to the State where the worker, although employed in another Member State, continues to habitually reside and where the habitual centre of his interests is also situated.[14]

99. The Commission submits that Article 71 of Regulation No 1408/71 seeks to ensure that the migrant worker receives unemployment benefits under the most favourable conditions for seeking new employment.[15] It argues that an employed person other than a frontier worker who, during his last employment, resided in a Member State other than the competent State has, in the event of becoming unemployed, a choice under Article 71(1)(b) of the Regulation between the State of residence and the State of last employment as regards the payment of benefits.

100. In the Commission's view, this category of migrant workers was given the choice to request unemployment benefits in the State of last activity given the possibility that their links to that State are stronger such as to give them a better chance of finding new employment in that State and to allow them the opportunity as job-seekers of having regular face to face contact with the competent institution.

101. Thus, according to the Commission, Article 71(1)(b) of the Regulation allows wholly unemployed persons who resided outside the competent Member State during their last employment and who were not frontier workers either to claim unemployment benefits in the competent Member State as though they were

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13 Reference is made to *Di Paolo*, cited above, paragraph 11.

14 Ibid., paragraph 12. Reference is also made to *Knoch*, cited above, paragraphs 21 to 23.

15 Reference is made to *Mouthaan*, paragraph 13; *Aubin*, paragraph 12; *Miethe*, paragraphs 15 to 19; and *De Laat*, paragraphs 32 and 36, all cited above.

98. Når det gjelder anvendelsen av artikkel 71 nr. 1 bokstav b) i forordningen, anfører Kommisjonen at ifølge rettspraksis er det avgjørende element ved anvendelse av forordningens artikkel 71 sett under ett, vedkommendes opphold i en annen medlemsstat enn den stat hvis lovgivning han var underlagt i sitt siste arbeidsforhold.[13] Kommisjonen er av den oppfatning at begrepet "den medlemsstat der vedkommende er bosatt" etter artikkel 71 må være begrenset til den stat der arbeidstakeren, selv om han er ansatt i en annen medlemsstat, fortsetter å ha sin sedvanlige bopel, og der hans vanlige interessesentrum også befinner seg.[14]

99. Kommisjonen gjør gjeldende at artikkel 71 i forordning nr. 1408/71 søker å sikre at vandrearbeidere mottar ytelser ved arbeidsledighet på de vilkår som er gunstigst for å søke nytt arbeid.[15] Det anføres at dersom en arbeidstaker som ikke er en grensearbeider, som under sitt siste arbeidsforhold var bosatt i en annen medlemsstat enn den kompetente stat, blir arbeidsledig, etter artikkel 71 nr. 1 bokstav b) i forordningen har valget mellom bostedsstaten og siste arbeidsstat når det gjelder utbetalingen av ytelser.

100. Etter Kommisjonens oppfatning fikk denne kategori vandrearbeidere mulighet til å søke ytelser ved arbeidsledighet i den stat der de hadde sitt siste arbeidsforhold, siden det er mulig at deres tilknytning til denne stat er sterkere, slik at de dermed ville ha bedre sjanse til å finne nytt arbeid i denne stat, og mulighet som arbeidssøkende til å ta personlig kontakt med den kompetente institusjon.

101. Ifølge Kommisjonen gir artikkel 71 nr. 1 bokstav b) i forordningen dermed helt arbeidsledige personer som var bosatt utenfor territoriet til den kompetente stat under sitt siste arbeidsforhold, og som ikke var grensearbeidere, mulighet for enten å kreve ytelser ved arbeidsledighet i den kompetente medlemsstat som om de var

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13 Det vises til *Di Paolo*, som omtalt over (avsnitt 11).
14 Samme sted (avsnitt 12). Det vises også til *Knoch*, som omtalt over (avsnittene 21 til 23).
15 Det vises til *Mouthaan* (avsnitt 13), *Aubin* (avsnitt 12), *Miethe* (avsnitt 15–19) og *De Laat* (avsnitt 32 og 36), alle som omtalt over.

residing in its territory, or to claim unemployment benefits in the State of residence as if they had last been employed there.

102. According to the Commission, this choice is exercised by the wholly unemployed person who makes himself available to the employment services of the country where the benefits are claimed. The provision in question requires the competent State to create a legal fiction of residence and to provide unemployment benefits to such person in accordance with its legislation as if he resided on its territory. If, on the other hand, the person claims benefits in the State of residence, the latter is required to create a legal fiction of previous employment and provide unemployment benefits in accordance with its legislation as though the person had last been employed there.

103. The Commission rejects the submission of the Norwegian State to the effect that it is compatible with Article 71 of the Regulation to require residence in the competent State for wholly unemployed persons who worked in Norway, but who were resident in another Member State, and, moreover, that a person who returned to the State of residence and who no longer resides in the competent State has thus chosen, for the purposes of Article 71(1)(b) of the Regulation, to be subject to the rules in his State of residence.

104. In contrast, the Commission submits that the phrase "who returns to that territory" merely implies that the concept of residence does not necessarily exclude non-habitual residence in another Member State.[16] Moreover, it contends that Article 71(1)(b) of the Regulation neither requires a continuous stay in the competent State nor it does imply that a person has resided or must reside there in order to claim unemployment benefits, since such an interpretation would contradict the purpose and the wording of the Article.

105. In the Commission's view, it follows clearly from the very existence of Article 71(1)(b) of the Regulation, as interpreted by the ECJ, that the law coordinating social security systems is

[16] Reference is made to *Di Paolo*, cited above, paragraph 21.

bosatt på dens territorium, eller å kreve ytelser ved arbeidsledighet i bostedsstaten som om det var der de sist var ansatt.

102. Ifølge Kommisjonen tas dette valg ved at den helt arbeidsledige personen stiller seg til rådighet for arbeidsformidlingen i staten der ytelsene kreves. Den aktuelle bestemmelse innebærer at den kompetente stat må skape en juridisk fiksjon om bosted og betale ytelser ved arbeidsledighet til vedkommende i henhold til intern rett som om han var bosatt på statens territorium. Dersom vedkommende på den annen side krever ytelser i bostedsstaten, har sistnevnte plikt til å skape en juridisk fiksjon om tidligere arbeidsforhold og utbetale ytelser ved arbeidsledighet i samsvar med intern rett som om vedkommende sist hadde vært beskjeftiget der.

103. Kommisjonen avviser statens påstand om at det er forenlig med artikkel 71 i forordningen å kreve bosted i den kompetente stat for helt arbeidsledige personer som har arbeidet i Norge, men som var bosatt i en annen medlemsstat, og videre at en person som har vendt tilbake til bostedsstaten og ikke lenger bor i den kompetente stat, etter artikkel 71 nr. 1 bokstav b) i forordningen dermed har valgt å være underlagt reglene i sin bostedsstat.

104. Kommisjon anfører derimot at formuleringen "som reiser tilbake til denne statens territorium" bare innebærer at bostedsbegrepet ikke nødvendigvis utelukker midlertidig opphold ("non-habitual residence") i en annen medlemsstat.[16] Videre gjør Kommisjonen gjeldende at artikkel 71 nr. 1 bokstav b) i forordningen verken krever fortsatt opphold i den kompetente stat, eller at en person har vært eller må være bosatt der for å kunne kreve ytelser ved arbeidsledighet, siden en slik tolkning ville være i strid med artikkelens formål og ordlyd.

105. Kommisjonen er av den oppfatning at eksistensen av artikkel 71 nr. 1 bokstav b) i forordningen, slik EU-domstolen har tolket den, klart må medføre at reglene som samordner trygdeordningene

[16] Det vises til *Di Paolo*, som omtalt over (avsnitt 21).

based on the premise that it is possible to be available to the employment services in the territory of a Member State, and, by extension, to satisfy the obligations laid down in the legislation of that Member State, without being resident in that Member State. Consequently, in so far as it remains possible to be available to the employment services in the competent Member State and to satisfy the obligations laid down in the legislation of that Member State, the latter cannot refuse to grant unemployment benefits in accordance with Article 71(1)(b) of the Regulation to the entitled person on account of his lack of residence in its territory.[17]

106. The Commission also rejects the submission of the Norwegian Government to the effect that Regulation No 883/2004 has introduced changes with regard to the purpose and interpretation of this provision.

107. The Commission contests the conclusions drawn by the Norwegian Government from *De Cuyper*[18] to the effect that considerations of control serve to underline that an unemployed person should not be able to claim benefits in his former State of employment without actually residing there.

108. The Commission argues that *De Cuyper* concerned a different category of migrant workers who did not fall within the scope of Article 71 of the Regulation. The Commission points out that, in paragraph 38 of the judgment, the ECJ emphasises that the Regulation provides for two situations in which the competent Member State is required to allow recipients of an unemployment allowance to reside in the territory of another Member State while retaining their benefit entitlement. Article 71 of the Regulation relating to unemployed persons who, during their last employment, were residing in the territory of a Member State other than the competent State is explicitly mentioned as one of the two situations.

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17 Reference is made to *Naruschawicus*, cited above, paragraphs 24 to 27, in particular paragraph 26.

18 Reference is made to *De Cuyper*, cited above, paragraphs 45 to 47.

er basert på den forutsetning at det er mulig å stå til rådighet for arbeidsformidlingen på territoriet til en medlemsstat, og følgelig også å oppfylle vilkårene fastsatt i lovgivningen i denne medlemsstat, uten å være bosatt i medlemsstaten. I den utstrekning det fortsatt er mulig å stå til rådighet for arbeidsformidlingen i den kompetente medlemsstat og oppfylle forpliktelsene fastsatt i lovgivningen i samme medlemsstat, kan sistnevnte følgelig ikke nekte å gi ytelser ved arbeidsledighet etter artikkel 71 nr. 1 bokstav b) i forordningen til en person som er berettiget, under henvisning til at han ikke har bosted på territoriet.[17]

106. Kommisjonen avviser også den norske regjerings påstand om at forordning nr. 883/2004 innførte endringer når det gjelder formålet med og tolkningen av bestemmelsen.

107. Kommisjonen bestrider slutningene Norges regjering trekker av *De Cuyper*[18], om at kontrollhensyn tilsier at en arbeidsledig ikke bør kunne kreve ytelser i sin siste arbeidsstat uten faktisk å bo der.

108. Kommisjonen gjør gjeldende at *De Cuyper* gjaldt en annen kategori vandrearbeidere som ikke falt inn under artikkel 71 i forordningen. Kommisjonen peker på at EU-domstolen i avsnitt 38 i dommen understreker at forordningen viser til to situasjoner der den kompetente medlemsstat må tillate at mottakere av ytelser ved arbeidsledighet bor på territoriet til en annen medlemsstat samtidig som de beholder sin rett til ytelsen. Artikkel 71 i forordningen som gjelder arbeidsledige personer som under sitt siste arbeid var bosatt på territoriet til en annen medlemsstat enn den kompetente stat, er uttrykkelig nevnt som en av de to situasjoner.

[17] Det vises til *Naruschawicus*, som omtalt over (avsnittene 24 til 27, særlig avsnitt 26).
[18] Det vises til *De Cuyper*, som omtalt over (avsnittene 45 til 47).

109. Therefore, in the Commission's view, the judgment cannot be interpreted, as the Norwegian Government suggests, as establishing that an unemployed person falling within the scope of Article 71(1)(b) of the Regulation should not be able to claim benefits in his former State of employment without actually residing there. On the contrary, according to the Commission, it follows clearly from *Naruschawicus* that for persons falling within the scope of Article 71(1)(b) of the Regulation the grant of unemployment benefits cannot be subject to a residence condition.

110. Moreover, the Commission adds that having regard to the aim pursued by the fundamental freedoms established under Union law and EEA law it is neither justified nor proportionate to require a person falling within the scope of Article 71(1)(b) of the Regulation to remain continuously present in the territory of that Member State. This would go beyond what is necessary to ensure compliance with obligations on job-seekers and would effectively prevent the person concerned from returning, on a regular basis, to his State of residence. In its view, the Norwegian State has not provided any justification for requiring the continuous presence of Mr Jonsson in Norway in order to comply with the obligations on job-seekers and the monitoring measures which are in place there.

111. As regards the question of the national court whether it has any relevance if the unemployed person lives in a country near the competent State, so that is possible in practice for that person to appear at the employment office in that State even if he/she does not stay there, the Commission submits that neither the place of residence nor the actual distance between the States concerned should be relevant for the unemployed person's entitlement, as long as the person complies with the statutory conditions for the grant of unemployment benefits in the competent State.

112. As to the question of the national court whether it is relevant in answering the first question if the person registered as a job seeker and applied for unemployment benefits in the State of residence after returning there, the Commission maintains its view that the fact that a person has applied for benefits in his

109. Etter Kommisjonens oppfatning kan derfor dommen ikke tolkes slik at den innebærer at en arbeidsledig person som faller inn under artikkel 71 nr. 1 bokstav b) i forordningen, ikke skal kunne søke om ytelser i sin siste arbeidsstat uten faktisk å bo der, slik Norges regjering antyder. Ifølge Kommisjonen følger det tvert imot klart av *Naruschawicus* at når det gjelder personer som faller inn under artikkel 71 nr. 1 bokstav b) i forordningen, kan ytelser ved arbeidsledighet ikke være underlagt et bostedskrav.

110. Videre legger Kommisjonen til at i betraktning av målet som de grunnleggende friheter fastsatt ved unionsretten og EØS-retten forfølger, vil et krav om at en person som faller inn under artikkel 71 nr. 1 bokstav b) i forordningen hele tiden skal være til stede på territoriet til nevnte medlemsstat, verken være berettiget eller forholdsmessig. Det ville gå ut over det som er nødvendig for å sikre at en arbeidssøkende overholder sine forpliktelser og ville effektivt hindre vedkommende fra å reise regelmessig tilbake til sin bostedsstat. Etter Kommisjonens syn har staten ikke lagt frem noen begrunnelse for å kreve at Jonsson stadig skal være til stede i Norge for å overholde de forpliktelser som hviler på arbeidssøkende, og det tilsyn som er på plass der.

111. Når det gjelder den nasjonale domstols spørsmål om det har betydning om den arbeidsledige bor i en stat som ligger i nærheten av den kompetente stat, slik at det er praktisk mulig for vedkommende å møte ved arbeidsformidlingen i denne stat selv om vedkommende ikke har opphold der, gjør Kommisjonen gjeldende at verken oppholdssted eller faktisk avstand mellom de berørte stater bør ha betydning for om den arbeidsledige har krav på dagpenger, så lenge vedkommende overholder lovens vilkår for å få ytelser ved arbeidsledighet i den kompetente stat.

112. Hva gjelder den nasjonale domstols spørsmål om det er av betydning for svaret på det første spørsmål om vedkommende har meldt seg som arbeidssøkende og søkt om ytelser ved arbeidsledighet i bostedsstaten etter å ha reist tilbake dit, fastholder Kommisjonen at det forhold at en person har søkt om

State of residence has no impact on the interpretation of Article 71(1)(b) of the Regulation.

113. The Commission stresses the fact that Mr Jonsson only applied for and was granted unemployment benefits in the State of residence after his claim for unemployment benefits was refused in Norway on the grounds that he was not resident there.

114. Contrary to the arguments of the Norwegian State, the Commission submits that it cannot be assumed that, in requesting unemployment benefits in his State of residence following the refusal in the competent State, Mr Jonsson exercised his choice under Article 71(1)(b) of the Regulation, since this step was necessary in order to obtain some means of subsistence. Therefore, this request cannot be considered an application under Article 71(1)(b) of the Regulation.

115. Moreover, according to the Commission, Mr Jonsson was entitled to claim unemployment benefits in Norway when he made himself available to the employment services there. This entitlement which is provided for in Union law and applicable in the EEA is not invalidated in circumstances where the application for benefits was rejected unlawfully by the competent Member State. In the Commission's view, where a worker makes a claim for benefits in the State of residence following a rejection of his claim for benefits in the competent Member State on the basis of a residence condition contrary to EEA law, it would clearly contradict the *effet utile* of the social security coordination rules to prohibit that worker from exercising his entitlement under Article 71(1)(b) of the Regulation.

116. Furthermore, the Commission rejects the argument of the Norwegian State to the effect that a wholly unemployed person, other than frontier worker, who registers with the employment services in his State of residence can no longer claim benefits under the legislation of the competent State. In this regard, the Commission submits, first, that no other provision of the Regulation lays down conditions limiting the application of Article 71(1)(b)(i) of the Regulation. Second, it submits that

ytelser i bostedsstaten ikke har noen betydning for tolkningen av artikkel 71 nr. 1 bokstav b) i forordningen.

113. Kommisjonen understreker at Jonsson først søkte om og fikk dagpenger i bostedsstaten etter å ha fått avslag på dagpenger i Norge med den begrunnelse at han ikke hadde opphold der.

114. Kommisjonen bestrider statens argumenter og anfører at det ikke kan antas at Jonsson, da han søkte om dagpenger i bostedsstaten etter å ha fått avslag i den kompetente stat, foretok et valgetter artikkel 71 nr. 1 bokstav b) i forordningen, da dette var et nødvendig skritt for å få midler til livsopphold. Derfor kan ikke denne anmodning anses som en søknad etter artikkel 71 nr. 1 bokstav b) i forordningen.

115. Ifølge Kommisjonen hadde Jonsson videre rett til å kreve dagpenger i Norge da han stilte seg til rådighet for arbeidsformidlingen der. Dette er en rett som er hjemlet i unionsretten og som gjelder i EØS, og den faller ikke bort når en søknad om dagpenger urettmessig blir avslått av den kompetente stat. Kommisjonen mener at dersom en arbeidstaker fremmer krav om dagpenger i bostedsstaten etter å ha fått avslag på søknad om dagpenger i den kompetente medlemsstat med grunnlag i et oppholdskrav som er i strid med EØS-retten, ville det klart være i strid med prinsippet om en effektiv virkning av reglene for trygdesamordning å hindre nevnte arbeidstaker i å utøve sin rett etter artikkel 71 nr. 1 bokstav b) i forordningen.

116. Videre avviser Kommisjonen statens argument om at en helt arbeidsledig person som ikke er en grensearbeider, som melder seg for arbeidsformidlingen i sin bostedsstat, ikke lenger kan kreve dagpenger etter lovgivningen i den kompetente stat. I denne sammenheng anfører Kommisjonen for det første at ingen andre bestemmelser i forordningen fastsetter vilkår som begrenser anvendelsen av artikkel 71 nr. 1 bokstav b) i) i forordningen. For

such an interpretation would conflict with the aim pursued by that provision, which is to optimise a worker's chances of resuming employment. In the Commission's view, that aim would not be attained if the person concerned were deprived of their entitlement to benefits under the legislation of one State as a result of having opted initially for benefits in another.

117. On the other hand, the Commission points out that a worker can neither aggregate the amounts of unemployment benefits from the two States, nor, if he is available solely to the employment services in the territory of the State of residence, claim unemployment benefits from the State of last employment.[19] In this regard, the Commission submits that entitlement to unemployment benefits presumes that the unemployed person is available to the employment office where he is registered.[20]

118. Pursuant to Article 71(1)(b)(ii) of the Regulation, where a wholly unemployed person receives benefits in accordance with the legislation of the State of residence and has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, the receipt of benefits under the legislation of the State of residence shall be suspended. In the Commission's view, this provision confirms that a person may remain entitled to unemployment benefits in the competent State even where he has received unemployment benefits under the legislation of the State of residence. The provision of unemployment benefits by the competent State takes priority, as the receipt of benefits under the legislation of the State of residence is suspended. This is also in line with the principle that the competent State for unemployed workers is the State of last employment and Article 71 of Regulation No 1408/71 introduces a derogation from this principle only in so far as the unemployed worker claims unemployment benefits in the State of residence.

[19] Reference is made to *Aubin*, cited above, paragraph 19.
[20] Case 20/75 *d'Amico* [1975] ECR 891, paragraph 4.

det andre gjør den gjeldende at en slik tolkning ville være i strid med bestemmelsens formål, nemlig å optimere arbeidstakerens muligheter til å finne nytt arbeid. Slik Kommisjonen ser det, ville ikke dette mål kunne nås dersom vedkommende var fratatt sin rett til ytelser etter lovgivningen i en stat fordi han først hadde valgt å søke om ytelser i en annen stat.

117. På den annen side peker Kommisjonen på at en arbeidstaker verken kan motta dagpenger fra begge stater samtidig eller, dersom han bare står til rådighet for arbeidsformidlingen på territoriet til bostedsstaten, kreve dagpenger fra siste arbeidsstat.[19] I denne sammenheng gjør Kommisjonen gjeldende at rett til dagpenger ved arbeidsledighet forutsetter at den arbeidsledige står til rådighet for arbeidsformidlingen der han er registrert.[20]

118. Etter artikkel 71 nr. 1 bokstav b) ii) i forordningen skal ytelser som en helt arbeidsledig person mottar etter lovgivningen i bostedsstaten, suspenderes dersom han har fått rett til ytelser fra den kompetente institusjon i den medlemsstat hvis lovgivning han sist var underlagt. Etter Kommisjonens oppfatning bekrefter denne bestemmelse at en person kan beholde sin rett til ytelser ved arbeidsledighet i den kompetente stat selv om han har mottatt ytelser etter lovgivningen i bostedsstaten. Ytelser ved arbeidsledighet fra den kompetente stat får forrang ettersom ytelsene etter lovgivningen i bostedsstaten blir suspendert. Dette er også i tråd med prinsippet om at den kompetente stat for arbeidsledige arbeidstakere er deres siste arbeidsstat, og artikkel 71 i forordning nr. 1408/71 tillater unntak fra dette prinsipp bare i den utstrekning den arbeidsledige krever ytelser ved arbeidsledighet i bostedsstaten.

19 Det vises til *Aubin*, som omtalt over (avsnitt 19).
20 Sak 20/75 *d'Amico*, Sml. 1975 s. 891 (avsnitt 4).

119. With regard to the argument of the Norwegian State that the legislation of only one State shall apply to a certain type of benefit, the Commission underlines the fact that it is not at all unknown to the Union's social security coordination rules that a person becomes entitled to a certain type of benefit under the legislation of different States. However, the coordination rules prevent these benefits overlapping. The application of Article 71(1)(b) of the Regulation does not lead to the aggregation of unemployment benefits from two States, as the payment of the benefits in the State of residence shall be suspended for any period during which the unemployed person receives unemployment benefits from the competent State, in order to prevent the overlapping of the two entitlements.

120. The Commission submits that the question should be answered as follows:

Article 71(1)(b) of Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community precludes a competent Member State (the State of last employment) within the meaning of that provision from applying in its national law a requirement of residence or continued stay in the competent Member State in order to grant unemployment benefits to a wholly unemployed person other than a frontier worker.

It is not relevant to the entitlement to claim unemployment benefits pursuant to Article 71(1)(b)(i) of Regulation (EEC) No 1408/71 in the competent Member State (the State of last employment) that the unemployed person lives in a country near the competent State, so that it is possible in practice for that person to appear at the employment office in that State even if he/she does not stay there.

A wholly unemployed person, other than a frontier worker, who registers as a job seeker with the employment service and applies for unemployment benefits in the State of residence, remains entitled to claim unemployment benefits pursuant to Article 71(1)(b)(i) of

119. Når det gjelder statens argument om at det bare er lovgivningen i én stat som skal få anvendelse på en viss type ytelser, understreker Kommisjonen det faktum at det slett ikke er en ukjent situasjon for EUs regler for trygdesamordning at en person har rett til en viss type ytelser etter lovgivningen i forskjellige stater. Imidlertid er samordningsreglene til hinder for at ytelsene kan overlappe hverandre. Anvendelsen av artikkel 71 nr. 1 bokstav b) i forordningen fører ikke til at en arbeidsledig kan motta dagpenger fra to stater, da utbetaling av ytelser i bostedsstaten skal suspenderes for den tid den arbeidsledige mottar dagpenger fra den kompetente stat, for å forhindre overlapping av de to ytelser.

120. Kommisjonen foreslår følgende som svar på spørsmålet:

Artikkel 71 nr. 1 bokstav b) i forordning (EØS) nr. 1408/71 om anvendelse av trygdeordninger på arbeidstakere, selvstendig næringsdrivende og deres familiemedlemmer som flytter innenfor Fellesskapet er til hinder for at en kompetent medlemsstat (siste arbeidsstat) etter denne bestemmelse kan ha et krav i sin nasjonale lovgivning om bosted eller fortsatt opphold i den kompetente stat for å gi ytelser ved arbeidsledighet til en helt arbeidsledig person som ikke er en grensearbeider.

Det er ikke av betydning for retten til å kreve ytelser ved arbeidsledighet etter artikkel 71 nr. 1 bokstav b) i) i forordning (EØS) nr. 1408/71 i den kompetente medlemsstat (siste arbeidsstat) at den arbeidsledige bor i et land i nærheten av den kompetente stat slik at det er mulig i praksis for vedkommende å møte ved arbeidsformidlingen i denne stat selv om han/hun ikke har opphold der.

En helt arbeidsledig person som ikke er en grensearbeider, som melder seg som arbeidssøkende ved arbeidsformidlingen og søker om ytelser ved arbeidsledighet i bostedsstaten, har fortsatt rett til å kreve ytelser ved arbeidsledighet etter artikkel 71 nr. 1 bokstav b)

Regulation (EEC) No 1408/71 in the competent Member State (the State of last employment) after registering with the employment services there. The receipt of benefits under the legislation of the State of residence is suspended for any period during which the unemployed person receives unemployment benefits from the competent Member State.

Páll Hreinsson

Judge-Rapporteur

i) i forordning (EØS) nr. 1408/71 i den kompetente medlemsstat (siste arbeidsstat) etter å ha meldt seg ved arbeidsformidlingen der. Utbetalingen av ytelser etter lovgivningen i bostedsstaten skal suspenderes for det tidsrom den arbeidsledige mottar ytelser ved arbeidsledighet fra den kompetente medlemsstat.

Páll Hreinsson

Forberedende dommer


EFTA COURT

Case E-10/12

Yngvi Harðarson

v

Askar Capital hf.

CASE E-10/12

Yngvi Harðarson

v

Askar Capital hf.

(Directive 91/533/EEC – Obligation to inform employees – Amendments to a written contract of employment – Effect of non–notification of amendments)

Summary of the Judgment

1. Article 2(1) of Directive 91/533/EEC ("the Directive") lays down the principle that the employer is obliged to notify employees of the essential aspects of the contract or employment relationship. Article 2(2) provides a non–exhaustive list of what that information at least shall cover. That list includes the remuneration and the amount of paid leave to which the employee is entitled, and the length of the periods of notice to be observed.

2. According to Article 3(1) of the Directive, the information referred to in Article 2(2) must be given to the employee in a written contract of employment; a letter of engagement; and/or one or more other written documents, not later than two months after the commencement of employment.

3. Moreover, Article 5 of the Directive provides that any amendments to an essential aspect of the contract or the employment relationship must be the subject of a written document given by the employer to the employee at the earliest opportunity and not later than one month after the date of entry into effect of the amendments in question.

4. It follows from the Directive that a distinction must be made between the terms and conditions of the contract of employment and the employer's duty to inform the employee of those terms and conditions. Its provisions presuppose that a contract of employment or amendments thereto may take effect regardless of whether the employee has been notified of them in writing.

MÁL E-10/12

Yngvi Harðarson

gegn

Askar Capital hf.

(Tilskipun 91/533/EBE – Skylda til að upplýsa launþega – Breytingar á skriflegum ráðningarsamningi – Áhrif þess að breytingar eru ekki tilkynntar)

Samantekt

1. Í 1. mgr. 2. gr. 1 tilskipunar 91/533/EBE („tilskipunin“) er kveðið á um þá meginreglu að vinnuveitanda beri skylda til að skýra launþega frá helstu ákvæðum ráðningarsamnings eða ráðningarfyrirkomulags. Í 2. mgr. 2. gr. er listi, sem er ekki tæmandi, með þeim lágmarks–upplýsingum sem fram skulu koma. Listinn tekur til launaþátta, þess hversu löngu launuðu orlofi launþegi á rétt á og hversu langan uppsagnarfrest vinnuveitanda og launþega ber að virða

2. Samkvæmt 1. mgr. 3. gr. tilskipunarinnar skal veita launþega upplýsingarnar sem um getur í 2. mgr. 2. gr. með skriflegum ráðningarsamningi; ráðningarbréfi; og/eða einu eða fleiri skriflegum skjölum, eigi síðar en tveimur mánuðum eftir að starf hefst.

3. Enn fremur segir í 5. gr. tilskipunarinnar að vinnuveitanda beri að skýra launþega frá sérhverri breytingu á meginatriðum ráðningarsamnings eða ráðningarfyrirkomulags í skriflegu skjali við fyrstu hentugleika og eigi síðar en einum mánuði eftir að breytingin kemur til framkvæmda.

4. Það leiðir af tilskipuninni að gera verður greinarmun á skilmálum ráðningarsamnings og á skyldu vinnuveitanda til að tilkynna launþega um skilmálana. Í ákvæðum tilskipunarinnar er gert ráð fyrir því að ráðningarsamningur eða breytingar á honum geti tekið gildi óháð skriflegri tilkynningu til launþega.

5. The Directive has no bearing on the material content of the contract of employment. It is a matter for the courts of the EEA States to apply national rules of evidence as to the existence and content of contracts or employment relationships. It follows from the system of Articles 3 and 5 that no distinction in this regard should be made between the existence of and amendments to a contract.

6. Consequently, the Directive does not require any amendments to an essential aspect of the contract or employment relationship that has not been mentioned in a written document delivered to the employee, or has not been mentioned therein with sufficient precision, to be regarded as ineffective.

5. Tilskipunin hefur engin áhrif á efnisákvæði ráðningarsamnings. Dómstólum EES–ríkja er því heimilt að beita reglum landsréttar um sönnunarfærslu varðandi tilvist og efni ráðningarsamnings eða ráðningarfyrirkomulags. Af því fyrirkomulagi sem lýst er í 3. og 5. gr. tilskipunarinnar leiðir að ekki er að þessu leyti gerður greinarmunur á tilvist ráðningarsamnings eða breytingum á efni hans.

6. Af framansögðu leiðir að ekki er gerð krafa um það samkvæmt tilskipuninni að breytingar á aðalatriðum ráðningarsamnings eða ráðningarfyrirkomulags, sem ekki hefur verið minnst á í skriflegu skjali sem afhent hefur verið launþega, eða ekki er orðað með nægilega skýrum hætti í slíku skjali, verði taldar ógildar.

JUDGMENT OF THE COURT

25 March 2013*

(Directive 91/533/EEC – Obligation to inform employees – Amendments to a written contract of employment – Effect of non–notification of amendments)

In Case E–10/12,

REQUEST to the Court from Héraðsdómur Reykjavíkur (Reykjavík District Court) under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in the case of

Yngvi Harðarson

and

Askar Capital hf.

on the interpretation of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship,

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:

– Yngvi Harðarson ("the plaintiff"), represented by Hildur Sólveig Pétursdóttir, Supreme Court Attorney;

– Askar Capital hf. ("the defendant"), represented by Stefán Geir Þórisson, Supreme Court Attorney;

* Language of the request: Icelandic.

DÓMUR DÓMSTÓLSINS

25. mars 2013*

(Tilskipun 91/533/EBE – Skylda til að upplýsa launþega – Breytingar á skriflegum ráðningarsamningi – Áhrif þess að breytingar eru ekki tilkynntar)

Mál E–10/12,

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

Yngvi Harðarson

gegn

Askar Capital hf.

varðandi túlkun á tilskipun ráðsins 91/533/EBE frá 14. október 1991 um skyldu vinnuveitanda að skýra launþegum frá samningsskilmálum eða ráðningarfyrirkomulagi.

DÓMSTÓLLINN,

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

dómritari: Gunnar Selvik,

hefur, með tilliti til skriflegra greinargerða frá:

– Sóknaraðila, Yngva Harðarsyni, í fyrirsvari er Hildur Sólveig Pétursdóttir, hrl.
– Varnaraðila, Askar Capital hf., í fyrirsvari er Stefán Geir Þórisson, hrl.

* Beiðni um ráðgefandi álit á íslensku.

– the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Clémence Perrin and Maria Moustakali, Officers, Department of Legal & Executive Affairs, acting as Agents;

– the European Commission ("the Commission"), represented by Johan Enegren, member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

having heard the oral argument of the plaintiff, represented by Hildur Sólveig Pétursdóttir; the defendant, represented by Stefán Geir Þórisson; ESA, represented by Clémence Perrin; and the Commission, represented by Johan Enegren, at the hearing on 1 March 2013,

gives the following

JUDGMENT

I LEGAL CONTEXT

EEA law

1 Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship ("the Directive" or "Directive 91/533") (OJ 1991 L 288, p. 32) was incorporated into the EEA Agreement by Decision No 7/94 of the EEA Joint Committee of 21 March 1994, amending Annex XVIII to the Agreement.

2 Article 1 of the Directive on its scope reads:

1. This Directive shall apply to every paid employee having a contract or employment relationship defined by the law in force in a Member State and/or governed by the law in force in a Member State.

...

– Eftirlitsstofnun EFTA („ESA“), í fyrirsvari sem umboðsmenn eru Xavier Lewis, framkvæmdastjóri lögfræði– og framkvæmdasviðs, ásamt Clémence Perrin og Mariu Moustakali lögfræðingum, á sama sviði.
– Framkvæmdastjórn Evrópusambandsins („framkvæmdastjórnin“), í fyrirsvari sem umboðsmaður er Johan Enegren, hjá lagaskrifstofu framkvæmdastjórnarinnar.

með tilliti til skýrslu framsögumanns,

og munnlegs málflutnings umboðsmanns sóknaraðila, Hildar Sólveigar Pétursdóttur, umboðsmanns varnaraðila, Stefáns Geirs Þórissonar, fulltrúa ESA, Clémence Perrin, og fulltrúa framkvæmdastjórnarinnar, Johan Enegren, sem fram fór 1. mars 2013,

kveðið upp svofelldan

DÓM

I LÖGGJÖF

EES–réttur

1 Tilskipun ráðsins 91/533/EBE frá 14. október 1991 um skyldu vinnuveitanda að skýra launþegum frá samningsskilmálum eða ráðningarfyrirkomulagi („tilskipunin“) (OJ 1991 L288, bls. 32) var tekin upp í EES–samninginn með ákvörðun sameiginlegu EES–nefndarinnar nr. 7/94 frá 21. mars 1994 en með þeirri ákvörðun var XVIII. viðauka EES–samningsins breytt.

2 Í 1. gr. tilskipunarinnar segir svo um gildissvið hennar:

1. Þessi tilskipun gildir um sérhvern launþega sem er ráðinn samkvæmt ráðningarsamningi eða ráðningarfyrirkomulagi sem er skilgreint í gildandi lögum aðildarríkis og/eða heyrir undir gildandi lög í aðildarríki.

...

3 Article 2 of the Directive on the obligation to provide information reads:

1. An employer shall be obliged to notify an employee to whom this Directive applies, hereinafter referred to as 'the employee', of the essential aspects of the contract or employment relationship.

2. The information referred to in paragraph 1 shall cover at least the following:

...

(h) the initial basic amount, the other component elements and the frequency of payment of the remuneration to which the employee is entitled;

....

4 Article 5 of the Directive on modifications reads:

1. Any change in the details referred to in Articles 2(2) and 4(1) must be the subject of a written document to be given by the employer to the employee at the earliest opportunity and not later than one month after the date of entry into effect of the change in question.

...

5 Article 6 of the Directive on the form and proof of the existence of a contract or employment relationship and procedural rules reads:

This Directive shall be without prejudice to national law and practice concerning:

– *the form of the contract or employment relationship,*

– *proof as regards the existence and content of a contract or employment relationship,*

– *the relevant procedural rules.*

6 Article 8 of the Directive on defence of rights reads:

1. Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to comply with the obligations arising

3 Um upplýsingaskyldu segir í 2. gr. tilskipunarinnar:

1. Vinnuveitanda ber skylda til að skýra launþega sem heyrir undir þessa tilskipun, hér á eftir nefndur „launþeginn“, frá helstu ákvæðum ráðningarsamnings eða ráðningarfyrirkomulags.

2. Í upplýsingunum sem um getur í 1. mgr. skal að minnsta kosti eftirfarandi koma fram:

...

h) upphafsgrunnlaun, aðrir launaþættir sem launþegi á rétt á og hve oft launagreiðslur fara fram;

...

4 Um breytingar er fjallað í 5. gr. tilskipunarinnar en þar segir:

1. Vinnuveitanda ber að skýra launþega frá sérhverri breytingu sem er gerð á atriðunum sem um getur í 2. mgr. 2. gr. og 1. mgr. 4 gr. í skriflegu skjali við fyrstu hentugleika og eigi síðar en einum mánuði eftir að breytingin kemur til framkvæmda.

...

5 Um form og sönnun á því að ráðningarsamningur eða ráðningarfyrirkomulag sé fyrir hendi ásamt reglum þar að lútandi er fjallað í 6. gr. tilskipunarinnar en þar segir:

Þessi tilskipun er með fyrirvara um landslög og réttarvenju varðandi:

- *form ráðningarsamnings eða ráðningarfyrirkomulags,*
- *sönnun á því að ráðningarsamningur eða ráðningarfyrirkomulag sé fyrir hendi og efni þess,*
- *reglur þar að lútandi.*

6 Um tryggingu réttinda er fjallað í 8. gr. tilskipunarinnar:

1. Aðildarríkin skulu taka upp ákvæði í innlendu réttarkerfi sem gera öllum launþegum, sem telja á sér brotið vegna þess að ekki sé farið að kröfum þessarar tilskipunar, kleift að sækja rétt sinn samkvæmt

from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities.

...

National law

7 The Directive was implemented in Icelandic law by Notice No 503/1997, which was published in Series B of the Law Gazette on 30 June 1997. Following consultation with the principal employers' and workers' organisations, it was decided to implement the provisions of the Directive by way of collective agreements in accordance with Article 9(1) of the Directive.

8 Under Icelandic law there is no general provision laying down formal requirements in relation to contracts of employment, although such requirements exist in certain sectors. This entails, *inter alia*, that oral contracts, or contracts made with the assistance of electronic media are, in principle, valid.

II FACTS AND PROCEDURE

9 On 18 December 2006, the plaintiff and the defendant concluded a contract of employment, which took effect on 1 January 2007. Article 2 of the contract provided that the notice period for the termination of the contract amounted to 12 months. According to Article 3 of the contract, the plaintiff's monthly remuneration was fixed at EUR 15 000.

10 In the course of the plaintiff's employment, several aspects of the contract of employment were modified. This included his title and responsibilities, his remuneration and the currency in which the remuneration was paid.

11 As regards his position, the plaintiff was initially hired as the Manager of the Consulting and Risk Management Department. He was then appointed as the Manager of the Risk Management Department as from summer 2007, and as the Manager of the Hedge Fund Department as from June 2008. Finally, from October 2008 to July 2010, he was engaged as the Manager of the Risk Consulting Department.

gildandi réttarreglum, hugsanlega eftir að hafa lagt málið fyrir önnur lögbær yfirvöld.

...

Landsréttur

7 Tilskipunin var innleidd í íslenska löggjöf með auglýsingu nr. 503/1997, sem birt var í B–deild Stjórnartíðinda 30. júní 1997. Að höfðu samráði við helstu samtök atvinnurekenda og launþega var ákveðið að hrinda ákvæðum hennar í framkvæmd með kjarasamningum í samræmi við 1. mgr. 9. gr. tilskipunarinnar.

8 Samkvæmt íslenskum lögum eru engar almennar kröfur gerðar um form ráðningarsamninga, þótt dæmi um slíkt finnist á sumum sviðum. Í þessu felst meðal annars að munnlegir samningar eða samningar gerðir með aðstoð rafrænna miðla geta verið gildir.

II MÁLAVEXTIR OG MEÐFERÐ MÁLSINS

9 Hinn 18. desember 2006 gerðu aðilar málsins með sér ráðningarsamning sem tók gildi 1. janúar 2007. Í 2. gr. samningsins var kveðið á um tólf mánaða uppsagnarfrest. Samkvæmt 3. gr. samningsins skyldu mánaðarlaun sóknaraðila vera 15.000 evrur.

10 Á ráðningartímabilinu var mörgum atriðum samningsins breytt, þar á meðal starfsheiti og skyldum, launafjárhæð og í hvaða gjaldmiðli laun ættu að greiðast.

11 Sóknaraðili var upphaflega ráðinn sem framkvæmdastjóri ráðgjafar og áhættustýringar, en síðar gerður að framkvæmdastjóra áhættustýringar frá sumrinu 2007 og því næst að framkvæmdastjóra vogunarsjóðsdeildar frá og með júní 2008. Frá október 2008 til júlí 2010 gegndi hann loks stöðu framkvæmdastjóra áhætturáðgjafar.

12 From January 2009, the plaintiff's monthly remuneration was paid in Icelandic krónur (ISK). From April 2009, the monthly pay of EUR 15 000 was reduced to ISK 1 500 000 (equivalent to some EUR 9 000 according to exchange rates at the time). Based on the information given in the request from the national court, the parties in the national proceedings disagree whether such modification was temporary or permanent, and from when the reduction applied. This is due to the fact that the negotiations were conducted orally and via email between December 2008 and November 2009.

13 By a ruling of 14 July 2010, the defendant was put into winding–up proceedings.

14 By a letter of 26 July 2010 to the defendant's winding–up committee, the plaintiff declared that he considered the defendant to have defaulted on the contract and that he would not accept any deviation from the terms of the written contract as regards his terms of employment, including those relating to wages. By a letter of 27 July 2010, the winding–up committee terminated the contract of employment and informed the plaintiff that it would not take over any rights and obligations under the contract.

15 On 18 November 2010, the plaintiff lodged a claim with the defendant's winding–up committee for wages during his notice period together with vacation pay and social security tax, a total of EUR 252 836. The claim was based on a 12–month notice period and a monthly wage of EUR 15 000 as provided in the employment contract. The claim was lodged as a priority claim in the winding up under national law.

16 The winding–up committee rejected the plaintiff's full claim on the basis that, as of April 2009, the calculation of his claim should have been based on a monthly remuneration of ISK 1 500 000.

17 As a result, the winding–up committee reduced the plaintiff's claim from EUR 252 386 to EUR 150 023. Moreover, it did not consider the claim a priority claim but an ordinary one for the purpose of

12 Mánaðarlaun sóknaraðila voru frá janúar 2009 greidd í íslenskum krónum. Frá því í apríl 2009 voru launin, 15.000 evrur á mánuði, lækkuð niður í 1.500.000 krónur á mánuði (sem jafngildir um það bil 9.000 evrum á þágildandi gengi). Af þeim upplýsingum sem fylgja beiðni Héraðsdóms Reykjavíkur um ráðgefandi álit verður ráðið að ágreiningur sé með aðilum um hvort slík breyting hafi verið tímabundin eða til frambúðar og um það hvenær hún hafi gengið í gildi. Það má rekja til þess að samningaviðræður fóru fram munnlega og í tölvupósti frá desember 2008 til nóvember 2009.

13 Héraðsdómur Reykjavíkur skipaði varnaraðila slitastjórn 14. júlí 2010.

14 Með bréfi sóknaraðila til slitastjórnar varnaraðila, dags. 26. júlí 2010, lýsti sóknaraðili því yfir að hann teldi varnaraðila hafa vanefnt samning þeirra og að hann myndi ekki samþykkja að vikið yrði frá ákvæðum skriflegs ráðningarsamnings um kjör sín, meðal annars hvað varðar laun. Með bréfi slitastjórnar varnaraðila, dags. 27. júlí 2010, var endir bundinn á ráðningarsamning sóknaraðila með því að honum var tilkynnt að slitastjórnin tæki ekki við réttindum og skyldum samkvæmt samningnum.

15 Hinn 18. nóvember 2010 lýsti sóknaraðili kröfu á hendur varnaraðila um laun á uppsagnarfresti, auk orlofs og tryggingagjalds, alls að fjárhæð 252.836 evrur. Krafan miðaðist við 12 mánaða uppsagnarfrest og mánaðarlaun að fjárhæð 15.000 evrur, í samræmi við ráðningarsamninginn. Kröfunni var lýst sem forgangskröfu samkvæmt íslenskum gjaldþrotaskiptalögum.

16 Slitastjórn varnaraðila hafnaði kröfu sóknaraðila á grundvelli þess að útreikningur kröfunnar hefði, frá apríl 2009, átt að miðast við mánaðarlaun að fjárhæð 1.500.000 krónur.

17 Vegna þessa lækkaði slitastjórn varnaraðila kröfu sóknaraðila úr 252.386 evrum í 150.023 evrur. Enn fremur flokkaði hún ekki kröfuna sem forgangskröfu heldur sem almenna kröfu. Sóknaraðili

the winding–up proceedings. The plaintiff rejected the winding–up committee's position both with regard to the status of the claim (which is not the subject of the reference) and the amount.

18 When attempts to resolve the dispute proved unsuccessful, it was decided to refer it to Reykjavík District Court.

19 In the proceedings before the District Court, the plaintiff requested that two questions be referred to the Court. By the first question proposed, the plaintiff essentially requested the District Court to seek clarification whether Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ 2008 L 283, p. 36) ("Directive 2008/94"), and in particular Article 12(c) of Directive 2008/94, precluded an employee from being deprived of his priority status in insolvency proceedings such as those at issue in the case at hand.

20 The plaintiff also proposed a second question, by which the Court was to be asked essentially to clarify the implications of amendments to the contract of employment not being notified in accordance with Article 5 of Directive 91/533.

21 In a ruling of 7 June 2012, the District Court rejected that request.

22 An appeal was made to the Supreme Court of Iceland. In its judgment of 27 August 2012, having regard to recital 3 in the preamble to Directive 2008/94, the Supreme Court confirmed the District Court's ruling in relation to the first question. However, on the second question proposed, it overruled the District Court and decided that a reference should be made to the Court in connection with the dispute concerning the reduction of the plaintiff's claim.

23 On 14 September 2012, Reykjavík District Court referred the following question to the Court:

Should Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship be interpreted

mótmælti afstöðu slitastjórnar varnaraðila bæði að því er laut að stöðu kröfu hans sem almennrar kröfu (beiðnin um ráðgefandi álit tekur ekki til þess atriðis) og fjárhæð kröfunnar.

18 Eftir að sáttatilraunir höfðu reynst árangurslausar var ákveðið að vísa ágreiningnum til Héraðsdóms Reykjavíkur.

19 Í máli því sem rekið er fyrir Héraðsdómi Reykjavíkur óskaði sóknaraðili þess að tveimur spurningum yrði vísað til EFTA–dómstólsins. Með fyrstu spurningunni óskaði sóknaraðili í grundvallaratriðum eftir því að héraðsdómur leitaði skýringa á því hvort tilskipun Evrópuþingsins og ráðsins 2008/94/EB frá 22. október 2008 um vernd til handa launþegum verði vinnuveitandi gjaldþrota (OJ 2008 L 283, bls. 36) („tilskipun 2008/94"), sérstaklega c–liður 12. gr. hennar, girti fyrir að krafa launþega teldist ekki forgangskrafa við gjaldþrotaskipti eins og þau sem um ræðir í máli þessu.

20 Sóknaraðili lagði til aðra spurningu, þar sem dómstólinn er í meginatriðum beðinn um að skýra afleiðingar þess að ekki sé tilkynnt um breytingar á ráðningarsamningi í samræmi við 5. gr. tilskipunar 91/533.

21 Með úrskurði 7. júní 2012 hafnaði héraðsdómari beiðninni.

22 Sá úrskurður var kærður til Hæstaréttar sem staðfesti úrskurðinn með dómi 27. ágúst 2012, hvað fyrri spurninguna varðar, með vísan til 3. málsliðar formálsorða tilskipunar 2008/94. Hæstiréttur felldi hins vegar úrskurð héraðsdóms úr gildi, að því er laut að annarri spurningu sóknaraðila, og ákvað að leitað skyldi ráðgefandi álits EFTA–dómstólsins um þá spurningu sem lýtur að lækkun á kröfu sóknaraðila.

23 Þann 14. september 2012 beindi Héraðsdómur Reykjavíkur eftirfarandi spurningu til dómstólsins:

Ber að skýra ákvæði tilskipunar 91/533/EBE 14. október 1991, um skyldu vinnuveitanda að skýra launþegum frá samningsskilmálum eða ráðningarfyrirkomulagi, á þann veg, þar með talið við

as meaning, in circumstances including bankruptcy proceedings or a comparable division of a limited liability company, that compensation to an employee is to be assessed on the basis of a written contract of employment if no written document has been handed over to the employee concerning amendments, temporary or permanent, that may have been made to the main features of the contract of employment or employment relationship between the parties within the time limits laid down in Article 5 of the Directive?

24 On 28 November 2012, ESA issued Iceland with a reasoned opinion concerning the implementation of Article 8 of the Directive. Those infringement proceedings have no bearing on the present case.

25 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 QUESTION REFERRED

26 By its question, the national court essentially asks whether and, if so, to what extent it affects the calculation of the compensation due to an employee, in circumstances including bankruptcy or similar proceedings, if amendments to the written contract of employment relevant to the calculation of the compensation have not been notified to the employee by means of a written document and within the time limits established in Article 5 of the Directive.

Observations submitted to the Court

27 The plaintiff submits that the provisions of the Directive are to be interpreted as meaning that, in the event of insolvency proceedings or comparable division of a limited company, compensation to an employee, including vacation pay and pay during the notice period, should be assessed on the basis of the written contract of employment.

gjaldþrotaskipti eða sambærileg skipti á hlutafélagi, að bætur til launþega skuli metnar á grundvelli skriflegs ráðningarsamnings, hafi launþeganum ekki verið afhent skriflegt skjal um breytingar sem kunna að hafa verið gerðar, tímabundið eða varanlega, á meginatriðum ráðningarsamnings eða ráðningarfyrirkomulags aðila innan tímamarka samkvæmt 5. gr. tilskipunarinnar?

24 Þann 28. nóvember 2012 skilaði ESA Íslandi rökstuddu áliti varðandi innleiðingu 8. gr. tilskipunarinnar. Sú málsmeðferð vegna brots á samningsskyldum hefur engin áhrif á mál þetta.

25 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 SPURNINGIN SEM BEINT VAR TIL DÓMSTÓLSINS

26 Spurning landsdómstólsins lýtur í meginatriðum að því hvort, og þá að hvaða marki, það hafi áhrif á útreikning greiðslu til launþega við gjaldþrotaskipti eða sambærileg skipti á hlutafélagi, ef launþeganum hefur ekki verið afhent skriflegt skjal um breytingar sem geta haft áhrif á fjárhæð greiðslu innan þeirra tímamarka sem kveðið er á um í 5. gr. tilskipunarinnar.

Athugasemdir bornar fram við EFTA–dómstólinn

27 Sóknaraðili telur að túlka beri ákvæði tilskipunarinnar með þeim hætti að ef hlutafélag er tekið til gjaldþrotaskipta eða sambærilegra skipta, skuli miða greiðslur til launþega, þar með talið orlof og laun á uppsagnarfresti, við skriflegan ráðningarsamning.

28 The plaintiff points out that, according to its preamble, the objective of the Directive is to subject employment relationships to formal requirements. To this end, Article 5 of the Directive states that any change in the contract of employment must be the subject of a written document to be given by the employer to the employee not later than one month after the date of entry into effect of the change in question.

29 Furthermore, under Article 2(2) of the Directive, the employer is obliged to inform the employee in a clear manner of the essential aspects of the contract of employment. Therefore, the plaintiff's view is that the position adopted by the defendant towards his claim infringes Articles 1, 2(2) and 5 of the Directive. According to the plaintiff, the fact that he approved, from month to month, a deviation from the contract of employment in the form of a reduction of his basic wage does not alter the obligation of the defendant to pay him the basic wage (EUR 15 000) and vacation pay for a period of 12 months, which is the notice period specified in the contract.

30 In the plaintiff's view, this conclusion is not altered by Article 6 of the Directive. This provision provides that the Directive shall be without prejudice to national law and practice concerning, *inter alia*, proof as regards the existence of a contract or employment relationship. However, in his view, this provision does not apply to amendments to an existing contract, which according to Article 5 of the Directive must be the subject of a written document.

31 Moreover, the plaintiff submits that the employees of an employer which becomes bankrupt or insolvent do not lose their protection under Article 1 of the Directive. According to the plaintiff, this follows from Articles 1(1) and 2(1) of Directive 2008/94.

32 The defendant, ESA and the Commission submit that when an essential element of a contract has not been mentioned in a written document within the meaning of Article 2 of the Directive it does not follow from the Directive that that element will be regarded as inapplicable.

28 Sóknaraðili bendir á að samkvæmt formálsorðum tilskipunarinnar sé markmið hennar að sett verði ákvæði um formlegar kröfur sem gildi um ráðningarfyrirkomulag. Sóknaraðili telur það í samræmi við ofangreint markmið að í 5. gr. tilskipunarinnar sé kveðið á um að vinnuveitanda beri að skýra launþega frá sérhverri breytingu sem er gerð á samningnum, í skriflegu skjali, eigi síðar en einum mánuði eftir að breytingin kemur til framkvæmda.

29 Sóknaraðili telur jafnframt að vinnuveitanda beri skylda til þess samkvæmt 2. mgr. 2. gr. tilskipunarinnar, að upplýsa launþega með skýrum hætti um meginatriði ráðningarsamnings. Afstaða varnaraðila til kröfu hans sé því brot á 1. gr., 2. mgr. 2. gr. og 5. gr. tilskipunarinnar. Hann telur þá staðreynd að hann hafi samþykkt að vikið væri frá ráðningarsamningnum í formi lækkunar á grunnlaunum, frá mánuði til mánaðar, engu breyta um skyldu varnaraðila til að greiða honum grunnlaun (15.000 evrur) og orlof á tólf mánaða uppsagnarfresti þeim sem kveðið er á um í samningnum.

30 Að mati sóknaraðila breytir 6. gr. tilskipunarinnar ekki þessari niðurstöðu. Í 6. gr. segir að tilskipunin sé með fyrirvara um landslög og réttarvenju, meðal annars varðandi sönnun á því að ráðningarsamningur eða ráðningarfyrirkomulag sé fyrir hendi. Hann telur ákvæðið hins vegar ekki gilda um breytingar á gildandi samningi, sem verður að gera með skriflegu skjali, samkvæmt 5. gr. tilskipunarinnar.

31 Enn fremur heldur sóknaraðili því fram að þegar vinnuveitandi verður gjaldþrota eða ógjaldfær missi launþegar ekki þá vernd

sem þeim er veitt samkvæmt 1. gr. tilskipunarinnar. Samkvæmt sóknaraðila leiðir þetta af 1. mgr. 1. gr. og 1. mgr. 2. gr. tilskipunar 2008/94.

32 Varnaraðili, ESA og framkvæmdastjórnin telja að þótt ekki hafi verið minnst á einn af meginþáttum samnings í skriflegu skjali í skilningi 2. gr. tilskipunarinnar, þá leiði það ekki af tilskipuninni að þeim þætti skuli ekki beitt.

33 The defendant, ESA and the Commission observe that Articles 2 and 5 of the Directive require the employer to notify the employee in writing of the essential aspects of the contract, or of amendments to such aspects, within a specific time frame. However, they submit that the provisions of the Directive have no bearing on the material content of the contract of employment.

34 According to the defendant, ESA and the Commission, the aim of the written declaration required by the Directive is not to harmonise the content of employment contracts with regard to matters such as remuneration. Article 6 states that the Directive is without prejudice to national law and practice concerning the form of the contract or employment relationship, proof as regards the existence and content of a contract or employment relationship as well as the relevant procedural rules. This provision implies that proof regarding the existence of a contract or employment relationship may be produced in any form allowed under national law, even in the absence of any written notification from the employer.

35 The defendant, ESA and the Commission observe that the Directive does not provide for any penalty or sanction in the case of a failure to notify in writing any amendment to the contract of employment as required in Article 5. Instead, Article 8 leaves it to the Member States to define the penalties appropriate in the case of a failure to comply with the obligations arising from the Directive. Therefore, it is for the national legislature to introduce the necessary measures to enable employees who consider themselves wronged by a failure to comply with the obligations arising from the Directive to pursue their claims by judicial process after possible recourse to other competent authorities.

36 According to ESA, the aim of the Directive is to ensure that national courts apply and interpret their national rules on evidence in the light of the purpose of the Directive. This is to provide employees with improved protection against possible infringements of their rights. Accordingly, even if the defendant failed to provide the plaintiff with the information required by a

33 Varnaraðili, ESA og framkvæmdastjórnin benda á að sú krafa sé gerð í 2. og 5. gr. tilskipunarinnar að vinnuveitandi skýri launþega skriflega frá meginatriðum ráðningarsamnings, eða breytingum sem gerðar eru á þeim, innan tilgreinds tímaramma. Hins vegar telja þau að ákvæði tilskipunarinnar hafi engin áhrif á efnisákvæði ráðningarsamningsins.

34 Samkvæmt varnaraðila, ESA og framkvæmdastjórninni er það ekki markmið hinnar skriflegu yfirlýsingar sem tilskipunin mælir fyrir um að efni ráðningarsamninga varðandi þætti eins og launagreiðslur sé samræmt. Ákvæði 6. gr. kveði á um að tilskipunin gildi með fyrirvara um landslög og réttarvenju varðandi form ráðningarsamnings eða ráðningarfyrirkomulags og reglur þar að lútandi. Ákvæðið gefi til kynna að færa megi sönnun fyrir því að ráðningarsamningur eða ráðningarfyrirkomulag sé fyrir hendi með sérhverjum hætti sem landsréttur heimilar, óháð því hvort fyrir liggi skrifleg sönnun frá vinnuveitanda.

35 Varnaraðili, ESA og framkvæmdastjórnin benda á að ekki sé gert ráð fyrir úrbótum eða viðurlögum í tilvikum þar sem skriflegri tilkynningarskyldu um breytingar á ráðningarsamningnum er ekki sinnt í samræmi við 5. gr. tilskipunarinnar. Samkvæmt 8. gr. tilskipunarinnar er aðildarríkjunum þess í stað látið eftir að kveða á um beitingu réttarbóta vegna brots á skyldum sem kveðið er á um í tilskipuninni. Þau telja það því vera hlutverk löggjafans í aðildarríkinu að gera viðeigandi ráðstafanir sem gera launþegum, sem telja á sér brotið vegna þess að ekki sé farið að kröfum tilskipunarinnar, kleift að sækja rétt sinn fyrir dómstólum, hugsanlega eftir að hafa lagt málið fyrir önnur lögbær yfirvöld.

36 Að mati ESA er stefnt að því með tilskipuninni að tryggja að dómstólar aðildarríkjanna beiti og túlki reglur landsréttar um sönnun í samræmi við markmið tilskipunarinnar. Þetta markmið sé að veita launþegum aukna vernd gegn hugsanlegum brotum gegn réttindum þeirra. Tilskipunin leysir því hvorugan aðilann

provision of the Directive, the Directive does not release either of the parties from their obligations arising under the contract.

Findings of the Court

37 According to 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 interpretation of elements of EEA law to decide the cases before them (see Cases E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 25, E-1/95 *Samuelsson* [1994-1995] EFTA Ct. Rep. 145, paragraph 13, and E-1/11 *Dr A* [2011] EFTA Ct. Rep. 484, paragraph 34).

38 Under this system of cooperation, which is intended as a means of ensuring a homogenous interpretation of the EEA Agreement, 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 in the light of the particular circumstances of the case both the need for an Advisory Opinion in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see Case E-17/11 *Aresbank*, judgment of 22 November 2012, not yet reported, paragraph 43, and case law cited). Even if in practice the decision to submit a reference will often be made on an application by one or both parties in the national proceedings, the cooperation between the Court and the national court is completely independent of any initiative by the parties (see Case E-18/11 *Irish Bank*, judgment of 28 September 2012, not yet reported, paragraph 55).

39 In order to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law, the Court may extract from all the factors provided by the national court and, in particular, from the statement of grounds in the order for reference, the elements of EEA law requiring an interpretation having regard to the subject-matter of the dispute and to restrict its analysis to the provisions of

undan skyldum samkvæmt samningnum, jafnvel þótt varnaraðili hafi vanrækt þá skyldu að veita sóknaraðila þær upplýsingar sem honum bar samkvæmt ákvæði hennar.

Álit dómstólsins

37 Samkvæmt viðtekinni dómaframkvæmd er í 34. gr. samnings EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls sérstaklega kveðið á um hvernig haga skuli samstarfi dómstólsins og landsdómstóla þannig að síðarnefndu dómstólunum sé látin í té sú túlkun á atriðum EES-réttar sem nauðsynleg er til að þeir geti dæmt í málum sem rekin eru fyrir þeim (sjá mál E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct. Rep. 15, 25. mgr., E-1/95 *Samuelsson* [1994-1995] EFTA Ct. Rep. 145, 13. mgr., og E-1/11 *Dr A* [2011] EFTA Ct. Rep. 484, 34. mgr.).

38 Samkvæmt þessu fyrirkomulagi um samstarf dómstóla sem hefur það markmið að tryggja einsleita túlkun EES-samningsins er það einungis landsdómstólsins, sem málið hefur verið lagt fyrir og axla verður ábyrgð á eftirfarandi dómsniðurstöðu, að meta bæði þörfina á ráðgefandi áliti til að hann geti kveðið upp dóm og mikilvægi spurninganna sem hann vísar til EFTA-dómstólsins í ljósi þeirra tilteknu aðstæðna sem uppi eru í hverju máli (sjá mál E-17/11 *Aresbank*, óbirtur dómur frá 22. nóvember 2012, 43. mgr. og þau mál sem þar er vitnað til). Jafnvel þó að ákvörðunin um að óska eftir ráðgefandi áliti sé í reynd oft tekin að beiðni annars eða beggja aðila í innlendu málsmeðferðinni er þetta samstarf dómstólsins og landsdómstólsins algerlega óháð frumkvæði aðilanna (sjá óbirt mál E-18/11 *Irish Bank*, frá 28. september 2012, 55. mgr.).

39 Til þess að unnt sé að veita landsdómstólum EFTA-ríkjanna aðstoð í málum þar sem þeir þurfa að beita ákvæðum EES-réttar, tekur dómstóllinn mið af öllum atriðum sem landsdómstóll leggur fram í beiðni um ráðgefandi álit. Er þá einkum litið til rökstuðningsins að baki ákvörðuninni um að leita ráðgefandi álits, svo og þeirra þátta EES-réttar sem nauðsynlegt er að túlka að teknu tilliti til sakarefnisins. Í því sambandi kann dómstóllinn að takmarka

EEA law and provide an interpretation of them which will be of use to the national court, which has the task of interpreting the provisions of national law and determining their compatibility with EEA law (see *Irish Bank*, cited above, paragraph 56, and case law cited).

40 In its written and oral submissions to the Court, the plaintiff has argued that Directive 2008/94 is relevant for the outcome of the case in the main proceedings notwithstanding the findings of the referring court to the contrary in its reasoned ruling of 7 June 2012, subsequently upheld by the Supreme Court.

41 Having regard to the system of judicial cooperation noted in paragraphs 38 to 40 of this judgment, the questions referred to the Court by national courts enjoy a presumption of relevance. The same presumption also applies in relation to reasoned decisions of national courts as regards the content and scope of the questions referred (see *Aresbank*, cited above, paragraph 44, and case law cited).

42 The Court has not found any cause to question the findings of the national court on the applicability of Directive 2008/94 for the purposes of the present case. Therefore, it sees no need to consider the plaintiff's arguments on that point. Therefore, the Court will answer the question referred solely in light of Directive 91/553.

43 As noted in paragraph 26 above, the national court essentially asks whether and, if so, to what extent it affects the calculation of the compensation due to an employee, in circumstances including bankruptcy or similar proceedings, if amendments to the written contract of employment relevant to the calculation of the compensation have not been notified to the employee by means of a written document and within the time limits established in Article 5 of the Directive.

44 It is apparent from the preamble to the Directive (recitals 1 and 3) that new forms of work have led to an increase in the number of types of employment relationships and that national

umfjöllun sína og túlkun við þau ákvæði EES-réttar sem nýtast landsdómstólnum sem hefur það verkefni að túlka ákvæði landsréttar og taka afstöðu til hvernig þau samræmast EES-rétti (sjá áður tilvitnað mál *Irish Bank*, 56. mgr., og þau mál sem þar er vitnað til).

40 Í skriflegum og munnlegum málflutningi sínum fyrir dómstólnum hefur sóknaraðili haldið því fram að tilskipun 2008/94 hafi þýðingu fyrir niðurstöðu málsins sem rekið er fyrir landsdómstólnum þrátt fyrir úrskurð héraðsdóms frá 7. júní 2012, sem staðfestur var í Hæstarétti.

41 Að teknu tilliti til þess fyrirkomulags um samstarf dómstóla, sem lýst var í 38. til 40. mgr. hér að framan, verður að ganga út frá því fyrirfram að spurningar landsdómstóls um EES-rétt hafi þýðingu fyrir úrlausn málsins og eigi þar með erindi til dómstólsins. Telja verður að sömu sjónarmið eigi almennt við um það hvernig landsdómstólar hafa með rökstuddum hætti afmarkað efni og umfang þeirra spurninga sem vísað er til dómstólsins (sjá áður tilvitnað mál *Aresbank*, 44. mgr. og þau mál sem þar er vitnað til).

42 Dómstóllinn hefur ekki fundið neina ástæðu til að vefengja mat landsdómstólsins á því hvaða þýðingu tilskipun 2008/94 hafi um úrlausn málsins. Hann telur því enga þörf á að skoða röksemdir sóknaraðila nánar hvað þetta atriði snertir. Dómstóllinn mun því einvörðungu svara spurningunni með hliðsjón af tilskipun 91/553.

43 Eins og tekið er fram í 26. mgr. hér að framan lýtur spurning landsdómstólsins í meginatriðum að því hvort, og þá að hvaða marki, það hafi áhrif á útreikning greiðslu til launþega við gjaldþrotaskipti eða sambærileg skipti á hlutafélagi, ef launþeganum hefur ekki verið afhent skriflegt skjal um breytingar á ráðningarsamningi sem varða útreikning launa innan þeirra tímamarka sem kveðið er á um í 5. gr. tilskipunarinnar.

44 Það er ljóst af formálsorðum tilskipunarinnar (1. og 3. málsliður) að þar sem nýjar tegundir starfa hafa komið fram í aðildarríkjunum hefur fjölbreytni ráðningarfyrirkomulags aukist. Þá er löggjöf EES-ríkjanna á þessu sviði innbyrðis ólík

legislation differs considerably on fundamental points such as the requirement to inform employees in writing of the main terms of the contract or employment relationship.

45 Thus, the purpose of the Directive is to provide employees with improved protection against possible infringements of their rights and create greater transparency in the labour market (recital 2). Therefore, the general requirement that every employee must be provided with a document containing information on the essential elements of his contract or employment relationship has been established at EEA level (recital 7).

46 To that end, Article 2(1) of the Directive lays down the principle that the employer is obliged to notify employees of the essential aspects of the contract or employment relationship. Article 2(2) provides a non–exhaustive list of what that information at least shall cover. That list includes the remuneration and the amount of paid leave to which the employee is entitled, and the length of the periods of notice to be observed.

47 According to Article 3(1) of the Directive, the information referred to in Article 2(2) must be given to the employee in a written contract of employment; a letter of engagement; and/or one or more other written documents, not later than two months after the commencement of employment.

48 Moreover, Article 5 of the Directive provides that any amendments to an essential aspect of the contract or the employment relationship must be the subject of a written document given by the employer to the employee at the earliest opportunity and not later than one month after the date of entry into effect of the amendments in question.

49 Where a notification is made in accordance with Articles 3 and 5, it must be given such evidential weight as to allow it to serve as factual proof of the essential aspects of the contract of employment, including a certain presumption of correctness as enjoyed by similar documents under domestic law (see, for comparison, Joined Cases C-253/96 to C-258/96 *Kampelmann and Others* [1997] ECR I-6907, paragraphs 30 to 34).

um ýmis grundvallaratriði, svo sem um skylduna að skýra launþegum skriflega frá helstu skilmálum ráðningarsamnings eða ráðningarfyrirkomulags.

45 Markmið tilskipunarinnar er að veita launþegum aukna vernd gegn brotum á réttindum þeirra og auka gagnsæi á vinnumarkaði (2. málsliður). Því er sú almenna krafa gerð á vettvangi EES–samningsins að sérhverjum launþega beri að fá í hendur skjal með upplýsingum um meginatriði í ráðningarsamningi hans eða ráðningarfyrirkomulagi (7. málsliður).

46 Í samræmi við þetta markmið er í 1. mgr. 2. gr. tilskipunarinnar kveðið á um þá meginreglu að vinnuveitanda beri skylda til að skýra launþega frá helstu ákvæðum ráðningarsamnings eða ráðningarfyrirkomulags. Í 2. mgr. 2. gr. er listi, sem er ekki tæmandi, með þeim lágmarksupplýsingum sem fram skulu koma. Listinn tekur til launaþátta, lengd launaðs orlofs sem launþegi á rétt á og lengd uppsagnarfrests sem vinnuveitanda og launþega ber að virða.

47 Samkvæmt 1. mgr. 3. gr. tilskipunarinnar skal veita launþega upplýsingarnar sem um getur í 2. mgr. 2. gr. með skriflegum ráðningarsamningi; ráðningarbréfi; og/eða einu eða fleiri skriflegum skjölum, eigi síðar en tveimur mánuðum eftir að starf hefst.

48 Enn fremur segir í 5. gr. tilskipunarinnar að vinnuveitanda beri að skýra launþega frá sérhverri breytingu á meginatriðum ráðningarsamnings eða ráðningarfyrirkomulags í skriflegu skjali við fyrstu hentugleika og eigi síðar en einum mánuði eftir að breytingin kemur til framkvæmda.

49 Ef tilkynning hefur farið fram í samræmi við 3. og 5. gr. verður að ljá henni vægi sem sönnun á atvikum varðandi meginatriði ráðningarsamnings, þar á meðal verður að ganga út frá sannleiksgildi slíkrar tilkynningar með sama hætti og gert er með sambærileg skjöl að landsrétti (sjá, til samanburðar, sameinuð mál C-253/96 til C-258/96 *Kampelmann and Others* [1997] ECR I-6907, 30. - 34. mgr.).

50 However, the present case concerns the consequences of a notification not being made, that is whether an amendment to a contract of employment must be considered ineffective if it has not been notified in accordance with Article 5 of the Directive.

51 It follows from the Directive that a distinction must be made between the terms and conditions of the contract of employment and the employer's duty to inform the employee of those terms and conditions. Its provisions presuppose that a contract of employment or amendments thereto may take effect regardless of whether the employee has been notified of them in writing.

52 Moreover, it follows plainly from the second indent of Article 6 that the Directive is to be without prejudice to the rules on proof of the existence of a contract or employment relationship under national law. That provision implies that such proof may be produced in any form allowed by national law, even in the absence of any written notification from the employer (see, for comparison, Case C-350/99 *Lange* [2001] ECR I-1061, paragraph 27).

53 The Directive does not itself lay down any rules of evidence. Thus, proof of the essential aspects of the contract or employment relationship cannot depend solely on the employer's notifications under Articles 2(1) and 5, or the lack of such notifications. The employer must therefore be allowed to bring any evidence to the contrary, by showing that the information in the notification provided under Article 2(1) has been subsequently altered (compare, *mutatis mutandis, Kampelmann and Others*, cited above, paragraph 34).

54 In other words, the Directive has no bearing on the material content of the contract of employment. It is a matter for the courts of the EEA States to apply national rules of evidence as to the existence and content of contracts or employment relationships. It follows from the system of Articles 3 and 5 that no distinction in this regard should be made between the existence of and amendments to a contract.

50 Þetta mál snýst hins vegar um afleiðingar þess að slík tilkynning hefur ekki farið fram. Nánar lýtur málið að því hvort breyting á ráðningarsamningi skuli teljast ógild ef ekki hefur verið tilkynnt um hana með þeim hætti sem kveðið er á um í 5. gr. tilskipunarinnar.

51 Það leiðir af tilskipuninni að gera verður greinarmun á skilmálum ráðningarsamnings og á skyldu vinnuveitanda til að tilkynna launþega um skilmálana. Í ákvæðum tilskipunarinnar er gert ráð fyrir því að ráðningarsamningur eða breytingar á honum geti tekið gildi óháð skriflegri tilkynningu til launþega.

52 Það leiðir jafnframt með skýrum hætti af 2. málslið 6. gr. að tilskipuninni er ekki ætlað að hafa áhrif á reglur landsréttar um sönnunarfærslu um það að ráðningarsamningur eða ráðningarfyrirkomulag sé fyrir hendi. Ákvæðið bendir til þess að slík sönnunarfærsla geti farið fram með hverjum þeim hætti sem heimill er samkvæmt landslögum, jafnvel þótt engin skrifleg tilkynning frá vinnuveitanda liggi fyrir (sjá, til samanburðar, mál C-350/99 *Lange* [2001] ECR I-1061, 27. mgr.).

53 Engar reglur um sönnunarfærslu er að finna í tilskipuninni sjálfri. Þar af leiðandi getur sönnunarfærsla um meginatriði ráðningarsamnings eða ráðningar–fyrirkomulags ekki ráðist einvörðungu af tilkynningu vinnuveitanda samkvæmt 1. mgr. 2. gr. og 5. gr. tilskipunarinnar, eða því að farist hefur fyrir að senda slíka tilkynningu. Vinnuveitanda verður því að teljast heimilt að færa sönnur á hið gagnstæða með því að sýna fram á að upplýsingar í tilkynningu sem kveðið er á um í 1. mgr. 2. gr. hafi síðar verið breytt (sjá, til samanburðar, að breyttu breytanda, áður tilvitnað mál *Kampelmann and Others*, 34. mgr.).

54 Tilskipunin hefur með öðrum orðum engin áhrif á efnisákvæði ráðningarsamningsins. Dómstólum EES–ríkja er því heimilt að beita reglum landsréttar um sönnunarfærslu varðandi tilvist og efni ráðningarsamnings eða ráðningarfyrirkomulags. Af því fyrirkomulagi sem lýst er í 3. og 5. gr. tilskipunarinnar leiðir að ekki er að þessu leyti gerður greinarmunur á tilvist ráðningarsamnings eða breytingum á efni hans.

55 Furthermore, Article 8(1) of the Directive provides that EEA States are to introduce such measures as are necessary to enable all employees who consider themselves wronged by failure to comply with the obligations arising from the Directive to pursue their claims by judicial process after possible recourse to other competent authorities. It follows from that provision that the Directive cannot be interpreted as meaning that a failure to give an employee the requisite information concerning an essential aspect of the contract or employment relationship will render that aspect ineffective. The Directive leaves to the EEA States the power to define the penalties appropriate to such circumstances, subject to the proviso that employees must be able to pursue their claims by judicial process (see, for comparison, *Lange*, cited above, paragraph 28).

56 Consequently, the Directive does not require any amendments to an essential aspect of the contract or employment relationship that has not been mentioned in a written document delivered to the employee, or has not been mentioned therein with sufficient precision, to be regarded as ineffective (compare *Lange*, cited above, paragraph 29).

57 The question from the national court has arisen in the context of bankruptcy proceedings. However, the Directive applies generally to employment relationships. It therefore applies in the same manner also in bankruptcy proceedings or a comparable division of a limited company.

58 The answer to the question must therefore be as follows:

Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship must be interpreted as not requiring that compensation to an employee is to be assessed on the basis of a written contract of employment if no written document has been handed over to the employee concerning amendments, temporary or permanent, that may have been made to the essential aspects of the contract of employment or employment relationship between the parties within the time limits laid down in Article 5 of the Directive. This applies also in the context of bankruptcy proceedings or a comparable division of a limited liability company.

55 Enn fremur segir í 1. mgr. 8. gr. tilskipunarinnar að aðildarríkin skuli taka upp ákvæði sem gera öllum launþegum, sem telja á sér brotið vegna þess að ekki sé farið að kröfum tilskipunarinnar, kleift að sækja rétt sinn samkvæmt gildandi réttarreglum, hugsanlega eftir að hafa lagt málið fyrir önnur lögbær yfirvöld. Af því ákvæði leiðir að ekki er unnt að túlka tilskipunina með þeim hætti að vanræksla á því að veita launþega umræddar upplýsingar varðandi meginatriði ráðningarsamnings eða ráðningarfyrirkomulags geri það að verkum að hið tiltekna atriði teljist ógilt. Tilskipunin eftirlætur aðildarríkjunum að ákvarða viðeigandi viðurlög í slíkum tilfellum, með því skilyrði að launþegar geti leitað réttar síns fyrir dómstólum (sjá, til samanburðar, áður tilvitnað mál *Lange*, 28. mgr.).

56 Af framansögðu leiðir, að ekki er gerð krafa um það, samkvæmt tilskipuninni, að breytingar á aðalatriðum ráðningarsamnings eða ráðningarfyrirkomulags, sem ekki hefur verið minnst á í skriflegu skjali sem afhent hefur verið launþega, eða ekki er orðað með nægilega skýrum hætti í slíku skjali, verði taldar ógildar (sjá, til samanburðar, áður tilvitnað mál *Lange*, 29. mgr.).

57 Spurning héraðsdóms er borin upp í tengslum við mál sem varðar gjaldþrotaskipti. Tilskipunin gildir þó almennt um ráðningarsamband. Hún gildir því einnig um gjaldþrotaskipti eða sambærileg skipti á hlutafélagi.

58 Í ljósi þess sem rakið er hér að framan verður að svara spurningunni með eftirfarandi hætti:

Túlka verður ákvæði tilskipunar 91/533/EBE frá 14. október 1991, um skyldu vinnuveitanda að skýra launþegum frá samningsskilmálum eða ráðningarfyrirkomulagi, á þann veg að í henni sé ekki gerð krafa um að greiðslur til launþega skuli metnar á grundvelli skriflegs ráðningarsamnings, hafi launþeganum ekki verið afhent skriflegt skjal um breytingar sem kunna að hafa verið gerðar, tímabundið eða varanlega, á meginatriðum ráðningarsamnings eða ráðningarfyrirkomulags aðila innan tímamarka samkvæmt 5. gr. tilskipunarinnar. Þetta gildir einnig við gjaldþrotaskipti eða sambærileg skipti á hlutafélagi.

IV COSTS

59 The costs incurred by ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before Reykjavík District Court, any decision on the costs of 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 the Héraðsdómur Reykjavíkur hereby gives the following Advisory Opinion:

Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship must be interpreted as not requiring that compensation to an employee is to be assessed on the basis of a written contract of employment if no written document has been handed over to the employee concerning amendments, temporary or permanent, that may have been made to the essential aspects of the contract of employment or employment relationship between the parties within the time limits laid down in Article 5 of the Directive. This applies also in the context of bankruptcy proceedings or a comparable division of a limited liability company.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 25 March 2013.

Gunnar Selvik — Dómritari

Carl Baudenbacher — Forseti

IV MÁLSKOSTNAÐUR

59 ESA og framkvæmdastjórn Evrópusambandsins, sem skilað hafa greinargerðum til 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 spurningu þá sem Héraðsdómur Reykjavíkur beindi til dómstólsins:

Túlka verður ákvæði tilskipunar 91/533/EBE frá 14. október 1991, um skyldu vinnuveitanda að skýra launþegum frá samningsskilmálum eða ráðningarfyrirkomulagi, á þann veg að í henni sé ekki gerð krafa um að bætur til launþega skuli metnar á grundvelli skriflegs ráðningarsamnings, hafi launþeganum ekki verið afhent skriflegt skjal um breytingar sem kunna að hafa verið gerðar, tímabundið eða varanlega, á meginatriðum ráðningarsamnings eða ráðningarfyrirkomulags aðila innan tímamarka samkvæmt 5. gr. tilskipunarinnar. Þetta gildir einnig við gjaldþrotaskipti eða sambærileg skipti á hlutafélagi.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Kveðið upp í heyranda hljóði í Lúxemborg 25. mars 2013.

Gunnar Selvik Carl Baudenbacher

Dómritari Forseti

REPORT FOR THE HEARING

in Case E–10/12

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 Héraðsdómur Reykjavíkur (Reykjavík District Court) in the case of

Yngvi Harðarson

and

Askar Capital hf.

on the interpretation of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

I INTRODUCTION

1. By a letter of 14 September 2012, registered at the EFTA Court on the same day, Reykjavík District Court made a request for an Advisory Opinion in a case pending before it between Yngvi Harðarson ("the plaintiff"), and his former employer Askar Capital hf., a financial undertaking in winding–up proceedings ("the defendant").

2. The case before the national court concerns, *inter alia*, whether an employee's compensation for breach of contract is to be assessed on the basis of the written contract of employment if no written document has been handed over to the employee concerning any amendments that may have been made to the main features of the contract.

II LEGAL BACKGROUND

EEA law

3. Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship ("the

SKÝRSLA FRAMSÖGUMANNS

í máli E–10/12

BEIÐNI samkvæmt 34. gr. samningsins milli EFTA–ríkjanna um stofnun eftirlitsstofnunar og dómstóls um ráðgefandi álit EFTA–dómstólsins, frá Héraðsdómi Reykjavíkur, í máli

Yngva Harðarsonar

gegn

Askar Capital hf.

varðandi túlkun á tilskipun ráðsins 91/533/EBE frá 14. október 1991 um skyldu vinnuveitanda að skýra launþegum frá samningsskilmálum eða ráðningarfyrirkomulagi.

I INNGANGUR

1. Með bréfi dagsettu 14. september 2012, sem samdægurs var skráð í málaskrá dómstólsins, óskaði Héraðsdómur Reykjavíkur eftir ráðgefandi áliti í máli sem rekið er fyrir dómstólnum, milli Yngva Harðarsonar, (sóknaraðili), og Askar Capital hf., fjármálafyrirtækis í slitameðferð, (varnaraðili).

2. Málið sem rekið er fyrir Héraðsdómi Reykjavíkur snýst, meðal annars, um það hvort meta skuli bætur til launþega, vegna samningsbrots, á grundvelli skriflegs ráðningarsamnings, hafi launþeganum ekki verið afhent skriflegt skjal um breytingar sem kunna að hafa verið gerðar á meginatriðum ráðningarsamningsins.

II LÖGGJÖF

EES–réttur

3. Tilskipun ráðsins 91/533/EBE frá 14. október 1991 um skyldu vinnuveitanda að skýra launþegum frá samningsskilmálum eða

Directive")[1] was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 7/94 of 21 March 1994, amending Annex XVIII to the EEA Agreement.

4. Article 1 of the Directive reads:

Scope

1. This Directive shall apply to every paid employee having a contract or employment relationship defined by the law in force in a Member State and/or governed by the law in force in a Member State.

...

5. Article 2 of the Directive reads:

Obligation to provide information

1. An employer shall be obliged to notify an employee to whom this Directive applies, hereinafter referred to as 'the employee', of the essential aspects of the contract or employment relationship.

2. The information referred to in paragraph 1 shall cover at least the following:

...

(h) the initial basic amount, the other component elements and the frequency of payment of the remuneration to which the employee is entitled;

...

6. Article 5 of the Directive reads:

Modification of aspects of the contract or employment relationship

1. Any change in the details referred to in Articles 2(2) and 4(1) must be the subject of a written document to be given by the employer to the employee at the earliest opportunity and not later than one month after the date of entry into effect of the change in question.

...

[1] OJ 1991 L 288, p. 32.

ráðningarfyrirkomulagi (tilskipunin)[1] var tekin upp í EES–samninginn með ákvörðun sameiginlegu EES–nefndarinnar nr. 7/94 frá 21. mars 1994 og breytti XVIII. viðauka EES–samningsins.

4. Í 1. gr. tilskipunarinnar segir:

Gildissvið

1. Þessi tilskipun gildir um sérhvern launþega sem er ráðinn samkvæmt ráðningarsamningi eða ráðningarfyrirkomulagi sem er skilgreint í gildandi lögum aðildarríkis og/eða heyrir undir gildandi lög í aðildarríki.

...

5. Í 2. gr. tilskipunarinnar segir:

Upplýsingaskylda

1. Vinnuveitanda ber skylda til að skýra launþega sem heyrir undir þessa tilskipun, hér á eftir nefndur „launþeginn", frá helstu ákvæðum ráðningarsamnings eða ráðningarfyrirkomulags.

2. Í upplýsingunum sem um getur í 1. mgr. skal að minnsta kosti eftirfarandi koma fram:

...

(h) upphafsgrunnlaun, aðrir launaþættir sem launþegi á rétt á og hve oft launagreiðslur fara fram;

...

6. Í 5. gr. tilskipunarinnar segir:

Afmarkaðar breytingar á ráðningarsamningi eða ráðningarfyrirkomulagi

1. Vinnuveitanda ber að skýra launþega frá sérhverri breytingu sem er gerð á atriðunum sem um getur í 2. mgr. 2. gr. og 1. mgr. 4 gr. í skriflegu skjali við fyrstu hentugleika og eigi síðar en einum mánuði eftir að breytingin kemur til framkvæmda.

...

[1] OJ 1991 L 288, bls. 32.

7. Article 6 of the Directive reads:

Form and proof of the existence of a contract or employment relationship and procedural rules

This Directive shall be without prejudice to national law and practice concerning:

– *the form of the contract or employment relationship,*

– *proof as regards the existence and content of a contract or employment relationship,*

– *the relevant procedural rules.*

8. Article 8 of the Directive reads:

Defence of rights

1. Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities.

...

9. Article 9 of the Directive reads:

Final provisions

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive no later than 30 June 1993 or shall ensure by that date that the employers' and workers' representatives introduce the required provisions by way of agreement, the Member States being obliged to take the necessary steps enabling them at all times to guarantee the results imposed by this Directive.

...

National law

10. The Directive was implemented in Icelandic law by Advertisement No 503/1997, which was published in Series B of the Law Gazette on 30 June 1997. Following consultation with the principal employers' and workers' organisations, it was decided

7. Í 6. gr. tilskipunarinnar segir:

Form og sönnun á því að ráðningarsamningur eða ráðningarfyrirkomulag sé fyrir hendi ásamt reglum þar að lútandi

Þessi tilskipun er með fyrirvara um landslög og réttarvenju varðandi:

– *form ráðningarsamnings eða ráðningarfyrirkomulags,*

– *sönnun á því að ráðningarsamningur eða ráðningarfyrirkomulag sé fyrir hendi og efni þess,*

– *reglur þar að lútandi.*

8. Í 8. gr. tilskipunarinnar segir:

Réttur tryggður

1. Aðildarríkin skulu taka upp ákvæði í innlendu réttarkerfi sem gera öllum launþegum, sem telja á sér brotið vegna þess að ekki sé farið að kröfum þessarar tilskipunar, kleift að sækja rétt sinn samkvæmt gildandi réttarreglum, hugsanlega eftir að hafa lagt málið fyrir önnur lögbær yfirvöld.

...

