REPORT of the EFTA Court 2012

Book 2

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REPORT of the EFTA Court 2012

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Foreword

The EFTA Court was set up under the Agreement on the European Economic Area (the EEA Agreement) of 2 May 1992. This was originally a treaty between, on the one hand, the European Communities and their then twelve Member States and, on the other hand, the EFTA States Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland. The treaty 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. 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. Since 1 August 2007, the EEA has consisted of the 27 Member States of the European Union 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 2012 and contains the decisions rendered during that period as well as an overview of other activities of the Court. The reader is referred to the first Report of the Court 1994-1995, for general information on the establishment of the Court, its jurisdiction, legal status and procedures.

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 translated to the language of the requesting national court. Both language versions are authentic and published in the Court Reports. When a case is published in two languages, the different language versions are published with corresponding page numbers to facilitate reference.

A collection of relevant legal texts for the EFTA Court, as amended, can be found in the booklet EFTA Court Texts (latest edition, September 2008). The booklet is available in English, German, Icelandic and Norwegian, and can be obtained from the Registry. All language versions of the texts can also be accessed on the EFTA Court website www.eftacourt.int.

The EFTA Court has also published a booklet entitled “Legal framework, case law and composition – 1994-2003”, which was republished in an updated form in November 2006 under the shorter title “Legal framework and case law”. The booklet was updated and published for the third time in July 2008. As the title indicates, the publication summarises the Court’s legal framework and its case law since 1994. In addition, it gives an account of the Court’s composition, including the former Members and Registrars of the Court. Its aim is to serve as a tool of information for those who take interest in European integration. The booklet can be obtained from the Registry, by request by e-mail to registry@eftacourt.int or accessed on the EFTA Court website www.eftacourt.int

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

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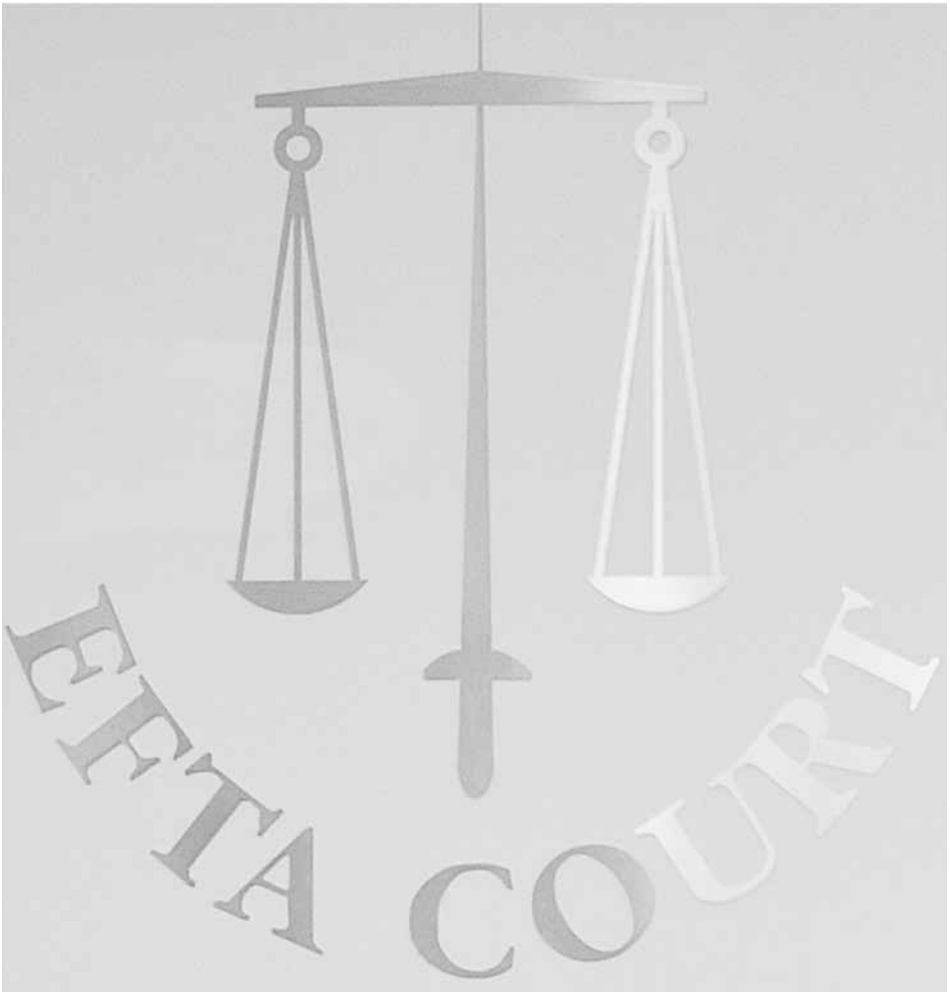

EFTA COURT

Case E-12/11

Asker Brygge AS
v
EFTA Surveillance Authority

CASE E-12/11

Asker Brygge AS

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 – Option agreement – Relevant time of assessment for considering the market value)

Summary of the Judgment

1. The conditions which a measure must meet in order to be treated as State aid for the purposes of Article 61(1) EEA are not fulfilled if the recipient undertaking could, in circumstances which correspond to normal market conditions, obtain the same advantage as that which has been made available to it through State resources. In the case of the State acting as an economic operator, that assessment is made by applying, in principle, the private investor test.

2. As regards an option agreement concerning the sale of land or buildings, the relevant question is whether a private investor would have entered into the option agreement in question on the same terms and, if not, on which terms he might have done so. The comparison between the conduct of public and private investors must be made by reference to the attitude which a private investor would have had at the time of conclusion of the option agreement in question, having regard to the available information and foreseeable developments at that time. If a private investor, operating in normal competitive conditions, would be likely to have entered into an option agreement on similar terms as the public authority, the existence of State aid will be excluded.

3.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 actually implemented. Thus, 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 actually carried out.

4. Where the subject of ESA's State aid assessment is the actual sale of the land, not the option agreement as such, ESA is not required to quantify the aid element in the option agreement. ESA is required simply to establish whether an aid element in the sale of land can be excluded because Article 61(1) EEA is not applicable.

5. A sale of land or buildings by public authorities to an undertaking involved in an economic activity may include elements of 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.

6. Where ESA adopts a measure involving a complex economic assessment, it enjoys a wide discretion. Judicial review of that measure, even though it is in principle a "comprehensive" review of whether a measure falls within the scope of Article 61(1) EEA, is 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.

7. When ESA, in order to determine whether a sale is made at market value, carries out an examination for that purpose of the experts' reports drawn up after the transaction in question, it is bound to compare the sale price actually paid to the price suggested in those various reports and to determine whether it deviates sufficiently to justify a finding that there is a benefit.

8. Article 10 of Part II of Protocol 3 SCA is applicable in cases

concerning unlawful aid, that is new aid put into effect in contravention of the standstill obligation in Article 1(3) of Part I of Protocol 3 SCA.

9. Only if the EFTA State concerned does not comply with ESAs request for information in situations covered by Article 10(1) and (2) of Part II of Protocol 3 SCA, might ESA be under the obligation to issue an information injunction pursuant to Article 10(3) of Part II of Protocol 3 SCA.

JUDGMENT OF THE COURT

17 August 2012

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Sale of land by public authorities – Market investor principle – Option agreement – Relevant time of assessment for considering the market value)

In Case E-12/11,

Asker Brygge AS, represented by Thomas Nordby and Espen Bakken, advocates, Arntzen de Besche advokatfirma,

applicant,

v

EFTA Surveillance Authority, represented by Gjermund Mathisen, Officer, and Maria Moustakali, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents,

defendant,

APPLICATION for annulment of the EFTA Surveillance Authority's Decision No 232/11/COL of 13 July 2011 concerning sale of land at Nesøyveien 8, gnr. 32 bnr. 17, in the Municipality of Asker, Norway,

THE COURT,

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

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties and the written observations of the Danish Government, represented by Christian Vang, Ministry of Foreign Affairs, acting as Agent, and the European Commission ("the Commission"), represented by Davide Grespan, member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

having heard oral argument of Asker Brygge AS ("Asker Brygge" or "the applicant"), represented by Espen Bakken; the EFTA Surveillance Authority ("ESA" or "the defendant"), represented by Gjermund Mathisen; and the Danish Government, represented by Christian Vang, at the hearing on 25 April 2012,

gives the following

JUDGMENT

I LEGAL CONTEXT

1 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.

2 Article 1(3) of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("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.

II FACTS

Background

3 The Municipality of Asker and Asker Brygge entered into an agreement in 2001 ("the option agreement") granting Asker Brygge an option, exercisable until 31 December 2009, to purchase the property located at Nesøyveien 8, gnr. 32 bnr. 17, in the Municipality of Asker, for a fixed price of NOK 8 000 000, adjusted for inflation according to the Consumer Price Index. The property comprised land of approximately 9 700 m² on which there were no buildings. In 2001, the property was classified for use as a marina and storage area for boats.

4 Under the option agreement, the Municipality granted to Asker Brygge the right to purchase the property at an index adjusted market price, considered to be NOK 8 000 000 at the time, on condition that Asker Brygge undertook extensive planning and research to obtain permission for a change of use with a view to further develop the property as a marina.

5 The option agreement included a right of renegotiation for Asker Brygge if property prices were to decrease considerably before the option was exercised. There was no corresponding right of renegotiation for the Municipality if property prices were to increase. Moreover, Asker Brygge was given a right to pay the purchase price in two instalments, with payment of 70% of the

purchase price deferred and interest-free until 31 December 2011.

6 In 2004, the option agreement was renewed, and the validity of the option was extended until 31 December 2014 under similar conditions.

7 In 2005, Asker Brygge exercised the option to purchase the land. The parties entered into a sale agreement for the land on 21 March 2007 at a price of NOK 8 727 462. The land was conveyed to Asker Brygge on the same date. However, in accordance with the option agreement, only the first instalment of the purchase price (30%) was paid on the date of conveyance. The second and larger instalment (70% of the purchase price) amounting to NOK 6 109 223 was due at the latest by 31 December 2011.

8 By letter of 15 December 2008, received by ESA on 13 February 2009, the Norwegian authorities notified the sale to ESA, pursuant to Article 1(3) of Part I of Protocol 3 SCA. ESA requested additional information in letters of 8 April 2009 and 7 July 2009, to which the Norwegian authorities replied by letters of 11 May 2009 and 14 August 2009 respectively.

9 Subsequently, ESA informed the Norwegian authorities that it had decided to initiate the procedure laid down in Article 1(2) of Part I of Protocol 3 SCA in respect of the sale of the land. ESA called on interested parties to submit their comments. By a letter of 29 January 2010, it received comments from one interested party, the purchaser Asker Brygge. On 14 October 2010, a meeting between ESA and the Norwegian authorities was held to discuss the case. Following that meeting, the Norwegian authorities submitted their final comments on 19 November 2010.

The contested decision

10 On 13 July 2011, ESA adopted Decision No 232/11/COL ("the contested decision"), in which it held that the sale constituted unlawful State aid incompatible with the EEA Agreement.

11 ESA adopted a two-step approach to its State aid assessment. First, it examined whether the 2001 option agreement was concluded in accordance with the market investor principle, i.e. whether a private investor operating in a market economy would have chosen to enter an agreement with a similar price and terms as the one signed between the Municipality and Asker Brygge in 2001. Second, ESA assessed whether, when the sale agreement was concluded in 2007 on the basis of the price agreed in 2001, the property was transferred at market value.

12 ESA found that the option agreement was not concluded on market conditions, in accordance with the market investor principle. It held that a private operator would not have entered an option agreement on similar terms as the Municipality of Asker, in particular for such a long period without requiring adequate remuneration for the option itself. In ESA's assessment, by simply requiring remuneration corresponding to the consumer price indexed value of the property assessed in 2001, the Municipality ran the risk of granting State aid at a later stage. The decision found that the Municipality did not obtain an independent valuation before entering into the agreement in 2001, but assessed the property's value based on its experience in the real estate market. ESA considered that even if NOK 8 000 000 represented the market price for the property as such in 2001, the market value of the other elements agreed also had to be assessed to determine the agreement's total value. Otherwise, this would mean that Asker Brygge obtained the option as such free of charge, without any economic consideration for its preferential right of purchase. On that point, ESA also noted that although the option agreement barred the Municipality from selling the property to another buyer, it was not entitled to any compensation were Asker Brygge to decide not to purchase the property.

13 ESA did not accept, as argued by the Norwegian authorities, that the option could not be considered to have been granted without remuneration because Asker Brygge undertook obligations in relation to planning and research on difficult soil conditions

and pollution. On the contrary, ESA considered that the option agreement did not entail any real risk for Asker Brygge. The planning and research commitment did not qualify as proper payment for the possibility to purchase the land. There was no unconditional obligation to carry out any research as the holder of the option was entitled not to enter a purchase agreement, without any contractual penalty. In any event, any amount spent on research would benefit the potential purchaser. If the research were to show that the property was unsuitable for development, the research works could be stopped and costs minimised, without any obligation to purchase the property. Accordingly, the option agreement involved minimal risk for the potential purchaser, whereas the Municipality would not profit if the research showed that the property could be developed.

14 ESA found that since the option agreement was not entered into on market terms, the existence of aid in the subsequent sale could not be excluded. Consequently, ESA then, as a second step, went on to assess whether the property was sold at below market value. It reasoned that although the option agreement gave Asker Brygge a right to purchase the property valid for a period of ten years, the property remained with the Municipality until Asker Brygge exercised the option. Therefore, the relevant time for the purposes of the State aid assessment was when the property was sold and transferred to Asker Brygge in 2007 and not the date of the option agreement in 2001, when the conditions for the sale were established.

15 Consequently, ESA compared the selling price of around NOK 8 700 000 with the market value of the property in 2007.

16 In that connection, ESA analysed the three valuations of the property submitted by the Norwegian authorities together with their notification, all of which were conducted after the 2001 option agreement was concluded.

17 A first valuation of 30 June 2006 was not taken into account in the State aid assessment. In ESA's view, the value of the property in 2007 at the time of its sale and transfer to the new

owner represented the relevant value. In any event, ESA found the estimation made in the 2006 valuation to be very approximate.

18 A second report, jointly commissioned by the parties to the sale agreement, was delivered on 18 January 2008 by TJB Eiendomstaksering, EK & Mosveen AS and Bjørn Aarvik. The report concluded that the market value of the property in 2007 was NOK 26 000 000, discounted to take account of inflation to a value of NOK 17 000 000 in 2001.

19 Neither Asker Brygge nor the Municipality agreed with that assessment. Hence, a new valuation report was delivered by TJB Eiendomstaksering, EK & Mosveen AS and Bjørn Aarvik on 16 June 2008. It constituted a revised version of the earlier valuation. It reduced the assessment of the property's market value in 2007 to NOK 12 000 000, discounted to NOK 8 000 000 in 2001 prices.

20 Both of the 2008 valuations were based on the use of the property as was permitted in 2001 and 2007, that is, as a marina and storage area for boats. Both also presumed that it would be possible to dredge the shoreline to establish further moorings, and to establish boat storage yards. In the second report it was also clarified and highlighted that risks in relation to ground pollution had been taken into account in the reports.

21 ESA based its assessment of the market price on the second 2008 report. As a consequence, it concluded that, as the selling price of NOK 8 727 462 was below the property's market value in 2007 of NOK 12 000 000, the sale was not carried out in accordance with the market investor principle.

22 Furthermore, ESA found that the sale exhibited all the constituent elements of the concept of State aid as defined in Article 61(1) EEA; i.e. it was an advantage, granted by the State or through State resources, on a selective basis, affecting intra-EEA trade, and which distorts or threatens to distort competition. Finally, ESA found that the transaction could not be justified under the derogations to the prohibition on State aid provided for in Article 61(2) and (3) EEA.

23 The operative part of the contested decision reads, in extract, as follows:

Article 1

The sale of the plot of land at Nesøyveien 8, gnr. 32 bnr. 17 by the Municipality of Asker to Asker Brygge AS entails state aid which is not compatible with the functioning of the EEA Agreement within the meaning of Article 61(1) of the EEA Agreement.

Article 2

The Norwegian authorities shall take all necessary measures to recover from Asker Brygge AS the aid referred to in Article 1 and unlawfully made available to the beneficiary.

Article 3

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 aid to be recovered shall include interest and compound interest from the date on which it was at the disposal of Asker Brygge AS until the date of its recovery. Interest shall be calculated on the basis of Article 9 in the EFTA Surveillance Authority Decision No 195/04/COL.

...

III PROCEDURE AND FORMS OF ORDER SOUGHT

24 By application registered at the Court on 21 September 2011, the applicant lodged the present action under the first paragraph of Article 36 SCA for annulment of the contested decision. ESA submitted a statement of defence, which was registered at the Court on 24 November 2011. The reply from Asker Brygge was registered at the Court on 18 January 2012. The rejoinder from ESA was registered at the Court on 24 February 2012.

25 The applicant requests the Court to:

annul the EFTA Surveillance Authority Decision No 232/11/COL of 13 July 2011 concerning sale of land at Nesøyveien 8, gnr. 32 bnr. 17 in the Municipality of Asker.

26 ESA claims that the Court should:

(i) dismiss the application; and

(ii) order the applicant to pay the costs.

27 Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, the Danish Government and the Commission submitted written observations, registered on 3 February 2012 and 31 January 2012, respectively.

28 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 LAW

I – Admissibility of certain documents

29 Pursuant to Article 37 of the Rules of Procedure, a party may offer further evidence in reply or rejoinder. The party must, however, give reasons for the delay in offering it.

30 Compliance with Article 37 of the Rules of Procedure is a procedural requirement which may be raised by the Court of its own motion.

31 In the present case, the applicant presented evidence concerning pollution of the property in two unnumbered annexes to its reply. The applicant has not given any reasons for the delay. These annexes are therefore inadmissible.

32 According to Article 25(2) of the Rules of Procedure, English shall be used in the written and oral part of the procedure, unless otherwise provided in those rules. According to Article 25(3) of the Rules of Procedure, all supporting documents submitted to the Court shall be in English or be accompanied by a translation into English, unless the Court decides otherwise. According to the second subparagraph of that provision, in the case of lengthy documents, translations may be confined to extracts.

33 Compliance with Article 25 of the Rules of Procedure is a procedural requirement which may be raised by the Court on its own motion.

34 Consequently, an annex submitted exlusively in Norwegian is inadmissible, unless the document which refers to it contains at least an extract in English as provided for in the second subparagraph of Article 25(3) of the Rules of Procedure (see Case E-15/10 *Posten Norge* v *ESA*, judgment of 18 April 2012, not yet reported, paragraph 115).

35 In the present case, both parties have submitted documents which are in Norwegian only. This applies to annexes IV, V, VI, VII, VIII, IX, X and XI to the application, and annexes III, IV, V, VI and VII to the defence. However, the defence and rejoinder contains extracts in English of some of these annexes.

36 Annexes V, VI, VII, VIII, IX, X and XI to the application are therefore inadmissible. In the specific circumstances of the case, annex IV to the application and annexes III, IV, V, VI and VII to the defence are admissible only in so far as they have been translated.

II – The substance of the action

A – The complaint alleging that ESA applied the wrong date for the assessment

1. Arguments of the parties

37 The applicant submits that ESA erred in its assessment of the relevant time for the determination whether State aid within the meaning of Article 61(1) EEA has been granted in favour of Asker Brygge. It has not taken account of the fact that the sale is based on, and was merely an execution of, the terms agreed in the 2001 option agreement. If the closing of the sale transaction were to constitute the relevant date for the State aid assessment, this would imply that public authorities and private entities would be unable to enter option agreements corresponding to those between private parties alone. There will always be a risk, as a result of external factors that the parties cannot influence, that

the subsequent contract implies State aid. Such an interpretation of the market investor principle will result in unequal treatment between private and public sellers.

38 The decisive factor when applying the market investor principle should be whether commercial agreements, including option agreements, are based on normal market conditions at the time they are entered into by the parties.

39 The applicant adds that, provided that the initial option agreement is based on normal market conditions, any profit for the commercial operator gained from the final sale agreement does not involve State aid within the meaning of Article 61(1) EEA. Applying that principle to the present case, the economic advantage gained by Asker Brygge does not constitute State aid. It merely results from the option agreement and the fact that real estate prices increased after conclusion of the option agreement.

40 The applicant concedes that it might be discussed whether Asker Brygge should have paid an option premium in addition to the cost of researching and planning the property. However, ESA did not establish a market-based reference value with a view to calculating any possible aid element of the option. Hence, in the applicant's view, ESA failed to prove that the criteria of Article 61(1) EEA are fulfilled.

41 ESA contests these arguments. It submits that it did not err in taking the date when the sale agreement was entered into in 2007 and not when the option agreement was first concluded in 2001 as the basis for the State aid assessment and the calculation of the economic advantage received by the applicant.

42 Had the option agreement been notified at the time it was first concluded, ESA would have had to assess the option alone. The same would have been the case if the agreement had been notified when it was renewed in 2004, or even when Asker Brygge exercised the option in 2005. However, no notification was made until nearly two years after the sale was effected. Both the notification form submitted by the Norwegian authorities on

9 May 2009 and a letter from the Municipality of 9 May 2009 specified that any State aid involved was put into effect on 21 March 2007. Moreover, both valuation reports commissioned by the Municipality assessed the value of the property in 2007.

43 The applicant submits, however, that pursuant to the SCA, it is within ESA's competence to undertake an assessment of all the relevant facts of a State aid case. ESA is entitled to ask for further information from the notifying party. In any event, ESA's contention that the notification of 9 May 2009 supports basing the assessment on the 2007 agreement is flawed. The notification letter of 15 December 2008 states that the Municipality of Asker consistently held the correct time for the aid assessment to be the date the parties concluded the option agreement.

44 ESA submits that its approach of taking the time when the sale agreement was entered into, in 2007, as the basis for the State aid assessment was, in effect, more lenient on the applicant. The aid that is to be recovered consists of two components, namely (i) the difference between the purchase price and the market price of the property at the time it was sold, and (ii) the economic advantage of the "soft loan", i.e. the interest-free deferral of payment of 70% of the purchase price, from the date of the sale agreement signed on 21 March 2007. Were the State aid assessment to be calculated from the date when the option agreement was first concluded, the additional economic advantage conferred upon the applicant by the option agreement in 2001 – and by its renewal in 2004 – would also have to be recovered. In those circumstances, the total amount of State aid would consist of (i) the difference between the market price and the purchase price at the time of the sale in 2007, together with (ii) the economic advantage of the soft loan, (iii) the unpaid option premium from 2001, and (iv) the unpaid option premium from 2004.

45 The applicant doubts whether recovery of further aid qualifies as an argument against using the date of the option agreement as the basis for the assessment. It points out that ESA argues that 2001 is not the relevant date for the assessment and, at

the same time, that also the option premium and the soft loan agreed in 2001 may constitute State aid. In the applicant's view, this approach is inconsistent and illogical. In any event, it notes that only the difference between the purchase price set out in the 2007 sale agreement and the market price was found to entail State aid in the contested decision. The applicant observes that the Court's assessment is limited to the scope of ESA's decision.

46 ESA argues that it used its competence and reviewed the option agreement in the contested decision. It was, however, not demonstrated that the option agreement was entered into on market terms. Rather, the exclusive right to purchase the property was granted to the applicant free of charge, and was renewed free of charge.

47 The Danish Government submits that whether an agreement constitutes an advantage in relation to the concept of State aid must, in this case, be assessed on the basis of the market investor principle, and the assessment must take place at the time the parties entered into a legally binding contract.

48 In its view, provided that the price of the option agreement was valued correctly in accordance with the Commission's Communication on State aid elements in sales of land and buildings by public authorities and normal economic models on valuation of options at the time the parties entered into the agreement, any difference at the time when the option is exercised between the price established by the contract and the actual market price does not constitute State aid. It is merely the result of price or market fluctuations in relation to the value of the option that the applicant was granted in 2001.

49 According to the Danish Government, any part of the option agreement between the Municipality of Asker and the applicant which constitutes State aid must be taken into account when assessing the amount of aid granted. At the very least, the unpaid option premiums from 2001 and 2004, the soft loan, and the unilateral right for the applicant to demand renegotiation of the price of the property and all other terms in the contract fall within the meaning of State aid.

50 The Commission agrees in principle with the applicant's contention that the decisive point in applying the market investor principle should be whether commercial agreements, including option agreements, are based on normal market conditions at the time when they are entered into between the parties. If a public authority grants an option for the sale of land and receives appropriate remuneration for the risk of a change in the value, the presence of aid can be excluded even if the market price of the land at the time of the sale is higher than the price agreed in the option.

51 However, in the case at hand, a private operator would not have entered into such an agreement on similar terms. The option agreement thus contained an element of aid. To evaluate that aid, ESA had to place itself at the moment when that agreement was entered into in 2001. A quantification of that aid element would lead to the identification of incompatible aid to be recovered from the applicant. The applicant therefore has no legal interest in pursuing this claim, because even if it were accepted it would bring it no benefit.

52 With regard to the subsequent sale of the land to the applicant, the Commission considers that ESA was correct not to adopt a strict approach and automatically conclude that since the option agreement does not comply with the private operator test any subsequent transaction implementing that agreement also contains State aid. Even if the option agreement does not reflect the behaviour of a private operator, the possibility could not be excluded that the price agreed in the sale agreement might have reflected the market value of the land at the time when that agreement was concluded. Therefore, ESA had to consider the market value of the land at that time and compare it with the price established in the sale agreement. Only on the conclusion of that agreement was aid in the form of a difference between the selling price and the market value of the land granted to the applicant by a legally binding act of the Norwegian authorities.

2. Findings of the Court

53 By the present plea, the applicant essentially claims that the existence of State aid should be assessed at the date when the option agreement was entered into in 2001 and not when the sale of the land was carried out in 2007.

54 In the contested decision, ESA applied the market investor test. ESA first examined whether a private investor operating in a market economy would have chosen to enter an option agreement with similar price and terms as the one signed between the Municipality and Asker Brygge in 2001. ESA concluded that the option agreement was not entered into on market conditions. Accordingly, the presence of State aid in the subsequent sale of the property could not be excluded. Consequently, ESA went on to assess whether, when the sale agreement was concluded in 2007 on the basis of the price agreed in 2001, the property was transferred none the less at market value.

55 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, *inter alia*, Joined Cases E-17/10 and E-6/11 *Liechtenstein and VTM Fundmanagement* v *ESA*, judgment of 30 March 2012, not yet reported, paragraph 50, and the case-law cited).

56 The conditions which a measure must meet in order to be treated as aid for the purposes of Article 61(1) EEA are not fulfilled if the recipient undertaking could, in circumstances which correspond to normal market conditions, obtain the same advantage as that which has been made available to it through State resources. In the case of the State acting as an economic operator, that assessment is made by applying, in principle, the private investor test (see, for comparison, Case C-124/10 P *Commission* v *France*, judgment of 5 June 2012, not yet reported, paragraph 78).

57 As regards an option agreement concerning the sale of land or buildings, that is, a contract giving the option holder a right to purchase the property at a specific price at some point in the future, the relevant question is whether a private investor would have entered into the option agreement in question on the same terms and, if not, on which terms he might have done so. The comparison between the conduct of public and private investors must be made by reference to the attitude which a private investor would have had at the time of conclusion of the option agreement in question, having regard to the available information and foreseeable developments at that time (see, for comparison, Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraphs 245 and 246).

58 If a private investor, operating in normal competitive conditions, would be likely to have entered into an option agreement on similar terms as the public authority, the existence of State aid will be excluded.

59 The applicant appears not to contest any of the factual findings concerning the option agreement but seems only to contest the legal implications. However, it cannot be considered likely that a private investor, operating in normal competitive conditions, would have entered into a contract without remuneration for the risk of a change in the value of the land. There was no option premium and the right to renegotiate the agreement was one-sided in favour of the other party to the contract. This conclusion is reinforced by the fact that the applicant expected to be able to exercise dredging rights and applied for a permission to dredge. Such a permission would have led to an important increase in the value of the land without any compensation for the municipality.

60 On the other hand, the situation might have been different if the option agreement had been notified and ESA had found that the conditions of the agreement either satisfied the private investor test or were declared compatible with the functioning of the EEA Agreement. Under the first of those possibilities, if the price fixed in the option agreement turned out to be lower than the market

price of the land when the sale took place, that difference would, in principle, not constitute State aid within the meaning of Article 61(1) EEA.

61 Therefore, ESA was entitled to conclude, without committing a manifest error of appraisal, that the provisions of the present option agreement and the intentions displayed by the private investors in this case did not demonstrate that a prudent private investor would have entered into a similar option agreement, and that, consequently, Article 61 EEA was applicable to the option agreement.