9. Í 9. gr. tilskipunarinnar segir:

Lokaákvæði

1. Aðildarríkin skulu samþykkja lög og stjórnsýslufyrirmæli sem nauðsynleg eru til að fara að tilskipun þessari eigi síðar en 30. júní 1993 eða tryggja eigi síðar en á þeim degi að aðilar vinnumarkaðarins setji nauðsynleg ákvæði með samningum sem leggja aðildarríkjunum þær skyldur á herðar að gera nauðsynlegar ráðstafanir er tryggi á öllum tímum þann ávinning sem af tilskipun þessari hlýst.

...

Landsréttur

10. Tilskipunin var innleidd í íslenska löggjöf með auglýsingu nr. 503/1997, sem birt var í B–deild Stjórnartíðinda 30. júní 1997. Að höfðu samráði við helstu samtök atvinnurekenda og launþega

to implement the provisions of the Directive by way of collective agreements in accordance with Article 9(1) of the Directive.

11. Under Icelandic law there is no general provision laying down formal requirements in relation to contracts of employment, although such requirements exist in certain sectors. This entails, *inter alia*, that oral contracts, or contracts made with the assistance of electronic media, are, in principle, valid.

III FACTS AND PROCEDURE

12. On 18 December 2006, the plaintiff and the defendant concluded a contract of employment, which took effect on 1 January 2007. Article 2 of the contract provided that the notice period for the termination of the contract amounted to 12 months. According to Article 3 of the contract, the plaintiff's monthly remuneration was EUR 15 000.

13. In the course of the plaintiff's employment, several aspects of the contract of employment were modified including his title and responsibilities, his remuneration as well as the currency in which this remuneration was paid.

14. As regards his position, the plaintiff was initially hired as the Manager of the Consulting and Risk Management Department; he was then appointed as the Manager of the Risk Management Department as from summer 2007, and then as the Manager of the Hedge Fund Department as from June 2008. Finally, from October 2008 to July 2010, he was engaged as the Manager of the Risk Consulting Department.

15. As from January 2009, the plaintiff's monthly remuneration was paid in Icelandic krónur (ISK). In April 2009 – possibly as early as from January 2009 – the initial amount of EUR 15 000 per month was reduced to ISK 1 500 000 per month (equivalent to some EUR 9 000 according to exchange rates at the time). Based on the information given in the request from the national court, it is unclear whether such modification was temporary or permanent. This is due to the fact that the negotiations were undertaken

var ákveðið að hrinda ákvæðum hennar í framkvæmd með kjarasamningum, sbr. 1. mgr. 9. gr. tilskipunarinnar.

11. Samkvæmt íslenskum lögum eru engar almennar kröfur gerðarum form ráðningarsamninga, þótt dæmi um slíkt finnist á sumum sviðum. Í þessu felst, meðal annars, að munnlegir samningar eða samningar gerðir með aðstoð rafrænna miðla geta verið gildir.

III MÁLAVEXTIR OG MEÐFERÐ MÁLSINS

12. Hinn 18. desember 2006 gerðu sóknaraðili og varnaraðili með sér ráðningarsamning sem tók gildi 1. janúar 2007. Í 2. gr. samningsins var kveðið á um tólf mánaða uppsagnarfrest. Samkvæmt 3. gr. samningsins skyldu mánaðarlaun sóknaraðila vera 15.000 evrur.

13. Á ráðningartímabilinu var mörgum atriðum samningsins breytt, þar á meðal starfsheiti og skyldum, launafjárhæð og gjaldmiðillinn sem hún skyldi greiðast í.

14. Hvað viðkemur stöðu sóknaraðila, var hann upphaflega ráðinn sem framkvæmdastjóri ráðgjafar og áhættustýringar, hann var síðar gerður að framkvæmdastjóra áhættustýringar frá sumrinu 2007 og því næst að framkvæmdastjóra vogunarsjóðsdeildar frá og með júní 2008. Loks gegndi hann stöðu framkvæmdastjóra áhætturáðgjafar, frá október 2008 til júlí 2010.

15. Frá því í janúar 2009 voru mánaðarlaun sóknaraðila greidd í íslenskum krónum. Frá því í apríl 2009 – hugsanlega frá janúar 2009 – var fjárhæðin sem upphaflega var samið um, 15.000 evrur á mánuði, lækkuð niður í 1.500.000 ISK á mánuði (sem jafngildir um það bil 9.000 evrum á þágildandi gengi). Af upplýsingum þeim sem fylgja beiðni Héraðsdóms Reykjavíkur um ráðgefandi álit, er óljóst hvort slík breyting hafi verið tímabundin eða til frambúðar. Það má rekja til þess að samið var munnlega og með

orally and via emails and over a period of several months extending from December 2008 to November 2009.

16. By a ruling of 14 July 2010, the defendant was put into winding–up proceedings.

17. By a letter of 26 July 2010 to the defendant's winding–up committee, the plaintiff declared that he considered the defendant to have defaulted on the contract and that he would not accept any deviation from the terms of the written contract as regards his terms of employment, including those relating to wages. By a letter of 27 July 2010, the winding–up committee terminated the contract of employment and informed the plaintiff that it would not take over any rights and obligations under the contract.

18. On 18 November 2010, the plaintiff lodged a claim with the defendant's winding–up committee for wages during his notice period, in addition to vacation pay and social security tax, a total of EUR 252 836. The claim was based on a 12–month notice period and a monthly wage of EUR 15 000 as provided in Articles 2 and 3 of the employment contract. The claim was lodged as a priority claim in the winding up under national law.

19. The winding–up committee rejected the plaintiff's full claim on the basis that the calculation of his claim should have been based on a monthly remuneration of ISK 1 500 000 and not EUR 15 000. As a result, the winding–up committee reduced the plaintiff's claim from EUR 252 386 to EUR 150 023. Moreover, it did not consider the claim a priority claim but an ordinary one for the purpose of the winding–up proceedings. The plaintiff rejected the winding–up committee's position both with regards to the status of the claim (which is not the subject of the request for an Advisory Opinion) and the amount.

20. When attempts to resolve the dispute proved unsuccessful, it was decided to refer it to Reykjavík District Court.

tölvupósti, og stóðu viðræðurnar um margra mánaða skeið, frá desember 2008 til nóvember 2009.

16. Héraðsdómur Reykjavíkur skipaði varnaraðila slitastjórn 14. júlí 2010.

17. Með bréfi sóknaraðila til slitastjórnar varnaraðila dags. 26. júlí 2010 lýsti sóknaraðili því yfir að hann teldi að samningur sinn hefði verið vanefndur af hálfu varnaraðila og að hann myndi ekki samþykkja að vikið yrði frá ákvæðum skriflegs ráðningarsamnings um kjör sín, meðal annars launakjör. Með bréfi slitastjórnar varnaraðila dags. 27. júlí 2010 var endi bundinn á ráðningarsamning sóknaraðila með því að honum var tilkynnt að slitastjórnin tæki ekki við réttindum og skyldum samkvæmt samningnum.

18. Hinn 18. nóvember 2010 lýsti sóknaraðili kröfu á hendur varnaraðila um laun á uppsagnarfresti, auk orlofs og tryggingagjalds, alls að fjárhæð 252.836 evrur. Krafan miðaðist við 12 mánaða uppsagnarfrest og mánaðarlaun að fjárhæð 15.000 evrur, í samræmi við 2. og 3. gr. ráðningarsamningsins. Kröfunni var lýst sem forgangskröfu samkvæmt íslenskum gjaldþrotaskiptalögum.

19. Slitastjórn varnaraðila hafnaði kröfu sóknaraðila á grundvelli þess að útreikningar kröfunnar hefðu átt að miðast við mánaðarlaun að fjárhæð 1.500.000 krónur en ekki 15.000 evrur. Vegna þessa lækkaði slitastjórn varnaraðila kröfu sóknaraðila úr 252.386 evrum í 150.023 evrur. Enn fremur flokkaði hún ekki kröfuna sem forgangskröfu heldur sem almenna kröfu. Sóknaraðili mótmælti afstöðu slitastjórnar varnaraðila bæði að því er laut að stöðu kröfu hans sem almennrar kröfu (beiðnin um ráðgefandi álit tekur ekki til þess atriðis) og fjárhæð kröfunnar.

20. Eftir að sáttatilraunir höfðu reynst árangurslausar var ákveðið að vísa ágreiningnum til Héraðsdóms Reykjavíkur.

21. The parties are in dispute as to the appropriate amount of compensation to be awarded as a result of the termination of the contract of employment. The plaintiff argues that Article 3 of the contract of employment providing for a monthly remuneration of EUR 15 000 should be used as the starting point in the calculation of his claim. Moreover, the plaintiff contends that, if, contrary to his argument, the remuneration was amended in the course of the employment, this was only on a temporary basis. Alternatively, if any such amendment was intended to be permanent, it should have been done in accordance with the provisions of Article 5 of the Directive, and the burden of proof rests with the defendant to prove such.

22. The defendant argues that the plaintiff's wages were amended from EUR 15 000 to ISK 1 500 000 during the course of the employment period in a binding fashion either by an oral agreement or, alternatively, in accordance with custom established between the parties. As a result, ISK 1 500 000 should be used as the reference amount for the calculation of the claim.

23. In the proceedings before the District Court, the plaintiff requested that two questions be referred to the Court. In a ruling of 7 June 2012, the District Court rejected that request. An appeal was made to the Supreme Court of Iceland. The Supreme Court set aside the District Court's ruling in relation to one of the questions, and decided that an Advisory Opinion should be sought from the Court in connection with the dispute concerning the reduction of the plaintiff's claim.

24. Consequently, Reykjavík District Court has referred the following question to the Court:

Should Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship be interpreted as meaning, in circumstances including bankruptcy proceedings or a comparable division of a limited liability company, that compensation to an employee is to be assessed on the basis of a written contract

21. Ágreiningur er með aðilum um fjárhæð bóta sem greiða skal vegna uppsagnar ráðningarsamningsins. Sóknaraðili heldur því fram að leggja skuli 3. gr. ráðningarsamningsins, sem kveður á um mánaðarlaun að fjárhæð 15.000 evrur, til grundvallar útreiknings á kröfunni. Jafnframt byggir sóknaraðili á að ef talið verði að launanum hafi verið breytt á ráðningartímabilinu, öfugt við það sem hann heldur fram, hafi slíkt einungis verið tímabundin ráðstöfun. Auk þess heldur hann því fram, að ef slíkri breytingu hafi verið ætlað að hafa varanlegt gildi, hafi borið að gera hana í samræmi við 5. gr. tilskipunarinnar, og að sönnunarbyrðin um varanleika hennar hvíli á varnaraðila.

22. Varnaraðili heldur því fram að launakjörum sóknaraðila hafi verið breytt með bindandi hætti, úr 15.000 evrum í 1.500.000 krónur, á ráðningartímanum, annað hvort með munnlegum samningi, eða með því að venja þess efnis hafi myndast milli aðila. Þar af leiðandi beri að miða við 1.500.000 krónu mánaðarlaun við útreikning kröfunnar.

23. Í máli því sem rekið er fyrir Héraðsdómi Reykjavíkur óskaði sóknaraðili þess að tveimur spurningum yrði vísað til EFTA–dómstólsins. Með úrskurði 7. júní 2012 hafnaði héraðsdómari beiðninni. Sá úrskurður var kærður til Hæstaréttar. Hæstiréttur felldi úrskurð héraðsdóms úr gildi, að því er laut að annarri spurningu sóknaraðila, og ákvað að leitað skyldi ráðgefandi álits EFTA–dómstólsins um þá spurningu sem lýtur að lækkun á kröfu sóknaraðila.

24. Héraðsdómur Reykjavíkur beindi því eftirfarandi spurningu til dómstólsins:

Ber að skýra ákvæði tilskipunar 91/533/EBE 14. október 1991, um skyldu vinnuveitanda að skýra launþegum frá samningsskilmálum eða ráðningarfyrirkomulagi, á þann veg, þar með talið við gjaldþrotaskipti eða sambærileg skipti á hlutafélagi, að bætur til launþega skuli metnar

of employment if no written document has been handed over to the employee concerning amendments, temporary or permanent, that may have been made to the main features of the contract of employment or employment relationship between the parties within the time limits laid down in Article 5 of the Directive?

IV WRITTEN OBSERVATIONS

25. 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 Hildur Sólveig Pétursdóttir, Supreme Court Attorney;
- the defendant, represented by Stefán Geir Þórisson, Supreme Court Attorney;
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Clémence Perrin and Maria Moustakali, Officers, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Johan Enegren, Member of its Legal Service, acting as Agent.

V SUMMARY OF THE PLEAS AND ARGUMENTS SUBMITTED

The plaintiff

26. The plaintiff submits that the provisions of the Directive are to be interpreted as meaning that in the event of insolvency proceedings or comparable division of a limited company, compensation to an employee, including vacation pay and pay during the notice period, should be assessed on the basis of the written contract of employment.

27. The plaintiff points out that, according to its preamble, the objective of the Directive is to subject employment relationships to formal requirements. Such formal requirements are designed

á grundvelli skriflegs ráðningarsamnings, hafi launþeganum ekki verið afhent skriflegt skjal um breytingar sem kunna að hafa verið gerðar, tímabundið eða varanlega, á meginatriðum ráðningarsamnings eða ráðningarfyrirkomulags aðila innan tímamarka samkvæmt 5. gr. tilskipunarinnar?

IV SKRIFLEGAR GREINARGERÐIR

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

– Sóknaraðila, Yngva Harðarsyni, í fyrirsvari er Hildur Sólveig Pétursdóttir, hrl.

– Varnaraðila, Askar Capital hf., í fyrirsvari er Stefán Geir Þórisson, hrl.

– Eftirlitsstofnun EFTA, í fyrirsvari sem umboðsmenn eru Xavier Lewis, framkvæmdastjóri lögfræði– og framkvæmdasviðs, ásamt Clémence Perrin og Mariu Moustakali lögfræðingum á lögfræði– og framkvæmdasviði.

– Framkvæmdastjórn Evrópusambandsins, í fyrirsvari sem umboðsmaður er Johan Enegren, hjá lagaskrifstofu framkvæmdastjórnarinnar.

V SAMANTEKT YFIR MÁLSÁSTÆÐUR OG LAGARÖK

Sóknaraðili

26. Sóknaraðili telur að túlka beri ákvæði tilskipunarinnar með þeim hætti að ef hlutafélag er tekið til gjaldþrotaskipta eða sambærilegra skipta, skuli miða bætur til launþega, þar með talið orlof og laun á uppsagnarfresti, við skriflegan ráðningarsamning.

27. Sóknaraðili bendir á að samkvæmt formálsorðum tilskipunarinnar, er markmið hennar að sett verði ákvæði um formlegar kröfur sem gildi um ráðningarfyrirkomulag. Slíkum formlegum kröfum er

to provide employees with improved protection against possible infringements of their rights and to create greater transparency on the labour market. This transparency consists in employees' being able to assume that their terms of employment at any given time will be in accordance with the written contracts of employment that they have signed.

28. To this end, the plaintiff continues, Article 5 of the Directive states that any change in the contract of employment must be the subject of a written document to be given by the employer to the employee not later than one month after the date of entry into effect of the change in question.

29. The plaintiff submits that, although the Directive does not itself lay down any rules of evidence, the objective of the Directive would not be achieved if the employee were unable in any way to use the information contained in the notification referred to in Article 2(1) of the Directive as evidence before the national courts, particularly in disputes concerning essential aspects of the contract or employment relationship.[2] The national courts must therefore apply and interpret their national rules on the burden of proof in light of the purpose of the Directive, giving the aspects specifically referred to in Article 2(1) of the Directive such evidential weight as to allow them to serve as factual proof of the essential aspects of the contract of employment or employment relationship and using them as the basis for resolution of the dispute by the courts.[3]

30. The plaintiff contends furthermore that, under Article 2(2) of the Directive, the employer is obliged to inform the employee in a clear manner of the essential aspects of the contract of employment.[4] The purpose of that obligation is to apprise employees of their rights and obligations vis–à–vis their employers, and not to give an indication of the practices observed

2 Reference is made to Joined Cases C-253/96 to C-258/96 *Kampelmann and Others* [1997] ECR I-9607, paragraph 32.
3 Reference is made to *Kampelmann and Others*, cited above, paragraph 33.
4 Reference is made to Case C-350/99 *Lange* [2001] ECR I-1061.

ætlað að veita launþegum aukna vernd gegn brotum á réttindum þeirra og auka gagnsæi vinnumarkaðarins. Gagnsæið felst í því að launþegar geti gengið að því vísu, að skilyrði ráðningarinnar séu öllum stundum í samræmi við þann skriflega ráðningarsamning sem þeir hafa undirritað.

28. Sóknaraðili segir það í samræmi við ofangreint markmið, að í 5. gr. tilskipunarinnar sé kveðið á um að vinnuveitanda beri að skýra launþega frá sérhverri breytingu sem er gerð á samningnum í skriflegu skjali, eigi síðar en einum mánuði eftir að breytingin kemur til framkvæmda.

29. Sóknaraðili telur að þótt engar reglur um sönnunarfærslu sé að finna í tilskipuninni, yrði markmiði hennar ekki náð ef launþegi gæti ekki með nokkru móti notað upplýsingar í skjölum, sem vísað er til í 1. mgr. 2. gr. tilskipunarinnar, sem sönnunargagn fyrir dómstólum aðildarríkis, sérstaklega í deilum sem varða meginatriði ráðningarsamnings eða ráðningarfyrirkomulags.[2] Dómstólar aðildarríkjanna verði því að beita og túlka reglur landsréttar um sönnunarbyrði í ljósi markmiðs tilskipunarinnar, og gefa þeim þáttum sem sérstaklega er vísað til í 1. mgr. 2. gr. slíkt vægi að þeir teljist til sönnunargagna um meginatriði ráðningarsamnings eða ráðningarfyrirkomulags og leggja þær til grundvallar við lausn á deilumálum fyrir dómstólum.[3]

30. Sóknaraðili telur jafnframt að vinnuveitanda beri skylda til þess, samkvæmt 2. mgr. 2. gr. tilskipunarinnar, að upplýsa launþega með skýrum hætti um meginatriði ráðningarsamnings.[4] Tilgangur þeirrar skyldu er að launþegum sé ljóst hver réttindi og skyldur þeirra séu gagnvart vinnuveitendum sínum, en ekki aðeins að

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2 Vísað er til sameinaðra mála C-253/96 til C-258/96 *Kampelmann and Others* [1997] ECR I-9607, 32. mgr.
3 Vísað er til áður tilvitnaðara mála *Kampelmann and Others*, 33. mgr.
4 Vísað er til máls C-350/99 *Lange* [2001] ECR I-1061.

as a general rule in the undertaking in the period preceding their recruitment.[5]

31. Therefore, the plaintiff's view is that the position adopted by the defendant towards his claim infringes Articles 1, 2(2) and 5 of the Directive. According to the plaintiff, the fact that he approved, from month to month, a deviation from the contract of employment in the form of a reduction of his basic wage does not alter the obligation of the defendant to pay him the basic wage (EUR 15 000) and vacation pay specified in the contract of employment for a period of 12 months, which is the notice period specified in the contract.

32. Moreover, the plaintiff submits that the employees of an employer which becomes bankrupt or insolvent do not lose their protection under Article 1 of the Directive, as is assumed in the defendant's observations to Reykjavík District Court. According to the plaintiff, this follows from Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer ("Directive 2008/94").[6]

33. The plaintiff observes that he proposed to the national court that it should include a reference to Directive 2008/94 in its question to the Court. However, in its wording of the question, the national court did not make specific mention of Directive 2008/94. In the view of the plaintiff, there is no reason to believe that this indicates anything other than the fact that the national court considered it evident that Directive 2008/94 would also be taken into consideration, since the matter in dispute directly concerns the protection of employees in the event of insolvency or other comparable proceedings.

34. The plaintiff submits that the defendant bases its defence in the national proceedings on considerations which are contrary to the

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5 Reference is made to *Lange*, cited above, paragraph 18.

6 OJ 2008 L 283, p. 3. Directive 2008/94 was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 51/2009 of 24 April 2009, amending Annex XVIII to the EEA Agreement.

veita vísbendingu um þær venjur sem almennt hafa gilt hjá fyrirtækinu áður en þeir voru ráðnir til starfa. [5]

31. Að mati sóknaraðila er afstaða varnaraðila til kröfu hans því brot á 1. gr, 2. mgr. 2. gr. og 5. gr. tilskipunarinnar. Hann telur þá staðreynd, að hann hafi samþykkt að vikið væri frá ráðningarsamningnum í formi lækkunar á grunnlaunum, frá mánuði til mánaðar, engu breyta um skyldu varnaraðila til að greiða honum grunnlaun (15.000 evrur) og orlof í samræmi við ráðningarsamninginn, á tólf mánaða uppsagnarfresti þeim sem kveðið er á um í samningnum.

32. Enn fremur heldur sóknaraðili því fram, að þegar vinnuveitandi verður gjaldþrota eða ógjaldfær missi launþegar ekki þá vernd sem þeim er veitt samkvæmt 1. gr. tilskipunarinnar, eins og varnaraðili geri ráð fyrir í greinargerð sinni fyrir Héraðsdómi Reykjavíkur. Samkvæmt sóknaraðila leiðir þetta af tilskipun Evrópuþingsins og ráðsins 2008/94/EB frá 22. október 2008 um vernd til handa launþegum verði vinnuveitandi gjaldþrota (tilskipun 2008/94).[6]

33. Sóknaraðili bendir á að hann hafi lagt það til við landsdómstólinn, að hann vísaði til tilskipunar 2008/94 í spurningu sinni til EFTA–dómstólsins. Orðalag spurningarinnar vísar hins vegar ekki sérstaklega til tilskipunar 2008/94. Sóknaraðili sér enga ástæðu til annars en að ætla að þetta gefi til kynna að landsdómstóllinn hafi talið augljóst að tilskipun 2008/94 kæmi einnig til skoðunar, þar sem ágreiningur aðila varðar með beinum hætti vernd til handa launþegum við gjaldþrotaskipti eða sambærileg skipti.

34. Sóknaraðili telur að varnaraðili byggi mál sitt í héraði á sjónarmiðum sem séu andstæð ákvæðum tilskipunar 2008/94.

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5 Vísað er til áður tilvitnaðs máls *Lange*, 18. mgr.

6 OJ 2008 L 283, bls. 3. Tilskipun 2008/94 var tekin upp í EES–samninginn með ákvörðun sameiginlegu EES–nefndarinnar nr. 51/2009 frá 24. apríl 2009, og breytir XVIII. viðauka EES–samningsins.

provisions of Directive 2008/94. According to the plaintiff, the defendant argues that the plaintiff should be deprived of the right to have his claim for wages during the 12–month notice period (including his claim for vacation pay) accorded priority status, and deprived of his agreed leave entitlement, because he held the position of manager.

35. However, in the plaintiff's view, the provisions of Directive 2008/94 preclude a reduction of an employee's rights in the manner claimed by the defendant. Article 1(1) of Directive 2008/94 applies to employees' claims arising from employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1) of that directive. The plaintiff submits that, in principle, higher management staff cannot be excluded from the scope of Directive 2008/94.[7] Accordingly, the plaintiff unequivocally enjoys the protection of Directive 2008/94.

36. The plaintiff is of the opinion that the protection offered by Directive 91/533 may not be reduced by a determination that employees are not to enjoy protection during the notice period for termination specified in their contracts of employment, unless the length of this period corresponds to the minimum terms specified in legislation or a collective agreement in the Member State concerned. An interpretation of that kind would, in effect, deprive employees of their freedom to negotiate the length of the notice period and render the protection granted by the Directive inapplicable in the event of the insolvency of their employer.

37. The plaintiff emphasises that Article 11 of Directive 2008/94 provides that the Directive shall not affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees. This applies also to contracts made directly between employees and their employers. The plaintiff notes further that Article 12(a) of Directive 2008/94 provides that the option of Member States to take the measures necessary to avoid abuses shall not be

[7] Reference is made to Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 14.

Samkvæmt sóknaraðila felur afstaða varnaraðila í sér að krafa hans um launagreiðslur vegna tólf mánaða uppsagnarfrests (að meðtöldum orlofsgreiðslum) fái ekki stöðu forgangskröfu, og hann sé sviptur umsömdum rétti til orlofs, vegna þess að hann gegndi stöðu framkvæmdastjóra.

35. Hins vegar, telur sóknaraðili að ákvæði tilskipunar 2008/94 girði fyrir skerðingu á réttindum launþega með þeim hætti sem varnaraðili fer fram á. Ákvæði 1. mgr. 1. gr. tilskipunar 2008/94 gildi um kröfur launþega, í tengslum við ráðningarsamning eða ráðningarsamband, á hendur vinnuveitendum sem eru gjaldþrota í skilningi 1. mgr. 2. gr. tilskipunarinnar. Að mati sóknaraðila verða launþegar úr hópi stjórnenda ekki færðir undan gildissviði tilskipunar 2008/94.[7] Þar af leiðandi telur sóknaraðili sig njóta óskoraðrar verndar samkvæmt tilskipun 2008/94.

36. Sóknaraðili telur vernd samkvæmt tilskipun 91/533 ekki mega takmarkast af ákvörðun um að launþegar skuli ekki njóta verndar á þeim uppsagnarfresti sem tilgreindur er í ráðningarsamningi þeirra, nema ef lengd uppsagnarfrestsins sé í samræmi við lágmarksfrest sem kveðið er á um í löggjöf eða kjarasamningum í aðildarríkinu sem í hlut á. Slík túlkun myndi í raun svipta launþega frelsi þeirra til að semja um uppsagnarfrestinn, og myndi þýða að vernd samkvæmt tilskipuninni ætti ekki eiga við ef vinnuveitandi þeirra yrði gjaldþrota.

37. Sóknaraðili leggur á það áherslu að 11. gr. tilskipunar 2008/94 kveði á um að hún hafi ekki áhrif á rétt aðildarríkjanna til að beita eða setja lög eða stjórnvaldsfyrirmæli sem eru launþegum hagstæðari. Þetta gildir einnig um samninga sem gerðir eru beint á milli launþega og vinnuveitenda. Sóknaraðili bendir enn fremur á að a–liður 12. gr. tilskipunar 2009/94 kveði á um að nauðsynlegum úrræðum aðildarríkja til að koma í veg fyrir misnotkun skuli engar skorður settar. Að mati sóknaraðila þýðir

[7] Vísað er til máls C-334/92 *Wagner Miret* [1993] ECR I-6911, 14. mgr.

affected. In the plaintiff's view, this means that Member States are permitted to set rules only to prevent abuses of the rules of Directive 2008/94 regarding protection for employees in the event of their employers' insolvency. If, on the contrary, an employee's claim does not involve abuse of the rules (or the system), he should have his claims paid in full, in accordance with the proportion of claims that can be met by the assets of the estate.

38. In the plaintiff's view, it cannot be said that the plaintiff's contract of employment with the defendant involved abuse within the meaning of Directive 2008/94.[8] Nor does the defendant base its arguments on the view that the plaintiff engaged in such abuse. On the contrary, the plaintiff submits, the provisions of the contract of employment were lawful in every respect, and consequently there was no reason to invalidate or review them when the plaintiff's employment ended and the defendant's estate was accepted for winding–up proceedings.

39. Having regard to the foregoing, the plaintiff considers that the provisions of Directive 91/533 and Directive 2008/94 should be interpreted as meaning that, in the event of the employer's insolvency, compensation to an employee in respect of wages during the notice period should be assessed on the basis of the written contract of employment.

40. The plaintiff proposes that the Court should answer the question as follows:

Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship should be interpreted as meaning, in circumstances including insolvency proceedings or a comparable division of a limited liability company, that compensation to an employee is to be assessed on the basis of a written contract of employment if no written document has been handed over to the employee concerning amendments, temporary or permanent, that may have been made to the essential elements of the contract of employment or employment relationship between the parties within

8 Reference is made to Case C-201/01 *Walcher* [2003] ECR I-8827, paragraphs 34 to 52.

þetta að aðildarríkjum er einungis heimilt að setja slíkar reglur til að koma í veg fyrir misnotkun á reglum tilskipunar 2008/94 um vernd launþega við gjaldþrot vinnuveitanda. Ef krafa launþega felur á hinn bóginn ekki í sér misnotkun á reglunum (eða kerfinu) ber að greiða kröfu hans að fullu, í samræmi við það hlutfall krafna sem reynist unnt að greiða úr þrotabúinu.

38. Að mati sóknaraðila er ekki hægt að telja að ráðningarsamningurinn milli hans og varnaraðila falli undir misnotkun í skilningi tilskipunar 2008/94.[8] Þá hafi varnaraðili heldur ekki haldið því fram að sóknaraðili hafi beitt slíkri misnotkun. Þvert á móti, segir sóknaraðili að ákvæði ráðningarsamningsins séu lögleg að öllu leyti, og þar af leiðandi engin ástæða til að ógilda þau, eða endurskoða, við lok ráðningarsambandsins og upphaf slitaferlis varnaraðila.

39. Að framansögðu gættu, telur sóknaraðili að túlka beri ákvæði tilskipunar 91/533 og tilskipunar 2008/94 með þeim hætti að í tilvikum þar sem vinnuveitandi verður gjaldþrota beri að meta bætur til launþega, vegna launa á uppsagnarfresti, á grundvelli skriflega ráðningarsamningsins.

40. Sóknaraðili leggur til að dómstóllinn svari spurningunni með eftirfarandi hætti:

Skýra ber ákvæði tilskipunar 91/533/EBE 14. október 1991, um skyldu vinnuveitanda að skýra launþegum frá samningsskilmálum eða ráðningarfyrirkomulagi, á þann veg, þar með talið við gjaldþrotaskipti eða sambærileg skipti á hlutafélagi, að bætur til launþega skuli metnar á grundvelli skriflegs ráðningarsamnings, hafi launþeganum ekki verið afhent skriflegt skjal um breytingar sem kunna að hafa verið gerðar,

[8] Vísað er til máls C-201/01 *Walcher* [2003] ECR I-8827, 34. til 52. mgr.

the time limits laid down in Article 5 of the Directive. As Directive 2008/94/EC of 22 October 2008 on the protection of employees in the event of the insolvency of their employer applies directly to the protection of employees in circumstances where the employer's estate is subjected to insolvency proceedings or comparable division, including circumstances in which an employee presents his claims directly against the employer's estate (but not against a guarantee institution or insurance institution), then the employee's rights should also be protected when such proceedings or division takes place in accordance with the provisions of that Directive (cf. – as appropriate to the circumstances of the case – in particular Articles 1 and 11 of the Directive), providing that the employee has not forfeited his rights by engaging in activities covered by Article 12(a) of the Directive.

The defendant

41. The defendant submits that, when an essential element of a contract has not been mentioned in a written document within the meaning of Article 2 of the Directive, it does not follow from the Directive that that element will be regarded as inapplicable.

42. According to the defendant, the Directive contains no provisions to indicate directly or indirectly that an agreement on essential elements made in a form other than writing shall be deemed void and inapplicable.[9] The Directive merely provides that amendments should ideally be notified in writing. Were it the intention of the legislature that a failure to provide such notification of an agreement would render that agreement null and void, this would have to be stated clearly in the Directive.

43. The defendant submits further that the Directive does not lay down any rules of evidence. Article 6 of the Directive presupposes that national rules of proof apply when evaluating whether essential contractual elements should be ruled inapplicable or not.[10] This means that proof may be produced in any form allowed by national law, and thus, even in the absence of any

[9] Reference is made to *Lange,* cited above.
[10] Reference is made to *Lange*, paragraph 27, and *Kampelmann and Others,* paragraph 30, both cited above.

tímabundið eða varanlega, á meginatriðum ráðningarsamnings eða ráðningarfyrirkomulags aðila innan tímamarka samkvæmt 5. gr. tilskipunarinnar. Þar sem tilskipun 2008/94/EB frá 22. október 2008 um vernd launþega verði vinnuveitandi gjaldþrota, gildir beinlínis um vernd launþega í þeirri stöðu, að bú vinnuveitanda er tekið til gjaldþrotaskipta eða sambærilegra skipta, þ.á.m. um það tilvik, að launþeginn geri kröfu beint á hendur búi vinnuveitanda síns, en ekki á hendur tryggingasjóði, ber við slík skipti einnig að vernda rétt launþega samkvæmt ákvæðum þeirrar tilskipunar, sbr. – með hliðsjón af atvikum málsins – einkum 1. grein og 11. grein tilskipunarinnar, enda hafi launþeginn ekki fyrirgert rétti sínum með háttsemi, sem fellur undir ákvæði 12. greinar a) í tilskipuninni.

Varnaraðili

41. Varnaraðili telur að þegar ekki hafi verið minnst á einn af meginþáttum samnings í skriflegu skjali, í skilningi 2. gr. tilskipunarinnar, leiði það ekki af tilskipuninni að þeim þætti skuli ekki beitt.

42. Það er mat varnaraðila að tilskipunin hafi ekki að geyma nein ákvæði sem gefa til kynna, með beinum eða óbeinum hætti, að samkomulag um meginatriði sem gert er með öðrum hætti en skriflegum skuli teljast ógilt og skuli ekki beitt.[9] Tilskipunin kveður einungis á um að ákjósanlegast sé að breytingar séu tilkynntar skriflega. Hefði ætlunin verið sú að vanræksla á skriflegri tilkynningu hefði í för með sér að samningurinn yrði ógildur, hefði þurft að taka það skýrlega fram í tilskipuninni.

43. Varnaraðili bendir jafnframt á að engar reglur um sönnunarfærslu sé að finna í tilskipuninni. Í 6. gr. tilskipunarinnar er gert ráð fyrir að reglur aðildarríkis um sönnun gildi, þegar meta skal hvort meginatriðum samnings skuli beitt eður ei.[10] Þetta þýði að sönnunarfærsla geti farið fram með hverjum þeim hætti sem reglur landsréttar heimila, og er þar af leiðandi óháð því

[9] Vísað er til áður tilvitnaðs máls *Lange*.
[10] Vísað er til áður tilvitnaðra mála, *Lange*, 27. mgr. og *Kampelmann and Others*, 30. mgr.

written notification from the employer. The aim of the provision would be frustrated were it given a contrary interpretation.[11]

44. The defendant observes that Article 8(1) of the Directive leaves it to the Member States to introduce necessary measures to enable employees who consider themselves wronged by failure to comply with the Directive to pursue their claims by judicial process. This gives the Member States the authority to define penalties appropriate to such circumstances.[12]

45. According to the defendant, the duty to provide information to the employee can be complied with by means other than those listed in Article 6 of the Directive. Each instance must be evaluated on a case by case basis. In its view, the wording of the preamble to the Directive indicates that it was not the legislature's intention to lay down a rigid rule in the Directive. Recital 8 in the preamble to the Directive states that Member States should be able to exclude certain limited cases of employment relationship from the scope of the Directive, "in view of the need to maintain a certain degree of flexibility". The wording of Article 1(2)(b) of the Directive, in relation to casual work, also indicates that there is flexibility.[13]

46. The defendant emphasises that the purpose of the Directive is to make it easier for employees to prove rights and obligations and to create transparency on the labour market. In its view, therefore, the Directive should not be interpreted to preclude methods of establishing the conditions of or amendments to a contract other than by written document.[14]

47. The defendant proposes that the Court should answer the question as follows:

Council Directive 91/533/EEC of 14 October 1991 should be interpreted as meaning that, in circumstances including bankruptcy proceedings or comparable division of a limited liability company, compensation to an employee should not be assessed on the basis of a written contract of

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11 Reference is made to *Lange*, cited above, paragraph 27.
12 Reference is made to *Lange*, cited above, paragraphs 28 and 29.
13 Reference is made to Case C-313/02 *Wippel* [2004] ECR I-9483.
14 Reference is made to *Wippel*, cited above.

hvort fyrir liggi skrifleg tilkynning frá vinnuveitanda. Markmiði ákvæðisins væri stefnt í hættu yrði það túlkað með öðrum hætti.[11]

44. Varnaraðili bendir á að 1. mgr. 8. gr. tilskipunarinnar lætur aðildarríkjum eftir að innleiða ákvæði sem gera launþegum, sem telja á sér brotið vegna þess að ekki sé farið að kröfum tilskipunarinnar, kleift að sækja rétt sinn fyrir dómstólum. Aðildarríkjunum er því heimilt að ákveða viðeigandi viðurlög í slíkum kringumstæðum. [12]

45. Samkvæmt varnaraðila má fullnægja upplýsingaskyldu til launþega með öðrum aðferðum en þeim sem taldar eru upp í 6. gr. tilskipunarinnar. Leggja verði mat á hvert tilvik fyrir sig. Varnaraðili telur að orðalag formálsorða tilskipunarinnar bendi til þess að ekki hafi verið ætlun löggjafans að regla tilskipunarinnar yrði ófrávíkjanleg. Í 8.–lið formálsorðanna segir að gera eigi aðildarríkjum kleift að útiloka ákveðin afmörkuð tilvik er varða ráðningarfyrirkomulag, frá gildissviði tilskipunarinnar ,,þar sem það getur verið hagkvæmt að viðhalda ákveðnum sveigjanleika“. Orðalag b–liðs 2. mgr. 1. gr. tilskipunarinnar um tilfallandi starfa gefur einnig slíkan sveigjanleika til kynna.[13]

46. Varnaraðili leggur áherslu á að markmið tilskipunarinnar sé að auðvelda launþegum að sanna réttindi sín og skyldur, og skapa gagnsæi á vinnumarkaðnum. Að hans mati ætti ekki að túlka tilskipunina með þeim hætti að hún girði fyrir að sýna megi fram á efni samnings, eða breytingar á honum, með öðrum aðferðum en notkun skriflegs skjals.[14]

47. Varnaraðili leggur til að dómstóllinn svari spurningunni með eftirfarandi hætti:

Skýra ber ákvæði tilskipunar 91/533/EBE frá 14. október 1991 á þann veg, þar með talið við gjaldþrotaskipti eða sambærileg skipti á hlutafélagi, að bætur til launþega skuli ekki metnar á grundvelli skriflegs ráðningarsamnings, ef lagðar hafa verið fram sannanir sem

[11] Vísað er til áður tilvitnaðs máls *Lange*, 27. mgr.
[12] Visað er til áður tilvitnaðs máls *Lange*, 28. og 29. mgr.
[13] Vísað er til máls C-313/02 *Wippel* [2004] ECR I-9483.
[14] Visað er til áður tilvitnaðs máls *Wippel*.

employment, if there is evidence which supports the existence of a verbal agreement or other types of agreements through application of national rules of proof and practise, and the agreement concerns the main features of the original written contract between the parties.

The EFTA Surveillance Authority

48. As a preliminary remark, ESA notes that the Directive is applicable to the present case as the plaintiff can be considered a worker for the purposes of EEA labour law. The activity of the plaintiff falls within the scope of the concept of a worker as defined in the case law of the European Court of Justice ("ECJ") since he provided services to and under the direction of the defendant regularly and in return for remuneration.[15] The fact that the plaintiff was appointed as a manager and his claim is not considered a priority claim in the bankruptcy proceedings is not relevant for EEA labour law purposes and has no bearing on the fact that he was a worker falling within the scope of the Directive.

49. ESA notes that, as stated in recital 2 of its preamble, the Directive was introduced in order to provide employees with improved protection against possible infringements of their rights and create greater transparency in the labour market. The Directive thus lays down various requirements aimed at ensuring such protection, in particular by imposing the obligation on the employer to provide the employee with the required minimum amount of information concerning the employment relationship.

50. To this end, ESA submits, both Articles 2 and 5 of the Directive require the employer to notify the employee in writing of the essential aspects of the contract, or of amendments to such aspects, within a specific time frame. In particular, Article 5 provides that any changes to an essential aspect of the contract or the employment relationship must be the subject of a written document given by the employer to the employee at the earliest opportunity and not later than one month after the date of entry into effect of the changes in question.

[15] Reference is made to Case C-232/09 *Danosa* [2010] ECR I-11405, paragraph 39.

styðja að í gildi hafi verið munnlegt samkomulag eða annars konar samkomulag, í samræmi við reglur landsréttar um sönnunarfærslu eða venju þar um, og samkomulagið varðar meginatriði *skriflega ráðningarsamningsins milli aðilanna.*

Eftirlitsstofnun EFTA

48. ESA vill í upphafi taka fram að mál þetta fellur undir gildissvið tilskipunarinnar þar sem telja megi sóknaraðila launþega samkvæmt vinnurétti EES-réttar. Starf sóknaraðila fellur undir hugtakið launþegi, eins og það hefur verið túlkað í úrlausnum Evrópudómstólsins, þar sem hann veitti þjónustu reglulega, í þágu varnaraðila og samkvæmt leiðbeiningum hans, gegn greiðslu launa.[15] Sú staðreynd, að sóknaraðili hafi gegnt stöðu framkvæmdastjóra og að krafa hans teljist ekki forgangskrafa í gjaldþrotaskiptunum, hefur enga þýðingu frá sjónarhóli vinnuréttar EES–réttar og breytir ekki þeirri staðreynd að hann var launþegi í skilningi tilskipunarinnar.

49. ESA bendir á, að eins og fram kemur í 2.–lið formálsorða tilskipunarinnar, var markmiðið með henni, að veita launþegum aukna vernd gegn brotum á réttindum þeirra og auka gagnsæi vinnumarkaðarins. Í tilskipuninni er því kveðið á um margs konar skyldur sem miða að því að tryggja þá vernd, sérstaklega með því að leggja þá skyldu á herðar vinnuveitanda að hann veiti launþega lágmarksupplýsingar varðandi ráðningarfyrirkomulagið.

50. ESA telur, að með það að leiðarljósi, sé sú krafa gerð í 2. og 5. gr. tilskipunarinnar að vinnuveitandi skýri launþega skriflega frá helstu atriðum ráðningarsamnings, eða breytingum sem gerðar eru á þeim, innan tilgreinds tímaramma. Sérstaklega, að vinnuveitanda beri að skýra launþega frá sérhverri breytingu á meginatriðum samningsins eða ráðningarfyrirkomulagsins við fyrsta hentugleika og eigi síðar en einum mánuði eftir að breytingin kemur til framkvæmda, eins og segir í 5. gr.

[15] Vísað er til máls C-232/09 *Danosa* [2010] ECR I-11405, 39. mgr.

51. ESA submits, however, that the Directive does not affect or modify the substantive rights and obligations entered into by the parties to a contract of employment. According to ESA, the Directive does not provide for any penalty or sanction in the case of a failure to notify in writing any amendment to the contract of employment as required in Article 5 of the Directive. Instead, Article 8 of the Directive leaves to the Member States the task of defining the penalties appropriate in the case of a failure to comply with the obligations arising from the Directive. Therefore, ESA continues, it is for the national legislature to introduce the necessary measures to enable employees who consider themselves wronged by a failure to comply with the obligations arising from the Directive to pursue their claims by judicial process after possible recourse to other competent authorities.

52. ESA refers to Article 6 of the Directive, which specifically provides that the Directive shall be without prejudice to national law and practice concerning the form of the contract and proof as regards the existence and content of the contract. According to ESA, this entails that the provisions of Article 5 are to be applied in a way which allows for the introduction of amendments to the employment contract and the production of proof of such amendments in a form accepted by national law, even in the absence of any written documentation.[16]

53. Thus, ESA continues, the Directive does not aim at laying down any rules on the form of the contract and on evidence, with the breach of such to be sanctioned in a certain way. Instead, the aim is to ensure that national courts apply and interpret their national rules on evidence in the light of the purpose of the Directive, which is to provide employees with improved protection against possible infringements of their rights. Accordingly, even if the defendant failed to provide the plaintiff with the information required by a provision of the Directive, the Directive does not release either of the parties from their obligations arising under the contract.[17]

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16 Reference is made to *Lange*, cited above, paragraph 29.

17 Reference is made to *Kampelmann and Others*, cited above, paragraph 35.

51. Þrátt fyrir það, telur ESA að tilskipunin hafi hvorki áhrif á, né breyti grundvallarréttindum og skyldum sem aðilar hafa tekist á hendur samkvæmt ráðningarsamningi. Samkvæmt ESA, er ekki gert ráð fyrir úrbótum eða viðurlögum í tilvikum þar sem skriflegri tilkynningarskyldu um breytingar á ráðningarsamningnum er ekki sinnt í samræmi við 5. gr. tilskipunarinnar. Samkvæmt 8. gr. tilskipunarinnar er aðildarríkjunum þess í stað látið eftir að kveða á um beitingu réttarbóta vegna brots á skyldum sem kveðið er á um í tilskipuninni. ESA telur það því vera hlutverk löggjafans í aðildarríkinu að gera viðeigandi ráðstafanir sem gera launþegum, sem telja á sér brotið vegna þess að ekki sé farið að kröfum tilskipunarinnar, kleift að sækja rétt sinn fyrir dómstólum, hugsanlega eftir að hafa lagt málið fyrir önnur lögbær yfirvöld.

52. ESA vísar til 6. gr. tilskipunarinnar, sem kveður sérstaklega á um að tilskipunin gildi með fyrirvara um landslög og réttarvenju varðandi form ráðningarsamnings og sönnun á því að ráðningarsamningur sé fyrir hendi og hvert efni hans sé. Að mati ESA, felur þetta í sér að ákvæðum 5. gr. skuli beitt þannig að þau heimili breytingar á ráðningarsamningnum og sönnunarfærslu um framkvæmd slíkra breytinga með einhverjum öðrum hætti, sem viðurkenndur er samkvæmt landslögum, þótt engum skriflegum skjölum sé til að dreifa um þær.[16]

53. ESA telur því tilskipunina ekki miða að því að setja reglur um form samningsins eða sönnun, þar sem sérstök viðurlög ættu við um vanrækslu á reglunum. Þess í stað sé stefnt að því að tryggja að dómstólar aðildarríkjanna beiti og túlki reglur landsréttar um sönnun í samræmi við markmið tilskipunarinnar sem er að veita launþegum aukna vernd gegn hugsanlegum brotum gegn réttindum þeirra. Tilskipunin leysir því hvorugan aðilann undan skyldum samkvæmt samningnum, jafnvel þótt varnaraðili hafi vanrækt þá skyldu að veita sóknaraðila þær upplýsingar sem honum bar samkvæmt ákvæði hennar.[17]

[16] Vísað er til áður tilvitnaðs máls *Lange*, 29. mgr.
[17] Vísað er til áður tilvitnaðs máls *Kampelmann and Others*, 35. mgr.

54. ESA submits that the Directive neither affects the burden of proof nor shifts it from one party to another.[18] According to ESA, it follows from Article 6 of the Directive that the burden and the standard of proof in any dispute with the employer remains governed by national law. Consequently, ESA does not accept the argument advanced by the plaintiff in the main proceedings, namely, that, according to the Directive, the burden of proof lies with the employer.

55. ESA adds that it has opened infringement proceedings against Iceland (Case No 69202) because Iceland has failed to take any measures to implement Article 8 of the Directive. In its view, however, those infringement proceedings have no bearing on the present case which concerns a dispute between the parties on their rights and obligations under the contract of employment and not the availability of means of defence and redress under national law.

56. Therefore, in relation to the question referred by Reykjavík District Court, ESA submits that the validity of the amendments to the contract of employment is, first and foremost, a question of national law and practice. Thus, it is for the national court to ascertain the facts which have given rise to the dispute before it and establish whether the contract of employment has been amended, whether or not the requirements of Article 5 of the Directive have been complied with.

57. ESA proposes that the Court should answer the question as follows:

Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship should not be interpreted as meaning, in circumstances including bankruptcy proceedings or a comparable division of a limited liability company, that compensation to an employee is to be assessed on the basis of a written contract of employment if no written document has been handed over to the employee concerning amendments, temporary or permanent, that may

[18] Reference is made to *Kampelmann and Others*, cited above, paragraph 33.

54. ESA telur tilskipunina hvorki hafa áhrif á sönnunarbyrðina né færa hana frá öðrum aðilanum til hins.[18] Að mati ESA leiðir það af 6. gr. tilskipunarinnar, að sönnunarbyrðin og sönnunarmat í deilum við vinnuveitendur fari eftir landslögum. ESA hafnar því málatilbúnaði sóknaraðila fyrir héraðsdómi, um að sönnunarbyrðin hvíli á vinnuveitandanum samkvæmt tilskipuninni.

55. ESA bætir við að stofnunin hafi hafið formlega málsmeðferð gegn íslenska ríkinu vegna brots á samningsskyldum (mál nr. 69202), þar sem Ísland hafi ekki sinnt skyldu sinni til að koma efni 8. gr. tilskipunarinnar í framkvæmd. Að mati stofnunarinnar hefur sú málsmeðferð þó engin áhrif á þetta mál, sem varðar deilu milli aðilanna um réttindi þeirra og skyldur samkvæmt ráðningarsamningi, en ekki það hvort úrræði til að sækja rétt og leita úrbóta samkvæmt landsrétti standi þeim til boða.

56. Varðandi spurninguna sem Héraðsdómur Reykjavíkur hefur beint til dómstólsins, telur ESA, að gildi breytinga á ráðningarsamningnum sé fyrst og fremst háð lögum og venjum aðildarríkis. Það er því landsdómstólsins að leggja mat á þær staðreyndir sem liggja að baki málaferlunum fyrir honum og leggja mat á það hvort ráðningarsamningnum hafi verið breytt og hvort skilyrði 5. gr. tilskipunarinnar séu uppfyllt.

57. ESA leggur til að dómstóllinn svari spurningunni með eftirfarandi hætti:

Ekki ber að skýra ákvæði tilskipunar 91/533/EBE frá 14. október 1991, um skyldu vinnuveitanda að skýra launþegum frá samningsskilmálum eða ráðningarfyrirkomulagi, á þann veg, þar með talið við gjaldþrotaskipti eða sambærileg skipti á hlutafélagi, að bætur til launþega skuli metnar á grundvelli skriflegs ráðningarsamnings, hafi launþeganum ekki verið afhent skriflegt skjal um breytingar sem kunna að hafa verið gerðar,

[18] Vísað er til áður tilvitnaðs máls *Kampelmann and Others*, 33. mgr.

have been made to the main features of the contract of employment or employment relationship between the parties within the time limits laid down in Article 5 of the Directive.

The European Commission

58. The Commission observes that the aim of the Directive is to make employers responsible for providing precise information in written form on the nature and content of working relations between the employer and the employee in order to remove, as far as possible, uncertainty and insecurity about terms of the employment relationship. According to the Commission, the Directive does not concern itself with the national rules of law concerning the conclusion of employment contracts. Furthermore, the aim of the written declaration required by the Directive is not to harmonise the content of employment contracts with regards to matters such as remuneration.[19]

59. Consequently, according to the Commission, the provisions of the Directive have no bearing on the material content of the contract of employment. Article 6 of the Directive clearly states that it is without prejudice to national law and practice concerning the form of the contract or employment relationship, proof as regards the existence and content of a contract or employment relationship as well as the relevant procedural rules. The Commission asserts that this provision implies that proof regarding the existence of a contract or employment relationship may be produced in any form allowed under national law, and thus even in absence of any written notification from the employer.[20] Thus, the Commission continues, Article 5 of the Directive merely provides that any change in the terms of employment must be set out in a written document to be given to the employee no later than one month after the entry into force of the modification. Failure to provide such a document does not in any way affect the employment contract or relationship.

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19 Reference is made to the Commission's Proposal for a Council Directive on a form of proof of an employment relationship COM(90) 563 final, 8 January 1991, p. 4.

20 Reference is made to *Lange*, cited above, paragraph 27.

tímabundið eða varanlega, á meginatriðum ráðningarsamnings eða ráðningarfyrirkomulags aðila innan tímamarka samkvæmt 5. gr. tilskipunarinnar.

Framkvæmdastjórn Evrópusambandsins

58. Framkvæmdastjórnin bendir á að markmið tilskipunarinnar sé að gera vinnuveitendur ábyrga fyrir því að nákvæmar upplýsingar um eðli og tilhögun sambands milli vinnuveitanda og launþega séu veittar skriflega, til að koma í veg fyrir óvissu og óöryggi varðandi skilmála ráðningarfyrirkomulags, eins og frekast er unnt. Framkvæmdastjórnin telur tilskipunina ekki taka til reglna landsréttar um lok ráðningarsamninga. Jafnframt, að markmið hinnar skriflegu yfirlýsingar sem tilskipunin mælir fyrir um, sé ekki að samhæfa efni ráðningarsamninga varðandi þætti eins og launagreiðslur.[19]

59. Þar af leiðandi telur framkvæmdastjórnin að ákvæði tilskipunarinnar hafi engin áhrif á efnisákvæði ráðningarsamningsins. Ákvæði 6. gr. kveði með skýrum hætti á um að tilskipunin gildi með fyrirvara um landslög og réttarvenju varðandi form ráðningarsamnings eða ráðningarfyrirkomulags og reglur þar að lútandi. Hún slær því föstu, að færa megi sönnun fyrir því að ráðningarsamningur eða ráðningarfyrirkomulag sé fyrir hendi með sérhverjum hætti sem landsréttur heimilar, óháð því hvort fyrir liggi skrifleg sönnun frá vinnuveitanda. [20] Ákvæði 5. gr. tilskipunarinnar kveði einungis á um að vinnuveitanda beri að skýra launþega frá sérhverri breytingu sem gerð er á tilteknum atriðum ráðningarsamnings, í skriflegu skjali og eigi síðar en einum mánuði eftir að breytingin kemur til framkvæmda. Vanræksla á því að afhenda slíkt skriflegt skjal hefur engin áhrif á gildi ráðningarsamningsins eða ráðningarfyrirkomulagsins.

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19 Vísað er til frumvarps framkvæmdastjórnarinnar til tilskipunar ráðsins um form sönnunarfærslu um tilvist ráðningarfyrirkomulags COM(90) 563 final, 8. janúar 1991, bls. 4.

20 Vísað er til áður tilvitnaðs máls *Lange*, 27. mgr.

60. None the less, the Commission observes that, if the employer fails to provide written information on the terms of an employment contract or relationship, Article 8(1) of the Directive provides that the employee shall have the right to pursue a possible claim against an employer by judicial process after possible recourse to other competent authorities.[21]

61. The Commission proposes that the Court should answer the question as follows:

Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship must be interpreted as not requiring that, in the context of an bankruptcy proceeding or a comparable division of a limited company, the compensation to an employee be assessed on the basis of a written contract of employment if no written document has been provided to the employee concerning amendments, temporary or permanent, that may have been made to the main features of the contract of employment or employment relationship between the parties within the time limits laid down in Article 5.

Per Christiansen

Judge–Rapporteur

[21] Reference is made to *Lange*, cited above, paragraph 28.

60. Engu að síður, tekur framkvæmdastjórnin fram, að ef vinnuveitandi lætur undir höfuð leggjast að veita skriflegar upplýsingar um ákvæði ráðningarsamnings eða ráðningarfyrirkomulags, kveði 1. mgr. 8. gr. á um að launþega skuli gert kleift að sækja rétt sinn fyrir dómstólum, hugsanlega eftir að hafa lagt málið fyrir önnur lögbær yfirvöld. [21]

61. Framkvæmdastjórnin leggur til að dómstóllinn svari spurningunni með eftirfarandi hætti:

Skýra verður ákvæði tilskipunar 91/533/EBE frá 14. október 1991, um skyldu vinnuveitanda að skýra launþegum frá samningsskilmálum eða ráðningarfyrirkomulagi, á þann veg, þar með talið við gjaldþrotaskipti eða sambærileg skipti á hlutafélagi, að tilskipunin geri ekki þá kröfu að bætur til launþega skuli metnar á grundvelli skriflegs ráðningarsamnings, hafi launþeganum ekki verið afhent skriflegt skjal um breytingar sem kunna að hafa verið gerðar, tímabundið eða varanlega, á meginatriðum ráðningarsamnings eða ráðningarfyrirkomulags aðila innan tímamarka samkvæmt 5. gr. tilskipunarinnar.

Per Christiansen

Framsögumaður

[21] Vísað er til áður tilvitnaðs máls *Lange*, 28. mgr.


EFTA COURT

Case E-12/12

EFTA Surveillance Authority
v
Iceland

CASE E-12/12

EFTA Surveillance Authority

v

Iceland

(Failure by a Contracting Party to fulfil its obligations – Directive 2008/48/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 failed to fulfil its obligation under the Article 27 of the Act referred to at point 7h of Annex XIX to the Agreement on the European Economic Area, that is 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, 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 implement the Act within the time prescribed.

JUDGMENT OF THE COURT

15 May 2013

(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)

In Case E-12/12,

EFTA Surveillance Authority, represented by Markus Schneider, Deputy Director, and Clémence Perrin, Officer, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

Iceland, represented by Jóhanna Bryndís Bjarnadóttir, Counsellor, Ministry for Foreign Affairs, acting as Agent,

defendant,

APPLICATION for a declaration that, by failing, within the time limit prescribed, to adopt, or to notify the EFTA Surveillance Authority of the measures necessary to implement into its national legislation the Act referred to at point 7h of Annex XIX to the Agreement on the European Economic Area, i.e. 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, as adapted to the Agreement by way of Protocol 1 thereto, Iceland has failed to fulfil its obligations under Article 27 of the Directive and under Article 7 of the EEA Agreement.

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 and the written observations of:

– the European Commission ("the Commission"), represented by Michel van Beek and Marta Owsiany-Hornung, Members of its Legal Service, acting as Agents,

having decided to dispense with the oral procedure,

gives the following

JUDGMENT

I INTRODUCTION

1 By application lodged at the Court Registry on 30 November 2012, 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 the EFTA Surveillance Authority of the measures necessary to implement into its national legislation the Act referred to at point 7h of Annex XIX to the Agreement on the European Economic Area ("EEA"), Iceland has failed to fulfil its obligations under Article 27 of the Act and under Article 7 EEA. The Act referred to is 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 (OJ 2008 L 133, p. 66) ("the Directive"), as adapted to the Agreement by way of Protocol 1 thereto.

II FACTS AND PRE-LITIGATION PROCEDURE

2 Decision No 16/2009 of 5 February 2009 of the EEA Joint Committee ("Decision 16/2009") amended Annex XIX to the EEA Agreement by adding Directive 2008/48 to point 7h of that Annex. Iceland indicated constitutional requirements for the purposes of Article 103 EEA. The six-month period provided by Article 103 EEA expired on 5 August 2009. Iceland did not

notify a delay in implementation before the expiry of the six-month period. The Directive thus became provisionally applicable on 5 August 2009 vis-à-vis Iceland. Norway and Liechtenstein implemented the Directive prior to the expiry of the six-month period prescribed in Article 103 EEA.

3 On 1 September 2011, Iceland notified that the constitutional requirements had been fulfilled, and, consequently, Decision 16/2009 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 the Icelandic Government of its obligation to take the national measures necessary to implement the Directive into the Icelandic legal order.

5 On 1 February 2012, ESA issued a letter of formal notice to Iceland. 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 obligation under the Directive and under Article 7 EEA.

6 On 13 April 2012, the Icelandic Government stated in its observations on the letter of formal notice that it had not yet adopted the necessary measures to implement the Directive. The Government indicated, however, that the Directive would be fully implemented before June 2012.

7 By further letter of 21 June 2012, the Icelandic Government informed ESA that the proposal presented to the parliament in the 2012 spring session had been rejected, but that it would be presented again during the 2012 autumn session. It was also stated that the implementing legislation was expected to be in place before the end of 2012.

8 By letter of 4 July 2012, ESA delivered a reasoned opinion to Iceland, maintaining the conclusion in its letter of formal notice. Pursuant to Article 31(2) SCA, ESA requested Iceland to take the measures necessary to comply with the reasoned opinion within

two months following notification thereof, i.e. no later than 4 September 2012.

9 On 28 November 2012, ESA decided to bring the matter before the Court.

III PROCEDURE BEFORE THE COURT

10 ESA lodged the present application at the Court Registry on 30 November 2012. The application is based on one plea in law, namely that, by failing to adopt the national measures necessary to fully implement Directive 2008/48 within the time limit prescribed, or to notify ESA thereof, Iceland has failed to fulfil its obligations under Article 27 of the Directive and under Article 7 EEA.

11 The statement of defence from Iceland was received on 4 February 2013. Iceland does not contest the declaration sought by ESA.

12 However, Iceland requests that the Court orders each party to bear its own costs of the proceedings. In this regard, Iceland indicates that the delay in implementation of the Directive results from the legislative procedure. A draft bill needed for the implementation was discussed in the parliament during the 2012 spring session, but was not passed as law. However, as the same draft bill with minor amendments is currently being debated in parliament, Iceland is confident that the bill will be passed before the spring recess (15 March 2013).

13 Pursuant to Article 20 of the Statute of the Court, written observations were received from the European Commission, which fully supports ESA's application.

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 FINDINGS OF THE COURT

15 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-5/11 *ESA* v *Norway* [2011] EFTA Ct. Rep. 418, paragraph 26 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 27 of the Directive.

16 Decision 16/2009 of the EEA Joint Committee of 5 February 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.

17 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-16/11 *ESA* v *Iceland*, judgment of 28 January 2013, not yet reported, paragraph 118 and the 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.

18 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 7h of Annex XIX to the Agreement on the European Economic Area, i.e. 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, as adapted to the Agreement by way of Protocol 1 thereto, or to notify ESA thereof, Iceland has failed to fulfil its obligations under Article 27 of the Directive and under Article 7 EEA.

V COSTS

19 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 implement into its national legislation the Act referred to at point 7h of Annex XIX to the Agreement on the European Economic Area, i.e. 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, as adapted to the Agreement by way of Protocol 1 thereto, or to notify ESA thereof, Iceland has failed to fulfil its obligations under Article 27 of the Directive and under 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 May 2013.

Gunnar Selvik — Dómritari

Carl Baudenbacher — Forseti

Case E-13/12

EFTA Surveillance Authority
v
Iceland

CASE E-13/12

EFTA Surveillance Authority

v

Iceland

(Failure by a Contracting Party to fulfil its obligations – Directive 90/167/EEC)

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 Article 15 of the Act referred to at point 10 of part 7.1 of Chapter I of Annex I to the Agreement on the European Economic Area, that is 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, 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 implement the Act into its national legislation within the time prescribed.

JUDGMENT OF THE COURT

15 May 2013

(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)

In Case E-13/12,

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 Jóhanna Bryndís Bjarnadóttir, Counsellor, Ministry for Foreign Affairs, acting as Agent,

defendant,

APPLICATION for a declaration that, by failing, within the time limits prescribed, to adopt, or to notify the EFTA Surveillance Authority of the measures necessary to implement into its national legislation the Act referred to at point 10 of part 7.1 of Chapter I of Annex I to the Agreement on the European Economic Area (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), as adapted to the Agreement by way of Protocol 1 thereto, Iceland has failed to fulfil its obligations under Article 15 of the Directive 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 30 November 2012, 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 limits prescribed, to adopt, or to notify the EFTA Surveillance Authority of the measures necessary to implement into its national legislation the Act referred to at point 10 of part 7.1 of Chapter I of Annex I to the Agreement on the European Economic Area ("EEA"), Iceland has failed to fulfil its obligations under Article 15 of the Act and under Article 7 EEA. The Act referred to is 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 (OJ 1990 L 92, p. 42) ("the Directive"), as adapted to the Agreement by way of Protocol 1 thereto.

II FACTS AND PRE-LITIGATION PROCEDURE

2 By Decision No 69/98 of 17 July 1998, which entered into force on 1 January 1999, the EEA Joint Committee incorporated the Directive into Annex I to the EEA Agreement. According to point 2 of the Introductory Part of Chapter I of Annex I, the transitional

period for Iceland to make the Directive part of its internal legal order expires 18 months after the entry into force of Decision No 133/2007 of the EEA Joint Committee.

3 Decision No 133/2007 was adopted on 26 October 2007. Iceland indicated constitutional requirements for the purposes of Article 103 EEA. The six-month period provided by Article 103 EEA expired on 26 April 2008. Iceland notified a delay on 5 May 2008. However, as the delay was notified after the expiry of the six-month period provided by Article 103 EEA, the Decision became provisionally applicable upon that date. On 17 March 2010, Iceland notified that the constitutional requirements had been fulfilled. Consequently, the Decision entered into force on 1 May 2010.

4 In a letter of 15 November 2011, ESA reminded the Icelandic Government that the transitional period expired on 1 November 2011, and of Iceland's obligation to take the national measures necessary to implement the Directive into the Icelandic legal order.

5 On 15 February 2012, ESA issued a letter of formal notice to Iceland. ESA concluded that, in the absence of any information indicating that national measures had been taken to ensure implementation of the Directive by 1 November 2011, Iceland had failed to fulfil its obligation under the Directive and under Article 7 EEA.

6 Iceland did not reply to the letter of formal notice.

7 By letter of 27 June 2012, ESA delivered a reasoned opinion to Iceland, where it maintained the conclusion in its letter of formal notice. Pursuant to Article 31(2) SCA, ESA requested Iceland to take the measures necessary to comply with the reasoned opinion within two months following notification thereof, i.e. no later than 27 August 2012.

8 On 28 November 2012, ESA decided to bring the matter before the Court.

III PROCEDURE BEFORE THE COURT

9 ESA lodged the present application at the Court Registry on 30 November 2012. The application is based on one plea in law, namely that, by failing to adopt the national measures necessary to fully implement the Directive within the time limit prescribed, or to notify ESA thereof, Iceland has failed to fulfil its obligations under Article 15 of the Directive and under Article 7 EEA.

10 The statement of defence from Iceland was received on 4 February 2013. Iceland does not contest the declaration sought by ESA.

11 However, Iceland requests that the Court orders each party to bear its own costs of the proceedings. In this regard, Iceland indicates that the delay in implementation of the Directive results from the legislative procedure. A draft bill needed for the implementation is currently being debated in parliament, and Iceland is confident that the bill will be passed before the spring recess (15 March 2013).

12 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

13 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-5/11 *ESA* v *Norway* [2011] EFTA Ct. Rep. 418, paragraph 26 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.

14 Decision No 133/2007 of the EEA Joint Committee of 26 October 2007 entered into force on 1 May 2010. The transitional period for Iceland to make the Directive part of its internal legal order expired 18 months after that date, i.e. 1 November 2011.

15 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-16/11 *ESA* v *Iceland*, judgment of 28 January 2013, not yet reported, paragraph 118 and the case law cited). It is undisputed that Iceland did not adopt the measures necessary to make the Directive part of its internal legal order before the expiry of the time limit given in the reasoned opinion.

16 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 10 of part 7.1 of Chapter I of Annex I to the Agreement on the European Economic Area, i.e. 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, as adapted to the Agreement by way of Protocol 1 thereto, or to notify ESA thereof, Iceland has failed to fulfil its obligations under Article 15 of the Directive and under Article 7 EEA.

V COSTS

17 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 implement into its national legislation the Act referred to at point 10 of part 7.1 of Chapter I of Annex I to the Agreement on the European Economic Area, i.e. 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, as adapted to the Agreement by way of Protocol 1 thereto, or to notify ESA thereof, Iceland has failed to fulfil its obligations under Article 15 of the Directive and under 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 May 2013.

Gunnar Selvik — Registrar

Carl Baudenbacher — President

Case E-14/12

EFTA Surveillance Authority

v

Principality of Liechtenstein

CASE E-14/12

EFTA Surveillance Authority

v

Principality of Liechtenstein

(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)

Summary of the Judgment

1. Article 31(1) EEA provides, in its first subparagraph, for the abolition of all restrictions on the freedom of establishment between the EEA States. The freedom of establishment includes the right of nationals of the EEA States to take up and pursue activities as self-employed persons and to set up and manage undertakings in another EEA State under the same conditions as are laid down by the law of the EEA State of establishment with respect to its own nationals. The rules on equal treatment in the EEA Agreement, including Article 31(1) EEA, prohibit not only overt discrimination based on nationality, but also covert forms of discrimination which, by applying other distinguishing criteria, achieve in practice the same result. National rules entailing indirectly discriminatory restrictions on the freedom of establishment may be justified by considerations of overriding public interest, provided that they are appropriate to secure the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it.

2. 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 that it is established in an EEA State other than that in which the service is to be provided. National rules entailing directly discriminatory

restrictions, such as that at issue in the case at hand, may be justified only on grounds of an express derogating provision, such as Article 33 EEA, that is, on grounds of public policy, public security or public health.

3. Liechtenstein has failed to fulfil its obligations under Article 31 and Article 36 of the EEA Agreement by maintaining into force legislation which imposes on persons resident in Liechtenstein who are responsible for a temporary work agency the obligations to supply a guarantee of 50 000 Swiss franc, whereas the guarantee of 100 000 Swiss francs is imposed upon persons performing a similar function who are resident outside of Liechtenstein, and on agencies seeking to deliver temporary employment services cross-border.

JUDGMENT OF THE COURT

3 June 2013

(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)

In Case E-14/12,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, and Clémence Perrin, Officer, and Catherine Howdle, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents,

defendant,

APPLICATION for a declaration that by maintaining in force legislation which imposes on persons resident in Liechtenstein who are responsible for a temporary work agency the obligation to supply a guarantee of 50 000 Swiss francs, whereas the guarantee of 100 000 Swiss francs is imposed upon persons performing a similar function who are resident outside of Liechtenstein, and on agencies seeking to deliver temporary employment services cross-border, the Principality of Liechtenstein has failed to fulfil its obligations under Article 31 and Article 36 of the EEA Agreement.

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 4 December 2012, 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 comply with a reasoned opinion delivered by ESA on 25 January 2012, the Principality of Liechtenstein ("Liechtenstein") has failed to fulfil its obligations under Articles 31 and 36 EEA in the field of temporary work and employment services.

II RELEVANT LAW

EEA law

2 Article 31(1) EEA reads:

Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage

undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

3 Article 33 EEA reads:

The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

4 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.

5 Article 39 EEA establishes that the possibilities for derogation set out in Article 33 EEA also extend to the freedom to provide services under Article 36 EEA.

National law

6 Article 25 of the Regulation of 11 July 2000 concerning job placement and temporary employment services (*Verordnung vom 11. Juli 2000 zum Gesetz über die Arbeitsvermittlung und den Personalverleih*, LR 823.101, as amended) ("AVV") reads:

(1) The provider of temporary employment services is obliged to provide a deposit, if the activity is subject to approval.

(2) The approval to offer temporary employment services can only be granted when the required deposit has been provided.

7 Article 26 of the AVV reads:

(1) If the person responsible for the management of the temporary work agency is resident in [Liechtenstein], the deposit for the

economic activity in [Liechtenstein] and abroad is 50 000 Swiss Francs each.

...

(3) If the person responsible for the management of the temporary work agency is resident abroad, the deposit for the economic activity in [Liechtenstein] and abroad is 100 000 Swiss Francs each.

...

(6) For the cross-border provision of temporary employment services, the deposit is 100 000 Swiss Francs. ...

8 The legal basis for the AVV is the Act of 12 April 2000 on placement services and temporary work agencies (*Gesetz vom 12. April 2000 über die Arbeitsvermittlung und den Personalverleih*, LR 823.10, as amended) ("AVG").

III FACTS AND PRE-LITIGATION PROCEDURE

9 The contested Liechtenstein measures are Articles 25 and 26 of the AVV. These measures impose on persons resident in Liechtenstein responsible for a temporary work agency established in Liechtenstein the obligation to supply a guarantee of CHF 50 000. An obligation to supply a guarantee of CHF 100 000 is imposed upon persons performing a similar function who are resident outside of Liechtenstein. A guarantee of CHF 100 000 is also required from temporary work agencies established outside of Liechtenstein which seek to provide such services cross-border.

10 By letter of 11 February 2010, ESA received a complaint in relation to Liechtenstein concerning the provisions of Articles 25 and 26 of the AVV. According to the complaint, these provisions discriminate against service providers established outside of Liechtenstein.

11 On 19 March 2010, ESA sent a request for information to Liechtenstein. ESA asked Liechtenstein to explain, *inter alia*, (i) the purpose of the guarantee provision; (ii) why, in comparison to agencies established in Liechtenstein, the guarantee required of temporary work agencies established outside of Liechtenstein is twice as high; (iii) whether Liechtenstein considered the guarantee requirement to be justified by a legitimate objective and, if so, (iv) whether the measure could be considered proportionate to that objective.

12 By letter of 6 April 2010, Liechtenstein replied to ESA's request. The protection of workers was given as the main purpose of the provisions, in particular the fact that the deposit was intended to secure the wage entitlement of workers if an agency became insolvent. Furthermore, Liechtenstein considered the deposit amount to be proportionate, and sought to justify the differing amounts required by reference to the difficulties in cross-border enforcement of claims.

13 On 27 October 2010, ESA issued a letter of formal notice. ESA took the view that, in imposing different requirements on persons responsible for the management of a temporary work agency with respect to the deposit amount required depending on whether they were resident in Liechtenstein or another State, Article 26 of the AVV infringed the freedom of establishment. It places a temporary work agency in Liechtenstein whose responsible person is resident on the national territory in a better position than a temporary work agency whose responsible person is resident in another EEA State. ESA also took the view that Article 26 of the AVV discriminates between cross-border service providers on the basis of their place of residence and establishment and thus constitutes a discriminatory restriction on the freedom to provide services. ESA concluded that, as such restrictions cannot be justified, Liechtenstein has failed to fulfil its obligations arising from Articles 31 and 36 EEA.

14 On 8 February 2011, Liechtenstein replied to the letter of formal notice. It stated that Article 26 of the AVV was to be amended, regardless of its compatibility with Article 36 EEA.

15 In an e-mail of 19 October 2011, Liechtenstein informed ESA that the proposed new wording of Article 26 of the AVV, consistent with EEA rules, went beyond the scope of the primary legislation (the AVG) on which it was based. Consequently, Liechtenstein stated that it was not possible to bring Article 26 of the AVV in line with EEA law without amending the AVG.

16 Liechtenstein further explained that the necessary modification to the AVG could only be made by Parliament. It stated that an amendment to the AVG was planned to take account of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9), which at that time was due to be incorporated into the EEA Agreement. In the light of this anticipated amendment, the Liechtenstein Government wished to ask Parliament to amend the AVG only once and not twice in quick succession.

17 On 25 January 2012, ESA delivered a reasoned opinion to Liechtenstein, maintaining the conclusion reached in the letter of formal notice. Pursuant to Article 31(2) SCA, ESA requested Liechtenstein to take the measures necessary to comply with the reasoned opinion within two months following notification thereof, i.e. no later than 25 March 2012.

18 In its reply of 20 March 2012 in response to the reasoned opinion, Liechtenstein repeated that it was still waiting for the incorporation of Directive 2008/104/EC into the EEA Agreement before commencing any amendment of the AVG. It stated that it intended to make the amendments necessary for compliance with Articles 31 and 36 EEA at the same time as the amendments made necessary by Directive 2008/104/EC.

19 In a letter of 29 October 2012, Liechtenstein confirmed that amendments to both the AVV and the AVG will not enter into force before January 2014.

20 On 3 December 2012, ESA decided to bring the matter before the Court.

IV PROCEDURE BEFORE THE COURT

21 ESA lodged the present application at the Court Registry on 4 December 2012. The application is based on two pleas in law. First, ESA submits that the CHF 100 000 deposit obligation, pursuant to Article 26(3) of the AVV, on persons responsible for temporary work agencies established in Liechtenstein, but who are resident outside of Liechtenstein amounts to a restriction on the freedom of establishment under Article 31 EEA. Second, ESA submits that the CHF 100 000 deposit obligation, pursuant to Article 26(6) AVV, on temporary work agencies which are not established in Liechtenstein but seek to provide services cross-border amounts to a restriction on the freedom to provide services under Article 36 EEA.

22 The time limit for lodging a defence was set for 7 February 2013. In a letter of 11 February 2013, Liechtenstein made a request for an extension of the time limit. By a letter of 13 February 2013, ESA supported Liechtenstein's request. In a letter of 15 February 2013, Liechtenstein was informed that the President of the Court had granted an extension of the time limit until 28 February 2013.

23 The statement of defence from Liechtenstein was received on 28 February 2013. Liechtenstein does not dispute the declaration sought by ESA.

24 Liechtenstein requests the Court to order each party to bear its own costs of the proceedings.

25 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 to dispense with the oral procedure.

V FINDINGS OF THE COURT

Compatibility of Article 26(3) of the AVV with Article 31(1) EEA on the freedom of establishment

26 Article 31(1) EEA provides, in its first subparagraph, for the abolition of all restrictions on the freedom of establishment between the EEA States. According to the second subparagraph, the freedom of establishment includes the right of nationals of the EEA States to take up and pursue activities as self-employed persons and to set up and manage undertakings in another EEA State under the same conditions as are laid down by the law of the EEA State of establishment with respect to its own nationals.

27 The Court notes that it follows from Article 26(3) of the AVV, read in conjunction with Article 25 AVV, that in order to be allowed to operate in Liechtenstein, temporary work agencies established in Liechtenstein whose responsible person resides in another State must make a deposit of CHF 100 000. In contrast, pursuant to Article 26(1) of the AVV, if the responsible person resides in Liechtenstein, the agency is obliged to deposit only half that amount, i.e. CHF 50 000.

28 While there is no overt discrimination on the basis of nationality, the provisions distinguish between temporary work agencies established in Liechtenstein on the basis of the residency of the person responsible for the management of that agency. It is settled case law that the rules on equal treatment in the EEA Agreement, including Article 31(1) EEA, prohibit not only overt discrimination based on nationality, but also covert forms of discrimination which, by applying other distinguishing criteria, achieve in practice the same result (see, *inter alia*, Case E-8/04 *ESA* v *Liechtenstein* [2005] EFTA Ct. Rep. 51, paragraph 16, and the case law cited).

29 The greater deposit required of undertakings where the person responsible resides outside of Liechtenstein places those undertakings in a less favourable position than undertakings where the person responsible is a resident of Liechtenstein. It

must therefore be held that Article 26(3) of the AVV constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

30 National rules entailing indirectly discriminatory restrictions on the freedom of establishment, in this case through a distinguishing criterion based on residence, may be justified by considerations of overriding public interest, provided that they are appropriate to secure the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it (see, *inter alia*, Case E-9/11 *ESA* v *Norway*, judgment of 16 July 2012, not yet reported, paragraph 83, and *ESA* v *Liechtenstein*, cited above, paragraph 23).

31 Although Liechtenstein does not contest the order sought by ESA in the present case, the defence refers to the protection of workers as the main purpose of the restriction. The greater deposit required of temporary work agencies where the person responsible resides outside of Liechtenstein was deemed necessary due to the difficulties in cross-border enforcement of claims, for instance claims to wages in the event of insolvency.

32 The overriding reasons relating to the public interest already recognised in case law include the social protection of workers (see, *inter alia*, Case E-2/11 *STX Norway and Others*, judgment of 23 January 2012, not yet reported, paragraph 81, and the case law cited). However, in order to be justified, the measure in question must also be proportionate, in that it must be appropriate and necessary as described in paragraph 30 of this judgment. It falls on the EEA State responsible for the restriction to demonstrate that this is the case (see Case E-1/09 *ESA* v *Liechtenstein* [2009-2010] EFTA Ct. Rep. 46, paragraph 38, and *ESA* v *Norway*, cited above, paragraph 88).

33 Liechtenstein has not provided any arguments as to why the measure should be regarded as appropriate or necessary. It must therefore be held that Article 26(3) of the AVV is not justified and that, in maintaining in force that provision, Liechtenstein has failed to fulfil its obligations pursuant to Article 31(1) EEA.

Compatibility of Article 26(6) of the AVV with Article 36 EEA on the freedom to provide services

34 According to consistent case law, 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 that it is established in an EEA State other than that in which the service is to be provided (Case E-13/11 *Granville Establishment*, judgment of 25 April 2012, not yet reported, paragraph 40, and the case law cited).

35 Article 26(6) of the AVV provides that undertakings established outside Liechtenstein wishing to provide cross-border temporary employment services in Liechtenstein must supply a deposit of CHF 100 000. In contrast, Article 26(1) of the AVV requires temporary work agencies established in Liechtenstein, and with a responsible person resident in Liechtenstein, to supply a deposit of only half that amount, i.e. CHF 50 000.

36 The distinction set out in Article 26(1) and (6) of the AVV is made on the basis of the place of establishment of the undertaking, with Article 26(6) of the AVV imposing a greater economic burden on undertakings established outside of Liechtenstein than on undertakings established in Liechtenstein. Therefore, the provision is overtly discriminatory and constitutes a restriction on the freedom to provide services contrary to Article 36 EEA.

37 National rules entailing directly discriminatory restrictions, such as that at issue in the case at hand, may be justified only on grounds of an express derogating provision, such as Article 33 EEA, that is, on grounds of public policy, public security or public health (see *Granville Establishment*, cited above, paragraph 49, and the case law cited).

38 As noted above in paragraph 31, Liechtenstein refers to the protection of workers as the main purpose of the measures in Article 26 of the AVV. It does not rely directly on any of the grounds for justification in Article 33 EEA. It is not necessary for the Court to assess whether the protection of workers could serve

as basis for justification under the grounds mentioned in Article 33 EEA, as Liechtenstein has not provided any arguments as to why the measure should be regarded as appropriate or necessary. Consequently, it must be held that, in maintaining in force Article 26(6) of the AVV, Liechtenstein has failed to fulfil its obligations pursuant to Article 36 EEA.

VI COSTS

39 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 Liechtenstein be ordered to pay the costs and the latter has been unsuccessful, and since none of the exceptions in Article 66(3) apply, Liechtenstein must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by maintaining in force legislation which imposes on persons resident in Liechtenstein who are responsible for a temporary work agency the obligation to supply a guarantee of 50 000 Swiss francs, whereas the guarantee of 100 000 Swiss francs is imposed upon persons performing a similar function who are resident outside of Liechtenstein, and on agencies seeking to deliver temporary employment services cross-border, the Principality of Liechtenstein has failed to fulfil its obligations under Article 31 and Article 36 of the EEA Agreement.**

2. **Orders Liechtenstein to bear the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 3 June 2013.

Gunnar Selvik — Registrar

Carl Baudenbacher — President


EFTA COURT

Case E-11/12

Beatrix Susanne Koch,
Lothar Hummel,
Stefan Müller
v
Swiss Life (Liechtenstein) AG

CASE E-11/12

Beatrix Susanne Koch,

Lothar Hummel,

Stefan Müller

v

Swiss Life (Lichtenstein) AG

(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)

Summary of the Judgment

1. The Court has no jurisdiction to give a preliminary ruling on a question raised before a national court where the interpretation of EEA law has no connection whatever with the circumstances or purpose of the main proceedings. The Court's function is to contribute to the administration of justice in the EEA States and not to give opinions on general or hypothetical questions.

2. Directive 92/96 and Directive 2002/83 aim at protecting consumers through choice based on information. The average consumer, i.e. a consumer who is reasonably well informed and reasonably observant and circumspect, must be taken into consideration when interpreting the Directives. Life assurance contracts are in general of a complex nature the details of which may be difficult to understand for the average consumer. Moreover, such contracts may involve considerable financial commitments for consumers over a long period of time. This underlines the importance of clear information to consumers when entering into life assurance contracts.

RECHTSSACHE E-11/12

Beatrix Susanne Koch,

Lothar Hummel,

Stefan Müller

und

Swiss Life (Liechtenstein) AG

(Richtlinie 90/619/EWG – Richtlinie 92/96/EWG – Richtlinie 2002/83/EG – Richtlinie 2002/92/EG – Lebensversicherung – Fondsgebundene Leistungen – Verpflichtung zur Durchführung einer ausgewogenen Beratung – Dem Versicherungsnehmer vor Abschluss des Vertrags mitzuteilende Informationen – Grundsatz der Äquivalenz – Grundsatz der Effektivität)

Zusammenfassung des Urteils

1. Der Gerichtshof ist für eine Vorabentscheidung in einer Frage vor einem nationalen Gericht, bei der die Auslegung des EWR-Rechts in keinerlei Zusammenhang mit den Umständen oder dem Gegenstand des Ausgangsverfahrens steht, nicht zuständig. Es ist die Aufgabe des Gerichtshofs einen Beitrag zur Justizgewährung in den EWR-Staaten zu leisten, und nicht zu allgemeinen oder hypothetischen Fragen Stellung zu nehmen.

2. Ziel der Richtlinie 92/96 und der Richtlinie 2002/83 ist es, den Verbraucher dadurch zu schützen, dass dieser im Besitz der notwendigen Informationen ist, wenn er seine Wahl trifft. Zur Auslegung der Richtlinie 92/96 und der Richtlinie 2002/83 ist ein Durchschnittsverbraucher heranzuziehen, der normal informiert und angemessen aufmerksam und verständig ist. Lebensversicherungsverträge sind in der Regel komplex und deren Einzelheiten können für den Durchschnittsverbraucher schwierig zu verstehen sein. Zudem können solche Verträge für Verbraucher eine erhebliche finanzielle Verpflichtung über einen langen Zeitraum darstellen. Dies verdeutlicht die Bedeutung klarer Informationen für die Verbraucher beim Abschluss von Lebensversicherungsverträgen.

3. Where EEA law does not preclude or limit the application of national contract law in a field otherwise coordinated or harmonised by a directive, that must also be the case for the application of general principles of national contract law, as long as this application of national law does not affect the effectiveness of the directives concerned. Directives 92/96 and 2002/83 do not prevent the EEA States from applying general principles of national contract law to establish an obligation to provide advice concerning complex financial instruments, such as life assurance, sold to consumers. They are therefore to be interpreted as meaning that they do not require the assurance undertaking to provide advice to the policy holder before the contract is concluded.

4. The Information listed in Annex II(A) to Directive 92/96 and Annex III(A) to Directive 2002/83 is required to be communicated to the policy holder before the contract is concluded. It must be provided in writing in a clear and accurate manner and in an official language of the EEA State of the commitment. If such information has not been provided to the policy holder before the contract is concluded, such contract is not concluded in accordance with the requirements of the relevant directive. It is for the national court to determine whether those requirements are met and if not, to draw the necessary conclusions in order to ensure the effectiveness of the relevant directive.

5. As long as the information is complete and communicated to the policy holder on the terms set out in Article 31 of Directive 92/96 and Article 36 of Directive 2002/83 and in accordance with other rules applicable, it suffices that the information is communicated to the policy holder by a third party, for example, an insurance intermediary.

6. The EEA Agreement, Directive 92/96 and Directive 2002/83 must be interpreted as not precluding a national rule which provides for an administrative complaint procedure after losses

3. Wenn das EWR-Recht die Anwendung von nationalem Vertragsrecht in einem ansonsten durch eine Richtlinie koordinierten oder harmonisierten Bereich nicht ausschliesst oder einschränkt, muss dies auch für die Anwendung allgemeiner Grundsätze des nationalen Vertragsrechts gelten, soweit diese Anwendung von nationalem Recht die Wirksamkeit der betreffenden Richtlinien nicht beeinträchtigt. Die Richtlinie 92/96 und Richtlinie 2002/83 stehen der Anwendung allgemeiner Grundsätze des nationalen Vertragsrechts zur Schaffung einer Beratungsverpflichtung betreffend komplexe Finanzinstrumente wie Lebensversicherungen beim Verkauf an Verbraucher durch die EWR-Staaten nicht entgegen. Die Richtlinie 92/96 und die Richtlinie 2002/83 sind deshalb so auszulegen, dass das Versicherungsunternehmen vor Abschluss des Vertrags nicht zur Beratung des Versicherungsnehmers verpflichtet ist.

4. Die gemäss Anhang II Buchstabe A der Richtlinie 92/96 und Anhang III Buchstabe A der Richtlinie 2002/83 mitzuteilenden Informationen müssen dem Versicherungsnehmer vor Abschluss des Vertrags eindeutig und detailliert schriftlich und in einer Amtssprache des EWR-Staats der Verpflichtung übermittelt werden. Wenn diese Informationen dem Versicherungsnehmer nicht vor Abschluss des Vertrags mitgeteilt werden, ist dieser Vertrag nicht entsprechend den Anforderungen der massgeblichen Richtlinie abgeschlossen. Es obliegt dem nationalen Gericht, festzustellen, ob diese Anforderungen erfüllt sind und, wenn dies nicht der Fall ist, die erforderlichen Schlussfolgerungen zu ziehen, um die Wirksamkeit der entsprechenden Richtlinie zu gewährleisten.

5. Es ist unerheblich, ob die Informationen unmittelbar vom Versicherungsunternehmen bereitgestellt oder über einen Dritten, bspw. einen Versicherungsvermittler, weitergegeben wurden, sofern die Informationen vollständig sind und dem Versicherungsnehmer laut den in Artikel 31 der Richtlinie 92/96 und Artikel 36 der Richtlinie 2002/83 festgelegten Vorgaben sowie den anderen anwendbaren Vorschriften mitgeteilt werden.

6. Das EWR-Abkommen sowie Richtlinie 92/96 und Richtlinie 2002/83 sind so auszulegen, dass sie keiner nationalen Regelung entgegenstehen, die ein Verwaltungsbeschwerdeverfahren

have been incurred pursuant to a failure on the part of an assurance undertaking to comply with the requirement to provide information. Provided that the right to claim compensation for pecuniary loss from that assurance undertaking for a failure to communicate the information is no less favourable than that applicable to similar domestic actions. Moreover, that the application of national law does not render it practically impossible or excessively difficult for the policy holder to exercise rights conferred by the Directives.

vorsieht, wenn infolge einer Verletzung der Informationspflicht durch ein Versicherungsunternehmen Verluste entstanden sind. Dies setzt voraus, dass das Recht zur Forderung einer Entschädigung für einen finanziellen Verlust von diesem Versicherungsunternehmen aufgrund einer Verletzung der Informationspflicht nicht weniger günstig gestaltet ist als das auf vergleichbare innerstaatliche Klagen anwendbare Recht und die Anwendung des nationalen Rechts es dem Versicherungsnehmer nicht praktisch unmöglich macht oder übermässig erschwert, die durch die Richtlinien vorgesehenen Rechte auszuüben.

JUDGMENT OF THE COURT

13 June 2013*

(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)

In Case E-11/12,

REQUEST to the Court from the Fürstliche Landgericht des Fürstentums Liechtenstein (Princely Court of the Principality of Liechtenstein) under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in the case between

Beatrix Susanne Koch,
Lothar Hummel, and
Stefan Müller

and

Swiss Life (Liechtenstein) AG

on the interpretation of Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC, Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive), Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance and Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation,

* Language of the request: German.

URTEIL DES GERICHTSHOFS

13. Juni 2013*

(Richtlinie 90/619/EWG – Richtlinie 92/96/EWG – Richtlinie 2002/83/EG – Richtlinie 2002/92/EG – Lebensversicherung – Fondsgebundene Leistungen – Verpflichtung zur Durchführung einer ausgewogenen Beratung – Dem Versicherungsnehmer vor Abschluss des Vertrags mitzuteilende Informationen – Grundsatz der Äquivalenz – Grundsatz der Effektivität)

In der Rechtssache E-11/12,

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

Beatrix Susanne Koch,
Lothar Hummel und
Stefan Müller

und

Swiss Life (Liechtenstein) AG

betreffend die Auslegung der Zweiten Richtlinie 90/619/EWG des Rates vom 8. November 1990 zur Koordinierung der Rechts- und Verwaltungsvorschriften für die Direktversicherung (Lebensversicherung) und zur Erleichterung der tatsächlichen Ausübung des freien Dienstleistungsverkehrs sowie zur Änderung der Richtlinie 79/267/EWG, der Richtlinie 92/96/EWG des Rates vom 10. November 1992 zur Koordinierung der Rechts- und Verwaltungsvorschriften für die Direktversicherung (Lebensversicherung) sowie zur Änderung der Richtlinien 79/267/EWG und 90/619/EWG (Dritte Richtlinie Lebensversicherung), der Richtlinie 2002/83/EG des Europäischen Parlaments und des Rates vom 5. November 2002 über Lebensversicherungen und der Richtlinie 2002/92/EG des Europäischen Parlaments und des Rates vom 9. Dezember 2002 über Versicherungsvermittlung, erlässt

* Sprache des Antrags: Deutsch.

THE COURT,

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

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

– Mr Hummel and Mr Müller represented by Dr Hans-Jörg Vogl, Rechtsanwalt; Ms Koch, represented first by Dr Hans-Jörg Vogl and later by Dr Franz Giesinger, Rechtsanwalt ("the plaintiffs");

– Swiss Life (Liechtenstein) AG ("the defendant"), represented by Dr Peter Nägele and Thomas Nägele, Rechtsanwälte;

– the Government of the Principality of Liechtenstein ("Liechtenstein"), represented by Dr Andrea Entner-Koch, Director, and Frédérique Lambrecht, Senior Legal Officer, EEA Coordination Unit, acting as Agents;

– the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, Clémence Perrin and Maria Moustakali, Legal Officers, Department of Legal & Executive Affairs, acting as Agents; and

– the European Commission ("the Commission"), represented by Karl Philipp Wojcik, Legal Advisor, and Nicola Yerrell, Member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Ms Koch, represented by Dr Franz Giesinger; Mr Hummel and Mr Müller, represented by Florian Scheiber; the defendant, represented by Dr Peter Nägele and Thomas Nägele; Liechtenstein, represented by Frédérique Lambrecht; ESA, represented by Clémence Perrin; and the Commission, represented by Nicola Yerrell, at the hearing on 20 March 2013,

gives the following

DER GERICHTSHOF

bestehend aus Carl Baudenbacher, Präsident, Per Christiansen und Páll Hreinsson (Berichterstatter), Richter,

Kanzler: Gunnar Selvik,

unter Berücksichtigung der schriftlichen Erklärungen

– von Lothar Hummel und Stefan Müller, vertreten durch Dr. Hans-Jörg Vogl, Rechtsanwalt; Beatrix Koch, ursprünglich vertreten durch Dr. Hans-Jörg Vogl und anschliessend durch Dr. Franz Giesinger, Rechtsanwalt (im Folgenden: Kläger);

– der Swiss Life (Liechtenstein) AG (im Folgenden: Beklagte), vertreten durch Dr. Peter Nägele und Thomas Nägele, Rechtsanwälte;

– der Regierung des Fürstentums Liechtenstein (im Folgenden: Liechtenstein), vertreten durch Dr. Andrea Entner-Koch, Direktorin, und Frédérique Lambrecht, Leitender Juristischer Mitarbeiter, Stabstelle EWR, als Bevollmächtigte;

– der EFTA-Überwachungsbehörde (im Folgenden: EFTA-Überwachungsbehörde), vertreten durch Xavier Lewis, Direktor, Clémence Perrin und Maria Moustakali, Beamtinnen, Abteilung Rechtliche & Exekutive Angelegenheiten, als Bevollmächtigte;

– der Europäischen Kommission (im Folgenden: Kommission), vertreten durch Karl Philipp Wojcik, Rechtsberater, und Nicola Yerrell, Mitarbeiterin des Juristischen Diensts der Kommission, als Bevollmächtigte;

unter Berücksichtigung des Sitzungsberichts,

nach Anhörung der mündlichen Ausführungen von Frau Koch, vertreten durch Dr. Franz Giesinger; von Herrn Hummel und Herrn Müller, vertreten durch Florian Scheiber; der Beklagten, vertreten durch Dr. Peter Nägele und Thomas Nägele; Liechtensteins, vertreten durch Frédérique Lambrecht; der EFTA-Überwachungsbehörde, vertreten durch Clémence Perrin, und der Kommission, vertreten durch Nicola Yerrell, in der Sitzung vom 20. März 2013

folgendes

JUDGMENT

I LEGAL CONTEXT

EEA law

Directive 90/619/EEC

1 Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC (OJ 1990 L 330, p. 50) ("Directive 90/619") was incorporated into the EEA Agreement by Joint Committee Decision 1/94, which entered into force on 1 July 1994.

2 Article 4 of Directive 90/619 provided:

1. The law applicable to contracts relating to the activities referred to in [Directive 79/267 of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct life assurance] shall be the law of the Member State of commitment. However, where the law of that State so allows, the parties may choose the law of another country.

Directive 92/96/EEC

3 Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive) (OJ 1992 L 360, p. 1) ("Directive 92/96") was incorporated into the EEA Agreement by Joint Committee Decision 1/94, which entered into force on 1 July 1994.

URTEIL

I RECHTLICHER RAHMEN

EWR-Recht

Richtlinie 90/619/EWG

1 Die Zweite Richtlinie 90/619/EWG des Rates vom 8. November 1990 zur Koordinierung der Rechts- und Verwaltungsvorschriften für die Direktversicherung (Lebensversicherung) und zur Erleichterung der tatsächlichen Ausübung des freien Dienstleistungsverkehrs sowie zur Änderung der Richtlinie 79/267/EWG (ABl. 1990, L 330, S. 50) (im Folgenden: Richtlinie 90/619) wurde mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 1/94, in Kraft getreten am 1. Juli 1994, in das EWR-Abkommen aufgenommen.

2 Artikel 4 der Richtlinie 90/619 sah vor:

> *1 Das Recht, das auf die Verträge über die in der [Ersten Richtlinie 79/267 vom 5. März 1979 zur Koordinierung der Rechts- und Verwaltungsvorschriften über die Aufnahme und Ausübung der Direktversicherung (Lebensversicherung)] genannten Tätigkeiten anwendbar ist, ist das Recht des Mitgliedstaats der Verpflichtung. Jedoch können die Parteien, sofern dies nach dem Recht dieses Mitgliedstaats zulässig ist, das Recht eines anderen Staates wählen.*

Richtlinie 92/96/EWG

3 Richtlinie 92/96/EWG des Rates vom 10. November 1992 zur Koordinierung der Rechts- und Verwaltungsvorschriften für die Direktversicherung (Lebensversicherung) sowie zur Änderung der Richtlinien 79/267/EWG und 90/619/EWG (Dritte Richtlinie Lebensversicherung) (ABl. 1992, L 360, S. 1) (im Folgenden: Richtlinie 92/96) wurde mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 1/94, in Kraft getreten am 1. Juli 1994, in das EWR-Abkommen aufgenommen.

4 Article 21 of Directive 92/96 provided:

1. The home Member State may not authorise assurance undertakings to cover their technical provisions with any but the following categories of assets:

A. Investments

(a) debt securities, bonds and other money- and capital-market instruments;

(b) loans;

(c) shares and other variable-yield participations;

(d) units in undertakings for collective investment in transferable securities [UCITS] and other investment funds;

...

5 Article 23 of Directive 92/96 provided:

1. Where the benefits provided by a contract are directly linked to the value of units in an UCITS or to the value of assets contained in an internal fund held by the insurance undertaking, usually divided into units, the technical provisions in respect of those benefits must be represented as closely as possible by those units or, in the case where units are not established, by those assets.

2. Where the benefits provided by a contract are directly linked to a share index or some other reference value other than those referred to in paragraph 1, the technical provisions in respect of those benefits must be represented as closely as possible either by the units deemed to represent the reference value or, in the case where units are not established, by assets of appropriate security and marketability which correspond as closely as possible with those on which the particular reference value is based.

4 Artikel 21 der Richtlinie 92/96 sah vor:

1. Der Herkunftsmitgliedstaat kann es jedem Versicherungsunternehmen gestatten, die versicherungstechnischen Rückstellungen ausschließlich durch folgende Kategorien von Vermögenswerten zu bedecken:

A. Kapitalanlagen

a) Schuldverschreibungen, Anleihen und andere Geld- und Kapitalmarktpapiere;

b) Darlehen;

c) Aktien und andere Anteile mit schwankendem Ertrag;

d) Anteile an Organismen für gemeinsame Anlagen in Wertpapieren [OGAW] und anderen gemeinschaftlichen Kapitalanlagen;

...

5 Artikel 23 der Richtlinie 92/96 sah vor:

1. Sind die Leistungen aus einem Vertrag direkt an den Wert von Anteilen an einem OGAW oder an den Wert von Vermögenswerten gebunden, die in einem von dem Versicherungsunternehmen gehaltenen und in der Regel in Anteile aufgeteilten internen Fonds enthalten sind, so müssen die versicherungstechnischen Rückstellungen für diese Leistungen so weit wie möglich durch die betreffenden Anteile oder, sofern keine Anteile gebildet wurden, durch die betreffenden Vermögenswerte bedeckt werden.

2. Sind die Leistungen aus einem Vertrag direkt an einen Aktienindex oder an einen anderen als den in Absatz 1 genannten Bezugswert gebunden, so müssen die versicherungstechnischen Rückstellungen für diese Leistungen so weit wie möglich entweder durch die Anteile, die den Bezugswert darstellen sollen, oder, sofern keine Anteile gebildet wurden, durch Vermögenswerte mit angemessener Sicherheit und Realisierbarkeit bedeckt werden, die so genau wie möglich denjenigen Werten entsprechen, auf denen der besondere Bezugswert beruht.

6 Article 31 of Directive 92/96 provided:

1. Before the assurance contract is concluded, at least the information listed in point A of Annex II shall be communicated to the policy-holder.

2. The policy-holder shall be kept informed throughout the term of the contract of any change concerning the information listed in point B of Annex II.

3. The Member State of the commitment may require assurance undertakings to furnish information in addition to that listed in Annex II only if it is necessary for a proper understanding by the policy-holder of the essential elements of the commitment.

4. The detailed rules for implementing this Article and Annex II shall be laid down by the Member State of the commitment.

7 Annex II of Directive 92/96 ("Information for policy holders") lists the information which is to be communicated to the policy holder before the contract is concluded (Section A) or during the term of the contract (Section B), in a clear and accurate manner, in writing, and in an official language of the Member State of the commitment.

8 Points a11 and a12 of Annex II(A) provide that the following information must be provided to the policy holder before concluding the contract:

(a)11 For unit-linked policies, definition of the units to which the benefits are linked

(a)12 Indication of the nature of the underlying assets for unit-linked policies.

Directive 2002/83/EC

9 Directive 2002/83/EC of the European Parliament and the Council of 5 November 2002 concerning life assurance (OJ 2002

6 Artikel 31 der Richtlinie 92/96 sah vor:

1. Vor Abschluß des Versicherungsvertrags sind dem Versicherungsnehmer mindestens die in Anhang II Buchstabe A aufgeführten Angaben mitzuteilen.

2. Der Versicherungsnehmer muß während der gesamten Vertragsdauer über alle Änderungen der in Anhang II Buchstabe B aufgeführten Angaben auf dem *laufenden gehalten werden.*

3. Der Mitgliedstaat der Verpflichtung kann von den Versicherungsunternehmen nur dann die Vorlage von Angaben zusätzlich zu den in Anhang II genannten Auskünften verlangen, wenn diese für das tatsächliche Verständnis der wesentlichen Bestandteile der Versicherungspolice durch den Versicherungsnehmer notwendig sind.

4. Die Durchführungsvorschriften zu diesem Artikel und zu Anhang II werden von dem Mitgliedstaat der Verpflichtung erlassen.

7 Anhang II der Richtlinie 92/96 („Informationen für die Versicherungsnehmer") enthält eine Aufstellung der Informationen, die dem Versicherungsnehmer vor Abschluss des Vertrags (Buchstabe A) oder während der Laufzeit des Vertrags (Buchstabe B) eindeutig und detailliert schriftlich in einer Amtssprache des Mitgliedstaats der Verpflichtung mitzuteilen sind.

8 Gemäss den Punkten a.11 und a.12 von Anhang II Buchstabe A sind dem Versicherungsnehmer folgende Informationen vor Abschluss des Vertrags mitzuteilen:

(a)11 für fondsgebundene Policen: Angabe der Fonds (in Rechnungseinheiten), an die die Leistungen gekoppelt sind

(a)12 Angabe der Art der den fondsgebundenen Policen zugrunde liegenden Vermögenswerte.

Richtlinie 2002/83/EG

9 Die Richtlinie 2002/83/EG des Europäischen Parlaments und des Rates vom 5. November 2002 über Lebensversicherungen (ABl.

L 345, p. 1) ("Directive 2002/83") replaced Directive 90/619 and Directive 92/96.

10 Directive 2002/83 was incorporated into the EEA Agreement at point 11 of Annex IX to the Agreement through EEA Joint Committee Decision No 60/2004 of 26 April 2004. The decision entered into force on 27 April 2004.

11 Article 23 of Directive 2002/83 ("Categories of authorised assets") reads:

1. The home Member State may not authorise assurance undertakings to cover their technical provisions with any but the following categories of assets:

A. investments

(a) debt securities, bonds and other money- and capital-market instruments;

(b) loans;

(c) shares and other variable-yield participations;

(d) units in undertakings for collective investment in transferable securities (UCITS) and other investment funds;

...

12 Article 32 of Directive 2002/83 ("Law applicable") reads:

1. The law applicable to contracts relating to the activities referred to in this Directive shall be the law of the Member State of the commitment. However, where the law of that State so allows, the parties may choose the law of another country.

13 Article 36 of Directive 2002/83 ("Information for policy holders") reads:

1. Before the assurance contract is concluded, at least the information listed in Annex III(A) shall be communicated to the policy holder.

2002, L 345, S. 1) (im Folgenden: Richtlinie 2002/83) ersetzte die Richtlinien 90/619 und 92/96.

10 Die Richtlinie 2002/83 wurde mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 60/2004 vom 26. April 2004 unter Punkt 11 des Anhangs IX in das EWR-Abkommen aufgenommen. Der Beschluss trat am 27. April 2004 in Kraft.

11 Artikel 23 der Richtlinie 2002/83 („Kategorien von zulässigen Vermögenswerten") lautet:

1. Der Herkunftsmitgliedstaat kann es jedem Versicherungsunternehmen gestatten, die versicherungstechnischen Rückstellungen ausschließlich durch folgende Kategorien von Vermögenswerten zu bedecken:

A. Kapitalanlagen

(a) Schuldverschreibungen, Anleihen und andere Geld- und Kapitalmarktpapiere;

(b) Darlehen;

(c) Aktien und andere Anteile mit schwankendem Ertrag;

(d) Anteile an Organismen für gemeinsame Anlagen in Wertpapieren [OGAW] und anderen gemeinschaftlichen Kapitalanlagen;

...

12 Artikel 32 der Richtlinie 2002/83 („Anwendbares Recht") lautet:

1. Das Recht, das auf die Verträge über die in der vorliegenden Richtlinie genannten Tätigkeiten anwendbar ist, ist das Recht des Mitgliedstaats der Verpflichtung. Jedoch können die Parteien, sofern dies nach dem Recht dieses Mitgliedstaats zulässig ist, das Recht eines anderen Staates wählen.

13 Artikel 36 der Richtlinie 2002/83 („Angaben für den Versicherungsnehmer") lautet:

1. Vor Abschluss des Versicherungsvertrags sind dem Versicherungsnehmer mindestens die in Anhang III Buchstabe A aufgeführten Angaben mitzuteilen.

2. The policy-holder shall be kept informed throughout the term of the contract of any change concerning the information listed in Annex III(B).

3. The Member State of the commitment may require assurance undertakings to furnish information in addition to that listed in Annex III only if it is necessary for a proper understanding by the policy holder of the essential elements of the commitment.

4. The detailed rules for implementing this Article and Annex III shall be laid down by the Member State of the commitment.

14 Annex III to Directive 2002/83 is identical to Annex II to Directive 92/96, as quoted in paragraphs 7 and 8 above.

The insurance mediation directive

15 Directive 2002/92/EC of the European Parliament and the Council of 9 December 2002 on insurance mediation (OJ 2002 L 345, p. 1) ("the insurance mediation directive" or "Directive 2002/92"), was incorporated into the EEA Agreement at point 13b of Annex IX to the Agreement by EEA Joint Committee Decision No 115/2003 of 26 September 2003. Constitutional requirements under Article 103 EEA were indicated and the decision entered into force on 1 May 2004. Liechtenstein notified its implementation of Directive 2002/92 on 16 February 2004.

16 By Directive 2002/92, the previous directive regulating the matter, Council Directive 77/92/EEC of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (ex ISIC Group 630) and, in particular, transitional measures in respect of those activities ("Directive 77/92"), was repealed in the European Union from 15 January 2005.

2. Der Versicherungsnehmer muss während der gesamten Vertragsdauer über alle Änderungen der in Anhang III Buchstabe B aufgeführten Angaben auf dem Laufenden gehalten werden.

3. Der Mitgliedstaat der Verpflichtung kann von den Versicherungsunternehmen nur dann die Vorlage von Angaben zusätzlich zu den in Anhang III genannten Auskünften verlangen, wenn diese für das tatsächliche Verständnis der wesentlichen Bestandteile der Versicherungspolice durch den Versicherungsnehmer notwendig sind.

4. Die Durchführungsvorschriften zu diesem Artikel und zu Anhang III werden von dem Mitgliedstaat der Verpflichtung erlassen.

14 Anhang III der Richtlinie 2002/83 ist identisch mit dem in den Randnrn. 7 und 8 oben zitierten Anhang II der Richtlinie 92/96.

Die Versicherungsvermittlungsrichtlinie

15 Die Richtlinie 2002/92/EG des Europäischen Parlaments und des Rates vom 9. Dezember 2002 über Versicherungsvermittlung (ABl. 2002, L 345, S. 1) (im Folgenden: Versicherungsvermittlungsrichtlinie oder Richtlinie 2002/92) wurde mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 115/2003 vom 26. September 2003 unter Punkt 13b des Anhangs IX in das EWR-Abkommen aufgenommen. Das Vorliegen verfassungsrechtlicher Anforderungen gemäss Artikel 103 EWR-Abkommen wurde mitgeteilt, und der Beschluss trat am 1. Mai 2004 in Kraft. Liechtenstein meldete die Umsetzung der Richtlinie 2002/92 am 16. Februar 2004.

16 Durch die Richtlinie 2002/92 wurde die Vorgängerrichtlinie zur Regelung dieser Thematik, die Richtlinie 77/92/EWG des Rates vom 13. Dezember 1976 über Maßnahmen zur Erleichterung der tatsächlichen Ausübung der Niederlassungsfreiheit und des freien Dienstleistungsverkehrs für die Tätigkeiten des Versicherungsagenten und des Versicherungsmaklers (aus ISIC-Gruppe 630), insbesondere Übergangsmaßnahmen für solche Tätigkeiten (im Folgenden: Richtlinie 77/92), in der Europäischen Union per 15. Januar 2005 aufgehoben.

17 Directive 77/92 was repealed in the EEA through Joint Committee Decision No 12/2010 of 10 November 2010. Constitutional requirements under Article 103 EEA were indicated and the decision entered into force on 1 November 2012.

18 Article 2(5) of the insurance mediation directive reads:

'insurance intermediary' means any natural or legal person who, for remuneration, takes up or pursues insurance mediation;

19 Article 12 of the insurance mediation directive ("information provided by the insurance intermediary") reads:

1. *Prior to the conclusion of any initial insurance contract, and, if necessary, upon amendment or renewal thereof, an insurance intermediary shall provide the customer with at least the following information:*

...

(e) ...

In addition, an insurance intermediary shall inform the customer, concerning the contract that is provided, whether:

(i) he gives advice based on the obligation in paragraph 2 to provide a fair analysis, or

(ii) he is under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings. In that case, he shall, at the customer's request provide the names of those insurance undertakings, or

(iii) he is not under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings and does not give advice based on the obligation in paragraph 2 to provide a fair analysis. In that case, he shall, at the customer's request provide the names

17 Die Richtlinie 77/92 wurde im EWR mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 12/2010 vom 10. November 2010 aufgehoben. Das Vorliegen verfassungsrechtlicher Anforderungen gemäss Artikel 103 EWR-Abkommen wurde mitgeteilt, und der Beschluss trat am 1. November 2012 in Kraft.

18 Gemäss Artikel 2 Absatz 5 der Versicherungsvermittlungsrichtlinie bezeichnet der Ausdruck

‚Versicherungsvermittler' jede natürliche oder juristische Person, die die Tätigkeit der Versicherungsvermittlung gegen Vergütung aufnimmt oder ausübt;

19 Artikel 12 der Versicherungsvermittlungsrichtlinie („Vom Versicherungsvermittler zu erteilende Auskünfte") lautet:

1. *Vor Abschluss jedes ersten Versicherungsvertrags und nötigenfalls bei Änderung oder Erneuerung des Vertrags teilt der Versicherungsvermittler dem Kunden zumindest Folgendes mit:*

...

(e) ...

Außerdem teilt der Versicherungsvermittler dem Kunden in Bezug auf den angebotenen Vertrag mit,

(i) ob er seinen Rat gemäß der in Absatz 2 vorgesehenen Verpflichtung auf eine ausgewogene Untersuchung stützt, oder

(ii) ob er vertraglich verpflichtet ist, Versicherungsvermittlungsgeschäfte ausschließlich mit einem oder mehreren Versicherungsunternehmen zu tätigen. In diesem Fall teilt er dem Kunden auf Antrag auch die Namen dieser Versicherungsunternehmen mit, oder

(iii) ob er nicht vertraglich verpflichtet ist, Versicherungsvermittlungsgeschäfte ausschließlich mit einem oder mehreren Versicherungsunternehmen zu tätigen, und seinen Rat nicht gemäß der in Absatz 2 vorgesehenen Verpflichtung auf eine ausgewogene Untersuchung stützt. In diesem Fall teilt er dem Kunden auf Antrag auch die Namen

of the insurance undertakings with which he may and does conduct business.

...

2. *When the insurance intermediary informs the customer that he gives his advice on the basis of a fair analysis, he is obliged to give that advice on the basis of an analysis of a sufficiently large number of insurance contracts available on the market, to enable him to make a recommendation, in accordance with professional criteria, regarding which insurance contract would be adequate to meet the customer's needs.*

3. *Prior to the conclusion of any specific contract, the insurance intermediary shall at least specify, in particular on the basis of information provided by the customer, the demands and the needs of that customer as well as the underlying reasons for any advice given to the customer on a given insurance product. These details shall be modulated according to the complexity of the insurance contract being proposed.*

...

National law

20 Liechtenstein has implemented Directive 2002/83 by way of the Insurance Supervisory Act ("VersAG"), LR 961.01, the Insurance Supervisory Regulation (VersAV), LR 961.011, the Insurance Contract Act (VersVG) LR 215.229.1, the International Private Law Act (IPRG) LR 290 and the International Insurance Contract Act (IVersVG), LR 291).

21 Article 45 of the Insurance Supervisory Act ("Duties to inform policy holders") provides as follows:

Prior to the conclusion and during the term of the insurance contracts, specific information must be given to the policy holders for their information and protection. The content and scope of this duty of information is regulated under Annex 4.

derjenigen Versicherungsunternehmen mit, mit denen er Versicherungsgeschäfte tätigen darf und auch tätigt.

...

2. *Teilt der Versicherungsvermittler dem Kunden mit, dass er auf der Grundlage einer objektiven Untersuchung berät, so ist er verpflichtet, seinen Rat auf eine Untersuchung einer hinreichenden Zahl von auf dem Markt angebotenen Versicherungsverträgen zu stützen, so dass er gemäß fachlichen Kriterien eine Empfehlung dahin gehend abgeben kann, welcher Versicherungsvertrag geeignet wäre, die Bedürfnisse des Kunden zu erfüllen.*

3. *Vor Abschluss eines Versicherungsvertrags hat der Versicherungsvermittler, insbesondere anhand der vom Kunden gemachten Angaben, zumindest dessen Wünsche und Bedürfnisse sowie die Gründe für jeden diesem zu einem bestimmten Versicherungsprodukt erteilten Rat genau anzugeben. Diese Angaben sind der Komplexität des angebotenen Versicherungsvertrags anzupassen.*

...

Nationales Recht

20 Liechtenstein hat die Richtlinie 2002/83 im Wege des Versicherungsaufsichtsgesetzes (VersAG), LR 961.01, der Versicherungsaufsichtsverordnung (VersAV), LR 961.011, des Versicherungsvertragsgesetzes (VersVG), LR 215.229.1, des Gesetzes über das internationale Privatrecht (IPRG), LR 290, und des Gesetzes über das internationale Versicherungsvertragsrecht (IVersVG), LR 291, in nationales Recht umgesetzt.

21 Artikel 45 des Versicherungsaufsichtsgesetzes („Mitteilungspflichten gegenüber Versicherungsnehmern“) lautet:

Vor Abschluss und während der Laufzeit von Versicherungsverträgen sind zur Information und zum Schutz von Versicherungsnehmern diesen gegenüber spezielle Informationen abzugeben. Inhalt und Umfang dieser Mitteilungspflichten sind in Anhang 4 geregelt.

22 Annex 4 to the Insurance Supervisory Act ("Duties to inform policy holders under Articles 45 and 49") provides as follows:

Where the policy holder is a natural person, insurance undertakings must inform him of the essential facts and rights under insurance contract before conclusion and during the term of a contract in accordance with the following provisions. In the case of the insurance of large risks, it is sufficient to mention the applicable law and the competent supervisory authority. The information must be made available in writing.

Section I

1. Information required for all classes of insurance:

...

(h) address of the competent supervisory authority which the policyholder may contact in the case of complaints about the insurance undertaking.

2. Additional information required for life or accident insurance with premium refund:

...

(e) for unit-linked policies, definition of the units to which the insurance is linked and indication of the nature of the underlying assets;

...

23 Article 3 of the Insurance Contract Act ("Duty of the insurance undertaking to provide information") provides as follows:

1. The generally applicable special insurance provisions and the information required under Art. 45 and 49 of the Insurance Supervisory Act must either be included in the insurance application form or made available to the applicant by other means prior to submission of the application.

22 Anhang 4 des Versicherungsaufsichtsgesetzes („Mitteilungspflichten gegenüber Versicherungsnehmern gemäss Art. 45 und 49“) lautet:

Die Versicherungsunternehmen haben den Versicherungsnehmer, wenn es sich um eine natürliche Person handelt, über die für das Versicherungsverhältnis massgeblichen Tatsachen und Rechte vor Abschluss und während der Laufzeit eines Vertrages gemäss den nachfolgenden Bestimmungen zu unterrichten. Bei der Versicherung von Grossrisiken genügt die Angabe des anwendbaren Rechts und der zuständigen Aufsichtsbehörde. Die Informationen haben schriftlich zu erfolgen.

Abschnitt I

1. Für alle Versicherungssparten notwendige Informationen:

...

(h) die Anschrift der zuständigen Aufsichtsbehörde, an die sich der Versicherungsnehmer bei Beschwerden über das Versicherungsunternehmen wenden kann.

2. Bei Lebensversicherungen und Unfallversicherungen mit Prämienrückgewähr zusätzlich notwendige Informationen:

...

(e) bei fondsgebundenen Versicherungen Angaben über den der Versicherung zugrunde liegenden Fonds und die Art der darin enthaltenen Vermögenswerte;

...

23 Artikel 3 des Versicherungsvertragsgesetzes („Informationspflicht des Versicherungsunternehmens“) lautet:

1. Die allgemeinen und besonderen Versicherungsbedingungen sowie die gemäss Art. 45 und 49 des Versicherungsaufsichtsgesetzes erforderlichen Informationen müssen entweder in den Versicherungsantrag aufgenommen oder dem Antragsteller auf andere Weise vor der Einreichung des Versicherungsantrages zur Verfügung gestellt werden.

2. In the event of a failure to comply with this condition, the applicant will not be bound by the application. Following conclusion of the contract, the policyholder may rescind the contract if there is a breach of the duty to provide information under paragraph 1. The right of rescission shall expire no later than four weeks after receipt of the policy which includes notification of the right of rescission.

II BACKGROUND

24 Two of the plaintiffs (Ms Koch and Mr Hummel) are German nationals resident in Germany. The third plaintiff (Mr Müller) is an Austrian national resident in Austria. The defendant, Swiss Life (Liechtenstein) AG, is a company registered in Liechtenstein. It carries a licence to provide life assurance.

25 In 2004 the plaintiffs, independently and by way of three different brokers, submitted applications for "unit-linked life assurance" to the defendant. The applications were accepted, and subsequently the life assurance agreements came into effect.

26 Ms Koch submitted her application for life assurance on 4 November 2004. It was accepted by the defendant on 22 December 2004 and the policy started on 1 December 2004 ("the first contract").

27 Mr Hummel submitted his application for life assurance on 23 December 2004. It was accepted by the defendant on 30 December 2004 and the policy started on 1 December 2004 ("the second contract").

28 Mr Müller submitted a first application for life assurance on 18 February 2004. This was accepted by the defendant on 5 April 2004 and the policy started on 1 March 2004 ("the third contract").

29 Mr Müller also submitted a second application for life assurance on 14 September 2004. This was accepted by the defendant on

2. Wird dieser Vorschrift nicht entsprochen, so ist der Antragsteller an den Antrag nicht gebunden. Nach Abschluss des Vertrages kann der Versicherungsnehmer vom Vertrag zurücktreten, wenn die Informationspflicht gemäss Abs. 1 verletzt worden ist. Das Rücktrittsrecht erlischt spätestens vier Wochen nach Zugang der Police einschliesslich einer Belehrung über das Rücktrittsrecht.

II HINTERGRUND

24 Zwei der Kläger (Beatrix Koch und Lothar Hummel) sind deutsche Staatsangehörige mit Wohnsitz in Deutschland. Der dritte Kläger (Stefan Müller) ist österreichischer Staatsangehöriger mit Wohnsitz in Österreich. Bei der Beklagten, der Swiss Life (Liechtenstein) AG, handelt es sich um ein in Liechtenstein eingetragenes Unternehmen, dem eine Bewilligung zum Betrieb der Lebensversicherung erteilt wurde.

25 Im Jahr 2004 stellten die Kläger unabhängig voneinander und mit Hilfe dreier unterschiedlicher Vermittler Anträge auf Abschluss einer „fondsgebundenen Lebensversicherung" an die Beklagte. Die Anträge wurden angenommen, sodass in der Folge die Lebensversicherungsverträge zustandekamen.

26 Beatrix Koch stellte ihren Lebensversicherungsantrag am 4. November 2004. Er wurde von der Beklagten am 22. Dezember 2004 angenommen, wobei die Laufzeit der Police am 1. Dezember 2004 begann (im Folgenden: der erste Vertrag).

27 Lothar Hummel stellte seinen Lebensversicherungsantrag am 23. Dezember 2004. Er wurde von der Beklagten am 30. Dezember 2004 angenommen, wobei die Laufzeit der Police am 1. Dezember 2004 begann (im Folgenden: der zweite Vertrag).

28 Stefan Müller stellte seinen ersten Lebensversicherungsantrag am 18. Februar 2004. Dieser wurde von der Beklagten am 5. April 2004 angenommen, wobei die Laufzeit der Police am 1. März 2004 begann (im Folgenden: der dritte Vertrag).

29 Stefan Müller stellte ausserdem einen zweiten Lebensversicherungsantrag am 14. September 2004. Dieser

1 December 2004 and the policy started on 1 October 2004 ("the fourth contract").

30 According to the application form, which appears to have been identical in all cases, a type of investment was agreed in each case "as per the attached investment strategy". In the "investment strategy" forms, signed in each case by the plaintiffs, it was recorded, *inter alia*, "Allocation initial investment: Swiss Select Garantie (Euro Medium Term Notes)".

31 Some of the investment strategies were amended by documents, signed by the plaintiffs, to read: "Note Swiss Select Garantie 3 or ff WKN XS0247561060".

32 The ISIN (international securities identification number; in German *WKN* or *Wertpapierkennnummer*) is a combination of numbers and letters used to identify transferable securities (financial instruments). Relevant information can be found on the Internet by entering the ISIN/WKN into a search engine.

33 The plaintiffs subsequently paid assurance premiums to the defendant which invested the amounts as cover funds, in accordance with the investment strategies.

34 The plaintiffs brought a claim for damages against the defendant, on the basis that the amounts that they paid to the latter as assurance premiums have been all but wiped out. They contend that it was impossible for them to determine the level of risk involved in the investment, and the structure of the products was not transparent. Excessive commissions and fees were taken by the defendant and the capital was therefore wiped out within a very short period of time.

35 The defendant claims that the applications for damages should be dismissed since the investments were made according to the "investment strategy" forms signed by the plaintiffs.

wurde von der Beklagten am 1. Dezember 2004 angenommen, wobei die Laufzeit der Police am 1. Oktober 2004 begann (im Folgenden: der vierte Vertrag).

30 Gemäss Antragsformular, das in allen Fällen identisch gewesen zu sein scheint, wurde jeweils eine Anlageform „laut beiliegender Anlagestrategie" vereinbart. In den in jedem Fall von den Klägern unterfertigten Formularen zur „Anlagestrategie" wurde u. a. festgehalten: „Aufteilung Erstanlage: Swiss Select Garantie (Euro Medium Term Notes)".

31 Die Anlagestrategien wurden teilweise mit von den Klägern unterfertigten Schriftstücken abgeändert, sodass sie lauteten wie folgt: „Note Swiss Select Garantie 3 oder ff WKN XS0247561060".

32 Bei der WKN (Wertpapierkennnummer; Englisch: ISIN – International Securities Identification Number) handelt es sich um eine Ziffern- und Buchstabenkombination zur Identifizierung von Wertpapieren (Finanzinstrumenten). Über eine Internet-Suchmaschine kann durch Eingabe der ISIN/WKN eine entsprechende Information im Internet gefunden werden.

33 Die Kläger zahlten in der Folge Versicherungsprämien an die Beklagte, die diese Beträge als Deckungsstock entsprechend den Anlagestrategien veranlagte.

34 Die Kläger machen gegenüber der Beklagten Schadenersatzansprüche geltend, da die als Versicherungsprämien an Letztere bezahlten Beträge praktisch vernichtet seien. Sie bringen vor, die Risikoträchtigkeit der Veranlagung sei für sie nicht einschätzbar und die Konstruktion der Produkte nicht durchschaubar gewesen. Die Beklagte habe überhöhte Provisionen und Gebühren einbehalten, wodurch das Kapital innerhalb kürzester Zeit vernichtet worden sei.

35 Die Beklagte hat die Abweisung der Schadenersatzansprüche beantragt, da die Veranlagung entsprechend den von den Klägern unterfertigten Formularen zur „Anlagestrategie" erfolgte.

36 The defendant has not claimed that it informed the plaintiffs about the relevant investment products, but asserts that the plaintiffs themselves requested those investment strategies.

37 On 31 October 2012, the *Fürstliche Landgericht des Fürstentums Liechtenstein* (Princely Court of the Principality of Liechtenstein; hereinafter the "Princely Court" or the "referring court") decided to seek an advisory opinion from the Court. It noted that Directive 2002/83 did not define what constitutes "unit-linked life assurance". In the view of the referring court it is unclear whether the duties under the Directive 2002/83 to inform the policy holder before the contract is concluded in the case of unit-linked life assurance also covers units which are not covered by a UCITS, as defined in Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 1985 L 375, p. 3) ("Directive 85/611").

38 Moreover, the referring court seeks clarification on the scope of an assurance undertaking's duty to give advice and to inform the policy holder before the contract is concluded, the role of insurance intermediaries and whether EEA/EFTA States are required to establish a civil law right for the policy holder to claim damages from the assurance undertaking.

39 The referring court observes that the Liechtenstein Supreme Court in a judgment of 10 February 2012 interpreted the national legislation implementing Directive 2002/83 in Liechtenstein. In that judgment, the Liechtenstein Supreme Court held that, contrary to the "clear statutory requirement", the defendant in that case, which concerned facts different to those of the present proceedings before the referring court, did not "provide advice to the plaintiff, and in particular did not provide advice about the product underlying the life assurance ... No more did it forward the necessary

36 Seitens der Beklagten wurde nicht vorgebracht, dass sie die Kläger über die entsprechenden Anlageprodukte informiert habe, jedoch hätten die Kläger selbst diese Anlagestrategien verlangt.

37 Am 31. Oktober 2012 stellte das Fürstliche Landgericht des Fürstentums Liechtenstein (im Folgenden: das Fürstliche Landgericht oder das vorlegende Gericht) beim Gerichtshof einen Antrag auf Vorabentscheidung. Es hielt fest, dass die Richtlinie 2002/83 nicht definiert, was eine „fondsgebundene Lebensversicherung" darstellt. Nach Auffassung des vorlegenden Gerichts ist unklar, ob die durch Richtlinie 2002/83 festgelegten Informationspflichten gegenüber dem Versicherungsnehmer vor Abschluss eines Vertrags bei fondsgebundenen Lebensversicherungen auch auf Fonds anwendbar sind, die nicht von einem OGAW gemäss Richtlinie 85/611/EWG des Rates vom 20. Dezember 1985 zur Koordinierung der Rechts- und Verwaltungsvorschriften betreffend bestimmte Organismen für gemeinsame Anlagen in Wertpapieren (OGAW) (ABl. 1985, L 375, S. 3) (im Folgenden: Richtlinie 85/611) abgedeckt sind.

38 Zudem ersucht das vorlegende Gericht um Klärung hinsichtlich des Umfangs der Informationspflichten eines Versicherungsunternehmens gegenüber dem Versicherungsnehmer vor Abschluss des Vertrags, der Rolle von Versicherungsvermittlern und der etwaigen Verpflichtung der EWR-/EFTA-Staaten, einen zivilrechtlichen Schadenersatzanspruch des Versicherungsnehmers gegenüber dem Versicherungsunternehmen vorzusehen.

39 Das vorlegende Gericht merkt an, dass ein Urteil des Obersten Gerichtshofs des Fürstentums Liechtenstein vom 10. Februar 2012 eine Auslegung der nationalen Gesetzgebung zur Umsetzung der Richtlinie 2002/83 in Liechtenstein enthält. In diesem Urteil hält der Oberste Gerichtshof des Fürstentums Liechtenstein fest, dass die Beklagte in diesem Fall, dessen Sachverhalt sich von jenem der vor dem vorlegenden Gericht anhängigen Rechtssache unterscheidet, entgegen der „klaren gesetzlichen Vorgabe" „keine Beratung des Klägers durch[führte], insbesondere auch keine Beratung über das der Lebensversicherung unterliegende Produkt ... Ebenso

information in this regard, to the insurance brokers who were selling the life assurance ...".

40 The Princely Court consequently has stayed the proceedings and submitted the following questions to the Court:

1. *Does the term unit-linked policies, within the meaning of Annex III A a11 and a12 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, refer exclusively to units ("common funds") within the meaning of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) or does Annex III A a(11) and a(12) also apply for example where payments from a life assurance contract are linked to a share index or other reference value?*

2. *If Question 1 is answered by the Court to the effect that Annex III A a11 and a12 of Directive 2002/83/EC does not restrict the term "unit-linked policies" simply to investment companies ("common funds") within the meaning of Directive 85/611/EEC:*

2.1 Does Directive 2002/83/EC oblige assurance undertakings to provide policy holders with advice or simply to notify them of the details set out in Annex III of the said Directive?

2.2 Is the duty to communicate information under Annex III A a11 of Directive 2002/83/EC sufficiently complied with if the assurance undertaking supplies the securities identification number (WKN), or what else does "definition of the fund (in units of account)" require in order for the duty to communicate information to be complied with? It must be borne in mind that the Member State of the commitment does not require any additional information from the assurance undertaking within the meaning of Art. 36(3) of Directive 2002/83/EC.

2.3 Is the duty to communicate information under Annex III A a12 of Directive 2002/83/EC sufficiently complied with if the

wenig gab sie diesbezüglich notwendige Informationen an die die Lebensversicherung vertreibenden Versicherungsmakler weiter ...".

40 In der Folge unterbrach das Fürstliche Landgericht das Verfahren und legte dem Gerichtshof die folgenden Fragen vor:

1. *Sind unter fondsgebundenen Policen im Sinne des Anhanges III A a11 und a12 der Richtlinie 2002/83/EG des Europäischen Parlaments und des Rates vom 05.11.2002 über Lebensversicherungen ausschliesslich Fonds („Investmentfonds") im Sinne der Richtlinie 85/611/EWG des Rates vom 20.12.1985 zur Koordinierung der Rechts- und Verwaltungsvorschriften betreffend bestimmte Organismen für gemeinsame Anlagen in Wertpapieren (OGAW) zu verstehen oder ist Anhang III A a11 und a12 beispielsweise auch dann anzuwenden, wenn Leistungen aus einem Lebensversicherungsvertrag etwa an einen Aktienindex oder an einen anderen Bezugswert gebunden sind?*

2. *Für den Fall, dass die erste Frage seitens des Gerichtshofes dahingehend beantwortet wird, dass Anhang III A a11 und a12 der Richtlinie 2002/83/EG „fondsgebundene Policen" nicht nur auf Investmentunternehmen („Investmentfonds") im Sinne der Richtlinie 85/611/EWG einschränkt:*

2.1 Verpflichtet die Richtlinie 2002/83/EG Versicherungsunternehmen zur Beratung von Versicherungsnehmern oder bloss zur Mitteilung der im Anhang III dieser Richtlinie aufgeführten Angaben?

2.2 Wird der Informationspflicht nach Anhang III A a11 der Richtlinie 2002/83/EG seitens des Versicherungsunternehmens dadurch Genüge getan, dass die Wertpapierkennnummer (WKN) angeführt wird, oder was ist sonst unter „Angabe der Fonds (in Rechnungseinheiten)" zu verstehen, damit der Informationspflicht Genüge getan wird. Dies unter Berücksichtigung des Umstandes, dass der Mitgliedstaat der Verpflichtung von den Versicherungsunternehmen keine weiteren Auskünfte im Sinne des Art 36 Abs 3 der Richtlinie 2002/83/EG verlangt.

2.3 Wird der Informationspflicht nach Anhang III A a12 seitens des Versicherungsunternehmens dadurch Genüge getan,

assurance undertaking supplies the securities identification number (WKN) or should more detailed information be provided? It must be borne in mind that the Member State of the commitment does not require any additional information from the assurance undertaking within the meaning of Art. 36(3) of Directive 2002/83/EC.

3. *Does Art. 36(1) of Directive 2002/83/EC make it mandatory for the assurance undertaking to provide the details set out in Annex III A or is it sufficient that this information is given to the policy-holder by a third party, for example by an insurance broker within the meaning of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation?*

4. *Does Directive 2002/83/EC require that Art. 36 be implemented into national law by the Member States in such a way that policy holders acquire a civil law right against the assurance undertaking to notify the details pursuant to Annex III or is it sufficient for the implementation into national law if a breach of the duties to provide information under Annex III of the Directive is only subject to sanction by a regulatory body such as by the imposition of a fine, withdrawal of license or other similar measure?*

41 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

Preliminary remarks

42 In view of the entry into force of the decisions of the EEA Joint Committee to incorporate Directive 90/619, Directive 92/96 and Directive 2002/83 into the EEA Agreement, the Court

dass beispielsweise die Wertpapierkennnummer (WKN) angeführt wird oder sind detailliertere Informationen abzugeben? Dies unter Berücksichtigung des Umstandes, dass der Mitgliedstaat der Verpflichtung von den Versicherungsunternehmen keine weiteren Auskünfte im Sinne des Art 36 Abs 3 der Richtlinie 2002/83/EG verlangt.

3. *Verpflichtet Art 36 Abs* 1 der Richtlinie 2002/83/EG zwingend Ver*sicherungsunternehmen zur Mitteilung der in Anhang III A aufgeführten Angaben oder genügt es, wenn diese Angaben dem Versicherungs[]nehmer*[*] *von einem Dritten, beispielsweise von einem Versicherungsvermittler im Sinne der Richtlinie 2002/92/EG des Europäischen Parlaments und des Rates vom 09.12.2002 über Versicherungsvermittlung, mitgeteilt werden?*

4. *Verlangt die Richtlinie 2002/83/EG, dass Art 36 von den Mitgliedstaaten derart im innerstaatlichen Recht umgesetzt wird, dass Versicherungsnehmer einen zivilrechtlichen Anspruch gegenüber dem Versicherungsunternehmen auf Mitteilung der Angaben laut Anhang III erhalten, oder genügt eine Umsetzung im innerstaatlichen Recht dahingehend, dass eine Verletzung der Informationspflichten laut Anhang III der Richtlinie lediglich aufsichtsbehördlich, etwa durch Verhängung einer Geldstrafe, Entzug der Zulassung oder eine ähnliche Massnahme, sanktioniert wird?*

41 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 ANTWORTEN DES GERICHTSHOFS

Vorbemerkungen

42 Angesichts des Inkrafttretens der Beschlüsse des Gemeinsamen EWR-Ausschusses zur Aufnahme von Richtlinie 90/619, Richtlinie 92/96 und Richtlinie 2002/83 in das EWR-Abkommen hält

[*] Korrigendum, im Vorlagebeschluss als „*Versicherungsunternehmer*“ bezeichnet.

notes that the questions must be interpreted in the light of Directive 90/619 and Directive 92/96, as amended, as far as they concern the third contract, whereas Directive 2002/83 was applicable at the material time in relation to the first, second and fourth contracts.

43 It is therefore necessary to answer the questions in the light of all three directives together (see Case E-17/11 *Aresbank*, judgment of 22 November 2012, not yet reported, paragraph 79).

44 At the hearing, the parties before the national court confirmed that the assurance policies in question are unit-linked policies as described in the request from the referring court.

45 The referring court refers to the national legislation of the Federal Republic of Germany and the Republic of Austria, but has formulated its questions exclusively in the light of the national legislation of the Principality of Liechtenstein.

46 At the hearing, the parties to the national proceedings agreed that the actual wording of the assurance contracts is not disputed before the national court. They have chosen Liechtenstein law to apply to the contracts in question. Since the referring court has not submitted any information indicating that a choice of law of that kind is not allowed (see Article 31(1) of Directive 92/96 and Article 32(1) of Directive 2002/83), it must be presumed that the law of Liechtenstein applies to the contracts in question.

47 According to the information provided by the parties in their written observations and confirmed at the hearing, the product covered by the contracts in question is an overall product package which consists of three elements: a loan, securities and life assurance. It is not entirely clear from the reference for an advisory opinion how these products relate to each other.

der Gerichtshof fest, dass die Fragen vor dem Hintergrund der Richtlinie 90/619 und der Richtlinie 92/96 in der jeweils gültigen Fassung auszulegen sind, soweit sie den dritten Vertrag betreffen, während in Bezug auf den ersten, zweiten und vierten Vertrag zum massgeblichen Zeitpunkt Richtlinie 2002/83 anwendbar war.

43 Aus diesem Grund müssen die Fragen unter Berücksichtigung aller drei Richtlinien gemeinsam beantwortet werden (vgl. Rechtssache E-17/11 *Aresbank*, Urteil vom 22. November 2012, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 79).

44 In der Sitzung haben die Parteien vor dem nationalen Gericht bestätigt, dass es sich bei den gegenständlichen Versicherungspolicen um fondsgebundene Policen handelt, wie im Antrag des vorlegenden Gerichts auf Vorabentscheidung erläutert.

45 Das vorlegende Gericht verweist auf die nationale Gesetzgebung der Bundesrepublik Deutschland und der Republik Österreich, hat seine Fragen jedoch ausschliesslich unter Bezugnahme auf die nationale Gesetzgebung des Fürstentums Liechtenstein formuliert.

46 In der Sitzung haben die Parteien des nationalen Verfahrens zugestimmt, dass der tatsächliche Wortlaut der Versicherungsverträge vor dem nationalen Gericht nicht strittig ist. Sie haben sich entschlossen, auf die gegenständlichen Verträge liechtensteinisches Recht anzuwenden. Da das vorlegende Gericht keine Angaben gemacht hat, aus denen hervorgeht, dass eine solche Wahl des anwendbaren Rechts nicht zulässig ist (vgl. Artikel 31 Absatz 1 der Richtlinie 92/96 und Artikel 32 Absatz 1 der Richtlinie 2002/83) ist davon auszugehen, dass auf die gegenständlichen Verträge liechtensteinisches Recht anwendbar ist.

47 Gemäss den von den Parteien in ihren schriftlichen Erklärungen übermittelten und im Rahmen der Sitzung bestätigten Informationen handelt es sich bei den gegenständlichen Verträgen unterliegenden Produkten um ein Gesamtprodukt bestehend aus folgenden drei Elementen: ein Kredit, Wertpapiere und eine Lebensversicherung. Aus dem Ersuchen um Vorabentscheidung geht nicht eindeutig hervor, in welcher Beziehung diese Produkte zueinander stehen.

48 However, in the light of the wording of the questions and the information provided by the parties, it follows that the answers of the Court in the present proceedings will be limited to life assurance.

The first question

49 By its first question, the national court essentially seeks to establish whether the term "unit-linked policies" in points a11 and a12 of Annex II to Directive 92/96 and Annex III to Directive 2002/83 should be interpreted as referring only to units ("common funds") within the meaning of Directive 85/611, or whether the term also refers to benefits linked to a share index or some other reference value.

50 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 ("SCA") enjoy a presumption of relevance. Consequently, where the questions concern the interpretation of EEA law, the Court is in principle bound to give a ruling, unless it is obvious that the interpretation of EEA law that is sought is unrelated to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see Cases E-13/11 *Granville Establishment*, judgment of 25 April 2012, not yet reported, paragraph 20, *Aresbank*, cited above, paragraph 44, and E-19/11 *Vín Tríó*, judgment of 30 November 2012, not yet reported, paragraph 26).

51 Nevertheless, the Court considers that it may, if need be, examine the circumstances in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court, which is to contribute to

48 Es folgt jedoch aus der Formulierung der Fragen und den von den Parteien vorgelegten Informationen, dass die Antworten des Gerichtshofs sich auf Lebensversicherungen beschränken.

Zur ersten Frage

49 Mit seiner ersten Frage möchte das nationale Gericht im Wesentlichen wissen, ob der Begriff „fondsgebundene Policen" in den Punkten a.11 und a.12 in Anhang II der Richtlinie 92/96 und Anhang III der Richtlinie 2002/83 so auszulegen ist, dass er nur auf Fonds („Investmentfonds") im Sinne der Richtlinie 85/611 anwendbar ist, oder ob sich dieser Begriff auch auf Leistungen bezieht, die an einen Aktienindex oder an einen anderen Bezugswert gebunden sind.

50 Für von nationalen Gerichten gemäss Artikel 34 des Abkommens zwischen den EFTA-Staaten zur Errichtung einer Überwachungsbehörde und eines Gerichtshofs (im Folgenden: ÜGA) vorgelegte Fragen gilt eine Vermutung der Entscheidungserheblichkeit. Demnach ist der Gerichtshof bei Fragen betreffend die Auslegung des EWR-Rechts grundsätzlich zu einer Entscheidung verpflichtet, es sei denn, dass die erbetene Auslegung des EWR-Rechts offensichtlich in keiner Beziehung zum Sachverhalt oder dem Gegenstand des Ausgangsverfahrens steht, wenn das Problem hypothetischer Natur ist oder wenn der Gerichtshof nicht über die tatsächlichen und rechtlichen Angaben verfügt, die für eine zweckdienliche Beantwortung der ihm vorgelegten Fragen erforderlich sind (vgl. Rechtssachen E-13/11 *Granville Establishment*, Urteil vom 25. April 2012, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 20; *Aresbank*, oben erwähnt, Randnr. 44, und E-19/11 *Vín Tríó*, Urteil vom 30. November 2012, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 26).

51 Trotzdem vertritt der Gerichtshof die Auffassung, dass es ihm bei Bedarf zusteht, die Umstände zu beleuchten, unter denen ihm die Rechtssache vom nationalen Gericht vorgelegt wurde, um seine Zuständigkeit zu beurteilen. Die Bereitschaft zur Zusammenarbeit, die in Vorabentscheidungsverfahren herrschen muss, erfordert

the administration of justice in the EEA States and not to give opinions on general or hypothetical questions.

52 It is in the light of that function that the Court finds that it has no jurisdiction to give a preliminary ruling on a question raised before a national court where the interpretation of EEA law has no connection whatever with the circumstances or purpose of the main proceedings (see Case E-6/96 *Wilhelmsen* [1997] EFTA Ct. Rep. 56, paragraphs 39 and 40).

53 According to Article 23(1)(A)(d) of Directive 2002/83, the EEA States may authorise assurance undertakings to cover their technical provisions with assets such as UCITS and other investment funds. In this case, pursuant to Article 24(3), second indent, of Directive 2002/83, UCITS not coordinated within the meaning of Directive 85/611 and other investment funds shall be given more limitative treatment as compared with UCITS coordinated within the meaning of that Directive. Corresponding provisions can be found in Directive 92/96.

54 The referring court and the parties to the proceedings before it agree that the assurance policies in question are unit-linked assurance contracts. Thus, it appears that the benefits provided by the contracts are linked to "other investment funds" within the meaning of Directive 92/96 and Directive 2002/83.

55 Under those circumstances, and without prejudice to the fact that the question of information requirements may arise in other cases concerning assurance policies where the benefits provided by the contracts are not unit-linked but directly linked to share indexes or some other reference other than those mentioned in Article 25(1) of Directive 2002/38 or Article 23(1) of Directive 92/96, the first question appears to be purely hypothetical in the context of the present case.

von Seiten des nationalen Gerichts die Rücksichtnahme auf die dem Gerichtshof übertragenen Aufgabe, nämlich einen Beitrag zur Justizgewährung in den EWR-Staaten zu leisten, und nicht zu allgemeinen oder hypothetischen Fragen Stellung zu nehmen.

52 Angesichts dieser Funktion gelangt der Gerichtshof zu dem Schluss, dass er für eine Vorabentscheidung in einer Frage vor einem nationalen Gericht, bei der die Auslegung des EWR-Rechts in keinerlei Zusammenhang mit den Umständen oder dem Gegenstand des Ausgangsverfahrens steht, nicht zuständig ist (vgl. Rechtssache E-6/96 *Wilhelmsen*, Slg. 1997, 56, Randnrn. 39 und 40).

53 Gemäss Artikel 23 Absatz 1 Buchstabe A Buchstabe d der Richtlinie 2002/83 können es die EWR-Staaten Versicherungsunternehmen gestatten, die versicherungstechnischen Rückstellungen mit Vermögenswerten wie OGAW und anderen gemeinschaftlichen Kapitalanlagen zu bedecken. In diesem Fall werden gemäss Artikel 24 Absatz 3 zweiter Spiegelstrich der Richtlinie 2002/83 nichtkoordinierte OGAW im Sinne der Richtlinie 85/611 und andere gemeinschaftliche Kapitalanlagen einschränkender behandelt als im Sinne dieser Richtlinie koordinierte OGAW. Entsprechende Bestimmungen enthält Richtlinie 92/96.

54 Das vorlegende Gericht und die Parteien des Verfahrens vor diesem Gericht stimmen darin überein, dass es sich bei den gegenständlichen Versicherungspolicen um fondsgebundene Versicherungsverträge handelt. Es scheint daher, dass die aus den Verträgen erwachsenden Leistungen an „andere gemeinschaftliche Kapitalanlagen“ im Sinne der Richtlinie 92/96 und der Richtlinie 2002/83 gebunden sind.

55 Unter diesen Umständen und unbeschadet der Tatsache, dass sich die Frage der Informationspflichten in anderen Fällen in Bezug auf Versicherungspolicen stellen kann, bei denen die aus den Verträgen erwachsenden Leistungen nicht an Fonds, sondern unmittelbar an Aktienindizes oder andere Bezugswerte als die in Artikel 25 Absatz 1 der Richtlinie 2002/38 oder Artikel 23 Absatz 1 der Richtlinie 92/96 genannten gebunden sind, erscheint die erste Frage im Rahmen der gegenständlichen Rechtssache rein hypothetisch.

56 It is thus not necessary to provide an answer to the first question for the national court to be able to render its judgment. Without prejudice to the second question, the first question must be regarded as inadmissible.

General remarks concerning Questions 2 and 3

57 By Question 2.1, the referring court asks, in essence, whether Directive 92/96 and Directive 2002/83 must be interpreted as obliging assurance undertakings to provide policy holders with advice or whether it suffices simply to communicate to them the details set out in Annex II to Directive 92/96 and Annex III to Directive 2002/83. By Questions 2.2 and 2.3, the referring court also asks whether points a11 and a12 in Annex II(A) to Directive 92/96 and Annex III(A) to Directive 2002/83 are to be interpreted as requiring further information from the undertaking to the policy holder in addition to the securities identification number of the financial instrument to which the assurance is linked.

58 By Question 3, the referring court essentially asks whether it suffices that the information listed in Annex II(A) to Directive 92/96 and Annex III(A) to Directive 2002/83 is communicated to the policy holder by an insurance intermediary or whether the information must be communicated directly by the assurance company to the policy holder.

59 The referring court refers to a judgment of 10 February 2012 of the Liechtenstein Supreme Court, from which it follows that an obligation to provide advice exists under Liechtenstein law. The plaintiffs also make reference to this judgment, whereas the defendant contends that the judgment was set aside by judgment of the Liechtenstein Constitutional Court (*Staatsgerichtshof*) of 10 December 2012. In the plaintiffs' view, however, the grounds on which the judgment of 10 February 2012 was set aside are not relevant to the present proceedings and that, consequently, the judgment remains relevant in the case at hand.

56 Damit das nationale Gericht sein Urteil fällen kann, ist es daher nicht nötig, die erste Frage zu beantworten. Die erste Frage ist daher unbeschadet der zweiten Frage als unzulässig zu betrachten.

Allgemeine Bemerkungen zu den Fragen 2 und 3

57 Mit Frage 2.1 möchte das vorlegende Gericht wissen, ob Richtlinie 92/96 und Richtlinie 2002/83 dahingehend auszulegen sind, dass sie Versicherungsunternehmen zur Beratung von Versicherungsnehmern verpflichten, oder ob die blosse Mitteilung der in Anhang II der Richtlinie 92/96 und Anhang III der Richtlinie 2002/83 aufgeführten Angaben ausreicht. Mit den Fragen 2.2 und 2.3 will das vorlegende Gericht darüber hinaus in Erfahrung bringen, ob die Punkte a.11 und a.12 in Anhang II Buchstabe A der Richtlinie 92/96 und Anhang III Buchstabe A der Richtlinie 2002/83 so auszulegen sind, dass das Versicherungsunternehmen dem Versicherungsnehmer über die Wertpapierkennnummer des Finanzinstruments, an welches die Versicherung gebunden ist, hinausgehende Informationen mitteilen muss.

58 Mit Frage 3 möchte das vorlegende Gericht wissen, ob es genügt, dass die in Anhang II Buchstabe A der Richtlinie 92/96 und Anhang III Buchstabe A der Richtlinie 2002/83 aufgeführten Angaben dem Versicherungsnehmer von einem Versicherungsvermittler mitgeteilt werden, oder ob diese Angaben dem Versicherungsnehmer unmittelbar vom Versicherungsunternehmen mitgeteilt werden müssen.

59 Das vorlegende Gericht verweist auf ein Urteil des Obersten Gerichtshofs des Fürstentums Liechtenstein vom 10. Februar 2012, aus dem hervorgeht, dass das liechtensteinische Recht eine Beratungspflicht vorsieht. Auch die Kläger beziehen sich auf dieses Urteil, wobei die Beklagte festhält, dass dieses Urteil mittels Urteil des Staatsgerichtshofs des Fürstentums Liechtenstein vom 10. Dezember 2012 aufgehoben wurde. Nach Auffassung der Kläger sind die Gründe, aus welchen das Urteil vom 10. Februar 2012 aufgehoben wurde, für das gegenständliche Verfahren jedoch nicht massgeblich, sodass das Urteil für die vorliegende Sache relevant bleibt.

60 It is not for the Court to rule on the interpretation of national law, that being exclusively for the national court.

61 However, according to 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 interpretation of elements of EEA law to decide the cases before them (see Case E-10/12 *Harðarson*, judgment of 23 March 2013, not yet reported, paragraph 37, and case law cited).

62 Directive 92/96 and Directive 2002/83 aim at protecting consumers through choice based on information. This approach is reflected in recital 23 in the preamble to Directive 92/96 and recital 52 in the preamble to Directive 2002/83, which state that if consumers are to profit fully from wider and more varied choice of contracts, they must be provided with whatever information is necessary to enable them to choose the contract best suited to their needs (see Case E-1/05 *ESA* v *Norway* [2005] EFTA Ct. Rep. 234, paragraph 42).

63 In that regard, the Court notes that the average consumer, i.e. a consumer who is reasonably well informed and reasonably observant and circumspect, must be taken into consideration when interpreting Directive 92/96 and Directive 2002/83. Life assurance contracts are in general of a complex nature the details of which may be difficult to understand for the average consumer. Moreover, such contracts may involve considerable financial commitments for consumers over a long period of time. This underlines the importance of clear information to consumers when entering into life assurance contracts (see *ESA* v *Norway*, cited above, paragraph 41).

60 Die Auslegung des nationalen Rechts obliegt nicht dem Gerichtshof; dies ist ausschliesslich Aufgabe des nationalen Gerichts.

61 Gemäss der ständigen Rechtsprechung sieht Artikel 34 ÜGA allerdings eine besondere Möglichkeit der gerichtlichen Zusammenarbeit zwischen dem Gerichtshof und den nationalen Gerichten vor, deren Ziel darin besteht, für die nationalen Gerichte die erforderliche Auslegung von Elementen des EWR-Rechts vorzunehmen, damit diese die vor ihnen anhängigen Rechtssachen entscheiden können (vgl. Rechtssache E-10/12 *Harðarson*, Urteil vom 23. März 2013, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 37, und die dort zitierte Rechtsprechung).

62 Ziel der Richtlinie 92/96 und der Richtlinie 2002/83 ist es, den Verbraucher dadurch zu schützen, dass dieser im Besitz der notwendigen Informationen ist, wenn er seine Wahl trifft. Dieser Ansatz spiegelt sich in Erwägungsgrund 23 der Präambel der Richtlinie 92/96 und in Erwägungsgrund 52 der Präambel der Richtlinie 2002/83 wieder, wo es heisst, dass der Verbraucher, um die grössere und weiter gefächerte Auswahl von Verträgen voll zu nutzen, im Besitz der notwendigen Informationen sein muss, um den seinen Bedürfnissen am ehesten entsprechenden Vertrag auszuwählen (vgl. Rechtssache E-1/05 *EFTA-Überwachungsbehörde ./. Norwegen,* Slg. 2005, 234, Randnr. 42).

63 In diesem Zusammenhang merkt der Gerichtshof an, dass zur Auslegung der Richtlinie 92/96 und der Richtlinie 2002/83 ein Durchschnittsverbraucher heranzuziehen ist, der normal informiert und angemessen aufmerksam und verständig ist. Lebensversicherungsverträge sind in der Regel komplex und deren Einzelheiten können für den Durchschnittsverbraucher schwierig zu verstehen sein. Zudem können solche Verträge für Verbraucher eine erhebliche finanzielle Verpflichtung über einen langen Zeitraum darstellen. Dies verdeutlicht die Bedeutung klarer Informationen für die Verbraucher beim Abschluss von Lebensversicherungsverträgen (vgl. *EFTA*-Überwachungsbehörde *./. Norwegen*, oben erwähnt, Randnr. 41).

64 It is apparent from recital 23 in the preamble to Directive 92/96 and recital 52 in the preamble to Directive 2002/83 that the directives seek, *inter alia*, to coordinate the minimum provisions in order for the consumer to receive clear and accurate information on the essential characteristics of assurance products offered to him. As is pointed out in the same recital, if he/she is to profit fully from the greater choice and diversity in the single market for assurance, and from increased competition, the consumer must be provided with whatever information is necessary to enable him to choose the contract which best meets his requirements (see, for comparison, Case C-386/00 *Axa Royale Belge* [2002] ECR I-2209, paragraph 20).

65 Moreover, it must also be recalled that the legislature intended, by Article 31 of Directive 92/96 and Article 36 of Directive 2002/83, to delimit the type of information which EEA States may require assurance undertakings to provide in the interest of consumers, in order not to restrict unduly the choice of assurance products offered in the single market for assurance (see, for comparison, *Axa Royale Belge*, cited above, paragraph 23).

66 It is in the light of these considerations that the Court will answer the remaining questions posed by the national court.

Question 2.1 – Obligation to provide advice

67 By Question 2.1 the national court wishes to know whether Directive 92/96 and Directive 2002/83 are to be interpreted such that they require the assurance undertakings to provide advice.

68 With regard to the question whether Directive 92/96 and Directive 2002/83 must be interpreted as obliging assurance undertakings to provide policy holders with advice, it must be recalled, first, that Article 31(1) of Directive 92/96 and Article 36(1) of Directive 2002/83 provide that before the assurance

64 Aus Erwägungsgrund 23 der Präambel der Richtlinie 92/96 und Erwägungsgrund 52 der Präambel der Richtlinie 2002/83 geht hervor, dass mit den Richtlinien u. a. die Mindestvorschriften koordiniert werden sollen, damit der Verbraucher klare und genaue Angaben über die wesentlichen Merkmale der ihm angebotenen Produkte erhält. Wenn der Verbraucher, wie im selben Erwägungsgrund ausgeführt, die grössere Auswahl und Vielfalt auf dem einheitlichen Versicherungsmarkt und den verstärkten Wettbewerb voll nutzen zu können, muss er im Besitz der notwendigen Informationen sein, um den seinen Bedürfnissen am ehesten entsprechenden Vertrag auswählen zu können (vgl. entsprechend Rechtssache C-386/00 *Axa Royale Belge,* Slg. 2002, S. I-2209, Randnr. 20).

65 Zudem ist auch daran zu erinnern, dass der Gesetzgeber mit Artikel 31 der Richtlinie 92/96 und Artikel 36 der Richtlinie 2002/83 die Art der Angaben, deren Bereitstellung die EWR-Staaten im Interesse der Verbraucher von den Versicherungsunternehmen verlangen können, beschränken wollte, um zu verhindern, dass die Auswahl der im Rahmen des einheitlichen Versicherungsmarkts angebotenen Versicherungsprodukte ungerechtfertigt eingeschränkt wird (vgl. entsprechend *Axa Royale Belge*, oben erwähnt, Randnr. 23).

66 Der Gerichtshof wird die verbleibenden Fragen des nationalen Gerichts vor dem Hintergrund dieser Überlegungen beantworten.

Frage 2.1 – Informationspflicht

67 Mit Frage 2.1 möchte das nationale Gericht klären, ob Richtlinie 92/96 und Richtlinie 2002/83 so auszulegen sind, dass Versicherungsunternehmen zur Beratung verpflichtet sind.

68 Im Zusammenhang mit der Frage, ob Richtlinie 92/96 und Richtlinie 2002/83 so auszulegen sind, dass Versicherungsunternehmen zur Beratung von Versicherungsnehmern verpflichtet sind, ist erstens darauf hinzuweisen, dass Artikel 31 Absatz 1 der Richtlinie 92/96 und Artikel 36 Absatz 1 der Richtlinie 2002/83

contract is concluded, at least the information listed in Annex II(A) and Annex III(A), respectively, shall be communicated to the policy holder before the contract is concluded. According to the introductory paragraph of the relevant annex, this information must be provided in writing in a clear and accurate manner and in an official language of the EEA State of the commitment.

69 Second, even though life assurance contracts are in general of a complex nature the details of which may be difficult to understand for the average consumer, Directive 92/96 and Directive 2002/83 only require the information listed to be communicated to the policy holder. The directives do not impose any obligation on the assurance undertaking to provide advice.

70 Third, Article 31 of Directive 92/96 and Article 36 of Directive 2002/83 and Annex II(A) and Annex III(A), respectively, show that the legislature considered the information required pursuant to these provisions sufficient to protect the average consumer before the contract is concluded. According to those provisions, when the listed information is communicated to the consumer before the contract is concluded, he/she will be able to compare the essential elements of a contract – and then to choose the contract best suited to his needs. This is confirmed by the fact that, pursuant to Article 31(3) of Directive 92/96 and Article 36(3) of Directive 2002/38, the EEA State of commitment may require additional information in addition to that listed in the annexes only where it is necessary for a proper understanding by the policy holder of the essential elements of the commitment (see, for comparison, *Axa Royale Belge*, cited above, paragraphs 22 and 23).

71 Fourth, as ESA, the Liechtenstein Government and the Commission have correctly observed, the obligation in Directive 92/96 and Directive 2002/83 to communicate to the policy holder the relevant information must be distinguished from the

vorsehen, dass dem Versicherungsnehmer vor dem Abschluss des Versicherungsvertrags mindestens die in Anhang II Buchstabe A bzw. Anhang III Buchstabe A aufgeführten Angaben mitzuteilen sind. Dem einleitenden Absatz des entsprechenden Anhangs zufolge sind diese Informationen eindeutig und detailliert schriftlich in einer Amtssprache des EWR-Staats der Verpflichtung abzufassen.

69 Zweitens sind gemäss Richtlinie 92/96 und Richtlinie 2002/83 dem Versicherungsnehmer nur die aufgeführten Angaben mitzuteilen, obwohl Lebensversicherungsverträge in der Regel komplex sind und deren Einzelheiten für den Durchschnittsverbraucher schwierig zu verstehen sein können. Die Richtlinien erlegen dem Versicherungsunternehmen keinerlei Verpflichtung zur Beratung auf.

70 Drittens ergibt sich aus Artikel 31 der Richtlinie 92/96 und Artikel 36 der Richtlinie 2002/83 bzw. Anhang II Buchstabe A und Anhang III Buchstabe A, dass der Gesetzgeber die gemäss diesen Bestimmungen verlangten Informationen zum Schutz des Durchschnittsverbrauchers vor Abschluss des Vertrags als ausreichend erachtete. Nach diesen Bestimmungen wird der Verbraucher bei Mitteilung der aufgeführten Angaben vor Abschluss des Vertrags in die Lage versetzt, die wesentlichen Elemente eines Vertrags zu vergleichen und anschliessend den seinen Bedürfnissen am ehesten entsprechenden Vertrag auszuwählen. Dies wird durch die Tatsache untermauert, dass der EWR-Staat der Verpflichtung gemäss Artikel 31 Absatz 3 der Richtlinie 92/96 und Artikel 36 Absatz 3 der Richtlinie 2002/38 nur dann die Vorlage von Angaben zusätzlich zu den in den Anhängen genannten Auskünften verlangen kann, wenn diese für das tatsächliche Verständnis der wesentlichen Bestandteile der Verpflichtung durch den Versicherungsnehmer notwendig sind (vgl. entsprechend *Axa Royale Belge*, oben erwähnt, Randnrn. 22 und 23).

71 Viertens ist, wie die EFTA-Überwachungsbehörde, die Regierung des Fürstentums Liechtenstein und die Kommission richtig bemerkt haben, die Verpflichtung nach Richtlinie 92/96 und Richtlinie 2002/83, dem Versicherungsnehmer die entsprechenden Angaben mitzuteilen, von der ausdrücklichen

express obligation of independent insurance intermediaries to provide advice based on a fair analysis pursuant to Articles 12(1)(c)(i) and 12(2) of Directive 2002/92.

72 As a result, it must be held that Directive 92/96 and Directive 2002/83 do not require an assurance undertaking to provide advice to the policy holder.

73 This interpretation is supported by the wording of Article 4 of Directive 90/619 and Article 32 of Directive 2002/83, which provide that the law applicable to contracts relating to the activities referred to in the directives shall be the law of the EEA State of commitment.

74 This interpretation is further supported by Article 12(5) of Directive 2002/92, which provides that EEA States may maintain or adopt stricter provisions regarding the information requirements concerning insurance intermediaries, provided that such provisions comply with EEA law.

75 However, Directives 92/96 and 2002/83 do not preclude the national courts of the EEA States from establishing an obligation under national law to provide advice to consumers before a contract is concluded, provided that this obligation does not affect the effectiveness of those directives.

76 Where EEA law does not preclude or limit the application of national contract law in a field otherwise coordinated or harmonised by a directive (see paragraph 64 above), that must also be the case for the application of general principles of national contract law, as long as this application of national law does not affect the effectiveness of the directives concerned.

77 As a result, without prejudice to other provisions, and as long as their effectiveness is not affected, Directive 92/96 and Directive 2002/83 do not prevent the EEA States from applying general principles of national contract law to establish an

Verpflichtung selbständiger Versicherungsvermittler, sich laut Artikel 12 Absatz 1 Buchstabe c Ziffer i und Artikel 12 Absatz 2 der Richtlinie 2002/92 bei der Beratung auf eine ausgewogene Untersuchung zu stützen, abzugrenzen.

72 Infolgedessen ist festzustellen, dass Richtlinie 92/96 und Richtlinie 2002/83 ein Versicherungsunternehmen nicht zur Beratung eines Versicherungsnehmers verpflichten.

73 Diese Auslegung wird durch den Wortlaut von Artikel 4 der Richtlinie 90/619 und Artikel 32 der Richtlinie 2002/83 gestützt, nach denen das Recht, das auf die Verträge über die in den Richtlinien genannten Tätigkeiten anwendbar ist, das Recht des EWR-Staats der Verpflichtung ist.

74 Weiter untermauert wird diese Auslegung durch Artikel 12 Absatz 5 der Richtlinie 2002/92, nach dem die EWR-Staaten hinsichtlich der zu erteilenden Auskünfte in Bezug auf Versicherungsvermittler strengere Vorschriften beibehalten oder erlassen können, sofern sie mit dem EWR-Recht vereinbar sind.

75 Die Richtlinien 92/96 und 2002/83 stehen der Errichtung einer Verpflichtung, Verbraucher vor dem Abschluss eines Vertrags zu beraten, nach nationalem Recht durch die nationalen Gerichte der EWR-Staaten nicht entgegen, sofern eine solche Verpflichtung die Wirksamkeit dieser Richtlinien nicht beeinträchtigt.

76 Wenn das EWR-Recht die Anwendung von nationalem Vertragsrecht in einem ansonsten durch eine Richtlinie koordinierten oder harmonisierten Bereich nicht ausschliesst oder einschränkt (vgl. Randnr. 64 oben), muss dies auch für die Anwendung allgemeiner Grundsätze des nationalen Vertragsrechts gelten, soweit diese Anwendung von nationalem Recht die Wirksamkeit der betreffenden Richtlinien nicht beeinträchtigt.

77 Infolgedessen stehen Richtlinie 92/96 und Richtlinie 2002/83, unbeschadet anderweitiger Bestimmungen und solange ihre Wirksamkeit nicht berührt wird, der Anwendung allgemeiner Grundsätze des nationalen Vertragsrechts zur Schaffung einer Beratungsverpflichtung betreffend komplexe Finanzinstrumente

obligation to provide advice concerning complex financial instruments, such as life assurance, sold to consumers (for a recent example concerning life assurance, see the judgment of the German Federal Court of Justice (*Bundesgerichtshof*) of 11 July 2012, IV ZR 271/10).

78 The answer to Question 2.1 must therefore be as follows:

Directives 92/96 and 2002/83 are to be interpreted as meaning that they do not require the assurance undertaking to provide advice to the policy holder before the contract is concluded.

Questions 2.2 and 2.3 – Interpretation of point a11 and a12 of Annex II(A) to Directive 92/96 and Annex III(A) to Directive 2002/83

79 By Questions 2.2 and 2.3 the referring court essentially asks whether points a11 and a12 of Annex II(A) to Directive 92/96 and Annex III(A) to Directive 2002/83 are to be interpreted such that provision of the securities identification number by the assurance undertaking suffices to fulfil those requirements.

80 The Court recalls that the general considerations underlying the directives concerned which have been presented above in paragraphs 62 to 65 must also form the point of departure for the answer to this question.

81 The two points to which the national court refers are intended to regulate two different aspects.

82 According to point a11, for unit-linked policies, the information communicated to a policy holder before the contract is concluded must contain a definition of the units to which the benefits are linked.

83 According to point a12, for unit-linked policies, the information communicated to a policy holder before the contract is concluded must contain an indication of the nature of the underlying assets.

wie Lebensversicherungen beim Verkauf an Verbraucher durch die EWR-Staaten nicht entgegen (für ein aktuelles Beispiel aus dem Lebensversicherungsbereich vgl. das Urteil des Deutschen Bundesgerichtshofs vom 11. Juli 2012, IV ZR 271/10).

78 Die Antwort auf Frage 2.1 muss daher folgendermassen lauten:

Die Richtlinien 92/96 und 2002/83 sind dahingehend auszulegen, dass das Versicherungsunternehmen vor Abschluss des Vertrags nicht zur Beratung des Versicherungsnehmers verpflichtet ist.

Fragen 2.2 und 2.3 – Auslegung der Punkte a.11 und a.12 von Anhang II Buchstabe A der Richtlinie 92/96 und Anhang III Buchstabe A der Richtlinie 2002/83

79 Mit den Fragen 2.2 und 2.3 möchte das vorlegende Gericht wissen, ob die Punkte a.11 und a.12 in Anhang II Buchstabe A der Richtlinie 92/96 und Anhang III Buchstabe A der Richtlinie 2002/83 so auszulegen sind, dass die Mitteilung der Wertpapierkennnummer durch das Versicherungsunternehmen zur Erfüllung dieser Anforderungen genügt.

80 Der Gerichtshof erinnert daran, dass die den Richtlinien zugrunde liegenden allgemeinen Überlegungen, die in den Randnrn. 62 bis 65 dargelegt wurden, auch den Ausgangspunkt zur Beantwortung dieser Frage bilden müssen.

81 Die zwei Punkte, auf die sich das nationale Gericht bezieht, dienen zur Regelung zweier unterschiedlicher Aspekte.

82 Gemäss Punkt a.11 müssen die dem Versicherungsnehmer vor Abschluss des Vertrags mitgeteilten Informationen bei fondsgebundenen Policen eine Angabe der Fonds (in Rechnungseinheiten), an die die Leistungen gekoppelt sind, enthalten.

83 Gemäss Punkt a.12 müssen die dem Versicherungsnehmer vor Abschluss des Vertrags mitgeteilten Informationen eine Angabe der Art der den fondsgebundenen Policen zugrunde liegenden Vermögenswerte enthalten.

84 The international securities identification number (ISIN/WKN) is a combination of numbers and letters used to identify transferable securities (financial instruments). It follows from the information submitted by the national court that details on transferable securities can be found on the Internet by entering the relevant ISIN/WKN into an Internet search engine.

85 However, as has been stated above, the information listed in Annex II(A) to Directive 92/96 and Annex III(A) to Directive 2002/83 required to be communicated to the policy holder before the contract is concluded must be provided in writing in a clear and accurate manner and in an official language of the EEA State of the commitment.

86 It must be recalled that the list in Annex II(A) to Directive 92/96 and Annex III(A) to Directive 2002/83 specifies information which must be provided to the policy holder, the underlying purpose of which is to ensure the protection of consumers. That information is precise and objective and is intended to enable the policy holder to choose from amongst the available products the one best suited to his/her requirements and also to assess the policy in practical terms (see, for comparison, *Axa Royale Belge*, cited above, paragraph 29).

87 As pointed out above, points a11 and a12 require that, for unit-linked policies, the definition of the units to which the benefits are linked and an indication of the nature of the underlying assets be communicated to the policy holder.

88 In order to ensure the effectiveness of Directive 92/96 and Directive 2002/83, the information communicated to the policy holder pursuant to Annex II(A) to Directive 92/96 and Annex III(A) to Directive 2002/83 must be complete. Only if the

84 Bei der Wertpapierkennnummer (WKN/ISIN) handelt es sich um eine Ziffern- und Buchstabenkombination zur Identifizierung von Wertpapieren (Finanzinstrumenten). Den vom nationalen Gericht übermittelten Informationen ist zu entnehmen, dass genauere Angaben über Wertpapiere durch Eingabe der entsprechenden WKN/ISIN über eine Internet-Suchmaschine im Internet gefunden werden können.

85 Wie jedoch oben ausgeführt wurde, müssen die gemäss Anhang II Buchstabe A der Richtlinie 92/96 und Anhang III Buchstabe A der Richtlinie 2002/83 mitzuteilenden Informationen dem Versicherungsnehmer vor Abschluss des Vertrags eindeutig und detailliert schriftlich und in einer Amtssprache des EWR-Staats der Verpflichtung übermittelt werden.

86 Es ist darauf hinzuweisen, dass in der Aufstellung in Anhang II Buchstabe A der Richtlinie 92/96 und Anhang III Buchstabe A der Richtlinie 2002/83 Informationen aufgeführt sind, die dem Versicherungsnehmer mitzuteilen sind, wobei der Zweck dieser Vorgehensweise im Schutz der Verbraucher besteht. Bei diesen Informationen handelt es sich um genaue und objektive Angaben, die es dem Versicherungsnehmer ermöglichen sollen, zum einen unter den verschiedenen Produkten dasjenige auszuwählen, das seinen Bedürfnissen am ehesten entspricht, als auch die Police konkret einzuschätzen (vgl. entsprechend *Axa Royale Belge*, oben erwähnt, Randnr. 29).

87 Wie oben erläutert, verlangen die Punkte a.11 und a.12, dass für fondsgebundene Policen dem Versicherungsnehmer eine Angabe der Fonds (in Rechnungseinheiten), an die die Leistungen gekoppelt sind, und eine Angabe der Art der den fondsgebundenen Policen zugrundeliegenden Vermögenswerte mitgeteilt wird.

88 Zur Gewährleistung der Wirksamkeit der Richtlinie 92/96 und der Richtlinie 2002/83 müssen die dem Versicherungsnehmer gemäss Anhang II Buchstabe A der Richtlinie 92/96 und Anhang III Buchstabe A der Richtlinie 2002/83 mitgeteilten Informationen vollständig sein. Nur wenn die dem

information communicated to the policy holder covers all the points in the annexes will he/she get a clear picture of the units to which the assurance policy contract is linked, thus enabling him to choose from amongst the available products the one best suited to his/her requirements and also to assess the policy in practical terms.

89 As a result, where any part of the information listed in Annex II(A) to Directive 92/96 and Annex III(A) to Directive 2002/83 has not been provided to the policy holder before the contract is concluded, such contract is not concluded in accordance with the requirements of the relevant directive.

90 In order to determine whether an assurance undertaking has provided complete information to a policy holder, it is therefore necessary to consider whether the information provided satisfies the requirements of Annex II(A) to Directive 92/96 and Annex III(A) to Directive 2002/83.

91 It is for the national court to determine whether those requirements are met and, if not, to draw the necessary conclusions in order to ensure the effectiveness of the relevant directive.