62 Moreover, 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 actually implemented (see, for comparison, Joined Cases T-102/07 and T-120/07 *Freistaat Sachsen and Others* v *Commission* [2010] ECR II-585, paragraph 120, and Case T-152/99 *HAMSA* v *Commission* [2002] ECR II-3049, paragraph 53).

63 Thus, 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 actually carried out.

64 Based on all the foregoing, the Court concludes that ESA did not err in taking the date when the sale agreement was entered into in 2007 and not the time when the option agreement was first concluded in 2001 as the basis for the State aid assessment and the calculation of the economic advantage received by the applicant. In a situation such as that in the present case, in order to properly calculate the economic advantage received by the applicant, ESA must simply assess whether the price paid in the sale agreement corresponds to the market price regardless of the price fixed in the option agreement. Therefore, the argument that it was erroneous to use 2007 as the basis for assessment is rejected.

65 In addition, the applicant has submitted that ESA erred in any event because for the purposes of calculating the potential aid

element in the option agreement it failed to establish a market-based value for any option premium which, on its assessment, should have been paid. This argument must be rejected. The measure which was notified to ESA was the sale of the land. As the subject of ESA's State aid assessment was the actual sale of the land, not the option agreement as such, ESA was not required to quantify the aid element in the option agreement. ESA was required simply to establish whether an aid element in the sale of land could be excluded because Article 61(1) EEA was not applicable. In order to do so, it merely needed to ascertain whether the option agreement was entered into on market terms.

66 It is clear from the contested decision that ESA found that the option agreement had a value, and that the Municipality did not receive any remuneration for the option. At any rate, as a quantification of the aid element in the option agreement would have entailed recovery of a greater amount from the applicant, the Court fails to see that the applicant has any legal interest in pursuing this claim. Even if the claim were accepted, it would bring the applicant no benefit. Therefore, this argument must be rejected.

67 Consequently, the first plea must be rejected.

B – The complaint alleging that ESA did not correctly calculate the market price in 2007

1. Arguments of the parties

68 The applicant disputes the validity of the second 2008 valuation report, which ESA used as the basis for its State aid assessment. According to the applicant, the report cannot be used in the assessment of whether Asker Brygge has received State aid because it does not establish a reliable market price of the property. The report is based on an assumption of further development of the property as a marina, and that dredging of the shoreline to make 85 new moorings available for lease would be approved. The latter assumption is fundamentally flawed, as Norwegian law contains a general prohibition on dredging.

The applicant's application for a derogation was rejected by the County Governor, and an administrative appeal brought against that decision was unsuccessful. Consequently, the prohibition on dredging continues to apply to the property. The income estimated in the report from the lease of new moorings, as well as winter storage spaces, has not materialised.

69 The applicant acknowledges that the legality of a State aid decision must be assessed in the light of the information available to ESA when the decision was adopted. However, it argues that in its third party comments on the opening of the formal investigation procedure it provided ESA with factual documentation on the basis of which ESA should have understood that the possibility for further dredging on the property is highly contested. The fundamental premise on which the valuation was based was therefore dubious. ESA should therefore have invoked the right to request further information, and to the extent necessary have adopted an order ("information injunction") pursuant to Article 10(3) of Part II of Protocol 3 SCA, in order to ensure that its decision was based on the correct factual circumstances.

70 Moreover, the applicant argues that although the property is polluted and Asker Brygge will incur cost of cleaning the land, this cost is not included in the report.

71 ESA contests the applicant's arguments and submits that the factual circumstances were appropriately taken into account when establishing the market price for the property in 2007.

72 ESA refutes the argument that the assumption that the shoreline may be dredged is "fundamentally invalid". Under Norwegian law there is no absolute prohibition on dredging. Instead, there is a general prohibition subject to a possibility to obtain a permission. If the valuation were to disregard that possibility, it would fail to take account of the fact that investors buy property to develop.

73 A proper assessment of the property's value in 2007 must be based on the assumptions of potential buyers at that time.

Indeed, the applicant itself appears to have relied upon this assumption. First, in an agreement concluded on 1 June 2006 with Slependen Båtforening it undertook to provide the necessary dredging. Second, Asker Brygge has on two occasions unsuccessfully applied for permission to dredge. Therefore, at the relevant time, Asker Brygge was planning to dredge and apparently made business calculations and entered into contracts on that basis and, thus, in fact, based itself on the assumption that the shoreline may be dredged. It thus makes sense that the assessment of the property's value in 2007 took account of the fact that other potential buyers would make the same assumption.

74 ESA submits that it was under no obligation to request further information, or to issue an information injunction against Norway, before adopting its decision. It observes that, pursuant to Article 10(3) of Part II of Protocol 3 SCA, such an injunction can only be issued after repeated failure on the part of the EFTA State concerned to provide information, despite being requested to do so and formally reminded thereof.

75 ESA contends that the applicant's assertion that the cost of cleaning the land is not included in the relevant valuation report is erroneous. Rather, the report emphasised that pollution was indeed taken into account.

76 According to the applicant, neither the applications for exemption nor the fact that a contract was entered into between Asker Brygge and Slependen Båtforening support the view that it relied on the right to dredge. Both the agreement and the applications were necessary steps in an attempt to develop the land, irrespective of the applicant's appraisal of the actual possibility to obtain an exemption from the prohibition on dredging.

77 ESA submits that the applicant's position is inherently contradictory. On the one hand, it wants the property valued on the basis that dredging is definitively prohibited. On the other, it evidently wants to dredge on the property in order to develop it.

78 The Commission fully supports ESA's view as regards the alternative plea.

2. Findings of the Court

(a) The value of the land in question

79 A sale of land or buildings by public authorities to an undertaking involved in an economic activity may include elements of 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, for comparison, Cases C-290/07 P *Commission* v *Scott* [2010] ECR I-7763, paragraph 68, and C-239/09 *Seydaland*, judgment of 16 December 2010, not yet reported, paragraph 34).

80 Where ESA adopts a measure involving a complex economic assessment, it enjoys a wide discretion. Judicial review of that measure, even though it is in principle a "comprehensive" review of whether a measure falls within the scope of Article 61(1) EEA, is 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 (see, for comparison, Case E-4/97 *Norwegian Bankers' Association* v *ESA* [1999] EFTA Ct. Rep. 3, paragraph 40).

81 Measures which, in various forms, mitigate the burdens which are normally included in the budget of an undertaking and which are thereby similar to subsidies, such as, for example, the supply of goods or services on preferential terms, constitute benefits for

the purposes of Article 61(1) EEA. When applied to the sale of land to an undertaking by a public authority, the consequence of that principle is that it must be determined whether the sale price could not have been obtained by the purchaser under normal market conditions. Where ESA carries out an examination for that purpose of the experts' reports drawn up after the transaction in question, it is bound to compare the sale price actually paid to the price suggested in those various reports and to determine whether it deviates sufficiently to justify a finding that there is a benefit. That method makes it possible to take into account the uncertainty of such a determination, which is by nature retrospective, of such market prices (see, for comparison, Case T-274/01 *Valmont* v *Commission* [2004] ECR II-3145, paragraphs 44 and 45).

82 In the present case, the applicant advances two arguments in support of its contention that the market price established by ESA relying on the second 2008 valuation report does not sufficiently take account of the factual circumstances in 2007. First, the applicant argues that the report is based on an assumption of dredging of the shoreline for further development of the property, even though Norwegian law contains a general prohibition on dredging unless an exception is given. Second, it asserts that the cost of cleaning the land is not included in the valuation report.

83 As regards the first argument, the Court notes that it is undisputed that dredging was a prerequisite for further development of the land in question as a marina. Moreover, it was a condition in the option agreement that the option holder undertook planning and research with a view to further development of the property. Second, the Court notes that the applicant applied in 2007 for a derogation from the general prohibition on dredging. Moreover, at the hearing the applicant confirmed that it had another application pending. This shows that the applicant believed that there was a possibility to receive permission to dredge the property in question. In the light of these facts, the Court finds that it has not been established that

ESA committed a manifest error of assessment when relying on the assumption that a buyer of the land would obtain a derogation from the general prohibition on dredging.

84 The second argument must also be rejected. As the defendant has shown, the second 2008 valuation report (annex IV to the application) clearly states that "a degree of polluted mass" was taken into account in the cost analysis. This evidence was not rebutted by the applicant. In the light of this fact, the Court finds that it has not been established that ESA made a manifest error of assessment when it calculated the value of the land.

(b) The obligation to issue an information injunction

85 Finally, the applicant has argued that ESA should have invoked the right to request further information, and to the extent necessary have adopted a decision pursuant to Article 10(3) of Part II of Protocol 3 SCA, in order to ensure that its decision was based on the correct factual circumstances. In order to make a proper assessment of this complaint, it is necessary to recall the purpose of the information injunction.

86 Article 10 of Part II of Protocol 3 SCA is applicable in cases concerning unlawful aid, that is new aid put into effect in contravention of the standstill obligation in Article 1(3) of Part I of Protocol 3 SCA.

87 Under Article 10(1) of Part II of Protocol 3 SCA, where ESA has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay. According to the second paragraph of the same provision, ESA shall, if necessary, request information from the EFTA State concerned.

88 Only if the EFTA State concerned does not comply might ESA be under the obligation to issue an information injunction pursuant to Article 10(3) of Part II of Protocol 3 SCA. According to Articles 5(1) and 5(2) of Part II of Protocol 3 SCA, which also apply *mutatis mutandis*, ESA shall request additional information if it considers that the information provided by the EEA State is

incomplete or that State does not reply. If the EEA State does not comply, ESA has to send out a reminder.

89 It is only after this stage has been reached that ESA must issue an information injunction pursuant to Article 10(3) of Part II of Protocol 3 SCA where there is no timely response or the information provided is incomplete. This is not the case in the present proceedings.

90 It is true that ESA must always examine all the relevant features of the transaction at issue and its context, particularly in applying the market investor test (see, for comparison, Case T-244/08 *Konsum Nord ekonomisk förening* v *Commission*, judgment of 13 December 2011, not yet reported, paragraph 57, and Joined Cases T-415/05, T-416/05 and T-423/05 *Greece and Others* v *Commission* [2010] ECR II-4749, paragraph 172, and the case-law cited).

91 In the present case, the applicant has not shown in what way the information available to ESA was incomplete but only claims that ESA should have requested a "clarification" of the necessary factual information.

92 Moreover, it is clear from the contested decision that ESA made an assessment of the value of the property in question based on the valuation reports submitted in the course of the proceedings.

93 In those circumstances, it was not appropriate for ESA, which was in a position to make a definitive assessment as to the compatibility of the disputed aid with the common interest on the basis of the information available to it, to require Norway, by means of an information injunction, to provide it with further information to clarify the factual information before it adopted the contested decision (see, for comparison, Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 28).

94 In the light of the foregoing, this plea must also be rejected.

95 Consequently, the application must be dismissed in its entirety.

V COSTS

96 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 the latter has been unsuccessful in its application, it must be ordered to do so. 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 17 August 2012.

Kjartan Björgvinsson — Acting Registrar

Carl Baudenbacher — President

REPORT FOR THE HEARING

in Case E-12/11

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

Asker Brygge AS

and

EFTA Surveillance Authority

seeking the annulment of the EFTA Surveillance Authority's Decision No 232/11/COL of 13 July 2011 concerning sale of land at Nesøyveien 8, gnr. 32 bnr. 17, in the Municipality of Asker, Norway.

I INTRODUCTION

1. The case concerns Decision No 232/11/COL of 13 July 2011 ("the contested decision") by which the EFTA Surveillance Authority ("ESA" or "the defendant") held that the sale of a plot of land at Nesøyveien 8, gnr. 32 bnr. 17, by the Municipality of Asker to the privately owned company Asker Brygge AS ("Asker Brygge" or "the applicant") entails unlawful State aid incompatible with the EEA Agreement. By Articles 2 and 3 of the contested decision, ESA ordered the Norwegian authorities to recover the aid already granted, including interest from the date on which the aid was at the disposal of Asker Brygge until the date of recovery.

2. The application is based on two pleas in law. First, the applicant argues that ESA misapplied Article 61(1) EEA in its determination of the relevant time at which to assess the existence of State aid in the present case. Second, and in the alternative, it contends that, if ESA was correct in its determination of the relevant time for the purposes of the assessment under Article 61(1) EEA, its calculation of the market value of the land did not, in any event, take account of all the relevant factual circumstances.

II FACTS

Background

3. The Municipality of Asker and Asker Brygge entered into an agreement in 2001 ("the option agreement") granting Asker Brygge an option, exercisable until 31 December 2009, to purchase the property located at Nesøyveien 8, gnr. 32 bnr. 17, in the Municipality of Asker, for a fixed price of NOK 8 000 000, adjusted for inflation according to the Consumer Price Index. The property comprised land of approximately 9 700 m² on which there were no buildings. In 2001, the property's existing class of use was as a marina and storage area for boats.

4. Under the option agreement, the Municipality granted to Asker Brygge the option to purchase the property at the market price, considered to be NOK 8 000 000, on condition that Asker Brygge undertook extensive planning and research to obtain permission for a change of use with a view to developing the property as a marina.

5. The option agreement included a right of renegotiation for Asker Brygge if property prices were to considerably decrease before the option was exercised. There was no corresponding right of renegotiation for the Municipality if property prices were to considerably increase. Moreover, Asker Brygge was given a right to pay the purchase price in two instalments, with payment of 70% of the purchase price deferred interest-free until 31 December 2011 at the latest.

6. In 2004, the option agreement was renewed, and the validity of the option was extended until 31 December 2014 under similar conditions.

7. In 2005, Asker Brygge exercised the option to purchase the land. The parties entered into a sales agreement for the land on 21 March 2007 at a price of NOK 8 727 462. The land was conveyed to Asker Brygge on the same date. However, in accordance with the option agreement, only the first instalment of the purchase

price (30%) was paid on the date of conveyance. The second and larger instalment (70% of the purchase price) amounting to NOK 6 109 223 was due at the latest by 31 December 2011.

8. By letter of 15 December 2008, received by ESA on 13 February 2009, the Norwegian authorities notified the sale to ESA, pursuant to Article 1(3) of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("Protocol 3 SCA"). ESA requested additional information in letters of 8 April 2009 and 7 July 2009, to which the Norwegian authorities replied by letters of 11 May 2009 and 14 August 2009 respectively.

9. Subsequently, ESA informed the Norwegian authorities that it had decided to initiate the procedure laid down in Article 1(2) of Part I of Protocol 3 SCA in respect of the sale of the land. ESA called on interested parties to submit their comments thereon. By a letter of 29 January 2010, it received comments from one interested party, the purchaser Asker Brygge. On 14 October 2010, a meeting between ESA and the Norwegian authorities was held to discuss the case. Following that meeting, the Norwegian authorities submitted their final comments on 19 November 2010.

The contested decision

10. On 13 July 2011, ESA adopted the contested decision, in which it held that the sale constituted unlawful State aid incompatible with the EEA Agreement.

11. ESA adopted a two-step approach to its State aid assessment. First, it examined whether the 2001 option agreement was concluded in accordance with the market economy investor principle, i.e. whether a private investor operating in a market economy would have chosen to enter an agreement with similar price and terms as the one signed between the Municipality and Asker Brygge in 2001. Second, ESA assessed whether, when the sales agreement was concluded in 2007 on the basis of the price agreed in 2001, the property was transferred at market value.

12. ESA found that the option agreement was not concluded on market conditions, in accordance with the market investor principle. It held that a private operator would not have entered an option agreement on similar terms as the Municipality of Asker for such a long period without requiring remuneration for the option. In ESA's assessment, by simply requiring remuneration corresponding to the value of the property in 2001, the Municipality ran the risk of granting State aid at a later stage, in particular if property prices were to increase. The decision found that the Municipality did not obtain an independent valuation before entering into the agreement in 2001, but assessed the property's value based on its experience in the real estate market. ESA considered that even if NOK 8 000 000 represented the market price for the property as such in 2001, the market value of the other elements agreed also had to be assessed to determine the agreement's total value. Otherwise, this would mean that Asker Brygge obtained the option as such for free, without any economic consideration for its preferential right of purchase. On that point, ESA noted that although the option agreement barred the Municipality from selling the property to another buyer, it was not entitled to any compensation were Asker Brygge to decide not to purchase the property.

13. ESA did not accept the argument put forward by the Norwegian authorities to the effect that the option could not be considered to have been granted without remuneration because Asker Brygge undertook obligations in relation to planning and research on difficult soil conditions and pollution. On the contrary, ESA considered that the option agreement did not entail any real risk for Asker Brygge, and that the planning and research commitment did not qualify as proper payment for the possibility to purchase the land. There was no unconditional obligation to carry out any research as the holder of the option was entitled not to enter a purchase agreement. In any event, any amount spent on research would benefit the potential purchaser and, if the research were to show that the property was unsuitable for development, the research works could be stopped and costs minimised, without any obligation to purchase the property. Accordingly, the option

agreement involved minimal risk for the potential purchaser, whereas the Municipality would not profit if the research showed that the property could be developed.

14. ESA then turned to the question whether the property was sold at below market value. It reasoned that although the option agreement gave Asker Brygge a right to purchase the property valid for a period of ten years, the property remained with the Municipality until Asker Brygge exercised the option. Therefore, the relevant time for the purposes of the State aid assessment was when the property was sold and transferred to Asker Brygge in 2007 and not the date of the option agreement in 2001, when the conditions for the sale were established.

15. Consequently, ESA compared the selling price of around NOK 8 700 000 with the market value of the property in 2007.

16. In that connection, ESA analysed the three valuations of the property submitted by the Norwegian authorities together with its notification, all of which were conducted after the 2001 option agreement was concluded.

17. The first valuation of 30 June 2006 was not taken into account in the State aid assessment. In ESA's view, the value of the property in 2007 at the time of its sale and transfer to the new owner was the relevant value. In any event, ESA found the estimation made in the 2006 valuation to be very approximate.

18. The second report, jointly commissioned by the parties to the sale agreement, was delivered on 18 January 2008 by TJB Eiendomstaksering, EK & Mosveen AS and Bjørn Aarvik and concluded that the market value of the property in 2007 was NOK 26 000 000, discounted to take account of inflation to a value of NOK 17 000 000 in 2001.

19. Neither Asker Brygge nor the Municipality agreed with that assessment. Hence, a new valuation report was delivered by TJB Eiendomstaksering, EK & Mosveen AS and Bjørn Aarvik on 16 June 2008. It constitutes a revised version of the first 2008 valuation and reduced the assessment of the property's market

value in 2007 to NOK 12 000 000, discounted to NOK 8 000 000 in 2001 prices.

20. Both of the 2008 valuations were based on the use of the property as was permitted in 2001 and 2007, that is, as a marina and storage area for boats. Both also presume that it would be possible to dredge the shoreline to establish further moorings, and to establish boat storage yards. In the second report it was also clarified and highlighted that risks in relation to ground pollution had been taken into account in the reports.

21. ESA based its assessment of the market price on the second 2008 report. As a consequence, it concluded that, as the selling price of NOK 8 727 462 was below the property's market value in 2007 of NOK 12 000 000, and that the sale was not carried out in accordance with the market investor principle.

22. Furthermore, ESA found that the sale exhibited all the constituent elements of the concept of State aid as defined in Article 61(1) EEA; i.e. it was an advantage, granted by the State or through State resources, on a selective basis, affecting intra-EEA trade, and which distorts or threatens to distort competition. Finally, ESA found that the transaction could not be justified under the derogations to the prohibition on State aid provided for in Article 61(2) and (3) EEA.

III PROCEDURE AND FORMS OF ORDER SOUGHT BY THE PARTIES

23. By application registered at the Court on 21 September 2011, the applicant lodged the present action. ESA submitted a statement of defence, which was registered at the Court on 24 November 2011. The reply from Asker Brygge was registered at the Court on 18 January 2012. The rejoinder from ESA was registered at the Court on 24 February 2012.

24. The applicant, Asker Brygge, requests the Court:

    to annul the EFTA Surveillance Authority Decision No 232/11/COL of 13 July 2011 concerning sale of land at Nesøyveien 8, gnr. 32 bnr. 17 in the Municipality of Asker.

25. ESA claims that the Court should:

(1) dismiss the application;

(2) order the applicant to pay the costs.

26. The European Commission ("the Commission") submits that the application should be rejected.

IV LEGAL BACKGROUND

EEA law

27. 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.*

28. 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.

National law

29. Dredging is regulated in the Norwegian Pollution Regulation 2004 ("the Pollution Regulation") (*forurensningsforskriften*).[1] Section 22-3 of the Pollution Regulation provides that "[d]redging is prohibited, except when permission is granted in accordance with Section 22-6". Section 22-6, first paragraph, states that permission to dredge may be obtained. Such permission will be granted by the County Governor. The third paragraph of the provision provides that in deciding whether to grant permission weight must be placed on the pollution-related disadvantages of the measure together with an overall assessment of the remaining advantages and disadvantages of the project.

V WRITTEN PROCEDURE BEFORE THE COURT

30. Written arguments have been received from the parties:

- Asker Brygge, represented by Thomas Nordby, advokat, Espen Bakken, advokat, Arntzen de Besche advokatfirma;
- ESA, represented by Gjermund Mathisen, Officer, and Maria Moustakali, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents.

31. 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 Christian Vang, Ministry of Foreign Affairs, acting as Agent;

[1] Regulation relating to reduction of pollution of 1 June 2004 No 931.

– the Commission, represented by David Grespan, member of its Legal Service, acting as Agent.

VI SUMMARY OF THE PLEAS IN LAW AND ARGUMENTS

32. The applicant contends that ESA applied Article 61(1) EEA incorrectly. First, it argues that the relevant time for the assessment of the existence of State aid should be 2001 when the option agreement was entered into and not the date of the sale agreement in 2007. In that regard, it contends that ESA has not established a market-based value for any necessary option premium in order to calculate the potential aid element of the option.

33. Second, the applicant claims that the calculation of the 2007 market value of the land does not take account of the factual circumstances in 2007.

First plea: ESA wrongfully applied the date of the sale agreement (2007) as the basis for the State aid assessment and not the date of the option agreement (2001)

34. The applicant submits that ESA has erred in its assessment of the relevant time for the determination whether State aid has been granted in favour of Asker Brygge within the meaning of Article 61(1) EEA. It has not taken account of the fact that the sale is based on the terms agreed in the 2001 option agreement, which constitutes the core agreement between the parties. The sale agreement was merely an execution of the agreement provided for in the option agreement. If the closing of the sale transaction were to constitute the relevant date for the State aid assessment, this would imply that public authorities and private entities would be unable to enter option agreements corresponding to those between private parties alone, as there will always be a risk, as a result of external factors that the parties cannot influence, that the subsequent contract implies State aid. In that connection, the applicant stresses that, as ESA itself has recognised, public authorities may operate in a market on commercial terms. However, the interpretation of the market investor principle

advanced by ESA in the present case leads to unequal treatment between private and public sellers.

35. In that regard, the applicant takes the view that, in accordance with the objective of State aid legislation, the decisive factor when assessing the market economy investor principle should be whether commercial agreements, including option agreements, are based on normal market conditions at the time they are entered into by the parties. Consequently, provided that the initial option agreement is based on normal market conditions, any profit for the commercial operator gained from the final sale agreement does not involve State aid within the meaning of Article 61(1) EEA. Applying that principle to the present case, the economic advantage gained by Asker Brygge does not constitute State aid, but merely results from the option agreement and the fact that real estate prices increased after conclusion of the option agreement.

36. According to the applicant, it follows from ESA's State aid guidelines on State guarantees that for assessment purposes the relevant time is that at which the public authority entered into the guarantee agreement. It is not when the guarantee is invoked, nor when payment is made according to the terms of the guarantee. As is the case with guarantee agreements, option agreements are not necessarily invoked. Consequently, due to the inherent similarities between State guarantees and option agreements, the same principle should apply in the case at hand.[2]

37. The applicant notes that, in the contested decision, ESA appears to have attached weight to the fact that, under the option agreement, Asker Brygge could require renegotiation of the purchase price if property prices were to decrease considerably. However, according to the applicant, such a right to renegotiate is inherent in all option agreements giving the buyer the right but not the duty to call the option. This is so because the option holder might try to renegotiate the agreement instead of calling the option. Furthermore, whether renegotiations are successful or not lies solely within the seller's discretion.

[2] ESA's State Aid Guidelines Part V: specific aid instruments on State Guarantees, point 2.1.

38. Finally, the applicant observes that when a State aid assessment is carried out on the basis of the option agreement it might be discussed whether Asker Brygge should have paid an option premium in addition to the cost of researching and planning the property. However, ESA did not establish a market-based reference value in order to calculate any possible aid element of the option. Hence, in the applicant's view, ESA failed to prove that the criteria of Article 61(1) EEA are fulfilled.

39. ESA contests these arguments, and submits that it did not err in taking the date when the sale agreement was entered into in 2007 and not when the option agreement was first concluded in 2001 as the basis for the State aid assessment and the calculation of the economic advantage received by the applicant.

40. ESA acknowledges that, had the option agreement been notified at the time it was first concluded, it would have had to assess the option alone. The same would have been the case if the agreement had been notified when it was renewed in 2004, or even when Asker Brygge exercised the option in 2005. However, no notification was made until nearly two years after the sale was effected. Therefore, the notification and the documentation submitted in that connection gave ESA reason to base the State aid assessment and the calculation of recovery on the actual sale. In support of this point, the defendant refers to the notification form submitted by the Norwegian authorities on 9 May 2009 which specified that any State aid involved would be put into effect on 21 March 2007. The same was indicated in a letter from the Municipality of 9 May 2009. Moreover, both valuation reports commissioned by the Municipality assessed the value of the property in 2007.

41. In its reply, the applicant contends that ESA, by its assertion that it must base its State aid assessment on the "sale actually carried out", is, in effect, arguing that its legal competence is limited by the statements submitted in a notification. However, Asker Brygge contends that, pursuant to the SCA, it is within ESA's competence to undertake an assessment of all the relevant facts of a State aid case. In that regard, it contends that, even if a notification

is complete, ESA is entitled to ask for further information from the notifying party. In any event, Asker Brygge continues, ESA's contention that the notification of 9 May 2009 supports basing the assessment on the 2007 agreement is flawed. In the applicant's view, ESA gives the impression that the Municipality of Asker admits granting illegal State aid in the notification, and states that the time for the assessment thereof shall be 2007. The applicant points out, however, that this assertion is contradicted by the notification letter of 15 December 2008, which states that the Municipality of Asker consistently held the correct time for the aid assessment to be the date the parties concluded the option agreement.

42. In its rejoinder, ESA contests the applicant's submissions and maintains that it must, indeed, give serious consideration to the contents of the notification actually made. Hence, it appears to be a misunderstanding on the part of the applicant when this apparently is taken to mean that the "legal competence" of ESA should be "limited by the content of the notification". Further, as regards the applicant's claim that the Municipality consistently held the correct time for the assessment of any aid to be the time when the parties entered into the option agreement, ESA submits that this is misleading. In its view, there is evidence that the Municipality considered the date of the sale agreement to be the relevant time. This follows, first, from the notification letter itself, which stated that the independent expert evaluation carried out "has considered the market value both in 2001 and in 2007. The reason for this is that at the time the sales contract was negotiated [in 2006], the parties had different opinions regarding the relevant cut-off date." Second, ESA observes that in part 1, section 5, of the notification, the Municipality indicated that the overall amount of any aid involved would be NOK 5 300 000[3] and, in section 7, it specified that any aid involved would be put into effect on 21 March 2007, i.e. at the time of the sale.

[3] This is based on the difference between the purchase price of NOK 8 700 000 and the valuation of NOK 12 000 000, i.e. NOK 3 300 000; plus the economic advantage of the "soft loan", i.e. the interest-free deferral of payment of 70% of the purchase price from 21 March 2007 until 31 December 2011, calculated as NOK 2 000 000, at most.

43. ESA submits that its approach of taking the time when the sale agreement was entered into (2007) as the basis for the State aid assessment was, in effect, more lenient on the applicant. ESA observes that the aid that is to be recovered, as specified in the contested decision, consists of two components, namely (i) the difference between the purchase price and the market price of the property at the time it was sold, and (ii) the economic advantage of the "soft loan", i.e. the interest-free deferral of payment of 70% of the purchase price, from the date of the sale agreement signed on 21 March 2007. In that regard, ESA submits that were the State aid assessment to be calculated from the date when the option agreement was first concluded, the additional economic advantage conferred upon the applicant by the option agreement in 2001 – and by its renewal in 2004 – would also have to be recovered. In those circumstances, the total amount of State aid would consist of (i) the difference between the market price and the purchase price at the time of the sale in 2007, together with (ii) the economic advantage of the soft loan, (iii) the unpaid option premium from 2001, and (iv) the unpaid option premium from 2004.