92 However, when giving an advisory opinion, the Court may, where appropriate, provide clarification designed to give the national court guidance in its interpretation.

93 The directives concerned do not specify at what time before the contract is concluded that the information must be submitted to the policy holder. Normally, such information is made available to the policy holder before the contract is concluded through the information about the commitment, provided, for example, in a prospectus or other information materials.

94 According to Article 4 of Directive 90/619 and Article 32 of Directive 2002/83, the law applicable to contracts relating to the

Versicherungsnehmer mitgeteilten Informationen alle Punkte der Anhänge abdecken, kann sich der Versicherungsnehmer ein klares Bild der Fonds machen, an die der Versicherungsvertrag gekoppelt ist. Dies ermöglicht es ihm, unter den verschiedenen Produkten dasjenige auszuwählen, das seinen Bedürfnissen am ehesten entspricht, als auch die Police konkret einzuschätzen.

89 Wird daher ein Teil der in Anhang II Buchstabe A der Richtlinie 92/96 und Anhang III Buchstabe A der Richtlinie 2002/83 angeführten Informationen dem Versicherungsnehmer nicht vor Abschluss des Vertrags mitgeteilt, ist dieser Vertrag nicht entsprechend den Anforderungen der massgeblichen Richtlinie abgeschlossen.

90 Um zu ermitteln, ob ein Versicherungsunternehmen einem Versicherungsnehmer vollständige Informationen mitgeteilt hat, muss daher geprüft werden, ob die mitgeteilten Informationen die Anforderungen von Anhang II Buchstabe A der Richtlinie 92/96 und Anhang III Buchstabe A der Richtlinie 2002/83 erfüllen.

91 Es obliegt dem nationalen Gericht, festzustellen, ob diese Anforderungen erfüllt sind und, wenn dies nicht der Fall ist, die erforderlichen Schlussfolgerungen zu ziehen, um die Wirksamkeit der entsprechenden Richtlinie zu gewährleisten.

92 Im Rahmen einer Vorabentscheidung kann sich der Gerichtshof jedoch gegebenenfalls klärend äussern, um dem nationalen Gericht eine Hilfestellung bei seiner Auslegung zu geben.

93 In den betreffenden Richtlinien ist nicht spezifiziert, zu welchem Zeitpunkt vor Abschluss des Vertrags die Informationen dem Versicherungsnehmer mitzuteilen sind. In der Regel werden derartige Informationen für den Versicherungsnehmer vor Abschluss des Vertrags in Form von Angaben über die Verpflichtung, die beispielsweise in einem Prospekt oder anderem Informationsmaterial enthalten sind, verfügbar gemacht.

94 Gemäss Artikel 4 der Richtlinie 90/619 und Artikel 32 der Richtlinie 2002/83 ist das Recht, das auf die Verträge über die in

activities referred to in the relevant directive shall be the law of the EEA State of the commitment.

95 It appears from the reference as well as the oral submissions by the parties before the national court that the life assurance contracts are unit-linked (see paragraph 54 above). The referring court has limited its question to whether the communication of the international securities identification number (ISIN/WKN) of the units to which the benefits are linked can be held to satisfy the requirements of both points a11 and a12 of Annex II(A) to Directive 92/96 and Annex III(A) to Directive 2002/83.

96 First, the written information must be communicated to the policy holder. This means that it cannot be deemed sufficient that the policy holder is asked to use a search engine on the Internet to find and access the necessary information (see, by analogy, Case E-4/09 *Inconsult* [2009-2010] EFTA Ct. Rep. 86, and for comparison, Case C-49/11 *Content Services*, judgment of 5 July 2012, not yet reported, paragraph 37).

97 Second, in order to satisfy the requirement set out in point a11, the written information communicated to the policy holder before the contract is concluded must provide, in a clear and accurate manner, the definition of the units to which the benefits are linked. The policy holder must be able, on the basis of this information, to clearly identify the units which are linked to the assurance policy.

98 In the light of the wording of point a11 of Annex II(A) of Directive 92/96 and Annex III(A) of Directive 2002/83, which only requires a definition of the units to which the benefits are linked, an ISIN/WKN suffices to define the units to which the life assurance is

der entsprechenden Richtlinie genannten Tätigkeiten anwendbar ist, das Recht des EWR-Staats der Verpflichtung.

95 Aus dem Ersuchen um Vorabentscheidung sowie aus den mündlichen Stellungnahmen der Parteien vor dem nationalen Gericht geht hervor, dass die Lebensversicherungsverträge fondsgebunden sind (vgl. Randnr. 54 oben). Das vorlegende Gericht hat seine Frage darauf beschränkt, ob die Mitteilung der Wertpapierkennnummer (WKN/ISIN) der Fonds, an die die Leistungen gekoppelt sind, als genügend angesehen werden kann, um die Anforderungen der Punkte a.11 und a.12 von Anhang II Buchstabe A der Richtlinie 92/96 und Anhang III Buchstabe A der Richtlinie 2002/83 zu erfüllen.

96 Erstens müssen dem Versicherungsnehmer diese Informationen schriftlich mitgeteilt werden. Dementsprechend kann es nicht als ausreichend angesehen werden, dass der Versicherungsnehmer aufgefordert wird, die benötigten Informationen mit Hilfe einer Suchmaschine im Internet zu suchen und darauf zuzugreifen (vgl. sinngemäss Rechtssache E-4/09 *Inconsult,* Slg. 2009-2010, 86, und entsprechend Rechtssache C-49/11 *Content Services*, Urteil vom 5. Juli 2012, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 37).

97 Zweitens müssen die dem Versicherungsnehmer vor Abschluss des Vertrags mitgeteilten schriftlichen Informationen, um der Anforderung gemäss Punkt a.11 zu entsprechen, in eindeutiger und detaillierter Form die Angabe der Fonds (in Rechnungseinheiten), an die die Leistungen gekoppelt sind, enthalten. Der Versicherungsnehmer muss auf der Grundlage dieser Informationen in der Lage sein, die Fonds, an die die Versicherungspolice gekoppelt ist, eindeutig zu identifizieren.

98 Angesichts des Wortlauts von Punkt a.11 von Anhang II Buchstabe A der Richtlinie 92/96 und Anhang III Buchstabe A der Richtlinie 2002/83, der nur eine Angabe der Fonds (in Rechnungseinheiten), an die die Leistungen gekoppelt sind, verlangt, genügt eine WKN/ISIN zur Angabe der Fonds, an die

linked, if the assurance is linked to that financial instrument alone. If the life assurance contract is linked to more than one instrument, each one must be defined in the information communicated to the policy holder.

99 It is for the national court, in the light of all the relevant circumstances of the case before it, to determine whether the written information was communicated to the policy holder before the contract was concluded and whether the information is sufficient to define the units to which the benefits are linked, such that the prospective policy holder was able to choose the contract best suited to his/her needs.

100 Third, in order to satisfy the requirement set out in point a12, for unit-linked policies, the written information communicated to the policy holder before the contract is concluded must also provide, in a clear and accurate manner, an indication of the nature of the underlying assets. This information must be communicated in addition to the definition of the units, so that the policy holder can determine whether the nature of the underlying assets – for example, the relevant stock exchange, their currency, denominations, form, type, maturity, level of risk and the costs involved in the management of these assets – are suited to his/her needs.

101 Given the purpose of the information related to the nature of the underlying assets, a simple statement of the ISIN/WKN number or the name of the asset underlying the unit-linked policy would normally not suffice to satisfy point a12 of the Directive. However, it is for the national court, in the light of all the relevant circumstances of the case before it, to determine whether the written information was communicated to the policy holder before the contract was concluded and whether it is sufficient to describe the nature of the underlying assets, such that the

die Lebensversicherung gebunden ist, wenn die Versicherung ausschliesslich an dieses Finanzinstrument gekoppelt ist. Ist der Lebensversicherungsvertrag an mehr als ein Instrument gebunden, muss jedes davon in den dem Versicherungsnehmer mitgeteilten Informationen angegeben werden.

99 Es obliegt dem nationalen Gericht, unter Einbeziehung aller relevanten Umstände der vor ihm anhängigen Rechtssache, festzustellen, ob die schriftlichen Informationen dem Versicherungsnehmer vor Abschluss des Vertrags mitgeteilt wurden und ob die Informationen zur Angabe der Fonds (in Rechnungseinheiten), an die die Leistungen gekoppelt sind, ausreichen, sodass der künftige Versicherungsnehmer in der Lage war, den seinen Bedürfnissen am ehesten entsprechenden Vertrag auszuwählen.

100 Drittens müssen die dem Versicherungsnehmer vor Abschluss des Vertrags mitgeteilten schriftlichen Informationen, um der Anforderung gemäss Punkt a.12 für fondsgebundene Policen zu entsprechen, ausserdem in eindeutiger und detaillierter Form eine Angabe der Art der den fondsgebundenen Policen zugrundeliegenden Vermögenswerte enthalten. Diese Informationen müssen zusätzlich zur Angabe der Fonds mitgeteilt werden, damit der Versicherungsnehmer feststellen kann, ob die Art der zugrundeliegenden Vermögenswerte – beispielsweise die entsprechende Börse, Währung, Stückelungen, Form, Typ, Fälligkeit, Risikoträchtigkeit und Kosten für die Vermögensverwaltung – seinen Bedürfnissen entspricht.

101 In Anbetracht des Zwecks der Informationen über die Art der zugrundeliegenden Vermögenswerte wird eine einfache Angabe der WKN/ISIN oder der Bezeichnung des der fondsgebundenen Police zugrundeliegenden Vermögenswerts zur Erfüllung der Vorgaben von Punkt a.12 der Richtlinie in der Regel nicht genügen. Allerdings obliegt es dem nationalen Gericht, unter Einbeziehung aller relevanten Umstände der vor ihm anhängigen Rechtssache, festzustellen, ob die schriftlichen Informationen dem Versicherungsnehmer vor Abschluss des Vertrags mitgeteilt wurden und ob die Informationen zur Beschreibung der Art

prospective policy holder was able to choose the contract best suited to his/her needs.

102 The answer to Questions 2.2 and 2.3 must therefore be as follows:

Article 31 and points a11 and a12 of Annex II(A) of Directive 92/96 and Article 36 and points a11 and a12 of Annex III(A) of Directive 2002/83 must be interpreted as meaning that it is for the national court, in the light of all the relevant circumstances of the case before it, to determine whether the written information communicated to the policy holder before a contract on unit-linked life assurance was concluded is complete, clear and accurate and

– sufficient to define the units to which the benefits are linked, and

– sufficient to describe the nature of the underlying assets,

such that the prospective policy holder was able to choose the contract best suited to his/her needs.

Question 3 – Obligation to communicate the information

103 By Question 3, the referring court essentially asks if it suffices that the information in Annex II to Directive 92/96 and Annex III to Directive 2002/83 is communicated to the policy holder by a third party, for example, an insurance intermediary.

104 Neither Directive 92/96 nor Directive 2002/83 explicitly specifies the persons or undertakings responsible for communicating the information referred to in Article 31 of Directive 92/96 and Article 36 of Directive 2002/83.

der zugrundeliegenden Vermögenswerte ausreichen, sodass der künftige Versicherungsnehmer in der Lage war, den seinen Bedürfnissen am ehesten entsprechenden Vertrag auszuwählen.

102 Die Antwort auf die Fragen 2.2 und 2.3 muss daher folgendermassen lauten:

Artikel 31 und die Punkte a.11 und a.12 des Anhangs II Buchstabe A der Richtlinie 92/96 und Artikel 36 und die Punkte a.11 und a.12 des Anhangs III Buchstabe A der Richtlinie 2002/83 sind dahingehend auszulegen, dass es dem nationalen Gericht obliegt, unter Einbeziehung aller relevanten Umstände der vor ihm anhängigen Rechtssache, festzustellen, ob die dem Versicherungsnehmer vor Abschluss eines Vertrags über eine fondsgebundene Lebensversicherung mitgeteilten schriftlichen Informationen vollständig, eindeutig und detailliert waren und

– zur Angabe der Fonds (in Rechnungseinheiten), an die die Leistungen gekoppelt sind, ausreichen und

– zur Beschreibung der Art der zugrundeliegenden Vermögenswerte ausreichen,

sodass der künftige Versicherungsnehmer in der Lage war, den seinen Bedürfnissen am ehesten entsprechenden Vertrag auszuwählen.

Frage 3 – Verpflichtung zur Mitteilung der Informationen

103 Mit Frage 3 ersucht das vorlegende Gericht im Wesentlichen um Klärung, ob es genügt, dass die in Anhang II der Richtlinie 92/96 und Anhang III der Richtlinie 2002/83 aufgeführten Angaben dem Versicherungsnehmer von einem Dritten, beispielsweise einem Versicherungsvermittler, mitgeteilt werden.

104 Weder in Richtlinie 92/96 noch in Richtlinie 2002/83 werden die für die Mitteilung der Angaben gemäss Artikel 31 der Richtlinie 92/96 und Artikel 36 der Richtlinie 2002/83 zuständigen Personen oder Unternehmen ausdrücklich genannt.

105 As all parties and participants rightly have pointed out, assurance undertakings covered by the directives concerned are required to provide the complete information listed in Annex II(A) and Annex III(A) of the relevant directive. Nevertheless, it may be communicated to the policy holder by a third party such as an insurance intermediary.

106 Since assurance undertakings are the principal undertaking creating, structuring, managing and offering assurance policies, they will have access to the complete information concerning their products.

107 Moreover, incomplete, inaccurate and unclear information from an assurance undertaking prevents the consumer from making an informed choice and also prevents an insurance intermediary from providing fair advice within the meaning of Article 12 of Directive 2002/92, and, in particular, from satisfying the obligations laid down in Article 12(3) of that directive.

108 Therefore, in determining whether the information requirements of Article 31 of Directive 92/96 and Article 36 of Directive 2002/83 are satisfied, it does not matter whether the information was provided directly by the assurance company, or relayed by an insurance intermediary, as long as the information is complete and communicated to the policy holder on the terms set out in those provisions and Annex II and Annex III, respectively, and in accordance with other rules applicable to the communication of information to the policy holder.

109 Thus, as long as the information is complete and communicated to the policy holder on the terms set out in Article 31 of Directive 92/96 and Article 36 of Directive 2002/38, and in accordance with other rules applicable to the communication of information to the policy holder, it suffices that the information listed in Annex II and Annex III, respectively, is communicated to the policy holder by a third party, for example, an insurance intermediary.

105 Wie alle Parteien und Beteiligten zutreffenderweise dargelegt haben, müssen Versicherungsunternehmen, für die die betreffenden Richtlinien gelten, die vollständigen in Anhang II Buchstabe A und Anhang III Buchstabe A der entsprechenden Richtlinie genannten Information bereitstellen. Trotzdem können diese Informationen dem Versicherungsnehmer über einen Dritten wie einen Versicherungsvermittler mitgeteilt werden.

106 Da es sich bei Versicherungsunternehmen um die bei der Schaffung, Strukturierung, Verwaltung und dem Vertrieb von Versicherungspolicen federführenden Einrichtungen handelt, geniessen diese Zugang zu den vollständigen Informationen über ihre Produkte.

107 Zudem halten unvollständige, nicht detaillierte und uneindeutige Informationen eines Versicherungsunternehmens den Verbraucher davon ab, eine fundierte Wahl zu treffen, und machen es auch einem Versicherungsvermittler unmöglich, eine ausgewogene Beratung im Sinne von Artikel 12 der Richtlinie 2002/92 durchzuführen und insbesondere den in Artikel 12 Absatz 3 dieser Richtlinie verankerten Verpflichtungen nachzukommen.

108 Aus diesem Grund ist es zur Feststellung, ob die Informationspflichten nach Artikel 31 der Richtlinie 92/96 und Artikel 36 der Richtlinie 2002/83 erfüllt wurden, unerheblich, ob die Informationen unmittelbar vom Versicherungsunternehmen bereitgestellt oder über einen Versicherungsvermittler weitergegeben wurden, sofern die Informationen vollständig sind und dem Versicherungsnehmer laut den in diesen Bestimmungen festgelegten Vorgaben sowie Anhang II bzw. Anhang III und gemäss anderen auf die Mitteilung von Informationen an den Versicherungsnehmer anwendbaren Vorschriften mitgeteilt werden.

109 Soweit also die Informationen vollständig sind und dem Versicherungsnehmer laut den in Artikel 31 der Richtlinie 92/96 und Artikel 36 der Richtlinie 2002/38 festgelegten Vorgaben sowie gemäss anderen auf die Mitteilung von Informationen an den Versicherungsnehmer anwendbaren Vorschriften mitgeteilt werden, genügt es, wenn die in Anhang II bzw. Anhang III genannten Informationen dem Versicherungsnehmer über einen Dritten, beispielsweise einen Versicherungsvermittler, mitgeteilt werden.

110 The answer to Question 3 must therefore be as follows:

As long as the information is complete and communicated to the policy holder on the terms set out in Article 31 of Directive 92/96 and Article 36 of Directive 2002/38, and in accordance with other rules applicable to the communication of information to the policy holder, it suffices that the information listed in Annex II and Annex III, respectively, is communicated to the policy holder by a third party, for example, an insurance intermediary.

Question 4 – Access to an effective remedy

111 By its fourth question, the referring court essentially asks whether a national rule which provides for an administrative complaint procedure, which is only subject to a regulatory sanction such as the imposition of a fine, withdrawal of license or other similar measure, may constitute a sufficient remedy for the purposes of Directive 92/96 and Directive 2002/83 in cases where the assurance undertaking has failed to satisfy its obligation to inform the policy holder pursuant to Article 31 of Directive 92/96 and Article 36 of Directive 2002/83.

112 More precisely, seemingly on the assumption that a policy holder has a legal right enforceable against the assurance undertaking to receive the information set out in Article 31 of Directive 92/96 and Article 36 of Directive 2002/83, the national court asks if such an administrative complaint procedure is compatible with the principles of equivalence and effectiveness.

113 Article 4 of Directive 90/619 and Article 32 of Directive 2002/83 state that the law applicable to contracts relating to the activities referred to in the relevant directive shall be the law of the EEA State of the commitment. Neither directive requires the EEA States to introduce sanctions for the situation where, in its

110 Die Antwort auf Frage 3 muss daher folgendermassen lauten:

> Sofern die Informationen vollständig sind und dem Versicherungsnehmer laut den in Artikel 31 der Richtlinie 92/96 und Artikel 36 der Richtlinie 2002/38 festgelegten Vorgaben sowie gemäss anderen auf die Mitteilung von Informationen an den Versicherungsnehmer anwendbaren Vorschriften mitgeteilt werden, genügt es, wenn die in Anhang II bzw. Anhang III genannten Informationen dem Versicherungsnehmer über einen Dritten, beispielsweise einen Versicherungsvermittler, mitgeteilt werden.

Frage 4 – Zugang zu einem effektiven Rechtsmittel

111 Mit seiner vierten Frage ersucht das vorlegende Gericht im Wesentlichen um Klärung, ob eine nationale Regelung, die ein verwaltungsrechtliches Beschwerdeverfahren, an welches nur eine aufsichtsbehördliche Sanktion wie die Verhängung einer Geldstrafe, der Entzug der Zulassung oder eine ähnliche Massnahme geknüpft ist, im Sinne der Richtlinien 92/96 und 2002/83 einen ausreichenden Rechtsbehelf für Fälle darstellen kann, in denen das Versicherungsunternehmen seiner Informationspflicht gegenüber dem Versicherungsnehmer gemäss Artikel 31 der Richtlinie 92/96 und Artikel 36 der Richtlinie 2002/83 nicht nachgekommen ist.

112 Genauer fragt das nationale Gericht, anscheinend auf der Grundlage der Annahme, dass ein Versicherungsnehmer einen gegenüber dem Versicherungsunternehmen durchsetzbaren Rechtsanspruch auf den Erhalt der in Artikel 31 der Richtlinie 92/96 und Artikel 36 der Richtlinie 2002/83 angeführten Informationen besitzt, ob ein Verwaltungsbeschwerdeverfahren den Grundsätzen der Äquivalenz und Effektivität genügt.

113 Gemäss Artikel 4 der Richtlinie 90/619 und Artikel 32 der Richtlinie 2002/83 ist das Recht, das auf die Verträge über die in der entsprechenden Richtlinie genannten Tätigkeiten anwendbar ist, das Recht des EWR-Staats der Verpflichtung. Keine der

relations with a consumer, an assurance undertaking infringes a rule of national contract law.

114 It follows from the wording of those provisions that the rules governing an action for the enforcement of contractual obligations relating to activities referred to in Directives 90/916 and 2002/83, seeking, for example, compensation for pecuniary loss, are governed by national law.

115 ESA has correctly assumed that the fourth question should be answered in the light of the principles of equivalence and effectiveness, as established by the Court of Justice of the European Union ("ECJ") under EU law, for the reasons set out below.

116 The Court has repeatedly held that the objective of establishing a dynamic and homogeneous European Economic Area can only be achieved if EEA/EFTA and EU nationals and economic operators enjoy, relying upon EEA law, the same rights in both the EU and EFTA pillars of the EEA (see Cases E-18/11 *Irish Bank*, judgment of 28 September 2012, not yet reported, paragraph 122; E-14/11 *DB Schenker and Others*, judgment of 21 December 2012, not yet reported, paragraph 118; E-3/12 *Jonsson*, judgment of 20 March 2013, not yet reported, paragraph 60; and in relation to the EU see the Opinion of Advocate General Kokott of 21 March 2013 in pending Case C-431/11 *United Kingdom* v *Council*, point 42).

117 Access to justice and effective judicial protection are essential elements in the EEA legal framework (see Case E-2/02 *Bellona* v *ESA* [2003] EFTA Ct. Rep. 52, paragraph 36; and in relation to the EU see Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph

Richtlinien verlangt von den EWR-Staaten die Verhängung von Sanktionen für den Fall, dass ein Versicherungsunternehmen in seiner Beziehung zu einem Verbraucher eine Vorschrift des nationalen Vertragsrechts verletzt.

114 Aus dem Wortlaut dieser Bestimmungen folgt, dass die Regelungen für eine Klage zur Durchsetzung vertraglicher Verpflichtungen im Zusammenhang mit den in Richtlinie 90/916 und Richtlinie 2002/83 genannten Tätigkeiten, die beispielsweise auf eine Entschädigung für finanziellen Verlust gerichtet sein kann, sich nach nationalem Recht richtet.

115 Die EFTA-Überwachungsbehörde ist richtigerweise davon ausgegangen, dass die vierte Frage aus den nachstehend erläuterten Gründen unter Berücksichtigung der vom Gerichtshof der Europäischen Union (im Folgenden: EuGH) im EU-Recht verankerten Grundsätze der Äquivalenz und Effektivität beantwortet werden sollte.

116 Der Gerichtshof hat wiederholt festgestellt, dass das Ziel der Schaffung eines dynamischen und homogenen Europäischen Wirtschaftsraums nur erreicht werden kann, wenn die EWR/EFTA- und EU-Staatsangehörige und Wirtschaftsbeteiligte auf der Grundlage des EWR-Rechts sowohl in der EU- als auch in der EFTA-Säule des EWR gleiche Rechte geniessen (vgl. Rechtssachen E-18/11 *Irish Bank*, Urteil vom 28. September 2012, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 122; E-14/11 *DB Schenker u. a.*, Urteil vom 21. Dezember 2012, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 118; E-3/12 *Jonsson*, Urteil vom 20. März 2013, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 60; in Bezug auf die EU vgl. die Schlussanträge der Generalanwältin Kokott vom 21. März 2013 in der anhängigen Rechtssache C-431/11 *Vereinigtes Königreich* gegen *Rat*, Ziffer 42).

117 Der Zugang zu Gerichten und der wirksame gerichtliche Rechtsschutz sind wesentliche Elemente des Rechtssystems des EWR (vgl. Rechtssache E-2/02 *Bellona* v *ESA*, Slg. 2003, 52, Randnr. 36; in Bezug auf die EU vgl. Rechtssache

37). This can only be achieved if EEA/EFTA and EU nationals and economic operators enjoy equal access to the courts in both the EU and EFTA pillars of the EEA to ensure their rights which they derive from the EEA Agreement.

118 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 (see Case E-2/12 *HOB-vín III*) judgment of 11 December 2012, not yet reported, 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 comes 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).

119 The second is where a directive is implemented pursuant to Article 7 EEA, in which case it shall prevail over national provisions (see Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 38).

120 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 *Aresbank*, cited above, paragraphs 76 and 77).

121 In the absence of EEA rules in the field it is for the domestic legal system of each EEA State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which EFTA and EU citizens and economic operators derive from EEA law whether they are binding pursuant to Article 104 EEA, implemented, or provisionally applicable provided, first, that such rules are no less favourable than those governing

C-432/05 *Unibet,* Slg. 2007, S. I-2271, Randnr. 37). Dies kann nur umgesetzt werden, wenn Staatsangehörige und Wirtschaftsbeteiligte in EWR/EFTA und EU sowohl in der EU- als auch in der EFTA-Säule des EWR gleichen Zugang zu den Gerichten geniessen, um ihre aus dem EWR-Abkommen abgeleiteten Rechte zu wahren.

118 Im Rahmen des EWR-Abkommens gibt es drei Hauptanwendungsfälle, in denen eine Richtlinie Wirkung entfaltet. Es ist dies erstens, wenn ein Beschluss des Gemeinsamen EWR-Ausschusses in Kraft getreten ist, gemäss Artikel 104 EWR-Abkommen bindend wird und umgesetzt werden muss (vgl. *HOB Vín III*, Urteil vom 11. Dezember 2012, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 128). Die Umsetzung muss spätestens zum Zeitpunkt des Ablaufs der Umsetzungsfrist in der EU oder des Inkrafttretens der Entscheidung des Gemeinsamen Ausschusses stattgefunden haben, je nachdem, welcher Zeitpunkt später liegt. Jede spätere Umsetzung stellt eine Verletzung des EWR-Abkommens dar (vgl. Rs. E-6/06 *EFTA*-Überwachungsbehörde ./. *Liechtenstein*, Slg. 2007, 238, Randnr. 19).

119 Der zweite Fall tritt ein, wenn eine Richtlinie gemäss Artikel 7 EWR-Abkommen umgesetzt wird und in der Folge Vorrang gegenüber nationalen Bestimmungen geniesst (vgl. Rechtssache E-1/07 *Strafverfahren gegen A*, Slg. 2007, 246, Randnr. 38).

120 Im dritten Fall wird ein Beschluss des Gemeinsamen EWR-Ausschusses gemäss Artikel 103 EWR-Abkommen vorläufig anwendbar, es sei denn, dass eine Vertragspartei mitteilt, dass eine solche vorläufige Anwendbarkeit nicht möglich ist (vgl. *Aresbank*, oben erwähnt, Randnrn. 76 und 77).

121 Mangels einer einschlägigen EWR-Regelung ist es Sache der innerstaatlichen Rechtsordnung der einzelnen EWR-Staaten, die zuständigen Gerichte und die Ausgestaltung von Verfahren zu bestimmen, die den Schutz der den Bürgern und Wirtschaftsbeteiligten in der EFTA und der EU aus dem EWR-Recht erwachsenden Rechte gewährleisten sollen. Dies gilt unabhängig davon, ob diese Rechte gemäss Artikel 104 EWR-Abkommen

similar domestic actions (principle of equivalence) and, second, that they do not render practically impossible or excessively difficult the exercise of rights conferred by EEA law (principle of effectiveness) (see, *mutatis mutandis*, *Unibet*, cited above, paragraph 43).

122 First, the principle of equivalence requires that the national rule in question be applied without distinction, whether the infringement alleged is of EEA law or national law, where the purpose and cause of action are similar (see, *mutatis mutandis*, Cases C-246/09 *Bulicke* [2010] ECR I-7003, paragraph 26, C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 55 and case law cited, and C-63/08 *Pontin* [2009] ECR I-10467, paragraph 45).

123 In other words, the principle of equivalence extends the general principle of equality to the law of remedies. National procedural law must remain neutral in relation to the origin of the rights invoked, under the conditions set out below.

124 In order to establish whether the principle of equivalence has been complied with in the case in the main proceedings, it is for the national court, which alone has direct knowledge of the procedural rules governing actions in national civil law, to consider the purpose, cause of action and the essential characteristics of allegedly similar domestic actions (see, *mutatis mutandis*, *Bulicke*, cited above, paragraph 28, *Preston and Others*, cited above, paragraph 56, and *Pontin*, cited above, paragraph 45).

125 Moreover, every case in which the question arises as to whether a national provision is less favourable than those concerning similar domestic actions must be analysed by the national court

bindend, umgesetzt oder vorläufig anwendbar sind. Zudem dürfen diese Verfahren nicht weniger günstig gestaltet sein als bei entsprechenden Klagen, die nur innerstaatliches Recht betreffen (Grundsatz der Äquivalenz), und sie dürfen die Ausübung der durch die EWR-Rechtsordnung verliehenen Rechte nicht praktisch unmöglich machen oder übermässig erschweren (Grundsatz der Effektivität) (vgl. sinngemäss *Unibet*, oben erwähnt, Randnr. 43).

122 Zuerst erfordert der Äquivalenzgrundsatz, dass das entsprechende nationale Gesetz in gleicher Weise für Klagen gilt, die auf eine Verletzung des EWR-Rechts gestützt sind, wie für solche, die auf die Verletzung des innerstaatlichen Rechts gestützt sind, sofern diese Klagen einen ähnlichen Gegenstand und Rechtsgrund haben (vgl. sinngemäss Rechtssache C-246/09 *Bulicke,* Slg. 2010, S. I-7003, Randnr. 26, Rechtssache C-78/98 *Preston u. a.,* Slg. 2000, S. I-3201, Randnr. 55 und die zitierte Rechtsprechung, und Rechtsache C-63/08 *Pontin,* Slg. 2009, S. I-10467, Randnr. 45).

123 Anders ausgedrückt, wird der allgemeine Gleichheitsgrundsatz durch den Äquivalenzgrundsatz auf die Rechtsmittelgesetzgebung ausgedehnt. Das nationale Verfahrensrecht muss unter den nachstehend geschilderten Bedingungen gegenüber dem Ursprung der in Anspruch genommenen Rechte neutral bleiben.

124 Um festzustellen, ob der Äquivalenzgrundsatz im Ausgangsverfahren gewahrt ist, hat das nationale Gericht, das allein eine unmittelbare Kenntnis der Verfahrensmodalitäten für Klagen im Bereich des nationalen Zivilrechts besitzt, den Gegenstand, Rechtsgrund und die wesentlichen Merkmale der als vergleichbar dargestellten Klagen des innerstaatlichen Rechts zu prüfen (vgl. sinngemäss *Bulicke*, oben erwähnt, Randnr. 28, *Preston u. a.*, oben erwähnt, Randnr. 56, und *Pontin*, oben erwähnt, Randnr. 45).

125 Zudem ist jeder Fall, in dem sich die Frage stellt, ob eine nationale Verfahrensvorschrift weniger günstig ist als die für vergleichbare Klagen des innerstaatlichen Rechts geltende, unter

by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies (see, *mutatis mutandis*, *Bulicke*, cited above, paragraph 29, *Preston and Others*, cited above, paragraph 61, and *Pontin*, cited above, paragraph 46).

126 In light of the information supplied by the national court, it appears to follow from the general principles of national civil law that compensation for pecuniary loss may be obtained from an assurance undertaking or an insurance intermediary which fails to satisfy its obligation to communicate the information required under national law. The referring court notes that such a claim for compensation for pecuniary loss is based on a civil law right in Liechtenstein.

127 This point has been confirmed by the Liechtenstein Government, which indicates that an action seeking compensation for pecuniary loss is part of the general law of obligations which civil courts have to apply.

128 Finally, it appears from the order for reference that such claims are admitted by the Liechtenstein courts. This also appears to follow from the judgments of 10 February 2012 of the Liechtenstein Supreme Court and of 10 December 2012 of the Liechtenstein Constitutional Court referred to by the referring court and the defendant.

129 If, in the light of this description of the national legislation, the only remedy available in Liechtenstein to a policy holder in the case of a violation by an assurance undertaking of the obligation to communicate information pursuant to points a11 and a12 of Annex II(A) to Directive 92/96 and Annex III(A) to Directive 2002/83 would be an administrative complaint against the assurance undertaking, and which is only subject

Berücksichtigung der Stellung dieser Vorschrift im gesamten Verfahren, des Verfahrensablaufs und der Besonderheiten des Verfahrens vor den verschiedenen nationalen Stellen zu prüfen (vgl. sinngemäss *Bulicke*, oben erwähnt, Randnr. 29, *Preston u. a.*, oben erwähnt, Randnr. 61, und *Pontin*, oben erwähnt, Randnr. 46).

126 Vor dem Hintergrund der vom nationalen Gericht vorgelegten Informationen erscheint es aus den allgemeinen Grundsätzen des nationalen Zivilrechts ableitbar, dass von Versicherungsunternehmen oder Versicherungsvermittlern, die ihrer Verpflichtung zur Mitteilung der nach nationalem Recht erforderlichen Informationen nicht nachgekommen sind, eine Entschädigung für einen finanziellen Verlust erlangt werden kann. Das vorlegende Gericht hält fest, dass eine solche Forderung nach einer Entschädigung für einen finanziellen Verlust auf einem zivilrechtlichen Anspruch in Liechtenstein beruht.

127 Dieser Aspekt wurde von der Regierung des Fürstentums Liechtenstein bestätigt, die darauf hinweist, dass eine Klage zur Erlangung einer Entschädigung für einen finanziellen Verlust Bestandteil des von Zivilgerichten anzuwendenden allgemeinen Schuldrechts ist.

128 Schliesslich geht auch aus dem Antrag auf Vorabentscheidung hervor, dass derartige Forderungen vor den liechtensteinischen Gerichten zulässig sind. Dies ergibt sich auch aus dem Urteil des Obersten Gerichtshofs des Fürstentums Liechtensteins vom 10. Februar 2012 und dem Urteil des Staatsgerichtshofs des Fürstentums Liechtenstein vom 10. Dezember 2012, auf die das vorlegende Gericht und die Beklagte Bezug genommen haben.

129 In Anbetracht dieser Erläuterung der nationalen Gesetzgebung – wenn der einzige einem Versicherungsnehmer zur Verfügung stehende Rechtsbehelf in Liechtenstein bei einer Verletzung der Informationspflicht gemäss den Punkten a.11 und a.12 von Anhang II Buchstabe A der Richtlinie 92/96 und Anhang III Buchstabe A der Richtlinie 2002/83 durch ein Versicherungsunternehmen eine Verwaltungsbeschwerde gegenüber dem Versicherungsunternehmen ist, an die lediglich

to a regulatory sanction, such as the imposition of a fine, withdrawal of license or other similar measure, the situation would be substantially less favourable within the meaning of the principle laid down in paragraph 121 of the present judgment. Such a procedure does not allow for the policy holder to obtain compensation for his/her pecuniary loss from an assurance undertaking or an insurance intermediary which fails to satisfy its obligation to communicate the information required under the directives, even though similar claims on the basis of national law appear permitted under the general law of obligations before the civil courts.

130 It is, however, for the national court to determine what constitutes a comparable domestic action to obtain compensation for pecuniary loss resulting from a failure to comply with the obligation to provide information under the directives. If it transpired that other national remedies that have not been put before the Court were similar to an action for compensation for pecuniary loss resulting from a failure to comply with the obligation to provide information under the directives, it would also be for the referring court to consider whether such actions involved more favourable rules (see, *mutatis mutandis*, *Pontin*, cited above, paragraph 56).

131 Nevertheless, the various aspects of the national rules cannot be examined in isolation but must be placed in their general context. Moreover, such an examination may not be carried out subjectively by reference to circumstances of fact but must involve an objective comparison, in the abstract, of the procedural rules at issue (see, *mutatis mutandis*, *Preston and Others*, cited above, paragraph 62).

132 Second, as regards application of the principle of effectiveness, every case in which the question arises as to whether a national procedural provision makes the application of EEA law impossible

eine aufsichtsbehördlichen Sanktion, wie die Verhängung einer Geldstrafe, Entzug der Zulassung oder eine ähnliche Massnahme, geknüpft ist – wäre die Lage im Sinne des in Randnr. 121 des vorliegenden Urteils beschriebenen Grundsatzes allerdings wesentlich weniger günstig. Ein solches Verfahren erlaubt es dem Versicherungsnehmer nicht, von Versicherungsunternehmen oder Versicherungsvermittlern, die ihrer Verpflichtung zur Mitteilung der erforderlichen Informationen nicht nachkommen, eine Entschädigung für seinen finanziellen Verlust zu erlangen, obwohl derartige Forderungen im allgemeinen Schuldrecht vor den Zivilgerichten zulässig zu sein scheinen.

130 Es ist jedoch Aufgabe des nationalen Gerichts, festzustellen, was als eine vergleichbare Klageart nach nationalem Recht zur Erlangung einer Entschädigung für einen finanziellen Verlust infolge einer Verletzung der aus den Richtlinien resultierenden Informationspflicht darstellt. Sollte sich herausstellen, dass andere nationale Klagearten, die im Verfahren vor dem Gerichtshof nicht erwähnt worden sind, einer Klage auf Entschädigung für einen finanziellen Verlust infolge einer Verletzung der aus den Richtlinien resultierenden Informationspflicht vergleichbar sind, so müsste das vorlegende Gericht ferner prüfen, ob die erstgenannten Klagearten günstigere Modalitäten aufweisen (vgl. sinngemäss *Pontin*, oben erwähnt, Randnr. 56).

131 Nichtsdestotrotz können die unterschiedlichen Aspekte der nationalen Vorschriften nicht getrennt geprüft werden, sondern sind in ihrem allgemeinen Zusammenhang zu sehen. Ausserdem kann diese Prüfung nicht subjektiv nach den Umständen des Einzelfalls erfolgen, sondern muss einen objektiven, abstrakten Vergleich der betreffenden Verfahrensmodalitäten zum Gegenstand haben (vgl. sinngemäss *Preston u. a.*, oben erwähnt, Randnr. 62).

132 Was die Anwendung des Effektivitätsgrundsatzes betrifft, ist jeder Fall, in dem sich die Frage stellt, ob eine nationale Verfahrensvorschrift die Anwendung des EWR-Rechts unmöglich

or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure (see, for comparison, *mutatis mutandis*, *Unibet*, cited above, paragraph 54).

133 Under the administrative complaint procedure, as explained by the national court, a policy holder can lodge an administrative complaint before the national supervisory authority that an assurance undertaking has infringed its obligations pursuant to Directive 92/96 and Directive 2002/83.

134 However, this administrative procedure must be seen in the light of the national rules applicable to contracts relating to the activities referred to in those directives as a whole.

135 Therefore, in circumstances such as those in the present case, this administrative procedure does not mean that it is practically impossible or excessively difficult to exercise the rights conferred by Article 31 of Directive 92/96 and Article 36 of Directive 2002/83, if, in addition, which is for the national court to verify, national legislation provides a civil law right to seek compensation for pecuniary loss.

136 The answer to Question 4 must therefore be as follows:

In circumstances such as those in the present case, the EEA Agreement and Directive 92/96 and Directive 2002/83 must be interpreted as not precluding a national rule which provides for an administrative complaint procedure after losses have been incurred pursuant to a failure on the part of an assurance undertaking to comply with the requirement to provide information set out in Article 31(1) of Directive 92/96 and Article 36(1) of Directive 2002/83, provided,

macht oder übermässig erschwert, unter Berücksichtigung der Stellung dieser Vorschrift im gesamten Verfahren, des Verfahrensablaufs und der Besonderheiten des Verfahrens vor den verschiedenen nationalen Stellen zu prüfen. Dabei sind gegebenenfalls die Grundsätze zu berücksichtigen, die dem nationalen Rechtsschutzsystem zugrunde liegen, wie z. B. der Schutz der Verteidigungsrechte, der Grundsatz der Rechtssicherheit und der ordnungsgemässe Ablauf des Verfahrens (vgl. entsprechend sinngemäss *Unibet*, oben erwähnt, Randnr. 54).

133 Im Rahmen des Verwaltungsbeschwerdeverfahrens kann ein Versicherungsnehmer bei der nationalen Aufsichtsbehörde eine Verwaltungsbeschwerde einlegen, wenn ein Versicherungsunternehmen seinen Verpflichtungen aus der Richtlinie 92/96 und der Richtlinie 2002/83 nicht nachgekommen ist.

134 Dieses Verwaltungsverfahren ist jedoch vor dem Hintergrund der nationalen Vorschriften für Verträge im Zusammenhang mit den in diesen Richtlinien genannten Tätigkeiten als Ganzes zu sehen.

135 Unter Umständen wie jenen der gegenständlichen Rechtssache führt dieses Verwaltungsverfahren daher nicht dazu, dass die Ausübung der Rechte gemäss Artikel 31 der Richtlinie 92/96 und Artikel 36 der Richtlinie 2002/83 praktisch unmöglich oder übermässig erschwert wird, wenn zusätzlich – was vom nationalen Gericht zu prüfen ist – die nationale Gesetzgebung einen zivilrechtlichen Entschädigungsanspruch für einen finanziellen Verlust vorsieht.

136 Die Antwort auf Frage 4 muss daher folgendermassen lauten:

Unter Umständen wie jenen der gegenständlichen Rechtssache sind das EWR-Abkommen sowie Richtlinie 92/96 und Richtlinie 2002/83 so auszulegen, dass sie keiner nationalen Regelung entgegenstehen, die ein Verwaltungsbeschwerdeverfahren vorsieht, wenn infolge einer Verletzung der Informationspflicht gemäss Artikel 31 Absatz 1 der Richtlinie 92/96 und Artikel 36 Absatz 1 der Richtlinie 2002/83 durch ein Versicherungsunternehmen Verluste entstanden sind,

first, that the right to claim compensation for pecuniary loss from that assurance undertaking for a failure to communicate the information prescribed in Annex II to Directive 92/96 and Annex III to Directive 2002/83 is no less favourable than that applicable to similar domestic actions, and,

second, that the application of national law does not render it practically impossible or excessively difficult for the policy holder to exercise rights conferred by the directives.

It is for the national court to ascertain whether those two conditions are met.

IV COSTS

137 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 Princely Court of the Principality of Liechtenstein, any decision on the costs of the parties to those proceedings is a matter for that court.

vorausgesetzt, dass

erstens das Recht zur Forderung einer Entschädigung für einen finanziellen Verlust von diesem Versicherungsunternehmen aufgrund einer Verletzung der in Anhang II der Richtlinie 92/96 und Anhang III der Richtlinie 2002/83 festgelegten Informationspflicht nicht weniger günstig gestaltet ist als das auf vergleichbare innerstaatliche Klagen anwendbare Recht und

zweitens die Anwendung des nationalen Rechts es dem Versicherungsnehmer nicht praktisch unmöglich macht oder übermässig erschwert, die durch die Richtlinien vorgesehenen Rechte auszuüben.

Es ist Aufgabe des nationalen Gerichts, sicherzustellen, dass diese beiden Bedingungen erfüllt werden.

IV KOSTEN

137 Die Auslagen der Regierung des Fürstentums Liechtenstein, der EFTA-Überwachungsbehörde und der Europäischen 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 des Fürstentums Liechtenstein 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 the Princely Court of the Principality of Liechtenstein hereby gives the following Advisory Opinion:

1. **Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive) and Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance are to be interpreted as meaning that they do not require the assurance undertaking to provide advice to the policy holder before the contract is concluded.**

2. **Article 31 and points a11 and a12 of Annex II(A) of Directive 92/96 and Article 36 and points a11 and a12 of Annex III(A) of Directive 2002/83 must be interpreted as meaning that it is for the national court, in the light of all the relevant circumstances of the case before it, to determine whether the written information communicated to the policy holder before a contract on unit-linked life assurance was concluded is complete, clear and accurate and**

   sufficient to define the units to which the benefits are linked, and

   sufficient to describe the nature of the underlying assets,

   such that the prospective policy holder was able to choose the contract best suited to his/her needs.

3. **As long as the information is complete and communicated to the**

Aus diesen Gründen erstellt

DER GERICHTSHOF

in Beantwortung der ihm vom Fürstlichen Landgericht des Fürstentums Liechtenstein vorgelegten Fragen folgendes Gutachten:

1. **Richtlinie 92/96/EWG des Rates vom 10. November 1992 zur Koordinierung der Rechts- und Verwaltungsvorschriften für die Direktversicherung (Lebensversicherung) sowie zur Änderung der Richtlinien 79/267/EWG und 90/619/EWG (Dritte Richtlinie Lebensversicherung) sowie Richtlinie 2002/83/EG des Europäischen Parlaments und des Rates vom 5. November 2002 über Lebensversicherungen sind dahingehend auszulegen, dass das Versicherungsunternehmen vor Abschluss des Vertrags nicht zur Beratung des Versicherungsnehmers verpflichtet ist.**

2. **Artikel 31 und die Punkte a.11 und a.12 von Anhang II Buchstabe A der Richtlinie 92/96 und Artikel 36 und die Punkte a.11 und a.12 von Anhang III Buchstabe A der Richtlinie 2002/83 sind dahingehend auszulegen, dass es dem nationalen Gericht obliegt, unter Einbeziehung aller relevanten Umstände der vor ihm anhängigen Rechtssache, festzustellen, ob die dem Versicherungsnehmer vor Abschluss eines Vertrags über eine fondsgebundene Lebensversicherung mitgeteilten schriftlichen Informationen vollständig, eindeutig und detailliert waren und**

   zur Angabe der Fonds (in Rechnungseinheiten), an die die Leistungen gekoppelt sind, ausreichen und

   zur Beschreibung der Art der zugrundeliegenden Vermögenswerte ausreichen,

   sodass der künftige Versicherungsnehmer in der Lage war, den seinen Bedürfnissen am ehesten entsprechenden Vertrag auszuwählen.

3. **Sofern die Informationen vollständig sind und dem Versicherungsnehmer laut den in Artikel 31 der Richtlinie 92/96 und Artikel 36 der Richtlinie 2002/38 festgelegten Vorgaben sowie gemäss anderen auf die Mitteilung von Informationen an**

policy holder on the terms set out in Article 31 of Directive 92/96 and Article 36 of Directive 2002/38, and in accordance with other rules applicable to the communication of information to the policy holder, it suffices that the information listed in Annex II and Annex III, respectively, is communicated to the policy holder by a third party, for example, an insurance intermediary.

4. **In circumstances such as those in the present case the EEA Agreement and Directive 92/96 and Directive 2002/83 must be interpreted as not precluding a national rule which provides for an administrative complaint procedure after losses have been incurred pursuant to a failure on the part of an assurance undertaking to comply with the requirement to provide information set out in Article 31(1) of Directive 92/96 and Article 36(1) of Directive 2002/83, provided**

   first, that the right to claim compensation for pecuniary loss from that assurance undertaking for a failure to communicate the information prescribed in Annex II to Directive 92/96 and Annex III to Directive 2002/83 is no less favourable than that applicable to similar domestic actions, and,

   second, that the application of national law does not render it practically impossible or excessively difficult for the policy holder to exercise rights conferred by the directives.

   It is for the national court to ascertain whether those two conditions are met.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 13 June 2013.

Gunnar Selvik — Registrar

Carl Baudenbacher — President

den Versicherungsnehmer anwendbaren Vorschriften mitgeteilt werden, genügt es, wenn die in Anhang II bzw. Anhang III genannten Informationen dem Versicherungsnehmer über einen Dritten, beispielsweise einen Versicherungsvermittler, mitgeteilt werden.

4. Unter Umständen wie jenen der gegenständlichen Rechtssache sind das EWR-Abkommen sowie Richtlinie 92/96 und Richtlinie 2002/83 so auszulegen, dass sie keiner nationalen Regelung entgegenstehen, die ein Verwaltungsbeschwerdeverfahren vorsieht, wenn infolge einer Verletzung der Informationspflicht gemäss Artikel 31 Absatz 1 der Richtlinie 92/96 und Artikel 36 Absatz 1 der Richtlinie 2002/83 durch ein Versicherungsunternehmen Verluste entstanden sind, vorausgesetzt, dass

erstens das Recht zur Forderung einer Entschädigung für einen finanziellen Verlust von diesem Versicherungsunternehmen aufgrund einer Verletzung der in Anhang II der Richtlinie 92/96 und Anhang III der Richtlinie 2002/83 festgelegten Informationspflicht nicht weniger günstig gestaltet ist als das auf vergleichbare innerstaatliche Klagen anwendbare Recht und

zweitens die Anwendung des nationalen Rechts es dem Versicherungsnehmer nicht praktisch unmöglich macht oder übermässig erschwert, die durch die Richtlinien vorgesehenen Rechte auszuüben.

Es ist Aufgabe des nationalen Gerichts, sicherzustellen, dass diese beiden Bedingungen erfüllt werden

Carl Baudenbacher Per Christiansen Páll Hreinsson

Verkündet in öffentlicher Sitzung in Luxemburg am 13. Juni 2013.

Gunnar Selvik — Kanzler

Carl Baudenbacher — Präsident

REPORT FOR THE HEARING

in Case E-11/12

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 the Fürstliches Landgericht des Fürstentums Liechtenstein (Princely Court of the Principality of Liechtenstein) in the case of

Beatrix Koch,
Lothar Hummel, and
Stefan Müller

and

Swiss Life (Liechtenstein) AG

on the interpretation of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ 2002 L 345, p. 1) and Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (OJ 2003 L 9, p. 3).

I INTRODUCTION

1. By a decision of 31 October 2012, registered at the EFTA Court on 8 November 2012, the Princely Court of the Principality of Liechtenstein ("the national court", or "the Princely Court") made a request for an Advisory Opinion in a case pending before it between Beatrix Koch, Lothar Hummel and Stefan Müller ("the plaintiffs"), and Swiss Life (Liechtenstein) AG ("the defendant").

2. The case before the national court concerns four life assurance contracts concluded between the plaintiffs and the defendant during 2004. The plaintiffs claim damages from the defendant, asserting that the value of their life assurance contributions has been reduced to almost nothing. Before the national court, they

SITZUNGSBERICHT

in der Rechtssache E-11/12

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

Beatrix Koch,
Lothar Hummel und
Stefan Müller

und

Swiss Life (Liechtenstein) AG

betreffend die Auslegung der Richtlinie 2002/83/EG des Europäischen Parlaments und des Rates vom 5. November 2002 über Lebensversicherungen (ABl. 2002, L 345, S. 1) und der Richtlinie 2002/92/EG des Europäischen Parlaments und des Rates vom 9. Dezember 2002 über Versicherungsvermittlung (ABl. 2003, L 9, S. 3).

I EINLEITUNG

1. Mit Beschluss vom 31. Oktober 2012, beim EFTA-Gerichtshof eingegangen am 8. November 2012, stellte das Fürstliche Landgericht des Fürstentums Liechtenstein (im Folgenden: nationales Gericht oder Fürstliches Landgericht) einen Antrag auf Vorabentscheidung in einer bei ihm anhängigen Rechtssache zwischen Beatrix Koch, Lothar Hummel und Stefan Müller (im Folgenden: Kläger) und der Swiss Life (Liechtenstein) AG (im Folgenden: Beklagte).

2. Die Rechtssache vor dem nationalen Gericht betrifft vier Lebensversicherungsverträge, die zwischen den Klägern und der Beklagten im Verlaufe des Jahres 2004 abgeschlossen wurden. Die Kläger machen gegenüber der Beklagten Schadenersatzansprüche geltend, da der Wert ihrer Lebensversicherungsbeiträge auf beinahe null reduziert worden sei. Vor dem nationalen Gericht bringen die Kläger vor, die Risikoträchtigkeit und die Konstruktion

assert that it was impossible for them to assess the level of risk and the structure of the life assurance product at issue.

II LEGAL BACKGROUND

EEA law

The UCITS Directive

3. Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended ("the UCITS Directive" or "Directive 85/611"),[1] is incorporated into the EEA Agreement at point 30 of Annex IX to the Agreement.

4. Article 1(2) and (3) of Directive 85/611, as amended, reads:

> *2. For the purposes of this Directive, and subject to Article 2, UCITS shall be undertakings:*
>
> – *the sole object of which is the collective investment in transferable securities and/or in other liquid financial assets referred to in Article 19(1) of capital raised from the public and which operates on the principle of risk-spreading and*
>
> – *the units of which are, at the request of holders, re-purchased or redeemed, directly or indirectly, out of those undertakings' assets. Action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value shall be regarded as equivalent to such re-purchase or redemption.*
>
> *3. Such undertakings may be constituted according to law, either under the law of contract (as common funds managed by management companies) or trust law (as unit trusts) or under statute (as investment companies).*
>
> *For the purposes of this Directive "common funds" shall also include unit trusts.*

[1] OJ 1985 L 375, p. 3.

des gegenständlichen Lebensversicherungsprodukts sei für sie nicht einschätzbar gewesen.

II RELEVANTES RECHT

EWR-Recht

Die OGAW-Richtlinie

3. Die Richtlinie 85/611/EWG des Rates vom 20. Dezember 1985 zur Koordinierung der Rechts- und Verwaltungsvorschriften betreffend bestimmte Organismen für gemeinsame Anlagen in Wertpapieren (OGAW), in der gültigen Fassung (im Folgenden: OGAW-Richtlinie oder Richtlinie 85/611),[1] wurde unter Punkt 30 des Anhangs IX in das EWR-Abkommen aufgenommen.

4. Artikel 1 Absätze 2 und 3 der Richtlinie 85/611 in der gültigen Fassung lauten:

> *2. Vorbehaltlich des Artikels 2 sind im Sinne dieser Richtlinie als OGAW diejenigen Organismen anzusehen,*
>
> – *deren ausschließlicher Zweck es ist, beim Publikum beschaffte Gelder für gemeinsame Rechnung nach dem Grundsatz der Risikostreuung in Wertpapieren und/oder anderen in Artikel 19 Absatz 1 genannten liquiden Finanzanlagen zu investieren, und*
>
> – *deren Anteile auf Verlangen der Anteilinhaber unmittelbar oder mittelbar zu Lasten des Vermögens dieser Organismen zurückgenommen oder ausgezahlt werden. Diesen Rücknahmen oder Auszahlungen gleichgestellt sind Handlungen, mit denen ein OGAW sicherstellen will, daß der Kurs seiner Anteile nicht erheblich von deren Nettoinventarwert abweicht.*
>
> *3. Diese Organismen können nach einzelstaatlichem Recht die Vertragsform (von einer Verwaltungsgesellschaft verwaltete Investmentfonds), die Form des Trust („unit trust") oder die Satzungsform (Investmentgesellschaft) haben.*
>
> *Im Sinne dieser Richtlinie gilt ein „unit trust" als Investmentfonds.*

[1] ABl. 1985, L 375, S. 3.

The life assurance directives

5. Directive 2002/83/EC of the European Parliament and the Council of 5 November 2002 concerning life assurance ("the life assurance directive" or "Directive 2002/83")[2] is incorporated into the EEA Agreement at point 11 of Annex IX to the Agreement.

6. The life assurance directive was incorporated into the EEA Agreement by EEA Joint Committee Decision No 60/2004 of 26 April 2004. The decision entered into force on 27 April 2004.

7. Joint Committee Decision No 60/2004 repealed the First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct life assurance,[3] Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC[4] (the second life assurance directive) and Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive)[5] in the EEA.

8. Article 23(1) of Directive 2002/83 ("Categories of authorised assets") reads:

   1. The home Member State may not authorise assurance undertakings to cover their technical provisions with any but the following categories of assets:

---

2 OJ 2002 L 345, p. 1.
3 OJ 1979 L 63, p. 1.
4 OJ 1990 L 330, p. 50.
5 OJ 1992 L 360, p. 1.

Die Lebensversicherungsrichtlinien

5. Die Richtlinie 2002/83/EG des Europäischen Parlaments und des Rates vom 5. November 2002 über Lebensversicherungen (im Folgenden: Lebensversicherungsrichtlinie oder Richtlinie 2002/83)[2] wurde unter Punkt 11 des Anhangs IX in das EWR-Abkommen aufgenommen.

6. Die Lebensversicherungsrichtlinie wurde mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 60/2004 vom 26. April 2004 in das EWR-Abkommen aufgenommen. Der Beschluss trat am 27. April 2004 in Kraft.

7. Der Beschluss des Gemeinsamen EWR-Ausschusses Nr. 60/2004 diente zur Aufhebung der Ersten Richtlinie 79/267/EWG des Rates vom 5. März 1979 zur Koordinierung der Rechts- und Verwaltungsvorschriften über die Aufnahme und Ausübung der Direktversicherung (Lebensversicherung),[3] der Richtlinie 90/619/EWG des Rates vom 8. November 1990 zur Koordinierung der Rechts- und Verwaltungsvorschriften für die Direktversicherung (Lebensversicherung) und zur Erleichterung der tatsächlichen Ausübung des freien Dienstleistungsverkehrs sowie zur Änderung der Richtlinie 79/267/EWG[4] (zweite Richtlinie Lebensversicherung) und der Richtlinie 92/96/EWG des Rates vom 10. November 1992 zur Koordinierung der Rechts- und Verwaltungsvorschriften für die Direktversicherung (Lebensversicherung) sowie zur Änderung der Richtlinien 79/267/EWG und 90/619/EWG (dritte Richtlinie Lebensversicherung)[5] im EWR.

8. Artikel 23 Absatz 1 der Richtlinie 2002/83 („Kategorien von zulässigen Vermögenswerten“) lautet:

   1. Der Herkunftsmitgliedstaat kann es jedem Versicherungsunternehmen gestatten, die versicherungstechnischen Rückstellungen ausschließlich durch folgende Kategorien von Vermögenswerten zu bedecken:

---

2 ABl. 2002, L 345, S. 1.
3 ABl. 1979, L 63, S. 1.
4 ABl. 1990, L 330, S. 50.
5 ABl. 1992, L 360, S. 1.

A. investments

(a) debt securities, bonds and other money- and capital-market instruments;

(b) loans;

(c) shares and other variable-yield participations;

(d) units in undertakings for collective investment in transferable securities (UCITS) and other investment funds;

...

9. Article 25(1) and (2) of Directive 2002/83 ("Contracts linked to UCITS or share index") reads:

1. Where the benefits provided by a contract are directly linked to the value of units in an UCITS or to the value of assets contained in an internal fund held by the insurance undertaking, usually divided into units, the technical provisions in respect of those benefits must be represented as closely as possible by those units or, in the case where units are not established, by those assets.

2. Where the benefits provided by a contract are directly linked to a share index or some other reference value other than those referred to in paragraph 1, the technical provisions in respect of those benefits must be represented as closely as possible either by the units deemed to represent the reference value or, in the case where units are not established, by assets of appropriate security and marketability which correspond as closely as possible with those on which the particular reference value is based.

10. Article 36 of Directive 2002/83 ("Information for policy holders") reads:

1. Before the assurance contract is concluded, at least the information listed in Annex III(A) shall be communicated to the policy holder.

A. Kapitalanlagen

(a) Schuldverschreibungen, Anleihen und andere Geld- und Kapitalmarktpapiere;

(b) Darlehen;

(c) Aktien und andere Anteile mit schwankendem Ertrag;

(d) Anteile an Organismen für gemeinsame Anlagen in Wertpapieren (OGAW) und anderen gemeinschaftlichen Kapitalanlagen;

...

9. Artikel 25 Absätze 1 und 2 der Richtlinie 2002/83 („An einen OGAW oder Aktienindex gebundene Verträge") lauten:

1. Sind die Leistungen aus einem Vertrag direkt an den Wert von Anteilen an einem OGAW oder an den Wert von Vermögenswerten gebunden, die in einem von dem Versicherungsunternehmen gehaltenen und in der Regel in Anteile aufgeteilten internen Fonds enthalten sind, so müssen die versicherungstechnischen Rückstellungen für diese Leistungen so weit wie möglich durch die betreffenden Anteile oder, sofern keine Anteile gebildet wurden, durch die betreffenden Vermögenswerte bedeckt werden.

2. Sind die Leistungen aus einem Vertrag direkt an einen Aktienindex oder an einen anderen als den in Absatz 1 genannten Bezugswert gebunden, so müssen die versicherungstechnischen Rückstellungen für diese Leistungen so weit wie möglich entweder durch die Anteile, die den Bezugswert darstellen sollen, oder, sofern keine Anteile gebildet wurden, durch Vermögenswerte mit angemessener Sicherheit und Realisierbarkeit bedeckt werden, die so genau wie möglich denjenigen Werten entsprechen, auf denen der besondere Bezugswert beruht.

10. Artikel 36 der Richtlinie 2002/83 („Angaben für den Versicherungsnehmer") lautet:

1. Vor Abschluss des Versicherungsvertrags sind dem Versicherungsnehmer mindestens die in Anhang III Buchstabe A aufgeführten Angaben mitzuteilen.

2. The policy-holder shall be kept informed throughout the term of the contract of any change concerning the information listed in Annex III(B).

3. The Member State of the commitment may require assurance undertakings to furnish information in addition to that listed in Annex III only if it is necessary for a proper understanding by the policy holder of the essential elements of the commitment.

4. The detailed rules for implementing this Article and Annex III shall be laid down by the Member State of the commitment.

11. Annex III to Directive 2002/83 ("Information for policy holders") lists the information which is to be communicated to the policy holder before the contract is concluded (Section A) and during the term of the contract (Section B), in a clear and accurate manner, in writing, and in an official language of the Member State of the commitment.

12. Points (a)11 and (a)12 of Annex III(A) to Directive 2002/83 provide that the following information must be provided to the policy holder before the contract is concluded:

(a)11 For unit-linked policies, definition of the units to which the benefits are linked

(a)12 Indication of the nature of the underlying assets for unit -linked policies.

13. Before it was repealed in the EEA and replaced by Article 23 of Directive 2002/38 by Joint Committee Decision No 60/2004, Article 21 of Directive 92/96/EEC provided:

1. The home Member State may not authorise assurance undertakings to cover their technical provisions with any but the following categories of assets:

2. Der Versicherungsnehmer muss während der gesamten Vertragsdauer über alle Änderungen der in Anhang III Buchstabe B aufgeführten Angaben auf dem Laufenden gehalten werden.

3. Der Mitgliedstaat der Verpflichtung kann von den Versicherungsunternehmen nur dann die Vorlage von Angaben zusätzlich zu den in Anhang III genannten Auskünften verlangen, wenn diese für das tatsächliche Verständnis der wesentlichen Bestandteile der Versicherungspolice durch den Versicherungsnehmer notwendig sind.

4. Die Durchführungsvorschriften zu diesem Artikel und zu Anhang III werden von dem Mitgliedstaat der Verpflichtung erlassen.

11. Anhang III der Richtlinie 2002/83 („Informationen für Versicherungsnehmer") enthält eine Aufstellung der Informationen, die dem Versicherungsnehmer vor Abschluss des Vertrages (Buchstabe A) und während der Laufzeit des Vertrages (Buchstabe B) eindeutig und detailliert schriftlich in einer Amtssprache des Mitgliedstaats der Verpflichtung mitzuteilen sind.

12. Gemäss den Punkten a.11 und a.12 von Anhang III Buchstabe A der Richtlinie 2002/83 sind dem Versicherungsnehmer folgende Informationen vor Abschluss des Vertrages mitzuteilen:

(a)11 für fondsgebundene Policen: Angabe der Fonds (in Rechnungseinheiten), an die die Leistungen gekoppelt sind

(a)12 Angabe der Art der den fondsgebundenen Policen zugrunde liegenden Vermögenswerte.

13. Vor der Aufhebung im EWR und Ersetzung durch Artikel 23 der Richtlinie 2002/38 infolge des Beschlusses des Gemeinsamen EWR-Ausschusses Nr. 60/2004 sah Artikel 21 der Richtlinie 92/96/EWG Folgendes vor:

1. Der Herkunftsmitgliedstaat kann es jedem Versicherungsunternehmen gestatten, die versicherungstechnischen Rückstellungen ausschließlich durch folgende Kategorien von Vermögenswerten zu bedecken:

A. investments

(a) debt securities, bonds and other money- and capital -market instruments;

(b) loans;

(c) shares and other variable-yield participations;

(d) units in undertakings for collective investment in transferable securities (UCITS) and other investment funds;

...

14. Before it was repealed in the EEA and replaced by Article 25 of Directive 2002/38 by Joint Committee Decision No 60/2004, Article 23 of Directive 92/96/EEC provided:

1. Where the benefits provided by a contract are directly linked to the value of units in an UCITS or to the value of assets contained in an internal fund held by the insurance undertaking, usually divided into units, the technical provisions in respect of those benefits must be represented as closely as possible by those units or, in the case where units are not established, by those assets.

2. Where the benefits provided by a contract are directly linked to a share index or some other reference value other than those referred to in paragraph 1, the technical provisions in respect of those benefits must be represented as closely as possible either by the units deemed to represent the reference value or, in the case where units are not established, by assets of appropriate security and marketability which correspond as closely as possible with those on which the particular reference value is based.

15. Before it was repealed in the EEA and replaced by Article 36 of Directive 2002/38 by Joint Committee Decision No 60/2004, Article 31 of Directive 92/96/EEC provided:

A. Kapitalanlagen

(a) Schuldverschreibungen, Anleihen und andere Geld- und Kapitalmarktpapiere;

(b) Darlehen;

(c) Aktien und andere Anteile mit schwankendem Ertrag;

(d) Anteile an Organismen für gemeinsame Anlagen in Wertpapieren (OGAW) und anderen gemeinschaftlichen Kapitalanlagen;

...

14. Vor der Aufhebung im EWR und Ersetzung durch Artikel 25 der Richtlinie 2002/38 infolge des Beschlusses des Gemeinsamen EWR-Ausschusses Nr. 60/2004 sah Artikel 23 der Richtlinie 92/96/EWG Folgendes vor:

1. Sind die Leistungen aus einem Vertrag direkt an den Wert von Anteilen an einem OGAW oder an den Wert von Vermögenswerten gebunden, die in einem von dem Versicherungsunternehmen gehaltenen und in der Regel in Anteile aufgeteilten internen Fonds enthalten sind, so müssen die versicherungstechnischen Rückstellungen für diese Leistungen so weit wie möglich durch die betreffenden Anteile oder, sofern keine Anteile gebildet wurden, durch die betreffenden Vermögenswerte bedeckt werden.

2. Sind die Leistungen aus einem Vertrag direkt an einen Aktienindex oder an einen anderen als den in Absatz 1 genannten Bezugswert gebunden, so müssen die versicherungstechnischen Rückstellungen für diese Leistungen so weit wie möglich entweder durch die Anteile, die den Bezugswert darstellen sollen, oder, sofern keine Anteile gebildet wurden, durch Vermögenswerte mit angemessener Sicherheit und Realisierbarkeit bedeckt werden, die so genau wie möglich denjenigen Werten entsprechen, auf denen der besondere Bezugswert beruht.

15. Vor der Aufhebung im EWR und Ersetzung durch Artikel 36 der Richtlinie 2002/38 infolge des Beschlusses des Gemeinsamen EWR-Ausschusses Nr. 60/2004 sah Artikel 31 der Richtlinie 92/96/EWG Folgendes vor:

1. Before the assurance contract is concluded, at least the information listed in point A of Annex II shall be communicated to the policy-holder.

2. The policy-holder shall be kept informed throughout the term of the contract of any change concerning the information listed in point B of Annex II.

3. The Member State of the commitment may require assurance undertakings to furnish information in addition to that listed in Annex II only if it is necessary for a proper understanding by the policy-holder of the essential elements of the commitment.

4. The detailed rules for implementing this Article and Annex II shall be laid down by the Member State of the commitment.

16. Annex II to Directive 92/96/EEC is identical to Annex III to Directive 2002/83. The relevant details are set out in paragraphs 11 and 12 above.

The insurance mediation directives

17. Directive 2002/92/EC of the European Parliament and the Council of 9 December 2002 on insurance mediation ("the insurance mediation directive" or "Directive 2002/92")[6] is incorporated into the EEA Agreement at point 13b of Annex IX to the Agreement.

18. The insurance mediation directive was incorporated into the EEA Agreement by EEA Joint Committee Decision No 115/2003 of 26 September 2003. Constitutional requirements were indicated and the decision entered into force on 1 May 2004. Before that date, Liechtenstein notified its implementation of Directive 2002/92 on 16 February 2004.

[6] OJ 2003 L 9, p. 3.

1. Vor Abschluß des Versicherungsvertrags sind dem Versicherungsnehmer mindestens die in Anhang II Buchstabe A aufgeführten Angaben mitzuteilen.

2. Der Versicherungsnehmer muß während der gesamten Vertragsdauer über alle Änderungen der in Anhang II Buchstabe B aufgeführten Angaben auf dem *laufenden gehalten werden.*

3. Der Mitgliedstaat der Verpflichtung kann von den Versicherungsunternehmen nur dann die Vorlage von Angaben zusätzlich zu den in Anhang II genannten Auskünften verlangen, wenn diese für das tatsächliche Verständnis der wesentlichen Bestandteile der Versicherungspolice durch den Versicherungsnehmer notwendig sind.

4. Die Durchführungsvorschriften zu diesem Artikel und zu Anhang II werden von dem Mitgliedstaat der Verpflichtung erlassen.

16. Anhang II der Richtlinie 92/96/EWG ist identisch mit Anhang III der Richtlinie 2002/83. Die massgeblichen Einzelheiten sind in den Randnrn. 11 und 12 oben angeführt.

Die Versicherungsvermittlungsrichtlinien

17. Die Richtlinie 2002/92/EG des Europäischen Parlaments und des Rates vom 9. Dezember 2002 über Versicherungsvermittlung (im Folgenden: Versicherungsvermittlungsrichtlinie oder Richtlinie 2002/92)[6] wurde unter Punkt 13b des Anhangs IX in das EWR-Abkommen aufgenommen.

18. Die Versicherungsvermittlungsrichtlinie wurde mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 115/2003 vom 26. September 2003 in das EWR-Abkommen aufgenommen. Das Vorliegen verfassungsrechtlicher Anforderungen wurde mitgeteilt, und der Beschluss trat am 1. Mai 2004 in Kraft. Vor diesem Zeitpunkt meldete Liechtenstein die Umsetzung der Richtlinie 2002/92 am 16. Februar 2004.

[6] ABl. 2003, L 9, S. 3.

19. As a result of Directive 2002/92, the previous directive regulating the matter, Council Directive 77/92/EEC of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (ex ISIC Group 630) and, in particular, transitional measures in respect of those activities ("Directive 77/92"), was repealed in the European Union from 15 January 2005.

20. Directive 77/92 was repealed in the EEA by Joint Committee Decision No 12/2010 of 10 November 2010. Constitutional requirements were indicated and the decision entered into force on 1 November 2012.

21. Article 2(5) of the insurance mediation directive reads:

"insurance intermediary" means any natural or legal person who, for remuneration, takes up or pursues insurance mediation;

22. Article 12 of the insurance mediation directive ("information provided by the insurance intermediary") reads:

1. *Prior to the conclusion of any initial insurance contract, and, if necessary, upon amendment or renewal thereof, an insurance intermediary shall provide the customer with at least the following information:*

...

(e) ...

In addition, an insurance intermediary shall inform the customer, concerning the contract that is provided, whether:

(i) he gives advice based on the obligation in paragraph 2 to provide a fair analysis, or

(ii) he is under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance

19. Infolge der Richtlinie 2002/92 wurde die Vorgängerrichtlinie zur Regelung dieser Thematik, die Richtlinie 77/92/EWG des Rates vom 13. Dezember 1976 über Maßnahmen zur Erleichterung der tatsächlichen Ausübung der Niederlassungsfreiheit und des freien Dienstleistungsverkehrs für die Tätigkeiten des Versicherungsagenten und des Versicherungsmaklers (aus ISIC-Gruppe 630), insbesondere Übergangsmaßnahmen für solche Tätigkeiten (im Folgenden: Richtlinie 77/92), in der Europäischen Union per 15. Januar 2005 aufgehoben.

20. Die Richtlinie 77/92 wurde im EWR mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 12/2010 vom 10. November 2010 aufgehoben. Das Vorliegen verfassungsrechtlicher Anforderungen wurde mitgeteilt, und der Beschluss trat am 1. November 2012 in Kraft.

21. Gemäss Artikel 2 Absatz 5 der Versicherungsvermittlungsrichtlinie bezeichnet der Ausdruck

„Versicherungsvermittler" jede natürliche oder juristische Person, die die Tätigkeit der Versicherungsvermittlung gegen Vergütung aufnimmt oder ausübt;

22. Artikel 12 der Versicherungsvermittlungsrichtlinie („Vom Versicherungsvermittler zu erteilende Auskünfte") lautet:

1. *Vor Abschluss jedes ersten Versicherungsvertrags und nötigenfalls bei Änderung oder Erneuerung des Vertrags teilt der Versicherungsvermittler dem Kunden zumindest Folgendes mit:*

...

e) ...

Außerdem teilt der Versicherungsvermittler dem Kunden in Bezug auf den angebotenen Vertrag mit,

i) ob er seinen Rat gemäß der in Absatz 2 vorgesehenen Verpflichtung auf eine ausgewogene Untersuchung stützt, oder

ii) ob er vertraglich verpflichtet ist, Versicherungsvermittlungsgeschäfte ausschließlich mit

undertakings. In that case, he shall, at the customer's request provide the names of those insurance undertakings, or

(iii) he is not under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings and does not give advice based on the obligation in paragraph 2 to provide a fair analysis. In that case, he shall, at the customer's request provide the names of the insurance undertakings with which he may and does conduct business.

2. *When the insurance intermediary informs the customer that he gives his advice on the basis of a fair analysis, he is obliged to give that advice on the basis of an analysis of a sufficiently large number of insurance contracts available on the market, to enable him to make a recommendation, in accordance with professional criteria, regarding which insurance contract would be adequate to meet the customer's needs.*

3. *Prior to the conclusion of any specific contract, the insurance intermediary shall at least specify, in particular on the basis of information provided by the customer, the demands and the needs of that customer as well as the underlying reasons for any advice given to the customer on a given insurance product. These details shall be modulated according to the complexity of the insurance contract being proposed.*

23. Article 2(2) of Directive 77/92, with the adaptations inserted for the purposes of the EEA Agreement, reads as follows:

This Directive shall apply in particular to activities customarily described in the Member States as follows:

(a) *activities referred to in paragraph 1 (a):*

in Liechtenstein:

– *Versicherungsmakler*

...

einem oder mehreren Versicherungsunternehmen zu tätigen. In diesem Fall teilt er dem Kunden auf Antrag auch die Namen dieser Versicherungsunternehmen mit, oder

iii) ob er nicht vertraglich verpflichtet ist, Versicherungsvermittlungsgeschäfte ausschließlich mit einem oder mehreren Versicherungsunternehmen zu tätigen, und seinen Rat nicht gemäß der in Absatz 2 vorgesehenen Verpflichtung auf eine ausgewogene Untersuchung stützt. In diesem Fall teilt er dem Kunden auf Antrag auch die Namen derjenigen Versicherungsunternehmen mit, mit denen er Versicherungsgeschäfte tätigen darf und auch tätigt.

2. *Teilt der Versicherungsvermittler dem Kunden mit, dass er auf der Grundlage einer objektiven Untersuchung berät, so ist er verpflichtet, seinen Rat auf eine Untersuchung einer hinreichenden Zahl von auf dem Markt angebotenen Versicherungsverträgen zu stützen, so dass er gemäß fachlichen Kriterien eine Empfehlung dahin gehend abgeben kann, welcher Versicherungsvertrag geeignet wäre, die Bedürfnisse des Kunden zu erfüllen.*

3. *Vor Abschluss eines Versicherungsvertrags hat der Versicherungsvermittler, insbesondere anhand der vom Kunden gemachten Angaben, zumindest dessen Wünsche und Bedürfnisse sowie die Gründe für jeden diesem zu einem bestimmten Versicherungsprodukt erteilten Rat genau anzugeben. Diese Angaben sind der Komplexität des angebotenen Versicherungsvertrags anzupassen.*

23. Artikel 2 Absatz 2 der Richtlinie 77/92 lautet mit den für die Zwecke des EWR-Abkommens eingefügten Anpassungen:

Die vorliegende Richtlinie gilt insbesondere für nachstehende Tätigkeiten, die in den Mitgliedstaaten unter folgenden branchenüblichen Bezeichnungen ausgeübt werden:

(a) *die in Absatz 1 Buchstabe a) bezeichneten Tätigkeiten:*

in Liechtenstein:

– *Versicherungsmakler*

...

(b) *activities referred to in paragraph 1 (b):*

in Liechtenstein:

– *Versicherungs-Generalagent*

– *Versicherungsagent*

– *Versicherungsinspektor*

24. Directive 77/92 does not contain any provisions corresponding to Articles 2 and 12 of the insurance mediation directive.

Commission Recommendation 92/48/EEC

25. Commission Recommendation 92/48/EEC of 18 December 1991 on insurance intermediaries (OJ 1992 L 19, p. 32) was incorporated into the EEA Agreement by EEA Joint Committee Decision No 7/94.

26. The recommendation was added as point 37 in Annex IX under "Acts of which the contracting parties shall take note".

27. Constitutional requirements were indicated and the decision entered into force on 1 July 1994.

National law

28. Liechtenstein has implemented Directive 2002/83 by way of the Insurance Supervision Act (VersAG), LR 961.01, by way of the Insurance Supervision Regulation (VersAV), LR 961.011, by way of the Insurance Contracts Act (VersVG) LR 215.229.1, by way of the International Private Law Act (IPRG) LR 290 and by way of the International Insurance Contracts Act (IVersVG), LR 291.

29. Article 45 of the Insurance Supervision Act ("Duties to inform policy holders") provides as follows:

Prior to the conclusion and during the term of the insurance contracts, specific information must be given to the policy holders for their information and protection. The content and scope of this duty of information is regulated under Annex 4.

(b) *die in Absatz 1 Buchstabe b) bezeichneten Tätigkeiten:*

in Liechtenstein:

– *Versicherungs-Generalagent*

– *Versicherungsagent*

– *Versicherungsinspektor*

24. Die Richtlinie 77/92 enthält keine Bestimmungen die den Artikeln 2 und 12 der Versicherungsvermittlungsrichtlinie entsprechen.

Empfehlung der Kommission 92/48/EWG

25. Die Empfehlung 92/48/EWG der Kommission vom 18. Dezember 1991 über Versicherungsvermittler (ABl. 1992, L 19, S. 32) wurde mittels Beschluss des Gemeinsamen EWR-Ausschusses Nr. 7/94 in das EWR-Abkommen aufgenommen.

26. Die Empfehlung wurde als Punkt 37 unter „Rechtsakte, von denen die Vertragsparteien Kenntnis nehmen“ in Anhang IX aufgenommen.

27. Das Vorliegen verfassungsrechtlicher Anforderungen wurde mitgeteilt, und der Beschluss trat am 1. Juli 1994 in Kraft.

Nationales Recht

28. Liechtenstein hat die Richtlinie 2002/83 im Wege des Versicherungsaufsichtsgesetzes (VersAG), LR 961.01, im Wege der Versicherungsaufsichtsverordnung (VersAV), LR 961.011, im Wege des Versicherungsvertragsgesetzes (VersVG), LR 215.229.1, im Wege des Gesetzes über das internationale Privatrecht (IPRG), LR 290, und im Wege des Gesetzes über das internationale Versicherungsvertragsrecht (IVersVG), LR 291, in nationales Recht umgesetzt.

29. Artikel 45 des Versicherungsaufsichtsgesetzes („Mitteilungspflichten gegenüber Versicherungsnehmern“) lautet:

Vor Abschluss und während der Laufzeit von Versicherungsverträgen sind zur Information und zum Schutz von Versicherungsnehmern diesen gegenüber spezielle Informationen abzugeben. Inhalt und

30. Annex 4 to the Insurance Supervision Act ("Duties to inform policy holders under Articles 45 and 49") provides as follows:

Where the policy holder is a natural person, insurance undertakings must inform him of the essential facts and rights under insurance contract before conclusion and during the term of a contract in accordance with the following provisions. In the case of the insurance of large risks, it is sufficient to mention the applicable law and the competent supervisory authority. The information must be made available in writing.

Section I

1. Information required for all classes of insurance:

...

2. Additional information required for life or accident insurance with premium refund:

...

e) for unit-linked policies, definition of the units to which the insurance is linked and indication of the nature of the underlying assets;

...

31. Article 3 of the Insurance Contracts Act ("Duty of the insurance undertaking to provide information") provides as follows:

1. The generally applicable special insurance provisions and the information required under Art. 45 and 49 of the Insurance Supervision Act must either be included in the insurance application form or made available to the applicant by other means prior to submission of the application.

2. In the event of a failure to comply with this condition, the applicant will not be bound by the application. Following conclusion of the contract, the policyholder may rescind the contract if there is a breach of the duty to provide information under paragraph 1. The right of rescission shall expire no later than four

Umfang dieser Mitteilungspflichten sind in Anhang 4 geregelt.

30. Anhang 4 des Versicherungsaufsichtsgesetzes („Mitteilungspflichten gegenüber Versicherungsnehmern gemäss Art. 45 und 49“) lautet:

Die Versicherungsunternehmen haben den Versicherungsnehmer, wenn es sich um eine natürliche Person handelt, über die für das Versicherungsverhältnis massgeblichen Tatsachen und Rechte vor Abschluss und während der Laufzeit eines Vertrages gemäss den nachfolgenden Bestimmungen zu unterrichten. Bei der Versicherung von Grossrisiken genügt die Angabe des anwendbaren Rechts und der zuständigen Aufsichtsbehörde. Die Informationen haben schriftlich zu erfolgen.

Abschnitt I

1. Für alle Versicherungssparten notwendige Informationen:

...

2. Bei Lebensversicherungen und Unfallversicherungen mit Prämienrückgewähr zusätzlich notwendige Informationen:

...

e) bei fondsgebundenen Versicherungen Angaben über den der Versicherung zugrunde liegenden Fonds und die Art der darin enthaltenen Vermögenswerte;

...

31. Artikel 3 des Versicherungsvertragsgesetzes („Informationspflicht des Versicherungsunternehmens“) lautet:

1. Die allgemeinen und besonderen Versicherungsbedingungen sowie die gemäss Art. 45 und 49 des Versicherungsaufsichtsgesetzes erforderlichen Informationen müssen entweder in den Versicherungsantrag aufgenommen oder dem Antragsteller auf andere Weise vor der Einreichung des Versicherungsantrages zur Verfügung gestellt werden.

2. Wird dieser Vorschrift nicht entsprochen, so ist der Antragsteller an den Antrag nicht gebunden. Nach Abschluss des Vertrages kann der Versicherungsnehmer vom Vertrag zurücktreten, wenn

weeks after receipt of the policy which includes notification of the right of rescission.

III FACTS AND PROCEDURE

32. Two of the plaintiffs (Beatrix Koch and Lothar Hummel) are German nationals resident in Germany. The third plaintiff (Stefan Müller) is an Austrian national resident in Austria. The defendant, Swiss Life (Liechtenstein) AG, is a company registered in Liechtenstein. It holds a licence to provide life assurance.

33. During 2004, the plaintiffs, independently and by way of three different brokers, submitted applications for "unit-linked life assurance" to the defendant, which accepted the applications and, as a result, the life assurance agreements came into effect.

34. Beatrix Koch submitted her application for life assurance on 4 November 2004. It was accepted by the defendant on 22 December 2004 and the policy commenced on 1 December 2004 ("the first contract").

35. Lothar Hummel submitted his application for life assurance on 23 December 2004. It was accepted by the defendant on 30 December 2004 and the policy commenced on 1 December 2004 ("the second contract").

36. Stefan Müller submitted a first application for life assurance on 18 February 2004. This was accepted by the defendant on 5 April 2004 and the policy commenced on 1 March 2004 ("the third contract").

37. He also submitted a second application for life assurance on 14 September 2004. This was accepted by the defendant on 1 December 2004 and the policy commenced on 1 October 2004 ("the fourth contract").

die Informationspflicht gemäss Abs. 1 verletzt worden ist. Das Rücktrittsrecht erlischt spätestens vier Wochen nach Zugang der Police einschliesslich einer Belehrung über das Rücktrittsrecht.

III SACHVERHALT UND VERFAHREN

32. Zwei der Kläger (Beatrix Koch und Lothar Hummel) sind deutsche Staatsangehörige mit Wohnsitz in Deutschland. Der dritte Kläger (Stefan Müller) ist österreichischer Staatsangehöriger mit Wohnsitz in Österreich. Bei der Beklagten, der Swiss Life (Liechtenstein) AG, handelt es sich um ein in Liechtenstein eingetragenes Unternehmen, dem eine Bewilligung zum Betrieb der Lebensversicherung erteilt wurde.

33. Im Verlaufe des Jahres 2004 stellten die Kläger unabhängig voneinander und im Wege dreier unterschiedlicher Vermittler Anträge auf Abschluss einer „fondsgebundenen Lebensversicherung" an die Beklagte, welche die Anträge annahm, sodass in der Folge die Lebensversicherungsverträge zustandekamen.

34. Beatrix Koch stellte ihren Lebensversicherungsantrag am 4. November 2004. Er wurde von der Beklagten am 22. Dezember 2004 angenommen, wobei die Laufzeit der Police am 1. Dezember 2004 begann (im Folgenden: der erste Vertrag).

35. Lothar Hummel stellte seinen Lebensversicherungsantrag am 23. Dezember 2004. Er wurde von der Beklagten am 30. Dezember 2004 angenommen, wobei die Laufzeit der Police am 1. Dezember 2004 begann (im Folgenden: der zweite Vertrag).

36. Stefan Müller stellte seinen ersten Lebensversicherungsantrag am 18. Februar 2004. Dieser wurde von der Beklagten am 5. April 2004 angenommen, wobei die Laufzeit der Police am 1. März 2004 begann (im Folgenden: der dritte Vertrag).

37. Stefan Müller stellte ausserdem einen zweiten Lebensversicherungsantrag am 14. September 2004. Dieser wurde von der Beklagten am 1. Dezember 2004 angenommen, wobei die Laufzeit der Police am 1. Oktober 2004 begann (im Folgenden: der vierte Vertrag).

38. It was stated on the application form for life assurance that a form of investment had been agreed in each case "as per the attached investment strategy". The investment strategy forms, signed in each case by the relevant plaintiff, recorded, inter alia, the following information: "Allocation of initial investment: Swiss Select Garantie (Euro Medium Term Notes)".

39. Some of the investment strategies were amended by other documents, signed by the plaintiffs, to read: "Note Swiss Select Garantie 3 or ff WKN XS0247561060".

40. The plaintiffs subsequently paid assurance premiums to the defendant which invested the amounts as cover funds, in accordance with the investment strategies.

41. The plaintiffs have brought a claim for damages against the defendant on the basis that the amounts that they paid to the latter as assurance premiums have been reduced to almost nothing. They assert that the loss of capital was already predetermined when the contracts were concluded. It was impossible for them to determine the level of risk involved in the investment, and the structure of the products was not transparent. Excessive commissions and fees were taken by the defendant and the capital was therefore exhausted within a very short period of time.

42. The defendant contends that the claims for damages should be dismissed. It argues that that the investments were effected in accordance with the investment strategy forms signed by the plaintiffs.

43. The WKN (*Wertpapierkennnummer*, or securities investment number) is a combination of numbers and letters used in Germany to identify transferable securities (financial instruments). Relevant information can be found on the Internet by entering the WKN into a search engine.

44. The defendant does not claim that it informed the plaintiffs about the relevant investment products, but asserts that the plaintiffs themselves requested these investment strategies.

38. Vereinbart wurde laut Antragsformular für die Lebensversicherung jeweils eine Anlageform „laut beiliegender Anlagestrategie". In den vom jeweiligen Kläger unterfertigten Formularen zur Anlagestrategie ist u. a. Folgendes festgehalten: „Aufteilung Erstanlage: Swiss Select Garantie (Euro Medium Term Notes)".

39. Die Anlagestrategien wurden teilweise mit von den Klägern unterfertigten Schriftstücken abgeändert, sodass sie lauteten wie folgt: „Note Swiss Select Garantie 3 oder ff WKN XS0247561060".

40. Die Kläger zahlten in der Folge Versicherungsprämien an die Beklagte, die diese Beträge als Deckungsstock entsprechend den Anlagestrategien veranlagte.

41. Die Kläger machen gegenüber der Beklagten Schadenersatzansprüche geltend, da die als Versicherungsprämien an Letztere bezahlten Beträge auf beinahe null reduziert wurden. Sie bringen vor, dass der Verlust des Eigenkapitals bei Abschluss der Verträge bereits vorprogrammiert gewesen sei. Die Risikoträchtigkeit der Veranlagung sei für sie nicht einschätzbar und die Konstruktion der Produkte nicht durchschaubar gewesen. Die Beklagte habe überhöhte Provisionen und Gebühren einbehalten, wodurch das Kapital innerhalb kürzester Zeit ausgeschöpft worden sei.

42. Die Beklagte beantragte die Abweisung der Schadenersatzansprüche. Sie bringt vor, die Veranlagung sei entsprechend den von den Klägern unterfertigten Formularen zur Anlagestrategie erfolgt.

43. Die Wertpapierkennnummer (WKN) ist eine in Deutschland verwendete Ziffern- und Buchstabenkombination zur Identifizierung von Wertpapieren (Finanzinstrumenten). Über eine Internet-Suchmaschine kann durch Eingabe der WKN eine entsprechende Information im Internet gefunden werden.

44. Seitens der Beklagten wurde nicht vorgebracht, dass sie die Kläger über die entsprechenden Anlageprodukte informiert habe, jedoch hätten die Kläger selbst diese Anlagestrategien verlangt.

45. On 31 October 2012, the Princely Court decided to seek an Advisory Opinion from the Court. It noted that Directive 2002/83 does not define "unit-linked life assurance". Moreover, in the view of the Princely Court, in particular following the judgment of the European Court of Justice ("ECJ") in Case C-166/11 Ángel *Lorenzo González Alonso* (judgment of 1 March 2012, not yet reported), which the Princely Court considers to contradict the wording of Article 25 of Directive 2002/83, it is unclear whether the duties established by Directive 2002/83 to inform a policy holder before the contract is concluded also apply in relation to assets not included in a UCITS.

46. Moreover, in light of the judgment of the ECJ in Case C-38/00 *Axa Royale Belge* [2002] ECR I-2209, the national court seeks clarification on the scope of the duties to inform the policy holder before the contract is concluded, the role of insurance intermediaries and whether EFTA States are required to establish a civil law right for a policy holder to claim damages from the assurance undertaking in the event of a breach of the obligation to provide information.

47. The referring court also notes that in a judgment of 10 February 2012 the Supreme Court of the Principality of Liechtenstein interpreted the national legislation which implements Directive 2002/83. It held in that case, in relation to facts comparable to those of the present proceedings, that the defendant, contrary to the "clear statutory requirement", did not "provide advice to the plaintiffs, and in particular did not provide advice about the products ...No more did it forward the necessary information to the insurance brokers who were selling life assurance ...".

48. The Princely Court consequently stayed the proceedings and referred the following questions to the Court:

45. Am 31. Oktober 2012 stellte das Fürstliche Landgericht beim Gerichtshof einen Antrag auf Vorabentscheidung. Es hielt fest, dass die Richtlinie 2002/83 nicht definiert, was eine „fondsgebundene Lebensversicherung“ ist. Darüber hinaus ist es nach Auffassung des Fürstlichen Landgerichts – insbesondere angesichts des Urteils des Gerichtshofs der Europäischen Union (im Folgenden: EuGH) in der Rechtssache C-166/11 Ángel Lorenzo González Alonso (Urteil vom 1. März 2012, noch nicht in der amtlichen Sammlung veröffentlicht), das, so das Fürstliche Landgericht, im Widerspruch zum Wortlaut des Artikels 25 der Richtlinie 2002/83 steht – unklar, ob die durch die Richtlinie 2002/83 festgelegten Informationspflichten gegenüber Versicherungsnehmern vor Abschluss eines Vertrages auch auf Vermögenswerte anwendbar sind, die nicht Teil eines OGAW sind.

46. Zudem ersucht das nationale Gericht in Anbetracht des Urteils des EuGH in der Rechtssache C-38/00 *Axa Royale Belge,* Slg. 2002, S. I-2209, um Klärung hinsichtlich des Umfangs der Informationspflichten gegenüber Versicherungsnehmern vor Abschluss eines Vertrages, der Rolle von Versicherungsvermittlern und der etwaigen Verpflichtung der EFTA-Staaten, bei einer Verletzung der Informationspflicht einen zivilrechtlichen Schadenersatzanspruch des Versicherungsnehmers gegenüber dem Versicherungsunternehmen vorzusehen.

47. Das vorlegende Gericht weist ausserdem darauf hin, dass ein Urteil des Obersten Gerichtshofs des Fürstentums Liechtenstein vom 10. Februar 2012 eine Auslegung der nationalen Gesetzgebung zur Umsetzung der Richtlinie 2002/83 enthält. Im Urteil des Obersten Gerichtshofs in dieser Rechtssache betreffend einen mit dem gegenständlichen Verfahren vergleichbaren Sachverhalt heisst es: Die Beklagte führte entgegen dieser „klaren gesetzlichen Vorgabe“ „keine Beratung des Klägers durch, insbesondere auch keine Beratung über das ... Produkt .... Ebenso wenig gab sie diesbezüglich notwendige Informationen an die die Lebensversicherung vertreibenden Versicherungsmakler weiter ...“.

48. In der Folge unterbrach das Fürstliche Landgericht das Verfahren und legte dem Gerichtshof die folgenden Fragen vor:

1. *Does the term unit-linked policies, within the meaning of Annex III(A) a11 and a12 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, refer exclusively to units ("Common Funds") within the meaning of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) or does Annex III(A) a(11) and a(12) also apply for example where payments from a life assurance contract are linked to a share index or other reference value?*

2. *If Question 1 is answered by the Court to the effect that Annex III(A) a11 and a12 of Directive 2002/83/EC does not restrict "unit-linked policies" to investment companies ("Common Funds") within the meaning of Directive 85/611/EEC:*

2.1 *Does Directive 2002/83/EC oblige assurance undertakings to provide policy holders with advice or simply to notify them of the details set out in Annex III of the said Directive?*

2.2 *Is the duty to communicate information under Annex III(A) a11 of Directive 2002/83/EC sufficiently complied with if the assurance undertaking supplies the securities identification number (WKN), or, how else is "definition of the units" to be understood in order to fulfil the requirement to communicate information? It must be borne in mind that the Member State of the commitment does not require any additional information from the assurance undertaking within the meaning of Art. 36(3) of Directive 2002/83/EC.*

2.3 *Is the duty to communicate information under Annex III(A) a12 of Directive 2002/83/EC sufficiently complied with if the assurance undertaking supplies the securities identification number (WKN) or should more detailed information be provided? It must be borne in mind that the Member State of the commitment does not require any additional information from the assurance undertaking within the meaning of Art. 36(3) of Directive 2002/83/EC.*

1. *Sind unter fondsgebundenen Policen im Sinne des Anhanges III A a11 und a12 der Richtlinie 2002/83/EG des Europäischen Parlaments und des Rates vom 05.11.2002 über Lebensversicherungen ausschliesslich Fonds („Investmentfonds") im Sinne der Richtlinie 85/611/EWG des Rates vom 20.12.1985 zur Koordinierung der Rechts- und Verwaltungsvorschriften betreffend bestimmte Organismen für gemeinsame Anlagen in Wertpapieren (OGAW) zu verstehen oder ist Anhang III A a11 und a12 beispielsweise auch dann anzuwenden, wenn Leistungen aus einem Lebensversicherungsvertrag etwa an einen Aktienindex oder an einen anderen Bezugswert gebunden sind?*

2. *Für den Fall, dass die erste Frage seitens des Gerichtshofes dahingehend beantwortet wird, dass Anhang III A a11 und a12 der Richtlinie 2002/83/EG „fondsgebundene Policen" nicht nur auf Investmentunternehmen („Investmentfonds") im Sinne der Richtlinie 85/611/EWG einschränkt:*

2.1 *Verpflichtet die Richtlinie 2002/83/EG Versicherungsunternehmen zur Beratung von Versicherungsnehmern oder bloss zur Mitteilung der im Anhang III dieser Richtlinie aufgeführten Angaben?*

2.2 *Wird der Informationspflicht nach Anhang III A a11 der Richtlinie 2002/83/EG seitens des Versicherungsunternehmens dadurch Genüge getan, dass die Wertpapierkennnummer (WKN) angeführt wird, oder was ist sonst unter „Angabe der Fonds (in Rechnungseinheiten)" zu verstehen, damit der Informationspflicht Genüge getan wird. Dies unter Berücksichtigung des Umstandes, dass der Mitgliedstaat der Verpflichtung von den Versicherungsunternehmen keine weiteren Auskünfte im Sinne des Art 36 Abs 3 der Richtlinie 2002/83/EG verlangt.*

2.3 *Wird der Informationspflicht nach Anhang III A a12 seitens des Versicherungsunternehmens dadurch Genüge getan, dass beispielsweise die Wertpapierkennnummer (WKN) angeführt wird oder sind detailliertere Informationen abzugeben? Dies unter Berücksichtigung des Umstandes, dass der Mitgliedstaat der Verpflichtung von den Versicherungsunternehmen keine weiteren Auskünfte im Sinne des Art 36 Abs 3 der Richtlinie 2002/83/EG verlangt.*

3. *Does Art. 36(1) of Directive 2002/83/EC make it mandatory for the assurance undertaking to provide the details set out in Annex III(A) or is it sufficient if this information is given to the [policy-holder]* by a third party, for example by an insurance intermediary within the meaning of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation?*

4. *Does Directive 2002/83/EC require that Art. 36 be implemented into national law by the Member States in such a way that policy holders acquire a civil law right against the assurance undertaking to be notified of the details pursuant to Annex III or is it sufficient for the implementation into national law if a breach of the duties to provide information under Annex III of the Directive is only subject to sanction by a regulatory body such as by the imposition of a fine, withdrawal of license or other similar measure?*

IV WRITTEN OBSERVATIONS

49. 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 plaintiffs, represented by Dr Hans-Jörg Vogl, Advocate;
- the defendant, represented by Dr Peter Nägele and Thomas Nägele, Advocates;
- the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, EEA Coordination Unit, and Frédérique Lambrecht, Senior Legal Officer, EEA Coordination Unit, acting as Agents;
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, Maria Moustakali and Clémence Perrin, Officers, Department of Legal & Executive Affairs, acting as Agents; and

* Corr

3. *Verpflichtet Art 36 Abs 1 der Richtlinie 2002/83/EG zwingend Versicherungsunternehmen zur Mitteilung der in Anhang III A aufgeführten Angaben oder genügt es, wenn diese Angaben dem Versicherungs[]nehmer* von einem Dritten, beispielsweise von einem Versicherungsvermittler im Sinne der Richtlinie 2002/92/EG des Europäischen Parlaments und des Rates vom 09.12.2002 über Versicherungsvermittlung, mitgeteilt werden?*

4. *Verlangt die Richtlinie 2002/83/EG, dass Art 36 von den Mitgliedstaaten derart im innerstaatlichen Recht umgesetzt wird, dass Versicherungsnehmer einen zivilrechtlichen Anspruch gegenüber dem Versicherungsunternehmen auf Mitteilung der Angaben laut Anhang III erhalten, oder genügt eine Umsetzung im innerstaatlichen Recht dahingehend, dass eine Verletzung der Informationspflichten laut Anhang III der Richtlinie lediglich aufsichtsbehördlich, etwa durch Verhängung einer Geldstrafe, Entzug der Zulassung oder eine ähnliche Massnahme, sanktioniert wird?*

IV SCHRIFTLICHE ERKLÄRUNGEN

49. Gemäss Artikel 20 der Satzung des Gerichtshofs und Artikel 97 der Verfahrensordnung haben schriftliche Erklärungen abgegeben:

– die Kläger, vertreten durch Dr. Hans-Jörg Vogl, Rechtsanwalt;

– die Beklagte, vertreten durch Dr. Peter Nägele und Thomas Nägele, Rechtsanwälte;

– die Regierung des Fürstentums Liechtenstein, vertreten durch Dr. Andrea Entner-Koch, Direktorin, und Frédérique Lambrecht, Leitender Juristischer Mitarbeiter, von der Stabstelle EWR, als Bevollmächtigte;

– die EFTA-Überwachungsbehörde, vertreten durch Xavier Lewis, Direktor, Maria Moustakali und Clémence Perrin, Beamtinnen, Abteilung Rechtliche & Exekutive Angelegenheiten, als Bevollmächtigte;

* Korrigendum, im Vorlagebeschluss als „*Versicherungsunternehmer*“ bezeichnet.

– the European Commission ("the Commission"), represented by Karl-Philipp Wojcik, Legal Advisor, and Nicola Yerrell, Member of its Legal Service, acting as Agents.

V SUMMARY OF THE ARGUMENTS SUBMITTED

The first question

Government of the Principality of Liechtenstein

50. The Liechtenstein Government observes that the purpose of Directive 2002/83 is to facilitate the taking-up and pursuit of the business of life assurance and, at the same time, to ensure adequate protection for policy holders and beneficiaries. The Directive aims at protecting consumers through choice based on information.[7]

51. It notes that Article 36 of Directive 2002/83 specifies that certain minimum information must be communicated to the policy holder before the assurance contract is concluded and throughout the term of the contract. This information is defined in Annex III to the Directive.

52. Given the purpose of Directive 2002/83, that is to protect consumers through choice based on information, the Liechtenstein Government contends that the term unit-linked policies in Annex III(A), points a(11) and a(12), does not refer exclusively to units ("Investment Funds") within the meaning of Directive 85/611/EEC. In its view, the information requirements of Annex III(A), points a(11) and a(12), also apply where payments from a life assurance contract are linked to a share index or other reference value. The information mentioned in Annex III A, points a(11) and a(12), should be stated not only

[7] Reference is made to Case E-1/05 *ESA* v *Norway* [2005] EFTA Ct. Rep. 236, paragraph 42.

– die Europäische Kommission (im Folgenden: Kommission), vertreten durch Karl-Philipp Wojcik, Rechtsberater, und Nicola Yerrell, Mitarbeiterin des Juristischen Diensts der Kommission, als Bevollmächtigte.

V ZUSAMMENFASSUNG DER AUSFÜHRUNGEN

Zur ersten Frage

Die Regierung des Fürstentums Liechtenstein

50. Die Regierung des Fürstentums Liechtenstein stellt fest, dass der Zweck der Richtlinie 2002/83 darin besteht, die Aufnahme und Ausübung der Tätigkeiten der Lebensversicherung zu erleichtern und gleichzeitig einen angemessenen Schutz der Versicherten und der Begünstigten zu wahren. Ziel der Richtlinie ist es, den Verbraucher dadurch zu schützen, dass dieser im Besitz der notwendigen Informationen ist, wenn er seine Wahl trifft.[7]

51. Die Regierung des Fürstentums Liechtenstein führt aus, dass Artikel 36 der Richtlinie 2002/83 vorsieht, dass dem Versicherungsnehmer vor Abschluss des Versicherungsvertrags und während der gesamten Vertragsdauer bestimmte Mindestangaben mitgeteilt werden müssen. Diese Angaben sind in Anhang III der Richtlinie definiert.

52. Aus dem Zweck der Richtlinie 2002/83, den Verbraucher dadurch zu schützen, dass dieser seine Entscheidung auf der Grundlage der notwendigen Informationen treffen kann, leitet die Regierung des Fürstentums Liechtenstein ab, dass sich der in Anhang III Buchstabe A Punkte a.11 und a.12 verwendete Begriff der fondsgebundenen Policen nicht ausschliesslich auf Fonds („Investmentfonds“) im Sinne der Richtlinie 85/611/EWG bezieht. Ihrer Ansicht nach sind die Informationspflichten gemäss Anhang III Buchstabe A Punkte a.11 und a.12 auch anwendbar, wenn Leistungen aus einem Lebensversicherungsvertrag an einen Aktienindex oder an einen anderen Bezugswert gebunden sind. Die in Anhang III Buchstabe A Punkte a.11 und a.12 genannten

[7] Es wird auf die Rechtssache E-1/05 *ESA* v *Norway*, EFTA Court Report 2005, S. 236, Randnr. 42, verwiesen.

in relation to unit-linked policies, as expressly set out in those provisions, but also in relation to all other investment-linked or reference-linked insurance policies.

53. According to the Liechtenstein Government, it appears compatible with the purpose of Directive 2002/83 that consumers should be provided with information which is as complete as possible in order to choose the insurance product which will most closely suit their individual needs.

54. It contends that the information should inform consumers on where and how their premiums are invested and, where appropriate, to which share index or other reference value the performance of the policy is linked. In its view, this information gives consumers the possibility to identify and assess the risk that is entailed in the transaction of the insurance product (regardless whether unit-linked or linked to a share index or other reference value).

55. The Government of the Principality of Liechtenstein proposes that the Court should answer the first question as follows:

The term unit-linked policies, within the meaning of Annex III(A), points a(11) and a(12), does not refer exclusively to units ("Investment Funds") within the meaning of Directive 85/611/EEC but Annex III(A), points a(11) and a(12), also applies for example where payments from a life assurance contract are linked to a share index or other reference value.

EFTA Surveillance Authority

56. ESA notes that Directive 2002/83 is applicable to the first, second and fourth contracts. The third contract falls under Directive 92/96. However, the material provisions remain identical under the two directives.

Informationen sollten nicht nur in Bezug auf fondsgebundenen Policen, wie in diesen Bestimmungen ausdrücklich festgelegt, sondern auch im Zusammenhang mit allen anderen anlage- oder bezugswertgebundenen Versicherungspolicen mitgeteilt werden.

53. Der Regierung des Fürstentums Liechtenstein zufolge erscheint es mit dem Zweck der Richtlinie 2002/83 vereinbar, dass Verbrauchern möglichst vollständige Informationen mitgeteilt werden sollten, um sie in die Lage zu versetzen, jenes Versicherungsprodukt wählen zu können, das ihren individuellen Bedürfnissen am ehesten entspricht.

54. Die Regierung des Fürstentums Liechtenstein legt dar, dass die Informationen die Verbraucher darüber in Kenntnis setzen sollten, wo und wie ihre Versicherungsprämien veranlagt werden und gegebenenfalls an welchen Aktienindex oder anderen Bezugswert die Entwicklung der Police gebunden ist. Nach ihrer Auffassung bieten diese Informationen den Verbrauchern die Möglichkeit, das mit der Transaktion des Versicherungsprodukts verbundene Risiko zu bestimmen und abzuschätzen (unabhängig davon, ob das Produkt an einen Fonds, Aktienindex oder einen anderen Bezugswert gebunden ist).

55. Die Regierung des Fürstentums Liechtenstein schlägt vor, dass der Gerichtshof die erste Frage folgendermassen beantwortet:

Unter fondsgebundenen Policen im Sinne des Anhangs III Buchstabe A Punkte a.11 und a.12 sind nicht ausschliesslich Fonds („Investmentfonds“) im Sinne der Richtlinie 85/611/EWG zu verstehen; vielmehr ist Anhang III Buchstabe A Punkte a.11 und a.12 beispielsweise auch dann anzuwenden, wenn Leistungen aus einem Lebensversicherungsvertrag an einen Aktienindex oder an einen anderen Bezugswert gebunden sind.

Die EFTA-Überwachungsbehörde

56. Die EFTA-Überwachungsbehörde merkt an, dass die Richtlinie 2002/83 auf den ersten, zweiten und vierten Vertrag anwendbar ist. Für den dritten Vertrag gilt die Richtlinie 92/96. Die wesentlichen Bestimmungen der beiden Richtlinien sind jedoch identisch.

57. At the outset, ESA states that a "unit-linked" life assurance policy is a life assurance policy linked to a fund which is divided into units of equal value. The value, or price, of each unit depends on the value of the assets in which the unit-linked fund has invested. The fund can directly hold specific assets, such as company shares or property. Alternatively, it can hold assets by investing in a collective investment scheme, such as UCITS. UCITS are therefore an underlying investment of certain unit-linked life assurance products.

58. ESA observes that Directive 2002/83 does not define the term "unit-linked" policy. However, Article 23 of Directive 2002/83 lists the categories of assets which an EEA State may authorise undertakings to use in their technical provisions. This list includes, *inter alia*, "units in UCITS and other investment funds".

59. It notes that Article 25 of Directive 2002/83 on contracts linked to UCITS or a share index refers to benefits in contracts "linked to the value of units in UCITS or to the value of assets contained in an internal fund held by the insurance company, usually divided into units".

60. In ESA's view, this indicates that the concept of "unit-linked" policy is not limited exclusively to units in UCITS but can also extend to any other form of investment fund or reference value. Consequently, "unit-linked" insurance should be interpreted as

57. Eingangs hält die EFTA-Überwachungsbehörde fest, dass es sich bei einer „fondsgebundenen“ Lebensversicherungspolice um eine Lebensversicherungspolice handelt, die an einen Fonds gebunden ist, der in Anteile von gleichem Wert unterteilt ist. Der Wert, oder Preis, jedes Anteils ist abhängig vom Wert der Anlagen, in die die fondsgebundenen Mittel investiert wurden. Der Fonds kann bestimmte Vermögenswerte wie Unternehmensanteile oder Immobilien direkt halten. Er kann jedoch auch Vermögenswerte durch Veranlagung in einem kollektiven Kapitalanlagemodell wie OGAW halten. Dementsprechend handelt es sich bei OGAW um die bestimmten fondsgebundenen Lebensversicherungsprodukten zugrunde liegenden Anlagen.

58. Die EFTA-Überwachungsbehörde weist darauf hin, dass der Begriff „fondsgebundene“ Police in der Richtlinie 2002/83 nicht definiert ist. Artikel 23 der Richtlinie 2002/83 enthält jedoch eine Aufstellung der Kategorien von Vermögenswerten, die für die versicherungstechnischen Rückstellungen von Versicherungsunternehmen in EWR-Staaten zulässig sind. In dieser Aufstellung sind u. a. „Anteile an OGAW und anderen gemeinschaftlichen Kapitalanlagen“ angeführt.

59. Die EFTA-Überwachungsbehörde bringt vor, dass Artikel 25 der Richtlinie 2002/83 über an einen OGAW oder Aktienindex gebundene Verträge auf Leistungen aus Verträgen, die „an den Wert von Anteilen an einem OGAW oder an den Wert von Vermögenswerten gebunden [sind], die in einem von dem Versicherungsunternehmen gehaltenen und in der Regel in Anteile aufgeteilten internen Fonds enthalten sind“ Bezug nimmt.

60. Nach Ansicht der EFTA-Überwachungsbehörde lässt sich daraus entnehmen, dass das Konzept der „fondsgebundenen“ Police nicht ausschliesslich auf Anteile an OGAW beschränkt ist, sondern auch auf jede andere Form einer gemeinschaftlichen Kapitalanlage oder eines Bezugswerts ausgedehnt werden kann. Dementsprechend sollte der Begriff „fondsgebundene“ Versicherung als an gemeinschaftliche Kapitalanlagen gebundene

assurance contracts linked to investment funds.[8] This would be consistent with one of the aims of Directive 2002/83 which is to protect policy holders and ensure that they are provided with the information necessary to be able to select the life assurance contract best suited to their requirements.

61. ESA submits that the term "unit-linked" policy in Annex III(A) should extend to life assurance contracts linked to other reference values, such as a share index as defined in Article 25(2) of Directive 2002/83. ESA considers such a conclusion more convincing and more in line with the aims of Directive 2002/83. In its view, a restrictive interpretation of the notion "unit-linked" policy would entail an artificial distinction between Article 25(1) and Article 25(2) of Directive 2002/83, which is hardly justifiable given that Article 25(2) of the Directive specifically provides for benefits that are represented by "units" deemed to represent the reference value.

62. ESA proposes that the Court should answer the first question as follows:

The term "unit-linked" policy, within the meaning of Annex III(A) points a(11) and a(12) of Directive 2002/83, does not refer exclusively to units within the meaning of Directive 85/611 but also applies to life assurance contracts linked to a share index or other reference value.

The Commission

63. The Commission notes that Directive 2002/83 is applicable to the first, second and fourth contracts. The third contract falls under Directive 92/96. However, the material provisions remain identical under the two directives.

[8] Reference is made to Case C-166/11 *Angel Lorenzo Gonzalez Alonso*, judgment of 1 March 2012, not yet reported, paragraph 26.

Versicherungsverträge ausgelegt werden.[8] Dies stünde im Einklang zu einem der Ziele der Richtlinie 2002/83, das darin besteht, die Versicherten zu schützen und sicherzustellen, dass sie über die Informationen verfügen, die sie benötigen, um den Versicherungsvertrag wählen zu können, der ihren Anforderungen am ehesten entspricht.

61. Laut EFTA-Überwachungsbehörde sollte der Begriff „fondsgebundene" Police in Anhang III Buchstabe A auf Lebensversicherungsverträge ausgedehnt werden, die an andere Bezugswerte, wie einen Aktienindex gemäss Artikel 25 Absatz 2 der Richtlinie 2002/83, gebunden sind. Die EFTA-Überwachungsbehörde hält eine solche Schlussfolgerung für überzeugender und mit den Zielen der Richtlinie 2002/83 besser vereinbar. Ihrer Ansicht nach hätte eine enge Auslegung des Begriffs „fondsgebundene" Police eine unnatürliche Unterscheidung zwischen Artikel 25 Absatz 1 und Artikel 25 Absatz 2 der Richtlinie 2002/83 zur Folge, die in Anbetracht der Tatsache, dass Artikel 25 Absatz 2 der Richtlinie eigens auf Leistungen eingeht, die durch „Anteile" repräsentiert werden, die den Bezugswert darstellen sollen, kaum zu rechtfertigen ist.

62. Die EFTA-Überwachungsbehörde schlägt vor, dass der Gerichtshof die erste Frage folgendermassen beantwortet:

Unter dem Begriff „fondsgebundene" Police im Sinne des Anhangs III Buchstabe A Punkte a.11 und a.12 der Richtlinie 2002/83 sind nicht ausschliesslich Fonds im Sinne der Richtlinie 85/611 zu verstehen, sondern er ist auch auf Lebensversicherungsverträge anzuwenden, die an einen Aktienindex oder an einen anderen Bezugswert gebunden sind.

Die Kommission

63. Die Kommission merkt an, dass die Richtlinie 2002/83 auf den ersten, zweiten und vierten Vertrag anwendbar ist. Für den dritten Vertrag gilt die Richtlinie 92/96. Die wesentlichen Bestimmungen der beiden Richtlinien sind jedoch identisch.

[8] Es wird auf die Rechtssache C-166/11 *Angel Lorenzo Gonzalez Alonso*, Urteil vom 1. März 2012, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 26, verwiesen.

64. The Commission observes that some assistance may be found in the articles of Directive 2002/83 on technical provisions. Article 23(1) clearly refers to UCITS "and other investment funds", whilst Article 24(3) draws a distinction between UCITS "not coordinated within the meaning of Directive 85/611/EEC" and "other investment funds", on the one hand, and UCITS "coordinated within the meaning of Directive 85/611/EEC", on the other.

65. In the Commission's view, this suggests that for the purpose of Directive 2002/83 UCITS are simply a sub-group of "investment funds" and that in the context of that directive UCITS may refer to UCITS covered by Directive 85/611 or to those falling outside its scope.

66. The Commission observes that Article 25(1) of Directive 2002/83 refers to life assurance policies linked to the value of units in a UCITS (whether or not covered by Directive 85/611) or to the value of assets in an internal fund held by the insurer "usually divided into units". Consequently, the Commission concludes, the key element for this form of investment is either the link to the value of units or a share in underlying assets held in an internal fund. By way of contrast, it notes that Article 25(2) of Directive 2002/83 refers to life assurance policies where the benefits are linked to a share index or some other reference value. Both cases clearly constitute life assurance linked to "investment funds" within the meaning of Directive 2002/83.

67. The Commission finds itself obliged to conclude, having regard to the scheme of Directive 2002/83, that the term "unit-linked policies" in Annex III(A) to Directive 2002/83 refers only to the policies described in Article 25(1), and not those mentioned in

64. Die Kommission bringt vor, dass die Artikel der Richtlinie 2002/83 über versicherungstechnische Rückstellungen eine gewisse Orientierungshilfe enthalten. So bezieht sich Artikel 23 Absatz 1 eindeutig auf OGAW „und andere gemeinschaftliche Kapitalanlagen", während Artikel 24 Absatz 3 zwischen „nichtkoordinierten OGAW im Sinne der Richtlinie 85/611/EWG" und den „übrigen Investmentfonds" einerseits und „im Sinne derselben Richtlinie koordinierten OGAW" andererseits unterscheidet.

65. Nach Auffassung der Kommission lässt sich daraus ableiten, dass OGAW für die Zwecke der Richtlinie 2002/83 nur eine Untergruppe von „Investmentfonds" darstellen und dass es sich bei OGAW im Kontext dieser Richtlinie um OGAW handeln kann, die von der Richtlinie 85/611 abgedeckt werden oder auch nicht.

66. Die Kommission hält fest, dass sich Artikel 25 Absatz 1 der Richtlinie 2002/83 auf Lebensversicherungspolicen bezieht, die an den Wert von Anteilen an einem OGAW (unabhängig davon, ob dieser in den Geltungsbereich der Richtlinie 85/611 fällt) oder an den Wert von Vermögenswerten, die in einem von dem Versicherungsunternehmen gehaltenen und „in der Regel in Anteile aufgeteilten" internen Fonds enthalten sind, gebunden sind. Die Kommission gelangt daher zu der Schlussfolgerung, dass das für diese Anlageform massgebliche Element entweder die Bindung an den Wert von Anteilen oder das Halten eines Teils der zugrunde liegenden Vermögenswerte in einem internen Fonds ist. Im Gegensatz dazu, so die Kommission, bezieht sich Artikel 25 Absatz 2 der Richtlinie 2002/83 auf Lebensversicherungspolicen, deren Leistungen an einen Aktienindex oder an einen anderen Bezugswert gebunden sind. In beiden Fällen handelt es sich zweifellos um an „Investmentfonds" im Sinne der Richtlinie 2002/83 gebundene Lebensversicherungen.

67. Infolgedessen schliesst die Kommission mit Blick auf den Aufbau der Richtlinie 2002/83, dass sich der Begriff „fondsgebundene Policen" in Anhang III Buchstabe A der Richtlinie 2002/83 nur auf die in Artikel 25 Absatz 1 beschriebenen Policen, nicht jedoch

Article 25(2). In its view, the legislative history to Article 36 on the provision of information and Annex III(A) on the detailed information requirements provides no further explanation for such a distinction. Both provisions originate from Directive 92/96, in which it was noted in recital 23 in the preamble thereto simply that the consumer should be provided with "whatever information is necessary to enable him to choose the contract best suited to his needs", and in particular "to receive clear and accurate information on the essential characteristics of the product proposed".[9]

68. The Commission surmises that the distinction arose as it was more important to require detailed information of what were considered to be less transparent investment funds (unit-linked policies). On the other hand, in the case of policies linked to a share index or other reference value, these reference values were more likely to be publicly available.

69. The Commission recognises the consequences of this approach, namely, that in the case of life assurance policies where the benefits are linked to a share index or other reference value the information specified in points a(11) and a(12) of Annex III(A) to Directive 2002/83 does not need to be provided to policy holders. It observes, however, that in respect of such policies the requirement to provide the other information specified in points a(4) to a(16) evidently continues to apply.

70. The Commission proposes that the Court should answer the first question as follows:

The notion of "unit-linked policies" within the meaning of Annex III(A) of Directive 2002/83 is broader than that of investment funds covered

[9] Reference is made to *Axa Royale Belge*, cited above, paragraph 20.

auf die in Artikel 25 Absatz 2 genannten bezieht. Der Kommission zufolge bietet die Entstehungsgeschichte von Artikel 36 über die Bereitstellung von Angaben für den Versicherungsnehmer und Anhang III Buchstabe A mit ausführlichen Anforderungen an Informationen für Versicherungsnehmer keinen weiteren Aufschluss in Bezug auf eine solche Unterscheidung. Beide Bestimmungen sind auf Richtlinie 92/96 zurückzuführen, in der es in Erwägungsgrund 23 der Präambel nur hiess, der Verbraucher müsse „im Besitz der notwendigen Informationen sein, um den seinen Bedürfnissen am ehesten entsprechenden Vertrag auszuwählen" und er müsse insbesondere „klare und genaue Angaben über die wesentlichen Merkmale der ihm angebotenen Produkte" erhalten.[9]

68. Die Kommission vermutet, dass es zu der Unterscheidung kam, da es wichtiger war, ausführliche Informationen über die als weniger durchschaubar erachteten Investmentfonds (fondsgebundene Policen) zu verlangen. Dagegen war es in Bezug auf an einen Aktienindex oder an einen anderen Bezugswert gebundene Policen wahrscheinlicher, dass diese Bezugswerte für die Öffentlichkeit verfügbar sind.

69. Die Kommission nimmt die mit diesem Ansatz verbundenen Konsequenzen zur Kenntnis, nämlich dass im Falle von Lebensversicherungspolicen, deren Leistungen an einen Aktienindex oder an einen anderen Bezugswert gebunden sind, die in den Punkten a.11 und a.12 in Anhang III Buchstabe A der Richtlinie 2002/83 genannten Informationen den Versicherungsnehmern nicht mitgeteilt werden müssen. Allerdings weist die Kommission darauf hin, dass die Verpflichtung zur Mitteilung der anderen in den Punkten a.4 bis a.16 festgelegten Angaben in Bezug auf solche Policen augenscheinlich weiter anwendbar ist.

70. Die Kommission schlägt vor, dass der Gerichtshof die erste Frage folgendermassen beantwortet:

Der Begriff der „fondsgebundenen Policen" im Sinne von Anhang III Buchstabe A der Richtlinie 2002/83 ist breiter gefasst als jener der

[9] Es wird auf die Rechtssache *Axa Royale Belge*, Randnr. 20, verwiesen.

by the UCITS Directive 85/611 but does not extend to policies linked to a share index or reference value.

The second question

The plaintiffs

71. The plaintiffs assert that the assurance product at issue before the national court is a bundle of different financial instruments. The product consists of three elements: Loan: providing leverage for the investment; Security: investment fund; Assurance: life assurance.

72. The plaintiffs emphasise that the defendant must fulfil all the obligations to inform the consumer under the relevant national law applicable to the product in question.[10]

The defendant

73. The defendant notes that the judgment of the Liechtenstein Supreme Court of 10 February 2012, to which the national court refers in the request for an advisory opinion, has been set aside by a judgment of 10 December 2012 of the Constitutional Court of the Principality of Liechtenstein (*Staatsgerichtshof des Fürstentums Liechtenstein*) and the case sent back to the Supreme Court for a new assessment.

Government of the Principality of Liechtenstein

74. As regards Question 2.1, the Liechtenstein Government contends that it follows from the wording of Directive 2002/83 that it entails

[10] Reference is made to the following national provisions: Liechtenstein: Versicherungsvertragsgesetz (VersVG), Versicherungsaufsichtsgesetz (VersAG), Wertpapierprospektgesetz (WPPG), Finanzkonglomeratsgesetz (FKG), Konsumkreditgesetz (KKG), Wohlverhalten der Finanzmarktaufsicht (FMA); Austria: Versicherungsvertragsgesetz (VersAG), Versicherungsaufsichtsgesetz (VAG), Kapitalmarktgesetz (KMG), Wertpapieraufsichtsgesetz (WAG), Verbraucherkreditgesetz (VKrG), Bankwesengesetz (BWG), Wohlverhaltensregeln der Finanzmarktaufsicht (FMA); and Germany: Versicherungsvertragsgesetz (VVG), Versicherungsaufsichtsgesetz (VAG), Wertpapierprospektgesetz (WpPG), Wertpapierhandelsgesetz (WpHG), Verbraucherkreditgesetz (VerbrKrG), Kreditwesengesetz (KWG), Wohlverhaltensregeln der Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin).

von der OGAW-Richtlinie 85/611 abgedeckten Investmentfonds, erstreckt sich jedoch nicht auf Policen, die an einen Aktienindex oder Bezugswert gebunden sind.

Zur zweiten Frage

Die Kläger

71. Die Kläger bringen vor, das vor dem nationalen Gericht in Rede stehende Versicherungsprodukt setze sich aus einem Bündel unterschiedlicher Finanzinstrumente zusammen. Das Produkt besteht aus drei Elementen: Kredit: Fremdkapitaleinsatz; Wertpapier: Fonds; Versicherung: Lebensversicherung.

72. Die Kläger berufen sich auf die Aufklärungspflichten der Beklagten gegenüber den Verbrauchern im Rahmen der auf das gegenständliche Produkt anwendbaren nationalen Gesetzgebung.[10]

Die Beklagte

73. Die Beklagte hält fest, dass das Urteil des Obersten Gerichtshofs des Fürstentums Liechtenstein vom 10. Februar 2012, auf das sich das nationale Gericht in seinem Antrag auf Vorabentscheidung bezieht, mittels Urteil des Staatsgerichtshofs des Fürstentums Liechtenstein vom 10. Dezember 2012 aufgehoben und die Rechtssache zur neuerlichen Entscheidung an den Obersten Gerichtshof zurückverwiesen wurde.

Die Regierung des Fürstentums Liechtenstein

74. Betreffend Frage 2.1 vertritt die Regierung des Fürstentums Liechtenstein die Auffassung, dass dem Wortlaut der Richtlinie

[10] Es wird auf die folgenden nationalen Rechtsvorschriften verwiesen: Liechtenstein: Versicherungsvertragsgesetz (VersVG), Versicherungsaufsichtsgesetz (VersAG), Wertpapierprospektgesetz (WPPG), Finanzkonglomeratsgesetz (FKG), Konsumkreditgesetz (KKG), Wohlverhalten der Finanzmarktaufsicht (FMA); Österreich: Versicherungsvertragsgesetz (VersAG), Versicherungsaufsichtsgesetz (VAG), Kapitalmarktgesetz (KMG), Wertpapieraufsichtsgesetz (WAG), Verbraucherkreditgesetz (VKrG), Bankwesengesetz (BWG), Wohlverhaltensregeln der Finanzmarktaufsicht (FMA); Deutschland: Versicherungsvertragsgesetz (VVG), Versicherungsaufsichtsgesetz (VAG), Wertpapierprospektgesetz (WpPG), Wertpapierhandelsgesetz (WpHG), Verbraucherkreditgesetz (VerbrKrG), Kreditwesengesetz (KWG), Wohlverhaltensregeln der Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin).

only a duty to inform. Recital 52 in the preamble to Directive 2002/83 refers only to providing information to the policy holder. Moreover, Annex III to Directive 2002/83 lists information which is to be communicated to the policy holder before the contract is concluded or during the term of the contract. Unlike Article 12 of Directive 2002/92, which explicitly entails a duty to advise, the wording of Directive 2002/83 does not permit the conclusion that the latter directive entails a duty to advise.

75. According to the Liechtenstein Government, when interpreting Directive 2002/83, it is the average consumer, i.e. a consumer who is reasonably well informed and reasonably observant and circumspect, who is to be taken into consideration. Clear information to consumers is important in life assurance contracts.[11] Therefore, Directive 2002/83 does not entail a duty to advise, unlike Article 12 of Directive 2002/92.

76. As regards Questions 2.2 and 2.3, the Liechtenstein Government considers that these questions could be reformulated as follows: does the securities identification number (WKN) provide the average consumer, i.e. a consumer who is reasonably well informed and reasonably observant and circumspect the necessary information for a proper understanding of the essential elements of the commitment and does this WKN enable him/her to choose the contract best suited to his/her needs?

77. In its view, the purpose of the WKN is to ensure the uniform and unique identification of a security. The WKN makes it possible for an average consumer to determine, amongst other things, the degree of risk involved in the investment and the structure of the product. Based on this identification number, a consumer

[11] Reference is made to *ESA* v *Norway*, cited above, paragraphs 41 and 42.

2002/83 zu entnehmen ist, dass ausschliesslich eine Verpflichtung zur Mitteilung der Angaben besteht. Erwägungsgrund 52 der Präambel der Richtlinie 2002/83 bezieht sich nur auf die Bereitstellung von Informationen für den Versicherungsnehmer. Zudem enthält Anhang III der Richtlinie 2002/83 eine Aufstellung der Informationen, die dem Versicherungsnehmer vor Abschluss des Vertrages oder während der Laufzeit des Vertrages mitzuteilen sind. Im Gegensatz zu Artikel 12 der Richtlinie 2002/92, der ausdrücklich eine Verpflichtung zur Beratung vorsieht, lässt der Wortlaut der Richtlinie 2002/83 nicht die Schlussfolgerung zu, dass in der letztgenannten Richtlinie eine Beratungsverpflichtung verankert ist.

75. Der Regierung des Fürstentums Liechtenstein zufolge ist zur Auslegung der Richtlinie 2002/83 der Durchschnittsverbraucher, d. h. ein Verbraucher, der normal informiert und angemessen aufmerksam und verständig ist, heranzuziehen. Klare Informationen für Verbraucher im Zusammenhang mit Lebensversicherungsverträgen sind wichtig.[11] Deshalb enthält Richtlinie 2002/83, anders als Artikel 12 der Richtlinie 2002/92, keine Verpflichtung zur Beratung.

76. Im Hinblick auf die Fragen 2.2 und 2.3 schlägt die Regierung des Fürstentums Liechtenstein folgende Umformulierung vor: Bietet die Wertpapierkennnummer (WKN) dem Durchschnittsverbraucher, d. h. einem Verbraucher, der normal informiert und angemessen aufmerksam und verständig ist, die notwendigen Informationen für ein ordnungsgemässes Verständnis der wesentlichen Elemente der Verpflichtung und erlaubt ihm diese WKN die Auswahl des seinen Bedürfnissen am ehesten entsprechenden Vertrags?

77. Nach Auffassung der Regierung des Fürstentums Liechtenstein besteht der Zweck der WKN in der Gewährleistung der einheitlichen und eindeutigen Identifizierung eines Wertpapiers. Die WKN ermöglicht dem Durchschnittsverbraucher u. a. die Einschätzung

[11] Es wird auf die oben erwähnte Rechtssache *ESA* v *Norway*, Randnrn. 41 und 42, verwiesen.

who is reasonably observant and circumspect will be capable of unambiguously identifying whether the contract is suited to his/her needs and of making an informed choice.

78. As regards the differing language versions, the Liechtenstein Government contends that the text has to be assessed in the light of the purpose of the directive in question.[12]

79. The Government of the Principality of Liechtenstein proposes that the Court should answer the second question as follows:

Directive 2002/83/EC does not entail a duty to advise but only a duty to inform, and this duty to inform can be sufficiently complied with if the assurance undertaking supplies the securities identification number (WKN).

EFTA Surveillance Authority

80. ESA notes that Directive 2002/83 is applicable to the first, second and fourth contracts. The third contract falls under Directive 92/96. However, the material provisions remain identical under the two directives.

81. ESA interprets the duty to provide information as an obligation imposed on assurance undertakings to ensure that policy holders are provided with the information which is listed in Annex III to Directive 2002/83 either before the conclusion of the life assurance contract or during its term. However, such a duty does not extend to an obligation for assurance undertakings to advise policy holders. In its view, such interpretation is also confirmed by the case law of the EFTA Court.[13]

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[12] Reference is made to Case E-18/11 *Irish Bank Resolution Corporation*, judgment of 28 September 2012, not yet reported.

[13] Reference is made to *ESA* v *Norway*, cited above, paragraphs 41 and 42.

der Risikoträchtigkeit der Veranlagung und der Konstruktion des Produkts. Auf der Grundlage dieser Kennnummer wird ein Verbraucher, der angemessen aufmerksam und verständig ist, in der Lage sein, eindeutig festzustellen, ob der Vertrag seinen Bedürfnissen entspricht, und eine fundierte Wahl zu treffen.

78. Hinsichtlich der unterschiedlichen Sprachfassungen vertritt die Regierung des Fürstentums Liechtenstein die Ansicht, dass der Wortlaut vor dem Hintergrund des Zwecks der gegenständlichen Richtlinie bewertet werden muss.[12]

79. Die Regierung des Fürstentums Liechtenstein schlägt vor, dass der Gerichtshof die zweite Frage folgendermassen beantwortet:

Die Richtlinie 2002/83/EG sieht keine Beratungs-, sondern nur eine Informationspflicht vor, wobei dieser Informationspflicht seitens des Versicherungsunternehmens dadurch genügt wird, dass die Wertpapierkennnummer (WKN) angeführt wird.

Die EFTA-Überwachungsbehörde

80. Die EFTA-Überwachungsbehörde merkt an, dass die Richtlinie 2002/83 auf den ersten, zweiten und vierten Vertrag anwendbar ist. Für den dritten Vertrag gilt die Richtlinie 92/96. Die wesentlichen Bestimmungen der beiden Richtlinien sind jedoch identisch.

81. Für die EFTA-Überwachungsbehörde stellt die Informationspflicht eine Versicherungsunternehmen auferlegte Verpflichtung dar, zu gewährleisten, dass Versicherungsnehmern die in Anhang III der Richtlinie 2002/83 genannten Informationen vor Abschluss oder während der Laufzeit eines Lebensversicherungsvertrages mitgeteilt werden. Diese Pflicht lässt sich jedoch nicht auf eine Verpflichtung der Versicherungsunternehmen zur Beratung von Versicherungsnehmern ausdehnen. Der EFTA-Überwachungsbehörde zufolge wird diese Auslegung auch durch die Rechtsprechung des EFTA-Gerichtshofs untermauert.[13]

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[12] Es wird auf die Rechtssache E-18/11 *Irish Bank Resolution Corporation*, Urteil vom 28. September 2012, noch nicht in der amtlichen Sammlung veröffentlicht, verwiesen.

[13] Es wird auf die oben erwähnte Rechtssache *ESA* v *Norway*, Randnrn. 41 und 42, verwiesen.

82. In the light of the wording of recital 52 in the preamble and Article 36(3) of Directive 2002/83 and the case law of the EFTA Court, ESA submits that the duty imposed on assurance undertakings under Directive 2002/83 should be limited to the provision of the information listed in Annex III thereto, which affords an acceptable degree of consumer protection.

83. In ESA's view, it is for the national court to assess whether the provision of the securities identification number (WKN) on the investment form is sufficient to fulfil the duty to provide information imposed on assurance undertakings under Annex III(A), points a(11) and a(12).

84. According to ESA, when interpreting Directive 2002/83, the average consumer must be defined as a consumer who is "reasonably well informed and reasonably observant and circumspect".[14] Consequently, in its view, the national court should use such benchmark to assess whether the provision of the securities identification number suffices to meet the requirements listed in Annex III(A), points a(11) and a(12), and, ultimately, ensure that the policy holder is in a position to make an informed choice.

85. ESA proposes that the Court should answer the second question as follows:

Directive 2002/83 does not oblige assurance undertakings to advise policy holders but solely to make available to them the details set out in Annex III of the directive.

The duty to communicate information under Annex III(A), points a(11) and a(12), of Directive 2002/83 is complied with if the assurance undertaking supplies sufficient information to ensure an

[14] Ibid., paragraph 41.

82. In Anbetracht des Wortlauts von Erwägungsgrund 52 der Präambel und Artikel 36 Absatz 3 der Richtlinie 2002/83 und der Rechtsprechung des EFTA-Gerichtshofs bringt die EFTA-Überwachungsbehörde vor, dass die Versicherungsunternehmen gemäss Richtlinie 2002/83 auferlegte Verpflichtung auf die Mitteilung der in Anhang III genannten Angaben beschränkt werden sollte, welche ein annehmbares Mass an Verbraucherschutz gewährleisten.

83. Nach Ansicht der EFTA-Überwachungsbehörde obliegt es dem nationalen Gericht, zu beurteilen, ob der Versicherungsunternehmen laut Anhang III Buchstabe A Punkte a.11 und a.12 auferlegten Informationspflicht durch die Angabe der Wertpapierkennnummer (WKN) auf dem Anlageformular genügt wird.

84. Die EFTA-Überwachungsbehörde merkt an, dass der Durchschnittsverbraucher bei der Auslegung der Richtlinie 2002/83 als Verbraucher zu definieren ist, der „normal informiert, und angemessen aufmerksam und verständig ist".[14] Dementsprechend sollte, so die EFTA-Überwachungsbehörde, das nationale Gericht dieser Standard heranziehen, um zu beurteilen, ob die Angabe der Wertpapierkennnummer zur Erfüllung der in Anhang III Buchstabe A, Punkte a.11 und a.12 festgelegten Anforderungen ausreicht und letztlich gewährleistet, dass der Versicherungsnehmer in der Lage ist, eine fundierte Wahl zu treffen.

85. Die EFTA-Überwachungsbehörde schlägt vor, dass der Gerichtshof die zweite Frage folgendermassen beantwortet:

Die Richtlinie 2002/83 verpflichtet Versicherungsunternehmen nicht zur Beratung von Versicherungsnehmern, sondern bloss zur Mitteilung der im Anhang III dieser Richtlinie aufgeführten Angaben.

Der Informationspflicht nach Anhang III Buchstabe A Punkte a.11 und a.12 der Richtlinie 2002/83 wird seitens des Versicherungsunternehmens genügt, wenn dieses ausreichende Angaben zur Gewährleistung eines entsprechenden Grads an

[14] Ebenda, Randnr. 41.

appropriate level of consumer protection, allowing a reasonably well informed and reasonably observant and circumspect consumer to make an informed choice. It is for the national court to assess whether the mere provision of the securities identification number (WKN) fulfils such a requirement.

The Commission

86. The Commission notes that Directive 2002/83 is applicable to the first, second and fourth contracts. The third contract falls under Directive 92/96. However, the material provisions remain identical under the two directives.

87. As regards Question 2.1, the Commission takes the view that Directive 2002/83 clearly requires the provision of "information", not advice. Article 36 of the directive is expressly entitled "information for policy holders", whilst Article 36(1) requires the "information listed in Annex III(A)" to be "communicated" to the policy holder. At no point does Directive 2002/83 refer to the provision of advice, with its implication of greater in-depth analysis.

88. In relation to Questions 2.2 and 2.3, the Commission notes that points a(11) and a(12) of Annex III(A) to Directive 2002/83 only require the "definition of the units to which the benefits are linked" and an "indication of the nature of the underlying assets" to be communicated to the policy holder.

89. Consequently, according to the Commission, provision of the securities identification number (WKN) could in principle satisfy this obligation, but this will depend on the circumstances of a particular case and is a matter for the national court. In making its assessment, the national court should take into account the central purpose of the information requirements (as described above), that is, to protect consumers through choice based on information. In

Verbraucherschutz bereitstellt, die einen normal informierten, und angemessen aufmerksamen und verständigen Durchschnittsverbraucher in die Lage versetzen, eine fundierte Wahl zu treffen. Die Entscheidung, ob diese Anforderung rein durch die Angabe der Wertpapierkennnummer (WKN) erfüllt wird, obliegt dem nationalen Gericht.

Die Kommission

86. Die Kommission merkt an, dass die Richtlinie 2002/83 auf den ersten, zweiten und vierten Vertrag anwendbar ist. Für den dritten Vertrag gilt die Richtlinie 92/96. Die wesentlichen Bestimmungen der beiden Richtlinien sind jedoch identisch.

87. In Bezug auf Frage 2.1 steht die Kommission auf dem Standpunkt, dass die Richtlinie 2002/83 eindeutig die Bereitstellung von „Informationen" und nicht von Beratung vorsieht. Artikel 36 der Richtlinie trägt ausdrücklich die Überschrift „Angaben für den Versicherungsnehmer", während gemäss Artikel 36 Absatz 1 „die in Anhang III Buchstabe A aufgeführten Angaben" dem Versicherungsnehmer „mitzuteilen" sind. An keiner Stelle wird in der Richtlinie 2002/83 auf die Durchführung von Beratung und die damit einhergehende Notwendigkeit der eingehenderen Analyse Bezug genommen.

88. Hinsichtlich der Fragen 2.2 und 2.3 stellt die Kommission fest, dass die Punkte a.11 und a.12 von Anhang III Buchstabe A der Richtlinie 2002/83 nur vorsehen, dass dem Versicherungsnehmer die folgenden Informationen mitgeteilt werden: „Angabe der Fonds (in Rechnungseinheiten), an die die Leistungen gekoppelt sind" und „Angabe der Art der ... zugrunde liegenden Vermögenswerte".

89. Dementsprechend könnte, so die Kommission, die Angabe der Wertpapierkennnummer (WKN) dieser Verpflichtung im Grunde genommen Genüge tun. Dies ist jedoch abhängig von den Umständen im Einzelfall und durch das nationale Gericht zu klären. Bei seiner Entscheidung sollte das nationale Gericht den Hauptzweck der Informationspflichten (wie oben erläutert), nämlich den Verbraucher dadurch zu schützen, dass dieser seine Entscheidung auf der Grundlage der notwendigen Informationen

this regard, the Commission notes that it is "a consumer who is reasonably well-informed and reasonably observant and circumspect" who must be taken into consideration when interpreting Directive 2002/83.[15]

90. The Commission proposes that the Court should answer the second question as follows:

Article 36 of Directive 2002/83 requires the information set out in Annex III(A) to be communicated to policyholders but contains no obligation to provide advice. The nature of the information to be communicated will depend upon the circumstances of a particular case and is a matter for the assessment of the national court.

The third question

The plaintiffs

91. The plaintiffs assert that the defendant has conceded that it did not have any contact with the plaintiffs before the assurance contracts were concluded. They point out that the defendant does not have any sale staff of its own and that the mediation of the assurance contracts took place through Swiss Select Asset Management and their sub-intermediaries. The plaintiffs contend that this "sales organisation" had no knowledge whatsoever about the regulatory framework concerning insurance, financial instruments, supervision and consumer protection.

92. The plaintiffs claim further that the defendant has used the services of a third party to discharge its duty to inform. In this regard, they assert, it is irrelevant whether this was an independent or tied insurance intermediary. Such a transfer does not exonerate the defendant from its duties to inform the consumer. In their view, the general principle under national law that the intermediary as an ally ("*Bundesgenosse*") must protect

[15] Ibid.

treffen kann, berücksichtigen. In diesem Zusammenhang merkt die Kommission an, dass zur Auslegung der Richtlinie 2002/83 ein Durchschnittsverbraucher heranzuziehen ist, der „durchschnittlich informiert, aufmerksam und verständig" ist.[15]

90. Die Kommission schlägt vor, dass der Gerichtshof die zweite Frage folgendermassen beantwortet:

Artikel 36 der Richtlinie 2002/83 erfordert die Mitteilung der in Anhang III Buchstabe A aufgeführten Angaben an die Versicherungsnehmer, enthält jedoch keine Verpflichtung zur Durchführung von Beratung. Die Art der mitgeteilten Angaben ist von den Umständen im Einzelfall abhängig und durch das nationale Gericht zu klären.

Zur dritten Frage

Die Kläger

91. Die Kläger bringen vor, die Beklagte habe selbst eingeräumt, vor Abschluss der Lebensversichungsverträge keinen Kontakt mit den Klägern gepflogen zu haben. Sie weisen darauf hin, dass die Beklagte über keinen eigenen Vertriebsaussendienst verfügt und dass die Vermittlung der Versicherungsverträge über die Swiss Select Asset Management und deren Subvermittler erfolgte. Die Kläger stellen fest, dass diese „Vertriebsorganisation" nicht einmal ansatzweise Kenntnis über die versicherungs-, wertpapier-, aufsichts- und verbraucherschutzrechtlichen Bestimmungen hatte.

92. Die Kläger argumentieren weiter, die Beklagte habe sich zur Erfüllung ihrer Aufklärungspflichten Dritter bedient. Hiebei sei es irrelevant, so die Kläger, ob es sich um einen selbständigen oder unselbständigen Agenten handle. Eine solche Übertragung entbinde die Beklagte nicht von ihren Aufklärungspflichten gegenüber dem Verbraucher. Nach Auffassung der Kläger ist der allgemeine Grundsatz des nationalen Rechts, nach dem der Makler als Bundesgenosse die Interessen des Versicherungsnehmers zu schützen hat, in solchen Fällen nicht

[15] Ebenda.

the interests of the policy holder cannot be applicable in such a situation. Consequently, the insurance undertaking must bear the responsibility for any wrongdoing in this regard.

93. The plaintiffs assert further that this result is unavoidable given the logic of the protection provided by the legislation and its purpose. Any other conclusion would make it possible for the defendant to outsource the risk to external sales organisations which normally do not belong to a liability fund.

Government of the Principality of Liechtenstein

94. The Liechtenstein Government observes that Directive 2002/83 and Directive 2002/92 each have different a scope of application. The duty to inform and the duty to advise provided for in Article 12 of Directive 2002/92 apply only to insurance intermediaries and not to insurance undertakings. However, the duty to inform in Directive 2002/83 places the obligation on the insurance undertaking which is required, in the first place, to communicate this information to (prospective) policy holders.

95. In its view, this follows also from the express wording of Article 36 of Directive 2002/83.

96. However, according to the Liechtenstein Government, Directive 2002/83 does not preclude the communication of this information to (prospective) policy holders by a third party, for example, by an insurance broker within the meaning of Directive 2002/92. In its view, insurance intermediaries can only fulfil their duty to advise if they provide the consumer not only with the information listed in Article 12 of Directive 2002/92, but also with the information listed in Annex III to Directive 2002/83.

97. The Government of the Principality of Liechtenstein proposes that the Court should answer the third question as follows:

anwendbar. Dementsprechend hat die Versicherungsgesellschaft für jedes diesbezügliche Fehlverhalten die Verantwortung zu übernehmen.

93. Den Klägern zufolge ist dieses Ergebnis angesichts der Logik des durch die Rechtsvorschriften gewährten Schutzes und ihres Zweckes zwingend. Jede andere Schlussfolgerung würde es der Beklagten ermöglichen, das Risiko auf externe Vertriebsorganisationen auszulagern, welche in der Regel keinem Haftungsfonds angehören.

Die Regierung des Fürstentums Liechtenstein

94. Die Regierung des Fürstentums Liechtenstein stellt fest, dass die Richtlinie 2002/83 und die Richtlinie 2002/92 einen unterschiedlichen Geltungsbereich aufweisen. Die in Artikel 12 der Richtlinie 2002/92 verankerte Informations- und Beratungspflicht ist nur auf Versicherungsvermittler, aber nicht auf Versicherungsunternehmen anwendbar. Die Informationspflicht gemäss Richtlinie 2002/83 verpflichtet jedoch primär das Versicherungsunternehmen, diese Angaben (künftigen) Versicherungsnehmern mitzuteilen.

95. Die Regierung des Fürstentums Liechtenstein argumentiert, dies lasse sich auch ausdrücklich aus dem Wortlaut des Artikels 36 der Richtlinie 2002/83 ableiten.

96. Der Regierung des Fürstentums Liechtenstein zufolge schliesst die Richtlinie 2002/83 die Mitteilung dieser Angaben an (künftige) Versicherungsnehmer durch Dritte, beispielsweise durch einen Versicherungsvermittler im Sinne der Richtlinie 2002/92, nicht aus. Nach Auffassung der Regierung des Fürstentums Liechtenstein können Versicherungsvermittler ihrer Beratungspflicht nur nachkommen, wenn sie dem Verbraucher nicht nur die in Artikel 12 der Richtlinie 2002/92, sondern auch die in Anhang III der Richtlinie 2002/83 aufgeführten Auskünfte mitteilen.

97. Die Regierung des Fürstentums Liechtenstein schlägt vor, dass der Gerichtshof die dritte Frage folgendermassen beantwortet:

Article 36(1) of Directive 2002/83 makes it mandatory for the assurance undertaking to provide the details set out in Annex III(A). However, this information can be given to the policy holder by a third party, for example by an insurance broker within the meaning of Directive 2002/92.

EFTA Surveillance Authority

98. ESA notes that Directive 2002/92 was not applicable in the EEA at the material time. Consequently, it observes that the question must be read in the light of Directive 77/92, which was applicable.

99. According to ESA, depending on the terms of the contractual relationship between the assurance undertaking and the broker or agent, the latter may presumably be instructed and mandated by the former to communicate to potential policy holders the necessary information, before the contract is concluded. This should cover at least the information in Annex III(A) to Directive 2002/83.

100. ESA observes that Article 36 of Directive 2002/83 does not contain any indications as to how the obligation to provide the necessary information to the policy holder resting on the life assurance undertaking should be fulfilled in practice. In that regard, it notes that one of the principal characteristics of directives is that they intend to achieve a specific result while leaving it to the EEA States and their national authorities how to achieve this objective. What is clear, however, is the general obligation on the EEA States to ensure that the provisions of a directive are fully effective.[16]

[16] Reference is made to Case E-16/11 *ESA* v *Iceland*, judgment of 28 January 2013, not yet reported, paragraph 120.

Artikel 36 Absatz 1 der Richtlinie 2002/83 verpflichtet das Versicherungsunternehmen zur Mitteilung der in Anhang III Buchstabe A aufgeführten Angaben. Diese Angaben können dem Versicherungsnehmer jedoch durch einen Dritten, beispielsweise einen Versicherungsmakler im Sinne der Richtlinie 2002/92, mitgeteilt werden.

Die EFTA-Überwachungsbehörde

98. Die EFTA-Überwachungsbehörde merkt an, dass die Richtlinie 2002/92 zum massgeblichen Zeitpunkt im EWR nicht anwendbar war. Dementsprechend müsse die Frage vor dem Hintergrund der anwendbaren Richtlinie 77/92 betrachtet werden.

99. Abhängig von der vertraglichen Beziehung zwischen dem Versicherungsunternehmen und dem Makler oder Agenten, so die EFTA-Überwachungsbehörde, können Letztere vermutlich von Ersterem angewiesen und beauftragt werden, potenziellen Versicherungsnehmern die notwendigen Informationen vor Abschluss des Vertrags mitzuteilen. Dies sollte zumindest für die Angaben gemäss Anhang III Buchstabe A der Richtlinie 2002/83 gelten.

100. Die EFTA-Überwachungsbehörde stellt fest, dass Artikel 36 der Richtlinie 2002/83 keine Hinweise betreffend die praktische Umsetzung der Verpflichtung des Lebensversicherungsunternehmens zur Mitteilung der notwendigen Informationen an den Versicherungsnehmer enthält. In diesem Zusammenhang verweist die EFTA-Überwachungsbehörde darauf, dass eines der Hauptmerkmale von Richtlinien darin besteht, dass mit ihrer Hilfe ein bestimmtes Ergebnis erzielt werden soll, es jedoch den EWR-Staaten und ihren nationalen Behörden überlassen bleibt, wie dieses Ziel erreicht wird. Ausser Frage steht jedoch die allgemeine Verpflichtung der EWR-Staaten zur Gewährleistung, dass die Bestimmungen einer Richtlinie uneingeschränkt wirksam sind.[16]

[16] Es wird auf die Rechtssache E-16/11 *ESA v Iceland*, Urteil vom 28. Januar 2013, noch nicht in der amtlichen Sammlung veröffentlicht, Randnr. 120, verwiesen.

101. In the present case, ESA contends that Directive 2002/83 imposes an obligation of result in the sense that the life assurance undertaking is required to communicate to the policy holder certain information listed in Annex III(A) to that directive before the assurance contract is concluded.

102. According to ESA, the insurance intermediary will in any case need certain information regarding the policies available in order to undertake the necessary preparatory work for the conclusion of the contract. The life assurance undertaking is the best placed entity to provide that information to the insurance intermediary. Thus, the former may possibly impose a contractual obligation on the latter to communicate this information (and at least the information referred to in Article 36 of Directive 2002/83 and Annex III thereto[17]) subsequently to the policy holders instead of doing so directly itself. This would not amount to an extra obligation on the life assurance undertaking as it is mandatory under Directive 2002/83 to provide this information to policy holders.

103. In ESA's view, Directive 2002/83 allows for discretion on the part of the life assurance undertaking either to communicate this information to the policy holder directly or to impose this obligation contractually on the insurance intermediary. Both options are compatible with the provisions of Directive 2002/83 provided that the mandatory result pursued is achieved, i.e. the policy holder receives the necessary information before the contract is concluded.

104. ESA contends that under Directive 2002/92 the conclusion is identical.

[17] Ibid.

101. Im vorliegenden Fall bringt die EFTA-Überwachungsbehörde vor, dass die Richtlinie 2002/83 insofern eine Ergebnispflicht auferlegt, als das Lebensversicherungsunternehmen verpflichtet ist, dem Versicherungsnehmer vor Abschluss des Lebensversicherungsvertrags bestimmte Angaben, die in Anhang III Buchstabe A dieser Richtlinie aufgeführt sind, mitzuteilen.

102. Der EFTA-Überwachungsbehörde zufolge benötigt der Versicherungsvermittler in jedem Fall bestimmte Informationen hinsichtlich der verfügbaren Policen, um die nötigen Vorbereitungen für den Abschluss des Vertrags zu treffen. Das Lebensversicherungsunternehmen ist am besten in der Lage, dem Versicherungsvermittler diese Informationen mitzuteilen. Demensprechend kann das Erstere den Letzteren möglicherweise vertraglich verpflichten, diese Informationen (und zumindest die in Artikel 36 der Richtlinie 2002/83 und deren Anhang III[17] aufgeführten Angaben) anschliessend den Versicherungsnehmern mitzuteilen, anstatt dies unmittelbar selbst zu erledigen. Dies würde für das Lebensversicherungsunternehmen keine gesonderte Verpflichtung darstellen, da die Mitteilung dieser Angaben an die Versicherungsnehmer gemäss Richtlinie 2002/83 obligatorisch ist.

103. Nach Auffassung der EFTA-Überwachungsbehörde liegt es gemäss Richtlinie 2002/83 im Ermessensspielraum des Lebensversicherungsunternehmens, ob es die Angaben dem Versicherungsnehmer direkt mitteilt oder diese Verpflichtung vertraglich dem Versicherungsvermittler auferlegt. Beide Optionen sind mit den Bestimmungen der Richtlinie 2002/83 vereinbar, sofern das damit verfolgte obligatorische Ergebnis erzielt wird, d. h. der Versicherungsnehmer vor Abschluss des Vertrags die notwendigen Informationen erhält.

104. Die EFTA-Überwachungsbehörde erklärt, dass die Schlussfolgerung bei Anwendung der Richtlinie 2002/92 identisch ist.

[17] Ebenda.

105. ESA proposes that the Court should answer the third question as follows:

Article 31 and Annex II of Directive 92/96, as subsequently replaced by Article 36 and Annex III respectively of Directive 2002/83 on life assurance, makes it mandatory for the life assurance undertaking to provide the details laid down in the aforementioned provisions of the directives; however it is sufficient that these details are communicated to the policy holder by a third party, for example by an insurance broker within the meaning of Directive 77/92 (subsequently replaced by Directive 2002/92/EC on insurance mediation).

The Commission

106. In the Commission's view, in accordance with the consumer protection objectives set out in recital 52 in the preamble to Directive 2002/83, what is crucial is that the result required by Article 36(1) is achieved and the consumer protected.

107. Since life assurance policies are designed and set up by assurance undertakings, the Commission continues, they must logically retain primary responsibility for provision of the relevant information. If an assurance undertaking concludes a life assurance policy directly with a consumer, the consumer must receive the information directly from that undertaking. If, instead, an assurance undertaking concludes a life assurance contract indirectly through an intermediary, it must guarantee none the less that the relevant information is supplied, albeit through the intermediary. The responsibility for ensuring that the requirements of Article 36(1) of Directive 2002/83 are met remains with the insurer even if it chooses to delegate the actual implementation to a third party such as an insurance intermediary.

108. The Commission proposes that the Court should answer the third question as follows:

105. Die EFTA-Überwachungsbehörde schlägt vor, dass der Gerichtshof die dritte Frage folgendermassen beantwortet:

Artikel 31 und Anhang II der Richtlinie 92/96, später ersetzt durch Artikel 36 bzw. Anhang III der Richtlinie 2002/83 über Lebensversicherungen, verpflichten das Versicherungsunternehmen zur Mitteilung der in den obgenannten Bestimmungen der Richtlinie festgelegten Angaben; es genügt jedoch, wenn diese Angaben dem Versicherungsnehmer von einem Dritten, beispielsweise von einem Versicherungsvermittler im Sinne der Richtlinie 77/92 (später ersetzt durch Richtlinie 2002/92/EG über Versicherungsvermittlung), mitgeteilt werden.

Die Kommission

106. Die Kommission vertritt die Ansicht, dass es unter Berücksichtigung der in Erwägungsgrund 52 der Präambel der Richtlinie 2002/83 festgehaltenen Verbraucherschutzziele entscheidend ist, dass das in Artikel 36 Absatz 1 geforderte Ergebnis erzielt und der Verbraucher geschützt wird.

107. Da Lebensversicherungspolicen von Versicherungsunternehmen konzipiert und eingerichtet werden, so die Kommission weiter, liegt die Hauptverantwortung für die Mitteilung der relevanten Informationen folgerichtig bei ihnen. Schliesst ein Versicherungsunternehmen eine Lebensversicherungspolice direkt mit einem Verbraucher ab, müssen dem Verbraucher die Angaben direkt von diesem Unternehmen mitgeteilt werden. Schliesst stattdessen ein Versicherungsunternehmen einen Lebensversicherungsvertrag indirekt über einen Vermittler ab, muss es trotzdem gewährleisten, dass die relevanten Angaben mitgeteilt werden, wenn auch durch den Vermittler. Die Verantwortung für die Gewährleistung der Einhaltung der Anforderungen gemäss Artikel 36 Absatz 1 der Richtlinie 2002/83 verbleibt auch dann beim Versicherungsunternehmen, wenn dieses entscheidet, die tatsächliche Umsetzung an einen Dritten, wie einen Versicherungsvermittler, zu delegieren.

108. Die Kommission schlägt vor, dass der Gerichtshof die dritte Frage folgendermassen beantwortet:

Assurance undertakings are required to provide the information listed in Annex III(A) although it may be communicated to the policy holder by a third party such as an insurance intermediary.

The fourth question

The plaintiffs

109. The plaintiffs assert that, under national law, a violation of the obligation to inform the consumer carries not only regulatory consequences, but it can also lead to civil liability (damages). The duty to inform is intended to protect investors, borrowers and insurance policy holders in order to ensure that they receive sufficient information and advice. In their view, civil liability must be a direct consequence of such a violation. It is of no consequence whether the national legislation is of an administrative regulatory nature. Regulatory consequences are secondary in nature. The protection of investors, borrowers and insurance policy holders is important. Civil liability is the logical consequence of a violation of the obligation to inform.

Government of the Principality of Liechtenstein

110. According to the Liechtenstein Government, this question should be assessed in the light of Directive 2002/83, the purpose of which is to complete the internal market in direct life assurance and to guarantee adequate protection to clients of assurance undertakings. In that regard, it draws attention to the wording of recital 44 in the preamble to Directive 2002/83, which states "the harmonisation of assurance contract law is not a prior condition for the achievement of the internal market in assurance. Therefore, the opportunity afforded to the Member States of imposing the application of their law to assurance contracts

Versicherungsunternehmen sind zur Mitteilung der in Anhang III Buchstabe A aufgeführten Angaben verpflichtet, wenngleich diese dem Versicherungsnehmer von einem Dritten, wie einem Versicherungsvermittler, mitgeteilt werden können.

Zur vierten Frage

Die Kläger

109. Die Kläger bringen vor, dass eine Verletzung der Aufklärungspflicht gemäss nationalem Recht nicht nur aufsichtsbehördliche Folgen hat, sondern auch zu zivilrechtlichen (schadenersatzrechtlichen) Ansprüchen führen kann. Die Aufklärungspflicht hat den Zweck, die Anleger, Kreditnehmer und Versicherungsnehmer zu schützen, indem sie ausreichend informiert und beraten werden. Laut den Klägern ist einer Verletzung der Aufklärungspflicht ein zivilrechtlicher Anspruch als Folge immanent. Es ist unerheblich, ob die nationale Gesetzgebung aufsichtsrechtlichen Charakter besitzt. Aufsichtsbehördliche Sanktionen haben zweitrangige Bedeutung. Der Schutz der Anleger, Kreditnehmer und Versicherungsnehmer ist wichtig. Bei einer Verletzung der Aufklärungspflicht sind zivilrechtliche Konsequenzen die logische Folge.

Die Regierung des Fürstentums Liechtenstein

110. Der Regierung des Fürstentums Liechtenstein zufolge sollte dieser Frage vor dem Hintergrund der Richtlinie 2002/83 nachgegangen werden, deren Zweck die Vollendung des Binnenmarkts im Bereich der Direktversicherung (Lebensversicherung) und die Wahrung eines angemessenen Schutzes der Kunden von Versicherungsunternehmen ist. In diesem Zusammenhang verweist die Regierung des Fürstentums Liechtenstein auf den Wortlaut von Erwägungsgrund 44 der Richtlinie 2002/83, in dem es heisst: „Die Harmonisierung des für den Versicherungsvertrag geltenden Rechts ist keine Vorbedingung für die Verwirklichung des Binnenmarkts im Versicherungssektor. Die den Mitgliedstaaten belassene Möglichkeit, die Anwendung ihres eigenen Rechts für Versicherungsverträge vorzuschreiben, bei denen die Versicherungsunternehmen

covering commitments within their territories is likely to provide adequate safeguards for policy holders."

111. In its view, Directive 2002/83 does not directly address the issue of insurance contract law and leaves it to the EEA States to regulate the manner in which insurance contracts are concluded and to regulate the legal consequences of the non-observance of the duty to inform.

112. The Liechtenstein Government notes that, unlike Article 8 of Directive 2002/92, Directive 2002/83 does not make any provision for the sanctions to be applied if an insurance undertaking does not comply with the national legal provisions.

113. However, it observes that under Article 47 of the Insurance Supervision Act, for the purposes of exercising its supervisory and control tasks, the Financial Market Authority ("FMA") is authorised to take the necessary measures, including, in the event of an insurance undertaking not complying with its obligation to inform, an order to the insurance undertaking to fulfil its duty to inform in accordance with the legal requirements. Should the insurance undertaking not comply with this order of the FMA, Article 64 of the Insurance Supervision Act provides for the possibility of a fine to a maximum of CHF 50 000.

114. The Liechtenstein Government stresses that such provision must be distinguished from a possible claim for damages that a consumer may have against the insurance undertaking for causing loss and damage due to a breach of the insurance undertaking's duty to inform. This claim will fall under the general law of obligations which is applied by the civil courts.

115. The Government of the Principality of Liechtenstein proposes that the Court should answer the fourth question as follows:

Verpflichtungen in ihrem Hoheitsgebiet eingehen, stellt deshalb eine hinreichende Sicherung für die Versicherungsnehmer dar."

111. Nach Auffassung der Regierung des Fürstentums Liechtenstein befasst sich Richtlinie 2002/83 nicht unmittelbar mit der Frage des Rechts für Versicherungsverträge und überlässt es den EWR-Staaten, die Modalitäten für den Abschluss von Versicherungsverträgen und rechtliche Konsequenzen für die Nichtbeachtung der Informationspflicht festzulegen.

112. Die Regierung des Fürstentums Liechtenstein weist darauf hin, dass Richtlinie 2002/83 – anders als Artikel 8 der Richtlinie 2002/92 – keine Bestimmungen mit Sanktionen enthält, die zur Anwendung gelangen, wenn ein Versicherungsunternehmen die nationalen Rechtsvorschriften nicht einhält.

113. Allerdings, so die Regierung des Fürstentums Liechtenstein, kann die Finanzmarktaufsicht (im Folgenden: FMA) gemäss Artikel 47 des Versicherungsaufsichtsgesetzes zur Erfüllung ihrer Aufsichts- und Kontrollpflichten die erforderlichen Massnahmen ergreifen; so kann sie z. B. für den Fall, dass ein Versicherungsunternehmen seiner Informationspflicht nicht nachkommt, anordnen, dass das Versicherungsunternehmen seine in den Rechtsvorschriften verankerte Informationspflicht zu erfüllen hat. Sollte das Versicherungsunternehmen dieser Anordnung der FMA nicht folgen, sieht Artikel 64 des Versicherungsaufsichtsgesetzes die Möglichkeit der Verhängung eines Bussgeldes von bis zu 50 000 CHF vor.

114. Die Regierung des Fürstentums Liechtenstein hebt hervor, dass eine solche Bestimmung von einer möglichen Schadenersatzforderung eines Verbrauchers gegenüber dem Versicherungsunternehmen infolge eines durch eine Verletzung der Informationspflicht entstandenen Verlusts und Schadens abzugrenzen ist. Eine derartige Forderung fällt unter das von den Zivilgerichten angewendete allgemeine Schuldrecht.

115. Die Regierung des Fürstentums Liechtenstein schlägt vor, dass der Gerichtshof die vierte Frage folgendermassen beantwortet:

Directive 2002/83 does not require Article 36 to be implemented into national law of the Member State in such a way that policy holders acquire a civil law right against the assurance undertaking to notify the details pursuant to Annex III. Directive 2002/83 leaves it up to the EEA States to regulate the legal consequences of the non-observance of the duty to inform.

EFTA Surveillance Authority

116. In ESA's view, the referring court appears to pose the question whether a civil law action for breach of Directive 2002/83 can be maintained if the national implementing measures establish an administrative system of supervision.

117. In this regard, ESA emphasises that Article 3 EEA requires the EEA States to take all measures necessary to guarantee the application and effectiveness of European law. This is so even where a directive does not specifically provide for a penalty for an infringement. The EFTA Court has stated that while the choice of penalties remains within the discretion of the EEA States, "they must ensure that infringements of European law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive ... . These considerations are equally valid in the context of the EEA Agreement".[18]

118. ESA observes that Directive 2002/83 specifies neither the most appropriate means of implementation into domestic legislation nor the possible sanction(s) on a life assurance undertaking in the event of a failure to provide information. Instead, Directive

[18] Reference is made to Case E-2/10 *Kolbeinsson* [2009-2010] EFTA Ct. Rep. 234, paragraphs 46 to 47, and case law cited.

Richtlinie 2002/83 verlangt nicht, dass Artikel 36 derart im innerstaatlichen Recht der Mitgliedstaaten umgesetzt wird, dass Versicherungsnehmer einen zivilrechtlichen Anspruch gegenüber dem Versicherungsunternehmen auf Mitteilung der Angaben laut Anhang III erhalten. Richtlinie 2002/83 überlässt den EWR-Staaten die Regelung der rechtlichen Konsequenzen für die Nichtbeachtung der Informationspflicht.

Die EFTA-Überwachungsbehörde

116. Nach Ansicht der EFTA-Überwachungsbehörde scheint das vorlegende Gericht die Frage zu stellen, ob eine zivilrechtliche Klage infolge der Verletzung der Richtlinie 2002/83 zulässig ist, wenn die nationalen Umsetzungsmassnahmen ein System der behördlichen Aufsicht vorsehen.

117. In diesem Zusammenhang erinnert die EFTA-Überwachungsbehörde daran, dass die EWR-Staaten nach Artikel 3 des EWR-Abkommens verpflichtet sind, alle geeigneten Massnahmen zur Gewährleistung der Geltung und Wirksamkeit des EWR-Rechts zu treffen. Dies gilt selbst dann, wenn in einer Richtlinie für einen Verstoss nicht eigens eine Sanktion festgelegt ist. Der EFTA-Gerichtshof hat festgehalten, dass die EWR-Staaten, obwohl ihnen bei der Wahl der Sanktionen ein Ermessen verbleibt, „darauf achten müssen, dass Verstösse gegen das Europarecht unter materiellen und verfahrensmässigen Bedingungen geahndet werden, die denen entsprechen, die für nach Art und Schwere gleichartige Verstösse gegen nationales Recht gelten, wobei die Sanktion jedenfalls wirksam, verhältnismässig und abschreckend sein muss [...] Diese Erwägungen gelten gleichermassen im Zusammenhang mit dem EWR-Abkommen."[18]

118. Die EFTA-Überwachungsbehörde merkt an, dass die Richtlinie 2002/83 weder das geeignetste Verfahren zur Umsetzung in einzelstaatliches Recht noch die mögliche(n) Sanktion(en) gegenüber einem Lebensversicherungsunternehmen bei einer Verletzung der Informationspflicht nennt.

[18] Es wird auf die Rechtssache E-2/10 *Kolbeinsson*, EFTA Court Report 2009-2010, S. 234, Randnrn. 46 bis 47, und die zitierte Rechtsprechung verwiesen.

2002/83 imposes merely an obligation on the EEA States to ensure that appropriate and sufficient remedies are put in place such that life assurance undertakings comply with their obligation to provide information.

119. In support of this argument, ESA relies on recital 44 in the preamble to Directive 2002/83 which reads: "... The harmonisation of assurance contract law is not a prior condition for the achievement of the internal market in assurance. Therefore, the opportunity afforded to the Member States of imposing the application of their law to assurance contract covering commitments within their territories is likely to provide adequate safeguards for policy holders. ..." In other words, the national contract law applicable to an assurance contract will supplement the protection afforded by Directive 2002/83 in the territory of each EEA State.

120. Moreover, ESA adds, in accordance with settled case law, in the absence of EEA rules in the field, it is for the domestic legal system of each EEA State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EEA law.

121. First, such rules should not be less favourable than those pursuant to which the national legal order protects similar rights under purely domestic legislation (principle of equivalence).[19] ESA emphasises that this principle requires that the national rule which implements the provision of a directive is applied without distinction, whether the

[19] Reference is made to Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* [2010] ECR I-13849, paragraph 28.

Stattdessen verpflichtet die Richtlinie 2002/83 die EWR-Staaten nur dazu, zu gewährleisten, dass geeignete und ausreichende Abhilfemassnahmen eingeführt werden, damit Lebensversicherungsunternehmen ihrer Informationspflicht nachkommen.

119. Zur Untermauerung dieses Arguments bezieht sich die EFTA-Überwachungsbehörde auf Erwägungsgrund 44 der Präambel der Richtlinie 2002/83, der folgendermassen lautet: „[...] Die Harmonisierung des für den Versicherungsvertrag geltenden Rechts ist keine Vorbedingung für die Verwirklichung des Binnenmarkts im Versicherungssektor. Die den Mitgliedstaaten belassene Möglichkeit, die Anwendung ihres eigenen Rechts für Versicherungsverträge vorzuschreiben, bei denen die Versicherungsunternehmen Verpflichtungen in ihrem Hoheitsgebiet eingehen, stellt deshalb eine hinreichende Sicherung für die Versicherungsnehmer dar. [...]“ In anderen Worten: Das auf einen Versicherungsvertrag anwendbare nationale Vertragsrecht ergänzt den durch die Richtlinie 2002/83 gewährten Schutz auf dem Hoheitsgebiet jedes EWR-Staats.

120. Zudem, fährt die EFTA-Überwachungsbehörde fort, ist es nach ständiger Rechtsprechung mangels einer einschlägigen EWR-Regelung Sache der innerstaatlichen Rechtsordnung der einzelnen EWR-Staaten, die zuständigen Gerichte und die Ausgestaltung von Verfahren, die den Schutz der dem Bürger aus dem EWR-Recht erwachsenden Rechte gewährleisten soll, zu bestimmen.

121. Erstens sollte eine solche Regelung nicht weniger günstig gestaltet sein als jene, nach der die nationale Rechtsordnung vergleichbare Rechte im Rahmen der rein einzelstaatlichen Gesetzgebung schützt (Grundsatz der Äquivalenz).[19] Die EFTA-Überwachungsbehörde hebt hervor, dass dieser Grundsatz voraussetzt, dass das nationale Gesetz zur Umsetzung der Bestimmung einer Richtlinie in gleicher Weise für Klagen gilt, die auf die Verletzung des EWR-Rechts gestützt sind, wie für solche, die auf die Verletzung des

[19] Es wird auf die Rechtssache C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH*, Slg. 2010, S. I-13849, Randnr. 28, verwiesen.

infringement alleged is of EEA law or national law, where the purpose and cause of action are similar.[20]

122. Second, such rules must not render it in practice impossible or excessively difficult to exercise rights conferred by EEA law (principle of effectiveness).[21] ESA continues, when the question arises whether a national procedural provision makes the application of EEA law impossible or excessively difficult, it must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole.[22]

123. ESA contends that it is for the national court to establish whether a legal remedy complies with the principles of equivalence and effectiveness. For this purpose, it needs to examine the role of such remedy in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. Furthermore, account must be taken of the basic principles of the domestic judicial system, such as protection of the rights of defence, the principle of legal certainty and the proper conduct of procedure.[23]

124. In ESA's view, in the case at hand, in order to establish that these principles have not been compromised, the national court, which has direct knowledge of the procedural rules governing actions in the field of life assurance and of contracts in general, has to consider both the purpose and the essential characteristics of supposedly similar rules under national law.