44. As regards Asker Brygge's reference to the cost of researching and planning the property as sufficient remuneration for the option premium, ESA reiterates that during the administrative procedure no claims of that kind were supported by any documentation of costs actually incurred, and, in any event, such work would be to the benefit of the applicant itself.

45. In its reply, the applicant expresses difficulty in seeing how the statement made in the defence that further aid would have to be recovered qualifies as an argument against using the date of the option agreement as the basis for the assessment As it sees it, ESA appears to argue, on the one hand, that 2001 is not to the relevant date for the assessment and, on the other, that also the option premium and the soft loan agreed in 2001 may constitute State aid. According to Asker Brygge, this approach is inconsistent and lacks logical reasoning. It emphasises that, in the contested decision, only the difference between the purchase

price set out in the 2007 sale agreement and the market price was found to entail State aid. Neither the option agreement nor the soft loan was found to be State aid subject to recovery. Bearing in mind that the Court's assessment is limited to the scope of ESA's decision, Asker Brygge considers ESA's argument in this regard to be both contradictory and irrelevant.

46. ESA submits in its rejoinder that, contrary to what the applicant appears to imply, the fact that a greater amount of aid would have to be recovered if the assessment is based on the option agreement is not in and of itself an argument against doing so. ESA stresses that it seeks to apply the State aid rules correctly and appropriately and, therefore, contrary to what the applicant may appear to imply, does not necessarily always favour the particular application of the rules that involves the highest possible amount of aid. In the present case, ESA continues, it considered that whilst the option agreement was not entered into on market terms, this would not vitiate the sale if the sale were carried out on market terms.

47. In any event, ESA argues that it used its competence and reviewed the option agreement in the contested decision. In that regard, ESA stresses that it was not demonstrated that the selling price of NOK 8 000 000 set out in the option agreement in 2001 corresponded to the market price for the property at that time. Moreover, even if NOK 8 000 000corresponded to the market price in 2001, indexing in accordance with the consumer price index was not capable of ensuring that the market price was paid whenever the option was exercised. This is particularly the case given that the option was to be valid for as many as eight and a half years (later prolonged to a total of 13.5 years). Over such extended periods of time it is most likely that the consumer price index would see a less significant increase than property prices. Furthermore, there was no right for the Municipality to demand an upward adjustment if property prices increased more significantly than the consumer price index, whereas the applicant was given the right to demand a renegotiation of the price if there was a considerable decrease in property prices in Asker. Finally,

the Municipality received no remuneration when it entered into the option in 2001 or when the option was renewed in 2004. The exclusive right to purchase the property was thus granted to the applicant for free and was renewed for free.

48. As regards the applicant's reference to "the cost of researching and planning the property", ESA reiterates that during the administrative procedure no claims of that kind were supported by any documentation of costs actually incurred. It observes that, in fact, this remains the case. ESA further stresses the equally important point that, in any case, it would be to the applicant's benefit if its research on the property ensured that it obtained permission to change the property's use to allow for development, which would increase the value of the property.

49. As for the applicant's claim that only the price difference inherent in the 2007 sales agreement constituted State aid subject to recovery, ESA submits that the applicant seeks to interpret the contested decision to the effect that only the advantage of buying the property at a price below market price was found to entail State aid. ESA stresses, however, that it explicitly follows from the contested decision that, in its State aid assessment, it also took account of the advantage of the interest-free deferred payment, that is, the "soft loan".

50. The Commission observes at the outset that the Court of Justice of the European Union ("ECJ") has held that a sale by public authorities of land to an undertaking or to an individual involved in an economic activity may include elements of State aid, in particular where the real estate is not sold at the price which a private investor, operating in normal competitive conditions, would have been able to fix.[4] Further, according to the Commission, it is established that in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in

[4] Reference is made to Cases C-290/07 P *Commission* v *Scott*, judgment of 2 September 2010, not yet reported, paragraph 68; and C-239/09 *Seydaland* v *Commission*, judgment of 16 December 2010, not yet reported, paragraph 34.

the context of the period during which the measures were taken in order to assess the economic rationality of the State's conduct.[5]

51. The Commission agrees in principle with the applicant's contention that the decisive point in assessing the market economy investor principle should be whether commercial agreements, including option agreements, are based on normal market conditions at the time when they are entered into between the parties. In its view, in a case involving an option for the sale of land, private parties would fix an appropriate remuneration for the option. Hence, if a public authority grants a similar option and receives appropriate remuneration for the risk of a change in the value of the land, the presence of aid can be excluded even if the market price of the land at the time of the sale is higher than the price agreed in the option.

52. However, the Commission submits that, in the case at hand, a private operator would not have entered into such a long option agreement on similar terms. In this regard, the Commission fully supports ESA's assessment of the option agreement set out in the contested decision. Accordingly, the Commission contends that the option agreement already contained an element of aid, and to evaluate that aid ESA should have placed itself at the moment when that agreement was entered into in 2001.

53. Despite the fact that ESA did not quantify the element of aid inherent in the option agreement as such, the Commission considers that ESA is correct to observe that the quantification of that aid element would lead to the identification of incompatible aid to be recovered from the applicant. It is thus clear, the Commission argues, that the applicant has no legal interest in pursuing this claim, because even if it were accepted it would bring it no benefit.[6]

[5] Reference is made to Case C-482/99 *France* v *Commission (Stardust Marine)* [2002] ECR I-4397, paragraph 71.

[6] Reference is made to Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04 *France and Others* v *Commission* [2010] ECR II-2099, paragraph 116.

54. With regard to the subsequent sale of the land to the applicant, the Commission considers that for the purposes of applying State aid rules, two approaches could be envisaged. One approach, which is, in fact, more strict, is to conclude automatically that, since the option agreement does not comply with the private operator test, any subsequent transaction implementing that agreement also contains State aid. Such an approach, entailing that a plurality of measures, which are closely linked from a material point of view, must be examined together, would appear logical at first sight and moreover finds some support in case-law.[7]

55. However, the Commission considers that ESA was correct not to adopt that approach and conclude automatically that the sale agreement involved aid simply because it implemented the option agreement. Instead, ESA adopted the correct approach for the present case in concluding that in order to determine the existence of State aid in the sale agreement it had to consider the situation at the time of that agreement. Namely, even if the option agreement does not reflect the behaviour of a private operator, the possibility could not be excluded that the price agreed in the sale agreement might have reflected the market value of the land at the time when that agreement was concluded. Therefore, in the Commission's view, in order to identify any possible State aid contained in the sale agreement, ESA had to consider the market value of the land at the moment of that agreement and compare it with the price established in the sale agreement. Only on the conclusion of that agreement was aid in the form of a difference between the selling price and the market value of the land granted to the applicant by a legally binding act of the Norwegian authorities. For the same reason, the aid element inherent in the deferral of the payment of 70% of the agreed sale price could also not have been granted before the effective sale of the land to the applicant as before that moment the purchase price was simply not due. Consequently,

[7] Reference is made to Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraph 171; and Joined Cases T-415/05, T-416/05 and T-423/05 *Greece and Others* v *Commission*, judgment of 13 September 2010, not yet reported, paragraph 385.

the Commission submits that this aid element also had to be evaluated at the moment when the sale agreement was concluded.

56. The Danish Government submits that whether an agreement constitutes an advantage in relation to the concept of State aid must, in this case, be assessed on the basis of the market investor principle. The assessment must take place at the time the parties entered into a legally binding contract.[8]

57. In that regard, the Danish Government observes that, in relation to State aid in the form of State guarantees, aid is considered granted when the guarantee is given, not when the guarantee is invoked nor when payments are made under the terms of the guarantee.[9] In the Danish Government's view, options or option agreements, where a party may decide whether to exercise the option perhaps several years after entering into the agreement, must be assessed in the same way. Hence, if an option is issued without remuneration or sold below the market price, the aid is given at the moment when the option agreement is made legally binding, not when the option is exercised. Accordingly, the amount of the State aid must be assessed at this moment. Postponing the assessment to a later time would conflict with the principles specified above, and would entail a misleading result.

58. According to the Danish Government, if the purchaser pays the market price for the option at the time the agreement is made legally binding, and the option agreement, therefore, is consistent with the market investor principle, any subsequent development in the actual circumstances on the respective market which may favour one of the parties is irrelevant.

59. Accordingly, in the view of the Danish Government, provided that the price of the option agreed between the Municipality of Asker and the applicant was valued correctly in accordance with the

[8] Reference is made to Case C-482/99 *France* v *Commission*, cited above, paragraphs 70 and 71.

[9] Reference is made to the Commission Notice on the application of Article 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ 2008 C 155, p. 10, point 2.1).

Commission's Communication on State aid elements in sales of land and buildings by public authorities and normal economic models on valuation of options at the time the parties entered into the agreement, any difference in price at the time when the option is exercised between the price established by the contract and the actual market price does not constitute State aid. It is merely the result of price or market fluctuations in relation to the value of the option that the applicant was granted in 2001.

60. In the Danish Government's view, any part of the option agreement between the Municipality of Asker and the applicant which constitutes State aid must be taken into account when assessing the amount of aid granted. The Government contends that, at the very least, the unpaid option premiums from 2001 and 2004, the soft loan, and the unilateral right for the applicant to demand renegotiation of the price of the property and any other terms in the contract fall within the meaning of State aid as provided for in Article 61(1) EEA, and must be taken into account when calculating the amount of State aid.

Alternative plea: The market price established by ESA does not sufficiently take account of the factual circumstances in 2007

61. If the Court takes the view that 2007 is the relevant time for the State aid assessment, the applicant submits that the market price established by ESA is based on an incorrect assessment of the factual circumstances in 2007.

62. Asker Brygge disputes the validity of the second 2008 valuation report, which ESA uses as the basis for its State aid assessment. According to the applicant, the report cannot be used in the assessment of whether Asker Brygge has received State aid because it does not establish a reliable market price of the property. First, as the calculations in the valuation report demonstrate, further development of the property as a marina is fundamental to the market price established in the valuation. Moreover, the report is based on an assumption that the municipal landscape and building committee will approve the dredging of the shoreline to make 85 new moorings available, and

accordingly estimates the annual income from the lease of those moorings at NOK 2 525 000.

63. The applicant claims that this assumption is fundamentally flawed. A diligent valuation committee would have known and taken account of the fact that Norwegian law contains a general prohibition on dredging.[10] A derogation from the prohibition may be given only by the County Governor. The municipal landscape and building committee has no competence in that regard. An appeal against the decision of the County Governor may be made to the Climate and Pollution Agency ("KLIF"). Asker Brygge applied for a derogation, but this was rejected both by the County Governor and KLIF. Consequently, the prohibition on dredging continues to apply to the property as it did in 2001 and in 2007. Furthermore, Slependen Båtforening, which rents parts of the plot of land at issue, examined the possibility of dredging the harbour with the Public Road Administration in 1991, but the administration held that this was not suitable due to the stability of a nearby motorway bridge. Since the factual circumstances have not changed, it is evident that with the prohibition on dredging the estimated income from the lease of new moorings has not materialised.

64. The applicant notes further that the annual lease income from 90 winter storage spaces is estimated at NOK 1 080 000. In points out, however, that the market for winter storage is closely related to the number of moorings. Without the possibility to dredge the harbour and make available 85 new moorings, the annual lease income from winter storage is much lower than the estimated NOK 1 080 000.

65. The applicant does not contest the proposition that the legality of a State aid decision must be assessed in the light of the information available to ESA when the decision was adopted.[11]

[10] Reference is made to the prohibition previously laid down in the Regulation on dredging of sea and watercourses of 4 December 1997 No 1442 (repealed) and now included in Section 22-3 of the Pollution Regulation.

[11] Reference is made to Case T-274/01 *Valmont* v *Commission* [2004] ECR II-3145, paragraph 38, and case-law cited.

However, it asserts that, as the alleged aid recipient, in its third party comments on the opening of the formal investigation procedure pursuant to Article 1(2) of Part I of Protocol 3 SCA, contrary to what ESA contends, it provided ESA with factual documentation proving that the valuation of June 2008 is incorrect. It submits that it informed ESA of (i) the statement of the Public Road Administration in which the administration considered further dredging in the areas not suitable, and (ii) the negative outcome of its application for a derogation.[12] In those circumstances, ESA should have understood that the possibility for further dredging on the property is highly contested, and that the fundamental premise on which the valuation was based was dubious.

66. In the applicant's view, ESA should have invoked the right to request further information, and to the extent necessary have adopted an injunction pursuant to Article 10(3) of Part II of Protocol 3 SCA, in order to adopt a decision based on the correct factual circumstances. Hence, according to the applicant, ESA cannot defend its decision by the incomplete nature of the information provided by the Municipality of Asker or the alleged aid recipient.[13]

67. Moreover, according to the applicant, as the general prohibition on dredging is laid down in national legislation, ESA should have requested information from the authorities on the legal framework needed to determine whether independent expert reports such as the valuation report at issue in this case are sound.

68. ESA contests the applicant's arguments, and submits that the factual circumstances were appropriately taken into account when establishing the market price for the property in 2007.

69. At the outset, ESA notes that no independent valuation of the property had been carried out before the option agreement was entered into in 2001, or renewed in 2004. In the notification, however, the Norwegian authorities submitted three expert

[12] Reference is made to page 6 in the comments from Asker Brygge of 29 January 2010.
[13] Reference is made to *Valmont* v *Commission*, cited above, paragraph 60, and case-law cited.

reports. ESA notes that the second 2008 report was relied upon by the Municipality to determine the market price of the property in 2001, and by ESA itself to determine the market price in 2007.

70. As for the applicant's assertion that the assumption that the shoreline may be dredged is "fundamentally invalid", ESA claims that the applicant itself appears to have relied upon this assumption. Evidence to that effect can be found, first, in an agreement concluded on 1 June 2006 between Asker Brygge and Slependen Båtforening, where the former undertook to provide the necessary dredging. Second, Asker Brygge made an application on 4 September 2007 to the County Governor for permission to dredge, due to development and extension of the marina. This was rejected. Asker Brygge then submitted a second application on 11 December 2007, but the County Governor denied permission. On 13 June 2008, the applicant appealed against this decision, but the County Governor refused to revoke it and therefore referred the appeal to the relevant appellate body,[14] which upheld the decision on 16 February 2009.

71. In this regard, ESA submits that under Norwegian law there is no absolute prohibition on dredging. Instead, there is a general prohibition subject to a possibility to obtain a permission to dredge, as was indeed applied for by the applicant.[15] If the valuation were to disregard that possibility, it would fail to take account of the fact that investors buy property to develop. Consequently, in ESA's view, the market price in 2007 would necessarily be influenced by whether potential buyers expected to be successful in obtaining permission to dredge, as dredging would appear to be necessary for major construction works to be carried out.

72. According to ESA, a proper assessment of the property's value in 2007 must be based on the assumptions of potential buyers at that time. Therefore, as, at the relevant time, Asker Brygge was planning to dredge and apparently made business calculations

[14] Then the Pollution Control Authority, now the KLIF.
[15] Reference is made to Section 22-3 of the Pollution Regulation.

and entered contracts on that basis and, thus, in fact, based itself on the assumption that the shoreline may be dredged, it makes sense that the assessment of the property's value in 2007 took account of the fact that other potential buyers would also make the same assumption. The fact that Norwegian law provides for a possibility to obtain permission to dredge and the fact that the applicant itself relied on that possibility suggests that other potential buyers would have done the same.

73. Further, as for the fact that the Public Road Administration advised against dredging in 1991, ESA notes that this apparently did not prevent the applicant from taking on a contractual obligation vis-à-vis Slependen Båtforening in 2006 to carry out the necessary dredging. Nor did it prevent the applicant from twice seeking permission from the County Governor in 2007 to dredge, or from appealing against the refusal to grant permission in 2008.

74. ESA asserts that it is immaterial if the second 2008 valuation report did not refer to the correct authority with which to file an application for permission to dredge. Not identifying specifically the authority with which a buyer would have to file the necessary application has no effect on the value assessment. That said, the report seems, in any event, only to make a general reference to the "building authorities" (*bygningsmyndighetene*) and no specific reference to the "local landscape and building committee", as the applicant appears to contend.

75. In light of those considerations, ESA submits that, contrary to what the applicant contends, the information concerning the unfavourable opinion of the Public Road Administration and the fact that the applicant sought permission to dredge, does not undermine but supports the assumptions made in the 2008 valuation report with regard to dredging. ESA submits that it was under no obligation, therefore, to request further information before adopting its decision. Nor was it required to issue an information injunction against Norway. In that connection, it stresses that, pursuant to Article 10(3) of Part II of Protocol 3 SCA, such an injunction can only be issued after repeated failure

on the part of the EFTA State concerned to provide information, despite being requested to do so and formally reminded thereof. Consequently, according to ESA, it follows from the above submissions that the second 2008 valuation report was sound within the applicable national legal framework.

76. In its reply, the applicant maintains its contention that the second 2008 valuation report does not establish a reliable market price for the property. It submits that ESA's determination of the influence on the market price resulting from the legal restrictions is fundamentally wrong. Whilst accepting that the market price must be based on the assumptions of potential buyers, the applicant stresses that ESA's assessment must take account of the correct and decisive factual circumstances. In that regard, ESA is obliged to take into consideration all factors which influence the market price.[16]

77. The applicant argues that, although the Norwegian prohibition on dredging is not absolute, there is not a legal right nor is it a matter of course to obtain an exemption from the prohibition. As is evident from the facts of this case, an exemption is not easy to obtain, something the applicant knew. Therefore, contrary to ESA's submission, Asker Brygge – in the same way as any other potential purchaser – could not rely on this possibility. Consequently, the market price will depend on the specific potential for obtaining this exemption. Hence, according to the applicant, in assessing the market price, the valuation must be based on the presumption that dredging is prohibited.

78. According to the applicant, neither the applications for exemption nor the fact that a contract was entered into between Asker Brygge and Slependen Båtforening support the view that it relied on the right to dredge. Both the agreement and the applications were necessary steps in an attempt to develop the land, irrespective of the applicant's appraisal of the actual possibility to obtain an exemption from the prohibition on dredging.

[16] Reference is made to Case T-244/08 *Konsum Nord ekonomisk förening* v *Commission*, judgment of 13 December 2011, not yet reported, paragraph 57.

79. Finally, the applicant notes in its reply that, although the property is polluted and Asker Brygge will incur cost of cleaning the land, this cost is not included in the report.

80. In its rejoinder, ESA contends that the applicant's assertion that the cost of cleaning the land is not included in the relevant valuation report is erroneous. It refers to the report in question, which highlights that "[t]he expert commission has included, in its cost analyses, dredging and landfill of mass on Langøya, thereby taking into account a degree of polluted mass".[17] It notes that the valuation committee reached this finding following an e-mail from the Municipality and the applicant regarding pollution on the property which reads: "[f]urther corrections should be made for the commission having assumed that there is no pollution on the property, which must be obvious to everyone that there is (marina and winter storage for 30 years). Significant pollution has been evidenced both on land and in the sea (class 5 and 6)."[18] Accordingly, the valuation report itself emphasised that pollution was indeed taken into account.

81. Further, although agreeing with the applicant's submission that it is obliged to take into consideration all factors that influenced the market price at the relevant time, ESA contends that the applicant's reference to Case T-244/08 *Konsum Nord ekonomisk förening* has no bearing on the case at hand. In its view, that case was far more complex and involved a series of interconnected transactions between the parties, serving to execute a municipal framework and detailed plan for an area, which had to be considered as a whole.[19] Case-law which is more appropriate to the present case supports the approach taken in the contested decision, and emphasises how the sale by public authorities of

[17] Reference is made to the second 2008 valuation report (Annex 4 to the application, page 5).

[18] Reference is made to the e-mail from the Municipality and the applicant to the valuation committee (Annex B5 to the defence, page 2).

[19] Reference is made to *Konsum Nord ekonomisk förening* v *Commission*, cited above, paragraphs 47 to 48.

land must in all cases lead to a price as close as possible to the market value.[20]

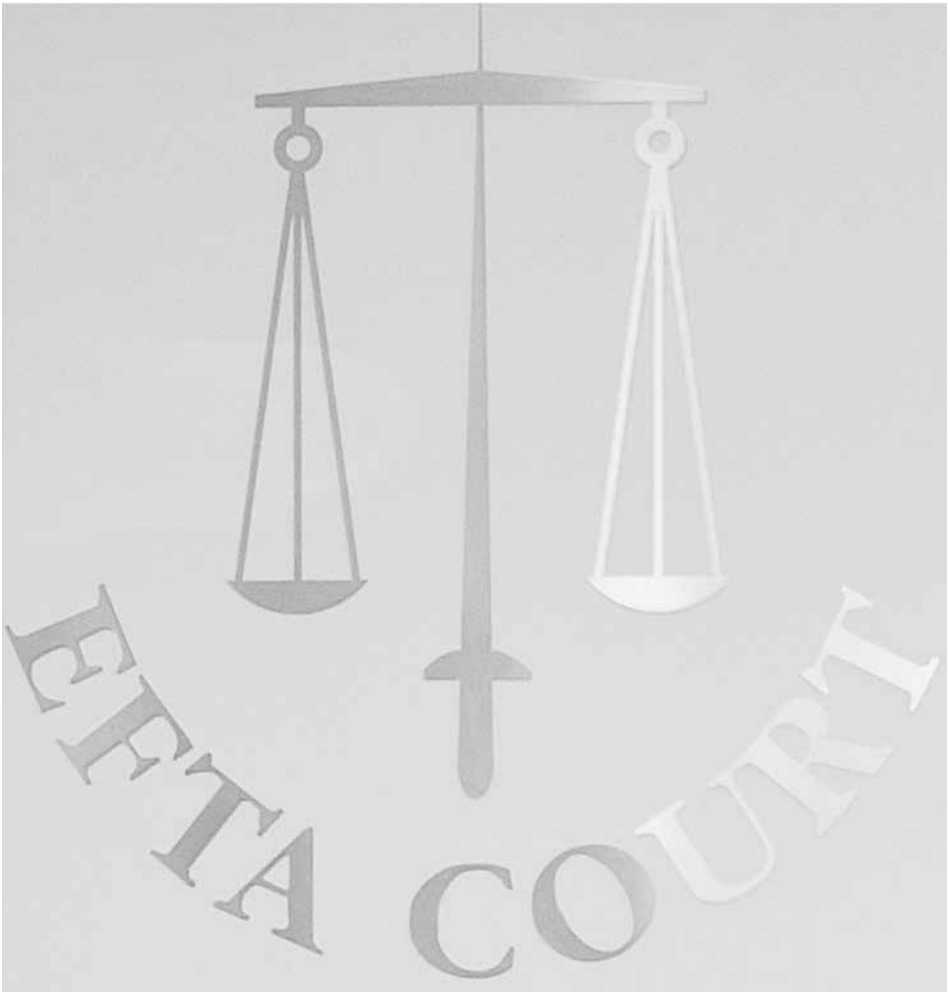
82. As a final observation, ESA submits that the applicant's position is inherently contradictory. On the one hand, it wants the property valued on the basis that dredging is definitively prohibited. On the other, it evidently wants to dredge on the property in order to develop it.

83. The Commission fully supports ESA's view as regards the alternative plea.

Per Christiansen

Judge-Rapporteur

[20] Reference is made to *Seydaland*, cited above, paragraphs 34 to 35, with further reference to *Scott*, cited above, paragraph 68.


EFTA COURT

Case E-18/11

Irish Bank Resolution Corporation Ltd

v

Kaupthing Bank hf.

CASE E-18/11

Irish Bank Resolution Corporation Ltd

v

Kaupthing Bank hf.

(Article 34 SCA – Appeal against a decision making a request for an Advisory Opinion – Reorganszation and winding-up of credit institutions – Directive 2001/24/EC – Conform Interpretation)

Summary of the Judgment

1. Article 34 SCA establishes a special means of judicial cooperation between the Court and national courts aiming at providing national courts with the necessary interpretation of elements of EEA law to decide cases before them. It is solely for the national court to determine in the light of particular circumstances of the case at hand the need for an Advisory Opinion and the relevance of questions which it submits.

2. The relationship between the Court and the national courts of last resort is, pursuant to Article 34 SCA, more partner-like than the relations between the ECJ and the highest courts of the EU Member States. Nevertheless, courts against whose decisions there is no judicial remedy under national law will take due account of the fact that they are bound to fulfil their duty of loyalty under Article 3 EEA and that EFTA citizens and economic operators benefit from the obligation of respective courts of the EU Member States to make a reference to the ECJ.

3. The provisions of EEA Agreement and SCA are to be interpreted in the light of fundamental rights. When a court against whose decisions there is no judicial remedy under national law refuses a motion to refer a case to another court, it cannot be excluded that such a decision may fall foul of the standards of Article 6(1) ECHR.

MÁL E-18/11

Irish Bank Resolution Corporation Ltd

gegn

Kaupthingi Banka hf.

(34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls – Málskot ákvarðana um að leita ráðgefandi álits – Endurskipulagning og slit lánastofnana – Tilskipun 2001/24/EB – Samræmd túlkun)

Samantekt

1. Samkvæmt viðurkenndri dómaframkvæmd dómstólsins kveður 34. gr. samningsins um stofnun eftirlitsstofnunar og dómstóls á um sérstakt samstarf á milli dómstólsins og dómstóla samningsríkjanna, með það að markmiði að veita dómstólum samningsríkjanna nauðsynlega túlkun á atriðum EES-réttar til að þeir geti leyst úr málum sem fyrir þá eru lögð. Það er einungis sá dómstóll eða réttur aðildarríkis sem aðilar hafa lagt ágreining sinn fyrir og ber ábyrgð á hinni endanlegu dómsniðurstöðu sem ákveður, með hliðsjón af aðstæðum í hverju máli, bæði hvort nauðsyn er að afla ráðgefandi álits til að kveða upp dóm og hvaða þýðingu spurningarnar sem hann leggur fyrir dómstólinn hafa.

2. Sambandið á milli dómstólsins og dómstóla samningsríkjanna á efstu dómstigum líkist í þessu tilliti meira sambandi samstarfsaðila, samkvæmt 34. gr. samningsins um stofnun eftirlitsstofnunar og dómstóls og endurspeglar þá staðreynd að sá samruni sem EES-samningurinn mælir fyrir um gengur ekki eins langt og er ekki eins víðfeðmur og sá samruni og kveðið er á um í sáttmálum Evrópusambandsins. Á sama tíma verða þeir dómstólar EFTA-ríkis sem ekki sæta endurskoðun æðri dómstóla á grundvelli málskots að taka tilhlýðilegt tillit til þeirrar trúnaðarskyldu sem þeir bera samkvæmt 3. gr. EES-samningsins. Dómstóllinn bendir í þessu samhengi á að ríkisborgarar og aðilar í atvinnurekstri í EFTA-ríkjunum njóta ávinnings af

4. In case of differing authentic language versions of a directive a preferred starting point for the interpretation will be to choose one that has the broadest basis in the various language versions. This would imply that the provision, to the largest possible extent, acquires the same content in all EEA States. In case of divergence between the language versions the provision must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part so as to be consistent with the general principles of EEA law.

5. The objective of establishing a dynamic and homogeneous European Economic Area can only be achieved if EFTA and EU citizens and economic operators enjoy, relying upon EEA law, the same rights in both the EU and EFTA pillars of the EEA.

6. The referring court is bound to interpret domestic law, so far as possible, in the light of the wording and purpose of the Directive, in order to achieve the result sought by the Directive to ensure that an individual or economic operator who is a known creditor but who has not been individually notified through the dispatch of a notice pursuant to Article 14 of the Directive, may be able to lodge a claim with the responsible national winding-up authority within the applicable time-limits established under national law.

7. Where that is not possible, in cases of violation of EEA law by an EEA State such a State is obliged to provide compensation for loss and damage caused to individuals and economic operators, in accordance with the principle of State liability, provided that conditions laid down in the Court's case-law are fulfilled.

skyldu dómstóla ESB-aðildarríkja, geti úrlausn þeirra ekki sætt málskoti samkvæmt landslögum, til að leita forúrskurðar hjá Evrópudómstólnum.