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20 Reference is made to Case C-246/09 *Susanne Bulicke* [2010] ECR I-7003, paragraph 26.
21 Reference is made to *Susanne Bulicke*, cited above, paragraph 25, and the case law cited.
22 Reference is made to Case C-40/08 *Asturcom Telecommunicaciones SL* [2009] ECR I-9579, paragraph 39.
23 Reference is made to *Susanne Bulicke*, cited above, paragraphs 29 and 35.

innerstaatlichen Rechts gestützt sind, sofern diese Klagen einen ähnlichen Gegenstand und Rechtsgrund haben.[20]

122. Zweitens darf eine solche Regelung die Ausübung der durch das EWR-Recht verliehenen Rechte in der Praxis nicht praktisch unmöglich machen oder übermässig erschweren (Grundsatz der Effektivität).[21] Wenn sich die Frage stellt, so die EFTA-Überwachungsbehörde weiter, ob eine nationale Verfahrensvorschrift die Anwendung des EWR-Rechts unmöglich macht oder übermässig erschwert, ist diese Vorschrift unter Berücksichtigung ihrer Stellung im gesamten Verfahren, des Verfahrensablaufs und der Besonderheiten des Verfahren zu prüfen.[22]

123. Die EFTA-Überwachungsbehörde führt aus, dass die Entscheidung, ob ein Rechtsmittel den Grundsätzen der Äquivalenz und Effektivität entspricht, dem nationalen Gericht obliegt. Zu diesem Zweck ist es seine Aufgabe, die Stellung eines solchen Rechtsmittels im gesamten Verfahren, den Verfahrensablauf und die Besonderheiten des Verfahrens vor den verschiedenen nationalen Stellen zu prüfen. Darüber hinaus sind die Grundsätze zu berücksichtigen, die dem nationalen Rechtsschutzsystem zugrunde liegen, wie z. B. der Schutz der Verteidigungsrechte, der Grundsatz der Rechtssicherheit und der ordnungsgemässe Ablauf des Verfahrens.[23]

124. Nach Auffassung der EFTA-Überwachungsbehörde muss im vorliegenden Fall, um festzustellen, dass diese Grundsätze nicht verletzt wurden, das nationale Gericht, das über unmittelbare Kenntnis der Verfahrensvorschriften für Klagen im Bereich Lebensversicherungen und im Vertragsrecht generell verfügt, sowohl den Zweck als auch die wesentlichen Merkmale vermeintlich ähnlicher Regelungen im nationalen Recht berücksichtigen.

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20 Es wird auf die Rechtssache C-246/09 *Susanne Bulicke*, Slg. 2010, S. I-7003, Randnr. 26, verwiesen.

21 Es wird auf die oben erwähnte Rechtssache *Susanne Bulicke*, Randnr. 25, und die zitierte Rechtsprechung verwiesen.

22 Es wird auf die Rechtssache C-40/08 *Asturcom Telecommunicaciones SL*, Slg. 2009, S. I-9579, Randnr. 39, verwiesen.

23 Es wird auf die oben erwähnte Rechtssache *Susanne Bulicke*, Randnrn. 29 und 35, verwiesen.

125. In particular, ESA asserts, if the domestic legislation provides solely for an administrative sanction for the failure of a life assurance undertaking to provide the relevant information, a policy holder who suffers loss and damage as a result will lack any adequate means of recourse against the life assurance undertaking and, thus, no possibility to obtain compensation for the loss incurred.[24]

126. In the case at hand, given the lack of direct effect, ESA contends that domestic legislation should provide for a legal remedy in favour of the party suffering losses as a result of its counterparty's failure to provide information. It notes that this was the approach taken by the Liechtenstein Supreme Court in its judgment of 10 February 2012 in case number 01 CG.2009.62 referred to by the Princely Court. ESA indicates that this remedy may be provided in general contract law or in a special provision of domestic legislation implementing the Directive in accordance with the principles of equivalence and effectiveness.

127. ESA proposes that the Court should answer the fourth question as follows:

Article 36 of Directive 2002/83 or Article 31 of Directive 92/96 allows the EEA States to choose the means to implement them in their national legal order as long as the principles of equivalence and effectiveness of EEA law are respected. In the present case, the principle of effectiveness requires that policy holders are granted a civil law right to seek compensation for loss incurred in case the assurance undertaking has failed to comply with its obligation

[24] Reference is made to Case C-12/11 *Denise McDonagh*, judgment of 31 January 2013, not yet reported, paragraphs 23 to 24.

125. Die EFTA-Überwachungsbehörde macht insbesondere geltend, dass, wenn das einzelstaatliche Recht nur aufsichtsrechtliche Sanktionen für die Verletzung der Informationspflicht durch ein Lebensversicherungsunternehmen vorsieht, ein Versicherungsnehmer, der in der Folge einen Verlust oder Schaden erleidet, über kein angemessenes Rechtsmittel gegenüber dem Lebensversicherungsunternehmen verfügt, und daher nicht in der Lage wäre, für den erlittenen Verlust eine Entschädigung zu erlangen.[24]

126. Im vorliegenden Fall bringt die EFTA-Überwachungsbehörde vor, dass in Anbetracht der fehlenden unmittelbaren Wirkung das einzelstaatliche Recht ein Rechtsmittel zugunsten der Partei vorsehen sollte, die infolge der Verletzung der Informationspflicht durch die jeweils andere Partei einen Schaden erlitten hat. Die EFTA-Überwachungsbehörde hält fest, dass der Oberste Gerichtshof des Fürstentums Liechtenstein in seinem Urteil vom 10. Februar 2012 in der Rechtssache 01 CG.2009.62, auf das das Fürstliche Landgericht verwiesen hat, diesen Ansatz gewählt hat. Die EFTA-Überwachungsbehörde legt dar, dass dieses Rechtsmittel im allgemeinen Vertragsrecht oder in einer besonderen Bestimmung des einzelstaatlichen Rechts zur Umsetzung der Richtlinie unter Berücksichtigung der Grundsätze der Äquivalenz und Effektivität enthalten sein kann.

127. Die EFTA-Überwachungsbehörde schlägt vor, dass der Gerichtshof die vierte Frage folgendermassen beantwortet:

Artikel 36 der Richtlinie 2002/83 bzw. Artikel 31 der Richtlinie 92/96 überlassen den EWR-Staaten die Wahl der Mittel zu ihrer Umsetzung in die nationale Rechtsordnung, vorausgesetzt, dass die Grundsätze der Äquivalenz und Effektivität des EWR-Rechts berücksichtigt werden. Im vorliegenden Fall verlangt der Grundsatz der Effektivität, dass Versicherungsnehmern das Recht gewährt wird, auf zivilrechtlichem Wege Schadenersatzansprüche für erlittene Verluste geltend zu machen, wenn das Versicherungsunternehmen seiner Verpflichtung

[24] Es wird auf die Rechtssache C-12/11 *Denise McDonagh*, Urteil vom 31. Januar 2013, noch nicht in der amtlichen Sammlung veröffentlicht, Randnrn. 23 bis 24, verwiesen.

to provide information under those directives. The principle of equivalence requires that the civil law right exercised by the policy holder in the circumstances of this case is exercised under conditions that are similar to analogous actions brought for breaches of national law.

The Commission

128. The Commission observes that Directive 2002/83 is silent on the matter of remedies. However, as a matter of general principle, it continues, the sanctions regime applied by each State should be effective, proportionate and dissuasive in order to achieve the key objective of consumer protection.[25]

129. The Commission proposes that the Court should answer the fourth question as follows:

The sanctions regime laid down by national law for a breach of Article 36 of Directive 2002/83 must be effective, proportionate and dissuasive in order to achieve the key objective of consumer protection.

Páll Hreinsson

Judge-Rapporteur

[25] Reference is made to Article 3 EEA which provides that EEA States shall take "all appropriate measures" to ensure fulfilment of the obligations arising out of the Agreement.

zur Mitteilung der Angaben im Rahmen dieser Richtlinien nicht nachgekommen ist. Der Grundsatz der Äquivalenz erfordert, dass die zivilrechtlichen Ansprüche des Versicherungsnehmers im Rahmen der Gegebenheiten dieser Rechtssache unter Voraussetzungen ausgeübt werden, die gleichartigen Klagen infolge Verletzungen nationalen Rechts ähnlich sind.

Die Kommission

128. Die Kommission bringt vor, Rechtsmittel seien in der Richtlinie 2002/83 nicht geregelt. Allerdings, so die Kommission weiter, müsse die von jedem Staat angewendete Sanktionsregelung wirksam, verhältnismässig und abschreckend sein, um das Hauptziel des Verbraucherschutzes zu erfüllen.[25]

129. Die Kommission schlägt vor, dass der Gerichtshof die vierte Frage folgendermassen beantwortet:

Die im nationalen Recht verankerte Sanktionsregelung für eine Verletzung des Artikels 36 der Richtlinie 2002/83 muss wirksam, verhältnismässig und abschreckend sein, um das Hauptziel des Verbraucherschutzes zu erfüllen.

Páll Hreinsson

Berichterstatter

[25] Es wird auf Artikel 3 EWR-Abkommen verwiesen, der vorsieht, dass die EWR-Staaten „alle geeigneten Maßnahmen“ zur Erfüllung der Verpflichtungen, die sich aus dem Abkommen ergeben, treffen.


EFTA COURT

Case E-7/12

Schenker North AB
Schenker Privpak AB
Schenker Privpak AS
v
EFTA Surveillance Authority

CASE E-7/12

Schenker North AB

Schenker Privpak AB

Schenker Privpak AS

v

EFTA Surveillance Authority

(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)

Summary of the Judgment

1. An application for failure to act must be preceded by a formal notice calling upon ESA to act, and the subject-matter of that notice must be set out in such a manner as to make it clear what measures ESA should have taken under EEA law. Moreover, in order to rule on the substance of a claim for a declaration that ESA has failed to act, it is necessary to determine whether, at the time when ESA was formally called upon to define its position within the meaning of Article 37 SCA, it was under a duty to act.

2. The conditions under which ESA may incur liability for damage caused to individuals by a breach of EEA law should not, in the absence of particular justification, differ from those governing the liability of the European Commission in similar circumstances, taking into account the shared supervisory role played by the two institutions in the EEA.

3. EEA law confers a right to reparation where the following three conditions are met: first, that the rule of law infringed must be intended to confer rights on individuals; second, that the breach must be sufficiently serious; and third, that there must be a direct causal link between the breach

of the obligation resting on the author of the act and the damage sustained by the injured parties.

4. By adopting Decision 407/08/COL, ESA has indicated to individuals and economic operators who wish to gain access to documents which it has in its possession that their requests will be dealt with according to the procedures, conditions and exceptions laid down for that purpose. Although Decision 407/08/COL is, in effect, a series of obligations which ESA has voluntarily assumed for itself in the interest of the principles of transparency and good administration. However, it forms part of the EEA legal order and is therefore capable of conferring on third parties legal rights which ESA is obliged to respect

5. The application of the condition of there being a sufficiently serious breach in a case concerning the non-contractual liability of ESA may not necessarily be coextensive to that condition under the EEA State liability rules. As has been repeatedly held, the principle of State liability which follows from the EEA Agreement itself differs, as it must, from the development in the case law of the Court of Justice of the European Union of the principle of State liability under EU law

6. As regards the liability of ESA under Article 46 SCA, that provision requires that it be taken into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to ESA.

7. The decisive test for finding that a breach of EEA law is sufficiently serious is whether ESA manifestly and gravely disregarded the limits on its discretion.

8. Where ESA has only considerably reduced or even no discretion, the mere infringement of EEA law may be sufficient to establish the existence of a sufficiently serious breach.

9. Article 7(1) RAD contains a clear rule that obliges ESA to provide its reasoned response within five working days of the registration of the application for access to documents, save in exceptional cases. Pursuant to Article 7(2) RAD, that time-limit may be extended by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.

10. It follows from this clear rule that the margin of appreciation of ESA for the timely processing of applications under Article 7 RAD was limited to extending the time limit by 20 working days under Article 7(2) RAD.

11. Only a direct link of cause and effect between the allegedly unlawful conduct of the institution concerned and the damage pleaded can give grounds for non-contractual liability on the part of ESA pursuant to Article 46, second paragraph, SCA.

12. The burden of proof for establishing the existence of such a causal link rests on the applicant.

JUDGMENT OF THE COURT

9 July 2013

(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)

In Case E-7/12,

Schenker North AB, Gothenburg, Sweden,

Schenker Privpak AB, Borås, Sweden,

Schenker Privpak AS, Oslo, Norway,

represented by Jon Midthjell, advokat,

applicants,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, Markus Schneider, Deputy Director, and Gjermund Mathisen, Officer, Legal and Executive Affairs, acting as Agents, Brussels, Belgium,

defendant,

APPLICATION under Articles 37 and 46 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice for a declaration of a failure to act and non-contractual liability of the EFTA Surveillance Authority,

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 regard to the Report for the Hearing,

having heard oral argument of the applicants, represented by Jon Midthjell, and of the EFTA Surveillance Authority ("ESA"), represented by Markus Schneider and Gjermund Mathisen, at the hearing on 16 April 2013,

gives the following

JUDGMENT

I LEGAL CONTEXT

EEA law

1 Article 37 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ("SCA") reads:

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.

2 According to Article 46, second paragraph, SCA:

In the case of non-contractual liability, the EFTA Surveillance Authority shall, in accordance with the general principles of law, make good any damage caused by it, or by its servants, in the performance of its duties.

3 According to Article 7 of the Rules on access to documents ("RAD"), adopted by ESA as Decision No 407/08/COL of 27 June 2008:

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, [ESA] shall either grant access to the document requested and provide access in accordance with Article 8 [RAD] 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.

II FACTS

4 On 3 August 2010, the applicants requested by email "access to the file in preparation of its damages claim against [Norway Post]" in ESA Case No 34250 (*Norway Post/Privpak*). The applicants also asked for a non-confidential version of the decision in that case, which they wished to submit in copy as soon as possible to Oslo City Court in the context of a follow-on action against Norway Post following the decision in ESA Case No 34250.

5 The Director of Legal and Executive Affairs at ESA replied on 4 August 2010 and noted, "given the size of the file and the many documents it contains", that it would be appreciated if the applicants were to specify the documents requested. He added: "As to the documents to which you have already been granted access in the course of the administrative proceedings, do you wish to request a waiver of the restriction on the use of those documents in order to produce them to the court which will be seized of a claim in damages?"

6 On the same day, the applicants thanked ESA for its "swift response" and specified that the "request concerns the entire file".

7 On 10 August 2010, the 5-day time limit in Article 7(1) RAD expired.

8 That same day, the Director of Legal and Executive Affairs at ESA sent an email to the applicants and stated that "the file is quite voluminous. Preparation of non-confidential versions of its contents will take some time. We will send you the documents as soon as they are available."

9 On 11 August 2010, the applicants informed ESA that it would be sufficient to receive the documents on CD-ROM and not in hard copy.

10 On 18 August 2010, the Deputy Director for Competition at ESA sent an email to the applicants informing them that ESA intended to "soon revert to you regarding your request for access to documents in the above-mentioned case". In the email, the applicants were informed that Norway Post had requested access to correspondence between ESA and Privpak and they were asked to inform ESA by 24 August 2010 whether the documents contained business secrets or other confidential information.

11 On 30 August 2010, the Deputy Director for Competition at ESA sent another email to the applicants. Included were a draft non-confidential version of ESA Decision 322/10/COL of 14 July 2010 in Case No 34250 (*Norway Post/Privpak*), a non-confidential version of Norway Post's reply to ESA's Statement of Objections in that case, and a list of the documents on the file to which Norway Post was granted access when the Statement of Objections was issued in the case ("the first list").

12 In that email, the applicants were informed that if they failed to reply by 2 September 2010 indicating whether they considered any business secrets or other confidential information to be found in the draft decision, ESA might assume that the decision did not contain such information.

13 In the email ESA noted that the only document of evidential value submitted after the oral hearing in Case No 34250 in June 2009 was a letter from Norway Post dated "13 July 2010 (524500)". There was no non-confidential version of the document on ESA's file at that stage.

14 The email ended with the following paragraph:

"*The administrative file in case 34250 contains a very large number of documents and many very long documents. We would assume that many of these documents would be of limited interest to Schenker Privpak, in particular those which are of a procedural nature without any evidential nature. Further, the volume of work required to process a request for access to all documents in the administrative file is very substantial. In order to find a fair solution we would therefore propose that Schenker Privpak reviews the material submitted by this e-mail with a view to identify in more concrete terms the documents to which it would be in Schenker Privpak's interest to have access. However, [ESA] cannot in any case grant Schenker Privpak access to documents which contain business secrets or other confidential information about Norway Post or other third parties.*"

15 The first list, which was included in the email, is a 33-page document. It contains around 900 event numbers. The documents in the first list are dated between 2001 and 2008, during the investigation into the business practices of Norway Post, leading to ESA Decision 322/10/COL. It may be noted that the list includes a detailed list of the inspection documents from the raid on the offices of Norway Post in 2004, which were the subject of the judgment of Case E-14/11 *DB Schenker* v *ESA* [2012] EFTA Ct. Rep. 1178 ('*Schenker I*'). In the first list, the names and sources of the documents have not been blacked out or otherwise rendered unintelligible.

16 On 30 August 2010, the applicants replied by email. First, they asked for an extension of the deadline to reply, which was granted in an email from ESA on 1 September 2010.

17 Second, the applicants confirmed that the request concerned the entire file and that in emails both of 10 August 2010 and 18 August 2010, ESA had confirmed that it was in the process of preparing documents.

18 In addition, the applicants stated the purpose of their request for access to documents and offered to discuss a reasonable extension to the deadline in the RAD:

"*As DB Schenker has explained earlier, the company is pursuing a damages claim against NPO in national court. NPO has also publicly stated on 14 July 2010 as well as during its recent Q2 presentation on 27 August 2010 that it will in all likelihood bring an appeal against the decision. It should therefore be clear that the request for access is entirely legitimate. It is in any case not for [ESA] to assume whether parts of a file could be of interest to [the applicants] or to require that the company justify its interest in each document referred to in the excel file that was sent through today, before releasing those documents.*

As to the issue of whether certain documents contain protected information, we assume that [ESA] has continuously requested NPO to provide non-confidential versions of the documents in question, as [ESA] continuously asked of [the applicants] during the eight year investigation, which we also stated in our email on 3 August 2010 without hearing differently from [ESA]. [The applicants have] a right to access those parts of the documents that do not contain protected information and we assume that [ESA] has made use of the last 18 working days since the request was filed, to ask NPO or other third parties for a release of any remaining documents, in accordance with its Rules of Procedure.

We assume on this basis that [ESA] will comply with the request for access to the entire file, within the deadline set out in its own Rules of Procedure, which also includes an extended working day period for processing voluminous files. To reduce the administrative burden, [the applicants have] confirmed that [they] will receive the documents on CD-ROM. We are also ready to discuss a reasonable extension if [ESA] has met unforeseen difficulties in preparing the file. At the moment, it is difficult to appreciate what those difficulties could be in light of the long investigation time which [ESA] has had to prepare for requests on access to the file and the fact that we are only requesting an electronic copy of the file."

19 On 6 September 2010, the applicants sent an email to ESA accepting the non-confidential draft of Decision 322/10/COL and added:

"*We would also like to remind you that the deadline for processing the request for access to the file, which was made on 3 August 2010, expires by the end of business tomorrow. We assume that a CD-ROM with the file has already been sent since you have not contacted us to request a reasonable extension beyond that deadline, to accommodate for any unforeseen reasons of delay, as invited in our email of 30 August 2010 below.*"

20 On 7 September 2010, the extended time limit in Article 7(2) RAD expired.

21 On 14 September 2010, the applicants sent an email to the Deputy Director for Competition at ESA noting that there had been no reply to the email of 6 September 2010. The applicants added:

"*Norway Post confirmed today that an appeal has been lodged with the EFTA Court. As you know, DB Schenker has a right to intervene in the case but will need access to the file in order to exercise that right effectively and protect its right to seek damages from Norway Post. However, [ESA] has still not handed over a copy of the file, even though the request was filed more than six weeks ago on 3 August 2010. [ESA] has also failed to offer any reasons which could justify the delay, in contravention of its own Rules of Procedure. DB Schenker invited [ESA] to discuss a reasonable extension of the deadline which expired on 7 September 2010, if [ESA] had encountered unforeseen reasons of delay. [ESA] never replied to the invitation.*

DB Schenker cannot accept that [ESA] continues to stall the request and infringe the procedural rights of the company in this matter. We expect that you will release the file by the close of business on Thursday 16 September 2010, in the form of a CD-ROM as requested. Your confirmation to that effect would be appreciated in accordance with the principle of good administration."

22 The Director of Legal and Executive Affairs at ESA replied by email on 17 September 2010:

"*Thank you for your email concerning your request for public access to documents in the file in this case made on behalf of your client DB Schenker.*

I had hoped that my previous emails to you had made clear that the file contains a very large number of documents and many of those contain business secrets or otherwise commercially sensitive information with the consequence that it would not be possible to give you the access you request within the deadlines that normally apply.

The rules on access, as you are aware, mean that it is necessary to examine each of the documents in the file and consider whether any of the exceptions provided for in our rules on public access apply.

The following documents were sent to you as soon as non-confidential versions were available:

– *A non-confidential version of [ESA's] Statement of Objections*
– *Norway Post's non-confidential reply to [ESA's] Statement of Objections*
– *A non-confidential version of [ESA's] decision*
– *A list of the documents to which Norway Post was granted access when the SO was issued*

As to the remainder of the documents in the file of which you seek disclosure, because of their very large number, you have been asked to provide us with guidance as to which documents in particular you seek disclosure in accordance with Article 6(2) and (3) of our Rules on access. Unfortunately, your response was not conducive to reaching a fair solution as you insist on receiving all documents including those to which you already have had access.

Consequently, [ESA] is in the process of examining the documents and consulting the authors of the third-party documents in accordance with Article 4(5) of the rules. Again, there are many such authors, the documents are numerous and thus time is needed.

Rest assured that we will disclose documents (or edited versions) as soon as practically possible in accordance with our rules. In order to

expedite matters and in another endeavour to reach a fair solution, I would be grateful if you could confirm that you do not seek access to documents that are purely administrative in nature and are devoid of substantive content, such as exchanges by letter or email requesting, refusing or granting extensions to deadlines and such like. I can easily imagine that such exchanges are completely irrelevant for your purposes and would only serve as a distraction in an action for damages in a domestic court."

23 On the same day, 17 September 2010, the applicants replied to ESA:

"*Thank you for finally answering our two last emails to [ESA]. Unfortunately, your answer does not address the key question – when will [ESA] release a copy of the file to DB Schenker?*

Given that you have already spent six weeks on the request that was sent on 3 August 2010 and also passed the deadline set in your own Rules of Procedure for handling large files, [ESA] should be able to give an answer on this point, in accordance with the principle of good administration.

We continue to have difficulties in understanding that [ESA] could have encountered unforeseen reasons of delay. DB Schenker has for its part consistently been asked by [ESA] to provide non-confidential versions of all submissions it has made during the eight year long investigation. Has [ESA] followed a different practice in relation to all other third parties to which you are referring to? We were also under the impression that you had already obtained non-confidential versions from those that you included in the copy of the file that was surrendered to NPO in 2009.

Moreover, we are surprised to learn that [ESA] has consistently failed to ask NPO to provide non-confidential versions of its submissions during the eight year long investigation. Are we to understand that you first started that work when our request for access was filed and that [ESA] was not anticipating such requests in a case as contentious as this?

As for your regrets that DB Schenker has requested access to the entire file, including procedural documents which allegedly take up much

of your time, we note that such documents rarely contain business secrets and should be fairly easy to process. Unfortunately, we cannot rely on [ESA] to identify documents that are of interest to DB Schenker. If a serious mistake should be committed, who would then be left with the professional responsibility?

You also mention that the company is burdening [ESA] by including requests for documents that it has already received a copy of. Please note that this concerns at most a handful of documents, that for most part were released prior to the Rules of Procedure and which we cannot present in a court of law without your authorisation. The company must also ensure that the documents that it considers using as evidence are identical and complete to the ones NPO submitted to [ESA]. These documents cannot possibly be used as an explanation for your significant delay.

We have no interest in burdening the work of [ESA] but, as you can appreciate, the company cannot accept that poor administration of the file during a period of eight years be allowed to undermine its rights in this matter.

For the avoidance of doubt, you are invited to release the documents you have already processed over the last six weeks. We take it that you will have no problem in forwarding those on a CD-ROM immediately.

We look forward to hearing when the rest of the file will be released to DB Schenker."

24 On 9 November 2010, the applicants sent a letter to the President of ESA. In that letter, the applicants referred to the previous communication relating to the access request and noted:

"*The decision which [ESA] made on 14 July 2010 established that DB Schenker's complaint against Norway Post on 24 June 2002, eight years earlier, was justified. As you will recall from our meeting on 4 September 2008, you expressed regret on behalf of [ESA] that the investigation had taken a long time to conclude.*

Unfortunately, DB Schenker has again experienced that [ESA] fails to respond on time. Since 3 August 2010, the company has tried to obtain access to an electronic copy of the non-confidential version of the file (hereinafter 'the file'), in order to pursue its significant

damages claim against Norway Post, to make effective use of its right to intervene before the EFTA Court, and to better understand what caused the investigation to last for so long.

[ESA]'s deadline for surrendering a copy of the file expired on 7 September 2010 pursuant to Article 7(2) of the Rules of Procedure. I am turning to you because, after having waited for more than three months, we still have not received a copy of the file. We have not even received an answer when [ESA] intends to give the company access [...]

[ESA]'s handling of the request for access to the file over the last three months is unacceptable and in contravention of the Rules of Procedure, established case-law and the principle of good administration. Given that [ESA] has ceased to respond to our correspondence, we have no other choice but to take legal action if [ESA] persists in infringing the company's right to access the file.

I sincerely hope that we can avoid a legal conflict and that [ESA] now will provide a copy of the file so that the company can effectively protect its lawful rights. I am confident that you will agree with me that [ESA] should not have any interest in undermining the private enforcement policy which the Commission encourages against those who commit serious antitrust violations. Timely access to the evidence is, of course, a cornerstone in that policy."

25 On 10 November 2010, the Director of Legal and Executive Affairs at ESA replied and noted that:

"*On 5 November 2010 I sent you a letter enclosing a CD-ROM including a considerable number of documents from Norway Post to which you are granted access. You were also sent, on 30 August 2010, the non-confidential versions of the Decision, of Norway Post's Reply to the Statement of Objections and the list of documents to which Norway Post was granted access during the administrative procedure. You may rest assured that all of the documents sent to you have been transmitted to you as soon as non-confidential versions were available.*

...

As my letter of 5 November 2010 makes clear, [ESA] is currently examining all the remaining documents on the case file and consulting the many third parties who sent them and will revert to you as soon as this examination has been completed ... ."

26 The letter of 5 November 2010 from ESA to the applicants – which the applicants claim they did not receive until 11 November 2010 – contains around 100 documents which were released either partially or in full to the applicants.

27 On 6 January 2011, the applicants sent another letter to the President of ESA. Attached to that letter was a copy of the first list:

"*On 31 December 2010, DB Schenker filed its application for leave to intervene before the EFTA Court in the pending case between Norway post and [ESA]. The application was served on [ESA], by the Court, on 4 January 2011.*

DB Schenker has now waited for more than five months for [ESA] to process the request for access to the file which was submitted on 3 August 2010. The time-limit for [ESA] expired on 7 September 2010.

[ESA] has so far only provided a minor part of the file. In the list attached to this letter, the documents that we have received have been highlighted in dark green (full access) and light green (partial access). Please note that the list itself is incomplete and does not account for documents included in the file after 16 December 2008, although [ESA] released the list as late as on 30 August 2010. [ESA] was apparently unable to provide an updated register of the documents belonging to the file, 18 months later.

As you will recall, all third parties have been required to submit non-confidential versions of their submissions to [ESA] during the course of the investigation. Moreover, the third party correspondence was vetted for business secrets when Norway post was granted access to the file already in 2008. However, [ESA] has still not granted DB Schenker access to a single third party document. [ESA] has not even granted access to the initial information requests that it sent out in 2003 and which could not possibly contain business secrets from the third parties which it then contacted for the first time.

Moreover, significant parts of the file concerning Norway Post have not been released, even though Norway Post has been required to submit non-confidential versions of its submissions during the course of the investigation. As you will recall, there is also a general presumption in antitrust proceedings that information older than five years old is no longer confidential.

...

[ESA] has also ceased to reply to our correspondence, following up the request for access to the file, presumably because there is no acceptable explanation for the significant delay. I had hoped that [ESA], nevertheless, would resolve the matter during the two months that have passed since I last contacted you on 9 November 2010. Since that is not the case and no further documents have been released, I must trouble you with this matter, once again.

The decision which [ESA] made on 14 July 2010 confirmed that DB Schenker's complaint against Norway Post eight years earlier was justified, and that a serious antitrust violation had been committed. As you will recall from our meeting on 4 September 2008, you expressed regret on behalf of [ESA] that the investigation had taken a long time to conclude. Under different circumstances, such a long investigation could have caused structural damage to the market, by forcing more efficient competitors than Norway Post to leave in the face of the unlawful and exclusionary conduct, absent the backing of a financially strong and committed group as DB Schenker.

When DB Schenker now seeks timely access to the file, it does so also to protect its rights as an antitrust plaintiff in a significant damages action pending before Oslo [City] Court, to recover its loss from Norway post. The claim is derived from [ESA]'s decision which the EFTA Court is reviewing. The Commission is actively promoting private antitrust actions, in addition to the significant fines it levies, to deter antitrust infringements. [ESA] should not take more lightly on the consequences of antitrust violations, by not offering plaintiffs timely access to evidence in cases relating to the three EFTA Member States, under the EEA Agreement.

I must therefore ask that you take the necessary steps to ensure that DB Schenker is granted access to the file in time to make effective use

of its rights, and I hope we can put this matter at rest without ending up in a legal conflict."

28 On 17 February 2011, the applicants sent a third letter to the President of ESA:

"*Reference is made to my letters on 9 November 2010 and 6 January 2011, which have not been answered.*

On 15 February 2011, the EFTA Court granted DB Schenker permission to intervene in support of [ESA] against Norway Post. A copy of the order is enclosed. The Court also decided that DB Schenker shall receive a copy of the written pleadings by 23 February 2011. These documents will only include parts of the file held by [ESA].

DB Schenker has now waited for more than six months for [ESA] to process the request for access to the file which was made on 3 August 2010. The time-limit for [ESA] expired on 7 September 2010. As also explained earlier, this significant delay is impairing DB Schenker's right to effectively review the file before its statement of intervention is submitted to the Court.

[ESA] has so far only provided a minor part of the file and is even withholding documents which clearly cannot be contested. Moreover, [ESA] has failed to provide a complete list showing all documents registered on file. [ESA] had also ceased to reply to our correspondence, following up the request for access to the file. Clearly, [ESA] cannot cease to respond to correspondence for several months, without infringing the principle of good administration (maladministration).

DB Schenker must therefore ask again that [ESA] respect its right to timely access the documents in question and release the remaining parts of the file as soon as possible."

29 On 18 February 2011, ESA replied by email, providing a letter from the Director of Legal and Executive Affairs, dated the same day:

"*Thank you for your letter of 17 February addressed to President Sanderud.*

In your letter you claim that [ESA] has not responded to your letters of 9 November 2010 and 6 January 2011. You also seek to give the impression that [ESA] has not granted you access to the documents you requested and has ceased to respond to your correspondence 'for several months'.

I responded to your letter dated 9 November 2010 on 10 November 2010, the following day. I enclose a copy of that letter.

I responded to your letter of 6 January 2011 on 16 February 2011 enclosing a CD-ROM containing a large number of the documents you had asked for.

I point out that [ESA] has sent you a considerable number of documents you have requested. Those documents were sent to you on 30 August 2010, 5 November 2010 and most recently on 16 February 2011.

In order to avoid further difficulties, I would be grateful if you could check your law firm records and confirm that you are in receipt of the documents and letters sent to you on 30 August 2010, 5 November 2010, 10 November 2010 and 16 February 2011."

30 On 18 February 2011, the applicants replied by email to ESA:

"*Thank you for your reply to our letter yesterday to President Sanderud.*

In your letter, received by telefax, you state that [ESA] sent a CD-ROM with documents on 16 February 2011. The reason why we have not yet received that shipment is probably because [ESA] has used a regular mail service (which can take up to a week) as it did the last time we received a CD-ROM, instead of an overnight express service. If [ESA] has relied on an express service, please forward the shipment number and identify the carrier so we can track down the CD-ROM immediately.

Your letter leaves some doubt as to whether [ESA] now has processed our request for access to the file of 3 August 2010 – in full. Since, under the circumstances, you have not clearly stated otherwise and indicated any time for an additional delivery, I am led to believe that [ESA] has processed our request in full and that we will find all remaining documents on the CD-ROM (including a current list

showing all the documents that have been registered to the file). For the avoidance of doubt, I would appreciate if you could verify that the CD-ROM in transit is indeed complete.

Leaving this issue aside, I would express hope that we may further our working relationship on a constructive level."

31 In an email the same day, the Director of Legal and Executive Affairs replied:

"*Thank you for your message. My letter of 16 February 2011 makes it clear that the bundle of documents that is contained in the CD-ROM does not process your request in full. Another bundle of documents is being prepared for you according to the procedure described in the letter and will be sent as soon as possible.*

You state that you have received a CD-ROM in the past from [ESA]. Is that the one sent on 5 November 2010? May I take it that you thus confirm that you have received the documents sent to you on that date?

Would you be so kind as to confirm that you have also received the documents sent to you on 30 August 2010, please?"

32 In a final email that day, 18 February 2011, the applicants replied:

"*Thanks for your swift reply. I actually confirmed in my letter on 6 January 2011 the documents that we received on the CD-ROM which you refer to (a copy of that annex has been attached to this email for your convenience). The letter also confirms that we did receive the email on 30 August 2010 by referring to the case list that was transmitted in that email. To my knowledge, we have not missed out on any files that [ESA] has sent over but I appreciate your initiative to verify this point.*

I am greatly worried that we will not have time to review all relevant parts of the file before we file our statement of intervention. (The court will probably ask for the submission by the end of March). Please note in that respect, that we are pursuing a regular and supportive intervention and will not seek to duplicate the arguments that you have already presented. Although we have strong held views on the investigation, which commenced long before you took office, we will not seek to bring those before the court. I hope this is not a concern

which ha[s] contributed to the delay in some quarters of [ESA]. As you can surmise also from the different courses taken in other recent cases where we have crossed paths, we only take sharp differences public when it serves a specific purpose, legally or politically, and then try to do that carefully.

Could you please forward a copy of your last letter dated 16 February 2011, which I assume contain a list of the documents included on the CD-ROM, as you did the last time, so that we can get a clearer picture of the volume and nature of the unreleased documents on file? I must also bother you again with my request for a time estimate for when we can expect the complete file. I am sure that you can appreciate the situation from our side."

33 In the letter of 16 February 2011 from ESA to the applicants, which was received by the latter on 22 February 2011, ESA thoroughly explained the legal reasons for its treatment of the third-party documents in the file. Of interest here is the distinction in treatment accorded to the addressee of the statement of objection/the final decision and the applicants. The letter concluded:

"*While [ESA] fully endorses the initiatives which have been taken in recent years, in particular by the European Commission, with a view to promote action for damages in relation to competition law infringements, [ESA] must at the same time comply with its obligation to protect commercially sensitive information. In this respect, I trust that your client will understand that [ESA] has to strike a balance between the sometimes conflicting interests which are at play.*

The obligatory consultation with all third parties before disclosing the documents they sent to [ESA] during the competition investigation and the assessment of all those documents, as provided for in general rules on access to documents, is on-going. However, the first batch of third party documents to which access can be granted have now been prepared. These documents are all stored on a CD-ROM attached to this letter. A list of these documents is enclosed as Annex I.

[ESA] has decided to grant you full access to several of those documents. They are all marked access granted. Access is not granted to documents or part of documents where [ESA] considers

that it is reasonably foreseeable that disclosure of this information would undermine the protection of the commercial interests of other undertakings. [ESA] has also examined whether there is any overriding interest in the disclosure of the information and found that not to be the case.

We will revert to you as soon as we have finalised the processing of the remaining parts of your application for access to documents."

Annex I to the letter listed 122 documents. Access was granted to 113 documents.

34 On 16 August 2011, ESA again released a number of documents from the file. In the same letter, ESA denied access to 352 of 354 inspection documents obtained during the inspection of Norway Post's premises in June 2004 (this decision was challenged before the Court in *Schenker I*, cited above. In that case, the Court annulled ESA's decision of 16 August 2011 'Norway Post/ Privpak –Access to documents' insofar as it denied full or partial access to inspection documents in Case No 34250 Norway Post / Privpak). Unlike the first list, the names and sources of the documents had been blacked out or otherwise rendered unintelligible. Annex II to the letter of 16 September 2011 listed 138 documents, of which access was granted to 128.

35 On 8 March 2012, the applicants served a pre-litigation notice on ESA pursuant to Article 37(2) SCA.

36 In the pre-litigation notice, the applicants made it clear that they would take legal action under Article 37 SCA if ESA failed to adopt a position on the remaining documents belonging to Case No 34250 within the statutory two-month pre-litigation period. The applicants claimed that they could not identify the remaining documents, but expected a decision on the following documents or type of documents:

a. the index to the documents attached to the file;

b. ESA's working documents;

c. any remaining correspondence, including, but not limited to, Norway Post, third parties, and the Norwegian Government;

d. any minutes from meetings between ESA and the Norwegian Government to discuss the case to the extent that these are not considered working documents;

e. any minutes from meetings between the president of ESA and Norway Post or the Norwegian Government to discuss the case to the extent that these are not considered working documents;

f. all documents from DB Schenker in the redacted form they were sent to Norway Post to protect business secrets and confidential information;

g. a letter from Norway Post to ESA of 13 July 2010; and

h. any other documents not listed in the index of the file but belonging to the case.

37 On 12 March 2012, the applicants submitted a separate request for access to the file in Case No 68736, that is the case concerning the applicants' access request (included here for the sake of completeness; see pending Case E8/12 *DB Schenker* v *ESA*, '*Schenker III*'). The letter carries the heading "Case No 68736 – Request for public access to the statement of content of the file (index)":

"*Reference is made to the pre-litigation notice that DB Schenker submitted in this matter on 8 March 2012 pursuant to Article 37 SCA. The company has decided to request public access to the index of the file in Case No 68736 (*DB Schenker's request for public access to the documents in Case No 34250 – Norway Post/Privpak*) under Article 2(1) of the Rules on Access to Documents (RAD) as a preparatory step if the matter should proceed to court.*"

38 On 15 March 2012, the Director of Legal and Executive Affairs at ESA answered:

"*Thank you for your letter of 12 March 2012 asking for access to the index of the file in Case no. 68736.*

I have made inquiries about the existence of such a document. I have found no document extant which is an 'index' of the file in that case.

As no index exists, I cannot grant access to it."

39 This reply was followed by a letter on 19 March 2012 from the applicants to ESA, carrying the heading "Case No 68736 – Request for public access to the statement of content of the file (index)". The letter was addressed directly to the Director of Legal and Executive Affairs:

"*...*

You have been designated as the case handler in charge of Case No 68736 in the correspondence with DB Schenker. The company was therefore surprised to learn that you had to make enquiries elsewhere in your organization to investigate whether a statement of content of the file (index) exists and that no such case register could be identified. The company recalls that ESA has made several decisions in Case No 68736; on 30 August 2010; 5 November 2010; 16 February 2011 and 16 August 2011. To that end, ESA has sent and received a number of letters and emails to Norway Post, DB Schenker and other third parties. The legality of the last decision, on 16 August 2011, has also been contested in the EFTA Court and is pending as Case E-14/11 DB Schenker v EFTA Surveillance Authority.

The implication of your email appears to be that ESA is unable to account for the documents that belong to the case, including all correspondence that ESA has sent and received during the past 20 months.

Pursuant to Article 11 RAD, ESA has a legal obligation to 'develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by these Rules'*. This includes an embedded routine to continuously register all correspondence and other documents belonging to a specific case. Presumably, ESA has operated on the basis of such a routine since its inception. DB Schenker notes in that regard that all correspondence from ESA carries a case number and an event number. It would therefore seem likely that all correspondence and other documents belonging to a specific case number are registered with separate event numbers electronically, and that ESA, at any given time, easily can provide a*

list (index) showing all events registered to a specific case number, the origin/author of each document, the recipient of each document, the date of each document as well as the date when each event was registered. This is, obviously, what DB Schenker is seeking with its present access request.

Moreover, pursuant to Article 6(2) RAD, ESA also has a legal obligation to 'assist the applicant' *if an access request is not sufficiently precise, i.a. where the documents for which a listing is sought have been registered under a different case number or the statement of content (index) is referred to by a different name, etc.*

It should also be noted that ESA's response to the present access request will be considered relevant evidence to support a legal action under Article 37 SCA pursuant to the pre-litigation notice that was served on 8 March 2012. The legality of a decision not to grant access to the statement of content of the file (index) may also be challenged, as such, in a parallel action. Furthermore, the present response could also be introduced as evidence against the hardship defence that has been submitted by ESA in Case E-14/11.

On that basis, I would respectfully ask you to reconsider the access request that was submitted on 12 March 2012. In the event that ESA should conclude that it is still unable to provide a statement of content of the file (index), including any printout from any electronic register listing the correspondence and the other documents concerning DB Schenker's initial access request on 3 August 2010, the company will request access under Article 2(1) RAD to ESA's standard operating procedures for administering case files, including routines for handling incoming/outgoing correspondence, assigning case numbers, designating event numbers, etc."

40 On 27 March 2012, the applicants again approached ESA with a letter carrying the heading "Case No 68736 – Request for public access to the statement of content of the file (index)":

"...

ESA has now had more than 10 working days to consider the present request.

... If the file should be in such disarray that ESA is unable to produce an index that accounts for the documents that belong to the case, including the dates of all its correspondence with Norway Post, DB Schenker and other third parties, that fact would be relevant to the Court's assessment of the alleged hardship that ESA has relied on to set aside the public right to partial access to the documents and evidence in question under Article 4(6) RAD.

On that basis, I must again ask that ESA either confirm that no index of the file exists or provide access to that index.

In the event that no index of the file can be produced, not even in the form of a database printout, please note that the company has requested public access under Article 2(1) RAD to ESA's standard operating procedures for administering case files, including the routines for handling incoming/outgoing correspondence, assigning case numbers, designating event numbers, etc."

41 On 30 March 2012, the Director of Legal and Executive Affairs at ESA sent an email to the applicants:

"*Your request for public access to an index of documents has caused me some confusion.*

An index is a list in alphabetical order of the names, places and subjects (also sometimes, the terms but those are usually listed in a separate document called a glossary) mentioned in the documents in a file (or in a work such as a book) with references to each page containing a mention of the item concerned.

As I stated previously, no such alphabetical listing was ever generated. The documents in the file were analysed manually, not through some index or similar tool.

However, your letter of 27 March 2012 now indicates that you wish to have access to 'the statement of content of the file (index)'.

May I take it that you mean by a 'statement of content' a list of the documents contained in the file rather than a document containing an alphabetical analysis of the contents of the documents?

If it is indeed a list of the documents to which you seek access, I can arrange for such a list to be sent to you."

42 The same day, 30 March 2012, the applicants replied by email:

"*In reference to ESA's email earlier today, DB Schenker notes that the company on 12 March 2012 requested access to the statement of content of the file in this matter, which was denied on 15 March 2012 on the basis that no such document existed. The access request was clarified by DB Schenker again on 19 March 2012, and absent any reply from ESA, again on 27 March 2012. Given that ESA subsequently has come to the conclusion that such a document exists and is willing to grant access, the company requests that it be sent as a PDF-file via email to avoid further delay.*"

43 On 5 April 2012, the applicants received by email from ESA a list of 220 documents from Case No 34250 ("the second list") with the following explanation:

"*Please find attached a list of the documents in the file from the date of the Statement of Objections. You have already received a list of the documents which predate the SO.*

I was unable to convert this document into the proprietary portable document format (pdf) as you requested. I do not have access to or use of the requisite software programme. I trust that the list as a MS Excel file will be acceptable to you."

44 On 11 April 2012, the applicants sent a letter to ESA, repeating their request for a statement of content of the file (index) in Case No 68736. In that letter they referred to the correspondence of 15 March 2012, 19 March 2012, 27 March 2012, 30 March 2012 and 5 April 2012. In the letter the applicants conclude that the second list covered documents which belonged to the file in Case No 34250.

45 The applicants' letter of 11 April 2012 which repeated its request that ESA provide the correct statement of content in Case No 68736 also included a third access request. This third request covered ESA's internal procedures/instructions for handling public access requests and administering case files. The applicants also requested access to the College decisions "empowering" ESA's directors in charge of the competition and State aid department and the legal and executive department.

46 In a letter dated 9 May 2012 (included here for the sake of completeness; see pending case *Schenker III*), ESA partially defined its position in relation to the pre-litigation notice of 8 March 2012 as follows:

a. Index to the documents attached to the file. *"I have already sent you the list of documents in the case from 16 December 2008 to date by email of 5 April 2012 as your letter of 11 April 2012 acknowledges. No other documents from the period exist that belong to the case but are not on the list. On 30 August 2010 you received a complete list of all the documents on the file to which NP was granted access when the SO was issued in December 2008."*

b. Further documents to which access is granted. *"I am pleased to grant you access to 50 further documents. A list of those documents is attached as annex 1 to this letter. The documents themselves are all contained on the CD-ROM enclosed with this letter."*

c. Minutes from meetings. *"There are not any minutes on the file from meetings between ESA and the Norwegian Government. Nor are there any minutes on the file from meetings between the president of ESA and Norway Post or the Norwegian Government."*

d. All documents from DB Schenker in redacted form as sent to Norway Post. *"I am pleased to grant you access to all of the documents in this category. A list of those documents is attached as annex 2 to this letter. The documents themselves are contained on a CD-ROM mentioned above enclosed with this letter."*

e. The letter of 13 July 2010. *"We have not been able to identify any letter on the file from Norway Post to ESA on 13 July 2010."*

f. Remaining documents. *"Document event no 521704 which figures on the list sent to you on 5 April 2012 has no content and appears as an 'event' as a consequence of some technical mistake. Consequently it is impossible to grant you access to it."*

g. *"Some of the remaining documents are purely clerical and have no substantive content, such as letters merely transmitting documents (already in you possession) to others. Please confirm whether you wish to receive such letters or not."*

47 Fifty documents were released to the applicants, together with around 130 documents from DB Schenker in redacted form as sent to Norway Post.

48 In relation to the rest of the documents, ESA noted that it would continue to review the remaining documents to which the applicants had requested access, including those on the list sent to the applicants on 5 April 2012 and which were not listed in Annexes 1 and 2 to the letter of 9 May 2012, in order to give the applicants access wherever possible to the complete document or in redacted form in compliance with ESA rules on access to documents.

49 On 23 May 2012 (included here for the sake of completeness; see pending case *Schenker III*), ESA emailed the applicants with "a list of documents" in ESA Case No 68736. The letter attached to the email, dated 22 May 2012, stated that "[t]his list was prepared in a timely manner to respond to your request of 23 March 2012. For reasons I cannot account for it has become clear that it has never reached you. [...]"

50 On 9 July 2012, the applicants lodged their action against ESA with the Court for failure to act and for damages.

51 On 5 September 2012, after the present case had been lodged and before the defence was submitted, ESA sent a letter to the applicants concerning the rest of the documents. By this letter, access was granted to certain documents and denied for the remainder of the documents in the file. ESA stated that the "letter discloses or refuses to disclose all the remaining documents on or relating to the file concerning the administrative proceedings against Norway Post to which [the applicants] requested access".

III PROCEDURE BEFORE THE COURT AND FORMS OF ORDER SOUGHT BY THE PARTIES

52 On 9 July 2012, the applicants brought an action under Articles 37, second paragraph, and 46, second paragraph, SCA seeking a declaration that ESA had failed to act on the request, submitted on 3 August 2010, for public access to ESA Case No 34250 and damages for losses incurred by reason of ESA's failure to take a timely decision and otherwise handle the request in a lawful manner.

53 ESA submitted a defence which was registered at the Court on 25 September 2012.

54 The reply from the applicants was registered at the Court on 12 November 2012.

55 The rejoinder from ESA was registered at the Court on 13 December 2012.

56 In relation to their application concerning the failure to act, the applicants contend that the Court should:

(1) declare that ESA has infringed Article 37(1) SCA by failing to act on its duty, under the Rules on Access to Documents, the Surveillance and Court Agreement and the EEA Agreement, to define its position on the request that the applicants submitted on 3 August 2010 for access to the complete file in ESA Case No 34250 (Norway Post/Privpak); and

(2) order ESA to bear the costs.

57 In relation to their claim for damages, the applicants contend that the Court should deliver the following judgment:

(1) find that the inaction of the defendant between 7 September 2010 or any later date, and until the defendant has lawfully defined its position on the applicants' request for access to the complete file in ESA Case No 34250 (Norway Post), on 3 August 2010, is such as to render the defendant liable, including default interest, under Article 46(2) SCA;

(2) within six months after ESA has lawfully defined its position on the applicants' request for access to the complete file in ESA Case No 34250 (Norway Post), on 3 August 2010, the applicants shall inform the Court of the amount of damages that they claim and whether the parties agree on that amount;

(3) in the event of a failure to agree on the amount of damages, the parties shall submit to the Court, within the same period, their calculations of the amount of damages attributable to the defendant's failure to lawfully define its position on the applicants' request for access to the compete file in ESA Case No 34250 (Norway Post), on 3 August 2010; and

(4) order ESA to bear the costs.

58 ESA contends that the Court should:

(1) declare that the action for failure to act is devoid of purpose;

(2) dismiss the application for the remainder;

(3) order the applicants to bear the costs;

or, in the alternative,

order each party to bear their own costs as regards the action for failure to act; and

order the applicants to bear the costs as regards the action for damages.

59 On 19 October 2012, the applicants requested the stay of the proceedings pending the judgment in *Schenker I*. Following receipt of comments from the defendant, this was rejected by Decision of 26 October 2012 of the President of the Court.

60 On 30 October 2012, Norway Post requested leave to intervene in the present case. Following receipt of comments from the defendant, this request was rejected by Order of 21 December 2012 of the President of the Court.

61 On 14 March 2013, the applicants made a request for measures of organization of procedure. Following receipt of comments from the defendant, the Court rejected the request by way of letter of 27 March 2013.

IV LAW

Measures of organization of procedure

62 By way of letter registered at the Court on 14 March 2013, the applicants made a request for measures of organization of procedure.

63 The applicants asked the Court to order the defendant pursuant to Article 49(3)(d) of the Rules of Procedure ("RoP") to disclose certain specific documents and two groups of documents. The applicants requested the Court to order ESA to disclose document #598682 ("Schenker's request for access to documents in case 34250 Norway Post internal update"); documents #569272, #569355, #569398, #569400, #569350, #569351, #569352, #569354, and #569353 (email exchanges with the Commission and templates) ("the specific documents"). The applicants also requested disclosure of "all correspondence (if any) that ESA after 1 January 2011 sent to and received from third parties concerning confidentiality claims" and disclosure of "all invitations that ESA sent to Norway Post for confidentiality claims between 3 August 2010 and 5 September 2012" ("the groups of documents").

64 The applicants submitted that the information was necessary for them to be fully able to contest the defendant's position that it did not take excessive time to process the access request and that the applicants were to blame because they did not provide any meaningful cooperation.

65 For the reasons set out below, the applicants' request was denied by letter of 27 March 2013.

66 At any stage of the proceedings, the Court may prescribe any measure of organization of procedure under Article 49 RoP or any measure of inquiry under Article 50 RoP. Pursuant to Article 49(4) RoP, each party may, at any stage of the procedure, propose the adoption or modification of measures of organization of procedure.

67 Article 49 RoP is identical in substance to Article 64 of the Rules of Procedure of the General Court. The reasoning of the General Court is consequently relevant to the understanding of Article 49 RoP in accordance with the principle of procedural homogeneity (see *Schenker I*, cited above, paragraph 91).

68 However, in order to enable the Court to determine whether it is conducive to the proper conduct of the procedure to prescribe such a measure, an applicant must, in an application under Article 49(3)(d) RoP, identify the documents requested and provide the Court with at least a minimum of information indicating the utility of those documents for the purposes of the proceedings. Moreover, the Court may order such a measure for the organization of procedure only if an applicant makes a plausible case that the documents are necessary and relevant for the purposes of judgment (see *Schenker I*, cited above, paragraph 92).

69 As regards "Schenker's request for access to documents in Case No 34250 Norway Post internal update" and the specific documents requested, the applicants clearly identified the documents requested and provided the Court with at least the minimum information indicating the utility of those documents for the purpose of these proceedings. However, the applicants failed to make a plausible case that the documents were necessary and relevant to arrive at a judgment.

70 As regards the groups of documents, the applicants failed to sufficiently identify the documents requested and to provide the Court with at least the minimum information indicating the utility of those documents for the purpose of these proceedings.

71 Consequently, the request for measures of organization of procedure was denied.

The first plea – failure to act

72 With regard to the legal force to be attributed to Decision 407/08/COL, the Court has already found that, while it was adopted by ESA of its own motion, it is part of EEA law (see *Schenker I*, cited above, paragraph 118).

73 By their first plea, the applicants submit in essence that ESA has failed to act on the information request of 3 August 2010.

74 Moreover, the applicants contest the assertion that the letter of 5 September 2012 effectively covers all remaining documents on the file.

75 As a preliminary point, it should be noted that an application for failure to act must be preceded by a formal notice calling upon ESA to act, and the subject-matter of that notice must be set out in such a manner as to make it clear what measures ESA should have taken under EEA law (see Order of the Court in Case E-7/96 *Paul Inge Hansen* v *ESA* [1997] EFTA Ct. Rep. 101, paragraph 15, and Order of the Court in Case E-5/08 *Yannike Bergling* v *ESA* [2008] EFTA Ct. Rep. 316, paragraph 4).

76 Moreover, in order to rule on the substance of a claim for a declaration that ESA has failed to act, it is necessary to determine whether, at the time when ESA was formally called upon to define its position within the meaning of Article 37 SCA, it was under a duty to act (see, for comparison, Case T-423/07 *Ryanair* v *Commission* [2011] ECR II-2397, paragraph 25).

77 It should also be noted that the remedy provided for in Article 37 SCA, which serves different purposes from the remedy provided for in Article 36 SCA, is founded on the premise that the unlawful inaction on the part of ESA enables the matter to be brought before the Court in order to obtain a declaration that the failure to act is contrary to the EEA Agreement, in so far as it has not been repaired by ESA.

78 The effect of that declaration, under Article 38 SCA, is that the defendant institution is required to take the necessary measures to comply with the judgment of the Court without prejudice to any actions to establish non-contractual liability to which the aforesaid declaration may give rise. In circumstances, where the act whose absence constitutes the subject-matter of the proceedings, was adopted after the action was brought but before judgment, a declaration by the Court to the effect that the initial failure to

act is unlawful can no longer bring about the consequences prescribed by Article 38 SCA.

79 It follows that in such a case, as in cases where ESA has responded within a period of two months after being called upon to act, the subject-matter of the action has ceased to exist, so that there is no longer any need to adjudicate. The fact that the position adopted by ESA has not satisfied the applicants is of no relevance in this respect. Article 37 SCA refers to failure to act in the sense of failure to take a decision or to define a position, not the adoption of a measure different from that desired or considered necessary by the persons concerned (see, for comparison, *Ryanair* v *Commission*, cited above, paragraph 26 and case-law cited).

80 It is in the light of these considerations that the Court must rule on the claim that ESA failed to act in relation to the request for access to documents submitted by the applicants on 3 August 2010.

81 The applicants refer to the right of access to documents established by ESA in the RAD. The applicants claim that ESA's failure to act lies in the fact that ESA delayed the handling of the access request and emphasise that ESA failed to take a decision at the end of the two-month period prescribed in Article 37, second paragraph, SCA in relation to those documents remaining after ESA defined its position in its letter of 9 May 2012.

82 ESA agrees that there is a right of access to documents, but claims that in the present case it extended only to partial access to a limited number of internal ESA documents, and this only after 18 April 2012, the day the Court handed down the judgment in Case E-15/10 *Posten Norge AS* v *ESA* [2012] EFTA Ct. Rep. 246.

83 At the oral hearing ESA expressed regret that the access request of the applicants had been processed over such a long period of time but reiterated its position in the defence that the claim of failure to act in relation to the request for access to the remaining documents is unfounded and that, in any event, in light of the adoption of the decision of 5 September 2012, the present action has become devoid of purpose.

84 In that respect, it must be noted that Article 7 RAD imposes on ESA a duty to act on the access request submitted on 3 August 2010 within certain well-defined, clear time limits. Article 7(1) RAD contains a clear rule that obliges ESA to provide its reasoned response within five working days of the registration of the application for access to documents, save in exceptional cases (see *Schenker I*, cited above, paragraph 274).

85 ESA has repeatedly contended that no right to access existed. However, such an argument cannot be used to show that ESA had no duty to take a position on the access request submitted by the applicants.

86 Nevertheless, by the decision of 5 September 2012, ESA granted access to a large number of documents from its file Case No 34250 whereas access to other documents was denied. In that decision, ESA stated that it "discloses or refuses to disclose all the remaining documents on or relating to the file concerning the administrative proceedings against Norway Post to which [the applicants] requested access".

87 Therefore, it must be held that on 5 September 2012 ESA clearly defined its position concerning the remaining documents.

88 This conclusion cannot be called into question by the arguments of the applicants that the decision of 5 September 2012 did not cover all the remaining documents. As has been noted above in paragraph 79, Article 37 SCA refers to failure to act in the sense of failure to take a decision or to define a position, not the adoption of a measure different from that desired or considered necessary by the persons concerned. In the latter case, the applicants could have brought an action under Article 36 SCA.

89 It follows that, by adopting the decision of 5 September 2012, ESA properly defined its position, within the meaning of the second paragraph of Article 37 SCA, on the applicants' request that it should act in that regard.

90 Consequently, although the applicants had a legitimate interest in bringing the present action, it has become devoid of purpose,

since it seeks a declaration that ESA unlawfully failed to adopt a position with regard to the remaining documents on which ESA had not yet on 9 May 2012 taken a decision.

91 There is therefore no need to adjudicate on the claim that ESA failed to act in relation to the remaining documents in Case No 34250.

The second plea – non-contractual liability

Arguments of the parties

92 The applicants claim that ESA should be held liable pursuant to Article 46 SCA and request the Court to render an interlocutory judgment. They argue that ESA's failure to handle their access request in a timely and otherwise lawful manner has resulted in losses for which ESA is liable. This also includes losses caused by the infringements that the applicants advanced in *Schenker I*, cited above, concerning ESA's overall refusal to grant access to the inspection documents, and the losses caused by the infringements that the applicants have advanced in pending case *Schenker III*, in relation to certain documents to which the applicants were refused access by ESA correspondence of 9 May 2012 and 23 May 2012.

93 The applicants refer to the rulings of the Court of Justice of the European Union (the "ECJ") in Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 41-42, and in Case C-440/07 P *Commission* v *Schneider Electric* [2009] ECR I-6413, paragraph 160. They submit that the conditions that must be met under Article 46 SCA should be aligned with the conditions governing State liability. First, the law infringed must be intended to confer rights on individuals. Second, the breach must be sufficiently serious. Third, there must be a direct causal link between the breach and the damage sustained.

94 As regards the first criterion, the applicants claim that they had a right of access, which ESA has infringed. The right to timely access is by its nature intended to confer rights on individuals. ESA had a duty to take a decision on the access request by the

end of the extended statutory time limit provided for under Article 7(2) of the RAD or, in any event, within a reasonable time in accordance with the fundamental right and general principle of sound administration in EEA law and the principle of legitimate expectations.

95 As regards the second criterion, the applicants submit that ESA had no margin of discretion on whether to act on the access request submitted on 3 August 2010. The handling of the case by ESA shows a staggering lack of diligence and care, over a long period, and at high level within ESA's organisation, towards the applicants.

96 As regards the third condition, the applicants claim that they have incurred legal fees in their efforts to establish a true state of affairs regarding ESA's handling of the access request and to bring ESA into compliance and state that they estimate those fees to have stood at EUR 22 500 at the time of the application. They also submit that they have incurred legal expenses in their efforts to have the follow-on action against Norway Post in Oslo City Court stayed until ESA has lawfully decided on the access request and state that they estimate those fees to have stood at EUR 26 000 at the time of the application.

97 ESA contests these arguments and argues that the claim for damages is inadmissible, since there has not been a failure to act. ESA also submits that the request for an interlocutory judgment must be rejected.

98 ESA agrees that the principle of homogeneity calls for Article 46, second paragraph, SCA, to be interpreted in line with the corresponding provision in the EU pillar, that is, Article 340, second paragraph, of the Treaty on the Functioning of the European Union ("TFEU").

99 However, ESA maintains that the applicants have not managed to demonstrate any breach of a rule intended to confer rights on them, that the breach, if any, was not sufficiently serious to merit

liability, and that there is no causal link between the legal fees mentioned by the applicants and the actions of ESA.

100 In relation to the legal fees, ESA specifically claims that these are not recoverable costs and that they cannot be the subject of the present action.

Findings of the Court

Admissibility

101 The action to establish liability is an autonomous form of action, with a particular purpose to fulfil within the system of legal remedies and subject to conditions of use dictated by its specific purpose. Although actions for annulment and for failure to act seek a declaration that a legally binding measure is unlawful or that such a measure has not been taken, an action to establish liability seeks compensation for damage resulting from a measure or from unlawful conduct attributable to ESA (see, for comparison, Case C-234/02 P *European Ombudsman* v *Lamberts* [2004] ECR I-2803, paragraph 59).

102 In that regard, the Court notes that the applicants' plea for damages is not based on a failure to act, but a failure to take a timely decision and handle the request in an otherwise lawful manner.

103 Even if there is no need to adjudicate on the claim that ESA failed to act, the Court must nevertheless consider whether ESA may have incurred liability under Article 46 SCA on those grounds.

104 However, Article 19 of the Statute of the Court provides, inter alia, that an application must specify the subject-matter of the dispute and contain a brief statement of the pleas in law on which the application is based. This means that the application must specify the grounds on which the action is based, with the result that a mere abstract statement of the grounds does not satisfy the requirements of the Statute or the RoP. Consequently, a mere reference to alleged infringements which are subject to parallel proceedings of the kind contained in the application cannot be considered sufficient, in particular as there have been

no specific arguments put forward in the present case concerning the letter of 9 May 2012 (see paragraph 46 above) and the letter attached to the email from ESA to the applicants of 23 May 2012 (see paragraphs 37, 38, 39, 40, 41, 42, 44 and 49 above), which are both subject to the parallel application for annulment (see pending case *Schenker III*).

105 Accordingly, the conditions laid down in Article 19 of the Court's Statute are not fulfilled with regard to the applicants' plea that they have suffered losses advanced in the parallel annulment action in Case E-8/12 *Schenker III* in relation to the correspondence of 9 May 2012 and the letter attached to the email from ESA to the applicants of 23 May 2012.

106 As to the general reference made to Case E-8/12 *Schenker III*, it must be added that it is not for the Court to transpose to the present proceedings, concerning a claim for damages under Article 46, second paragraph, SCA, pleas or arguments raised in the course of the other case concerning an application for annulment under Article 36, second paragraph, SCA. To do so would not be consistent with the responsibility of each party for the content of the pleadings which it lodges, in particular Article 33(1) RoP. The question of an infringement of the rights of the defence must be decided by taking into consideration the specific circumstances of each particular case. The Court thus considers that the content of the pleadings lodged in Case E-8/12 *Schenker III* cannot be taken into account in the present case.

107 Therefore the claim for non-contractual damages is admissible except for the part of the application covered by the parallel annulment action in Case E-8/12 *Schenker III*, which is inadmissible.

Preliminary remarks

108 Article 46, second paragraph, SCA provides that, in the case of non-contractual liability, ESA shall, in accordance with the general principles of law, make good any damage caused by it, or by its servants in the performance of its duties.

109 The Court has repeatedly held that although it is not required by Article 3(1) SCA to follow the reasoning of the ECJ when interpreting the main part of that Agreement, for the sake of procedural homogeneity, the reasoning which led that court to its interpretations of expressions in Union law is relevant when those expressions are identical in substance to those which fall to be interpreted by the Court (see, inter alia, the Order of the Court in Case E-13/10 *Aleris Ungplan* v *ESA* [2011] EFTA Ct. Rep. 3, paragraph 24, and case-law cited, and the judgment *Schenker I*, cited above, paragraphs 77-78 and case-law cited).

110 Consequently, in assessing the claim for non-contractual liability pursuant to Article 46, second paragraph, SCA, it is appropriate to take account of the reasoning in the case-law of the EU courts concerning Article 340, second paragraph, TFEU.

111 Moreover, the conditions under which ESA may incur liability for damage caused to individuals by a breach of EEA law should not, in the absence of particular justification, differ from those governing the liability of the European Commission (the "Commission") in similar circumstances, taking into account the shared supervisory role played by the two institutions in the EEA. The protection of the rights conferred on individuals in EEA law should not vary depending on whether ESA or the Commission is responsible for the damage when they exercise powers conferred upon them by the EEA Agreement pursuant to Article 109 EEA (see, *mutatis mutandis*, *Bergaderm*, cited above, paragraph 41).

112 The parties have thus correctly assumed that EEA law confers a right to reparation where the following three conditions are met: first, that the rule of law infringed must be intended to confer rights on individuals; second, that the breach must be sufficiently serious; and third, that there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties (see, for comparison, *Bergaderm*, cited above, paragraph 43).

The first condition

113 As to the first condition, it must be examined whether the grounds of annulment in the application refer to the infringement of rules of law conferring rights on individuals.

114 The applicants argue that they had a right of access and that ESA had a corresponding duty to take a decision on the request that was submitted on 3 August 2010 by the end of ESA's extended statutory time limit under Article 7(2) RAD or, in any event, within reasonable time in accordance with the fundamental right and general principle of sound administration in EEA law.

115 The applicants also contend that ESA infringed their legitimate expectations in obtaining a timely decision. That argument is linked to "the existence and specific provisions set out in the RAD, and [ESA]'s specific and repeated assurances during the entire process".

116 By adopting Decision 407/08/COL, ESA has indicated to individuals and economic operators who wish to gain access to documents which it has in its possession that their requests will be dealt with according to the procedures, conditions and exceptions laid down for that purpose. Although Decision 407/08/COL is, in effect, a series of obligations which ESA has voluntarily assumed for itself in the interest of the principles of transparency and good administration, it forms part of the EEA legal order and is therefore capable of conferring on third parties legal rights which ESA is obliged to respect.

117 Finally, the Court recalls that, according to settled case-law, the principle of legitimate expectations is a recognised general principle of EEA law (see Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord* [2005] EFTA Ct. Rep. 117, paragraphs 170 to 173, and Joined Cases E-17/10 and E-6/11 *Liechtenstein and Others* v *ESA* [2012] EFTA Ct. Rep. 114, paragraph 134).

118 That principle constitutes a rule of law conferring rights on individuals (see, for comparison, Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 15).

119 It follows that the first condition is satisfied.

The second condition

120 First, it must be noted that application of the condition of a sufficiently serious breach in a case concerning the non-contractual liability of ESA may not necessarily be coextensive with its application under the EEA State liability rules. As has been repeatedly held, the principle of State liability which follows from the EEA Agreement itself differs, as it must, from the development in the case-law of the ECJ of the principle of State liability under EU law (see Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraph 30, and Case E-2/12 *HOB-vín III* [2012] EFTA Ct. Rep. 1092, paragraph 120).

121 As regards the liability of ESA under Article 46 SCA, that provision requires that account be taken, *inter alia*, of the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to ESA (see, for comparison, *Bergaderm*, cited above, paragraph 40).

122 The decisive test for finding that a breach of EEA law is sufficiently serious is whether ESA manifestly and gravely disregarded the limits on its discretion.

123 Where ESA has only considerably reduced or even no discretion, the mere infringement of EEA law may be sufficient to establish the existence of a sufficiently serious breach (see, for comparison, Case C-282/05 P *Holcim (Deutschland)* v *Commission* [2007] ECR I-2941, paragraph 47 and case-law cited).

124 Therefore, it is necessary first to determine the margin of discretion of ESA in the present case in the light of that principle and, second, whether this has been infringed. The applicants have argued that ESA has committed a sufficiently serious breach by displaying a staggering lack of diligence and care and in grave disregard of its legal obligation to take a timely decision.

125 As noted above, by adopting Decision 407/08/COL, and in particular Article 7 RAD, ESA has voluntarily assumed for itself a series of obligations, such as specific and binding periods for the processing of applications, in the interest of the principles of transparency and good administration which are capable of conferring on third parties legal rights which ESA is obliged to respect.

126 However, in this case a sufficiently serious breach cannot follow from the application of the principle of legitimate expectations.

127 The right to rely on the principle of legitimate expectations extends to any individual who is in a situation in which it is clear that ESA has, by giving him precise assurances, led him to entertain such legitimate expectations. Regardless of the form in which it is communicated, precise, unconditional and consistent information which comes from authorised and reliable sources constitutes such assurances.

128 However, a person may not plead infringement of that principle unless he or she has been given precise assurances by the authorities (see *Liechtenstein and Others* v *ESA*, cited above, paragraph 134 and case-law cited). Moreover, only assurances which comply with the applicable rules may give rise to legitimate expectations (see, for comparison, Case T-475/07 *Dow AgroSciences Ltd and Others* v *Commission*, judgment of 9 September 2011, not yet reported, paragraph 265).

129 There is nothing in the present case to indicate that ESA gave the applicants any such precise assurances. On the contrary, the communications from ESA to the applicants, in particular those of 4 August 2010 and 30 August 2010, show that ESA informed the applicants that the file was voluminous and did not state a precise date when the assessment would be finished. That the applicants did not entertain any expectations is clear from their email of 30 August 2010 where they offered to discuss a reasonable extension of the deadline in Article 7 RAD.

130 Consequently, this argument must be rejected.

131 However, Article 7(1) RAD contains a clear rule that obliges ESA to provide its reasoned response within five working days of the registration of the application for access to documents, save in exceptional cases. Pursuant to Article 7(2) RAD, that time limit may be extended by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.

132 It follows from this clear rule that the margin of appreciation of ESA for the timely processing of applications under Article 7 RAD was limited to extending the time limit by 20 working days under Article 7(2) RAD.

133 Following the applicants' request of 3 August 2010 for access to documents, ESA was therefore obliged to take a decision at the latest by 7 September 2010.

134 It is clear from the evidence submitted by the parties that ESA failed to respect that time limit. The first documents were released by the letter of 5 November 2010, which reached the applicants on 11 November 2010. A second batch of documents was released to the applicants by the letter of 16 February 2011, which reached the applicants on 22 February 2011. Another batch of documents was released on 16 September 2011, and yet another batch on 9 May 2012. The final documents were released by the letter of 5 September 2012, after this action had been brought before the Court.

135 From this evidence it must be concluded that ESA failed to comply with the clear time limits laid down in Article 7 RAD. This constitutes an infringement of EEA law, sufficient to establish the existence of a sufficiently serious breach.

136 The Court, moreover, makes the following observations.

137 In the letter of 30 August 2010, the applicants referred to their follow-up action before the court in Norway and in their letter of 14 September 2010 called ESA's attention to the fact that they intended to intervene in support of ESA in *Posten Norge AS* v *ESA*, cited above.

138 Nevertheless, ESA remained largely passive. Some documents were released only by the letter of 5 November 2010, but the bulk of the documents were released after the hearing in Case E-15/10, which took place on 5 October 2011. Moreover, as the letters of 6 January 2011 and 17 February 2011 show, ESA seems to have paused in the treatment of the access request and effectively ended communications with the applicants. A small number of documents were released by letters of 16 February 2011 and 16 September 2011, but then the treatment of the file appears to have recommenced only with the threat of the action for a failure to act in 2012, which indicates that ESA did not act on the request during this period.

139 In the circumstances of the present case and given the importance of private enforcement of competition law (see *Schenker I*, cited above, paragraph 132, and with regard to the parallel rules in EU law, Case C-453/99 *Courage and Crehan* [2001] ECR I-6297 paragraphs 26 to 28, Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 91, and Case C-536/11 *Bundeswettbewerbsbehörde* v *Donau Chemie AG and Others*, judgment of 6 June 2013, not yet reported, paragraph 46), ESA's failure to comply with the clear time limits laid down in Article 7 RAD, as established in paragraph 135 above, is regrettable since it had the potential to undermine private enforcement of that kind.

140 It follows from the foregoing, in particular paragraphs 131 to 135, that ESA has committed a sufficiently serious breach sufficient to satisfy the conditions in Article 46 SCA.

The third condition

141 As to the third condition, it is clear that only a direct link of cause and effect between the allegedly unlawful conduct of the institution concerned and the damage pleaded can give grounds for non-contractual liability on the part of ESA pursuant to Article 46, second paragraph, SCA.

142 The burden of proof for establishing the existence of such a causal link rests on the applicant (see, for comparison, Joined Cases 197 to 200, 243, 245 and 247/80 *Ludwigshafener Walzmühle and Others* v *Council and Commission* [1981] ECR 3211, paragraphs 51 to 56, Case 310/81 *Ente Italiano di Servizio Sociale* v *Commission* [1984] ECR 1341, paragraphs 16 and 17, and Order of the General Court in Case T-346/03 *Krikorian and Others* v *European Parliament, Council and Commission* [2003] ECR II-6037, paragraph 23).

143 The applicants have demonstrated the existence of a sufficiently serious breach.

144 The applicants claim damages for two categories of legal costs. The first category consists of legal expenses incurred by the applicants in connection with the correspondence with ESA following their request for access to documents, which are not recoverable before the Court since they fall outside the scope of Article 69 RoP. The second category consists of legal expenses incurred before the national court in the context of staying the proceedings in the follow-on åaction in Oslo City Court against Norway Post pending the outcome of that request for access to documents.

145 As for the causal link between these costs and the violation of Article 7 RAD, the applicants claim that but for that breach they would not have incurred these losses.

146 ESA claims that the costs incurred by the applicants cannot be recovered by way of damages. First, the legal expenses incurred during the procedure before ESA cannot be reclassified as damages. Second, the costs incurred before the national court in the follow-up action are outside the jurisdiction of the Court.

147 With regard to the causal link required, it is not disputed that, pursuant to Article 69 RoP, the costs of proceedings incurred by the parties are recoverable if they were necessary for the purposes of the proceedings.

148 However, the general principles of law to which the second paragraph of Article 46 SCA refers do not oblige ESA to make

good every harmful consequence of its conduct. The condition under Article 46, second paragraph, SCA relating to a causal link concerns a sufficiently direct causal nexus between ESA's conduct and the damage (see, for comparison, Case C-419/08 P *Trubowest and Makarov* v *Council and Commission* [2010] ECR I-2259, paragraph 53, and case-law cited).

149 First, as regards the costs incurred before Oslo City Court, the Court notes that the costs for those proceedings are to be decided by that court. In that respect it must be recalled that a decision on the costs in a case covers all costs recoverable and determines which of the parties shall cover them and how they are to be allocated. Thus, even if the applicants were not to be awarded reimbursement of their expenses before the national court that would remain a matter for those proceedings.

150 Accordingly, costs incurred before the national court in the follow-up action before Oslo City Court cannot be considered harm suffered in the present proceedings but as costs relating to the proceedings before the national court. It follows from Article 97(5) RoP that costs of the parties to proceedings in a national court are a matter for that court to decide (see, for comparison, Case T-167/94 *Nölle* [1995] ECR II-2589, paragraphs 36 to 39).

151 As a result, the claims regarding costs in the proceedings before the national court must be dismissed.

152 Second, as regards costs incurred in connection with correspondence during the administrative procedure, it must be noted first of all that this procedure effectively ended when ESA defined its position by its decision of 5 September 2012.

153 In relation to these losses, ESA claims that the costs cannot be reclassified as damages and that the applicants have not shown that the actual costs have been substantiated.

154 It must be noted that the applicants base their request for damages on the costs incurred for correspondence during the administrative procedure concerning access to documents and

refers explicitly to the correspondence submitted in evidence. The applicants claim that the costs incurred for this correspondence – which covers more than 40 annexes to the application, including send receipts, decisions, emails, letters and document lists – should be reimbursed by ESA.

155 According to the evidence submitted by the applicants, correspondence was sent from the applicants to ESA on 18 occasions on 3 August 2010, 4 August 2010, 11 August 2010, 30 August 2010, 6 September 2010, 14 September 2010, 17 September 2010, 9 November 2010, 6 January 2011, 17 February 2011, 18 February 2011, 8 March 2012, 12 March 2012, 19 March 2012, 27 March 2012, 30 March 2012, 11 April 2012, and 18 May 2012.

156 According to the same evidence, correspondence was sent by ESA to the applicants on 18 occasions on 4 August 2010, 10 August 2010, 18 August 2010, 30 August 2010, 1 September 2010, 17 September 2010, 5 November 2010, 10 November 2010, 16 February 2011, 18 February 2011, 16 August 2011, 15 March 2012, 19 March 2012, 20 March 2012, 30 March 2012, 5 April 2012, 9 May 2012 and 22 May 2012.

157 It follows from this evidence – which has not been contested by ESA – that the applicants conducted a lengthy correspondence with ESA. During this correspondence ESA gave inconclusive answers to the applicants' inquiries. As a result the correspondence in the case became vastly greater in scope than can be considered necessary to respond to the applicants' enquiries.

158 However, this does not mean that there is a causal link within the meaning of Article 46 SCA. In the present case, the applicants pursued a negotiated solution with ESA after the clear time limit in Article 7(2) RAD had expired and had recourse to legal representation even though such representation is not mandatory. This is apparent from the correspondence between the applicants and ESA, in particular on 14 September 2010, 9 November 2010 and 17 February 2011.

159 With regard to a claim for compensation for material damage which an applicant alleges to have suffered on account of the costs incurred in seeking legal advice during negotiations with ESA, the Court notes that the contents of administrative complaints must be interpreted and understood by ESA with all the care that a large and well-equipped institution owes to those having dealings with it. Although those concerned may seek legal advice at that stage, it is their own decision and the institution concerned cannot be held liable for the consequences.

160 Thus, there is no causal link between ESA's conduct and the damage alleged, namely the lawyers' fees (see, for comparison, Case 54/77 *Herpels* v *Commission* [1978] ECR 585, paragraphs 47 to 49, and Case C-331/05 P *Internationaler Hilfsfonds eV* v *Commission* [2007] ECR I-5475, paragraph 24).

161 Similarly, the costs incurred during the negotiations with ESA after the clear time limit in Article 7(2) RAD expired must be distinguished from those incurred in contentious proceedings.

162 Those concerned are free to choose to enter into a negotiated agreement with ESA. The costs thus freely incurred by the applicants cannot therefore be regarded as damage caused by the institution in question (see, for comparison, by analogy, *Internationaler Hilfsfonds eV* v *Commission*, cited above, paragraph 27).

163 In contrast, the same does not apply to costs incurred by an applicant who has decided to institute legal proceedings which may result in a binding decision to recognise the applicant's rights and to oblige ESA to give effect to them pursuant to Article 38 SCA (see, for comparison, by analogy, *Internationaler Hilfsfonds eV* v *Commission*, cited above, paragraph 28).

164 There is therefore no causal link in law between the harm allegedly suffered by the applicants and the actions (or, in the present case, failure to act) of ESA after the expiry of the clear time limit in Article 7(2) RAD.

165 The second plea in law must therefore be rejected.

The request for an interlocutory judgment

166 The applicants' plea for damages has not been successful. The request for an interlocutory judgment must therefore be rejected.

V COSTS

167 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. The applicants have asked for ESA to be ordered to pay the costs.

168 In the present case, as regards, firstly, the main part of the action concerning the failure to act, there is no longer any need for the Court to give a decision. But the applicants cannot be criticised for having brought that action in order to protect their rights without waiting for ESA to adopt its decision, which was adopted after the expiry of the two-month period prescribed in Article 37, third paragraph, SCA. Therefore, the Court orders ESA to bear the costs for that part of the action.

169 Second, as regards the part of the action concerning the non-contractual liability of ESA, the Court considers it appropriate in the circumstances of the case to order ESA to bear its own costs and half of the costs of the applicants and to order the applicants to bear half of their own costs.

On those grounds,

THE COURT

hereby declares:

1. **There is no need to adjudicate on the claim that ESA failed to act in relation to the remaining documents in Case No 34250;**

2. **Dismisses the action to the remainder;**

3. **Orders ESA to pay the costs concerning the failure to act, its own costs concerning the action for non-contractual liability and half of those of the applicants concerning the action for non-contractual liability;**

4. **Orders the applicants to pay half of their own costs concerning the action for non-contractual liability.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 9 July 2013.

Gunnar Selvik — Carl Baudenbacher

Registrar — President

ORDER OF THE PRESIDENT

21 December 2012

(Intervention – Representation by a lawyer - Interest in the result of case)

In Case E-7/12,

Schenker North AB, established in Gothenburg (Sweden),

Schenker Privpak AB, established in Borås (Sweden),

Schenker Privpak AS, established in Oslo (Norway),

represented by Jon Midthjell, advokat,

applicant,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, Markus Schneider, Deputy Director; and Gjermund Mathisen, Officer, Legal & Executive Affairs, acting as Agents, Brussels, Belgium,

defendant,

APPLICATION seeking a declaration that the defendant has failed to act on a request, submitted on 3 August 2010, for public access to ESA Case No. 34250 under the Rules on Access to Documents ("RAD") established by ESA Decision No. 407/08/COL on 27 June 2008, and seek damages for the losses incurred by the failure to take a timely decision and otherwise handle the request in a lawful manner,

THE PRESIDENT

makes the following

ORDER

I BACKGROUND

1 The present case is a follow-up to Case E-14/11 *DB Schenker* v *ESA* in which the applicant in that case sought the annulment of ESA's Decision in Case No 68736 of 16 August 2011 denying DB Schenker access to certain documents relating to Case No 34250 *Norway Post / Privpak* on the basis of the Rules on Access to Documents ("RAD") established by the College of the EFTA Surveillance Authority on 27 June 2008.

2 Judgment in Case E-14/11 *DB Schenker* v *ESA* was handed down on 21 December 2012.

II FACTS AND PROCEDURE

3 On 9 July 2012, Schenker North AB, Schenker Privpak AB and Schenker Privpak AS ("DB Schenker" or "the applicants") made an application pursuant to Article 37(3) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") and Article 46(2) SCA. DB Schenker seeks a declaration that the defendant has failed to act on a request, submitted on 3 August 2010, for public access to ESA Case No. 34250 under the RAD. DB Schenker also seeks damages for the losses incurred by the failure to take a timely decision and otherwise handle the request in a lawful manner.

4 On 20 July 2012, ESA requested an extension of the deadline for the defence.

5 On 24 July 2012, the President, pursuant to Article 35(2) of the Court's Rules of Procedure ("RoP"), granted an extension of the time-limit for submitting a defence until 27 September 2012.

6 On 25 September 2012, ESA submitted its defence.

7 On 16 October 2012, the applicant requested an extension of the deadline for the Reply.

8 On 18 October 2012, the notice of the action brought by DB Schenker against ESA in Case E-7/12 was published in the EEA Section of the Official Journal of the European Union (2012/C 314/08) and EEA Supplement No 58/06 to the Official Journal.

9 On 19 October 2012, the President, pursuant to Article 36(2) RoP, granted an extension of the time-limit for submitting a Reply until 12 November 2012.

10 On 19 October 2012, DB Schenker made an application for a stay of the proceedings, pursuant to Article 79(1) RoP, until judgment has been rendered in Case E-14/11 *DB Schenker* v *ESA*.

11 On 26 October 2012, the President, pursuant to Article 79(1) RoP, after hearing the Judge-Rapporteur and ESA, decided not to stay proceedings.

12 On 30 October 2012, Posten Norge AS ("Norway Post") submitted an application for leave to intervene in support of the form of order sought by the defendant pursuant to Article 36(3) of the Statute. Norway Post contends that it has a direct and existing interest in the result of the case, as required by Article 36(2) of the Statute, as DB Schenker's application against the alleged failure to act concerns a request for access to the complete file in ESA Case No. 34250 (Norway Post/Privpak) where Norway Post was the party to the proceedings. Norway Post submits that many of those documents in the Norway Post/Privpak case-file entail detailed information about Norway Post which is liable to seriously undermine the protection of its commercial interest if disclosed. Norway Post states that it believes that ESA has adequately defined its position on DB Schenker's request for access to documents in ESA Case No. 34250 and that no further access to documents may be granted. Insofar as the application concerns an alleged on-going failure to act, the result of the case may force ESA to conduct further assessments as to whether or not DB Schenker can be granted access to additional documents. This may also, it is submitted, inflict an additional workload on Norway Post. Norway Post submits that its application to intervene is made within the time limit set by Article 89(1) RoP.

13 The application to intervene was served on the parties in accordance with Article 89(2) RoP.

14 On 12 November 2012, DB Schenker submitted its Reply.

15 On 19 November 2012, ESA submitted its written observations on Norway Post's application for leave to intervene.

16 On 20 November 2012, DB Schenker submitted its written observations on Norway Post's application for leave to intervene.

III OBSERVATIONS OF THE PARTIES

17 ESA submits that Article 36 of the Statute is essentially identical in substance to Article 40 of the Statute of the ECJ and that accordingly the principle of procedural homogeneity is applicable. As the present action is twofold, the application to intervene needs to be assessed with regard to both forms of order sought by the applicants, i.e. the declaration that ESA failed to act according to Article 37 SCA and damages pursuant to Article 46(2) SCA. ESA submits that as both parts of the present case are based on the alleged failure of ESA to act upon the applicant's request for public access to its complete case file no. 34250, a competition procedure to which Norway Post was a party, Norway Post has a direct and existing interest in the result of the case within the meaning of Article 36(2) of the Statute.

18 ESA submits that although Norway Post's interest to intervene in relation to the claim for the damages part of the case is not as clear, the two claims are closely connected and arguably even intrinsically linked. ESA therefore contends that in the circumstances of the present case the application to intervene should not be dealt with differently in relation to the two forms of orders sought by the applicants. Consequently, ESA states that Norway Post should be granted leave to intervene in Case E-7/12 in support of the form of order sought by the defendant.

19 DB Schenker submits that the present case concerns an action against ESA for a failure to act pursuant to Article 37(3) SCA and an action against ESA for damages pursuant to Article 46(2)

SCA. Norway Post has failed to demonstrate a direct and existing interest in the result of either action under Article 32(2) of the Statute, and that the application for leave to intervene must therefore be rejected.

20 DB Schenker argues that Norway Post has not put forward any reasons to demonstrate that it has a direct and existing interest in the result of the action for damages.

21 DB Schenker contends that Norway Post has failed to establish a direct and existing interest in the result of the action against ESA's failure to act under Article 37(3) SCA. An action against a failure to act is decision-neutral, in the sense that its purpose is to fault the defendant for not taking any decision, positive or negative to the applicant. DB Schenker submits that the very nature of an action against a failure to act makes it inherently difficult for any intervener to demonstrate a direct and existing interest in the result. It is argued that on its own contention, Norway Post has only demonstrated at most a potential or indirect interest in the result of the action. Therefore, the application must be rejected in so far as Norway Post seeks leave to intervene in the action against ESA's failure to act.

22 In addition, DB Schenker submits that the application is inadmissible because Norway Post is not independently represented before the Court. According to Article 17 of the Court's Statute, private parties must be represented by objectively independent counsel who is without an own interest tied to the subject matter. DB Schenker contends that the application for leave to intervene falls short of meeting this objective standard as it cannot be precluded that the law firm representing Norway Post has its own interest tied to the subject matter following the judgment in Case E-15/10 *Norway Post* v *ESA*, judgment of 18 April 2012, not yet reported, in light of the applicant's follow-on damages claim and on-going efforts to obtain ESA's evidence against Norway Post to substantiate the full extent of that claim.