3. Ákvæði EES-samningsins og ákvæði samningsins um eftirlitsstofnunina og dómstól ber að túlka með hliðsjón af grundvallarréttindum. Í þessu tilliti verður að hafa í huga að þegar dómstóll eða réttur sem fer með endanlegt úrlausnarvald samkvæmt landsrétti hafnar umsókn um að vísa máli til annars dómstóls, er ekki hægt að útiloka að slík ákvörðun geti farið í bága við ákvæði 1. mgr. 6. gr. mannréttindasáttmála Evrópu.

4. Ef um er að ræða efnislegan mun á útgáfum EES-reglna á ólíkum tungumálum, sem öll hafa sama vægi, verður almennt að ganga út frá því að sú skýring skuli valin sem á sér stoð í sem flestum útgáfum. Slík skýring leiðir til þess að viðkomandi ákvæði hefur sama inntak í öllum EES-ríkjunum, að svo miklu leyti sem unnt er.

5. Einungis er hægt að ná markmiðinu um myndun öflugs og einsleits Evrópsks efnahagssvæðis ef ríkisborgarar og aðilar í atvinnurekstri í EFTA- og ESB-ríkjunum njóta sömu réttinda innan EFTA- og ESB-stoðarinnar, þegar þeir þurfa að reiða sig á EES-rétt.

6. Landsdómstóli ber að túlka ákvæði landsréttar með hliðsjón af orðalagi og markmiði tilskipunar 2001/24/EB eftir því sem kostur er þannig að niðurstöðunni sem stefnt er að með tilskipuninni sé náð og tryggt sé að einstaklingur eða aðili í atvinnurekstri sem er þekktur lánardrottinn en fékk ekki sérstaka tilkynningu um slitin með auglýsingu samkvæmt 14. gr. tilskipunarinnar, geti lýst kröfu hjá þeim aðila sem vald hefur til að taka við kröfum samkvæmt landsrétti innan gildandi frests samkvæmt landslögum.

7. Sé það ekki mögulegt og ef um er að ræða brot EES-ríkis á EES-rétti, telst hlutaðeigandi EES-ríki skyldugt til að greiða bætur fyrir tap og tjón sem einstaklingar og aðilar í atvinnurekstri hafi orðið fyrir, í samræmi við meginregluna um bótaábyrgð ríkisins, sem er óaðskiljanlegur hluti EES-samningsins.

JUDGMENT OF THE COURT

28 September 2012*

(Article 34 SCA – Appeal against a decision making a request for an Advisory Opinion – Reorganisation and winding up of credit institutions – Directive 2001/24/EC – Conform interpretation)

In Case E-18/11,

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

Irish Bank Resolution Corporation Ltd

and

Kaupthing Bank hf.

concerning the interpretation of Article 14 of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions,

THE COURT,

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

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

– Irish Bank Resolution Corporation Ltd ("the Plaintiff" or "IBRC"), represented by Eggert B. Ólafsson, District Court Attorney;

– Kaupthing Bank hf. ("the Defendant"), represented by Þröstur Ríkharðsson, District Court Attorney;

– the Icelandic Government, represented by Þóra M. Hjaltested, Director, Ministry of Economic Affairs, acting as Agent, and Áslaug Árnadóttir, District Court Attorney, acting as Counsel;

* Language of the request: Icelandic.

DÓMUR DÓMSTÓLSINS

28. september 2012*

(34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls – Málskot ákvarðana um að leita ráðgefandi álits – Endurskipulagning og slit lánastofnana – Tilskipun 2001/24/EB – Samræmd túlkun)

Mál E-18/11,

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

Irish Bank Resolution Corporation Ltd

gegn

Kaupþingi banka hf.

varðandi túlkun á 14. gr. tilskipunar Evrópuþingsins og ráðsins 2001/24/EB frá 4. apríl 2001 um endurskipulagningu og slit lánastofnana.

DÓMSTÓLLINN,

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

dómritari: Skúli Magnússon,

hefur, með tilliti til skriflegra greinargerða frá:

– Stefnanda, Irish Bank Resolution Corporation Ltd, í fyrirsvari er Eggert B. Ólafsson, hdl.;
– Stefnda, Kaupþingi banka hf., í fyrirsvari er Þröstur Ríkharðsson, hdl.;
– Ríkisstjórn Íslands, í fyrirsvari sem umboðsmaður er Þóra M. Hjaltested, skrifstofustjóri í efnahags- og viðskiptaráðuneytinu og henni til aðstoðar er Áslaug Árnadóttir, hdl.;

* Beiðni um ráðgefandi álit er á íslensku.

– the Estonian Government, represented by Marika Linntam, Director, European Union Litigation Division of the Legal Department, Ministry of Foreign Affairs, acting as Agent;
– the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Maria Moustakali, Temporary Officer, of the Department of Legal & Executive Affairs, acting as Agents;
– the European Commission ("the Commission"), represented by Albert Nijenhuis and Julie Samnadda, 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 Eggert B. Ólafsson; the Defendant, represented by Þröstur Ríkharðsson and Finnur Magnússon; the Icelandic Government, represented by Þóra M. Hjaltested, Áslaug Árnadóttir, Peter Dyrberg and Matthías Geir Pálsson; ESA, represented by Markus Schneider and Maria Moustakali; and the Commission, represented by Julie Samnadda, at the hearing on 26 June 2012,

gives the following

JUDGMENT

I LEGAL BACKGROUND

EEA law

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

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

2 According to the eighth recital in the preamble to the EEA Agreement, the Contracting Parties are

– Ríkisstjórn Eistlands, í fyrirsvari sem umboðsmaður er Marika Linntam deildarstjóri í Evrópusambands-málflutningsdeild á lagaskrifstofu utanríkisráðuneytisins;
– Eftirlitsstofnun EFTA, í fyrirsvari sem umboðsmenn eru Xavier Lewis, framkvæmdastjóri, og Maria Moustakali, tímabundinn fulltrúi á lögfræði- og framkvæmdasviði;
– Framkvæmdastjórn Evrópusambandsins, í fyrirsvari sem umboðsmenn Albert Nijenhuis og Julie Samnadda, hjá lagaskrifstofu framkvæmdastjórnarinnar;

með tilliti til skýrslu framsögumanns,

og munnlegs málflutnings umboðsmanns stefnanda, Eggerts B. Ólafssonar, umboðsmanna stefnda, Þrastar Ríkharðssonar og Finns Magnússonar, umboðsmanna ríkisstjórnar Íslands, Þóru M. Hjaltested, Áslaugar Árnadóttur, Peter Dyrberg og Matthíasar Geirs Pálssonar, fulltrúa Eftirlitsstofnunar EFTA, Markus Schneider og Maria Moustakali, og fulltrúa framkvæmdastjórnar Evrópusambandsins, Julie Samnadda, sem fram fór 26. júní 2012,

kveðið upp svofelldan

DÓM

I LÖGGJÖF

EES-réttur

1 Í 4. lið inngangsorða EES-samningsins kemur fram að samningsaðilar:

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

2 Samkvæmt 8. lið inngangsorða EES-samningsins eru samningsaðilar:

CONVINCED of the important role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights;

3 In the fifteenth recital in the preamble to the EEA Agreement, the Contracting Parties declare that

WHEREAS,... in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition;

4 Article 2(a) EEA reads as follows:

For the purposes of this Agreement:

the term "Agreement" means the main Agreement, its Protocols and Annexes as well as the acts referred to therein;

5 Article 3 EEA reads as follows:

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

Moreover, they shall facilitate cooperation within the framework of this Agreement.

6 Article 119 EEA reads as follows:

The Annexes and the acts referred to therein as adapted for the purposes of this Agreement as well as the Protocols shall form an integral part of this Agreement.

SANNFÆRÐIR UM að einstaklingar muni gegna mikilvægu hlutverki á Evrópska efnahagssvæðinu vegna beitingar þeirra réttinda sem þeir öðlast með samningi þessum og þeirrar verndar dómstóla sem þessi réttindi njóta,

3 Í 15. lið inngangsorða EES-samningsins lýsa samningsaðilar því yfir að þeir:

STEFNA AÐ ÞVÍ, með fullri virðingu fyrir sjálfstæði dómstólanna, að ná fram og halda sig við samræmda túlkun og beitingu samnings þessa og þeirra ákvæða í löggjöf bandalagsins sem tekin eru efnislega upp í samning þennan, svo og að koma sér saman um jafnræði gagnvart einstaklingum og aðilum í atvinnurekstri að því er varðar fjórþætta frelsið og samkeppnisskilyrði,

4 Ákvæði a-liðar 2. gr. EES-samningsins er svohljóðandi:

Í þessum samningi merkir:

hugtakið „samningur“ meginmál samningsins, bókanir við hann og viðauka auk þeirra gerða sem þar er vísað til,

5 Ákvæði 3. gr. EES-samningsins er svohljóðandi:

Samningsaðilar skulu gera allar viðeigandi almennar eða sérstakar ráðstafanir til að tryggja að staðið verði við þær skuldbindingar sem af samningi þessum leiðir.

Þeir skulu varast ráðstafanir sem teflt geta því í tvísýnu að markmiðum samnings þessa verði náð.

Þeir skulu enn fremur auðvelda samvinnu innan ramma samnings þessa.

6 Ákvæði 119. gr. EES-samningsins er svohljóðandi:

Viðaukar, svo og gerðir sem vísað er til í þeim og aðlagaðar eru vegna samnings þessa, skulu auk bókana vera óaðskiljanlegur hluti samningsins.

7 Article 129(1) EEA reads as follows:

1. This Agreement is drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Icelandic, Italian, Norwegian, Portuguese, Spanish and Swedish languages, each of these texts being equally authentic.

Pursuant to the enlargements of the European Economic Area the versions of this Agreement in the Bulgarian, Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Romanian, Slovak and Slovenian languages shall be equally authentic.

The texts of the acts referred to in the Annexes are equally authentic in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages as published in the Official Journal of the European Union and shall for the authentication thereof be drawn up in the Icelandic and Norwegian languages and published in the EEA Supplement to the Official Journal of the European Union.

8 EEA Joint Committee Decision 167/2002 of 6 December 2002 amended Annex IX (Financial services) to the EEA Agreement by adding Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions ("the Directive") at point 16c of that Annex (OJ 2003 L 38, p. 28). The Decision entered into force on 1 August 2003.

9 The twentieth recital in the preamble of the Directive reads as follows:

Provision of information to known creditors on an individual basis is as essential as publication to enable them, where necessary, to lodge their claims or submit observations relating to their claims within the prescribed time limits. This should take place without discrimination against creditors domiciled in a Member State other than the home Member State, based on their place of residence or the nature of their claims. Creditors must be kept regularly informed in an appropriate manner throughout winding-up proceedings.

7 Ákvæði 1. mgr. 129. gr. EES-samningsins er svohljóðandi:

1. Samningur þessi er gerður í einu frumriti á dönsku, ensku, finnsku, frönsku, grísku, hollensku, íslensku, ítölsku, norsku, portúgölsku, spænsku, sænsku og þýsku og er hver þessara texta jafngildur.

Vegna stækkana Evrópska efnahagssvæðisins telst texti samnings þessa jafngildur á búlgörsku, eistnesku, lettnesku, litháísku, maltnesku, pólsku, rúmensku, slóvensku, slóvösku, tékknesku og ungversku.

Textar gerða, sem vísað er til í viðaukunum, eru jafngildir á búlgörsku, dönsku, eistnesku, ensku, finnsku, frönsku, grísku, hollensku, ítölsku, lettnesku, litháísku, maltnesku, pólsku, portúgölsku, rúmensku, slóvensku, slóvösku, spænsku, sænsku, tékknesku, ungversku og þýsku eins og þeir birtast í Stjórnartíðindum Evrópusambandsins og skulu með tilliti til jafngildingar þýddir á íslensku og norsku og birtir í EES-viðbæti við Stjórnartíðindi Evrópusambandsins.

8 Með ákvörðun sameiginlegu EES-nefndarinnar nr. 167/2002 frá 6. desember 2002 var tilskipun Evrópuþingsins og ráðsins 2001/24/EB frá 4. apríl 2001 um endurskipulagningu og slit lánastofnana („tilskipunin“) tekin upp í EES-samninginn, með breytingu á IX. viðauka (Fjármálaþjónusta) samningsins (Stjtíð. 2003 L 38, bls. 28). Ákvörðunin öðlaðist gildi 1. ágúst 2003.

9 Í 20. lið inngangsorða tilskipunarinnar segir:

Upplýsingamiðlun til þekktra lánardrottna, hvers þeirra um sig, er jafnmikilvæg og birting til að gera þeim kleift, þegar það á við, að lýsa kröfum eða gera athugasemdir varðandi kröfur sínar innan tilskilinna tímamarka. Þetta ætti að fara fram án mismununar gagnvart lánardrottnum með lögheimili í aðildarríki öðru en heimaðildarríkinu, eftir því hvar þeir hafa búsetu eða hvers eðlis kröfur þeirra eru. Lánardrottnum skulu reglulega, og á viðeigandi hátt, gefnar upplýsingar á meðan á slitameðferð stendur.

10 The English language version of Article 14 of the Directive reads as follows:

Provision of information to known creditors

1. When winding-up proceedings are opened, the administrative or judicial authority of the home Member State or the liquidator shall without delay individually inform known creditors who have their domiciles, normal places of residence or head offices in other Member States, except in cases where the legislation of the home State does not require lodgement of the claim with a view to its recognition.

2. That information, provided by the dispatch of a notice, shall in particular deal with time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims or observations relating to claims and the other measures laid down. Such a notice shall also indicate whether creditors whose claims are preferential or secured in re need lodge their claims.

11 The Icelandic language version of Article 14 of the Directive reads as follows:

Tilhögun upplýsingamiðlunar til þekktra lánardrottna

1. Þegar slitameðferð hefst skulu stjórnvöld eða dómsmálayfirvöld heimaðildarríkisins eða skiptastjórinn upplýsa án tafar alla lánardrottna, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu í öðrum aðildarríkjum, um það nema í tilvikum þegar í löggjöf heimaaðildarríkis þess er ekki krafist að kröfunni sé lýst til að hún fáist viðurkennd.

2. Þessar upplýsingar skulu gefnar í formi auglýsingar þar sem fram koma tímamörk og viðurlög ef þau eru ekki virt, hvaða aðili hefur vald til að taka við kröfum sem lýst er eða athugasemdum sem eru lagðar fram varðandi kröfur og aðrar ráðstafanir sem mælt er fyrir um. Í auglýsingunni skal einnig koma fram hvort þeir sem eiga forgangskröfur eða kröfur sem eru tryggðar samkvæmt hlutarétti þurfi að lýsa þeim.

12 Translated into English by the Plaintiff, the Icelandic language version of Article 14 of the Directive reads as follows:

10 Ensk útgáfa 14. gr. tilskipunarinnar er svohljóðandi:

Provision of information to known creditors

1. When winding-up proceedings are opened, the administrative or judicial authority of the home Member State or the liquidator shall without delay individually inform known creditors who have their domiciles, normal places of residence or head offices in other Member States, except in cases where the legislation of the home State does not require lodgement of the claim with a view to its recognition.

2. That information, provided by the dispatch of a notice, shall in particular deal with time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims or observations relating to claims and the other measures laid down. Such a notice shall also indicate whether creditors whose claims are preferential or secured in re need lodge their claims.

11 Íslensk útgáfa 14. gr. tilskipunarinnar er svohljóðandi:

Tilhögun upplýsingamiðlunar til þekktra lánardrottna

1. Þegar slitameðferð hefst skulu stjórnvöld eða dómsmálayfirvöld heimaðildarríkisins eða skiptastjórinn upplýsa án tafar alla lánardrottna, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu í öðrum aðildarríkjum, um það nema í tilvikum þegar í löggjöf heimaaðildarríkis þess er ekki krafist að kröfunni sé lýst til að hún fáist viðurkennd.

2. Þessar upplýsingar skulu gefnar í formi auglýsingar þar sem fram koma tímamörk og viðurlög ef þau eru ekki virt, hvaða aðili hefur vald til að taka við kröfum sem lýst er eða athugasemdum sem eru lagðar fram varðandi kröfur og aðrar ráðstafanir sem mælt er fyrir um. Í auglýsingunni skal einnig koma fram hvort þeir sem eiga forgangskröfur eða kröfur sem eru tryggðar samkvæmt hlutarétti þurfi að lýsa þeim.

12 Íslensk útgáfa 14. gr. tilskipunarinnar, þýdd yfir á ensku af stefnanda, er svohljóðandi:

Arrangements for the disclosure of information to known creditors

When winding-up proceedings are opened, the administrative or judicial authorities of the home Member State or the liquidator shall without delay inform all creditors, which have their domicile, permanent residence or head offices in other Member States, thereof except in cases where the legislation of the home Member State does not require the lodgement of the claim with a view to its recognition. [The Defendant agrees with this translation]

This information shall be provided in the form of an advertisement, which includes time limits and the penalty for non-observance of the time limits, the party empowered to take delivery of lodged claims or observations submitted regarding claims and other stipulated measures. The advertisement shall also indicate whether holders of preferential claims or claims secured under in re need to lodge such claims.

13 Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority ("Surveillance and Court Agreement" or "SCA") reads as follows:

The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.

Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.

An EFTA State may in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law.

Icelandic law

14 Article 2(1) of Act No 2/1993 on the European Economic Area ("EEA Act") provides that the main text of the EEA Agreement shall have the force of statutory law. The same applies for the text of Protocol l to the Agreement, point 9 of Annex VIII and point 1 g) of Annex XII to the Agreement.

Arrangements for the disclosure of information to known creditors

When winding-up proceedings are opened, the administrative or judicial authorities of the home Member State or the liquidator shall without delay inform all creditors, which have their domicile, permanent residence or head offices in other Member States, thereof except in cases where the legislation of the home Member State does not require the lodgement of the claim with a view to its recognition. [Stefndi samþykkir þessa þýðingu]

This information shall be provided in the form of an advertisement, which includes time limits and the penalty for non-observance of the time limits, the party empowered to take delivery of lodged claims or observations submitted regarding claims and other stipulated measures. The advertisement shall also indicate whether holders of preferential claims or claims secured under in re need to lodge such claims.

13 Í 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls („samningurinn um stofnun eftirlitsstofnunar og dómstóls“ eða „SED“) segir:

EFTA-dómstóllinn hefur lögsögu til að gefa ráðgefandi álit varðandi túlkun á EES-samningnum.

Komi upp álitamál í þessu sambandi fyrir dómstóli í EFTA-ríki, getur sá dómstóll eða réttur, ef hann álítur það nauðsynlegt til að geta kveðið upp dóm, farið fram á að EFTA-dómstóllinn gefi slíkt álit.

EFTA-ríki getur í eigin löggjöf takmarkað rétt til að leita eftir slíku ráðgefandi áliti við dómstóla og rétti geti úrlausn þeirra ekki sætt málskoti samkvæmt landslögum.

Landsréttur

14 1. mgr. 2. gr. laga nr. 2/1993 um Evrópska efnahagssvæðið (lögin um EES-samninginn) kveður á um að meginmál EES-samningsins skuli hafa lagagildi. Það á við um texta bókunar l við samninginn, 9. lið VIII. viðauka og 1. lið g XII. viðauka við samninginn.

15 According to Article 3 of the same Act "[s]tatutes and regulations shall be interpreted, in so far as appropriate, to accord with the EEA Agreement and the rules based thereon".

16 Directive 2001/24/EC was implemented into Icelandic legislation by Icelandic Act No 130/2004 of 22 December 2004 on the Amendment of Act No 161/2002 on Financial Undertakings ("the Financial Undertakings Act") and Act No 60/1994 on Insurance Services.

17 Article 14 of the Directive was transposed by Article 11 of Act No 130/2004, which amended Article 104(4) of the Financial Undertakings Act and Article 4 of Icelandic Regulation 872/2006 on the notification and publication of decisions concerning the reorganisation and winding-up of credit institutions. The Financial Undertakings Act has subsequently been amended by Act No 44/2009.

18 Article 102(2) of the Financial Undertakings Act reads:

Once a Winding-up Committee has been appointed for a financial undertaking, the Committee must without delay issue and have published in the Legal Gazette an invitation to lodge claims in connection with the winding-up. The same rules shall apply concerning the substance of the invitation to lodge claims, the time limit for lodging claims and notifications or advertisements for foreign creditors as apply in insolvency proceedings.

19 The rules referred to in Article 102(2) of the Financial Undertakings Act are found in Articles 85, 86(1) and 118 of Act No 21/1991 on bankruptcy (the "Bankruptcy Act").

20 Article 85 of the Bankruptcy Act provides:

The trustee in bankruptcy shall, immediately following his appointment, issue and have published a notice to creditors announcing the bankruptcy, and stating the following:

1. the name of the bankrupt, his or her National Registry number, and, as the case may be, domicile, residence, place of stay, place of business operation, or registered venue;

2. the name and National Registry number of a business enterprise or company, if the bankrupt has had unlimited liability for its obligations;

15 Samkvæmt 3. gr. sömu laga skal skýra „lög og reglur, að svo miklu leyti sem við á, til samræmis við EES-samninginn og þær reglur sem á honum byggja“.

16 Tilskipun 2001/24/EB var innleidd í íslenskan rétt með íslenskum lögum nr. 130/2004 frá 22. desember 2004, um breytingar á lögum nr. 161/2002, um fjármálafyrirtæki og með lögum nr. 60/1994, um tryggingaþjónustu.

17 14. gr. tilskipunarinnar var leidd í lög með 11. gr. laga nr. 130/2004, sem breytti 4. mgr. 104. gr. laga um fjármálafyrirtæki og 4. gr. íslensku reglugerðarinnar nr. 872/2006, um tilkynningu og birtingu ákvarðana um endurskipulagningu fjárhags og slit lánastofnana. Lögum um fjármálafyrirtæki hefur síðan verið breytt með lögum nr. 44/2009.

18 Í 2. mgr. 102 gr. laga um fjármálafyrirtæki segir:

Þegar fjármálafyrirtæki hefur verið skipuð slitastjórn, skal hún tafarlaust gefa út og fá birta í Lögbirtingablaði innköllun vegna slitanna. Um efni innköllunar, kröfulýsingarfrest og tilkynningar eða auglýsingar vegna erlendra kröfuhafa skal beitt sömu reglum og við gjaldþrotaskipti.

19 Reglurnar sem um getur í 2. mgr. 102. gr. laga um fjármálafyrirtæki er að finna í 85. gr., 1. mgr. 86. og 118. gr. laga nr. 21/1991 um gjaldþrotaskipti o.fl. (gjaldþrotaskiptalögin).

20 Í 85. gr. gjaldþrotaskiptalaga segir:

Skiptastjóri skal án tafar eftir skipun sína gefa út og fá birta innköllun vegna gjaldþrotaskiptanna þar sem eftirfarandi skal koma fram:

1. nafn þrotamannsins, kennitala og eftir atvikum lögheimili hans, dvalarstaður, aðsetur, starfsstöð eða skráð varnarþing,

2. heiti og kennitala firma eða félags, ef þrotamaðurinn hefur borið ótakmarkaða ábyrgð á skuldbindingum þess,

3. the date of the district court judge's order declaring the bankruptcy, and the bankruptcy reference date;

4. a call upon any creditors and others, who maintain that they have a claim against the bankruptcy estate, to declare their claims to the trustee in bankruptcy by sending or delivering their statements of claim to a certain place within the period determined for that purpose as provided for in the second paragraph;

5. the place and time of a meeting of the creditors held in the purpose of considering the declared claims, which shall be held not later than one month after the period for stating claims has expired;

The period for stating claims shall generally be two months, but in exceptional circumstances the trustee may decide on a period of three to six whole months. Irrespective of its duration, the period for stating claims shall start when the notice to creditors is published for the first time, and this shall be clearly stated in the notice.

In his notice to creditors, the trustee may provide that any creditors who have stated their claims during the bankrupt's preceding composition efforts need not state them anew, if they do not desire to submit a change to them.

If the trustee has, already when a notice to creditors is issued, decided to hold a meeting of the creditors to consider the interests of the bankruptcy estate, he may convene the meeting in the notice.

A notice to creditors shall be published twice in the Law and Ministerial Gazette.

21 Article 86 of the Bankruptcy Act reads:

As the trustee in bankruptcy issues a notice to creditors as provided for in Article 85, he may in particular seek information on whether any potential claimant against the bankruptcy estate resides abroad. If this proves to be the case, the trustee may notify the party in question as soon as possible of the bankruptcy, informing him of when the period for stating claims ends, and of the possible effects of a failure to state a claim within that period.

3. hvenær úrskurður héraðsdómara gekk um töku bús til gjaldþrotaskipta og hver frestdagur sé við gjaldþrotaskiptin,

4. áskorun til lánardrottna og annarra, sem telja sig eiga kröfur á hendur búinu eða til muna í vörslum þess, um að lýsa kröfum sínum fyrir skiptastjóra með sendingu eða afhendingu kröfulýsinga á tilteknum stað innan tilgreinds kröfulýsingarfrests sem hefur verið ákveðinn eftir 2. mgr.,

5. staður og stund sem skiptafundur verður haldinn til að fjalla um skrá um lýstar kröfur, en sá fundur skal haldinn innan mánaðar frá lokum kröfulýsingarfrests.

Kröfulýsingarfrestur skal að jafnaði ákveðinn tveir mánuðir, en ef sérstaklega stendur á má skiptastjóri ákveða að fresturinn verði tiltekinn mánaðarfjöldi frá þremur til sex mánaða. Hver sem lengd kröfulýsingarfrests verður ákveðin skal hann ávallt byrja að líða við fyrri birtingu innköllunar og skal þess skýrlega getið í henni.

Í innköllun má skiptastjóri kveða á um að þeim lánardrottnum sé óþarft að lýsa kröfum sínum sem hafi lýst þeim við undanfarandi nauðasamningsumleitan þrotamannsins og æski ekki að koma fram breyttum kröfum.

Hafi skiptastjóri þegar við útgáfu innköllunar ákveðið að halda skiptafund til að fjalla um ráðstöfun hagsmuna búsins má hann boða til slíks fundar í innkölluninni.

Innköllun skal birt tvívegis í Lögbirtingablaði.

21 Í 86. gr. gjaldþrotaskiptalaga segir:

Jafnframt því að gefa út innköllun skv. 85. gr. er skiptastjóra rétt að leita sérstaklega vitneskju um hvort einhver sá, sem kann að telja til kröfu á hendur þrotabúinu, sé búsettur erlendis. Komi fram vitneskja um slíkt er skiptastjóra rétt að tilkynna hlutaðeiganda svo fljótt sem verða má um gjaldþrotaskiptin, hvenær kröfulýsingarfrestur endi og hverjar afleiðingar það geti haft að kröfu verði ekki lýst innan frestsins.

If the trustee considers that some creditors, whose identities are unknown and cannot be reached, may reside abroad, he may have a notice published abroad, of the same content as provided for in the first paragraph.

The trustee may have an advertisement of the same content as a notice issued as provided for in the first paragraph published in an Icelandic daily paper, or in some other manner of his choice, if he deems that there is a particular reason to do so.

22 Article 118(1) of the Bankruptcy Act, points 1 and 2, reads:

If a claim against a bankruptcy estate is not stated to the trustee in bankruptcy before the period provided for in Article 85, the second paragraph, is over, it shall, if it cannot be pursued as provided for in Article 116, be cancelled with respect to the estate, except if:

1. the claim is stated before a meeting of the creditors is convened for considering a proposal for distribution, and its acceptance is approved by three fourths of the creditors who would not be paid as a result, both by number of creditors and the amounts of their claims;

2. the claimant resides abroad and neither knew nor should have known of the bankruptcy, provided his claim is stated without undue delay and before a meeting of the creditors is convened for considering a proposal for distribution;

23 Article 1 of Act No 21/1994 on Advisory Opinions from the EFTA Court reads:

In district court proceedings where a question arises concerning the interpretation of the EEA Agreement, Protocols, Annexes to the Agreement or acts referred to therein, a judge may, in accordance with Article 34 of the Agreement of the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, rule that an Advisory Opinion may be sought in relation to that matter, prior to judgment in the case.

A party to the case shall always be heard prior to a ruling in accordance with the first paragraph of this article, regardless of whether an Advisory Opinion has been requested by the parties to the case or is sought the judge's own volition.

Ef skiptastjóri telur ástæðu til að ætla að lánardrottnar kunni að vera búsettir erlendis, sem ekki er vitað hverjir séu eða hvar verði náð til, er honum rétt að fá birta auglýsingu erlendis með sama efni og tilkynning skv. 1. mgr.

Skiptastjóra er rétt að fá birta auglýsingu með sama efni og tilkynning skv. 1. mgr. í dagblaði hér á landi eða á annan hátt sem hann kýs, ef sérstök ástæða þykir til.

22 Í 1. og 2. lið 1. mgr. 118 gr. gjaldþrotaskiptalaga segir:

Ef kröfu á hendur þrotabúi er ekki lýst fyrir skiptastjóra áður en fresti lýkur skv. 2. mgr. 85. gr. og ekki er unnt að fylgja henni fram gagnvart því skv. 116. gr., þá fellur hún niður gagnvart búinu nema:

1. kröfunni sé lýst áður en boðað er til skiptafundar um frumvarp til úthlutunar úr búinu og samþykki fáist fyrir að krafan komist að hjá 3/4 hlutum þeirra kröfuhafa sem færu á mis við greiðslu af þeim sökum, talið bæði eftir höfðatölu kröfuhafanna og fjárhæðum krafna þeirra,

2. kröfuhafinn sé búsettur erlendis og hafi hvorki verið kunnugt né mátt vera kunnugt um gjaldþrotaskiptin, enda sé kröfunni lýst án ástæðulausra tafa og áður en boðað er til skiptafundar um frumvarp til úthlutunar úr búinu,

23 Í 1. gr. laga nr. 21/1994 um ráðgefandi álit EFTA-dómstólsins segir:

Nú er mál rekið fyrir héraðsdómstóli þar sem þarf að taka afstöðu til skýringar á samningi um Evrópska efnahagssvæðið, bókunum með honum, viðaukum við hann eða gerðum sem í viðaukunum er getið og getur þá dómari í samræmi við 34. gr. samnings EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls kveðið upp úrskurð um að leitað verði ráðgefandi álits EFTA-dómstólsins um skýringu á því atriði málsins áður en málinu er ráðið til lykta.

Hvort sem aðili máls krefst að álits verði leitað skv. 1. mgr. eða dómari telur þess þörf án kröfu skal dómari gefa aðilum kost á að tjá sig áður en úrskurður verður kveðinn upp.

A ruling of a district court under the first paragraph of this article may be appealed to the Supreme Court pursuant to the applicable rules of civil or criminal procedure. The filing of an appeal suspends any further measures to be taken on account of the ruling.

II FACTS AND PROCEDURE

24 On 9 October 2008, the Icelandic Financial Supervisory Authority exercised its special powers due to unusual financial market circumstances and took over the power of the shareholders' meeting of Kaupthing, dismissed its board of directors and appointed a resolution committee which immediately assumed control of the bank.

25 Anglo Irish Bank Corporation plc held two Kaupthing bonds. It was nationalised by the Irish State on 21 January 2009. Anglo Irish Bank Corporation Limited was renamed Irish Bank Resolution Corporation Limited on 14 October 2011.

26 On 25 May 2009, the Reykjavík District Court, upon a request from the resolution committee, appointed a winding-up committee for the estate.

27 On 30 June 2009, the Defendant issued and published an invitation for creditors to lodge claims according to the winding-up procedure in the Icelandic Legal Gazette (Lögbirtingablað). All those claiming debts of any sort, or other rights against Kaupthing, or assets controlled by it, were told to submit their claims in writing to the winding-up committee within six months of the publication of the notice.

28 The invitation stated that if a claim was not submitted within the specified time-limit, it would have the same legal effect as if it had not been properly submitted. Such a claim would therefore be deemed null and void against Kaupthing unless certain exceptions applied. At the same time, several invitations were published in daily newspapers in Iceland and in the countries Kaupthing had done business, including, *inter alia*, the United Kingdom, Germany, Spain, the Netherlands, Austria and Ireland. In Ireland, the invitation to lodge claims was published in the Irish Times on 21 July 2009.

Kæra má úrskurð héraðsdómara skv. 1. mgr. til Hæstaréttar eftir almennum reglum laga um meðferð einkamála eða meðferð eftir því sem á við. Kæra frestar frekari aðgerðum samkvæmt úrskurðinum.

II MÁLAVEXTIR OG MEÐFERÐ MÁLSINS

24 Þann 9. október 2008 nýtti íslenska Fjármálaeftirlitið sérstaka valdheimild sína, vegna óvenjulegra aðstæðna á fjármálamarkaði, og tók yfir völd hluthafafundar Kaupþings, vék stjórn bankans frá og skipaði honum skilanefnd, sem tók þegar í stað við stjórn hans.

25 Anglo Irish Bank Corporation plc átti tvö skuldabréf á hendur Kaupþingi. Anglo Irish Bank Corporation Ltd var þjóðnýttur af írska ríkinu 21. janúar 2009 og gefið nýtt nafn, Irish Bank Resolution Corporation Limited („IBRC“) 14. október 2011.

26 Þann 25. maí 2009 samþykkti Héraðsdómur Reykjavíkur beiðni frá skilanefndinni og skipaði slitastjórn fyrir búið.

27 Þann 30. júní 2009 innkallaði stefndi kröfur lánardrottna og birti innköllunina í Lögbirtingablaðinu, þar sem skorað var á kröfuhafa að lýsa kröfum í samræmi við slitameðferðina. Skorað var á alla sem töldu til hvers kyns skulda eða annarra réttinda á hendur Kaupþingi, eða eigna í umráðum bankans, að lýsa kröfum sínum skriflega fyrir slitastjórn innan sex mánaða frá birtingu innköllunarinnar.

28 Í innkölluninni kom fram að ef kröfur væru ekki lagðar fram innan fyrrnefnds frests hefði það sömu réttaráhrif og um vanlýsingu væri að ræða. Teldust slíkar kröfur fallnar niður gagnvart Kaupþingi nema tilteknar undantekningar ættu við. Á sama tíma voru nokkrar innkallanir birtar í dagblöðum á Íslandi og í þeim löndum þar sem Kaupþing stundaði viðskipti, m.a. í Bretlandi, á Spáni, á Írlandi, í Þýskalandi, í Hollandi og í Austurríki. Á Írlandi var innköllun krafna birt í Irish Times 21. júní 2009.

29 On 22 July 2009 and 18 November 2009, as the holder of two bonds, the Plaintiff received two notifications through the Clearstream securities service of the invitation to lodge claims.

30 Additionally, the invitations were published in the Financial Times and the Official Journal of the European Union on 15 August 2009 and on Kaupthing's website.

31 The time-limit within which to lodge claims expired on 30 December 2009.

32 On 14 April 2010, IBRC filed claims with the winding-up committee concerning two bonds for a total amount of EUR 15 558 733. The Plaintiff demanded that the claims be recognised as having been received within the time-limit for lodging claims and be added to the list of claims in the bank's winding-up proceedings.

33 The Defendant rejected the Plaintiff's claim as out of time on the grounds that an email communication from the Plaintiff of 29 October 2008 could not be considered a claim lodged within the meaning of the relevant national provisions.

34 Following meetings between the parties the dispute was referred to the Reykjavík District Court by the winding-up committee on 24 September 2010.

35 At the oral hearing on 7 September 2011, the Plaintiff asked the District Court to seek an Advisory Opinion from the Court to establish whether the provision set out in the first paragraph of Article 86 of Act No 21/1991 conformed to the substance of Directive 2001/24/EC. Kaupthing objected to the request.

36 Following oral submissions from both parties on 19 October 2011, the Reykjavík District Court decided, in a ruling of 8 November 2011, to make a request for an Advisory Opinion to the Court and posed the following questions:

1. Does it accord with the provision of Article 14 of Directive 2001/24/EC of 4 April 2001, on the reorganisation and winding up of credit institutions, to publish an invitation to lodge claims for known creditors which have their domicile, permanent residence or

29 Þann 22. júlí 2009 og 18. nóvember 2009, fékk stefnandi, sem handhafi tveggja skuldabréfa, tvær tilkynningar, í gegnum Clearstream securities service um innköllun krafna.

30 Að auki var innköllunin birt í Financial Times og Stjórnartíðindum Evrópusambandsins 15. ágúst 2009 og á vefsíðu Kaupþings.

31 Fresturinn til þess að lýsa kröfum við slitin rann út 30. desember 2009.

32 Þann 14. apríl 2010 lagði IBRC inn kröfu til slitastjórnarinnar varðandi tvö skuldabréf að heildarfjárhæð 15 558 733 evra. Stefnandi krafðist viðurkenningar á því að kröfurnar hefðu verið mótteknar innan kröfulýsingarfrestsins, og að þeim yrði bætt á kröfulista við slitameðferð bankans.

33 Stefndi hafnaði kröfu stefnanda sem of seint framkominni á þeim grundvelli að ekki væri hægt að telja orðsendingu í tölvupósti frá stefnanda þann 29. október 2008, sem lýsta kröfu í skilningi viðkomandi ákvæða landsréttar.

34 Í kjölfar funda milli aðila vísaði slitastjórnin deilunni til Héraðsdóms Reykjavíkur 24. september 2010.

35 Í þinghaldi 7. september 2011, óskaði stefnandi eftir því við Héraðsdóm Reykjavíkur að hann leitaði eftir ráðgefandi áliti frá EFTA-dómstólnum til að fá úr því skorið hvort ákvæði 1. mgr. 86. gr. laga nr. 21/1991 væri í samræmi við efni tilskipunar 2001/24/EB. Kaupþing mótmælti beiðninni.

36 Í framhaldi af munnlegum málflutningi beggja aðila 19. október 2011, féllst Héraðsdómur Reykjavíkur á að leita ráðgefandi álits frá dómstólnum í úrskurði frá 8. nóvember 2011, og bar fram eftirfarandi spurningar:

1. Samræmist það ákvæði 14. gr. tilskipunar 2001/24/EB frá 4. apríl 2001 um endurskipulagningu og slit lánastofnana, að birta innköllun til þekktra lánardrottna, sem hafa lögheimili, fasta búsetu

head offices in other Member States in the manner practised by the Winding-up Board of Kaupthing Bank hf. which is described in this Ruling?

2. If the reply to the first question is that sufficient regard was not had for the rules of Article 14 of the Directive when issuing an invitation to lodge claims, an opinion is requested as to what impact this has on the winding-up proceedings of the credit institution.

37 On 21 November 2011, Kaupthing appealed against the ruling of the Reykjavík District Court to the Supreme Court of Iceland, claiming that it should be set aside. On 16 December 2011, the Supreme Court upheld the decision to seek an Advisory Opinion but substantially amended the questions posed.

38 Following the Supreme Court of Iceland's judgment of 16 December 2011, the Reykjavík District Court referred to the Court, by a letter of 22 December 2011, the following amended questions:

1. In the case of a discrepancy between the text of the EEA Agreement or rules based upon it, in different languages, so that the substance of individual provisions or rules is unclear, how should their substance be construed in order to apply them in resolving disputes?

2. Having regard to the answer to question 1, does it comply with paragraph 1 of Article 14 of Directive 2001/24/EC on the reorganisation and winding up of credit institutions that the national legislation of a state, which is a member of the European Economic Area, vests the Winding-up Board or other competent authority or agency with competence to decide whether information should be disclosed on the aspects described in the provision, with an advertisement published abroad instead of individually notifying all known creditors?

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

eða aðalskrifstofu í öðrum aðildarríkjum á Evrópska efnahagssvæðinu, með þeim hætti sem slitastjórn Kaupþings banka hf. viðhafði og lýst er í úrskurði þessum?

2. Ef svarið við fyrri spurningunni er á þá leið að við innköllun krafna hafi ekki verið gætt reglna 14. gr. tilskipunarinnar, er leitað álits á því hvaða áhrif það hafi við slitameðferð lánastofnunarinnar?

37 Kaupþing kærði úrskurð héraðsdóms til Hæstaréttar Íslands 21. nóvember 2011 með þeim rökum að fella bæri ákvörðun héraðsdóms úr gildi. Þann 16. desember 2011 staðfesti Hæstiréttur niðurstöðu héraðsdóms um að leita skyldi ráðgefandi álits, en breytti spurningunum efnislega.

38 Í framhaldi af dómi Hæstaréttar Íslands 16. desember 2011, með bréfi dagsettu 22. desember 2011, beindi Héraðsdómur Reykjavíkur eftirfarandi breyttum spurningum til dómstólsins:

1. Ef misræmi er milli texta samningsins um Evrópska efnahagssvæðið eða reglna, sem á honum byggja, á mismunandi tungumálum þannig að efni einstakra ákvæða eða reglna er óljóst, hvernig ber að leiða efni þeirra í ljós svo að beita megi þeim við lausn ágreiningsmála?

2. Að teknu tilliti til svars við spurningu 1, samrýmist það 1. mgr. 14. gr. tilskipunar 2001/24/EB um endurskipulagningu og slit lánastofnana að í lögum ríkis, sem er aðili að samningnum um Evrópska efnahagssvæðis, sé það lagt í vald slitastjórnar eða annars þar til bærs stjórnvalds eða sýslumanns að ákveða hvort upplýsa skuli um þau atriði, sem þar eru greind, með auglýsingu, birtri erlendis, í stað sérstakrar tilkynningar til hvers og eins þekkts lánardrottins?

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

III CONSIDERATIONS ON THE ADMISSIBILITY OF THE QUESTIONS REFERRED

Preliminary remarks

40 In its letter of reference, the Reykjavik District Court set out the questions as amended by the Supreme Court in its judgment of 16 December 2011. The letter of reference does not itself contain a description of the factual and legal context of the main proceedings. However, the District Court referred to its own ruling of 8 November 2011, the judgment of the Supreme Court, and the case-file attached as regards the facts, pleas and legal arguments submitted by the parties to the national proceedings.

41 In the written observations submitted, the parties did not unanimously address those questions referred by the Reykjavík District Court, as amended by the Supreme Court of Iceland.

42 On 14 May 2012, the Court invited those participating in the proceedings to make written submissions on the admissibility of the first question of the reference of 22 December 2011 and of the other changes made to the reference of the District Court of 8 November 2011.

43 Substantive comments were received from the Plaintiff, the Defendant, the Icelandic Government and ESA.

Observations submitted to the Court

44 The Plaintiff submits that the questions posed by the Reykjavík District Court in the first reference of 8 November 2011 were not revoked and refers to the judgment of the Court of Justice of the European Union ("ECJ") in Case C-210/06 *Cartesio* [2008] ECR I-9641. Having regard to the fourth recital in the preamble to the EEA Agreement and the fact that Article 34 SCA and Article 267 TFEU have the same purpose, it argues that *Cartesio* constitutes a precedent for the purposes of EEA law. The Plaintiff also submits

III SJÓNARMIÐ UM HVAÐA SPURNINGAR SÉU TÆKAR TIL EFNISLEGRAR MEÐFERÐAR

Formálsorð

40 Í skriflegri beiðni um ráðgefandi álit setti Héraðsdómur Reykjavíkur fram spurningar eins og þeim var breytt með dómi Hæstaréttar Íslands 16. desember 2011. Bréfið sjálft inniheldur ekki lýsingu á málavöxtum og lagalegri þýðingu aðalmálsmeðferðarinnar. Héraðsdómur vísaði þó í eigin úrskurð frá 8. nóvember 2011, dóm Hæstaréttar og meðfylgjandi málsskjöl, að því er varðar málavexti, málsbætur og lagarök sem aðilar lögðu fram í innlendu málsmeðferðinni.

41 Ekki var fullt samræmi milli þeirra, sem skiluðu inn skriflegum greinargerðum í málinu, um hvort að þeir svöruðu spurningum héraðsdóms eins og þeim var breytt af Hæstarétti Íslands, eða upphaflegum spurningum héraðsdóms.

42 Dómstóllinn bauð þeim sem taka þátt í málsmeðferðinni að leggja fram skriflegar athugasemdir um hvort fyrri spurning tilvísunar héraðsdóms frá 22. desember 2011 væri tæk til efnismeðferðar og eins við aðrar breytingar sem gerðar voru á upphaflegri beiðni héraðsdóms frá 8. nóvember 2011 um ráðgefandi álit.

43 Efnislegar athugasemdir komu frá stefnanda, stefnda, ríkisstjórn Íslands og ESA.

Athugasemdir bornar fram við EFTA-dómstólinn

44 Stefnandi telur að spurningarnar sem Héraðsdómur Reykjavíkur beindi til dómstólsins 8. nóvember 2011, hafi ekki verið afturkallaðar og vísar í dóm Evrópudómstólsins í máli C-210/06 *Cartesio* [2008] ECR I-9641. Með hliðsjón af 4. lið inngangsorða EES-samningsins og þeirrar staðreyndar að 34. gr. samningsins um stofnun eftirlitsstofnunar og dómstóls og 267. gr. sáttmálans um starfshætti Evrópusambandsins („SSE“), þjóni sama tilgangi, telur stefnandi að dómur Evrópudómstólsins í máli *Cartesio* skapi fordæmi í EES-rétti. Jafnframt heldur stefnandi því fram að markmiðið með jafnræði einstaklinga og aðila í

that the objective of achieving a balance in rights for individuals and economic operators means that they must have equal access to courts and judicial remedies irrespective of whether they find themselves in an EU or an EFTA State. This necessitates that an Icelandic District Court must have equivalent access to the referral mechanism provided for in the SCA and the EEA Agreement as its counterparts in EU Member States do in respect of the ECJ.

45 The Plaintiff notes that Iceland has not in its internal legislation limited the right to request an Advisory Opinion to courts and tribunals against whose decisions there is no judicial remedy under national law. It submits, therefore, that the Court is not bound in the present case by the appellate ruling of the Supreme Court of Iceland. Moreover, were the Court to answer only the amended questions referred on 22 December 2011, the decisive issues reflected in the second question of the Reykjavík District Court of 8 November 2011 would not be addressed.

46 The Defendant submits that the admissibility of the second set of questions referred on 22 December 2011 cannot be disputed. Article 34 SCA, when interpreted in the light of Protocol 35 to the EEA Agreement, differs considerably from Article 267 TFEU and, consequently, the principle of homogeneity should not apply.

47 The Defendant contends that the rationale of *Cartesio* does not prohibit an appellate court from amending questions referred by a lower court to the ECJ, if the lower court decides to adhere to the amended questions. It adds that the Reykjavík District Court appears to have agreed to the amended questions in its reference of 22 December 2011. Significantly, the Defendant submits, the Icelandic Supreme Court did not hinder the Reykjavík District Court from making its reference. Indeed, in its view, the questions posed in the first reference of 8 November 2011 do not respect the relationship between the Court and the national court, as the questions referred disregard the competences of the respective

atvinnurekstri feli í sér að þeir hafi jafnt aðgengi að dómstólum og réttarúrræðum, óháð því hvort þeir séu staðsettir í ESB- eða EFTA-ríki. Íslenskir héraðsdómstólar verði því að hafa sama möguleika til að leita ráðgefandi álits samkvæmt samningnum um stofnun eftirlitsstofnunar og dómstóls og EES-samningnum, og sambærilegar stofnanir í aðildarríkjum Evrópusambandsins hafa gagnvart Evrópudómstólnum.

45 Stefnandi vekur athygli á því að Ísland hafi ekki með settum lögum takmarkað möguleika til að leita ráðgefandi álits við þá dómstóla sem hafa endanlegt úrlausnarvald að landsrétti. Að mati stefnanda er landsdómstóllinn í þessu máli því ekki bundinn af niðurstöðu Hæstaréttar Íslands. Ef dómstóllinn ætti einungis að svara breyttu spurningunum, sem vísað var til hans 22. desember 2011, myndi hann enn fremur ekki fjalla um þau úrslitaatriði málsins sem komu fram í annarri spurningu Héraðsdóms Reykjavíkur 8. nóvember 2011.

46 Stefndi heldur því fram að ekki sé hægt að deila um að dómstóllinn sé bær til að fjalla um síðari spurningarnar, þ.e. sem fyrir hann voru lagðar 22. desember 2011. Ljóst sé að 34. gr. samningsins um stofnun eftirlitsstofnunar og dómstóls, eins og hún er túlkuð með hliðsjón af bókun 35 við EES-samninginn, sé verulega ólík 267. gr. sáttmálans um starfshætti Evrópusambandsins og því ætti meginreglan um einsleitni ekki að gilda.

47 Stefndi heldur því fram að það fordæmi er felist í dómi Evrópudómstólsins í máli *Cartesio* komi ekki í veg fyrir að áfrýjunardómstóll geti breytt spurningum sem lægri dómstóll vísar til Evrópudómstólsins til ráðgefandi álits, ef lægri dómstóllinn ákveður að fylgja hinum breyttu spurningum. Hann bætir því við að Héraðsdómur Reykjavíkur virðist hafa samþykkt breyttu spurningarnar í beiðninni um ráðgefandi álit frá 22. desember 2011. Stefndi bendir á mikilvægi þess að Hæstiréttur hindraði ekki Héraðsdóm Reykjavíkur í því að leggja fram beiðni um ráðgefandi álit. Þvert á móti telur stefndi að fyrri spurningarnar frá 8. nóvember 2011 hafi ekki tekið tillit til sambandsins á milli dómstólsins og viðkomandi landsdómstóls,

courts. The reformulation of the questions ensured that they adhered to the inherently different functions of the Court and the Reykjavík District Court.

48 The Icelandic Government contends that the Advisory Opinion must be rendered upon the second set of questions referred by the Reykjavík District Court on 22 December 2011 as those were the questions duly notified and introduced to the parties. The form and content of the questions is immaterial. In its view, if proper account is taken of the differences between Article 34 SCA and Article 267 TFEU, *Cartesio* need not be considered when interpreting Article 34 SCA.

49 ESA submits that Article 34 SCA is designed to promote judicial dialogue. It asserts that the Reykjavík District Court is the referring court and that the Court was seised by way of the admissible questions set out in the judgment of 8 November 2011. Iceland could have limited the right to refer questions to the Court to courts of last resort but did not do so. The letter of 22 December 2011 which the Reykjavík District Court addressed to the Court is, plainly, a letter and not a judgment or order. Consequently, in ESA's view, without a formal variation of the questions, the Court is properly seised by the questions of 8 November 2011. ESA states that its reasoning is not based on *Cartesio* as no parallel proceedings are in play in this case.

50 ESA also argues that the essence of the two questions drafted by the Reykjavík District Court in its ruling of 8 November 2011 can be found in both questions drafted by the Supreme Court. While it appears that the Supreme Court split the first question of the District Court into two parts, ESA submits that the first question as drafted by the Supreme Court covers the ground of the second question. Indeed, the first question of the Supreme Court asks "how should their substance [i.e. the substance of provisions

enda hafi þær ekki tekið mið af lögsögu landsdómstólsins. Breytingarnar á spurningunum hafi tryggt að þær tækju mið af því að hlutverk dómstólsins og Héraðsdóms Reykjavíkur eru í eðli sínu ólík.

48 Ríkisstjórn Íslands telur að byggja skuli á síðari spurningum Héraðsdóms Reykjavíkur frá 22. desember 2011, enda séu það þær sem tilkynnt var um á viðeigandi hátt og kynntar aðilum málsins. Form og efni spurninganna skipti að því leyti ekki máli. Það er sjónarmið hennar að ef tekið sé tilhlýðilegt tillit til þess greinarmunar sem er á 34. gr. samningsins um stofnun eftirlitsstofnunar og dómstóls og 267. gr. sáttmálans um starfshætti Evrópusambandsins þurfi ekki að taka mið af dómi Evrópudómstólsins í máli *Cartesio* við túlkun á 34. gr. samningsins um stofnun eftirlitsstofnunar og dómstóls.

49 ESA heldur því fram að 34. gr. samningsins um stofnun eftirlitsstofnunar og dómstóls sé ætlað að stuðla að samvinnu dómstóla. ESA áréttar jafnframt að Héraðsdómur Reykjavíkur sé sá dómstóll sem leggur fram beiðnina og að málið hafi verið lagt fyrir dómstólinn með gildum spurningum sem settar voru fram í úrskurðinum frá 8. nóvember 2011. Ísland hefði getað takmarkað réttinn til að leita eftir ráðgefandi áliti frá EFTA-dómstólnum við dómstóla á efsta dómstigi, en gerði það ekki. Bréf Héraðsdóms Reykjavíkur frá 22. desember 2011 til dómstólsins sé einfaldlega bréf og ekki dómur eða úrskurður. Af þessum sökum hafi dómstóllinn fengið málið til meðferðar á tilhlýðilegan hátt með spurningunum frá 8. nóvember 2011. ESA tekur fram að forsendur hennar byggist ekki á dómi Evrópudómstólsins í máli *Cartesio* þar sem málsmeðferðin í þessu máli sé ekki hliðstæð því máli.

50 ESA heldur því einnig fram að kjarna spurninganna tveggja sem Héraðsdómur Reykjavíkur lagði fram í dómi sínum 8. nóvember 2011, sé að finna í spurningunum sem Hæstiréttur lagði fram. Þrátt fyrir að svo virðist sem Hæstiréttur skipti fyrstu spurningu Héraðsdóms Reykjavíkur í tvo hluta, taki fyrri spurning Hæstaréttar til meginefnis annarrar spurningarinnar. Fyrri spurningin fjalli í reynd um „hvernig ber að leiða efni þeirra [þ.e.

of EEA law] be construed in order to apply them in resolving disputes?".

51 In ESA's view, that phrase can only usefully be understood as referring to the resolution of disputes between the parties as to what form of notification should have taken place. In other words, the Supreme Court is asking in its first question what consequences must be drawn for the main proceedings of an interpretation of a provision of EEA law which appears unclear because of divergent language versions. If that phrase were taken to mean that the question only concerns how to resolve discrepancies between different language versions, it would be practically unnecessary to pose the second question. Moreover, given existing case-law such a question would be *acte clair.*

52 In addition, ESA argues that the questions drafted by the Reykjavík District Court are more pertinent and better suited to the resolution of the case than those framed by the Icelandic Supreme Court.

Findings of the Court

53 According to the Court's settled case-law, Article 34 SCA establishes a special means of judicial cooperation between the Court and national courts with the aim of providing the national courts with the necessary interpretation of elements of EEA law to decide the cases before them.

54 Under this system of cooperation, which is intended as a means of ensuring a homogenous interpretation of the EEA Agreement, a national court or tribunal is entitled to request the Court to give an Advisory Opinion on the interpretation of the Agreement (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; E-1/11 *Dr A* [2011] EFTA Ct. Rep. 484, paragraph 34).

efni ákvæða EES-réttar] í ljós svo að beita megi þeim við lausn ágreiningsmála?“.

51 Það er sjónarmið ESA að einungis sé hægt að leggja þann skilning í þessa setningu að hún vísi til ágreinings málsaðila um það á hvaða formi tilkynning hefði átt að vera. Með öðrum orðum þá sé Hæstiréttur í fyrri spurningunni að spyrja hvaða þýðingu túlkun reglu í EES-rétti, sem virðist óljós vegna ósamræmis hennar á mismunandi tungumálum, hafi fyrir úrlausn málsins. Ef setningin væri skilin á þann máta að spurningin sneri aðeins að því hvernig leysa ætti úr ósamræmi sem er um efni EES-reglu eftir því á hvaða tungumáli hún hefur verið birt, væri í reynd óþarfi að spyrja síðari spurningarinnar. Miðað við núverandi dómaframkvæmd þyrfti enn fremur ekki að leggja slíka spurningu fyrir dómstólinn þar sem svarið við henni væri augljóst.

52 Að auki heldur ESA því fram að spurningarnar sem lagðar voru fram af Héraðsdómi Reykjavíkur eigi betur við og séu hentugri til þess að leysa málið heldur en spurningarnar sem Hæstiréttur lagði fram.

Álit dómstólsins

53 Samkvæmt viðurkenndri dómaframkvæmd dómstólsins kveður 34. gr. samningsins um stofnun eftirlitsstofnunar og dómstóls á um sérstakt samstarf á milli dómstólsins og dómstóla samningsríkjanna, með það að markmiði að veita dómstólum samningsríkjanna nauðsynlega túlkun á atriðum EES-réttar til að þeir geti leyst úr málum sem fyrir þá eru lögð.

54 Samkvæmt þessu samvinnukerfi, sem er ætlað sem úrræði til að tryggja samleitna túlkun á EES-samningnum, hefur innlendur dómstóll eða réttur heimild til að leggja fram beiðni til dómstólsins um ráðgefandi álit varðandi túlkun á samningnum (sjá mál E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct., Rep. 15, 28. mgr., E-1/95 *Samuelsson* [1994-1995] EFTA Ct. Rep. 145, 13. mgr., E-1/11 *Dr A* [2011] EFTA Ct. Rep. 484., 34. mgr.).

55 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-13/11 *Granville*, judgment of 25 April 2012, not yet reported, paragraph 18). 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.

56 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 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 *Granville*, cited above, paragraph 22, and case-law cited).