23 DB Schenker contends that reliance placed by Norway Post on allegedly erroneous expert advice provided by its law firm in 2002

means that the law firm in question, which presently represents the applicant intervener, cannot be objectively perceived as being without its own interests tied to the subject matter before the Court in this case following the judgment in *Norway Post* v *ESA*. In any event, the application should be ruled inadmissible on the basis that Norway Post has chosen not to be independently represented pursuant to Article 17 of the Statute.

IV LAW

Admissibility

24 Pursuant to Article 17 of the Court's Statute, parties other than any EFTA State, ESA, the European Union and the Commission must be represented by a lawyer. Such a lawyer must be authorized to practice before a court of an EEA State.

25 The Court has recognised the procedural branch of the principle of homogeneity and held that the application of the principle of 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*, judgment of 21 December 2012, not yet reported, paragraphs 77-78; Order of the President of 23 April 2012 in Case E-16/11 *ESA* v *Iceland*, paragraph 32). The need to apply that principle, namely in order to ensure equal access to justice for individuals and economic operators throughout the EEA, is less urgent with regard to rules concerning the modalities of the procedure, when they relate mainly to the proper administration of the Court's own functioning. Nonetheless, for reasons of expediency and in order to enhance legal certainty for all parties concerned, the Court considers it also in such cases appropriate, as a rule, to take the reasoning of the European Union courts into account when interpreting expressions of the Statute and the Rules of Procedure which are identical in substance to expressions in the equivalent provisions of Union law. In any event, in the application of its procedural rules the Court must respect fundamental rights (see *DB Schenker* v *ESA*, cited above, paragraph 78 and *Norway Post* v *ESA*, cited above, paragraph 110).

26 Article 17 of the Court's Statute is identical in substance to Article 19(1) to (6) of the ECJ's Statute. In assessing, pursuant to Article 17 of the Statute, the assertions made by DB Schenker in its written observations that Norway Post's law firm cannot be objectively perceived as being without its own interests tied to the subject matter of the case, and that therefore the application for leave to intervene is inadmissible, it is appropriate to take account of the reasoning in the case-law of the Union courts on Article 19 ECJ Statute.

27 Article 17(2) and (3) of the Court's Statute, must be interpreted, so far as possible, independently, without reference to national law (see by comparison, Order in Case T-79/99 *Euro-Lex* v *OHIM* ("*EU-LEX*") [1999] ECR II-3555, paragraph 26).

28 The term 'represented' in Article 17(2) of the Court's Statute must be understood as meaning that an individual is not authorised to act in person, but must use the services of a third person authorised to practise before a court of an EEA State (see by comparison, Order in Case C-174/96 P *Lopes* v *Court of Justice* [1996] ECR I-6401, paragraph 11; Order in *EU-LEX,* cited above, paragraph 27; and Order in Case T-184/04 *Sulvida* v *Commission* [2005] ECR II-85, paragraph 8).

29 The requirement to have recourse to a third party is based on a conception of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence, and in the overriding interest of justice, such legal assistance as his client needs (Case 155/79 *AM & S* v *Commission* [1982] ECR 1575, paragraph 24; Order in *EU-LEX*, cited above, paragraph 28, and *Sulvida* v *Commission*, cited above, paragraph 9). The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose (see by comparison, *AM & S* v *Commission,* cited above, paragraph 24).

30 Moreover, in order to be considered independent, a lawyer cannot represent a legal person if he has within the body which he

represents, extensive administrative and financial powers (see, to that effect, Order of 29 September 2010 in Joined Cases C-74/10 P and C-75/10 P *EREF* v *Commission*, not published in the ECR, paragraphs 50 and 51).

31 However, the requirement imposed by EEA law that a party be represented before the Court by an independent third party is not a requirement designed solely to exclude representation by employees of the principal or by those who are financially dependant upon it. The essence of the requirement is to prevent private parties from bringing actions in person without recourse to an appropriate intermediary. So far as legal persons are concerned, the requirement of representation by a third party thus seeks to ensure that they are represented by someone who is sufficiently detached from the legal person which he is representing (see by comparison, Order of the General Court of 6 September 2011 in Case T-452/10, *ClientEarth* v *Council*, not yet reported, paragraphs 18 and 19).

32 Therefore, financial or structural relationships that the representative has with his client cannot be such as to give rise to confusion between the client's own interests and the personal interests of its representative. On the contrary, the representative must be objectively perceived as being a genuine intermediary between his client and the Court when he is entrusted with defending his client's best interests, in accordance with the forms and limits defined by the procedural rules applicable (See by comparison to that effect, *ClientEarth* v *Council*, cited above, paragraph 20).

33 However, in interpreting Article 17(2) of the Court's Statute, it is not alone determinative whether there is a relationship of employment between the lawyer, whether internal or external counsel, and his client unless that relationship is such as to put into doubt the independence of that lawyer as required by EEA law (see paragraph 29 above).

34 Consequently, in light of paragraph 25 above, a lawyer may represent a party before the Court, pursuant to Article 17(2) of the

Court's Statute, if such counsel is bound by an ethical code of an EEA State bar to provide in full independence, and in the overriding interest of justice, such legal assistance as his client needs, and entitled to make representations before the highest courts.

35 Moreover, if an in-house lawyer has a lesser degree of independence or rights of audience, as described in paragraph 34 above, such in-house counsel may not even represent before the Court a different company which is a part of the same group of companies as his employer (see by comparison, Order of the General Court of 9 November 2011 in Case T243/11 *Glaxo Group Ltd* v *OHIM*, not yet reported, paragraph 18).

36 Thus, it is only if a lawyer may ethically, as his EEA State bar dictates, provide his client with such legal assistance as may be necessary and appropriate in all the circumstances, in the overriding interest of justice and in its administration before the Court, that he may be considered fully independent.

37 It is unnecessary to consider, upon the present application, the extent to which the notion of full independence is intertwined with the matter of legal professional privilege.

38 In the present proceedings, the applicant intervener has chosen to be represented by a particular law firm as external counsel. Such external counsel must be perceived as a genuine intermediary between Norway Post and the Court unless the conduct of counsel towards the Court is, pursuant to Article 31 RoP, incompatible with the dignity of the Court or with the requirements of justice, or if such adviser or lawyer is using his rights for purposes other than those for which they were granted. No such concerns exist in the present proceedings.

39 Article 89(1) RoP provides that an application to intervene must be made within six weeks of the publication of the notice referred to in Article 14(6) RoP. In accordance with Article 14(6) RoP, notice of the action was given in the EEA Section of the Official Journal of the European Union on 18 October 2012.

40 The present application to intervene was lodged at the Court's Registry on 30 October 2012, and is therefore timely.

41 The application for leave to intervene is therefore admissible.

Interest in the result of the case

42 The subject of the present case is an action against ESA for a failure to act pursuant to Article 37(3) SCA and an action against ESA for damages pursuant to Article 46(2) SCA.

43 An interest in the result of a case within the sense of the Statute is to be understood as meaning that a person must establish a direct and existing interest in the grant of the forms of order sought by the party whom it intends to support and thus, in the present case, ruling on the specific declaration sought concerning an alleged failure to act on behalf of ESA, or, for damages resulting from ESA's non-contractual liability (see compare also Orders of the President of 29 February 2012 in *DB Schenker* v *ESA*, cited above, paragraph 15, 25 March 2011 in Case E-14/10 *Konkurrenten. no* v *ESA*, paragraph 10 and of 15 February 2011 in *Norway Post* v *ESA*, cited above, paragraph 9).

44 In the present case, Norway Post intends to support the defendant who seeks a declaration that the action for failure to act is devoid of purpose and to dismiss the remainder of the application, or, in the alternative, to order each party to bear their own costs as regards the action for failure to act; and order the applicant to bear the costs as regards the action for damages.

Action for Failure to Act

45 Article 37 SCA is identical in substance to Article 265 TFEU. A failure to act means a failure to take a decision or to define a position, and not a failure to adopt a measure different from that desired or considered necessary by an applicant (see by comparison, Order of the President of the ECJ in Case C-258/05 P(R) *Makhteshim-Agan and others* v *Commission*, paragraph 14 and case-law cited). In other words, such an application seeks to fault ESA for not having taken any decision whether positive or negative to the applicant.

46 The applicant intervener asserts that should ESA be found by the Court to have failed to have acted, pursuant to Article 37 SCA, then ESA may be forced "to conduct further assessments as to whether or not DB Schenker can be granted access to additional documents in the case [...] [which] may also inflict an additional workload on Norway Post."

47 Such an interest in the result of the case is not direct and existing but rather indirect and speculative. Consequently, the applicant intervener has failed to establish the requisite interest, pursuant to Article 36(2) of the Statute, in the result of the action for failure to act.

Action for damages

48 Norway Post has not established a direct and existing interest in the grant of the forms of order sought by the defendant in the action for damages pursuant to Article 46(2) SCA.

Conclusion

49 Therefore, in light of the above, the application for leave to intervene by Norway Post pursuant to Article 89 RoP must be dismissed as inadmissible.

On those grounds,

THE PRESIDENT

hereby orders:

1. **The application for leave to intervene is dismissed.**

2. **Posten Norge AS is to bear its own costs relating to this application.**

Luxembourg, 21 December 2012.

Michael-James Clifton	Carl Baudenbacher
Acting Registrar	President

REPORT FOR THE HEARING

in Case E-7/12

APPLICATION to the Court pursuant to Articles 37(3) and 46(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the cases between

Schenker North AB

Schenker Privpak AB

Schenker Privpak AS

and

EFTA Surveillance Authority

seeking a declaration that the EFTA Surveillance Authority has failed to act on a request, submitted on 3 August 2010, for public access to ESA Case No 34250 (Norway Post) under the Rules on access to documents established by ESA Decision No 407/08/COL on 27 June 2008 and damages for the losses incurred by reason of the failure to take a timely decision and otherwise handle the request in a lawful manner.

I INTRODUCTION

1. In the present action Schenker North AB, Schenker Privpak AB and Schenker AS ("the applicants" or "Schenker") pursue two claims. First, they request that the Court establish that the EFTA Surveillance Authority ("ESA") failed to act in relation to documents to which the applicants requested access. Second, the applicants seek damages from ESA as a matter of non-contractual liability in respect of losses incurred by them by reason of ESA's failure to take a timely decision and otherwise handle the request in a lawful manner.

II LEGAL CONTEXT

EEA law

2. Article 37 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ("SCA") reads:

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.

3. According to Article 46(2) SCA:

In the case of non-contractual liability, the EFTA Surveillance Authority shall, in accordance with the general principles of law, make good any damage caused by it, or by its servants, in the performance of its duties.

4. According to Article 7 of the Rules on access to documents ("RAD"), adopted by ESA as Decision No 407/08/COL of 27 June 2008:

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.

III BACKGROUND

The procedure leading up to the pre-litigation notice

5. On 3 August 2010, the applicants requested by email "access to the file" in ESA Case No 34250 (*Norway Post/Privpak*). They indicated their assumption that during the investigation Norway Post had been asked to submit non-confidential versions of its submissions to ESA.

6. ESA replied on 4 August 2010 and noted, "given the size of the file and the many documents it contains", that it would be appreciated if the applicants were to specify the documents requested.

7. On the same day, the applicants specified that the "request concerns the entire file".

8. On 10 August 2010, ESA replied that "the file is quite voluminous. Preparation of non-confidential versions of its content will take some time."

9. During the course of numerous communications between the parties over a considerable period of time, ESA handed over some of the requested documents to the applicants.

10. The applicants were granted access to documents from ESA on the following dates: 30 August 2010, 5 November 2010, 16 February 2011, 16 August 2011, 5 April 2012 and 9 May 2012.

11. In its letter of 16 February 2011, ESA also denied access to certain documents. This decision was reviewed by the Court in Case E14/11.[1]

[1] Case E-14/11 *Schenker and Others* v *ESA*, judgment of 21 December 2012, not yet reported.

12. On 8 March 2012, the applicants served a pre-litigation notice on ESA pursuant to Article 37(2) SCA in relation to the remainder of the documents not yet subject to any decision by ESA.

13. In a letter of 9 May 2012, ESA defined its position in part.

14. On 9 July 2012, the applicants lodged their action against ESA with the EFTA Court for failure to act and for damages.

The content of the pre-litigation notice

15. In the pre-litigation notice of 8 March 2012, the applicants made it clear that they would take legal action under Article 37 SCA if ESA failed to adopt a position on the remaining documents belonging to Case 34250 within the statutory two-month pre-litigation period.

16. The applicants claimed that they could not identify the remaining documents, but expected a decision on the following documents or type of documents:

    a. the index to the documents attached to the file;

    b. ESA's working documents;

    c. any remaining correspondence, including, but not limited to, Norway Post, third parties, and the Norwegian Government;

    d. any minutes from meetings between ESA and the Norwegian Government to discuss the case to the extent that these are not considered working documents;

    e. any minutes from meetings between the president of ESA and Norway Post or the Norwegian Government to discuss the case to the extent that these are not considered working documents;

    f. all documents from DB Schenker in the redacted form they were sent to Norway Post to protect business secrets and confidential information;

    g. a letter from Norway Post to ESA of 13 July 2010; and

    h. any other documents not listed in the index of the file but belonging to the case.

Definition of position by ESA

17. ESA responded to the formal pre-litigation notice in a letter dated 9 May 2012, and defined its position as follows:

    a. Index to the documents attached to the file. "I have already sent you the list of documents in the case from 16 December 2008 to date by email of 5 April 2012 as your letter of 11 April 2012 acknowledges. No other documents from the period exist that belong to the case but are not on the list. On 30 August 2010 you received a complete list of all the documents on the file to which NP was granted access when the SO was issued in December 2008."

    b. Further documents to which access is granted. "I am pleased to grant you access to 50 further documents. A list of those documents is attached as annex 1 to this letter. The documents themselves are all contained on the CD-ROM enclosed with this letter."

    c. Minutes from meetings. "There are not any minutes on the file from meetings between ESA and the Norwegian Government. Nor are there any minutes on the file from meetings between the president of ESA and Norway Post or the Norwegian Government."

    d. All documents from DB Schenker in redacted form as sent to Norway Post. "I am pleased to grant you access to all of the documents in this category. A list of those documents is attached as annex 2 to this letter. The documents themselves are contained on a CD-ROM mentioned above enclosed with this letter."

    e. The letter of 13 July 2010. "We have not been able to identify any letter on the file from Norway Post to ESA on 13 July 2010."

    f. Remaining documents. "Document event no 521704 which figures on the list sent to you on 5 April 2012 has no content and appears as an 'event' as a consequence of some technical mistake. Consequently it is impossible to grant you access to it.

    g. Some of the remaining documents are purely clerical and have no substantive content, such as letters merely transmitting

documents (already in you possession) to others. Please confirm whether you wish to receive such letters or not."

18. In relation to the rest of the documents, ESA noted that it would continue to review the remaining documents to which the applicants had requested access, including those on the list sent to the applicant on 5 April 2012 and which were not listed in annexes 1 and 2 to the letter of 9 May 2012, in order to give the applicants access wherever possible to the complete document or in redacted form in compliance with ESA rules on access to documents.

19. On 5 September 2012, after the present case had been lodged and before the defence was submitted, ESA sent a letter to DB Schenker concerning the rest of the documents. By this letter, access was granted to certain documents and denied for the remainder of the documents in the file. In this letter, ESA stated that the "letter discloses or refuses to disclose all the remaining documents on or relating to the file concerning the administrative proceedings against Norway Post to which [DB Schenker] requested access".

20. Before the Court, Schenker has contested the assertion that the letter of 5 September 2012 effectively covers all remaining documents on the file.

IV PROCEDURE BEFORE THE COURT AND FORMS OF ORDER SOUGHT BY THE PARTIES

21. On 9 July 2012, the applicants brought an action under Articles 37(3) and 46(2) SCA seeking a declaration that ESA had failed to act on the request, submitted on 3 August 2010, for public access to ESA Case 34250 and damages for losses incurred by reason of ESA's failure to take a timely decision and otherwise handle the request in a lawful manner.

22. ESA submitted a defence which was registered at the Court on 25 September 2012. The reply from the applicants was registered at the Court on 12 November 2012. The rejoinder from ESA was registered at the Court on 13 December 2012.

23. In relation to their application concerning the failure to act, the applicants contend that the Court should:

(1) declare that ESA has infringed Article 37(1) SCA by failing to act on its duty, under the Rules on Access to Documents, the Surveillance and Court Agreement and the EEA Agreement, to define its position on the request that the applicants submitted on 3 August 2010 for access to the complete file in ESA Case No. 34250 (Norway Post/Privpak); and

(2) order ESA to bear the costs.

24. In relation to their claim for damages, the applicants contend that the Court should:

(1) find that the inaction of the defendant between 7 September 2010 or any later date, and until the defendant has lawfully defined its position on the applicants' request for access to the complete file in ESA Case No 34250 (Norway Post), on 3 August 2010, is such as to render the defendant liable, including default interest, under Article 46(2) SCA;

(2) within six months after ESA has lawfully defined its position on the applicants' request for access to the complete file in ESA Case 34250 (Norway Post), on 3 August 2010, the applicants shall inform the Court of the amount of damages that they claim and whether the parties agree on that amount;

(3) in the event of a failure to agree on the amount of damages, the parties shall submit to the Court, within the same period, their calculations of the amount of damages attributable to the defendant's failure to lawfully define its position on the applicants' request for access to the compete file in ESA Case No 34250 (Norway Post), on 3 August 2010; and

(4) order ESA to bear the costs.

25. ESA contends that the Court should:

(1) declare that the action for failure to act is devoid of purpose;

(2) dismiss the application for the remainder;

(3) order the applicants to bear the costs;

or, in the alternative,

order each party to bear their own costs as regards the action for failure to act; and

order the applicants to bear the costs as regards the action for damages.

V WRITTEN PROCEDURE BEFORE THE COURT

26. Written arguments have been received from the parties:

- The applicants, represented by Jon Midthjell, advokat;
- ESA, represented by Xavier Lewis, Director, Gjermund Mathiesen and Markus Schneider, Officers, Department of Legal & Executive Affairs, acting as Agents.

VI SUMMARY OF THE PLEAS IN LAW AND ARGUMENTS

27. The applicants present two pleas in law.

The first plea: failure to act

Arguments of the applicants

28. The applicants claim that ESA has infringed Article 37 SCA by failing to meet its legal obligation to decide on the access request that the applicants submitted on 3 August 2010.

29. At the time of the formal pre-litigation notice, served on 8 March 2012, the applicants claim that ESA had committed an ongoing infringement of its legal obligation to decide on the access request for a significant time. In their view, ESA committed a clear infringement of Article 37 SCA in failing to take a decision on the remaining parts of the access request, after having been duly called upon to act, even after the pre-litigation period expired on 8 May 2012.

30. The arguments of the applicants focus on three separate issues.

31. First, the applicants contend that the right of access has been established under the EEA and SCA Agreements and is a fundamental right in EEA law.

32. They assert that the right of access to documents flows from Article 2(1) of the RAD which provides that 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 to access documents of ESA. The applicants refer further to Articles 1, 2(3) and 3 of the RAD, pursuant to which the rules shall ensure, *inter alia*, the widest possible access to documents and promote good administrative practice. Moreover, they cover all documents held by ESA, that is, any content whatever its medium.

33. According to the applicants, this includes databases in which data on ESA's correspondence and other documents are registered, *inter alia*, with the dates on which correspondence was received, the dates of internal documents and later amendments, and the authors/recipients of correspondence and internal documents, etc.[2]

34. The applicants observe that the RAD took effect on 30 June 2008, and according to Article 13 of the RAD, ESA was obliged to publish the rules in the EEA Supplement to the Official Journal of the European Union. However, more than four years later, ESA has still not published the rules in accordance with its obligation.

35. The applicants assert that a similar right of access under EU law has existed, and been properly published, for almost 20 years. In that connection, they refer to Regulation No 1049/2001.[3] The applicants also underline the importance of the right of access to documents in EU law, notably as established in Article 15(3) TFEU and Article 42 of the Charter of Fundamental Rights of the European Union.

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2 Reference is made to COM(2008) 229 final, p. 17, and Case T-436/09 *Dufour* v *ECB*, judgment of 26 October 2011, not yet reported, paragraph 160.

3 Reference is made to 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, Council Decision 93/731/EC of 20 December 1993 on public access to Council documents, OJ 1993 L 340, p. 43, and Commission Decision 94/90 of 8 February 1994 on public access to Commission documents, OJ 1994 L 46, p. 46.

36. They contend that, pursuant to Article 108(1) EEA, the EFTA Member States were legally obliged to establish a similar right of access in relation to ESA. Article 108(1) EEA provides that the EFTA States shall establish procedures similar to those existing in the EU including procedures for ensuring the fulfilment of obligations under the EEA Agreement.

37. The applicants assert that the right of access to documents in Article 2(1) of the RAD is derived from Article 108 EEA and Article 13 SCA. The preamble to the RAD explicitly reflects the obligation in Article 108(1) EEA to establish a right of access to ESA's documents similar to that established in Union law.

38. It follows, the applicants contend, that the three EFTA Member States met their obligation under Article 108(1) EEA to provide a right of access to ESA's documents through the adoption of the RAD on 30 June 2008. After Article 42 of the Charter was made binding in EU law, as a result of Article 6(1) TEU, the right of access must now also be recognised as a fundamental right in EEA law. Consequently, they argue, the right of access is a right based on the SCA and EEA Agreement, and is also a fundamental right in EEA law.

39. Second, the applicants contend that ESA failed to meet its legal obligation to take a decision within the extended time limit provided in Article 7(2) of the RAD.

40. They assert that the right of access results in a corresponding duty on ESA to decide on individual requests from citizens who choose to exercise that right. This principle is established in Article 7 of the RAD, which provides that an application shall be handled as quickly as possible. ESA shall either grant access or, in a written reply, state the reasons for the total or partial refusal within five working days from registration of the application. Furthermore, pursuant to Article 7(2) of the RAD, this time limit can be extended by twenty working days but only in "exceptional cases" and if detailed reasons are given.

41. The applicants observe that the duty to take a decision on individual access requests within the time limits set out in Article 7 of the RAD is complemented by a specific duty, established in Article 6(1) of the RAD, to examine the requests and a specific duty, established in Article 6(2) of the RAD, to assist the applicant if a request is not found sufficiently precise. Moreover, according to Article 8 of the RAD, ESA has a duty to provide the documents to which public access is granted in the format of the applicant's choice.

42. Consequently, according to the applicants, the duty on ESA to decide on individual requests follows from the substance of the right to access and, in addition, from the direct expression of that duty in Article 7 of the RAD and the complementing duties, set out in particular in Articles 6(1) and (2) and 8(1) of the RAD, interpreted in light of the fundamental right to and general principle of sound administration and the overall purpose of the right of access, as established in Article 1 of the RAD, that is "to ensure the easiest possible exercise of this right" and, as stated in its preamble, "to ensure at least the same degree of openness" as under EU law.

43. On the same basis, the applicants argue, the specific time limits set out in Article 7 of the RAD entail that the duty to take a decision on an individual request must be discharged, as a main rule, within five working days of the registration of the request, or sooner, if possible. In their view, the time limit is reinforced by the duty established in Article 7(1) of the RAD to provide the applicant with an "acknowledgment of receipt", the purpose of which, at least in part, is to establish when the access request has been duly registered, and thereby when time begins to run for the defendant to discharge its duty to take a decision.

44. The applicants observe that, according to Article 7(2) of the RAD, the time limits in Article 7(1) of the RAD can only be extended in exceptional circumstances, and then only by twenty working days. As examples of exceptional circumstances, Article 7(2) of the RAD mentions "a very large number of documents".

It follows, the applicants assert, that it is the responsibility of ESA to organise its files and internal processes, including in cases concerning large files, in such a manner that it can comply at least with the extended time limit, *inter alia*, by properly registering documents during an investigation, requesting non-confidential versions to be put on file continuously, starting third party consultation immediately after an access request has been submitted, etc.

45. According to the applicants, the ECJ has held the time limits in Regulation No 1049/2001 to be mandatory. Their purpose is to counter the risk that the administration would choose not to reply to an application for access to documents.[4] By contrast, they observe that Article 7 of the RAD establishes only a one-step procedure, sets different time limits and lacks a mechanism similar to that of Article 8(3) of Regulation No 1049/2001. However, the absence of such a mechanism means that the expiry of the time limit in Article 7 of the RAD does not in itself constitute a negative decision that can be challenged in court.[5] Instead, they assert, the inactivity of ESA must be challenged under Article 37 SCA, which itself requires that ESA is allowed an additional two-month pre-litigation period before legal action can be brought to challenge its inactivity.

46. The applicants contend that, since the access request in the present case concerned the complete file and ESA failed to take a decision on all the documents that belong to the file by the end of its extended time limit provided for in Article 7(2) of the RAD, that is on 7 September 2010, ESA infringed its legal obligation to decide on the access request.

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4 Reference is made to Joined Cases T-355/04 and T-446/04 *Co-Frutta Soc. coop.* v *Commission* [2010] ECR II-1, paragraphs 55-56 and 59.

5 Reference is made to Case C-521/06 P *Athinaïki Techniki* v *Commission* [2008] ECR I-5829, paragraphs 44-45. The applicants add that, in the present case, a negative decision can be inferred from correspondence with ESA and the accompanying circumstances. The expiry of the time limit established in Article 7 RAD will, obviously, be a relevant factor. Reference is made in addition to the pending Joined Cases E-4/12 and E-5/12 *Konkurrenten.no and Others* v *ESA*.

47. Third, the applicants contend that ESA has failed to meet its legal obligation to take a decision within reasonable time under the general principle and right to sound administration.

48. The applicants claim that, even if the time limit in Article 7(2) of the RAD were not held mandatory, the defendant would in any case be under a legal obligation to take a decision within a reasonable time, under the general principle and right to sound administration.

49. They note that the principle of sound administration is a general principle of EEA law and that the Court has specifically held that rendering decisions within reasonable time is part of that principle, which is consistent with Union case law.[6]

50. The applicants assert that the principle is also part of EU law. Consequently, on the basis of the principle of homogeneity, that right must also be regarded as a fundamental right in EEA law since the Court has already recognised that the principle of sound administration forms part of EEA law.

51. In the view of the applicants, the standard of reasonable time must be interpreted with due regard to the principle of homogeneity and the objective set out in the preamble to the RAD, that is to ensure "at least the same degree of openness" as under Regulation No 1049/2001. If ESA could delay access requests significantly longer than EU institutions are allowed (60 days according to Regulation No 1049/2001), this would circumvent the very purpose behind the RAD. They assert that in a similar case the Commission would have been required to take a decision by 26 October 2010. It follows from this alone that ESA failed to take a decision on DB Schenker's access request, submitted on 3 August 2010, within reasonable time.

52. In the present case, the applicants maintain, ESA has failed to conduct a diligent process. ESA repeatedly gave the impression

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6 Reference is made to Case E-2/05 *ESA* v *Iceland* [2005] EFTA Ct. Rep. 205, paragraph 22, and Joined Cases T-400/04, T-402/04 to T-404/04 *Arch Chemicals and Arch Timber* v *Commission*, judgment of 20 September 2011, not yet reported, paragraph 65.

that a decision was immediately impending. Although ESA must have understood that it would not meet the expectations of the applicants, the institution did not provide proper advance notice to extend the time limit under Article 7(2) of the RAD. Instead, ESA censured the applicants for not being willing to limit their access request. While DB Schenker was given two to four working days to submit confidentiality claims, the third parties concerned were contacted after three months. ESA refuses to disclose the dates concerning the correspondence with third parties. ESA claims that the third party consultation process is still ongoing, almost two years after the access request was submitted. ESA waited two months before starting consultations with Norway Post. ESA allowed Norway Post to submit a global confidentiality claim and waited six months before denying the applicants' access request, more than one year after the access request was submitted. ESA repeatedly ignores invitations from DB Schenker to discuss a reasonable extension of the time limits. The applicants have, to no avail, repeatedly complained directly to the President of ESA on four occasions.

53. According to the applicants, the excessive use of time is not only the result of the defendant's own failure to organise its files and internal processes properly. The evidence points, if anything, towards a lack of adequate leadership in its organisation.

54. In their reply, the applicants make the following remarks.

55. First, the applicants contend that the principal defence advanced by ESA, namely, that it was not under a duty to act even on 8 March 2012, and also its first alternative defence, that ESA laid down a definitive position in a letter and decision dated 9 May 2012, have not been accompanied by a request to the Court for the corresponding form of order, as required by Article 35(1)(c) of the Rules of Procedure ("RoP"). Therefore, these pleas must be held inadmissible.

56. In this regard, the applicants identify two points on which ESA contradicts itself. In relation to ESA's contention that as late as 8 March 2012 it was under no obligation to act, the applicants

observe that in its letter of 9 May 2012, ESA did not contest that it was under a duty to act when it received the pre-litigation notice. Instead, by the words "[t]he Authority is pleased to define its position on your letter of 8 March 2012 pursuant to Article 37(2) SCA", ESA conceded that the notice was well-founded for the purposes of Article 37(2) SCA. Moreover, during its long period of correspondence with the applicants, ESA never once objected that it was under no legal obligation to act on the access request.

57. According to the applicants, ESA's defence does not contest the fact that the RAD is binding.

58. Finally, the applicants claim that ESA has confused its duty to act, that is, to take a decision on the access request, with the substantive content of the right of access.[7] The applicants contend that they are not seeking a declaration from the Court that Schenker is entitled to "access to the complete antitrust file" in the present case. Instead, they seek a finding that ESA breached its duty by not taking a decision on their access request by the time the extended time limit in Article 7(2) of the RAD expired on 7 September 2010.

59. The applicants claim that ESA cannot be regarded as having ended its failure to act by its letter and decision of 9 May 2012. They aver that they filed a single request for access to the file and, in relation to that request, ESA failed to define its position. More specifically, ESA never defined its position in full.

60. According to the applicants, ESA has failed to demonstrate that it has yet taken a decision on all parts of the Norway Post/Privpak file. ESA has refused to disclose a complete statement of content of the file throughout the entire process. Moreover, ESA gave repeated written assurances that the applicants had received a full list, only to send a second list with more documents at a later stage in the proceedings, including a limited number of internal documents. Of the internal documents listed, there are

[7] Reference is made to Case T-423/07 *Ryanair* v *Commission* [2011] ECR II-2397 and case law cited. The applicant stresses that, contrary to what ESA suggests, a failure to act comes before and not after the pre-litigation notice.

no regular status reports; no minutes from meetings with anyone except the applicants; hardly any memos on the preparation and planning of information gathering such as the many information requests that were sent out, and hardly any memos analysing the 2 800 pages of evidence seized from Norway Post; hardly any emails between the team members; etc. Furthermore, taking into account the turnover of officers working on the case during the eight years, and the absence of reports from outgoing to incoming officers on the case, ESA's claim that there are no other internal documents than these is simply not credible. Finally, two internal memos show that ESA has repeatedly failed to register and scan documents onto the case file. Correspondence has been registered up to five years after it was received by ESA. Finally, ESA has admitted that it did not register the documents seized from Norway Post during the dawn raid in 2004.

61. In those circumstances, the applicants conclude that a number of documents, in particular internal documents, have either not been registered on the case file or been kept off the various lists that the defendant has hitherto provided. As a consequence, the defendant has failed to demonstrate that it has yet taken a decision on all remaining parts of the Norway Post/Privpak file and, thus, according to the applicants, the present action is, unfortunately, still not devoid of purpose.

Arguments of ESA

62. According to the defendant, an action under Article 37(2) SCA must be preceded by a formal notice calling on ESA to act.[8] The applicant must also have standing.[9] In addition, it follows from EU case law that at the time when ESA was formally called upon to define its position it must have been under a duty to act.[10] In any event, ESA contends, the general public's right to access in this

8 Reference is made to Case E-7/96 *Paul Inge Hansen* v *ESA* [1997] EFTA Ct. Rep. 101, paragraph 15, and Case E-5/08 *Yannike Bergling* v *ESA* [2008] EFTA Ct. Rep. 316, paragraph 4.

9 Reference is made to Case E-6/09 *Magasin- og Ukepresseforeningen* v *ESA* [2009-2010] EFTA Ct. Rep. 144, paragraph 39.

10 Reference is made to *Ryanair*, cited above, paragraph 25, and case law cited.

case extended only to partial access to a limited number of documents.

63. In ESA's view, this right existed only after 18 April 2012, the day the Court handed down its judgment in Case E-15/10 *Norway Post*, since the antitrust investigation was concluded only by means of that judgment. It observes further that, pursuant to Article 37 SCA, a declaration that a failure to act is contrary to the EEA Agreement requires ESA to take the necessary measures to comply with the judgment of the Court. Accordingly, in circumstances where the challengeable act whose absence constitutes the subject-matter of the proceedings was adopted after the action was brought, but before judgment, a declaration by the Court to the effect that the initial failure to act is unlawful can no longer bring about the consequences prescribed by Article 37 SCA.[11]

64. Moreover, ESA continues, if ESA responds within a period of two months after being called upon to act, the subject-matter of the action has ceased to exist, so that there is no longer any need to adjudicate.[12]

65. In that connection, ESA underlines, first, that the public's access to the antitrust file 34250 was very limited before 18 April 2012.

66. ESA acknowledges that documents collected or exchanged in the course of antitrust proceedings fall within the scope of the RAD. However, in light of the judgments of the ECJ in *Technische Glaswerke Ilmenau* ("*TGI*"), É*ditions Odile Jacob* and *Agrofert*,[13] it was under no obligation to disclose the documents submitted by or exchanged with Norway Post or other third parties.

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11 Ibid., paragraph 26.

12 Reference is made to Case C-44/00 P *Sodima* v *Commission* [2000] ECR I-11231, paragraph 38, Joined Cases T-297/01 and T-298/01 *SIC* v *Commission* [2004] ECR II-743, paragraph 31, and *Ryanair*, cited above, paragraph 26.

13 Reference is made to Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraphs 50-64, in particular paragraphs 61-63, Case C-404/10 P *Commission* v Éditions *Odile Jacob*, judgment of 28 June 2012, not yet reported, paragraph 107 et seq., and Case C-477/10 P *Commission* v *Agrofert Holding*, judgment of 28 June 2012, not yet reported, paragraph 47 et seq.

67. ESA recognises that it must abide by the RAD. However, it considers itself also bound by the provisions of Protocol 23 EEA and Protocol 4 SCA, which are provisions of primary law. In that light, ESA regards it as paramount to interpret its own procedural rules on access to documents so as not to breach primary law, in particular Protocol 4 SCA and Protocol 23 EEA.

68. ESA contends that, in light of Éditions *Odile Jacob*, *Agrofert* and *TGI*, it is clear that documents collected or drawn up in merger control proceedings and State aid proceedings are subject to a general presumption against disclosure on the basis of the exceptions relating, inter alia, to the protection of commercial interests.[14] This is possible regardless whether the request for access concerns proceedings which have already been closed or proceedings which are pending.

69. ESA submits that this is equally true in antitrust proceedings. Such a presumption must extend to all correspondence with undertakings and information exchanged with the Commission and national competition authorities, including the Advisory Committee.

70. ESA asserts that it was entitled to rely on this general presumption that disclosure of the documents collected or exchanged during antitrust proceedings undermines, in principle, the protection of the commercial interests of the undertakings involved and of other third parties as well as the protection of the purpose of investigations. Further, it submits that, in so relying, it did not need to carry out a concrete, individual examination of those documents.

71. Accordingly, in its letter of 5 September 2012, ESA relied on the general presumption that disclosure of documents held by ESA in antitrust proceedings against Norway Post other than its internal documents undermines, in principle, the protection of the commercial interests of the undertakings involved and of other third parties as well as the protection of the purpose of

[14] Reference is made to *Technische Glaswerke Ilmenau*, *Odile Jacob* and *Agrofert Holding*, all cited above.

investigations. In its view, this applies regardless of the fact that, in any event, the Court upheld Decision 322/10/COL.

72. ESA adds that correspondence with undertakings and exchange of information with the Commission and national competition authorities, including the Advisory Committee, fall under the presumption, since they are in principle protected by the exception relating to the decision-making process of ESA and the protection of legal advice.

73. ESA further submits that this limited right of partial access to the file remained applicable also after the judgment of the Court in Case E-15/10 *Norway Post* on 18 April 2012. Pending the delivery of that judgment, ESA was entitled to rely on the general presumption that disclosure of those internal documents would seriously undermine its decision-making process. Further, it contends that, as a result of the Court's judgment in that case, the proceedings regarding ESA's antitrust case 34250 are considered closed.

74. ESA concludes that there was never a right to public access to all the documents on ESA's file 34250. Only a right to public access to some internal ESA documents existed and this only took effect after the judgment of the Court on 18 April 2012.

75. Consequently, according to ESA, the applicants are wrong to contend that it has failed to adopt in relation to them a measure which they were legally entitled to claim by virtue of the rules of EEA law, i.e. access to the complete antitrust file 34250.[15] Since the pre-litigation notice was not limited in this way, ESA contends that the application should be dismissed.

76. Second, ESA claims that its definition of its position on 9 May 2012 was ignored by the applicants.

77. ESA refer to its letter of 9 May 2012 defining its position and its subsequent letter of 5 September 2012. ESA claims that it

[15] Reference is made to Case 246/81 *Lord Bethel* v *Commission* [1982] ECR 2277, paragraph 13.

follows from those letters that, in fact, ESA granted the applicants access to certain documents in the past on a voluntary basis, although it was under no legal obligation to do so.

78. Therefore, ESA contends, the declaration sought by the applicants that ESA infringed Article 37(1) SCA by failing to act on its duty, under the RAD, the SCA and the EEA Agreement to define its position on the request that the applicants submitted on 3 August 2010 for access to the complete file in ESA Case 34250 must be dismissed as inadmissible.[16]

79. Third, ESA claims that the action has become devoid of purpose following ESA's letter of 5 September 2012.

80. ESA contends that any failure to act comes to an end on the day on which the person who called upon ESA to act receives the document by which the latter defines its position.[17]

81. ESA adds that, in any event, its letter of 5 September 2012 meets those conditions. In that letter, ESA disclosed, or refused to disclose, all the remaining documents on or relating to the file concerning the administrative proceedings against Norway Post to which the applicants had requested access. ESA contends that in that letter it set out its position as regards disclosure to the applicants of the remaining documents saved under or related to ESA Case 34250 not yet covered by previous correspondence with those parties. Further, ESA stresses that in that letter it clarified that there were no other documents on the file or otherwise related to the case.

82. Fourth, ESA claims that the 2008 RAD is not part of the EEA Agreement or the SCA. Moreover, there is no legal basis for the

[16] Reference is made in the rejoinder to Case E-12/11 *Asker Brygge AS* v *ESA*, judgment of 17 August 2012, not yet reported, paragraphs 30 and 33, and Case C-160/08 *Commission* v *Germany* [2010] ECR I-3713, paragraph 40, in the light of which ESA calls on the Court to assess of its own motion the admissibility of the present action.

[17] Reference is made to Joined Cases T-194/97 and T-83/98 *Branco* v *Commission* [2000] ECR II-69, paragraph 55, *Sodima*, cited above, paragraph 83, and *Ryanair*, cited above, paragraph 26 and case law cited.

applicants' inference that the EFTA States took action by means of an ESA decision.

83. ESA contends that, although it is authorised by Article 13 SCA to adopt rules on public access to documents, there is nothing in EEA law to suggest that Decision 407/2008/COL forms part of the EEA Agreement within the meaning of Article 2 EEA.[18] It follows from case law that rules adopted by ESA of its own motion pursuant to the authorisation of Article 13 SCA but without any involvement of the EEA Joint Committee or the EFTA States cannot be construed to materially change the EEA Agreement or the SCA.[19]

84. Fifth, as regards the argument of the applicants that ESA failed to take a decision by 7 September 2010, ESA claims that it was under no legal obligation to disclose any documents relating to its competition investigation in Case 34250 before the EFTA Court handed down its judgment in Case E-15/10 *Norway Post* on 18 April 2012. Moreover, it continues, the relevant point in time for the purposes of an application alleging failure to act is the expiry of the pre-litigation notice served pursuant to Article 37(2) SCA. In the view of ESA, this did not expire before 9 May 2012.

85. Sixth, as regards its alleged failure to take a decision within a reasonable time, ESA refutes the claim.

86. It notes that the Court has already held that rendering decisions within a reasonable time is part of good administration under EEA law. An excessive length of procedure may render a decision unlawful.[20] ESA submits that, in the present case, the length of the procedure should not be considered excessive. ESA was under no obligation to disclose any documents relating to the competition investigation in Case 34250 before the EFTA Court handed down its judgment in Case E-15/10 *Norway Post* on 18 April 2012.

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18 Reference is made to Case C-58/94 *Netherlands* v *Council* [1996] ECR I-2169, paragraphs 37-38, and to the Opinion of Advocate General Tesauro in the same case, point 22.

19 Reference is made to Case E-3/97 *Jan og Kristian Jæger AS* v *Opel Norge AS* [1998] EFTA Ct. Rep. 1, paragraphs 29-32.

20 Reference is made to Case E-2/05 *ESA* v *Iceland* [2005] EFTA Ct. Rep. 202, paragraph 22.

87. ESA avers that, following that judgment, it carried out a concrete and individual examination of its internal documents stored in Case 34250 and by letter of 5 September 2012 decided to either refuse or to grant the applicants full or partial public access to those documents.

88. As regards the documents it refused to disclose, ESA indicates that it considered disclosure would undermine the protection of the decision-making process. In its view, a private interest in the disclosure of documents that might serve as evidence in claims for damages before national courts should not be considered an "overriding public interest" within the meaning of the RAD. Moreover, the individual interest which a party may invoke when requesting access to documents of personal concern to it cannot generally be decisive for the purposes both of the assessment of the existence of an overriding public interest and of the weighing up of interests under the second subparagraph of Article 4(3) of the RAD.

89. Given the absence of meaningful cooperation with the applicants and the considerable volume of documents to be evaluated with regard to full or partial disclosure, in ESA's view, the time from the expiry of the pre-litigation notice on 9 May 2012 to its letter concluding the access request on 5 September 2012 (just under four months including summer holidays) cannot be regarded as excessive in the circumstances.

90. Finally, ESA comments on certain claims made by the applicants outside their pleas in law.

91. In that regard, it denies, contrary to the applicants' claim, that it was under an obligation to disclose a document denoted as a "complete statement of content of the file". Instead, according to ESA, the list transmitted to counsel for the applicants on 30 August 2010 with all the documents on file 34250 to which Norway Post had been granted access met the requirements of

case law.[21] Moreover, the additional list provided by letter of 5 September 2012 covered the remaining documents. It observes that the list requested by the applicants did not exist at the time of the request and that it is not in a position to release documents which do not exist.

92. As regards the alleged letter from Norway Post of 13 July 2010, ESA contends that this is actually a letter from 2009 and has event number 524500. The applicants were granted access to a non-confidential version already in 2010.

93. ESA contends that in relation to the meetings referred to in recitals 20 and 22 in the preamble to ESA Decision 322/10/COL no minutes exist. It does not deny that the meetings took place. However, no specific records of those meetings were made other than to register any documentation presented at the meetings.

94. As for the registering of the inspection documents in Case 34250, ESA avers that it scanned each page of the inspection documents copied during the inspection and assigned "event" numbers not to individual documents but to batches of documents as listed per inspector, by the inspectors and during the inspection. In its view, whether the applicants approve or not of this registration method is irrelevant in the context of the present action for failure to act.

95. In its rejoinder, ESA makes the following remarks.

96. It asserts that, unless specific circumstances justify different treatment, procedural provisions such as Article 37 SCA must be interpreted in the same way in both pillars of the EEA Agreement.[22] In that regard, it emphasises that any legal interest to bring an action under Article 37(3) SCA comes to an end if and when ESA takes the action whose absence constitutes the subject-matter of the court proceedings.[23] Article 37 SCA refers to a failure to take

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21 Reference is made to Case T-437/08 *CDC Hydrogene Peroxide Cartel Damage Claims* v *Commission*, judgment of 15 December 2011, not yet reported, paragraphs 40, 45 and 48.

22 Reference is made to Case E-14/10 COSTS *Konkurrenten.no AS* v *ESA*, order of 9 November 2012, not yet reported, paragraph 23 and case law cited.

23 Reference is made to *Ryanair*, cited above, paragraph 26 and the case law cited.

a decision or to define a position, no matter whether the measure subsequently adopted is the one desired or considered necessary by the person that initiated the court proceedings.[24]

97. Contrary to the assertions of the applicants in their reply, ESA avers that it is no longer decisive for the present action initiated under Article 37(3) SCA whether and, if so, to what extent ESA may have failed to act on the applicants' public access request at the time when the present case was lodged. Hence, the subject-matter of the present action under Article 37(3) SCA ceased to exist as of the adoption of the allegedly missing act by ESA.[25]

98. If the applicants took the view that the full or partial refusals set out in the letter of 5 September 2012 were unlawful, ESA contends that they could have challenged those refusals by means of an action for annulment under Article 36 SCA. Furthermore, in so far as the applicants take the view that the position adopted by ESA on 5 September 2012 was incomplete the applicants could start a new, fresh procedure under Article 37 SCA.[26]

99. As regards the internal documents registered in Case 34250, ESA contends that the applicants are seriously distorting the facts. It is clear from the list enclosed with the letter of 5 September 2012 that a total of 198 internal documents were listed and at issue and not 98. The applicants have received 166 of these documents fully or partially. As for the treatment of the documents, ESA stresses that the documents were available in hardcopy but scanned at a later stage in the (then) new document handling system of ESA. As regards the alleged incompleteness of the list, ESA refers to the presumption of legality and presumption of veracity attached to a statement by the institutions relating to the nonexistence of documents

[24] Reference is made to *Sodima*, cited above, paragraph 83, and *Ryanair*, cited above, paragraph 26 and case law cited.
[25] Reference is made to *Sodima*, cited above, paragraph 83, *SIC*, cited above, paragraph 31, and *Ryanair*, cited above, paragraph 26.
[26] Reference is made to the nature of the Article 37 SCA proceedings and *Ryanair*, cited above, paragraphs 25 and 26.

requested.[27] This presumption may be rebutted by relevant and consistent evidence, which the applicants have failed to provide.

100. Finally, ESA observes that the present case concerns an alleged failure to act on the request for public access to documents and not the duty of ESA to register certain documents on a given case file.

The second plea: damages

Arguments of the applicants

101. As regards the non-contractual liability of ESA, the applicants start by asserting that, in relation to the corresponding provision of EU law, the courts of the EU have aligned the conditions that must be met, in relation to Union institutions, with the conditions governing State liability.[28] First, the law infringed must be intended to confer rights on individuals. Second, the breach must be sufficiently serious. Third, there must be a direct causal link between the breach and the damage sustained.

102. Since the Court has established that these conditions apply to State liability in relation to the three EFTA Member States,[29] the applicants contend that the same conditions developed in case law from the EU courts must also apply under Article 46(2) SCA in relation to ESA.

103. As regards the first criterion, the applicants submit that they had a right of access, which ESA has infringed. ESA had a duty to take a decision on the access request by the end of the extended statutory time limit provided for under Article 7(2) of the RAD or, in any event, within a reasonable time in accordance with the

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27 Reference is made to Case T-277/10 AJ *K* v *Eurojust*, order of 25 November 2010, not published, paragraph 6, and Case T-380/04 *Terezakis* v *Commission* [2008] ECR II-11*, paragraphs 155-156 and 163, and case law cited.

28 Reference is made to Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 41-42, and Case C-440/07 P *Commission* v *Schneider Electric* [2009] ECR I-6413, paragraph 160.

29 Reference is made to Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraph 66, and Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraphs 37-38 and 47.

fundamental right and general principle of sound administration in EEA law.

104. The applicants submit that ESA also infringed the legitimate expectation of a timely decision, encouraged by specific provisions set out in the RAD and ESA's specific and repeated assurances that access would be granted "as soon as possible".

105. The applicants assert that the right to timely access is by its nature intended to confer rights on individuals. Furthermore, the general principle of protection of legitimate expectations in EEA law also constitutes an individual right for which, if breached, the defendant can be held liable.[30]

106. As regards the second criterion, the applicants submit that the standard for demonstrating a sufficiently serious breach depends on whether the institution had a discretion or no or considerably reduced discretion.[31] In the former case, the standard is whether the institution "manifestly and gravely disregarded the limits on its discretion", whereas in the latter case, the standard is significantly lower and can result from the "mere infringement" of the law.[32]

107. The applicants argue that the correct standard in this case is the lower standard because the right of access and the duty of ESA to take a timely decision on access requests is a law-bound process in which the defendant has no discretion. The applicants submit that the outcome in this case does, however, not depend on the choice of standard because the facts set out in the application, through the defendant's own correspondence and admissions, shows a staggering lack of diligence and care, over a long period, and at high level within the organization of the defendant, towards the applicants.

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30 Reference is made to Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord* [2005] EFTA Ct. Rep. 117, paragraphs 170-173, and Case T-43/98 *Emesa Sugar* v *Council* [2001] ECR II-3519, paragraph 64.

31 Reference is made to *Bergaderm and Goupil*, cited above, paragraphs 43-44.

32 Reference is made to Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica* v *Commission* [2001] ECR II-1975, paragraph 134, and Case T-285/03 *Agraz* v *Commission* [2005] ECR II-1063, paragraph 40.

108. As regards the third condition, the applicants claim that they have incurred legal fees in their efforts to establish a true state of affairs regarding ESA's handling of the access request and to bring ESA into compliance and have stated that they estimated those fees to be at 22 500 EUR at the time of the application. They also claim that they have incurred legal expenses in their efforts to have the follow-on action in Oslo City Court against Norway Post stayed until ESA has lawfully decided on the access request and have stated that they estimated those fees to be at 26 000 EUR at the time of the application.

109. The applicants contend that the direct and causal link between those losses set out above and the infringements committed by ESA follows from a comparison of the current situation with the situation as it would have been had the defendant taken a timely and otherwise lawful decision.[33]

110. The applicants request that the Court decide on the action for damages by way of an interlocutory judgment, with the liability of the defendant determined separately from the calculation of the final loss. In support of this request, they argue, first, that the losses that have already materialised are likely to increase in the near future. Second, for reasons of procedural economy, they contend that, given the modest quantum of damages claimed, it would be better for all involved if the Court were first to decide on Case E-14/11 (the parallel annulment action), then the action for failure to act and, finally, the issue of liability in the damages claim.

111. In their reply, the applicants make the following remarks.

112. The applicants contend that the inadmissibility plea raised by ESA is itself inadmissible. They assert that, pursuant to Article 87(1) of the RoP, the defendant must state the pleas of fact and law relied on. Moreover, case law has held that a pleading must be sufficiently clear and precise to allow the opposing party to prepare a rebuttal and the Court to give a ruling. In addition, they

[33] Reference is made to Case T-351/03 *Schneider Electric* v *Commission* [2007] ECR II-2237, paragraph 264.

assert that, in terms of the form of sought, ESA has failed to seek to have the action ruled inadmissible. For that reason alone, this plea must be held inadmissible in light of Article 35(1)(c) of the RoP.

113. The applicants contend further that, in any event, ESA's inadmissibility plea is unfounded. The defendant cannot avoid adjudication on the non-contractual liability claim simply by pleading that it disagrees with the applicants on the substance in the action for failure to act and, in any event, it has not offered any legal support to that effect.

114. As regards the first criterion, the applicants emphasise that their action concerns ESA's legal obligation to take a timely decision on the access request and not what ESA now believes the substantive content of that decision should have been, i.e. to what extent it should have granted the applicants full or partial access to the various documents on the file. Contrary to what ESA suggests, in their application, the applicants have not argued for an unlimited right of access. Furthermore, they contend, ESA has not denied that the general principle of protection of legitimate expectations in EEA law constitutes an individual right for which, if breached, ESA can be held liable. Moreover, ESA repeatedly assured the applicants that it would deal with their request to access documents.

115. According to the applicants, the second criterion has also been met. On their interpretation of the pleadings, ESA admits that it took a decision after the expiration of the pre-litigation period, that it refused to disclose the dates for correspondence showing the progress and work on its supposedly ongoing consultation process and that it refused to state when it planned to complete the process even 704 days after the access request was submitted.

116. Moreover, the applicants contend, ESA has not contested that it refused to disclose a complete statement of the file. Instead, it has argued that, as a matter of law, the applicants did not have the right to see the complete statement of content of the file.

In the applicants' view, ESA also misconstrued their arguments concerning its failure to register all documents properly. In any event, the applicants allege, ESA has not offered any arguments why simply the non-contested parts of the evidence do not in themselves amount to a sufficiently serious breach.

117. According to the applicants, the third condition for imposing liability has also been met. All the costs in question arose after the breach was committed. Had it not been for the breach, the applicants would not have incurred the costs in question. The applicants have no in-house EU/EEA department which could deal with the issues and have had to rely on external representation.

118. Had ESA taken a timely decision, in the applicants' view, they would not have incurred costs to secure a stay of their damages action against Norway Post in the national court. The costs in those proceedings were the direct consequence of ESA's breach.

119. According to the applicants, the case law invoked by ESA is not applicable. It shows that the recoverability of legal costs will depend on whether the applicable statutory provisions must be interpreted to the effect that legal costs should not be compensated at all, or be compensated according to specific procedural rules. The applicants contend that, in the absence of any specific statutory provision to the contrary, legal costs must be treated like any other business costs pursuant to the express wording of Article 46(2) SCA. Moreover, the parallel which ESA seeks to draw with proceedings before the Ombudsman is flawed, since the Ombudsman can neither award nor impose costs on the applicant. Further, they reject ESA's reliance on *Nölle*, observing that the case concerns the preliminary ruling procedure, which is fundamentally different to the present direct action.

120. Finally, the applicants emphasise that ESA has not contested their submission that the Court can give an interlocutory ruling on liability and defer the assessment of the quantum of damages to a later stage.

Arguments of ESA

121. ESA contests the claim for damages.

122. ESA shares the view that the principle of homogeneity calls for Article 46(2) SCA to be interpreted in line with the corresponding EU provision (Article 340(2) TFEU). Moreover, it agrees that State liability has been made part of EEA law.[34]

123. ESA asserts that three cumulative conditions must be met. First, the law infringed must be intended to confer rights on individuals. Second, the breach must be sufficiently serious. Third, there must be a direct causal link between the breach and the damage sustained. ESA submits that the applicants have not shown that these conditions are met in the present proceedings, neither individually nor cumulatively.

124. Since the contentions of the applicants on which they base their damages action are not well founded, ESA asserts that the claim for damages is inadmissible simply in light of the applicants' own submissions.

125. On the substance, ESA submits, first, that the two amounts claimed by the applicants represent loss and damage which is irrecoverable in an action brought pursuant to Articles 39 and 46(2) SCA. Consequently, the action for damages is inadmissible or manifestly unfounded for that reason alone.

126. According to established case law, ESA asserts, the specific rules on recovery of lawyers' fees as costs under the rules of judicial procedure cannot be circumvented by claiming that irrecoverable legal expenses are recoverable as damages under the general rules on non-contractual liability. Consequently, neither head of claim concerns recoverable damages, and in particular this is true for the first head of claim that explicitly relates to legal costs incurred in Case E-14/11 in so far as they are not recoverable within the meaning of Article 69 of the RoP.[35]

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34 Reference is made to *Sveinbjörnsdóttir* and *Karlsson*, both cited above.

35 Reference is made to Case T-88/09 *Idromacchine Srl and Others* v *Commission*, judgment of 8 November 2011, not yet reported, paragraphs 100-101.

127. Further, ESA continues, as regards the second claim for compensation relating to legal expenses allegedly incurred in the national court in the applicants' follow-on action, the General Court already held that actions for compensation for damage consisting in the burden of costs incurred in proceedings before the national courts are outside the jurisdiction of the EU courts.[36] This case law is relevant for the present proceedings.

128. Second, ESA submits that there is no direct causal link between the alleged breach and the damage.[37] In relation to the first claim for compensation, ESA stresses that the administrative procedure applicable to requests for public access to documents does not require members of the public to retain a lawyer to assist them. The procedure before ESA for access to documents is free of charge, just like the procedure before the EU Ombudsman.[38]

129. In addition, the applicants have not shown any direct link between alleged breaches and their second head of claim where they seek legal expenses in the context of motions brought by a third party. Counsel for the applicants had not even charged Schenker the alleged expenses at the time the present application was brought before the EFTA Court.

130. Third, and finally, ESA maintains that the applicants have not managed to demonstrate any breach of a rule intended to confer rights on them.

131. In relation to the alleged failure to act, ESA refers to its submissions set out above made in its defence in the action for failure to act.

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[36] Reference is made to Case T-167/94 *Detlef Nölle* v *Council and Commission* [1995] ECR II-2589, paragraphs 36-39, and Case T-336/06 *2K-Teint SARL and Others* v *Commission and EIB* [2008] ECR II-52*, paragraph 121.

[37] Reference is made to Case C-440/07 P *Commission* v *Schneider Electric*, cited above, paragraph 192.

[38] Reference is made to Case 54/77 *Anton Herpels* v *Commission* [1978] ECR 585, paragraphs 45-50; Case T-294/04 *Internationaler Hilfsfonds eV* v *Commission* [2005] ECR II-2719, paragraphs 50-55; Case C-331/05 P *Internationaler Hilfsfonds eV* v *Commission* [2007] ECR I-5475, paragraphs 24-29; and Case C-481/07 P *SELEX Sistemi Integrati SpA* v *Commission* [2009] ECR I-127*.

132. As for legitimate expectations, ESA submits that the protection of a legitimate interest extends to any individual who is in a situation in which it is apparent that ESA has led him to entertain such prospects. On the other hand, a person may not plead a breach of that principle unless the administration has given him precise assurances.[39]

133. In the present case, ESA contends that the applicants are wrong to claim that it assured them access to the entire antitrust file 34250, when what it did was to assure them that it would continue to deal with their access request to that file as soon as practically possible.

134. ESA stresses that assessing whether disclosure of the entire antitrust file 34250 can be made, and actually granting the general public access to all documents held on the file are not the same.

135. ESA contends that if a prudent and alert applicant could have foreseen the likely rejection, or partial rejection, of his request for public access to all documents stored on an antitrust file, he cannot plead legitimate expectations to the contrary.[40] ESA avers that, in the present case, it was under no legal obligation to disclose any documents before the judgment in Case E-15/10 *Norway Post* on 18 April 2012. Moreover, ESA had refused to disclose the inspection documents as early as by letter of 16 August 2011.

136. ESA claims that the applicants have failed to demonstrate that a sufficiently serious breach occurred in the circumstances of the present proceedings.[41]

137. ESA submits that the arguments of the applicant (i.e. that ESA had no discretion, that ESA showed a lack of diligence and

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39 Reference is made to Joined Cases E-17/10 and E-6/11 *Liechtenstein and VTM* v *ESA*, judgment of 30 March 2012, not yet reported, paragraph 134 and case law cited.

40 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 143.

41 Reference is made to Case C-440/07 P *Commission* v *Schneider Electric*, cited above, paragraphs 160-161.

care and disregarded its obligations to take a timely decision) essentially repeat earlier assertions related to the alleged breach of the RAD and the protection of legitimate expectations. Both contentions have already been rejected by ESA. In the absence of any wrongful act and with no sufficiently serious breach demonstrated, the applicants are wrong to claim that ESA is liable to them under Article 46(2) SCA for their legal expenses allegedly incurred.

138. Finally, ESA submits that the applicants have failed to substantiate the loss and damage allegedly incurred. This applies in particular as the alleged losses referred to by the applicants are not recoverable.

139. According to ESA, the requirement of Article 33(1)(c) of the RoP that an application be sufficiently precise means that in an action for compensation under Article 46(2) SCA any alleged losses that have already been incurred must be substantiated and quantified in the application.[42] In relation to future losses, the applicant must at least demonstrate the certainty of those losses, even if he cannot yet quantify them.

140. ESA rejects the applicants' contention that it has been given a precise presentation of the nature and type of losses. In ESA's view, the applicants have not substantiated a single item of recoverable loss in the present proceedings.

141. ESA claims that the application neither enables it nor the Court to make any appraisal regarding the nature and type of the alleged losses and their factual basis, let alone how the alleged losses are calculated, with these apparently consisting of certain legal expenses.

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[42] Reference is made to Case E-15/10 *Posten Norge AS* v *ESA*, judgment of 18 April 2012, not yet reported, paragraph 111, Case T-195/95 *Guérin Automobiles* v *Commission* [1997] ECR II-679, paragraphs 21 and 22, and Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraph 107.

142. In its rejoinder, ESA makes the following remarks.

143. ESA maintains that the losses claimed are not recoverable. It is clear from the submissions of the applicants that the expenses pursued under the two heads of claims – for which damages are sought in the present case – have not been incurred for the purposes of the present proceedings and are not necessary for that purpose.[43] Moreover, the non-recoverable nature of both legal expenses incurred in national proceedings and of legal expenses which exceed what can be recoverable as costs has been confirmed in recent case law.[44]

144. In any event, the damages claimed have not been substantiated.[45] While it is possible to seek only partial compensation for losses allegedly incurred, it is not possible to omit the substantiation of damage that allegedly has already occurred.

145. If the Court finds that the action is devoid of purpose, ESA maintains that the costs of the proceedings should be borne by the applicant.

Páll Hreinsson

Judge-Rapporteur

43 Reference is made to Case E-14/10 COSTS *Konkurrenten.no AS* v *ESA*, cited above, paragraph 24.

44 Reference is made to Case T-340/11 *Régie Networks and Others* v *Commission*, order of 17 October 2012, not published, paragraphs 47 and 50.

45 Reference is made to Case T-574/08 *Syndicat des thoniers méditerranéens and Others* v *Commission*, judgment of 7 November 2012, not published, paragraphs 56 and 59, and Case T-501/10 *TI Media Broadcasting and Others* v *Commission*, order of 21 September 2012, not published, paragraph 74.


EFTA COURT

Case E-9/12

Iceland
v
EFTA Surveillance Authority

CASE E-9/12

Iceland

v

EFTA Surveillance Authority

(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 reasons)

Summary of the Judgment

1. A sale of land or buildings by public authorities to an undertaking involved in an economic activity may include elements of unlawful State aid, in particular where it is not made at market value. In order to determine whether a sale is made at market value, ESA must apply the private investor test, to ascertain whether the price paid by the presumed recipient of the aid corresponds to the selling price which a private investor, operating in normal competitive conditions, would be likely to have fixed. As a rule, the application of that test requires ESA to make a complex economic assessment.

2. Where ESA adopts a measure involving a complex economic assessment, it enjoys a wide discretion. In that connection, ESA may find it appropriate to clarify beforehand how it will exercise its discretion. This may take the form of measures such as general guidelines. By adopting guidelines, ESA must observe the requirements it has laid down in those guidelines, provided the guidelines do not depart from the rules in the EEA Agreement. Although such guidelines certainly help to ensure that ESA acts in a manner which is transparent, foreseeable and consistent with legal certainty, they cannot bind the Court. However, they may form a useful point of reference.

3. The Land Sale Guidelines describe two methods which automatically exclude the

existence of State aid. These are a sufficiently well-publicised, open and unconditional bidding procedure or an ex ante evaluation by an independent expert. In these cases, a sale is by definition at market value. ESA's assessment of whether one of these methods has been applied does not in itself involve a complex economic appraisal. Consequently, the Court's jurisdiction to review ESA's assessment in this regard is not limited. Indeed, it is only if ESA finds that the methods in the Land Sale Guidelines have not been applied that it has to undertake the complex economic assessment of ascertaining whether a sale has been made at market value.

4. Pursuant to subparagraph (a) of point 2.1 of the Land Sale Guidelines, an offer is regarded as sufficiently well-publicised when it is repeatedly advertised over two months or more in the national press, estate gazettes or other appropriate publications and through real estate agents addressing a broad range of potential buyers, so that it can come to the notice of all potential buyers.

5. The criterion of an offer being well-publicised must be interpreted such that where two or more properties are offered on sale together, but not necessarily only as one single unit, specific advertisements must be made for the individual properties. A general call for interest cannot suffice, as such a method cannot reasonably be expected to reach all potential buyers of specific properties. As regards the publication format, the wording of the Land Sale Guidelines does not in principle exclude adequate publication on the internet. However, advertisements must be placed in a publication, be it printed or digital, which is appropriate for reaching all potential buyers. The seller's own website can only exceptionally be regarded as such a publication.

6. In the interest of sound administration of the fundamental rules of the EEA Agreement relating to State aid, ESA is required to conduct a diligent and impartial examination of the contested measures. When adopting its final decision, ESA will then have complete and reliable information for its purpose. Moreover, as regards the sale of land and buildings by public authorities, ESA must examine all the relevant features of the transaction at issue and its context, particularly in applying the market investor test.

7. In cases concerning an examination of alleged unlawful aid, pursuant to the second paragraph of Article 10(1) of Part II of Protocol 3 SCA, ESA shall, if necessary, request information from the EEA State concerned. Furthermore, under Article 2(2) of Part II of Protocol 3 SCA, the EEA State concerned shall provide all information necessary to enable ESA to take a decision. According to Article 5(1) and (2) of Part II of Protocol 3 SCA, ESA shall request additional information if it considers that the information provided by the EEA State is incomplete. Only if the EEA State does not comply with a reminder shall ESA issue an information injunction under Article 10(3) of Part II of Protocol 3 SCA.

8. The statement of reasons required by Article 16 SCA must be appropriate to the measure at issue. It must disclose in a clear and unequivocal fashion the reasoning followed by ESA. The duty has two purposes: to allow interested parties to know the justification for the measure so as to enable them to protect their rights and to enable the Court to exercise its power to review the legality of the decision.

JUDGMENT OF THE COURT

22 July 2013

(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 reasons)

In Case E-9/12,

Iceland, represented by Jóhanna Bryndís Bjarnadóttir, Counsellor, acting as Agent, Haraldur Steinþórsson, Legal Officer, acting as Co-Agent, and Dóra Sif Tynes, Attorney at Law, acting as Counsel,

applicant,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, Auður Ýr Steinarsdóttir and Gjermund Mathisen, Officers, Department of Legal & Executive Affairs, acting as Agents,

defendant,

APPLICATION for the partial annulment of the EFTA Surveillance Authority's Decision No 261/12/COL of 4 July 2012 concerning municipal tax measures, the sale of real estate and the sale of electricity to Verne Holdings ehf.,

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 and the written observations of the Danish Government, represented by Vibeke Pasternak Jørgensen and Maria Søndahl Wolff, Ministry of Foreign Affairs, acting as

Agents, and the European Commission ("the Commission"), represented by Davide Grespan and Paul-John Loewenthal, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Iceland ("the applicant"), represented by Dóra Sif Tynes; the EFTA Surveillance Authority ("ESA" or "the defendant"), represented by Auður Ýr Steinarsdóttir; and the Commission, represented by Paul-John Loewenthal, at the hearing on 15 May 2013,

gives the following

JUDGMENT

I INTRODUCTION

1 On 4 July 2012, ESA adopted Decision No 261/12/COL concerning municipal tax measures, the sale of real estate and the sale of electricity to Verne Holdings ehf. ("the contested decision"). In Articles 4 and 5 of the contested decision, ESA found that an agreement concerning municipal tax measures to Verne Holdings ehf., and the sale of five buildings to Verne Real Estate ehf. ("Verne"), respectively, entail State aid incompatible with the EEA Agreement. By Article 6 of the contested decision, ESA ordered the Icelandic authorities to recover the aid granted through the tax measures and the sale of real estate.

2 By its application, Iceland seeks an annulment of the contested decision in so far as it concerns the sale of real estate.

3 The application is based on two pleas in law. First, the applicant argues that ESA misapplied Article 61(1) EEA as it failed to demonstrate that the relevant buildings were sold below their market value, partly by not analysing the bidding procedure held, and partly by erring in the assessment of the market value of the buildings. Second, the applicant argues that ESA failed to duly investigate the case and to state reasons.

II LEGAL BACKGROUND

EEA law

4 Article 61 EEA provides 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 the Contracting Parties, be incompatible with the functioning of this Agreement.*
>
> *...*
>
> *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.*

5 Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads as follows:

> *Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.*

6 Article 1(3) of Part I of Protocol 3 SCA reads as follows:

> *The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it*

considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

7 Article 5 of Part II of Protocol 3 SCA reads as follows:

1. Where the EFTA Surveillance Authority considers that information provided by the EFTA State concerned with regard to a measure notified pursuant to Article 2 of this Chapter is incomplete, it shall request all necessary additional information. Where an EFTA State responds to such a request, the EFTA Surveillance Authority shall inform the EFTA State of the receipt of the response.

2. Where the EFTA State concerned does not provide the information requested within the period prescribed by the EFTA Surveillance Authority or provides incomplete information, the EFTA Surveillance Authority shall send a reminder, allowing an appropriate additional period within which the information shall be provided.

3. The notification shall be deemed to be withdrawn if the requested information is not provided within the prescribed period, unless before the expiry of that period, either the period has been extended with the consent of both the EFTA Surveillance Authority and the EFTA State concerned, or the EFTA State concerned, in a duly reasoned statement, informs the EFTA Surveillance Authority that it considers the notification to be complete because the additional information requested is not available or has already been provided. In that case, the period referred to in Article 4(5) of this Chapter shall begin on the day following receipt of the statement. If the notification is deemed to be withdrawn, the EFTA Surveillance Authority shall inform the EFTA State thereof.

State Aid Guidelines

8 By Decision No 4/94/COL of 19 January 1994 (OJ 1994 L 231, p. 1), having regard in particular to Articles 5(2)(b) and 24 SCA and Article 1 of Part I of Protocol 3 SCA, ESA adopted

Procedural and Substantive Rules in the Field of State Aid ("State Aid Guidelines").

9 It follows from Decision No 4/94/COL that the purpose of the State Aid Guidelines is to provide national administrations and enterprises with information on how ESA interprets and applies the EEA State aid rules. The State Aid Guidelines correspond to guidelines, communications and notices adopted by the Commission in the EU. The aim of the State Aid Guidelines is thus to ensure a uniform and transparent application of the EEA State aid rules throughout the EEA.

10 By Decision No 275/99/COL of 17 November 1999 (OJ 2000 L 137, p. 28), ESA amended the State Aid Guidelines, introducing a new chapter, Chapter 18B, on State aid elements in sales of land and buildings by public authorities ("Land Sale Guidelines"). The Land Sale Guidelines correspond to the Commission Communication on State aid elements in sales of land and buildings by public authorities (OJ 1997 C 209, p. 3).

11 In Point 2.1, under the heading "Sale through an unconditional bidding procedure", the Land Sale Guidelines state, in particular, that:

1. A sale of land ... following a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is by definition at market value and consequently does not contain State aid.

(a) An offer is 'sufficiently well-publicised' when it is repeatedly advertised over a reasonably long period (two months or more) in the national press, estate gazettes or other appropriate publications and through real estate agents addressing a broad range of potential buyers, so that it can come to the notice of all potential buyers.

The intended sale of land and buildings, which in view of their high value of other features may attract investors operating on a Europe-wide or international scale, should be announced in publications which have a regular international circulation. Such

offers should also be made known through agents addressing clients on a Europe-wide or international scale.

...

12 In Point 2.2, under the heading "Sale without an unconditional bidding procedure", the Land Sale Guidelines state, in particular, as follows:

(a) Independent expert evaluation

If public authorities intend not to use the procedure described under 18B.2.1, an independent valuation should be carried out by one or more independent asset valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting State aid.

(b) Margin

If, after a reasonable effort to sell the land and buildings at the market value, it is clear that the value set by the valuer cannot be obtained, a divergence of up to 5 % from that value can be deemed to be in line with market conditions. If, after a further reasonable time, it is clear that the land and buildings cannot be sold at the value set by the valuer less this 5 % margin, a new valuation may be carried out, which is to take account of the experience gained and of the offers received.

(c) Special obligations

Special obligations that relate to the land and buildings and not to the purchaser or his economic activities may be attached to the sale in the public interest provided that every potential buyer is required, and in principle is able, to fulfil them, irrespective of whether or not he runs a business or of the nature of his business. The economic disadvantage of such obligations should be evaluated separately by independent valuers and may be set off against the purchase price. Obligations whose fulfilment would at least partly be in the buyer's own interest should be evaluated with that fact in mind: there may, for example, be an advantage

in terms of advertising, sport or arts sponsorship, image, improvement of the buyer's own environment, or recreational facilities for the buyer's own staff.

The economic burden related to obligations incumbent on all landowners under the ordinary law are not to be discounted from the purchase price (these would include, for example, care and maintenance of the land and buildings as part of the ordinary social obligations of property ownership or the payment of taxes and similar charges).

Icelandic law

13 Article 1 of Act No 6/2001 on the Registration and Assessment of Real Property ("Act No 6/2001") reads as follows:

Registers Iceland supervises the management of the registration of real property according to this Act as well as the operation of data and information system, named the Register of Real Property, on a computerised basis.

All real property in the country shall be registered in the Real Property Register. The core of the Real Property Register contains information on land and lots, the coordinates of their borders, structures thereon and rights pertaining thereto. The Register of Real Property is the basis for the Titleholder Register of Real Property, the assessment of real property and the building register of Registers Iceland and shall be so organised as to be a database for land information systems. The history of changes in the registration of a real property shall be kept in the Real Property Register.

14 Article 27 of Act No 6/2001, before the entry into force of amendments on 1 January 2009, reads as follows:

The registered valuation of real estate shall be the going price, converted into cash, which it can be assumed that the property would have traded for in the month of November preceding the valuation, based on authorized use and potential use of the property at the given time.

If such going price of comparable properties is not known, the registered value shall be determined on the basis of the best

available knowledge of comparable going price taking into account the cost of constructing buildings, their age, position with regard to transportation, exploitation potentials, perquisites [facilities], soil type, vegetation, landscape and other elements which may influence the going price of the property.

...

15 Article 27 of Act No 6/2001, as amended by Act No 83/2008 and in force from 1 January 2009, reads as follows:

The registered value of a real property shall be the going price converted to a cash basis, based on the permissible and possible use at each time that the property presumably had in purchases and sales in the month of February before the assessment [sic], and it should enter into effect in the period from 31 December to the end of February. If an assessment enters into effect in the period from 1 March to 20 December, it shall be based on the month of February next before the assessment, cf. Article 32 a.

If the going price of the real property is not known, the registered value shall be determined according to the best available knowledge of the market value of comparable properties with regard to income thereof, the cost of structures, their age, location with regard to communications, possibilities of use, perquisites, soil properties, vegetation, natural beauty and such other factors that may influence the market value of the property.

...

16 Article 31 of Act No 6/2001 reads as follows:

A person that can have a substantial interest in the assessed value of a property and is not in agreement with the registered assessment, according to Articles 29 and 30, can request a new decision by Registers Iceland on the assessment. The request for a revised assessment shall be in writing, based on grounds and necessary documents.

...

17 Article 8 of Icelandic Regulation No 486/1978 on the registration of real property and real property assessment reads as follows:

1. The assessed value of a real property as a whole shall be the market price converted to a cash basis that is likely to be the going price in purchases and sales. In addition to the base price cf. Article 7 of this Regulation, regard shall mainly be had to the factors listed in paragraphs 2-6 of this Article.

...

3. Account shall be taken of income derived from a real property, its geographic location and relation to other real properties. Account shall also be taken of the location of the real property with respect to communications, business and entrepreneurial conditions and its use with respect to the general provisions of laws on building and zoning, the Road Act and any preservation legislation as well as the decisions of authorities concerned with such matters. No account shall be taken of special provisions on the maximum sale price of real properties.

4. The nature of the location of the real property shall be considered, economic developments in the area as well as the situation of business, communications, prospects for education, health services and any other services rendered by the public or private sectors [sic].

III FACTS

Background

18 Between 1951 and 2006, United States armed forces ("US military") were deployed in the area next to Keflavik International Airport under the terms of the 1951 Bilateral Defence Agreement between Iceland and the United States of America. Under the terms of that agreement, Iceland was to acquire land in the area and permit the US military to use it without compensation.

19 In September 2006, the US military left Iceland and handed over the area and its constructions, ranging from residential buildings to large warehouses, to the Icelandic State. Subsequently, a specific body, Keflavík Airport Development Corporation (Þróunarfélag Keflavíkur ehf.) ("KADECO"), fully owned by the Icelandic State, was established to develop, administer and to sell/let real estate within the area on behalf of the State.

20 On 26 February 2008, Verne agreed to buy five of the buildings. The purchase price was USD 14 500 000, comprising a deposit of USD 25 000, paid on 26 February 2008, and the closing payment paid on 26 March 2008. Transfer of the title was signed on 9 May 2008.

21 The five buildings purchased were:

1) Building No 868, NATO warehouse/supply building, 11 064 m2
2) Building No 869, "Navy Exchange" warehouse, 16 606 m2
3) Building No 872, warehouse/cold storage, 1 009 m2
4) Building No 866, warehouse, 782 m2
5) Building No 864, electrical power plant, 1 547 m2.

22 ESA's formal investigation procedure arose in the context of an investment agreement initiated on 23 October 2009 between Verne and the Icelandic authorities concerning the establishment of a data centre in the municipality of Reykjanesbær. On 1 September 2010, the investment agreement was notified to ESA pursuant to Article 1(3) of Part I of Protocol 3 SCA.

23 On 3 November 2010, ESA decided to initiate the formal investigation procedure (Decision No 418/10/COL).

24 On 23 September 2011, the investment agreement was officially cancelled. By letter of 28 September 2011, the notification was withdrawn. However, ESA continued its investigation of the other agreements between the Icelandic State and Verne.

The contested decision

25 On 4 July 2012, ESA adopted the contested decision, where it found, inter alia, that the agreements concerning (i) the sale of real estate to and (ii) municipal tax measures in favour of Verne entailed State aid incompatible with the EEA Agreement.

26 As regards the sale of real estate, ESA found, first, that KADECO had not followed an open and unconditional bidding procedure within the meaning of the Land Sale Guidelines or a procedure

comparable to a bidding procedure. Therefore, the possibility could not be excluded that Verne had been provided with State aid. ESA stressed that only one building (No 869) was advertised specifically in various newspapers in Iceland. Other than that, regular advertisements were published with reference to KADECO and its homepage, calling for ideas for development in the area.

27 ESA noted that one bid was received for building 869, submitted on 23 April 2007 by Atlantic Film Studios ("Atlantic"). It offered a square metre price of ISK 35 000. Given the estimate of the size of building 869 at the time, 13 000 m2, this represented a bid price of ISK 455 000 000. In addition, Atlantic offered to pay ISK 15 000 000 for an asphalted area outside building 869. The contested decision states that, according to the explanations given by the Icelandic authorities, this offer was rejected.

28 ESA then assessed whether aid could be excluded on the basis of an independent expert evaluation. It concluded that the evaluation conducted on 23 April 2007 by a local real estate agent concerning building 869 could not be regarded as representative of the square metre price. Consequently, the evaluation could not constitute an independent expert evaluation within the meaning of the Land Sale Guidelines in relation to all five buildings sold to Verne. ESA noted that the evaluation only concerned one of the relevant buildings, had taken place 10 months prior to the sale of the real estate to Verne, and finally, it was questionable whether the evaluation had been based on generally accepted market indicators and evaluation standards.

29 Given that neither of the procedures to exclude automatically the existence of State aid was applicable, ESA concluded that the most reliable determination of the market value of the real estate at hand was provided by the annual value assessment of all civil real estate in Iceland. This assessment is carried out by Registers Iceland (Þjóðskrá Íslands), a central independent authority in Iceland.

30 The contested decision states that, at the time of the purchase of the five buildings by Verne, Registers Iceland valued the buildings as follows:

1) Building No 868: ISK 452 050 000
2) Building No 869: ISK 578 550 000
3) Building No 872: ISK 52 700 000
4) Building No 866: ISK 23 650 000
5) Building No 864: ISK 70 900 000.

According to Registers Iceland, the total value of the five buildings at the time of the purchase was ISK 1 177 850 000.

31 According to the contested decision, the purchase price of USD 14 500 000 corresponded to ISK 957 000 000, or a square metre price of ISK 31 000.

32 Consequently, ESA held that State aid had been granted by the Icelandic State when the real estate purchase agreement was entered into, as the purchase price was below the market value of the buildings as determined by Registers Iceland. ESA held the aid amount granted as ISK 220 850 000, reflecting the difference between the market value and the purchase price.

33 ESA dismissed the possibility that the aid could be considered lawful pursuant to Article 61(3)(c) EEA and the Regional Aid Guidelines. According to ESA, the aid granted was not connected to a specific investment project. Furthermore, the aid had not been awarded on condition that the investment project was maintained for a minimum of five years after it had been completed, as required under the Regional Aid Guidelines.

34 The operative part of the contested decision reads, in extract, as follows:

Article 5

The preferential price of buildings granted by Iceland to Verne Real Estate ehf. amounting to ISK 220 850 000 constitutes state aid which is incompatible with the state aid rules of the EEA Agreement.

Article 6

The Icelandic authorities shall recover the aid referred to in Articles 4 and 5 from Verne Holdings ehf. and Verne Real Estate ehf. and unlawfully made available to the companies.

Article 7

Recovery shall be affected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The sums to be recovered shall bear interest from the date on which they were put at disposal of Verne Holdings ehf. and Verne Real Estate ehf. until their actual recovery according to Article 9 in the EFTA Surveillance Authority Decision No 195/04/COL. The interests shall be calculated on a compound basis.

...

IV PROCEDURE AND FORMS OF ORDER SOUGHT

35 By application registered at the Court on 7 September 2012, the applicant lodged the present action. ESA submitted a statement of defence, which was registered at the Court on 23 November 2012. The reply from Iceland was registered at the Court on 16 January 2013. The rejoinder from ESA was registered at the Court on 18 February 2013.

36 The applicant requests the Court to declare that:

(1) Article 5 of the EFTA Surveillance Authority Decision No 261/12/COL of 4 July 2012 concerning municipal tax measures, the sale of real estate and the sale of electricity to Verne Holdings ehf. is annulled;

(2) Article 6 of the EFTA Surveillance Authority Decision No 261/12/COL of 4 July 2012 concerning municipal tax measures, the sale of real estate and the sale of electricity to Verne Holdings ehf. is void as concerns the reference to Article 5; and

(3) the EFTA Surveillance Authority is ordered to pay the full legal costs.

37 ESA claims that the Court should:

(i) dismiss the application;

(ii) order the applicant to bear the costs.

38 Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, the Commission and the Danish Government submitted written observations, registered on 21 and 23 January 2013, respectively.

39 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure, the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

V LAW

40 The applicant submits that the contested decision must be partially annulled. First, ESA has failed to demonstrate that the real property was sold below market value and that the sale resulted in an economic advantage for Verne. In Iceland's view, ESA did not analyse the bidding procedure held by KADECO correctly and erred in its assessment of market value.

41 Second, the applicant argues that ESA failed properly to investigate the case and state reasons for its decision. It argues that ESA should have made inquiries about the bidding procedure used by KADECO with a view to assessing its compliance with the Land Sale Guidelines. Furthermore, Iceland asserts that the defendant did not state its reasons for concluding that the procedure adopted by KADECO did not qualify as a bidding procedure within the meaning of Article 61(1) EEA.

First part of the first plea: Failure to demonstrate an economic advantage by not adequately analysing the bidding procedure held by KADECO

Arguments of the parties and the other participants in the proceedings

42 The applicant, supported by the Danish Government, submits that ESA erred in its analysis of the bidding procedure by KADECO. A well-publicised, open, transparent and unconditional bidding procedure, or a procedure comparable to that, was carried out by KADECO. As a consequence, State aid can be excluded in the present case.

43 First, the applicant submits that KADECO's offer was widely and repeatedly advertised in various national newspapers and on its website. This was done over a long period of time, with the first advertisement appearing on 17 and 18 March 2007.

44 Initially, every property was advertised specifically. From June 2007, the advertisements included a general call for interest in purchasing property in the area in question. Potential buyers were directed to the KADECO website, where detailed information in Icelandic and English was listed for each property. According to the applicant, online advertising is the best way to reach out to as many potential bidders as possible, in particular when the website is published in English as well as in Icelandic.

45 According to the Danish Government, the fact that complete information on all five buildings was not given in the newspaper advertisements does not mean that the criterion of well-publicised is not met. The purpose of advertising the buildings is to make it known that the buildings are for sale. Once this is known to the potential bidders, a reference to further details available on the internet must suffice, as advertisements on the internet would in themselves meet the criteria.

46 The applicant submits that where properties are sold *en masse*, as in the present case (with a total of 210 buildings), it is self-evident

that the advertising of each individual property in a newspaper is administratively unmanageable. A general call for interest in the press, and a reference to more detailed information on a website, is not only administratively more manageable but has the potential to reach a far greater audience.

47 Second, the applicant and the Danish Government assert that the bidding procedure must be regarded as unconditional, as no restrictions were imposed on bids or on bidders.

48 Finally, Atlantic's bid was withdrawn, not rejected. Thus Verne's bid was the only bid. In any event, Iceland submits, Verne's bid was higher than Atlantic's bid, as ESA erred in its calculation of the purchase price and comparison of Verne's and Atlantic's bids, including the assessment of the size of the buildings. Consequently, all the conditions specified in point 2.1 of the Land Sale Guidelines are fulfilled, and State aid is therefore excluded.

49 The defendant, supported by the Commission, submits that the market economy investor principle and, consequently, the Land Sale Guidelines were not complied with when KADECO sold the five buildings to Verne. It asserts that a private investor in similar circumstances would not have accepted the price paid by Verne for the buildings and would most likely also have used different methods when publicising the buildings for sale.

50 First, ESA maintains that no procedure substantially comparable to a bidding procedure was organised. The real estate was not sufficiently well-publicised. KADECO published some advertisements in national newspapers. However, only building 869 was advertised specifically. Other than that, the advertisements contained only a general text stating that KADECO sought new ideas on the use of the buildings as well as bids in relation to them. The advertisements further stated that more information on the properties was published on KADECO's website. In ESA's view, the call for expressions of interest published is too general in nature to constitute a sufficiently precise offer.

51 At the oral hearing, the Commission argued that publication on the internet may fulfil the criterion of well-publicised, in so far as advertisements are placed in internet publications equivalent

to paper publications which would have fulfilled the criterion. Conversely, placing advertisements on its own special-purpose website, as KADECO did, cannot fulfil the criterion.

52 Second, according to ESA, the procedure was not open and unconditional. The advertisements for specific properties imply that KADECO could refuse an offer if the proposed use was not suitable.

53 Finally, on the question whether the best, or only, bid was accepted, ESA submits that all the information provided by the Icelandic authorities during the investigation established that the bid from Atlantic had been rejected. It asserts that the calculation of the purchase price paid by Verne, and the comparison with Atlantic's bid, is correct.