57 When drafting Article 34 SCA, the EFTA States were inspired by Article 267 TFEU. There are, however, differences. According to the wording of Article 34 SCA, there is, in particular, no obligation on national courts against whose decisions there is no judicial remedy under national law to make a reference to the Court. This reflects not only the fact that the depth of integration under the EEA Agreement is less far-reaching that under the EU treaties (see Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraph 59). It also means that the relationship between the Court and the national courts of last resort is, in this respect, more partner-like.

55 Það er einungis sá dómstóll eða réttur aðildarríkis sem aðilar hafa lagt ágreining sinn fyrir og ber ábyrgð á hinni endanlegu dómsniðurstöðu sem ákveður, með hliðsjón af aðstæðum í hverju máli, bæði hvort nauðsyn er að afla ráðgefandi álits til að kveða upp dóm og hvaða þýðingu spurningarnar sem hann leggur fyrir dómstólinn hafa (sjá mál E-13/11 *Granville*, dómur frá 25. apríl 2012, enn óbirtur, 18. mgr.). Jafnvel þó að ákvörðunin um að óska eftir ráðgefandi áliti sé í raun oft tekin að beiðni annars eða beggja aðila í innlendu málsmeðferðinni, er samstarf dómstólsins og landsdómstólsins algerlega óháð frumkvæði aðilanna.

56 Í þeim tilgangi að veita landsdómstólum EFTA-ríkjanna aðstoð í málum þar sem þeir þurfa að beita ákvæðum EES-réttar, tekur dómstóllinn mið af öllum atriðum sem dómstóll samningsríkisins leggur fram. Er þá einkum litið til rökstuðningsins að baki þeirri ákvörðun að leita ráðgefandi álits, svo og þeirra þátta EES-réttar sem krefjast túlkunar að teknu tilliti til efnis deilunnar. Í því sambandi kann dómstóllinn að takmarka umfjöllun sína og túlkun við þau ákvæði EES-réttar sem nýtast dómstólum samningsríkjanna, en þeir hafa það verkefni að túlka ákvæði landsréttar og taka afstöðu til hvernig þau samræmast EES-rétti (sjá *Granville*, sem vitnað til hér að ofan, 22. mgr., og tilvitnaða dómaframkvæmd).

57 Við undirbúning 34. gr. samningsins um eftirlitsstofnunina og dómstólinn voru EFTA-ríkin undir áhrifum frá 267. gr. sáttmálans um starfshætti Evrópusambandsins. Þó er munur á þessum greinum. Samkvæmt orðalagi 34. gr. samningsins um eftirlitsstofnunina og dómstólinn hvílir engin skylda á dómstólum samningsríkjanna, sem ekki sæta endurskoðun æðri dómstóla á grundvelli málskots samkvæmt landslögum, að leita ráðgefandi álits hjá dómstólnum. Þetta endurspeglar ekki eingöngu þá staðreynd að samruni sá sem EES-samningurinn mælir fyrir um gengur ekki eins langt og er ekki eins víðfemur og samkvæmt sáttmálum Evrópusambandsins (sjá mál E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct Rep. 95., 59. mgr.), heldur einnig að sambandið á milli dómstólsins og dómstóla samningsríkjanna á efstu dómstigum líkist í þessu tilliti meira sambandi samstarfsaðila.

58 At the same time, courts against whose decisions there is no judicial remedy under national law will take due account of the fact that they are bound to fulfil their duty of loyalty under Article 3 EEA. The Court notes in this context that EFTA citizens and economic operators benefit from the obligation of courts of the EU Member States against whose decision there is no judicial remedy under national law to make a reference to the ECJ (see Case C-452/01 *Ospelt and Schlössle Weissenberg* [1993] ECR I-9743).

59 In the case at hand, the District Court seeks an interpretation of Directive 2001/24/EC. It is clear from the case-file accompanying the reference submitted by that court that the present dispute relates to the question how provisions of national law, including Article 102(2) of the Financial Undertakings Act, and Articles 85, 86 and 118 of the Bankruptcy Act, should be construed in order to be compatible with Article 14(1) of the Directive. In this regard, both the District Court and the Supreme Court agree that it needs to be determined whether Article 14 of the Directive establishes an obligation for a party such as the Defendant to individually notify known creditors, such as the Plaintiff, that winding-up proceedings have been opened, and thereby provide known creditors with the information set out in Article 14(2) of the Directive.

60 For those purposes, the Reykjavík District Court, in its ruling of 8 November 2011, specifically decided, by its first question, to seek an Advisory Opinion on whether the manner in which the winding-up board of the Defendant published an invitation to lodge claims for known creditors which had their offices, permanent residence or head offices in other EEA States complied with Article 14(1) of Directive 2001/24/EC. It clearly follows from the ruling of the District Court and the reasoning provided therein that this question is primarily related to the divergences between the Icelandic version of the Directive and versions in other EEA languages.

61 In their written observations and at the oral hearing, both the Plaintiff and ESA have argued that the Court should answer

58 Á sama tíma verða þeir dómstólar EFTA-ríkis sem ekki sæta endurskoðun æðri dómstóla á grundvelli málskots að taka tilhlýðilegt tillit til þeirrar trúnaðarskyldu sem þeir bera samkvæmt 3. gr. EES-samningsins. Dómstóllinn bendir í þessu samhengi á að ríkisborgarar og aðilar í atvinnurekstri í EFTA-ríkjunum njóta ávinnings af skyldu dómstóla ESB-aðildarríkja, geti úrlausn þeirra ekki sætt málskoti samkvæmt landslögum, til að leita forúrskurðar hjá Evrópudómstólnum (sjá mál C-452/01 *Ospelt og Schlössle Weissenberg* [1993] ECR I-9743).

59 Í þessu máli óskar Héraðsdómur Reykjavíkur eftir túlkun á tilskipun 2001/24/EB. Það er ljóst miðað við þau gögn málsins sem fylgja beiðninni um ráðgefandi álit frá dómstólnum, að málið lýtur að því hvernig unnt sé að túlka ákvæði landsréttar, þ.m.t. 2. mgr. 102 gr. laga um fjármálafyrirtæki og 85., 86. og 118. gr. gjaldþrotaskiptalaga til samræmis við 1. mgr. 14. gr. tilskipunarinnar. Héraðsdómur og Hæstiréttur eru sammála um að taka þurfi afstöðu til hvort 14. gr. tilskipunarinnar kveður á um skyldur aðila, eins og stefnda, að tilkynna hverjum og einum þekktum lánardrottni, eins og stefnanda, um að slitameðferð sé hafin, og á þann hátt veita þekktum lánardrottnum upplýsingarnar sem settar eru fram í 2. mgr. 14. gr. tilskipunarinnar.

60 Í þessu skyni ákvað Héraðsdómur Reykjavíkur, sérstaklega með fyrstu spurningunni í úrskurði sínum frá 8. nóvember 2011, að leita eftir ráðgefandi áliti á því hvort aðferðir slitastjórnar stefnda við að birta innköllun til þekktra lánardrottna, sem hafa skrifstofur sínar, fasta búsetu eða aðalskrifstofu í öðrum ríkjum á Evrópska efnahagssvæðinu, séu í samræmi við 1. mgr. 14. gr. tilskipunar 2001/24/EB. Það er ljóst af úrskurði héraðsdóms og forsendunum sem þar koma fram að þessi spurning tengist fyrst og fremst misræmi á milli íslenskrar útgáfu tilskipunarinnar og útgáfna hennar á öðrum EES-tungumálum.

61 Bæði ESA og stefnandi héldu því fram í skriflegu greinargerðinni og við munnlegan málflutning að dómstóllinn ætti einmitt

exactly the questions set out in the ruling of the District Court of 8 November 2011, and not as amended by the judgment of the Supreme Court of 16 December 2011, and stated in the District Court's letter of reference of 22 December 2011.

62 In relation to this argument, the Court notes that, in the case of a court or tribunal against whose decisions there is a judicial remedy under national law, Article 34 SCA does not preclude decisions of such a court by which questions are referred to the Court for an Advisory Opinion from remaining subject to the remedies normally available under national law.

63 Furthermore, it must be recalled that the provisions of the EEA Agreement as well as procedural provisions of the Surveillance and Court Agreement are to be interpreted in the light of fundamental rights. The provisions of the ECHR and the judgments of the European Court of Human Rights are important sources for determining the scope of these fundamental rights (see Cases E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 185, paragraph 23; E-4/11 *Clauder* [2011] EFTA Ct. Rep. 216, paragraph 49; E-15/10 *Posten Norge*, judgment of 18 April 2012, not yet reported, paragraphs 84 ff.).

64 In this regard, it must be kept in mind that when a court or tribunal against whose decisions there is no judicial remedy under national law refuses a motion to refer a case to another court, it cannot be excluded that such a decision may fall foul of the standards of Article 6(1) ECHR, which provides that in "determination of his civil rights and obligations [...], everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". In particular this may be the case if the decision to refuse is not reasoned and must therefore be considered arbitrary (compare *Ullens de Schooten and Rezabek* v *Belgium*, Case Nos 3989/07 and 38353/07, judgment of the European Court of Human Rights of 20 September 2011, paragraphs 59 and 60, and case-law cited). These considerations may also apply when a court or

að svara þeim spurningum sem settar voru fram í úrskurði héraðsdóms 8. nóvember 2011, en ekki spurningunum eins og þeim var breytt með dómi Hæstaréttar 16. desember 2011 og fram komu í bréflegri beiðni héraðsdóms um ráðgefandi álit 22. desember 2011.

62 Af þessu tilefni bendir dómstóllinn á að þegar um er að ræða mál sem til meðferðar eru hjá dómstóli eða rétti samningsríkis og úrlausn þeirra getur sætt málskoti samkvæmt landslögum þá útilokar 34. gr. samningsins um eftirlitsstofnunina og dómstólinn ekki að ákvörðun slíks dómstóls um að leita ráðgefandi álits sæti þeim réttarúrræðum sem venjulega eru til reiðu samkvæmt landslögum.

63 Enn fremur verður að minna á að ákvæði EES-samningsins og ákvæði samningsins um eftirlitsstofnunina og dómstól ber að túlka með hliðsjón af grundvallarréttindum. Ákvæði Evrópusáttmálans um verndun mannréttinda og mannfrelsis og dómar Mannréttindadómstóls Evrópu eru mikilvægar heimildir við skilgreiningu á umfangi þessara grundvallarréttinda (sjá mál E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 185, 23. mgr., E-4/11 *Clauder* [2011] EFTA Ct. Rep. 216, 49. mgr., E-15/10 *Posten Norge*, dómur frá 18. apríl 2012, enn óbirtur, mgr. 84 ff).

64 Í þessu tilliti verður að hafa í huga að þegar dómstóll eða réttur sem fer með endanlegt úrlausnarvald samkvæmt landsrétti hafnar umsókn um að vísa máli til annars dómstóls, er ekki hægt að útiloka að slík ákvörðun geti farið í bága við ákvæði 1. mgr. 6. gr. mannréttindasáttmála Evrópu, sem kveður á um að þegar „kveða skal á um réttindi og skyldur manns [...] [skuli] hann eiga rétt til réttlátrar og opinberrar málsmeðferðar innan hæfilegs tíma fyrir sjálfstæðum og óvilhöllum dómstóli.“ Einkum getur þetta átt við í þeim tilvikum ef ákvörðunin um höfnun er ekki rökstudd og telst því geðþóttaákvörðun (sambærilegt við *Ullens de Schooten and Rezabek* gegn *Belgíu*, mál nr. 3989/07 og 38353/07, dómur Mannréttindadómstóls Evrópu 20. september 2011, 59. og 60. mgr., og tilvitnuð dómaframkvæmd). Þessi sjónamið geta einnig átt við þegar dómstóll eða réttur sem fer með endanlegt úrlausnarvald í máli samkvæmt landslögum hnekkir ákvörðun

tribunal against whose decisions there is no judicial remedy under national law overrules a decision of a lower court to refer the case, whether in civil or criminal proceedings, to another court, or upholds the decision to refer, but nevertheless decides to amend the questions asked by the lower court.

65 As regards the first question posed by the Reykjavík District Court in its ruling of 8 November 2011, the Court notes that the Supreme Court of Iceland does not appear to have altered the substance. Rather, the Supreme Court divides the question into two parts. First, it asks generally about the construction of EEA rules in case of discrepancies between different language versions. Second, it wants to know whether Article 14(1) of the Directive is satisfied where the winding-up board or another competent authority or agency is vested with the competence to decide whether information should be disclosed on the aspects described in the provision by publishing an advertisement abroad instead of individually notifying all known creditors.

66 In light of the fact that there is no substantive difference between the first question in the ruling of the Reykjavík District Court of 8 November 2011 and the two questions posed by the judgment of the Supreme Court of 16 December 2011, the Court will answer the question posed by the District Court in its letter of 22 December 2011, and thereby the questions as amended by the Supreme Court.

67 Therefore, the Court will consider the two questions as amended by the Supreme Court together with the original first question of the Reykjavík District Court, namely, whether it follows from Article 14(1) of the Directive that known creditors must be individually notified about the opening of winding-up proceedings. In this context, the Court will also consider the divergences that exist between the Icelandic version of the Directive and versions in other EEA languages.

68 As regards the second question posed by the Reykjavík District Court in its original ruling of 8 November 2011, which concerns the consequences of the fact that sufficient regard was not had for the rules of Article 14 of the Directive when issuing

dómstóls af lægra dómsstigi um að vísa máli, hvort heldur sem er í einkamáli eða sakamáli, til annars dómstóls, eða staðfestir ákvörðun um að vísa málinu áfram, en ákveður engu að síður að breyta spurningum dómstólsins af lægra dómsstiginu.

65 Að því er varðar fyrri spurninguna sem Héraðsdómur Reykjavíkur lagði fram í úrskurði sínum 8. nóvember 2011 bendir dómstóllinn á að Hæstiréttur Íslands virðist ekki hafa breytt efni spurningarinnar. Þess í stað virðist Hæstiréttur hafa skipt spurningunni í tvo hluta. Þannig spyr dómstóllinn í fyrsta lagi almennt um túlkun á EES-reglum í þeim tilvikum þegar um er að ræða ósamræmi á milli reglnanna eftir því á hvaða tungumáli þær eru. Í öðru lagi er spurt hvort skilyrðum 1. mgr. 14. gr. tilskipunarinnar sé fullnægt ef það er lagt í vald slitastjórnar eða annars þar til bærs stjórnvalds eða sýslumanns að ákveða hvort upplýsa skuli um þau atriði, sem þar eru greind, með auglýsingu, birtri erlendis, í stað sérstakrar tilkynningar til hvers og eins þekkts lánardrottins.

66 Í ljósi þess að enginn efnislegur munur er á milli fyrstu spurningarinnar í úrskurði Héraðsdóms Reykjavíkur frá 8. nóvember 2011 og spurninganna tveggja sem lagðar voru fram í dómi Hæstaréttar 16. desember 2011, mun dómstóllinn svara spurningunni sem lögð var fram í bréfi héraðsdóms frá 22. desember 2011, og á þann hátt spurningunum eins og þeim var breytt af Hæstarétti.

67 Því tekur dómstóllinn þessar tvær spurningar til athugunar, eins og þeim var breytt af Hæstarétti, ásamt fyrstu upprunalegu spurningunni frá Héraðsdómi Reykjavíkur, nefnilega hvort að fram komi í 1. mgr. 14. gr. tilskipunarinnar að tilkynna verði hverjum og einum þekktum lánardrottni um að slitameðferð sé hafin. Í þessu samhengi mun dómstóllinn einnig taka til athugunar samræmi hinnar íslensku útgáfu tilskipunarinnar við útgáfur hennar á öðrum EES-tungumálum.

68 Að því er snertir síðari spurninguna sem Héraðsdómur Reykjavíkur lagði fram í upphaflega úrskurðinum frá 8. nóvember 2011 og sem snýr að afleiðingum þess að ekki var tekið nægjanlegt tillit

an invitation to lodge claims, the Plaintiff has argued against the omission of that question, submitting that, otherwise, a decisive issue in the case before the District Court would not be addressed. In contrast, ESA contends that the essence of the second question is to be found in the first question of the Supreme Court.

69 In the view of the Court, it is not apparent from the first question of the Supreme Court that it covers the second question posed by the Reykjavík District Court in its ruling of 8 November 2011. On the other hand, the judgment of the Supreme Court shows no clear indication that it has taken a different view to that of the *District Court on questions of national law or facts. Nor does the judgment set out any reasons why the second* question originally put by the District Court was omitted.

70 In light of these circumstances and *in order to give as complete and as useful a reply as possible to the referring court in the framework of the close cooperation under Article 34 SCA, the Court will also examine the problem raised by the second question* of the District Court in its ruling of 8 November 2011.

IV THE FIRST QUESTION

71 As noted above, the questions referred by the Reykjavík District Court in its ruling of 8 November 2011 and its letter of 22 December 2011 essentially seek to establish whether it follows from Article 14(1) of Directive 2001/24/EC that known creditors must be individually notified about the opening of winding-up proceedings, in particular with regard to the apparent divergences between the Icelandic version of the Directive and versions in other EEA languages.

Observations submitted to the Court

72 The Plaintiff submits that the Icelandic version of Article 14 of the Directive is not consistent with the wording of the English version. Unlike all the other language versions of Article 14(1)

til reglna 14. gr. tilskipunarinnar við útgáfu innköllunar þá hefur stefnandi andmælt því að hún skuli felld niður. Telur stefnandi að sú niðurfelling leiði til þess að ekki verði fjallað um þau atriði sem ráða úrslitum í málinu fyrir héraðsdómi. Á hinn bóginn, heldur ESA því fram að kjarna annarrar spurningarinnar sé að finna í fyrstu spurningu Hæstaréttar.

69 Að mati dómstólsins kemur það ekki skýrt fram í fyrri spurningu Hæstaréttar að í henni felist efni annarrar spurningar Héraðsdóms Reykjavíkur eins og hún var sett fram í úrskurði þess dómstóls 8. nóvember 2011. Á hinn bóginn eru engar skýrar vísbendingar um það í dómi Hæstaréttar að hann hafi metið álitaefni hvað varðar gildi landslaga eða staðreynda málsins með öðrum hætti en *héraðsdómur. Í dómi Hæstaréttar kemur heldur ekki fram neinn rökstuðningur* fyrir því að seinni spurningin sem héraðsdómur spurði upphaflega var felld niður.

70 Með vísan til þessara aðstæðna, og til að svara dómstólnum sem leggur fram beiðni um ráðgefandi álit á eins fullnægjandi og gagnlegan hátt og mögulegt er innan þeirrar umgjörðar sem 34. gr. samningsins um eftirlitsstofnun og dómstól setur um náið samstarf dómstólsins við landsdómstóla, mun dómstóllinn kanna álitamálið sem fram kom í annarri spurningu héraðsdóms í úrskurðinum frá 8. nóvember 2011.

IV FYRSTA SPURNINGIN

71 Eins og fram er komið leitast Héraðsdómur Reykjavíkur við að leiða í ljós með spurningunni sem hann beindi til dómstólsins í úrskurði sínum frá 8. nóvember 2011 og í bréfi frá 22. desember 2011 hvort 1. mgr. 14. tilskipunar 2001/24/EB feli í sér að tilkynna verði hverjum og einum þekktum lánardrottni að slitameðferð sé hafin, einkum með tilliti til ósamræmis á milli íslenskrar útgáfu tilskipunarinnar og útgáfna á öðrum EES-tungumálum.

Athugasemdir bornar fram við EFTA-dómstólinn

72 Stefnandi heldur því fram að íslensk útgáfa 14. gr. tilskipunarinnar sé ekki í samræmi við orðalag ensku útgáfunnar. Ólíkt útgáfum

of the Directive, the Icelandic version does not contain the word "individually". Similarly, there are differences in meaning between the Icelandic and all the other language versions of Article 14(2) of the Directive.

73 This position is supported by ESA, which argues that there are two differences between the English, French, German, Spanish, Italian, Greek and Norwegian versions of the Directive, on the one hand, and the Icelandic version, on the other. The first difference concerns the reference to "known" creditors and the implicit distinction between "known" and "unknown" creditors in Article 14 of the English version of the Directive. ESA indicates that the Icelandic version makes no reference to "known" or "unknown" creditors and so does not make this distinction.

74 The second difference is linked to the first and refers to the differential treatment of known and unknown creditors. Pursuant to the English version of the Directive, the competent authorities of the home EEA State or the liquidator have the legal obligation to notify individually each known creditor. In that connection, Article 14(2) of the Directive sets out the information that known creditors must receive. Conversely, the Icelandic version of the Directive does not provide for an obligation for individual notification to known creditors. The Commission agrees with ESA on this point.

75 The Plaintiff argues that case-law provides for three main methods of construction when the problem of divergence between EEA texts arises. These involve: (i) a comparison of the text in question in the various EEA languages; (ii) an analysis of the purpose and objective of the provision in question; and (iii) a consideration of the drafting language and the preparatory works. The Plaintiff contends that the first two methods of construction reveal unequivocally that the correct meaning of Article 14 of the Directive is that found in all its different language versions, bar Icelandic. While the third method is not available to the Plaintiff, there is no reason to assume that the result would be different.

1. mgr. 14. gr. tilskipunarinnar á öllum öðrum tungumálum, innihaldi íslenska útgáfan ekki orðið „sérstakrar“ [e. individually]. Á sama hátt sé merkingarmunur á íslenskri útgáfu 2. mgr. 14. gr. tilskipunarinnar og útgáfum hennar á öðrum tungumálum.

73 ESA styður þessa afstöðu og heldur því fram að það séu tvö atriði sem séu ólík í enskri, franskri, þýskri, spænskri, ítalskri, grískri og norskri útgáfu tilskipunarinnar annars vegar og íslenskri útgáfu hins vegar. Fyrra atriðið sé tilvísun til „þekktra“ lánardrottna og sá greinarmunur sem felist í tilskipuninni varðandi „þekkta“ og „óþekkta“ lánardrottna í 14. gr. ensku útgáfunnar. ESA bendir á að ekki sé skírskotað til „þekktra“ og „óþekktra“ lánardrottna í íslensku útgáfunni og þar sé þessi greinarmunur ekki gerður.

74 Seinna atriðið sem er ólíkt samkvæmt ESA, er tengt því fyrra og vísar í mismuninn á meðferð á þekktum og óþekktum lánardrottnum. Samkvæmt enskri útgáfu tilskipunarinnar beri lögbæru yfirvaldi EES-heimaríkisins eða skiptastjóra, lagaskylda til að tilkynna hverjum og einum þekktum lánardrottni sérstaklega. Í því samhengi séu í 2. mgr. 14. gr. tilskipunarinnar taldar upp þær upplýsingar sem að þekktir lánardrottnar verði að fá. Gagnstætt þessu kveði íslenska útgáfa tilskipunarinnar ekki á um skyldu um sérstaka tilkynningu til þekktra lánardrottna. Framkvæmdastjórnin er sammála ESA um þetta atriði.

75 Stefnandi heldur því fram að dómaframkvæmd kveði á um þrjár meginaðferðir við túlkun þegar upp komi vandamál vegna ósamræmis á milli EES-texta. Þær feli í sér: (i) samanburð á textanum sem um ræði á ólíkum EES-tungumálum, (ii) greiningu á tilgangi og markmiði ákvæðisins sem um ræðir, og (iii) að höfð sé hliðsjón af tungumáli sem notað var við undirbúning viðkomandi texta og undirbúningsgagna. Stefnandi staðhæfir að fyrstu tvær aðferðirnar við túlkun leiði ótvírætt í ljós að rétta merkingu 14. gr. tilskipunarinnar sé að finna í öllum ólíkum útgáfum tilskipunarinnar, að frátalinni þeirri íslensku. Þótt þriðja aðferðin sé ekki tiltæk stefnanda, sé engin ástæða til að ætla að ólík niðurstaða fengist.

76 The Plaintiff contends that the wording contained in the majority of the language versions should be accepted and refers to *Sveinbjörnsdóttir*, cited above. In any case, when there is a divergence between language versions concerning the meaning of a provision, that provision must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.

77 The Defendant argues that the Icelandic and English versions cannot be considered equally authentic if only one version is applied and not the other. The Defendant, the Icelandic Government and the Commission reject the view that a majority of language versions of a directive should override a particular language version in case of divergence. The Commission notes that under Article 129(1) EEA the texts of the acts referred to in the Annexes to the Agreement "are equally authentic" in all EU official languages. Those acts are then translated into Icelandic and Norwegian "for the authentication thereof".

78 The Plaintiff, the Defendant, the Estonian and Icelandic Governments, ESA and the Commission all agree that in case of divergence between different language versions, a provision of a directive must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part. In this regard, ESA and the Commission particularly emphasise the need for uniform interpretation of EEA law. Accordingly, preference should as far as possible be given to the interpretation which renders the provision consistent with the general principles of EU law and, more specifically, with the principle of legal certainty.

79 The Defendant contends that, although Article 14(1) of the English version of the Directive prescribes that a liquidator shall without delay "individually inform known creditors", which is to be done, according to Article 14(2), by "the dispatch of a notice", the Directive does not prescribe where this notice is to be sent. Therefore, according to the Defendant, an EEA State has considerable discretion as to how this is done and it may be left to a liquidator to decide on a case-by-case basis how foreign creditors are to be individually notified.

76 Stefnandi telur að það orðalag ákvæðis sem sé notað í flestum útgáfum skuli tekið gilt og vísar því til stuðnings í mál *Erlu Maríu Sveinbjörnsdóttur*, sem áður er vitnað til. Ef ákvæðinu ber ekki saman við útgáfur þess á öðrum tungumálum þá eigi, hvað sem því líður, að túlka ákvæðið með vísan til markmiðs og heildarsamhengis þeirra reglna sem það sé hluti af.

77 Stefndi heldur því fram að íslensku og ensku útgáfurnar geti ekki talist jafngildar ef einungis annarri er beitt en hinni ekki. Á sama hátt hafna stefndi, ríkisstjórn Íslands og framkvæmdastjórnin því sjónarmiði að meirihluti tungumálaútgáfna tilskipunarinnar skuli hafa meira vægi en tiltekin útgáfa, í þeim tilvikum þegar um ósamræmi sé að ræða. Framkvæmdastjórnin bendir á að 1. mgr. 129. gr. EES-samningsins mæli fyrir um að textar gerðanna sem vísað sé til í viðaukunum við samninginn, „séu jafngildir“ á öllum opinberum tungumálum Evrópusambandsins. Þessar gerðir séu svo þýddar á íslensku og norsku „með tilliti til jafngildis“.

78 Stefnandi, stefndi, ríkisstjórn Eistlands og ríkisstjórn Íslands, ESA og framkvæmdastjórnin eru sammála um að þegar að um er að ræða ósamræmi á milli mismunandi tungumálaútgáfna skuli ákvæði tilskipunar túlkað með hliðsjón af markmiði og heildarsamhengi reglnanna. Í þessu sambandi leggja ESA og framkvæmdastjórnin sérstaka áherslu á þörfina fyrir samræmda túlkun EES-réttar. Því beri eftir fremsta megni að leita þeirrar túlkunar sem leiði af sér samræmi við almennar meginreglur ESB-réttar og þá einkum meginregluna um réttarvissu.

79 Stefndi bendir á að þrátt fyrir að ensk útgáfa 1. mgr. 14. gr. tilskipunarinnar mæli fyrir um að skiptastjóri skuli án tafa „tilkynna sérstaklega hverjum og einum erlendum lánardrottni“ (e. *„individually inform known creditors”*) sem samkvæmt 2. mgr. 14. gr. eigi að gerast í „formi tilkynningar“ (e. *„dispatch of a notice”*), þá sé ekki mælt fyrir um í tilskipuninni hvert senda eigi tilkynninguna. Því sé það álit stefnda að EES-ríki hafi umtalsvert svigrúm til að ákveða hvernig þetta sé gert og þá jafnvel þannig að skiptastjóra sé látið eftir að ákveða, í hverju tilviki fyrir sig, á hvaða hátt tilkynna beri hverjum og einum erlendum lánardrottni sérstaklega um þessi atriði.

80 The Plaintiff, the Estonian Government, ESA and the Commission, however, all argue that Article 14 of the Directive must be read in light of the purpose set out in recital 20 of the preamble to the Directive which is identical in all language versions, including Icelandic. Therefore, Article 14 of the Directive should be interpreted as a non-discretionary requirement on the administrative or judicial body of the home EEA State to send individual notices to all known creditors who have their domiciles, normal places of residence or head offices in EEA States other than the home EEA State.

81 In the view of the Estonian Government, ESA and the Commission, the intention of the European legislature to establish an obligation of individual information for known creditors is further illustrated by the separation and distinction made in Articles 13 and 14 of the Directive between the considerations and conditions governing the announcement of the decision to open winding-up proceedings, on the one hand, and the provision of information to known creditors, on the other. ESA and the Commission both submit that, in light of the above, the competent authorities or the liquidator of the home EEA State is required to provide the information listed in Article 14(2) of the Directive to known creditors on an individual basis and the Icelandic version of the Directive should be read in this light.

82 ESA emphasises that the email the Plaintiff sent to the Kaupthing winding-up board on 29 October 2008, intending to lodge claims over the estate, although apparently not a proper method of lodging a claim, clearly indicates that the Plaintiff was a known creditor. In that regard, ESA contends further that, as the Plaintiff is a credit institution established in the EEA, its domicile, place of residence, or head office could be identified even if it were not already known. As the Plaintiff was a known creditor, the Defendant should have individually informed it regarding the specific conditions for the lodging of its claims. That it did not do so means that the Plaintiff's rights to receive individual notification containing the requisite information as provided for under the Directive have not been respected.

80 Stefnandi, ríkisstjórn Eistlands, ESA og framkvæmdastjórnin telja hins vegar að skýra skuli 14. gr. tilskipunarinnar í ljósi markmiðsins sem fram komi í 20. tölulið formálsorða hennar, sem sé nákvæmlega eins á öllum tungumálum, þ.m.t. íslensku. Því beri að túlka 14. gr. tilskipunarinnar sem fortakslausa kröfu, sem lögð er á bær yfirvöld eða dómstól heimaríkis, um að senda sérstakar tilkynningar til hvers og eins þekktra lánardrottna sem séu með fasta búsetu, lögheimili eða aðalskrifstofur í EES-ríki öðru en EES-heimaríkinu.

81 Að mati ríkisstjórnar Eistlands, ESA og framkvæmdastjórnarinnar birtist sú ætlun löggjafans að tryggt sé að hver og einn þekktur lánardrottinn sé upplýstur sérstaklega einnig í þeim aðskilnaði og greinarmun, sem gerður er í 13. og 14. gr. tilskipunarinnar, annars vegar á milli sjónarmiða og skilyrða sem stýra tilkynningu ákvörðunarinnar um að hefja slitameðferð, og hins vegar á tilhögun upplýsingamiðlunar til þekktra lánardrottna. Með vísan til framangreinds telja ESA og framkvæmdastjórnin að lögbær yfirvöld eða skiptastjóri EES-heimaríkis, eigi að veita hverjum og einum þekktum lánardrottni upplýsingarnar, sem taldar eru upp í 2. mgr. 14. gr. tilskipunarinnar og að skýra beri íslenska útgáfu tilskipunarinnar í þessu ljósi.

82 ESA leggur áherslu á að tölvupósturinn sem stefnandi sendi slitastjórn Kaupþings 29. október 2008, í þeim tilgangi að lýsa kröfu í búið bendi greinilega til þess að stefnandi hafi verið þekktur lánardrottinn, þrátt fyrir að augljóslega hafi ekki verið um að ræða viðeigandi aðferð við að lýsa kröfu. ESA bendir enn fremur á að þar sem að stefnandi sé lánastofnun með staðfestu innan EES hefði verið hægt að finna búsetu, lögheimili eða aðalskrifstofu hans, jafnvel þó að það hefði ekki verið þekkt fyrirfram. Þar sem að stefnandi var þekktur lánardrottinn, hefði stefndi átt að tilkynna honum sérstaklega, um tilgreind skilyrði varðandi kröfulýsingu. Það að hann hafi ekki gert það, feli í sér að réttur stefnanda til þess að fá sérstaka tilkynningu með nauðsynlegum upplýsingum, eins og kveðið sé á um í tilskipuninni, hafi ekki verið virtur.

83 The Commission submits further that, in light of the final sentence of recital 20 of the preamble to the Directive, there is an ongoing obligation, once proceedings are opened and known creditors have been individually informed, to keep all creditors "regularly informed in an appropriate manner throughout winding-up proceedings". While the EEA States would appear to enjoy some discretion as to how creditors are regularly informed, there is no such discretion in relation to the primary obligation in Article 14 of the Directive.

Findings of the Court

84 Unlike the translation of an EU measure into the EU official languages by the European Commission, the preparation of the Icelandic version of the Directive was undertaken by the Icelandic Ministry for Foreign Affairs before being transmitted to the EFTA Secretariat for publication in the EEA Supplement to the Official Journal of the European Union. This was done in accordance with the Arrangement with Regard to Publication of EEA Relevant Information of the EEA Agreement Final Act, pages 19 to 22. Article 119 EEA, read in the light of Article 2(a) EEA, provides that the Annexes and the acts referred to therein as adopted for the purposes of the EEA Agreement shall form an integral part of the Agreement. Article 129(1) EEA must be understood as providing that those versions of acts referred to in the Annexes to the Agreement drawn up in the Icelandic and Norwegian languages, and published in the EEA Supplement to the Official Journal of the European Union, are equally authentic as those texts in an official language of the European Union.

85 The Icelandic version of Article 14 of the Directive differs materially from the other language versions of the provision including those in the English, Norwegian, German, French, Danish, Swedish, Italian and Spanish languages. The Estonian Government and ESA have furthermore noted that it also differs materially from the Estonian and Finnish language versions, and the Greek language version, respectively. First, Article 14(1) of the Icelandic version of the Directive does not make reference to "known" creditors and does not thereby make the implicit

83 Framkvæmdastjórnin telur jafnframt að í ljósi lokasetningar 20. töluliðs formálsorða tilskipunarinnar sé það viðvarandi skylda, þegar málsmeðferð sé hafin og hver og einn þekktur lánardrottinn hafi fengið sérstaka tilkynningu, að öllum lánardrottnum séu „reglulega, og á viðeigandi hátt, gefnar upplýsingar á meðan á slitameðferð stendur“. Þótt EES-ríkin virðist njóta nokkurs svigrúms um mat á því hvernig gefa skuli lánardrottnum reglulega upplýsingar, þá sé ekkert slíkt svigrúm til staðar varðandi frumskylduna í 14. gr. tilskipunarinnar.

Álit dómstólsins

84 Ólíkt þýðingum framkvæmdastjórnarinnar á Evrópusambandsrétti yfir á opinber ESB-tungumál, fór undirbúningur íslensku útgáfunnar fram í íslenska utanríkisráðuneytinu áður en hún var send aðalskrifstofu EFTA til útgáfu í EES-viðbætinum við Stjórnartíðindi ESB. Þetta var gert í samræmi við tilhögun varðandi útgáfu á upplýsingum sem varða EES-samninginn í lokagerð EES-samningsins bls. 19-20. Ákvæði 119. gr. EES-samningsins, túlkuð með tilliti til a-liðar 2. gr. EES-samningsins, kveður á um að viðaukar og gerðir sem vísað er til og aðlagaðar eru vegna EES-samningsins, skuli vera óaðskiljanlegur hluti samningsins. Ákvæði 1. mgr. 129. gr. EES-samningsins verður því að skilja á þann hátt að hún kveði á um að þær útgáfur gerðanna sem vísað er til, í viðaukunum við samninginn sem gerður er á íslensku og norsku og útgefnar í EES-viðbæti við Stjórnartíðindi Evrópusambandsins, séu jafngildar og textarnir á opinberum tungumálum Evrópusambandsins.

85 Íslensk útgáfa 14. gr. tilskipunarinnar er efnislega ólík öðrum tungumálaútgáfum ákvæðisins þar með talið ensku, norsku, þýsku, frönsku, dönsku, sænsku, ítölsku og spænsku útgáfunum. Ríkisstjórn Eistlands og ESA hafa ennfremur getið þess að ákvæðið sé einnig efnislega frábrugðið eistnesku, finnsku og grísku tungumálaútgáfunum. Í fyrsta lagi vísar 1. mgr. 14. gr. íslensku útgáfu tilskipunarinnar ekki til „þekktra“ lánardrottna og gerir því ekki algeran greinarmun á milli „þekktra“ og „óþekktra“

distinction between "known" and "unknown" creditors. Second, the Icelandic version of the Directive does not provide for an obligation for individual notification to known creditors. Given the difference in wording, and thus in the legal obligations imposed by Article 14 in the Icelandic and other language versions of the Directive, ESA is correct in its submission that legal certainty is jeopardised.

86 As the Court has previously held, in the case of differing authentic language versions, a preferred starting point for the interpretation will be to choose one that has the broadest basis in the various language versions. This would imply that the provision, to the largest possible extent, acquires the same content in all EEA States (see *Sveinbjörnsdóttir*, cited above, paragraph 28).

87 The purpose of Article 129(1) EEA, by providing for the translation and publication of the acts referred to in the Annexes to the EEA Agreement beyond the EU official languages and into the Norwegian and Icelandic languages, is to ensure the uniform interpretation of those rules across the EEA, in light of the versions existing in all EEA languages.

88 Therefore the wording used in one language version of an EEA provision cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the principle of homogeneity and the requirement of the uniform application of EEA law.

89 It follows from the principle of homogeneity and the general need for uniform application of EEA law and from the principle of equality that the terms of a provision of EEA law which makes no express reference to the law of the EEA States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EEA, having regard to the context of the provision and the objective pursued by the legislation in question.

90 Consequently, in the case of divergence between the language versions, the provision must be interpreted by reference to the

lánardrottna. Í öðru lagi kveður íslensk útgáfa tilskipunarinnar ekki á um skyldu um sérstaka tilkynningu til þekktra lánardrottna. Vegna ósamræmis í orðalagi og af þeim sökum á lagalegum skuldbindingum sem leiða af 14. gr. íslensku útgáfunnar og öðrum útgáfum tilskipunarinnar, má fallast á þá röksemd ESA að réttarvissu sé teflt í tvísýnu.

86 Dómstóllinn hefur áður byggt á því að ef um er að ræða efnislegan mun á útgáfum á hinum ýmsu tungumálum, sem öll hafa sama vægi, verði almennt að ganga út frá því að sú skýring skuli valin sem á sér stoð í sem flestum tungumálaútgáfum. Slík skýring leiðir til þess að viðkomandi ákvæði hefur sama inntak í öllum EES-ríkjunum, að svo miklu leyti sem unnt er (sjá *Sveinbjörnsdóttir*, sem vitnað er til hér að framan, 28. mgr.).

87 Markmið 1. mgr. 129 gr. EES-samningsins, sem kveður á um þýðingar og útgáfu gerðanna, sem vísað er til í viðaukum við EES-samninginn, yfir á fleiri tungumál en opinber tungumál Evrópusambandsins og yfir á norsku og íslensku, er að tryggja samræmda túlkun reglnanna á gervöllu EES-svæðinu með útgáfum á öllum tungumálum sem til eru innan Evrópska efnahagssvæðisins.

88 Af þessu leiðir að ekki er hægt að nota orðalag í einni tungumálaútgáfu ákvæða EES-réttar sem eina grundvöll túlkunar þess ákvæðis, eða láta hana vega þyngra en útgáfur ákvæðisins á öðrum tungumálum. Slík nálgun væri ósamrýmanleg kröfunum um samræmda beitingu EES-réttar.

89 Af meginreglunni um einsleitni og almenna þörf á samræmdri beitingu EES-réttar og meginreglunni um jafnræði leiðir að þegar orðalag ákvæðis í EES-rétti vísar ekki með skýrum hætti í lög EES-ríkjanna, þá verður almennt að túlka ákvæðið á óháðan og samræmdan hátt innan Evrópska efnahagssvæðisins til að ákvarða merkingu þess og inntak, að teknu tilliti til samhengis þess við þau markmið sem stefnt er að með viðkomandi löggjöf.

90 Ef um er að ræða ósamræmi í merkingu ákvæðis eftir því á hvaða tungumáli það hefur verið birt ber því að túlka ákvæðið með

purpose and general scheme of the rules of which it forms a part so as to be consistent, as far as is possible, with the general principles of EEA law.

91 The text of Article 14(1) of the Directive in the other language versions states that when winding-up proceedings are opened, the administrative or judicial authority of the home EEA State or the liquidator shall, without delay, individually inform known creditors who have their domiciles, normal places of residence or head offices in other EEA States, except in cases where the legislation of the home State does not require lodgement of the claim with a view to its recognition. The individual character of the obligation to inform known EEA creditors is indicated by the use of the word "*individually*" in English, "*individuellement*" in French, "*einzeln*" in German, "*individualmente*" in Italian and Spanish, "*enkeltvis*" in Norwegian, "*individuelt*" in Danish and "*individuellt*" in Swedish. The necessary information, as set out in Article 14(2) of the Directive, must be provided to known creditors by the dispatch of a notice.

92 The purpose of Article 14 of the Directive may be understood from the third, fourth, fifteenth, sixteenth and twentieth recitals in the preamble thereto. These five recitals make clear that the Directive aims at ensuring the mutual recognition of reorganisation measures and winding-up proceedings in the EEA States as well as the co-operation necessary in that regard. Thus, the Directive forms a part of a framework of legislation whereby a credit institution and its branches form a single entity subject to the supervision of the competent authorities of the home EEA State (third recital). The important role played by the home EEA State authorities before winding-up proceedings are commenced may continue during the process of the winding-up in order to ensure that those proceedings can be properly carried out (15th recital), as in the present case.

93 The principles of unity and universality must be respected in the winding-up proceedings in order to ensure the equal treatment of creditors (16th recital). Crucially, according to the 20th recital, the provision of information to known creditors on an

vísan til markmiðs og heildarsamhengis þeirra reglna sem það er hluti af og, eftir því sem unnt er, til samræmis við almennar meginreglur EES-réttar.

91 Í texta 1. mgr. 14. gr. tilskipunarinnar í útgáfum hennar á öðrum tungumálum kemur fram að þegar slitameðferð hefst skuli stjórnvöld eða dómsmálayfirvöld EES-heimaríkisins, eða skiptastjórinn, án tafar upplýsa hvern og einn þekktan lánardrottinn, sem hefur lögheimili, fasta búsetu eða aðalskrifstofu í öðru EES-ríki, sérstaklega um það, svo framarlega sem lýsingar á kröfu er krafist í löggjöf heimaríkisins til að hún fáist viðurkennd. Sérstök skylda til að upplýsa þekktan EES-lánardrottinn er gefin til kynna með notkun orðanna „*individually*“ á ensku, „*individuellement*“ á frönsku, „*einzeln*“ á þýsku, „*individualmente*“ á ítölsku og spænsku, „*enkeltvis*“ á norsku, „*individuelt*“ á dönsku og „*individuellt*“ á sænsku. Þekktir lánardrottnar skulu fá nauðsynlegar upplýsingar eins og sett er fram í 2. mgr. 14. gr. í formi tilkynningar.

92 Markmið 14. gr. tilskipunarinnar má leiða af 3., 4., 15., 16. og 20. lið inngangsorða hennar. Þessir fimm inngangsliðir sýna skýrlega að tilskipunin miðar að því að tryggja gagnkvæma viðurkenningu á meðferð við endurskipulagningu og slit lánastofnana í EES-ríkjunum sem og nauðsynlega samvinnu í þeim tilgangi. Því er tilskipunin hluti af lagaumgjörð þar sem lánastofnun og útibú hennar mynda eina heild, sem er háð eftirliti lögbærra yfirvalda þess ríkis þar sem starfsleyfi, sem gildir alls staðar í bandalaginu, var gefið út, (sbr. þriðja lið inngangsorða tilskipunarinnar). Lögbær yfirvöld heimaaðildarríkis gegna mikilvægu hlutverki áður en slitameðferð hefst og geta haldið því áfram á meðan á slitunum stendur þannig að málsmeðferð geti farið fram með réttum hætti, sbr. 15. lið inngangsorða tilskipunarinnar, eins og við á í þessu máli.

93 Í því skyni að tryggja jafnræði allra lánardrottna við slitameðferð ber að fylgja meginreglunum um einingu („principle of unity“) og algildi („principle of universality“), sbr. 16. lið inngangsorða tilskipunarinnar. Samkvæmt 20. lið inngangsorðanna er það

individual basis is as essential as publication to enable them, where necessary, to lodge their claims or submit observations relating to their claims within the prescribed time limits. Creditors may neither be discriminated against on grounds of domicile or residence in another EEA State nor by the nature of their claims. Creditors must be kept regularly informed in an appropriate manner throughout winding-up proceedings.

94 Moreover, when Article 14 of the Directive is considered in the context and general scheme of the Directive as a whole, the individual nature of the notification requirement to known creditors becomes readily apparent. According to Article 13 of the Directive, the announcement of the decision to open winding-up proceedings by the liquidator or any administrative or judicial authority shall be published as an extract from the winding-up decision in the Official Journal of the European Union and at least two national newspapers in each of the host EEA States.

95 The intention of the European legislature underlying Article 13 of the Directive is evidently to bring the winding-up proceedings to the attention of the EEA publics at large. However, this advertisement to the public is entirely separate from, and not substitutable for, the requirements under Article 14 of the Directive on the liquidator, administrative or judicial authority of the home EEA State towards known creditors. Regard must also be had to the fact that pursuant to Article 18 of the Directive, liquidators must keep creditors regularly informed, in an appropriate manner, as to the progress of the winding-up.

96 Pursuant to Article 7(b) EEA, it is for national law to determine the choice of form and method of implementation of the Directive. Moreover, Article 10(2)(g) of the Directive provides that the law of the home EEA State shall determine the rules governing the lodging, verification and admission of claims.

97 However, in light of the purpose of the Directive, it is clear that the term known creditor in Article 14 of the Directive, as well

veigamikið atriði að tilhögun upplýsingamiðlunar til þekktra lánardrottna, hvers og eins þeirra, er álitin jafnmikilvæg og birting til að gera þeim kleift, þegar við á, að lýsa kröfum eða gera athugasemdir varðandi kröfur sínar innan tilskilinna tímamarka. Hvorki má mismuna lánardrottnum á grundvelli lögheimilis eða búsetu í öðru EES-ríki né vegna þess hvers eðlis kröfur þeirra eru. Lánardrottnum skulu reglubundið veittar upplýsingar á viðeigandi hátt meðan slitameðferð stendur yfir.

94 Þegar horft er til 14. gr. tilskipunarinnar og heildarsamhengis hennar við önnur ákvæði tilskipunarinnar og almenn markmið, kemur einstaklingsbundið inntak skyldunnar til að upplýsa lánardrottna skýrt fram. Samkvæmt 13. gr. tilskipunarinnar skulu skiptastjórar eða stjórnvöld eða dómsmálayfirvöld tilkynna um þá ákvörðun að hefja slitameðferð með birtingu útdráttar úr slitaákvörðuninni í Stjórnartíðindum Evrópusambandsins og í a.m.k. tveimur innlendum dagblöðum í hverju EES-gistiríki.

95 Þau áform löggjafans sem liggja til grundvallar 13. gr. tilskipunarinnar eru augljóslega að vekja athygli alls almennings innan Evrópska efnahagssvæðisins á slitameðferðinni. Þessi auglýsing sem ætluð er almenningi er þó algerlega aðskilin frá kröfunum sem gerðar eru í 14. gr. tilskipunarinnar til skiptastjóra, stjórnvalda eða dómsmálayfirvalda EES-heimaríkisins gagnvart þekktum lánardrottnum og kemur ekki í staðinn fyrir þær kröfur. Einnig þarf að taka tillit til þeirrar staðreyndar að samkvæmt 18. gr. tilskipunarinnar skulu skiptastjórar miðla upplýsingum reglulega og á viðeigandi hátt til lánardrottna, einkum um framvindu slitanna.

96 Samkvæmt b-lið 7. gr. EES-samningsins, fer það eftir ákvæðum innlendrar löggjafar hvaða form og aðferðir ber að hafa við innleiðingu tilskipunar í landsrétt. Enn fremur kveður g-liður 2. mgr. 10. gr. tilskipunarinnar á um að reglur um kröfulýsingu, sannprófun og skráningu krafna skuli einkum ákvarðaðar með lögum EES-heimaríkisins.

97 Í ljósi markmiðsins með tilskipuninni er þó ljóst að hugtakið þekktur lánardrottinn í 14. og í 7. gr. tilskipunarinnar er

as in Article 7 of the Directive, is an EEA law concept, which, in the absence of an express reference to the law of the EEA States, must be given an autonomous, uniform interpretation (see paragraph 89 above). Moreover, the principle of the equal treatment of creditors would be violated without an autonomous, uniform interpretation of the term. Article 14 of the Directive makes clear that the term known creditor describes a special category of creditor to whom greater obligations are owed.

98 Consequently, the term known creditor must be interpreted as encompassing those who are already known by the credit institution to be creditors, those creditors who may be discovered by a reasonably diligent responsible winding-up authority, such as by requesting information on the identity of creditors from a securities holding service, and those creditors who bring themselves to the attention of the credit institution at any stage prior to the final date imposed by national law for submission of claims to the responsible winding-up authority.

99 The answer to the first question must therefore be that in the case of discrepancy between different language versions, the version which reflects the purpose and the general scheme of the rules provided for by the Directive as well as the general principles of EEA law must be deemed to express the meaning of an EEA law provision. Consequently, Article 14 of Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding up of credit institutions precludes a rule of national law which, following the publication of an invitation to lodge claims directed towards known creditors who have their domicile, permanent residence or head offices in other EEA States, allows for the cancellation of claims that have not been lodged even if these creditors have not been individually notified and the national legislation requires the lodgement of the claim with a view to its recognition.

V THE SECOND QUESTION OF THE FIRST REFERENCE

100 By the second question of its ruling of 8 November 2011, the national court essentially seeks to establish what the consequences are for the winding-up proceedings of the credit institution if the first question is answered in the affirmative,

sérstakt hugtak að EES-rétti, sem felur ekki í sér beina eða skýra vísun til tiltekinna reglna í landsrétti og ber því að túlka á sjálfstæðan og samræmdan hátt (sjá 89. mgr. hér að framan). Án sjálfstæðrar og samræmdrar túlkunar á hugtakinu væri auk þess brotið gegn meginreglunni um jafna meðferð lánardrottna. Í 14. gr. tilskipunarinnar kemur skýrt fram að hugtakið þekkur lánardrottinn lýsir tilteknum flokki lánardrottna sem stærri skyldur eru gagnvart.

98 Orðasambandið þekktur lánardrottinn skal í þessu sambandi túlkað svo að það taki til þeirra sem viðkomandi lánastofnun sjálf hefur álitið lánardrottna, og þekkir til sem slíkra, þeirra lánardrottna sem ætla má að ábyrg og hæf skiptastjórn geti haft uppá með eðlilegum aðferðum, svo sem með því að óska eftir upplýsingum um þá frá umsýsluaðilum á sviði verðbréfa, og þeirra sem gefa sig fram við lánastofnunina áður en lögbundinn frestur til að lýsa kröfum er runninn út.

99 Fyrstu spurningunni verður því að svara á þann veg að ef ósamræmi er á milli ákvæða tilskipunar eftir því á hvaða tungumáli hún er, ber að leggja til grundvallar að útgáfan á því tungumáli sem endurspeglar markmið og heildarsamhengi ákvæðisins við reglur tilskipunarinnar, svo og meginreglur EES-réttar, lýsi merkingu ákvæðisins að EES-rétti. Af þessum sökum útilokar 14. gr. tilskipunar 2001/24/EB frá 4. apríl 2001, um endurskipulagningu og slit lánastofnana, landsreglur sem heimila niðurfellingu á kröfum í kjölfar innköllunar krafna þekktra lánardrottna með lögheimili, fasta búsetu eða aðalskrifstofu í öðrum EES-ríkjum, sem ekki hefur verið lýst, þrátt fyrir að hver og einn þessara lánardrottna hafi ekki fengið sérstaka tilkynningu, og landslög krefjast þess að kröfunni sé lýst til að hún fáist viðurkennd.

V SÍÐARI SPURNING FYRSTU BEIÐNINNAR UM RÁÐGEFANDI ÁLIT

100 Í síðari spurningu úrskurðarins frá 8. nóvember 2011 leitast Héraðsdómur Reykjavíkur í meginatriðum við að leiða í ljós hvaða afleiðingar það hafi fyrir slitameðferð fjármálafyrirtækis ef svarið

that is, the invitation by the competent authority to lodge claims is deemed not to satisfy the requirements of Article 14 of the Directive.

Observations submitted to the Court

101 In the view of the Plaintiff, the second question referred by the Reykjavík District Court essentially seeks to establish what consequences, if any, there are for the winding-up proceedings of an EEA financial undertaking if the competent authority fails to dispatch a notification as prescribed in Article 14(2) of the Directive to each known creditor in other Member States under circumstances in which the lodgement of a claim is a requirement for its recognition under the national legislation governing the winding-up proceedings.

102 The Plaintiff submits that the freedom of establishment and the freedom to provide services within the EEA entitle financial undertakings to set up branches and to offer their services throughout the EEA. However, within the EEA, some rules applicable to the reorganisation and winding up of financial undertakings are country specific, divergent and remain non-harmonised. These include the rules on the handling of claims and the consequences of not filing a formal proof of a claim in winding-up proceedings. In the Plaintiff's view, this contradicts the objectives of the internal market by creating unequal conditions for creditors, depending on their location and contributes to the uncertainty of creditors when dealing with financial institutions from EEA States other than their own due to unfamiliarity with their legislation and thereby hampers the provision of cross-border services.

103 The Plaintiff contends that the purpose of Directive 2001/24/EC is to address, to the extent possible, the problems and risks which divergent national rules have, in this regard, on the internal market. Therefore, Article 16(1) establishes the principle that EEA creditors outside the home Member State of the credit institution shall have the right to lodge claims or to submit written observations relating to claims. To facilitate that right, Article

við fyrstu spurningunni er jákvætt, þ.e. ef innköllun viðeigandi og bærs aðila telst ekki uppfylla kröfur 14. gr. tilskipunarinnar.

Athugasemdir bornar fram við EFTA-dómstólinn

101 Að mati stefnanda er með síðari spurningunni sem Héraðsdómur Reykjavíkur beindi til dómstólsins leitast við að kanna hvaða afleiðingar það hafi, ef einhverjar, fyrir slitameðferð fjármálafyrirtækis innan Evrópska efnahagssvæðisins, ef viðeigandi og bær aðili sendir ekki tilkynningu, eins og mælt sé fyrir um í 2. mgr. 14. gr. tilskipunarinnar, til hvers og eins þekkts lánardrottins í öðrum aðildarríkjum, í tilvikum þegar lög viðkomandi lands áskilji að kröfu sé lýst svo hún geti fengist viðurkennd við slitameðferðina.

102 Stefnandi heldur því fram að staðfesturéttur og frelsi til að veita þjónustu innan Evrópska efnahagssvæðisins heimili fjármálafyrirtækjum að stofna útibú og bjóða þjónustu þeirra á gervöllu Evrópska efnahagssvæðinu. Innan Evrópska efnahagssvæðisins séu þó nokkrar reglur, sem gildi um endurskipulagningu og slit lánastofnana, bundnar við tiltekin lönd, sem séu mismunandi og því áfram ósamræmdar. Þar með talið séu reglurnar um meðhöndlun krafna og afleiðingar þess að ekki sé lögð inn formleg sönnun á kröfu við slitameðferð. Stefnandi telur að þessi staða sé í mótsögn við markmið innri markaðarins, hún skapi ójöfn skilyrði fyrir lánardrottna eftir því hvar þeir séu staðsettir og að hún stuðli að óvissu í viðskiptum þeirra við fjármálafyrirtæki í öðrum EES-ríkjum en þeirra eigin, vegna vanþekkingar á löggjöf þeirra. Því hindri ákvæðið þjónustu yfir landamæri.

103 Stefnandi heldur því fram að tilgangur tilskipunar 2001/24/EB sé að takast á við, að því marki sem hægt sé, vandamál og áhættu sem mismunandi reglur landsréttar skapi, í þessu tilliti á innri markaðnum. Þess vegna sé meginreglunni, um að EES-lánardrottnar utan heimaaðildarríkis lánastofnunarinnar skuli hafa rétt til þess að lýsa kröfum eða leggja fram skriflegar greinargerðir er þær varða, komið á með 1. mgr. 16. gr. Til að

14 of the Directive sets out mandatory rules on the provision of information to EEA creditors known to the institution being wound up.

104 Article 118(1), point 2, of the Icelandic Bankruptcy Act provides that a foreign creditor who has not filed a claim within the prescribed deadline has the possibility of having his claim accepted under certain conditions. However, these conditions are stringent and strictly applied.