Findings of the Court

54 The concept of State aid in Article 61(1) EEA includes not only positive benefits, such as subsidies, loans or direct investment in the capital of undertakings, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see Case E-12/11 *Asker Brygge* v *ESA* [2012] EFTA Ct. Rep. 536, paragraph 55, and the case law cited).

55 A sale of land or buildings by public authorities to an undertaking involved in an economic activity may include elements of unlawful State aid, in particular where it is not made at market value. In order to determine whether a sale is made at market value, ESA must apply the private investor test, to ascertain whether the price paid by the presumed recipient of the aid corresponds to the selling price which a private investor, operating in normal competitive conditions, would be likely to have fixed. As a rule, the application of that test requires ESA to make a complex economic assessment (see *Asker Brygge* v *ESA*, cited above, paragraph 79, and the case law cited).

56 Where ESA adopts a measure involving a complex economic assessment, it enjoys a wide discretion. In that connection, ESA may find it appropriate to clarify beforehand how it will exercise its

discretion. This may take the form of measures such as general guidelines. ESA has adopted such general guidelines within the context of sale of land or buildings by public authorities (the Land Sale Guidelines).

57 By adopting guidelines, ESA must observe the requirements it has laid down in those guidelines, provided the guidelines do not depart from the rules in the EEA Agreement (see, for comparison, Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 62, and, concerning guidelines on the assessment whether aid is compatible with the EEA Agreement within the meaning of Article 61(3) EEA, Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord and Others* [2005] EFTA Ct. Rep. 117, paragraph 107).

58 Although such guidelines certainly help to ensure that ESA acts in a manner which is transparent, foreseeable and consistent with legal certainty, they cannot bind the Court. However, they may form a useful point of reference (compare, to that effect, Cases C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 52, and C-387/97 *Commission* v *Greece* [2000] ECR I-5047, paragraphs 87 and 89).

59 The parties concerned are therefore entitled to rely on those guidelines. The Court will ascertain whether ESA complied with the rules it has itself laid down when it adopted the contested decision.

60 The Land Sale Guidelines describe a simple procedure that allows EFTA States to handle sales of land and buildings in a way that automatically precludes the existence of State aid.

61 To this end, point 2.1 of the Land Sale Guidelines states that a sale of land and buildings following a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is by definition at market value. Consequently, no State aid is involved.

62 Moreover, under point 2.2 of the Land Sale Guidelines, if public authorities intend not to use the procedure described under point 2.1, State aid can be excluded only by an independent evaluation carried out by one or more independent asset valuers prior to

the sale negotiations. In this way, the market value based on generally accepted market indicators and valuation standards will be established.

63 As regards the scope of judicial review, it must be recalled that State aid is a legal concept and must be interpreted on the basis of objective factors. As a consequence, the Court must, in principle, having regard both to the specific features of the case before it and to the technical or complex nature of ESA's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 61(1) EEA (see, to that effect, Case E-6/98 *Norway* v *ESA* [1999] EFTA Ct. Rep. 74, paragraph 42, and, for comparison, Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 111, and the case law cited).

64 However, judicial review of a measure involving a complex economic assessment, such as whether a sale of land or buildings by public authorities is made at market value, must be limited to verifying whether ESA complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment of those facts or a misuse of powers. In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision (*Asker Brygge* v *ESA*, cited above, paragraph 80, and Joined Cases E-10/11 and E-11/11 *Hurtigruten and Norway* v *ESA* [2012] EFTA Ct. Rep. 758, paragraph 156).

65 The Land Sale Guidelines describe two methods which automatically exclude the existence of State aid. These are an unconditional bidding procedure or an ex ante evaluation by an independent expert. In these cases, a sale is by definition at market value. ESA's assessment of whether one of these methods has been applied does not in itself involve a complex economic appraisal. Consequently, the Court's jurisdiction to review ESA's assessment in this regard is not limited. Indeed, it is only if ESA finds that the methods in the Land Sale Guidelines have

not been applied that it has to undertake the complex economic assessment of ascertaining whether a sale has been made at market value.

66 In the contested decision, ESA was unable to conclude that a sufficiently well-publicised, open and unconditional bidding procedure, or a procedure comparable to that, was followed by KADECO for the sale in question. ESA emphasised that only one building (No 869) was advertised specifically in various newspapers in Iceland. Other than that, regular advertisements were published calling for ideas for development in the area. In these advertisements reference was made to KADECO's website on the internet, where all buildings were specifically listed.

67 Pursuant to subparagraph (a) of point 2.1 of the Land Sale Guidelines, an offer is regarded as sufficiently well-publicised when it is repeatedly advertised over two months or more in the national press, estate gazettes or other appropriate publications and through real estate agents addressing a broad range of potential buyers, so that it can come to the notice of all potential buyers.

68 The criterion of an offer being well-publicised must be interpreted such that where two or more properties are offered on sale together, but not necessarily only as one single unit, specific advertisements must be made for the individual properties. A general call for interest cannot suffice, as such a method cannot reasonably be expected to reach all potential buyers of specific properties.

69 As regards the publication format, the wording of the Land Sale Guidelines does not in principle exclude adequate publication on the internet. However, advertisements must be placed in a publication, be it printed or digital, which is appropriate for reaching all potential buyers. The seller's own website can only exceptionally be regarded as such a publication.

70 In the present case, four of the five buildings in question were specifically advertised solely on KADECO's website. There is

nothing to suggest that this website was appropriate for reaching all potential buyers. It must therefore be held that ESA did not err in finding itself unable to conclude that a sufficiently well-publicised bidding procedure, or a procedure comparable to that, was followed.

71 As the conditions in point 2.1 of the Land Sale Guidelines are cumulative, there is no need for the Court to assess the applicant's arguments on whether the bidding procedure was unconditional, and whether the best bid was accepted.

72 The first part of the first plea must therefore be rejected.

Second part of the first plea: Failure to demonstrate an economic advantage by erring in the assessment of market value as the basis for a finding of State aid

Arguments of the parties and the other participants in the proceedings

73 The applicant submits that the defendant incorrectly applied Article 61(1) EEA and the Land Sale Guidelines when it determined the market value of the five buildings in question by relying on the valuations issued by Registers Iceland.

74 The applicant asserts that in the case at hand the defendant merely referred to the valuations of Registers Iceland, and did not carry out a complex economic assessment. Consequently, it cannot be said to have enjoyed a wide discretion. Therefore, the Court may review whether the methodology in question can be relied upon for the purposes of determining the presence of State aid. The Court must assess whether the method of valuation adopted by Registers Iceland is appropriate for determining the market value of the relevant buildings.

75 The applicant submits that the valuation of properties for the purposes of Act No 6/2001 is to determine the likely value of a property for tax purposes. The private investor test cannot rely solely on that valuation. The fact that valuations by Registers

Iceland were not challenged and appealed by KADECO or Verne does not prove that the valuations correspond to the correct market value.

76 Second, the assessment of whether State aid has been granted must take into consideration the situation at the time when the measure actually was implemented. In this case, that is February 2008, when the real estate purchase agreement was concluded. However, in the contested decision, reference is made to an amended version of Act No 6/2001, which had not entered into force at the time of the conclusion of the agreement.

77 Moreover, Registers Iceland applied the cost method in its valuation of the five buildings. This method is based on the costs of replacing a building as new. The other method available to Registers Iceland is the sales value method, based on the recorded sales values in the preceding year. It appears from the contested decision that the defendant based its conclusion on the assumption that the valuation by Registers Iceland of the five buildings was based on previous sales contracts. Iceland asserts, therefore, that the defendant's conclusion in the contested decision is based on a wholly incorrect assumption.

78 There is nevertheless an uncertainty attached to the valuation of the buildings in question. The increase in unemployment and in the number of sale properties at the time when the buildings in question were put on the market made it difficult for Registers Iceland to properly estimate the value of the relevant buildings. This is further underlined by the fact that the properties were former military buildings, and had never been registered or put on the market before.

79 The applicant claims that the defendant failed in particular to take account of the cost of converting the electric power network in the buildings from American to European standards. Other alterations were necessary, too.

80 Finally, the applicant contends that ESA should have considered the economic advantage in selling a group of properties and not

simply a single property. This would reflect the approach likely to be taken by a private investor.

81 ESA, supported by the Commission, rejects Iceland's arguments and maintains that Verne received an economic advantage. The properties at issue were sold to Verne at a price below market value, as demonstrated in the contested decision

82 The valuations by Registers Iceland are based on law and are commonly accepted and used in Iceland as the benchmark when the market price of a property must be established.

83 ESA submits that it examined thoroughly all the documents put forward by the Icelandic Government during the investigation. The most appropriate method to ascertain the market price was to use the valuations made by Registers Iceland. ESA concedes that in the case of other countries the valuation issued for tax purposes may not necessarily represent market value. However, Iceland has a special system established by law to evaluate the market price of properties. Pursuant to Article 27 of Act No 6/2001, Registers Iceland is obliged to evaluate the market price of properties in Iceland. The valuations are not only issued for tax purposes. The tax authorities do not have any part in the valuation. Moreover, according to ESA, the explicit statement by the Icelandic authorities in an email that the valuation "is generally understood to reflect the market rate" further strengthens the conclusion.

84 ESA asserts that its reliance on the amended version of Article 27 of Act No 6/2001 is of no significance, since the amendments were not to the parts of the provision of relevance in the case at hand.

85 According to ESA, the fact that Registers Iceland had to use the cost method instead of the sales value method when assessing the five buildings is of no significance as both methods serve the same purpose, i.e. to establish the market price.

86 ESA fails to see how any renovation and alteration costs for the five buildings at issue could be regarded as resulting from

"special obligations" within the meaning of point 2.2(c) of the Land Sale Guidelines.

87 As regards the argument that it should have considered the economic advantage entailed in the bid encompassing a bundle of properties, ESA observes that it follows from the letter of intent that Verne offered USD 15 000 000 for the largest three of the five buildings eventually sold. In its view, this demonstrates that the two smaller buildings were considered to be of little value. Moreover, in total, the five buildings together constitute only some 15% of the commercial real estate in the area.

88 The Commission contends that ESA's reliance on the valuations produced by Registers Iceland does not imply that it failed to examine the contested sale in accordance with the market economy investor test. At the time of the contested decision, the valuations by Registers Iceland were the most reliable information available to ESA for determining the market value of the properties in question. In the view of the Commission, ESA did not commit a manifest error of assessment in relying on those valuations.

Findings of the Court

89 In the contested decision, ESA found that neither an unconditional bidding procedure nor an ex ante evaluation by an independent expert had been undertaken. ESA therefore had to assess if the sale was made at market value. ESA concluded that the most reliable determination of the market value of the properties in this case was provided by the annual value assessment of all civil real estate in Iceland carried out by Registers Iceland. The Court's review of ESA's assessment in this regard is limited as stated in paragraph 64 above.

90 Iceland has a system established by law to evaluate the market price of properties. Pursuant to Article 1 of Act No 6/2001, all real property in the country shall be registered in the Real Property Register, operated by Registers Iceland. According to Article 27 of Act No 6/2001, Registers Iceland is obliged to evaluate and register the market price of properties in Iceland.

91 The applicant argues, first, that the purpose of the valuation carried out by Registers Iceland is to determine the likely value of a property for tax purposes, and that the private investor test cannot rely solely on that valuation.

92 It is true that valuation in the context of a tax audit does not necessarily show the market value of land (see, for comparison, Case C-290/07 P *Commission* v *Scott* [2010] ECR I-7763, paragraph 97). However, in an email of 13 May 2012, the Icelandic authorities themselves confirmed that, as a matter of Icelandic practice, the valuation for taxation purposes is generally understood to reflect the market rate.

93 Second, the applicant argues that, in the contested decision, reference is made to an amended version of Act No 6/2001, which had not entered into force at the time of the conclusion of the agreement.

94 The question whether a measure constitutes aid within the meaning of Article 61(1) EEA must be resolved having regard to the situation existing at the time when the measure was implemented. As regards a sale by public authorities of land or buildings to an undertaking involved in an economic activity, the relevant time for assessing the existence of State aid must, in principle, be the time when the sale was carried out (see *Asker Brygge* v *ESA*, cited above, paragraphs 62 and 63, and the case law cited).

95 As to whether ESA committed a manifest error of assessment by relying on the valuations by Registers Iceland of the properties in question, the Court notes that, in order to establish that ESA committed a manifest error in assessing the market value of the buildings in question, the evidence adduced by the applicant must be sufficient to make the factual assessments used in the decision implausible (see, to that effect, *Hurtigruten and Norway* v *ESA*, cited above, paragraph 156, and the case law cited).

96 The fact that, in its description of national law in the contested decision, ESA referred to a version of Article 27 of Act No

6/2001 which was not in force at the time of the sale does not in itself make ESA's assessment implausible. The amendments only concerned the reference month of the valuation, which was changed from November to February, and a possibility, when the going price is unknown, to take account of the potential revenue of similar properties.

97 The applicant's third argument is that, in the contested decision, ESA incorrectly assumed that Registers Iceland conducted the valuation of the five buildings on the basis of previous sales contracts. Instead, Registers Iceland applied the cost method, that is to say the costs of replacing a building as new.

98 However, there is nothing to suggest that ESA assumed Registers Iceland's valuations of the buildings in question to be based on previous sales contracts. In the contested decision, both valuation methods of Registers Iceland are mentioned when the valuation procedure is described in a general manner in paragraphs 137 to 142. Nothing is said or indicated as to which method was used by Registers Iceland when assessing the value of the five buildings in question.

99 Finally, the applicant claims that ESA should have collected further information on the cost of altering the buildings, and that ESA should have considered the economic advantage in selling a group of properties and not simply a single property.

100 This argument must also be rejected. To the extent that the applicant relies, in support of its application, on information which was not available at the time when the contested decision was adopted or was not brought to ESA's attention during the procedure under Part II of Protocol 3 SCA, it must be recalled that in an action for annulment based on Article 36 SCA the lawfulness of the measure concerned must be assessed in the light of the matters of fact and of law existing at the time when that measure was adopted (see, for comparison, Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7, and Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 81).

101 An EEA/EFTA State therefore cannot rely before the Court on matters of fact which were not put forward in the course of the pre-litigation procedure laid down in Part II of Protocol 3 SCA (see, to that effect, Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 31, and Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraphs 49 and 76).

102 During the formal investigation procedure, the Icelandic authorities did not provide any information to suggest that the valuation by Registers Iceland of the five buildings in question was not appropriate. Moreover, the valuation of the buildings could have been challenged pursuant to Article 31 of Act No 6/2001. Such a challenge did not take place.

103 Thus, ESA did not make a manifest error of assessment when it determined the market value of the five buildings in question by relying on the valuations issued by Registers Iceland.

104 Consequently, also the second part of the first plea must be rejected.

The first part of the second plea: Failure to duly investigate the case

Arguments of the parties and the other participants in the proceedings

105 The applicant submits that ESA did not carry out a diligent and impartial examination of the case. It neglected to investigate whether KADECO carried out an open and unconditional bidding procedure or a procedure comparable thereto. In its view, the defendant committed manifest errors in its assessment whether State aid was involved and those manifest errors demonstrate that ESA did not carry out a diligent and impartial investigation, as required by the principle of sound administration.

106 Iceland notes that the possible presence of State aid in relation to the sale of real estate to Verne was first mentioned by ESA on 3 November 2010 in the decision to open the formal investigation procedure. That procedure resulted from the notification of the 2009 investment agreement. The decision mentioned briefly that

ESA lacked evidence to assess whether the real estate purchase agreement complied with the market investor principle.

107 On 28 February and 21 June 2011, the applicant submitted information to ESA on the sale of the buildings. It asserts that the defendant never raised questions or asked for additional material during its investigations. The applicant contends that it repeatedly asked for the opportunity to submit further comments during the formal investigation procedure, but that it was not invited to do so before the contested decision was adopted.

108 Although it follows from the duty of loyal co-operation that it is for the national authorities to provide all relevant information to ESA during a State aid investigation, the principle of sound administration entails that the situation must shift when of its own accord ESA gathers information and starts looking into new avenues in a case. Consequently, according to Iceland, when ESA sought to base its findings on information or evidence other than that provided by the applicant, such as the valuations of Registers Iceland, ESA should have afforded the Icelandic authorities the opportunity to submit comments.

109 The applicant also argues that ESA was required to continue its investigation by requesting further information by formal or informal means, or by issuing a formal order in accordance with Article 10(3) of Part II of Protocol 3 SCA, requesting all necessary information.

110 ESA, supported by the Commission, rejects the applicant's assertions. According to ESA, the applicant's pleadings include nothing to substantiate the allegation that the investigation was not impartial. This plea is therefore not sufficiently clear and precise to enable ESA to prepare a defence and for the Court to give a ruling. Accordingly, this plea must be dismissed as inadmissible.

111 ESA rejects the argument that the investigation was not diligent. The decision to open the formal investigation procedure repeatedly addressed whether the real estate purchase agreement complied with the requirements of the market economy investor test.

112 The Icelandic authorities were also expressly invited to provide the necessary information to assess whether the real estate purchase agreement entailed State aid or not. Indeed, as the applicant itself submits, in its response to the opening decision, it provided ESA in a letter of 28 February 2011 with detailed information on KADECO's sale of five buildings to Verne. In a letter of 21 June 2011, the applicant provided ESA with an overview of KADECO's sales procedure. Finally, in an email of 13 May 2012, the Icelandic authorities stated that they could not see what other information needed to be provided.

113 According to ESA, it is only if the EEA State concerned does not comply with an information request, or if it provides incomplete information, that ESA may proceed to issue an information injunction. In the present case, the applicant replied and ESA had no reason to consider the information incomplete or incorrect.

114 In the Commission's view, the applicant knew that it was uncertain whether the contested sale complied with the market economy investor test and, in addition, should have been aware of the two methods to exclude the presence of State aid set out in the Land Sale Guidelines. Thus, if the applicant was intending to rely on the bidding procedure method, it was clearly its responsibility to provide ESA with sufficient information to support such a claim during the formal investigation. Moreover, in an email of 13 May 2012, the applicant itself declared that it did not see what other information needed to be provided with a view to determining the market value for the properties. According to the Commission, therefore, ESA was entitled to consider the information made available to it complete and was under no obligation to adopt any information injunction.

Findings of the Court

115 The applicant's argument that ESA's investigation was not impartial must be rejected outright. It is based on an assertion that ESA committed manifest errors in its assessment as to the

existence of State aid. However, the Court has already found that ESA did not commit any errors in this assessment which must lead to annulment.

116 Iceland argues that ESA's investigation was not diligent, because it should have requested further information. ESA should have afforded the Icelandic authorities the opportunity to submit comments were it to base its findings on information or evidence other than that provided by the applicant.

117 In the interest of sound administration of the fundamental rules of the EEA Agreement relating to State aid, ESA is required to conduct a diligent and impartial examination of the contested measures. When adopting its final decision, ESA will then have complete and reliable information for its purpose (see, for comparison, *Commission* v *Scott*, cited above, paragraph 90).

118 Moreover, as regards the sale of land and buildings by public authorities, ESA must examine all the relevant features of the transaction at issue and its context, particularly in applying the market investor test (see *Asker Brygge* v *ESA*, cited above, paragraph 90, and the case law cited).

119 In cases concerning an examination of alleged unlawful aid, pursuant to the second paragraph of Article 10(1) of Part II of Protocol 3 SCA, ESA shall, if necessary, request information from the EEA State concerned. Furthermore, under Article 2(2) of Part II of Protocol 3 SCA, the EEA State concerned shall provide all information necessary to enable ESA to take a decision. According to Article 5(1) and (2) of Part II of Protocol 3 SCA, ESA shall request additional information if it considers that the information provided by the EEA State is incomplete. Only if the EEA State does not comply with a reminder shall ESA issue an information injunction under Article 10(3) of Part II of Protocol 3 SCA (see, *Asker Brygge* v *ESA*, paragraphs 86 to 89, and *Hurtigruten and Norway* v *ESA*, paragraphs 268 to 271, both cited above).

120 In the present case, the decision to open the formal investigation procedure clearly showed that, in ESA's view, the Icelandic

authorities had not submitted sufficient evidence to assess whether the real estate purchase agreement complied with the requirements of the market investor principle. The decision also mentioned, albeit in the context of a municipal property tax, the valuations made by Registers Iceland, and their legal basis. Furthermore, the opening decision invited the Icelandic authorities to provide ESA with all necessary information. In letters of 28 February and 21 June 2011, the Icelandic authorities provided ESA with general and detailed information on the procedure used for the sale of the five buildings. In an email of 13 May 2012, the Icelandic authorities stated that they could not see what other information needed to be provided.

121 Consequently, the Icelandic authorities were aware that ESA needed more information to consider whether the real estate purchase agreement entailed State aid. They must also have been aware of the two possibilities in the Land Sale Guidelines to automatically exclude the existence of State aid, and of the fact that if, in ESA's view, the requirements in this respect were not fulfilled, ESA would have to assess the market value of the five buildings. Also, the Icelandic authorities knew that ESA was aware of Registers Iceland's assessment of the market value of the five buildings.

122 In these circumstances, ESA was entitled to consider the information made available to it complete and correct. It cannot be complained that ESA failed to take into account matters of fact or of law which were not submitted to it during the administrative procedure. ESA is under no obligation to consider of its own motion and on the basis of prediction what information might have been submitted to it (see, for comparison, Case T-489/11 *Rousse Industry* v *Commission*, judgment of 20 March 2013, not yet reported, paragraph 33, and the case law cited). Accordingly, ESA was in a position to make a definitive assessment as to the existence of State aid on the basis of the information available to it. There was therefore no need to require Iceland in an information injunction to clarify further the factual information before adopting the contested decision (see *Asker Brygge* v *ESA*,

cited above, paragraph 93, and the case law cited). The first part of the second plea must therefore be rejected.

The second part of the second plea: Failure to state reasons

Arguments of the parties and the other participants in the proceedings

123 In the applicant's view, ESA failed to state any reason for concluding that the sales procedure adopted by KADECO did not qualify as a bidding procedure within the meaning of the Land Sale Guidelines.

124 ESA's examination of the sales procedure merely contains references to the annual report and the performance audit report issued by the Icelandic National Audit Office and KADECO's sale advertisements. However, ESA does not attempt to analyse or draw any conclusions on the basis of its references or available evidence to substantiate its reasoning why the sales procedure adopted by KADECO does not qualify as a proper bidding procedure within the meaning of the Land Sale Guidelines.

125 According to the applicant, the reasoning in paragraphs 98, 99 and 119 of the contested decision regarding the effect on trade and distortion of competition is deficient. A general reasoning based on the reaffirmation of principles laid down in settled case law cannot by itself be considered to satisfy the requirement to state reasons. ESA must consider whether the aid is capable of strengthening the position of an undertaking, compared to other undertakings competing in EEA trade.

126 ESA disagrees, and observes that paragraph 114 of the contested decision states that there was no "sufficiently well-published, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid". Paragraphs 115 to 122 of the contested decision then demonstrate that no other comparable procedure applied. In particular, paragraphs 119 to 121 demonstrate that only very few buildings were advertised specifically. Moreover, paragraph 121 shows that the bid by Atlantic, which was rejected, entailed a square metre price clearly higher than that paid by Verne.

127 As regards the reasoning concerning effect on trade and distortion of competition, ESA submits, first, that neither paragraphs 98 and 99 nor paragraph 119 of the contested decision concern that issue. The effect on trade and distortion of competition are addressed in paragraph 109, pointing to the fact that Verne intends to operate a global wholesale data centre where the service will be available to customers across the EEA. In ESA's view, paragraph 109 must also be read in light of the fuller reasoning in paragraphs 102 and 103.

128 The Commission supports ESA's arguments. In essence, the Commission considers that, although the decision is reasoned in a concise manner, it enables the interested parties and the Court to understand the reasons underlying ESA's decision, and thus for the Court to review its legality.

Findings of the Court

129 The statement of reasons required by Article 16 SCA must be appropriate to the measure at issue. It must disclose in a clear and unequivocal fashion the reasoning followed by ESA. The duty has two purposes: to allow interested parties to know the justification for the measure so as to enable them to protect their rights and to enable the Court to exercise its power to review the legality of the decision (see, for example, *Hurtigruten and Norway* v *ESA*, cited above, paragraph 252, and the case law cited).

130 The statement of reasons must be adapted to the circumstances of each case. In particular, the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations, must be emphasised. It is not a requirement for the reasoning to go into all the relevant facts and points of law. Whether the statement of reasons meets the requirements of Article 16 SCA must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, for example, *Hurtigruten and Norway* v *ESA*, cited above, paragraph 254, and the case law cited).

131 The applicant argues that ESA failed to sufficiently state reasons with regard to its examination of the sales procedure, and the effect on trade and distortion of competition.

132 First, ESA's examination of the sales procedure has been contested also on a substantive level by the applicant. It is clear from the Court's assessment of the first part of the first plea that even though the contested decision is drafted in a brief manner in this regard, it has permitted the applicant to safeguard its rights and enabled the Court to exercise its power of review.

133 Second, the reasoning concerning effect on trade and distortion of competition has not been contested in substance by the applicant. There is therefore a need to assess whether that reasoning satisfies the requirements of Article 16 SCA.

134 In this regard, the very circumstances in which aid is granted may be sufficient to show that the aid is capable of affecting trade between Contracting Parties and of distorting or threatening to distort competition. In such situations, ESA must nevertheless set out those circumstances in the statement of reasons (see, for comparison, Case T-171/02 *Regione autonoma della Sardegna* v *Commission* [2005] ECR II-2123, paragraph 74).

135 In paragraph 109 of the contested decision, ESA points to the fact that Verne intends to operate a global wholesale data centre where the service will be available to customers within the EEA and the world market. This must also be read in light of the general statement on effect on trade and distortion of competition in paragraph 102, concerning the agreement on Licensing and Charges.

136 It was thus not impossible for the applicant to identify the facts set out by ESA in the contested decision on the effects or possible effects on trade between Contracting Parties and on competition. The reasoning must therefore be considered adequate for the purposes of Article 16 SCA.

137 In the light of the foregoing, also the second part of the second plea must be rejected. Consequently, the application must be dismissed in its entirety.

VI COSTS

138 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. ESA has asked for the applicant to be ordered to pay the costs. Since Iceland has been unsuccessful in its application, it must be ordered to pay the costs. The costs incurred by the Danish Government and the Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application.**

2. **Orders the applicant to pay the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 22 July 2013.

Magnus Schmauch — Acting Registrar

Carl Baudenbacher — President

REPORT FOR THE HEARING

in Case E-9/12

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

Iceland

and

EFTA Surveillance Authority

seeking partial annulment of the EFTA Surveillance Authority's Decision No 261/12/COL of 4 July 2012 concerning municipal tax measures, the sale of real estate and the sale of electricity to Verne Holdings ehf.

I INTRODUCTION

1. On 4 July 2012, the EFTA Surveillance Authority ("ESA" or "the defendant") adopted Decision No 261/12/COL ("the contested decision"). In Article 5 of the contested decision, ESA held that the sale of five buildings to Verne Real Estate ehf. entails State aid incompatible with the EEA Agreement. By Article 6 of the contested decision, ESA ordered the Icelandic authorities to recover the aid granted through the sale.

2. By its application, Iceland ("the applicant") seeks a partial annulment of the contested decision. It claims that the Court should annul Article 5 of the contested decision and declare Article 6 partially void.

3. The application is based on two pleas in law. First, the applicant argues that ESA misapplied Article 61(1) EEA as it failed to demonstrate that the relevant buildings were sold below their market value, partly by not analysing the bidding procedure held, and partly by erring in the assessment of the market value of the buildings. Second, the applicant argues that ESA failed to duly investigate the case and to state reasons.

II FACTS

Background

4. Between 1951 and 2006, United States ("US") armed forces were deployed in the area situated next to Keflavik International Airport under the terms of the 1951 Bilateral Defense Agreement between Iceland and the United States of America. Under the terms of that agreement, Iceland was to acquire land in the area and permit the US Navy to use it without compensation.

5. In September 2006, the US Navy left Iceland and handed over the area and its constructions, ranging from residential buildings to large warehouses, to the Icelandic State. Subsequently, a specific body, Keflavík Airport Development Corporation (Þróunarfélag Keflavíkur ehf.) ("KADECO"), fully owned by the Icelandic State, was established to develop, administer and to sell/let real estate within the area on behalf of the State.

6. On 26 February 2008, Verne Real Estate ehf. ("Verne") agreed to buy five of the buildings from the Icelandic Treasury. The purchase price was USD 14 500 000, comprising a deposit of USD 25 000, paid on 26 February 2008, and the closing payment paid on 26 March 2008. Transfer of the title was signed on 9 May 2008.

7. The five buildings purchased were:

   1) Building No 868, NATO warehouse/supply building, 11 064 m2
   2) Building No 869, "Navy Exchange" warehouse, 16 606 m2
   3) Building No 872, warehouse/cold storage, 1 009 m2
   4) Building No 866, warehouse, 782 m2
   5) Building No 864, electrical power plant, 1547 m2.

8. ESA's formal investigation procedure arose in the context of an investment agreement initiated on 23 October 2009 between Verne and the Icelandic authorities concerning the establishment of a data centre in the municipality of Reykjanesbær. On 1 September 2010, the investment agreement was notified to ESA

pursuant to Article 1(3) of Part I of Protocol 3 to the Surveillance and Court Agreement ("Protocol 3 SCA").

9. By letter of 3 November 2010, ESA informed the Icelandic authorities that it had decided to initiate the formal investigation procedure (Decision No 418/10/COL).

10. On 23 September 2011, the investment agreement was officially cancelled. By letter of 28 September 2011, the notification was withdrawn. However, ESA continued its investigation of the other agreements between the Icelandic State and Verne.

The contested decision

11. On 4 July 2012, ESA adopted the contested decision, where it found, *inter alia*, that the agreements concerning (i) the sale of real estate to, and (ii) municipal tax measures in favour of, Verne entailed State aid incompatible with the EEA Agreement.

12. As regards the sale of real estate, ESA found, first, that KADECO had not followed an open and unconditional bidding procedure within the meaning of the State Aid Guidelines on elements of State aid in sales of land and buildings by public authorities ("State Aid Guidelines") or a procedure comparable to a bidding procedure. Therefore, the possibility could not be excluded that Verne had been provided with State aid. ESA stressed that only one building (No 869) was advertised specifically in various newspapers in Iceland. Other than that, regular advertisements were published with reference to KADECO and its homepage, calling for ideas for development in the area.

13. ESA noted that one bid was received for building 869, submitted on 23 April 2007 by Atlantic Film Studios ("Atlantic"). It offered a square metre price of ISK 35 000. Given the estimate of the size of building 869 at the time, 13 000 m2, this represented a bid price of ISK 455 000 000. In addition, Atlantic offered to pay ISK 15 000 000 for an asphalted area outside building 869. The contested decision states that, according to the explanations given by the Icelandic authorities, this offer was rejected.

14. ESA then assessed whether aid could be excluded on the basis of an independent expert evaluation. It concluded that the valuation conducted on 23 April 2007 by a local real estate agent concerning building 869 could not be regarded as representative of the square metre price. Consequently, the valuation could not constitute an independent expert valuation within the meaning of the State Aid Guidelines in relation to all five buildings sold to Verne. ESA noted that the valuation only concerned one of the relevant buildings, had taken place 10 months prior to the sale of the real estate to Verne, and finally, it was questionable whether the valuation had been based on generally accepted market indicators and valuation standards.

15. Given that neither of the procedures to exclude automatically the existence of State aid was applicable, ESA concluded that the most reliable determination of the market value of the real estate at hand was provided by the annual value assessment of all civil real estate on Iceland. This assessment is carried out by Registers Iceland (Þjóðskrá Íslands), a central independent authority in Iceland.

16. The contested decision states that, at the time of the purchase of the five buildings by Verne, Registers Iceland valued the buildings as follows:

    1) Building No 868: ISK 452 050 000

    2) Building No 869: ISK 578 550 000

    3) Building No 872: ISK 52 700 000

    4) Building No 866: ISK 23 650 000

    5) Building No 864: ISK 70 900 000.

    According to Registers Iceland, the value of the five buildings at the time of the purchase was in sum ISK 1 177 850 000.

17. According to the contested decision, the purchase price of USD 14 500 000 corresponded to ISK 957 000 000, or a square metre price of ISK 31 000.

18. Consequently, ESA held that State aid had been granted by the Icelandic State when the real estate purchase agreement was entered into, as the purchase price was below the market value of the buildings as determined by Registers Iceland. ESA held the aid amount granted as ISK 220 850 000, reflecting the difference between the market value and the purchase price.

19. ESA dismissed the possibility that the aid could be considered lawful pursuant to Article 61(3)(c) EEA and the Regional Aid Guidelines. According to ESA, the aid granted was not connected to a specific investment project. Furthermore, the aid had not been awarded on condition that the investment project was maintained for a minimum of five years after it had been completed, as required under the Regional Aid Guidelines.

III PROCEDURE AND FORMS OF ORDER SOUGHT BY THE PARTIES

20. By application registered at the Court on 7 September 2012, the applicant lodged the present action. ESA submitted a statement of defence, which was registered at the Court on 23 November 2012. The reply from Iceland was registered at the Court on 16 January 2013. The rejoinder from ESA was registered at the Court on 18 February 2013.

21. The applicant, Iceland, requests the Court to declare that:

    (1) Article 5 of the EFTA Surveillance Authority Decision No 261/12/COL of 4 July 2012 concerning municipal tax measures, the sale of real estate and the sale of electricity to Verne Holdings ehf. is annulled;

    (2) Article 6 of the EFTA Surveillance Authority Decision No 261/12/COL of 4 July 2012 concerning municipal tax measures, the sale of real estate and the sale of electricity to Verne Holdings ehf. is void as concerns the reference to Article 5; and

    (3) the EFTA Surveillance Authority is ordered to pay the full legal costs.

22. ESA claims that the Court should:

    (1) dismiss the application;

    (2) order the applicant to bear the costs.

IV LEGAL BACKGROUND

EEA law

23. 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 the Contracting Parties, be incompatible with the functioning of this Agreement.*
>
> *...*
>
> *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.*

24. Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads as follows:

> *Decisions of the EFTA Surveillance Authority shall state the reasons on which they are based.*

25. Article 1(3) of Part I of Protocol 3 SCA reads:

> *The EFTA Surveillance Authority shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it*

considers that any such plan is not compatible with the functioning of the EEA Agreement having regard to Article 61 of the EEA Agreement, it shall without delay initiate the procedure provided for in paragraph 2. The State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

26. Article 5 of Part II of Protocol 3 SCA reads as follows:

1. Where the EFTA Surveillance Authority considers that information provided by the EFTA State concerned with regard to a measure notified pursuant to Article 2 of this Chapter is incomplete, it shall request all necessary additional information. Where an EFTA State responds to such a request, the EFTA Surveillance Authority shall inform the EFTA State of the receipt of the response.

2. Where the EFTA State concerned does not provide the information requested within the period prescribed by the EFTA Surveillance Authority or provides incomplete information, the EFTA Surveillance Authority shall send a reminder, allowing an appropriate additional period within which the information shall be provided.

3. The notification shall be deemed to be withdrawn if the requested information is not provided within the prescribed period, unless before the expiry of that period, either the period has been extended with the consent of both the EFTA Surveillance Authority and the EFTA State concerned, or the EFTA State concerned, in a duly reasoned statement, informs the EFTA Surveillance Authority that it considers the notification to be complete because the additional information requested is not available or has already been provided. In that case, the period referred to in Article 4(5) of this Chapter shall begin on the day following receipt of the statement. If the notification is deemed to be withdrawn, the EFTA Surveillance Authority shall inform the EFTA State thereof.

National law[1]

27. Article 1 of Act No 6/2001 on the Registration and Assessment of Real Property ("Act No 6/2001") reads as follows:

Registers Iceland supervises the management of the registration of real property according to this Act as well as the operation of data and information system, named the Register of Real Property, on a computerised basis.

All real property in the country shall be registered in the Real Property Register. The core of the Real Property Register contains information on land and lots, the coordinates of their borders, structures thereon and rights pertaining thereto. The Register of Real Property is the basis for the Titleholder Register of Real Property, the assessment of real property and the building register of Registers Iceland and shall be so organised as to be a database for land information systems. The history of changes in the registration of a real property shall be kept in the Real Property Register.

28. Article 27 of Act No 6/2001, before the entry into force of amendments on 1 January 2009, read as follows:

The registered valuation of real estate shall be the going price, converted into cash, which it can be assumed that the property would have traded for in the month of November preceding the valuation, based on authorized use and potential use of the property at the given time.

If such going price of comparable properties is not known, the registered value shall be determined on the basis of the best available knowledge of comparable going price taking into account the cost of constructing buildings, their age, position with regard to transportation, exploitation potentials, perquisites [facilities], soil type, vegetation, landscape and other elements which may influence the going price of the property.

...

[1] Translations of national law are unofficial, and based on translations in the documents of the case.

29. Article 27 of Act No 6/2001, as amended by Act No 83/2008 and in force from 1 January 2009, reads as follows:

The registered value of a real property shall be the going price converted to a cash basis, based on the permissible and possible use at each time that the property presumably had in purchases and sales in the month of February before the assessment [sic], and it should enter into effect in the period from 31 December to the end of February. If an assessment enters into effect in the period from 1 March to 20 December, it shall be based on the month of February next before the assessment, cf. Article 32 a.

If the going price of the real property is not known, the registered value shall be determined according to the best available knowledge of the market value of comparable properties with regard to income thereof, the cost of structures, their age, location with regard to communications, possibilities of use, perquisites, soil properties, vegetation, natural beauty and such other factors that may influence the market value of the property.

...

30. Article 8 of Regulation No 486/1978 on the registration of real property and real property assessment reads as follows:

1. The assessed value of a real property as a whole shall be the market price converted to a cash basis that is likely to be the going price in purchases and sales. In addition to the base price cf. Article 7 of this Regulation, regard shall mainly be had to the factors listed in paragraphs 2-6 of this Article.

...

3. Account shall be taken of income derived from a real property, its geographic location and relation to other real properties. Account shall also be taken of the location of the real property with respect to communications, business and entrepreneurial conditions and its use with respect to the general provisions of laws on building and zoning, the Road Act and any preservation legislation as well as the decisions of authorities concerned with such matters. No account shall be taken of special provisions on the maximum sale price of real properties.

4. The nature of the location of the real property shall be considered, economic developments in the area as well as the situation of business, communications, prospects for education, health services and any other services rendered by the public or private sectors [sic].

V WRITTEN PROCEDURE BEFORE THE COURT

31. Written arguments have been received from the parties:

- Iceland, represented by Jóhanna Bryndís Bjarnadóttir, Counsellor, acting as Agent, Haraldur Steinþórsson, Legal Officer, acting as Co-Agent, and Dóra Sif Tynes, Attorney at Law, acting as Counsel;
- ESA, represented by Xavier Lewis, Director, Auður Ýr Steinarsdóttir and Gjermund Mathisen, Officers, Department of Legal & Executive Affairs, acting as Agents.

32. 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 Danish Government, represented by Vibeke Pasternak Jørgensen and Maria Søndahl Wolff, Ministry of Foreign Affairs, acting as Agents;
- the European Commission ("the Commission"), represented by Davide Grespan and Paul-John Loewenthal, members of its Legal Service, acting as Agents.

VI SUMMARY OF THE PLEAS IN LAW AND ARGUMENTS

33. The applicant submits that the contested decision must be partially annulled. First, ESA has failed to demonstrate that the real property was sold below market value and that the sale resulted in an economic advantage for Verne. In Iceland's view, ESA did not analyse the bidding procedure held by KADECO correctly and erred in its assessment of market value.

34. Second, the applicant argues that ESA failed properly to investigate the case and state reasons for its decision. It argues that ESA should have made inquiries about the bidding procedure

used by KADECO with a view to assessing its compliance with the State Aid Guidelines. Furthermore, Iceland asserts that the defendant did not state its reasons for concluding that the procedure adopted by KADECO did not qualify as a bidding procedure within the meaning of Article 61(1) EEA.

First part of the first plea: Failure to demonstrate an economic advantage by not adequately analysing the bidding procedure held by KADECO

35. As regards the scope and nature of judicial review, the applicant submits that it is for the Court to carry out a full and comprehensive review as to whether a measure falls within the scope of Article 61(1) EEA. As regards the burden of proof, it is for the defendant to demonstrate that the evidence contains all relevant information necessary to assess complex situations, and that the information can support the conclusions drawn from it.[2] The applicant further asserts that the examination of the bidding procedure by KADECO cannot be considered to fall within the scope of the discretionary powers enjoyed by ESA in the area of State aid. Consequently, the Court retains full competence to carry out a comprehensive review of ESA's assessment.

36. The applicant submits that ESA erred in its analysis of the bidding procedure by KADECO, disregarding the evidence made available during the investigation on how the sales process was carried out. In Iceland's view, ESA based its conclusions concerning the bidding procedure only on the arguments submitted by the Icelandic authorities, and a performance audit report dated 26 March 2008 on KADECO and the annual report for 2008, both issued by the Icelandic National Audit Office (Ríkisendurskoðun). Iceland alleges that the defendant offered no analysis or explanations to show how its conclusions could be based on those references and not on actual evidence.

37. Iceland contends that KADECO carried out a well-publicised, open, transparent and unconditional bidding procedure. At the

[2] Reference is made to Case T-244/08 *Konsum Nord ekonomisk förening* v *Commission*, judgment of 13 December 2011, not yet reported, paragraphs 37 and 38 and the case law cited.

very least, this procedure was comparable to the procedures referred to in the State Aid Guidelines. As a consequence, State aid can be excluded in the present case.

38. The applicant observes that point 2.1(a) of Part V of the State Aid Guidelines specifies that an offer which is repeatedly advertised over a reasonably long period (two months or more) in the national press, estate gazettes or other appropriate publications, so that it can come to the notice of all potential buyers, is considered to have been sufficiently well-publicised. It points out that KADECO widely and repeatedly advertised the sale of real property in various national newspapers, and on its website. This was done for a long period of time, with the first advertisement appearing on 17 and 18 March 2007.

39. Iceland indicates that, initially, every property was advertised specifically. However, many potential buyers were more interested in bidding on several properties together and not simply on individual properties. From June 2007, the advertisements included a general call for interest in purchasing property in the area in question. Potential buyers were directed to the KADECO website, where detailed information for each property was listed in both Icelandic and English.

40. Iceland notes that to ensure transparency of the bidding procedure, KADECO published all bids received on their website. This allowed potential buyers to view and compare bids.

41. The applicant stresses that the single criterion for winning the bidding procedure was offering the highest bid for either a single property or for a bundle of properties. If KADECO received more than one identical bid in relation to the same property, the bid which included the largest number of properties would be preferred.

42. The applicant contends that ESA has not demonstrated how KADECO could have organised its bidding procedure differently in order to get more bids or higher prices. A private party would not have used the same volume of resources as KADECO in order to

secure the highest possible bid. There is a concentrated market in Iceland for properties such as those at issue in the present case, and it is customary to use a far more restricted procedure.

43. In relation to the bids submitted, the applicant observes that, by March 2007, KADECO had received 34 bids for various properties in the area, providing them with an idea of the market price for the properties. KADECO had also obtained a valuation from a local real estate agent, who estimated, *inter alia*, the value of building 869 to be ISK 980 000 000. It stresses, however, that the existence of a valuation prior to a bidding procedure is irrelevant.[3] It observes, moreover, that the actual commercial bids submitted in response to the advertisements in March 2007 made it clear that the valuation by the real estate agent had been excessive. The excessive valuation was also confirmed by the fact that the bid for building 869 submitted on 23 April 2007 was ISK 455 000 000, which was less than half of the value estimated by the local real estate agent.

44. Iceland observes that, on 22 May 2007, KADECO accepted the offer by Atlantic Film Studios ("Atlantic") for building 869. Before the sale was finalised, Verne submitted a letter of intent, offering to buy five buildings for USD 15 000 000. Verne offered to pay USD 12 000 000 at the closing of the transaction, and USD 3 000 000 in three subsequent instalments over a period of four years. At this time, the properties continued to be advertised, as neither of the two possible purchase agreements had been finalised. Atlantic retracted its bid for building 869 on 3 October 2007 due to lack of funding. Therefore, KADECO formally rejected the bid. On 3 October 2007, Atlantic and KADECO concluded an agreement for the purchase of 12 buildings at the price of ISK 575 000 000. However, as Atlantic was incapable to fund also that second purchase, Atlantic did not purchase any property from KADECO. The applicant contends that during the formal investigation procedure the defendant did not request information on the bid by Atlantic or the reasons for the rejection of the bid.

[3] Reference is made to point 2.1 of Part V of the State Aid Guidelines.

45. Iceland notes that, on 26 February 2008, KADECO accepted the bid by Verne for the five buildings, as that bid was the only existing bid. The price offered was considered to reflect the market value of those properties. Accordingly, the real estate purchase agreement between Verne and KADECO was entered into on that day, with a final agreed price for the five buildings of USD 14 500 000. The reduction in price from USD 15 000 000 to 14 500 000 reflected the fact that Verne had committed to a payment schedule faster than outlined in the letter of intent. According to the payment terms of the real estate purchase agreement, Verne was to pay USD 25 000 on 26 February 2008 and the remaining sum of USD 14 475 000 on 26 March 2008. The amount was thus to be paid in full within a month and not over the course of four years, as initially proposed.

46. In conclusion, the applicant submits that the bidding procedure followed by KADECO fulfils the requirements set out in the State Aid Guidelines for open and unconditional bidding procedures, or, in the alternative, a procedure comparable to an open and unconditional bidding procedure.

47. It asserts, first, that KADECO's bidding procedure must be regarded as open and well-publicised, as advertisements for the properties, directing potential bidders to the KADECO website, were repeatedly published in leading national newspapers over the course of several months.

48. The applicant takes note of the fact that the contested decision refers to the performance audit report, wherein it is suggested that it would have been appropriate to advertise more of the buildings specifically. It underlines that each property indeed was advertised individually on the KADECO website, as was mentioned in the advertisements published in newspapers. Furthermore, Iceland asserts, given the technology of today, online advertising is the best way to reach out to as many potential bidders as possible, in particular when the website is published in English as well as in Icelandic. In fact, publication on the internet is the way to ensure that all potentially interested bidders have access. Iceland asserts that support for this view can be found in

existing and proposed EEA legislation on State aid,[4] and public procurement.[5] In adds, moreover, that the fact that all bids were published on the website for the first year of the bidding procedure ensured that the procedure was open and transparent.

49. In the reply, the applicant asserts further that where properties are sold *en masse*, as in the present case (with a total of 210 buildings), it is self-evident that the advertising of each individual property in a newspaper is not only administratively unmanageable, but is also not the best means of alerting all potential buyers of the intended sale. In contrast, a general call for interest in the press, coupled to a reference to a website which provides more detailed information, is not only administratively more manageable, but also has the potential to reach a far greater audience.

50. Second, Iceland asserts that the bidding procedure must be regarded as unconditional within the meaning of the State Aid Guidelines as no restrictions were imposed on bids or on bidders. The bidding procedure was based on accepting the best, or, where

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4 Reference is made, *inter alia*, to recital 33 in the preamble and Articles 87 and 88 of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (OJ 2008 L 214, p. 3) and to the Communication from the Commission, *European Union framework for State aid in the form of public service compensation* (2011) (OJ 2012 C 8, p 15), paragraph 60. Reference is also made to the draft EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, paragraph 67(c): "Member States shall ensure a sufficiently transparent process and a competitive outcome and shall use a dedicated central website at the national level to publish all on-going tender procedures on broadband State aid measures".

5 Reference is made to Article 15(3)(c) and the Annexes to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) and to Articles 33(3)(c) and 38(6) and the Annexes to 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). Reference is also made to Articles 33(4)(a) and 67(1) and the Annexes to the draft directive on procurement by entities operating in the water, energy, transport and postal services sectors set out in a 2011 Commission proposal (COM(2011) 895 final) and to Articles 19(4)(a) and (b), 51(1) and 58 and the Annexes to the draft directive on public procurement set out in a 2011 Commission proposal (COM(2011) 896 final). Reference is also made to the Commission's impact assessment in relation to the two proposed directives (SEC(2011) 185 final).

applicable, the only bid. The applicant submits that, following the cancellation on 3 October 2007 of Atlantic's bid for building 869, this was the procedure applied to the five buildings in question. As a consequence of that cancellation, the bid submitted by Verne was the only offer. Iceland observes further that even if account were to be taken of Atlantic's bid, the bid by Verne was higher and, consequently, the best bid offered for the buildings in question. As a result, the applicant asserts, Verne's bid must, by definition, be regarded as reflecting the market value.[6]

51. In its defence, ESA submits that the market economy investor principle and, consequently, the State Aid Guidelines were not complied with when KADECO sold the five buildings to Verne. It asserts that a private investor in similar circumstances would not have accepted the price paid by Verne for the buildings and would most likely also have used different methods when publicising the buildings for sale.

52. ESA maintains that no bidding procedure was organised. ESA therefore had to assess whether the sales procedure was substantially comparable to a bidding procedure within the meaning of the State Aid Guidelines. It found that it was not.

53. According to ESA, it was for the Icelandic authorities to demonstrate that the bidding procedure was unconditional, well-publicised and open, comparable to an auction, and that the buildings were sold at market price. Alternatively, the Icelandic authorities must demonstrate that the requirements of the market economy investor principle were fulfilled in some other way.

54. ESA contends that it repeatedly requested information from the Icelandic authorities over a long period of time. It received what it considered to be sufficient information in order to adopt a decision. Consequently, it had no reason to believe that the

[6] Reference is made to point 2.1 of Part V of the State Aid Guidelines, and Joined Cases T-268/08 and T-281/08 *Austria* v *Commission*, judgment of 28 February 2012, not yet reported, paragraph 70.

Icelandic authorities had not submitted all the information available during the investigation.

55. On the question of whether the real estate was sufficiently well-publicised, ESA contends that, according to point 2.1(a) of Part V of the State Aid Guidelines, the offer must be advertised repeatedly over a reasonably long period both in appropriate newspapers, estate gazettes or other publications as well as through real estate agents, nationally and internationally.

56. The defendant concedes that KADECO published some advertisements in national newspapers. A few of these referred to specific properties including building 869. No advertisements referred specifically to the other four buildings, 864, 866, 868 and 872. Moreover, most of the advertisements only contain a general text stating that KADECO sought new ideas on the use of the buildings as well as bids in relation to them. The advertisements further stated that more information on the properties was published on KADECO's website. The defendant asserts, however, that at no point has it been demonstrated that information on each specific building, including bids, was available online at the time.

57. According to ESA, the properties at the former US military base at Keflavík Airport have the potential to attract international investors. Consequently, pursuant to point 2.1(a) of Part V of the State Aid Guidelines, advertisements should have been published in publications that have a regular international circulation, and should also have been made known through agents addressing international clients. ESA submits that these requirements were not satisfied. In its view, the publication of information on KADECO's website in English cannot be considered sufficient as the public must be made aware of the existence of the information on the internet. In any event, it has not been demonstrated that information on the specific properties was in fact available on the website. In its view, a private seller would likely have been more focused on getting the attention of potential investors.

58. In its reply, Iceland submits that if ESA genuinely considered the use of agents crucial and, hence, shortcomings in this regard a decisive element in the setting aside of an otherwise well-publicised bidding procedure, the defendant was obliged to provide reasons to this effect in the contested decision. It chose not to do so. Accordingly, in the applicant's view, ESA has confirmed by its omission what is obvious to all, namely, that the State Aid Guidelines on the sale of land and buildings are outdated as regards the choice of optimal publication methods to the extent that technological developments generated by the internet are not taken into account.

59. ESA observes that, pursuant to point 2.1(b) of Part V of the State Aid Guidelines, an offer for sale is considered to be unconditional when any buyer is generally free to acquire the land and buildings and use it for his own purposes. In its view, the advertisements for specific properties imply that the procedure was not open and unconditional. Seemingly, KADECO could refuse an offer if the proposed use was not suitable.

60. In its reply, Iceland submits that, since ESA did not rely on this argument in the contested decision, it cannot rely on this ground in its defence before the Court. In any event, the applicant continues, it is incorrect to assert that KADECO could refuse an offer if the proposed use was not suitable. The advertisement stated that the ideas of potential bidders as regards the utilisation of the properties, together with the impact on the demand for other properties, would be considered. According to the applicant, this complies with the wording of point 2.1(b) of Part V of the State Aid Guidelines which suggests that conditions may be imposed for the prevention of public nuisance, for reasons of environmental protection or to avoid purely speculative bids.

61. Moreover, ESA continues, the information brought forward in the application that KADECO accepted Atlantic's offer for building 869 is new. During the investigation, ESA was informed that the offer had been rejected. Similarly, the information that Atlantic experienced financial difficulties in 2007 is also new. ESA submits that it did not ask the Icelandic authorities for

more information on the bid from Atlantic, as it had no reason to doubt that the information already submitted was correct and complete. An additional piece of new information, according to ESA, is the fact that on 3 August 2007 Verne submitted a letter of intent in which it offered to purchase buildings 868, 869 and 872 for USD 15 000 000.

62. ESA submits that even if the Icelandic authorities had proven that the bid from Verne was the highest bid received or the only bid, this would not be decisive as the bidding procedure was not unconditional within the meaning of the State Aid Guidelines. In any event, however, there was another offer for building 869, which was higher than Verne's bid. From the information in the application, it appears that the offer may have been withdrawn on 3 October 2007. In that connection, ESA considers it relevant that, as regards building 869, the letter of intent states that KADECO would "negotiate with the third party to recall the offer". In ESA's view, this new information strengthens the conclusion that the bidding procedure was not unconditional, as it implies that KADECO may have influenced the decision by Atlantic to withdraw its bid for building 869.

63. The applicant takes the view that, in any event, ESA erred in its calculation of the purchase price when converting the price from USD to ISK. The error lies in applying the conversion rate of 26 February 2008 to not only the USD 25 000 due on that date, but also to the remaining amount of USD 14 975 000. According to Iceland, the defendant should have converted the latter amount using the conversion rate of 26 March 2008 which was higher than that of 26 February 2008. Had the defendant applied the correct conversion rate, the total purchase price would have been reported as ISK 1 112 754 500 and not a total purchase price of ISK 957 000 000.

64. ESA rejects this assertion, submitting that State aid is granted on the date when a contract entailing aid is entered into and not when the aid is later disbursed. Therefore, the date of the real estate purchase agreement, 26 February 2008, is the correct date on which to base the calculation of the total purchase price of the

five buildings. It contends that case law supports the view that State aid is considered to be granted on the day when the right to receive the aid is conferred on the aid recipient.[7] Recital 10 in the preamble to the *de minimis* Regulation No 1998/2006 also states that "de minimis aid should be considered to be granted at the moment the legal right to receive the aid is conferred on the undertaking under the applicable national legal regime".[8] Also, ESA continues, even paragraph 95 of the application appears to support this conclusion, as it states that the question whether a measure constitutes State aid must be resolved having regard to the situation existing at the time when the measure was actually implemented, "in the case at hand by the conclusion of the real estate purchase agreement in February 2008".

65. The applicant contends that ESA erred when comparing the bids submitted by Verne and Atlantic. The contested decision states that the square metre price paid by Verne is ISK 4 000 lower than that offered by Atlantic. According to Iceland, the calculation of the price offered by Atlantic is based on building 869 alone, whereas the calculation of the square metre price paid by Verne is based on the total price paid for all five buildings. In its view, the bids made by Atlantic and Verne cannot be compared by calculating the square metre price as that would be tantamount to suggesting that KADECO and the potential buyers were precluded from taking account of the exact nature of each property or each group of properties offered for sale in the area. Furthermore, it would mean that KADECO could not use its commercial judgment to consider the economic advantages of selling several properties in one sale. This would be contrary to the private investor test inherent in the State Aid Guidelines.

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7 Reference is made to Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1275, paragraph 181, and Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 74. See also the reference to "the date when the sale agreement was entered into" in Case E-12/11 *Asker Brygge* v *ESA*, judgment of 17 August 2012, not yet reported, paragraph 64.

8 Reference is made to Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ 2006 L 379, p. 5).

66. Iceland argues that the defendant made an incorrect assumption in relation to the size of building 869. The applicant observes that in paragraph 121 of the contested decision ESA states that the bid by Atlantic was based on building 869 measuring 13 000 m2. However, in paragraphs 33 and 129 of the contested decision, the price paid by Verne is said to be based on building 869 measuring 16 606 m2. Consequently, the defendant's calculation and comparison of the square metre price in the two bids is based on two different property sizes.

67. In the view of the applicant, paragraph 33 of the contested decision confirms that the official size of building 869 is 16 606 m2. Should a comparison of the square metre price be deemed relevant, this must be calculated in accordance with the official size of the building. Under these circumstances, Iceland continues, the square metre price offered by Atlantic corresponds to approximately ISK 27 000. When compared with the square metre price paid by Verne, ISK 31 000, it follows that the square metre price offered by Atlantic was approximately ISK 3 600 lower than that paid by Verne. Consequently, this correct calculation of square metre price demonstrates that the bid by Verne was the highest bid.

68. Furthermore, the applicant asserts that were the square metre price paid by Verne to be calculated on the basis of building 869 measuring 13 000 m2, this would correspond to a square metre price of approximately ISK 35 000. This would at least be equivalent to the square metre price offered by Atlantic of ISK 35 000. In the view of the applicant, however, the bid submitted by Verne would still be the best bid, as it concerned a larger number of buildings.

69. ESA contests these assertions and submits that at the time when Atlantic made its bid, on 23 April 2007, the size of the building had not yet been established by Registers Iceland and it was simply estimated at 13 000 m2. It contends that Atlantic's bid was explicitly based on a square metre price of ISK 35 000, making the bid price for the building ISK 455 000 000. It explains that the comparison in the contested decision between the bids

of Atlantic and Verne was intended to provide further support for the argument that the square metre price Atlantic was willing to pay demonstrates that the price at which the property was sold to Verne 10 months later was below the market price.

70. The Danish Government submits that the Icelandic authorities carried out the sale of the real estate in accordance with the State Aid Guidelines, following a well-publicised, open and unconditional bidding procedure. Thus, the land and buildings were sold at market value, and the sale does not involve State aid within the meaning of Article 61(1) EEA.

71. According to the Danish Government, the fact that complete information on all five buildings was not given in the newspaper advertisements does not mean that the criterion of well-publicised is not met. The purpose of advertising the buildings is to make it known to potential bidders that the buildings are for sale. Once this is known to the potential bidders, a reference to further details available on the internet must be sufficient, as advertisements on the internet would in themselves meet the criteria.

72. The Danish Government contends that advertising on the internet is a natural consequence of technical developments and is the relevant way to communicate information at European or international level reaching out to potential buyers. Support for this view, it asserts, can be found in the latest proposal by the European Commission as a part of its State aid modernisation plan.[9]

73. In the view of the Danish Government, it must be kept in mind that the State Aid Guidelines do not replace Article 61(1) EEA. Consequently, it is important that the guidelines concerning the field outside the scope of competitive tendering procedures are

[9] Reference is made to recital 15 in the preamble and Article 1(2) and (3) of the proposed Council regulation to amend Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 (now 87 and 88 respectively) of the Treaty establishing the European Community to certain categories of horizontal State aid and Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road set out in a 2012 Commission proposal (COM(2012)730 final, 5 December 2012).

not given too narrow an interpretation. This must be the case in particular where the advertisement of the sale of real estate was indeed effected by publication.

74. The Danish Government contends further that the bidding procedure was unconditional. Any buyer could freely acquire the buildings and use these for his own purposes. KADECO's reservation of the right to take account, *inter alia*, of the utilisation of the properties must be considered to satisfy the State Aid Guidelines, as they specifically state that the unconditional nature of a procedure is not affected by restrictions imposed in order to prevent public nuisance or in accordance with urban or regional planning rules. Moreover, the procedure was open, as KADECO published all bids received on its website, which allowed all potential bidders to view and compare offers.

75. Finally, the Danish Government notes that the bid from Atlantic appears to have been withdrawn. In this case, it asserts, the bid from Verne was the only bid.

76. The European Commission submits, at the outset, that the examination of whether the contested sale of land conferred an advantage on Verne, that is, whether the price paid corresponds to the selling price which a private investor operating in normal competitive conditions would be likely to have fixed ("the market economy investor test"), requires ESA to make complex economic assessments.[10] The review of such is necessarily limited and confined to whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers.[11] In the present case, it is thus for the Court to determine whether ESA, on the basis of the information available to it, committed a manifest error of assessment in finding that the market value of the five buildings sold to Verne was higher than the price Verne actually paid.

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10 Reference is made to Case C-290/07 P *Commission* v *Scott* [2010] ECR I-7763, paragraph 68 and the case law cited.

11 Reference is made to *Konsum Nord ekonomisk förening* v *Commission*, cited above, paragraph 61 and the case law cited.

77. The Commission observes that there appears to be some discrepancy between the information provided to ESA before and during the formal investigation procedure and the facts put forward by Iceland in its application. In that regard, it stresses that the legality of a decision concerning State aid must be assessed in light of the information available to ESA when the decision was adopted, and that before the courts no party can rely on matters which were not put forward in the course of the preliminary investigation.[12]

78. Moreover, the Commission contends, in light of the applicant's general duty to cooperate with ESA, it should have provided all the information in its possession during the formal investigation stage to enable ESA to verify the existence of State aid.[13] Where this duty of cooperation has not been fulfilled, so that ESA only has a small amount of information at its disposal, it cannot be charged with having erred in its assessment on this point.[14] The Commission observes that the Icelandic authorities acknowledged, in an email of 14 May 2012 concerning the market value of the contested property, that they "did not see what other information need[ed] to be provided, for further comfort on this point". Consequently, ESA was entitled to consider that Iceland had no other relevant information at its disposal concerning the sales procedure.

79. In any event, even if account is taken of the information provided by Iceland in its application, the Commission takes the view that the procedure organised by KADECO for the contested sale does not meet the requirements of the State Aid Guidelines in terms of publicity and the absence of conditionality.

80. As regard publicity, the Commission observes that only one of the five buildings appears to have been advertised specifically. The

12 Reference is made to Cases C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraph 54 and the case law cited, and T-303/10 *Wam Industriale* v *Commission*, judgment of 27 September 2012, not yet reported, paragraph 120 and the case law cited.

13 Reference is made to Cases C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraph 20, and T-25/07 *Iride* v *Commission* [2009] ECR II-245, paragraph 100.

14 Reference is made to *Italy* v *Commission*, cited above, paragraphs 20 to 22, and Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraph 76.

applicant has not been able to demonstrate that information on other properties was in fact made available on its website or that the bids received for other properties were posted there. In the Commission's view, the call for expressions of interest published is too general in nature to constitute a sufficiently precise offer.

81. Moreover, the Commission continues, an offer needs not only to be advertised in the press or by other appropriate means, it must also be repeatedly advertised by real estate agents addressing a broad range of potential buyers. Having regard to the size and nature of the properties, it seems likely that they had the potential to attract the attention of investors operating on a Europe-wide or international scale. Consequently, according to the State Aid Guidelines, their intended sale should have been announced in international publications and made known through agents addressing clients on a Europe-wide or international scale. The Commission contends that the applicant has not demonstrated that this was done in the present case.

82. As regards conditionality, the Commission submits that if KADECO was entitled to refuse bids where the proposed use was not in line with what it had in mind, as the wording of the advertisements suggests, the "offer" in question does not fulfil the requirement for unconditionality.

83. The Commission contends that the applicant has given conflicting explanations as to whether Atlantic's bid for building 869 was withdrawn, rejected or cancelled. According to the Commission, from the information available to ESA at the time of adopting the contested decision, it appeared that the bid had been rejected, even though it was higher than what Verne had bid. If, however, the bid had been withdrawn, and that withdrawal was influenced by KADECO's desire to sell the five buildings as a package to Verne, that would equally call into question the applicant's claim that Verne's bid was the best and only bid. It would also undermine the claim that the bidding procedure was unconditional.

Second part of the first plea: Failure to demonstrate an economic advantage by erring in the assessment of market value as the basis for a finding of State aid

84. The applicant submits primarily that the market value of the five buildings should be defined on the basis of the open and unconditional bidding procedure adopted by KADECO, which excludes the presence of State aid. In the alternative, the applicant submits that the defendant incorrectly determined the market value of the buildings in question through its assumption, first, that the independent expert evaluation indicated that the price paid by Verne might have been below market value, and second, that the valuation carried out by Registers Iceland was the most reliable method available to determine the value of the properties purchased by Verne.

85. The applicant observes that the private investor test must be applied to determine whether the sale of land or buildings by public authorities to a private entity constitutes State aid.[15] In that connection, the frame of reference when comparing the conduct of public and private investors is the attitude which a private investor would have had at the time of conclusion of the agreement in question, having regard to the available information and foreseeable developments at that time.[16] The State Aid Guidelines are based on that same principle.[17]

86. Iceland submits that ESA must always examine all the relevant features of the transaction at issue and its context.[18] On the other hand, it is for the Court to carry out a full and comprehensive review as to whether the measure falls within the scope of Article 61(1) EEA.

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15 Reference is made to Cases C-239/09 *Seydaland* [2010] ECR I-13083, paragraph 34, and C-124/10 P *Commission* v *France*, judgment of 5 June 2012, not yet reported, paragraph 78, and *Commission* v *Scott*, cited above, paragraph 68.

16 Reference is made to *Asker Brygge* v *ESA*, cited above, paragraph 57.

17 Ibid.

18 Reference is made to *Asker Brygge* v *ESA*, paragraph 90, and *Konsum Nord ekonomisk förening* v *Commission*, paragraph 57, both cited above.

87. The applicant asserts that in the case at hand the defendant merely referred to the valuations of Registers Iceland in order to determine the market price and did not carry out a complex economic assessment. Consequently, it cannot be said to have enjoyed a wide discretion. Therefore, the Court may review whether the methodology in question can be relied upon for the purposes of determining the presence of State aid. In Iceland's view, the Court must assess whether the method of valuation adopted by Registers Iceland is appropriate for determining the market value of the relevant buildings.

88. The applicant submits that ESA made several analytical errors in concluding that the valuation by Registers Iceland represented the market value for the five buildings in question. The applicant submits, first, that the valuation of properties for the purposes of Act No 6/2001 is to determine the likely value of a property for tax purposes. The private investor test cannot rely solely on that valuation.[19] A remark regarding the use of the tax value to establish market value, made by the applicant in an email to ESA in a different context, cannot be used to confirm a conclusion on the definition of market value in the case at hand. Furthermore, Iceland asserts, the fact that Registers Iceland is an independent authority does not in and of itself demonstrate that its valuation corresponds to market value. In addition, the fact that Registers Iceland valuations can be challenged and appealed does not prove that the valuations correspond to a correct market value. The valuations issued by Registers Iceland are intended to be used for tax purposes, and the right to appeal should be viewed as a reflection of that purpose. The fact that the valuations by Registers Iceland were not disputed by KADECO or Verne should not be given any weight.

89. Second, the applicant submits that the assessment of whether State aid has been granted within the meaning of Article 61(1)

[19] Reference is made to *Commission* v *Scott*, cited above, paragraph 97, where, in the view of the applicant, the European Court of Justice implicitly upheld the Commission's concerns about relying on valuations for tax purposes, referred to at paragraph 82 of Case T-366/00 *Scott* v *Commission* [2007] ECR II-797.

EEA must take in to consideration the situation at the time when the measure actually was implemented,[20] in this case, February 2008, when the real estate purchase agreement was concluded. In conclusion, the applicant submits that the defendant incorrectly applied the State Aid Guidelines and Article 61(1) EEA by exclusively relying on the valuations by Registers Iceland.

90. The applicant observes that Act No 6/2001 governs the registration and valuation of properties in Iceland. The general purpose of the Act is to regulate the registered value of real estate in order to impose taxes and other fees on real estate. Registers Iceland is charged with maintaining an official register for such purposes. Article 27 of Act No 6/2001 specifies the methods to be adopted for the valuation. Regulation No 406/1978 supplements the Act. Article 27 of the Act was amended by Act No 83/2008, with the amendments entering into force on 1 January 2009. In the contested decision, reference is made to the Act as amended. In Iceland's view, the appropriate reference is the legislation in force at the time of the conclusion of the agreement.

91. The applicant notes that Registers Iceland applied the cost method in its valuation of the five buildings. This method is based on the costs of replacing a building as new, depreciated having regard to its age, eventual obsolescence, external and economic factors as well as its location. The other method available to Registers Iceland pursuant to Article 27 of Act No 6/2001 was the sales value method, based on the recorded sales values in the preceding year. In the view of the applicant, it appears from the contested decision that the defendant based its conclusion on the assumption that the valuation of properties by Registers Iceland in 2008 in the relevant area was based on previous sales contracts. However, Registers Iceland based its valuation on the cost method, which does not imply the use of previous sales contracts as a basis. Therefore, Iceland asserts, it is clear that the defendant

[20] Reference is made to *Asker Brygge* v *ESA*, cited above, paragraph 62.

has based its conclusion in the contested decision on a wholly incorrect assumption.

92. The applicant asserts that, when using the cost method, a locality index is applied to reflect the situation in the local market, as well as other economic and social factors in the area. Because the relevant area had not previously been included in the Registers Iceland valuations, no locality index had been established specifically for that area. Therefore, the locality index used in the valuation was estimated as the average of the index for nearby municipalities. Consequently, the applicant argues that the defendant erred in concluding in the contested decision that for the purposes of applying the private investor test the market value of real estate can be based exclusively on the valuation carried out by Registers Iceland.

93. Iceland maintains that there is an uncertainty attached to the valuation of the buildings in question. The private investor test is aimed at determining whether the purchase price could have been obtained by the purchaser under normal market conditions. The valuation by Registers Iceland cannot be relied on exclusively, although it may serve as a relevant factor. The applicant contends that ESA should have considered whether all relevant economic factors pertinent to the sale were reflected in the Registers Iceland valuation.[21] In the view of the applicant, this was not done.

94. Iceland observes, first, that the discontinuation of US military activity in September 2006 caused a local economic downturn and a great number of job losses. At the time when the buildings in question were put on the market, there was an increase in available commercial property in the municipality of approximately 50%. Consequently, according to Iceland, the increase in unemployment and in the number of sale properties made it difficult for Registers Iceland to properly estimate the value of the relevant buildings. In the view of the applicant, this is further underlined by the fact that there was no locality index for

[21] Ibid., paragraph 81.

the area at the time of valuation, in part because there were no records of previous sales.

95. Second, Iceland continues, as the properties were former military buildings, they had never been registered or put on the market before. In its view, the sheer number of buildings that had to be valued in a short time, the lack of data and the various different forms of property at issue, ranging from apartments to aircraft hangars, all imply that the initial valuation of the properties in the area should be considered with a great degree of caution, in particular when relying on those valuations for the purposes of the private investor test.

96. The applicant submits further that ESA erred in concluding that the real estate purchase agreement did not include any obligations that would represent an economic burden on Verne within the meaning of the State Aid Guidelines. It points out that, pursuant to clause 4 of the real estate purchase agreement, the costs of renovation and alterations on the properties would be borne by Verne.

97. The applicant claims that the defendant failed to collect further information on the cost of altering the buildings, or establish whether such costs were included in the valuation by Registers Iceland. The applicant asserts that ESA should have considered the alteration costs separately, as the cost method used by Registers Iceland is based on the calculation of replacement costs for a new building that conforms to all relevant building standards and regulations.

98. According to the applicant, converting the electric power network in the buildings from American to European standards costs ISK 10 000 per square metre. Consequently, the total valuation of the five buildings by Registers Iceland at ISK 1 177 850 000 should have been reduced by ISK 310 080 000 to ISK 867 770 000 to reflect the costs of converting the electric power network. In the alternative, those costs should have been added to the purchase price paid by Verne. In the view of the applicant,

this shows that the price paid by Verne exceeded the value of the buildings as established by Registers Iceland.

99. Moreover, the applicant contends that ESA should have considered the economic advantage in selling a group of properties and not simply a single property, which was not done. This should have been assessed on its own merits, reflecting the approach likely to be taken by a private investor.

100. The applicant submits that the bid by Atlantic and the independent expert opinion do not indicate that the price paid by Verne for the five buildings was below market value.

101. The applicant asserts that the amount bid by Atlantic was in fact lower than the price paid by Verne, and, consequently, that bid cannot serve as an indication that the price paid by Verne was below market value.

102. As for the independent expert opinion, the applicant observes that the valuation by a local real estate agent was obtained by KADECO for internal purposes. On 23 April 2007, the real estate agent estimated the value of building 869 to be ISK 980 000 000. However, the subsequent commercial bids submitted showed that the valuation by the real estate agent was excessive. Iceland stresses that it never suggested that the independent expert opinion was obtained in order to establish market value within the meaning of the State Aid Guidelines.

103. According to the applicant, there is an inherent conflict in the contested decision regarding the independent expert opinion. Although ESA held the independent expert opinion not to be reliable, in paragraphs 127 and 130 of the decision ESA used it as an indicator of market price. Moreover, pursuant to the State Aid Guidelines, independent expert valuations prior to an open and transparent tender procedure are irrelevant.[22]

104. Iceland asserts that further support for its argument may be found in paragraph 133 of the contested decision, which refers to

[22] Reference is made to *Austria* v *Commission*, cited above, paragraphs 70 and 71.

the performance audit report of 26 March 2008 by the Icelandic National Audit Office. This report indicates that real estate in the former US military area in general was sold at between 25% and 40% below the value estimated by independent experts in 2007. In Iceland's view, this shows, contrary to the assertion in paragraphs 130 and 135 of the contested decision, that the value estimated by the independent expert for building 869 could not serve as an indication that the market value was higher than the price paid by Verne for that building.

105. In conclusion, the applicant submits that the defendant incorrectly determined the market value of the five buildings in question by relying on the valuations issued by Registers Iceland on 31 December 2008. Consequently, the defendant incorrectly applied Article 61(1) EEA and the State Aid Guidelines.

106. ESA rejects Iceland's arguments and maintains that Verne received an economic advantage by means of the real estate purchase agreement. The properties at issue were sold to Verne at a price below market value, as demonstrated in the contested decision.

107. ESA submits that it follows from paragraphs 127, 130, 133 and 135 of the contested decision that the independent expert valuation was not used to *determine* the market value of the five buildings. As the valuation concerned only one, and not all five buildings, it is only referred to as *indicating* that the price paid might have been below the market price.

108. As regards the valuations by Registers Iceland, ESA submits that they are based on law and are commonly accepted and used in Iceland as the benchmark when the market price of a property must be established.

109. ESA submits that it examined thoroughly all the documents put forward by the Icelandic Government during the investigation. The most appropriate method to ascertain the market price was to use the valuations made by Registers Iceland. It concedes that in the case of other countries the valuation issued for tax purposes may not necessarily represent market value. However, Iceland

has a special system established by law to evaluate the market price of properties. ESA observes that, pursuant to Article 27 of Act No 6/2001, Registers Iceland is obliged to evaluate the market price of properties in Iceland. In its view, it cannot be inferred from Act No 6/2001 that the valuations are only issued for tax purposes. The tax authorities do not have any part in the valuation. Moreover, the explicit statement by the Icelandic authorities in an email that the valuation "is generally understood to reflect the market rate" further strengthens ESA's conclusion. ESA also emphasises the proportionality of its approach. It was more appropriate to rely on the valuation by Registers Iceland than on the (considerably higher) valuation of the independent expert provided by the Icelandic authorities.

110. According to ESA, the fact that it relied on the amended version of Article 27 of Act No 6/2001 is of no significance, since the amendments were not to the parts of the provision of relevance in the case at hand. The amendments made as regards the substance of the provision were two-fold: first, the reference month of the valuation was changed in the first paragraph from November to February. Second, the possibility, when the going price is unknown, to take account of the potential revenue of similar properties in the assessment of market price was added to the second paragraph. The explanatory memorandum to the legislative proposal for Act No 83/2008 confirms this understanding.

111. ESA submits that the Icelandic authorities did not provide any information during the formal investigation procedure to substantiate Iceland's contention that the valuation by Registers Iceland was not appropriate. Additionally, ESA observes, pursuant to Articles 31 and 34 of Act No 6/2001, Verne had the possibility to challenge the valuation but did not exercise that option.

112. ESA fails to see that any renovation and alteration costs for the five buildings at issue could be regarded as resulting from "special obligations" within the meaning of point 2.2(c) of Part V of the State Aid Guidelines. The fact that the buildings were sold "as is" does not alter this conclusion in any way.

113. As regards the argument that it should have considered the economic advantage entailed in the bid encompassing a bundle of properties, ESA observes that it follows from the letter of intent that Verne offered USD 15 000 000 for the largest three of the five buildings eventually sold. In its view, this demonstrates that the two smaller buildings were considered to be of little value. Moreover, in total, the five buildings together constitute only some 15% of the commercial real estate in the area.

114. ESA acknowledges that it follows from point 2.1.1 of Part V of the State Aid Guidelines that a valuation given by an independent expert prior to an open and transparent tender procedure is, in any case, irrelevant. It stresses, however, that this only applies if the property is sold pursuant to a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction. This was not the case with KADECO's sales procedure.

115. Therefore, ESA continues, the contested decision ascertained whether, in the alternative, the independent expert opinion could be used to automatically exclude State aid pursuant to point 2.2(a) of Part V of the State Aid Guidelines. However, since the valuation covered only one of the five buildings sold and was already 10 months old at the time of the sale, this was not possible.

116. According to ESA, this does not mean, however, that the valuation is without any indicative value when the market price of the five properties is established.

117. The Commission contends that ESA's reliance on the valuations produced by Registers Iceland does not imply that it failed to examine the contested sale in accordance with the market economy investor test. At the time of the contested decision, the valuations by Registers Iceland were the most reliable information available to ESA for determining the market value of the properties in question. In the view of the Commission, ESA did not commit a manifest error of assessment in relying on those valuations.

118. According to the Commission, the fact that the valuations made by Registers Iceland may also be used for tax purposes does not automatically discredit those valuations for the purpose of establishing the market value of the properties. Methods for land valuations laid down by law can be relied upon so long as it is assured that the value calculated on the basis of those methods reflects, in so far as possible, the market value of the land.[23] In that connection, the Commission notes that, in an email of 14 May 2012, the Icelandic authorities themselves confirmed that, as a matter of Icelandic practice, the valuation for tax purposes is generally understood to reflect the market rate.

The first part of the second plea: Failure to duly investigate the case

119. The applicant submits that ESA did not carry out a diligent and impartial examination of the case[24] and that it neglected to investigate whether KADECO carried out an open and unconditional bidding procedure or a procedure comparable thereto. In its view, the defendant committed manifest errors in its assessment whether State aid was involved and those manifest errors demonstrate that ESA did not carry out a diligent and impartial investigation.[25]

120. Iceland notes that the possible presence of State aid in relation to the sale of real estate to Verne was mentioned by ESA for the first time on 3 November 2010 in the decision to open the formal investigation procedure. That procedure resulted from the notification of the 2009 investment agreement. The decision mainly stated reasons whether the investment agreement constituted State aid and mentioned briefly that ESA lacked evidence to assess whether the real estate purchase agreement complied with the market investor principle.

121. On 28 February 2011 and 21 June 2011, the applicant submitted information to ESA on the sale of the buildings. It asserts that the

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23 Reference is made to *Seydaland*, cited above, paragraph 39.

24 Reference is made to *Commission* v *Scott*, cited above, paragraph 90 and the case law cited.

25 Ibid., paragraph 84.

defendant never raised questions or asked for additional material during its investigations. The applicant contends that it repeatedly asked for the opportunity to submit further comments during the formal investigation, but that it was not invited to provide more information or to comment on the assumptions of the defendant before the contested decision was adopted.

122. The applicant argues that ESA was required to continue its investigation by requesting further information by formal or informal means, or by issuing a formal order in accordance with Article 10(3) of Part II of Protocol 3 SCA, requesting all necessary information.

123. ESA rejects the applicant's assertions. According to ESA, the applicant's pleadings do not include anything to substantiate the allegation that the investigation was not impartial. This plea is therefore not sufficiently clear and precise to enable ESA to prepare a defence and for the Court to give a ruling, if necessary without other supporting information. Accordingly, this plea must be dismissed as inadmissible.[26]

124. According to ESA, the argument that the investigation was not diligent must be rejected. The decision to open the formal investigation procedure repeatedly addresses whether the real estate purchase agreement complies with the requirements of the market economy investor principle (points 1.1 and 1.2 on page 13, point 1.3 on page 15, and point 4 and Articles 2 and 3 of the operative part). It avers that the Icelandic authorities were also expressly invited to provide ESA with the necessary information to assess whether the Agreement entailed State aid or not. Indeed, as the applicant itself submits, in its response to the opening decision it provided ESA in a letter of 28 February 2011 with detailed information on KADECO's sale of five buildings to Verne. In a letter of 21 June 2011, the applicant provided ESA with an overview of KADECO's sales procedure. Finally, in an email of 13 May 2012, the

[26] Reference is made to Joined Cases E-10/11 and E-11/11 *Hurtigruten and Norway* v *ESA*, judgment of 8 October 2012, not yet reported, paragraphs 313 and 314.

Icelandic authorities stated that they could not see what other information needed to be provided.

125. In ESA's view, this demonstrates that the applicant was repeatedly requested to substantiate how the real estate purchase agreement complied with the market economy investor principle such as not to entail State aid. In that connection, it notes that the applicant replied to those requests.

126. According to ESA, it is only if the EEA State concerned does not comply with an information request, or if it provides incomplete information, that ESA may proceed to issue an information injunction.[27] In the present case, the applicant replied and ESA had no reason to consider the information incomplete.

127. In the Commission's view, the applicant knew that it was uncertain whether the contested sale complied with the market economy investor test and, in addition, should have been aware of the two methods to exclude the presence of State aid set out in the State Aid Guidelines. Thus, the Commission argues, if the applicant was intending to rely on the bidding procedure method, it was clearly its responsibility to provide ESA with sufficient information to support such a claim during the formal investigation. Moreover, in an email of 13 May 2012, the applicant itself declared that it did not see what other information needed to be provided in relation to determining the market value for the properties. According to the Commission, therefore, ESA was entitled to consider the information made available to it complete and was under no obligation to adopt any information injunction.

The second part of the second plea: Failure to state reasons

128. The applicant submits that the statement of reasons must show the reasoning followed by the institution that adopted the measure in a clear and unequivocal manner.[28] According to Article

[27] Ibid., paragraphs 270 and 271.

[28] Reference is made to Case T-1/08 *Buczek Automotive* v *Commission* [2011] ECR II-2107, paragraph 99 and the case law cited.

16 SCA, the statement of reasons must be appropriate to the measure at issue.[29] However, in the applicant's view, ESA failed to state any reason for concluding that the sales procedure adopted by KADECO did not qualify as a bidding procedure within the meaning of Article 61(1) EEA.

129. In the view of the applicant, the defendant's examination of the sales procedure merely contains references to the annual report and the performance audit report issued by the Icelandic National Audit Office and KADECO's sale advertisements. However, ESA does not attempt to analyse or draw any conclusions on the basis of its references or available evidence to substantiate its reasoning why the sales procedure adopted by KADECO does not qualify as a proper bidding procedure within the meaning of the State Aid Guidelines. In particular, Iceland continues, ESA has not identified which aspects of the bidding procedure called for the conclusion that the procedure did not qualify as open and unconditional within the meaning of the State Aid Guidelines. Moreover, it cannot be concluded simply from the rejection of Atlantic's bid that no bidding procedure had been conducted in accordance with the Guidelines, particularly given the fact that the very rejection of that bid meant that only Verne's bid remained.

130. According to the applicant, the reasoning in paragraphs 98 and 99 of the contested decision regarding the effect on trade and distortion of competition is deficient. A general reasoning based on the reaffirmation of principles laid down in settled case law cannot by itself be considered to satisfy the requirement to state reasons.[30] ESA must consider whether the aid is capable of strengthening the position of an undertaking, compared to other undertakings competing in EEA trade.[31]

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29 Reference is made to Cases E-2/94 *Scottish Salmon Growers* v *ESA* [1994-1995] EFTA Ct. Rep. 59, paragraph 25, and E-6/98 *Norway* v *ESA* [1999] EFTA Ct. Rep. 74, paragraph 68, and Joined Cases E-5/04 and E-7/04 *Fesil and Finnfjord and Others* [2005] EFTA Ct. Rep. 117, paragraph 96; and Joined Cases E-4/10, E-6/10 and E-7/10 *Liechtenstein and Others* v *ESA* [2011] EFTA Ct. Rep. 16, paragraph 171.

30 Reference is made to Case C-494/06 P *Commission* v *Italy and Wam* [2010] ECR I-3639, paragraph 59.

31 Reference is made to *Liechtenstein and Others* v *ESA*, cited above, paragraph 95.

131. The applicant observes that, in paragraph 119 of the contested decision, the defendant concludes, by reference to the intended operation of a wholesale data centre by Verne, that the measures at issue distort or have the potential to distort competition and affect trade between the Contracting Parties to the EEA Agreement. In the applicant's view, the nature of Verne's operations in isolation does not support the assertion that competition may be distorted and trade be affected when the subject of the examination is the purchase of real estate. It contends that even in cases where it is clear from the circumstances that State aid has been granted, and that it is liable to affect trade between Member States, ESA must at least set out those circumstances in the statement of reasons for its decision.[32]

132. ESA asserts that the reasoning of the contested decision is adequate.

133. ESA observes that paragraph 114 of the contested decision states that there was no "sufficiently well-published, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid". Paragraphs 115 to 122 of the contested decision then demonstrate that no other comparable procedure applied. In particular, paragraphs 119 to 121 demonstrate that only very few buildings were advertised specifically. Moreover, paragraph 121 shows that the bid by Atlantic, which was rejected, entailed a square metre price approximately 12.9% higher than that paid by Verne.

134. As regards the reasoning concerning effect on trade and distortion of competition, ESA submits, first, that neither paragraphs 98 and 99 nor paragraph 119 of the contested decision concern that issue. The effect on trade and distortion of competition are addressed in paragraph 109, pointing to the fact that Verne intends to operate a global wholesale data centre where the service will be available to customers across the EEA.

[32] Reference is made to *Buczek Automobile* v *Commission*, cited above, paragraphs 102 to 107 and the case law cited.

In ESA's view, paragraph 109 must also be read in light of the fuller reasoning in paragraphs 102 and 103.

135. In its rejoinder, ESA adds that, in its view, what Iceland appears to claim is that ESA would have decided differently, using different reasons, if ESA had considered the information that Iceland did not submit to it during the investigation. Iceland's plea thus challenges the substantive findings of the contested decision, not the adequacy of its statement of reasons.[33]

136. The Commission fully supports ESA's arguments. In essence, the Commission considers that, although the decision is reasoned in a concise manner, it enables the interested parties and the Court to understand the reasons underlying ESA's decision, and thus to review its legality.

Per Christiansen

Judge-Rapporteur

[33] Reference is made, *inter alia*, to Joined Cases T-494/08 to T-500/08 and T-509/08 *Ryanair* v *Commission* [2010] ECR II-5723, paragraphs 96 and 97.

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