105 The Plaintiff submits that the rejection of its claims by the Defendant entails an unlawful restriction of its right under Article 16(1) of the Directive, and, at the same time, a corresponding violation by the Defendant of that right. Iceland, as an EEA State, has an obligation to apply its national law in a manner which conforms to EEA law in the relevant field.

106 According to the Plaintiff, a provision of EEA law that is both unconditional and sufficiently precise is capable of conferring upon individuals and economic operators, rights and obligations which can be relied upon before national courts of EEA/EFTA States. While in EU law this principle is introduced through case-law, under the EEA Agreement, the same principle applies as a result of the objectives of the Agreement as set out, *inter alia*, in the fourth and fifteenth recitals of its preamble.

107 Article 14 of the Directive, the Plaintiff adds, contains a clear and precise substantive provision setting out the duties of an administrator of a failed bank in relation to known EEA creditors outside the home EEA State of the bank in question when winding-up proceedings commence. In its view, the wording of Article 14 of the Directive leaves no room for a choice of measures when it comes to informing known creditors of the opening of winding-up proceedings and the consequences of not lodging a claim within the deadline.

108 According to the Defendant, the Reykjavík District Court essentially seeks to ascertain whether, under EEA law, the provision included in Article 14 of the Directive, which provides

greiða fyrir þessum rétti kveði 14. gr. tilskipunarinnar á um ófrávíkjanlega reglu um tilhögun upplýsingamiðlunar til EES-lánardrottna sem stofnunin sem slitið er hefur vitneskju um.

104 Í 2. tölulið 1. mgr. 118. gr. íslensku gjaldþrotaskiptalaganna er kveðið á um að útlendir lánardrottnar, sem ekki hafi lagt fram kröfu innan tilskilins frests, eigi möguleika á að fá kröfu sína samþykkta að tilteknum skilyrðum uppfylltum. Þessi skilyrði eru þó ströng og þeim skal fylgt í einu og öllu.

105 Stefnandi heldur því fram að það að stefndi hafi hafnað kröfunum feli í sér ólögmæta takmörkun á rétti hans samkvæmt 1. mgr. 16. gr. tilskipunarinnar og um leið samsvarandi brot stefnda á þeim rétti. Íslandi beri sem EES-ríki skylda til að beita landsrétti í samræmi við EES-rétt á viðkomandi sviði.

106 Samkvæmt stefnanda getur ákvæði EES-réttar, sem er hvort tveggja óskilyrt og nægjanlega nákvæmt, veitt einstaklingum og aðilum í atvinnurekstri réttindi og skyldur sem hægt er að byggja á fyrir dómstólum samningsríkja EES/EFTA. Þessi meginregla sé tilkomin í ESB-rétti á grundvelli dómaframkvæmdar, en samkvæmt EES-samningnum sé sömu meginreglu beitt á grundvelli markmiða samningsins eins og þau birtast m.a. í 4. og 15. lið aðfararorða samningsins.

107 Stefnandi bætir því við að 14. gr. tilskipunarinnar feli í sér skýr og nákvæm efnisákvæði, þar sem sett sé fram hvaða skyldur sá sem stjórnar slitum fallins banka hefur gagnvart þekktum EES-lánardrottnum utan EES-heimaríkis bankans þegar slitameðferð hefst. Að mati stefnanda veitir orðalag 14. gr. tilskipunarinnar ekki svigrúm um hvaða aðferðir eru valdar við að tilkynna þekktum lánardrottni um upphaf slitameðferðar og afleiðingar þess að kröfur eru ekki lagðar fram innan frestsins.

108 Stefndi telur að Héraðsdómur Reykjavíkur leitist í meginatriðum við að kanna hvort ákvæði 14. gr. tilskipunarinnar, um að skiptastjóri skuli „tilkynna án tafar hverjum og einum þekktum

that a liquidator "shall without delay individually inform known creditors", must prevail over Article 86 of the Icelandic Bankruptcy Act, which vests, *inter alia*, a liquidator with the power to determine how information should be disclosed to creditors.

109 The Defendant submits that directives incorporated into the EEA Agreement by the EEA Joint Committee are binding, as to the result to be achieved, upon an EEA State, but leave the choice of form and methods to the national authorities. The transposition of a directive does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation. In the Defendant's view, such discretion has been employed by Iceland. The 16th and 17th recitals in the preamble to the Directive emphasise the sole jurisdiction of the home State in the winding-up process.

110 The Defendant submits that, if the Court concludes that a provision of national law vesting power in a liquidator to decide how known creditors are notified is incompatible with the Directive, the question arises whether the present case concerns the non-implementation or incorrect implementation of EEA law. In neither case, the Defendant submits, can Article 14(1) of the Directive override provisions of national law.

111 According to the Defendant, EEA law provides that the EFTA States are obliged to ensure that EEA rules that have been implemented prevail over national legal provisions. The EEA Agreement does not require any EEA State to transfer legal powers to any institution of the EEA and, moreover, the homogeneity of the EEA must be achieved through national procedures. However, if EEA rules have not been implemented into national law, they cannot take precedence over conflicting national law provisions. Therefore, if the Court concludes that Article 14(1) of the Directive has not been implemented into national law, it cannot take precedence over the relevant articles of the Icelandic Bankruptcy Act.

112 The Icelandic Government asserts that Article 14(1) of the English version of the Directive does not really prescribe how

lánardrottni sérstaklega“ um upphaf skiptameðferðar, gangi samkvæmt EES-rétti framar ákvæði 86. gr. íslensku gjaldþrotaskiptalaganna, sem feli m.a. skiptastjóra vald til að ákveða hvernig miðla skuli upplýsingum til lánardrottna.

109 Stefndi heldur því fram að tilskipanir, sem teknar séu upp í EES-samninginn af sameiginlegu EES-nefndinni, séu bindandi fyrir samningsríki að því er varði þau markmið sem stefnt sé að, en lögbærum yfirvöldum í hverju EES-ríki sé eftirlátið á hvern hátt og með hvaða ráðum þeim skuli náð. Innleiðing á tilskipun krefst þess þó ekki endilega að ákvæðin séu formlega og ótvírætt orðrétt felld inn í tiltekna lagasetningu. Að mati stefnda var slíkt svigrúm nýtt af hálfu Íslands. Í 16. og 17. lið inngangsorða tilskipunarinnar sé lögð áhersla á að heimaaðildarríkið hafi eitt lögsögu við slitameðferðina.

110 Stefndi heldur því fram að ef að niðurstaða dómstólsins verði að ákvæði landsréttar, sem veiti skiptastjóra vald til þess að ákveða hvernig upplýsa skuli þekkta lánardrottna, séu ósamrýmanleg tilskipuninni, vakni sú spurning hvort að þetta mál varði EES-rétt sem ekki hafi verið innleiddur eða ranga innleiðingu hans. Stefndi heldur því fram að í hvorugu tilvikinu gangi 1. mgr. 14. gr. framar ákvæðum landsréttar.

111 Samkvæmt stefnda leiðir það af EES-rétti að EFTA-ríkjunum beri að tryggja að innleiddar EES-reglur gangi framar öðrum ákvæðum landsréttar. EES-samningurinn feli ekki í sér að EES-ríki skuli yfirfæra löggjafarvald til stofnana Evrópska efnahagssvæðisins. Þar að auki skuli stefnt að einsleitni Evrópska efnahagssvæðisins með málsmeðferðarreglum landsréttar. Hafi EES-reglur ekki verið innleiddar í landsrétt, geti þær ekki gengið framar ákvæðum landsréttar sem stangast á við þær. Af þeim sökum geti niðurstaða dómstólsins, ef hún verður á þann veg að 1. mgr. 14. gr. tilskipunarinnar hafi ekki verið innleidd í landsrétt, ekki gengið framar viðkomandi ákvæðum íslensku gjaldþrotaskiptalaganna.

112 Ríkisstjórn Íslands heldur því fram að 1. mgr. 14. gr. ensku útgáfunnar á tilskipuninni lýsi því ekki í reynd hvernig „tilkynna

"known creditors" should be "individually informed". Although Article 14(2) of the English version of the Directive stipulates that the information should be provided "by the dispatch of a notice", the Directive is silent as to how, or where this notice should be dispatched. The Government concludes that the Directive gives EEA States considerable discretion in determining how such notices should be dispatched.

113 In the view of the Icelandic Government, Icelandic legislation conforms to the Directive. Article 104(4) of the Financial Undertakings Act provides that if a known creditor of the credit institution is resident in another EEA State, the administrator shall, without delay, "inform the creditor" of the commencement of the winding-up. Meanwhile, Article 86(1) and (2) of the Icelandic Bankruptcy Act, which applies to the winding up of financial undertakings in accordance with Article 102(1) of the Financial Undertakings Act, provides that the liquidator should investigate whether any party who potentially has a claim against the bankruptcy estate is domiciled abroad and, if that is the case, he should "notify the party in question". Equal treatment of creditors is ensured as the same rules apply to all creditors irrespective of the EEA State of residence.

114 ESA considers that the second question contains a certain ambiguity. It could either be read as asking whether the EEA Agreement requires Article 14 of Directive 2001/24 that has been made part of the EEA Agreement to be directly applicable and take precedence over the national rule that fails to transpose the relevant EEA rule correctly into national law or it could simply refer to the practical conclusions which the winding-up board should draw in the proceedings before it.

115 On the matter of direct applicability, ESA submits that, although it could be argued that Article 7 EEA and Protocol 35 to the EEA Agreement are relevant, neither provision provides an answer to the question posed.

116 ESA and the Commission both argue that national courts are bound to interpret national law, and in particular legislative provisions specifically adopted to transpose EEA rules into

skuli hverjum og einum þekktum lánardrottni sérstaklega“. Þrátt fyrir að mælt sé fyrir um í 2. mgr. 14. gr. tilskipunarinnar á ensku að veita skuli upplýsingarnar „by the dispatch of a notice“, komi ekki fram í tilskipuninni hvernig eða hvar eigi að gefa þessar upplýsingar í formi tilkynningar. Af þessum sökum heldur ríkisstjórnin því fram að tilskipunin veiti EES-ríkjunum umtalsvert svigrúm við ákvörðun um hvernig senda skuli slíka tilkynningu.

113 Að mati ríkisstjórnar Íslands er íslenska löggjöfin í samræmi við tilskipunina. Í 4. mgr. 104. gr. laga um fjármálafyrirtæki sé kveðið á um að ef að þekktur kröfuhafi lánastofnunar sé búsettur í öðru EES-ríki skuli skiptastjóri án tafar „tilkynna honum“ um upphaf skiptanna. Jafnframt kveði 1. og 2. mgr. 86. gr. íslensku gjaldþrotaskiptalaganna, sem gildi um slit fjármálafyrirtækja, í samræmi við 1. mgr. 102. gr. laga um fjármálafyrirtæki, á um að skiptastjóri skuli leita sérstaklega vitneskju um hvort einhver sá, sem kunni að telja til kröfu á hendur þrotabúinu, sé búsettur erlendis, og sé það tilfellið skuli hann „tilkynna hlutaðeigandi“ um það. Jöfn meðferð lánardrottna sé tryggð, þar sem sömu reglur gildi um alla lánardrottna, án tillits til þess í hvaða EES-ríki þeir hafi búsetu.

114 ESA telur að önnur spurningin sé óljós að ákveðnu leyti. Hægt sé að lesa spurninguna annars vegar sem svo, að spurt sé hvort að EES-samningurinn krefjist þess að 14. gr. tilskipunar 2001/24, sem tekin hafi verið upp í EES-samninginn, hafi bein réttaráhrif og gangi framar ákvæði landsréttar sem ekki hafi innleitt viðkomandi EES-reglu með réttum hætti. Hins vegar megi lesa spurninguna sem svo að þar sé einfaldlega vísað til þeirrar niðurstöðu sem slitastjórnin eigi að ná við slitameðferðina.

115 Um bein réttaráhrif ákvæðisins telur ESA þrátt fyrir að hægt sé að færa rök fyrir því að 7. gr. EES-samningsins og bókun 35 við EES-samninginn hafi þýðingu, þá veiti hvorugt ákvæðið svar við spurningunni sem fram er lögð.

116 ESA og framkvæmdastjórnin halda því fram að dómstólar aðildarríkjanna séu bundnir af því að túlka landsrétt, og þá einkum lagaákvæði sem séu sérstaklega samþykkt til að innleiða

national law, as far as possible in conformity with EEA law. The obligation of harmonious interpretation requires a national court to interpret national law in the light of an inadequately implemented or a non-implemented directive even in a case against an individual or between individuals, as in the case at hand. The national court must apply the methods of interpretation recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule. However, in ESA's view, this duty of harmonious interpretation cannot lead to a *contra legem* interpretation or lead to the judicial re-writing of legislation.

117 In the case at hand, the Commission asserts that an interpretation should be adopted that makes it feasible to inform known creditors and, so far as possible, to allow known creditors who would have been in a position to do so to lodge a claim. If it is no longer possible to lodge a claim under national law, taking into account all the circumstances, including the fact that the Plaintiff was precluded from exercising its rights, there should be a remedy available under national law for the known creditors. Any such remedy should take account of the time-limits specified in accordance with Article 14(2) of the Directive and the penalties for failing to adhere to such time-limits including any objective justification for imposing those time limits.

118 ESA submits further that, if the harmonious interpretation of the implementing measure with the text and purpose of the Directive is not possible, the second question referred becomes more complicated as the EEA Agreement does not entail a transfer of legislative powers or require that non-implemented EEA rules take precedence over conflicting national rules, including those which fail to transpose the relevant EEA rules correctly into national law. In that regard, EEA law does not require that individuals and economic operators be able to rely directly on non-implemented EEA rules before national courts. ESA contends that this must be interpreted to mean that EEA law does not have direct effect.

EES-reglur í landsrétt, til samræmis við EES-rétt eins og unnt er. Skyldan um samræmda túlkun krefjist þess af dómstólum samningsríkjanna að þeir túlki landsrétt í ljósi tilskipunar sem sé innleidd á ófullnægjandi hátt eða hafi ekki verið innleidd, jafnvel í málum gegn einkaaðilum eða í málum milli einkaaðila, eins og hér eigi við. Hvað þetta varði verði dómstólar samningsríkjanna eftir fremsta megni að beita túlkunaraðferðum sem viðurkenndar séu að landsrétti til að ná því markmiði sem stefnt sé að með viðkomandi EES-reglu. Þó er það mat ESA að þessi skylda um samræmda túlkun geti ekki leitt til túlkunar sem fer í bága við önnur lagaákvæði eða þess að dómstóll endursemji í reynd lagaákvæði.

117 Framkvæmdastjórnin heldur því fram að í þessu máli verði að beita þeirri túlkun sem geri það framkvæmanlegt að upplýsa þekkta lánardrottna, og eftir því sem unnt sé að heimila öllum þekktum lánardrottnum að lýsa kröfu, sem hefðu verið í aðstöðu til þess. Ef ekki sé lengur hægt að lýsa kröfu samkvæmt landsrétti, að teknu tilliti til allra aðstæðna, þ.m.t. þeirri staðreynd að stefnandi hafi verið útilokaður frá því að nýta rétt sinn, þá ætti að vera til úrræði samkvæmt landsrétti fyrir þekkta lánardrottna. Öll slík úrræði ættu að taka mið af frestinum sem tilgreindur sé í samræmi við 2. mgr. 14. gr. tilskipunarinnar og áhrifum þess að virða ekki frestinn, meðal annars í ljósi þeirra málefnalegu raka sem eru fyrir því að leggja þennan frest á.

118 ESA heldur því fram að ef samræmd túlkun og beiting þeirra aðgerða sem notaðar voru við innleiðingu annars vegar og texta og tilgangs tilskipunarinnar hins vegar sé ekki möguleg, þá verði seinni spurningin sem beint sé til dómstólsins flóknari, enda feli EES-samningurinn hvorki í sér yfirfærslu á löggjafarvaldi né kröfu um að óinnleiddar EES-reglur gangi framar landsreglum sem þær stangast á við, þ.m.t. þær sem ekki innleiði viðkomandi EES-reglur á réttan hátt. Að þessu leyti tryggi EES-réttur ekki að einstaklingar og aðilar í atvinnurekstri geti reitt sig beint á óinnleiddar EES-reglur frammi fyrir dómstólum samningsríkjanna. ESA bendir á að þetta feli í sér að EES-réttur hafi ekki bein réttaráhrif. Því sé það sjónarmið ESA að 14. gr. tilskipunarinnar

Therefore, in its view, Article 14 of the Directive cannot take precedence over the conflicting Icelandic rules.

119 ESA observes that, according to case-law, in cases of conflict between national law and non-implemented EEA law, the EFTA States may decide whether, under their national legal order, national administrative and judicial organs are to apply the relevant EEA rule directly and thereby avoid the violation of EEA law. Alternatively, the EFTA State concerned is obliged to provide compensation for loss and damage caused to individuals and economic operators, in accordance with the principle of State liability, which is integral to the EEA Agreement. As a further alternative, ESA also notes that pursuant to Article 31 SCA it may commence proceedings against Iceland, even if this possibility may not be of great practical value to the parties to the main proceedings in the case at hand.

120 As regards the practical consequences for the winding-up board, ESA argues that, under the principle of effectiveness, the detailed procedural rules governing actions for safeguarding an individual's rights under EEA law must not make it, in practice, impossible or excessively difficult to exercise the rights conferred by EEA law. Likewise, according to the principle of equivalence, the rights conferred on the Plaintiff by Article 14 of the Directive must be respected in a way which is no less favourable than the manner in which the national legal order protects similar rights under purely domestic legislation. Moreover, if Icelandic bankruptcy law permits a winding-up board to admit a claim that has been lodged late due to a procedural error committed by the board, ESA submits that such a solution should be extended to remedy the problem in the present case. However, in this regard, ESA considers that the order for reference contains insufficient information to offer further guidance.

Findings of the Court

121 In cases of conflict between national law and non-implemented EEA law, the EEA/EFTA States may, unless the principle of provisional applicability becomes operational, decide whether,

geti ekki gengið framar íslenskum reglum sem stangast á við hana.

119 ESA bendir á að samkvæmt dómaframkvæmd í málum þar sem landsréttur og óinnleiddur EES-réttur stangist á geti EFTA-ríkin sjálf ákveðið hvort innlendir úrskurðaraðilar á stjórnsýslu- og dómstólastigi megi beita viðkomandi EES-reglu beint og þannig forðast að brjóta gegn EES-rétti. Að öðrum kosti sé hlutaðeigandi EFTA-ríki skyldugt til að greiða bætur fyrir tap og tjón sem einstaklingar og aðilar í atvinnurekstri hafi orðið fyrir í samræmi við meginregluna um bótaábyrgð ríkisins, sem sé óaðskiljanlegur hluti EES-samningsins. ESA vekur einnig athygli á því að hún geti í þessari stöðu hafið málsmeðferð gegn Íslandi samkvæmt 31. gr. samningsins um eftirlitsstofnunina og dómstólinn, en sá kostur komi aðilum málsins fyrir héraðsdómi ekki að miklu gagni.

120 Að því er snertir afleiðingar fyrir slitastjórnina bendir ESA á að samkvæmt meginreglunni um skilvirkni megi ítarlegar málsmeðferðarreglur sem fylgja beri við verndun réttinda einstaklingsins samkvæmt EES-rétti ekki leiða til þess að það verði ómögulegt eða óhóflega erfitt að nýta þessi réttindi í reynd. Á sama hátt verði samkvæmt meginreglunni um jafngildi að virða þau réttindi sem 14. gr. tilskipunarinnar veiti stefnanda, þannig að verndin samkvæmt tilskipuninni sé óhagfelldari en sú vernd sem innlenda réttarkerfið veitir sambærilegum réttindum í tilvikum þar sem beitt er landsbundinni löggjöf. ESA telur að ef íslenskur gjaldþrotaskiptaréttur heimilar slitastjórn að samþykkja kröfur sem lýst hafi verið seint vegna mistaka hennar við málsmeðferð, ætti slík lausn að geta leyst vandann í þessu máli. Í þessu samhengi telur ESA þó að beiðnin um ráðgefandi álit veiti ekki nægilegar upplýsingar til að hægt sé að veita frekari leiðbeiningar.

Álit dómstólsins

121 Þegar landsréttur og óinnleiddur EES-réttur stangast á geta EES/EFTA-ríkin ákveðið, svo framarlega sem reglan um beitingu til bráðabirgða kemur ekki til framkvæmda, ákveðið hvort

under their national legal order, domestic administrative and judicial authorities have to apply the relevant EEA law rule directly, and thereby avoid violation of EEA law in a particular case (see Case E-1/07 *Criminal Proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 41).

122 The objective of establishing a dynamic and homogeneous European Economic Area can only be achieved if EFTA and EU citizens and economic operators enjoy, relying upon EEA law, the same rights in both the EU and EFTA pillars of the EEA.

123 The national court is bound to interpret domestic law, so far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result sought by the directive and consequently comply with Articles 3 EEA and 7 EEA and Protocol 35 to the EEA Agreement (*Criminal Proceedings against A*, cited above, paragraph 39).

124 The principle of conform interpretation requires the referring court to do whatever lies within its competence, having regard to the whole body of rules of national law, to ensure that an individual or economic operator who is a known creditor (see, paragraph 98 above) but who has not been individually notified through the dispatch of a notice pursuant to Article 14 of the Directive, such as the Plaintiff, may be able to lodge a claim with the responsible national winding-up authority within the applicable time-limits established under national law.

125 Where that is not possible, the Court notes that in cases of violation of EEA law by an EEA State, the EEA State is obliged to provide compensation for loss and damage caused to individuals and economic operators, in accordance with the principle of State liability which is an integral part of the EEA Agreement, if the conditions laid down in *Sveinbjörnsdóttir*, cited above, paragraph 62 et seq. and Case E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraphs 25 and 37 to 48, are fulfilled (see *Criminal Proceedings against A*, cited above, paragraph 42).

innlendir úrskurðaraðilar á stjórnsýslu- og dómstólastigi geti beitt viðkomandi EES-reglu beint og þannig forðast að brjóta gegn EES-rétti í tilteknu máli, (sjá mál E-1/07 *Ákværuvaldið gegn A* [2007] EFTA Ct. Rep. 246, 41. mgr.).

122 Einungis er hægt að ná markmiðinu um myndun öflugs og einsleits Evrópsks efnahagssvæðis ef ríkisborgarar og aðilar í atvinnurekstri í EFTA- og ESB-ríkjunum njóta sömu réttinda innan EFTA- og ESB-stoðarinnar, þegar þeir þurfa að reiða sig á EES-rétt.

123 Landsdómstóli ber að túlka ákvæði landsréttar með hliðsjón af orðalagi og markmiði tilskipunarinnar eftir því sem kostur er þannig að niðurstöðunni sem stefnt er að með tilskipuninni sé náð og 3. og 7. gr. EES-samningsins og bókun 35 við EES-samninginn sé þar með fylgt (*Ákæruvaldið gegn A*, sem áður er vitnað til, 39. mgr.).

124 Meginreglan um samræmda túlkun krefst þess að dómstóllinn sem óskar eftir ráðgefandi áliti geri allt það sem fellur innan valdsviðs hans, með hliðsjón af öllum reglum landsréttar, til að tryggja að einstaklingur eða aðili í atvinnurekstri sem er þekktur lánardrottinn (sjá 98. mgr. hér að ofan) en fékk ekki sérstaka tilkynningu um slitin með auglýsingu samkvæmt 14. gr. tilskipunarinnar, eins og stefnandi, geti lýst kröfu hjá þeim aðila sem vald hefur til að taka við kröfum samkvæmt landsrétti innan gildandi frests samkvæmt landslögum.

125 Sé það ekki mögulegt, bendir dómstóllinn á að ef um er að ræða brot EES-ríkis á EES-rétti, telst hlutaðeigandi EFTA-ríki skyldugt til að greiða bætur fyrir tap og tjón sem einstaklingar og aðilar í atvinnurekstri hafi orðið fyrir, í samræmi við meginregluna um bótaábyrgð ríkisins, sem er óaðskiljanlegur hluti EES-samningsins, enda séu uppfyllt þau skilyrði sem sett eru fram í dómi dómstólsins í máli *Erlu Maríu Sveinbjörnsdóttur*, sem áður er vitnað til, 62. mgr. og áfram, og í máli E-4/01 *Karls K. Karlssonar hf.* [2002] EFTA Ct. Rep. 240, 25., 37. og 48. mgr. (sjá *Ákæruvaldið gegn A*, sem áður er vitnað til, 42. mgr.).

126 In light of the above, the answer to the second question of the first reference must be that while the EEA Agreement does not require that a provision of a directive that has been made part of the EEA Agreement is directly applicable and takes precedence over a national rule that fails to transpose the relevant EEA rule correctly into national law, the national court is obliged, as far as possible, to ensure the result sought by the directive at issue through the conform interpretation of the national law with the EEA law provision.

VI COSTS

127 The costs incurred by the Icelandic Government, the Estonian Government, 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 Héraðsdómur Reykjavíkur, any decision on costs for the parties to those proceedings is a matter for that court.

126 Í ljósi þess sem rakið er hér að framan verður að svara síðari spurningu fyrri beiðninnar um ráðgefandi álit á þann veg að þótt EES-samningurinn geri ekki kröfu um að ákvæði tilskipunar sem tekin hefur verið upp í EES-samninginn hafi bein réttaráhrif í landsrétti og að það gangi framar innlendri reglu, sem ekki hefur tekið viðkomandi EES-reglu réttilega upp í landsrétt, ber landsdómstóli skylda til að tryggja að markmiðið sem stefnt er að með tilskipuninni náist, að svo miklu leyti sem unnt er, með samræmdri túlkun landsréttar við ákvæði EES-réttar.

VI KOSTNAÐUR

127 Ríkisstjórn Íslands, ríkisstjórn Eistlands, Eftirlitsstofnun EFTA og framkvæmdastjórn Evrópusambandsins, sem skilað hafa greinargerðum til EFTA-dómstólsins, skulu hver bera sinn málskostnað. Þar sem um er ræða mál sem er hluti af málarekstri fyrir Héraðsdómi Reykjavíkur, kemur það í hlut þess dómstóls að kveða á um kostnað málsaðila.

On those grounds,

THE COURT

in answer to the questions referred to it by Héraðsdómur Reykjavíkur hereby gives the following Advisory Opinion:

1. **In the case of discrepancy between different language versions, the version which reflects the purpose and the general scheme of the rules provided for by the Directive, as well as the general principles of EEA law must be deemed to express the meaning of an EEA law provision.**

2. **Article 14 of Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding up of credit institutions precludes a rule of national law which, following the publication of an invitation to lodge claims directed towards known creditors who have their domicile, permanent residence or head offices in other EEA States, allows for the cancellation of claims that have not been lodged even if these creditors have not been individually notified and the national legislation requires the lodgement of the claim with a view to its recognition.**

3. **While the EEA Agreement does not require that a provision of a directive that has been made part of the EEA Agreement is directly applicable and takes precedence over a national rule that fails to transpose the relevant EEA rule correctly into national law, the national court is obliged, as far as possible, to ensure the result sought by the directive at issue through the conform interpretation of the national law with the EEA law provision.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 28 September 2012.

Gunnar Selvik — Registrar

Carl Baudenbacher — President

Með vísan til framangreindra forsendna lætur,

DÓMSTÓLLINN

uppi svohljóðandi ráðgefandi álit í tilefni af spurningum sem Héraðsdómur Reykjavíkur beindi til dómstólsins:

1. **Ef ósamræmi er á milli ákvæða tilskipunar eftir því á hvaða tungumáli hún er ber að leggja til grundvallar að útgáfan á því tungumáli sem endurspeglar markmið og heildarsamhengi ákvæðisins við reglur tilskipunarinnar, svo og meginreglur EES-réttar, lýsi merkingu ákvæðisins að EES-rétti.**

2. **14. gr. tilskipunar 2001/24/EB frá 4. apríl 2001, um endurskipulagningu og slit lánastofnana, útilokar landsreglur sem heimila niðurfellingu á kröfum í kjölfar innköllunar krafna þekktra lánardrottna með lögheimili, fasta búsetu eða aðalskrifstofu í öðrum aðildarríkjum, sem ekki hefur verið lýst, þrátt fyrir að hver og einn þessara lánardrottna hafi ekki fengið sérstaka tilkynningu og landslög krefjast þess að kröfunni sé lýst til að hún fáist viðurkennd.**

3. **Þótt EES-samningurinn geri ekki kröfu um að ákvæði tilskipunar sem tekin hefur verið upp í EES-samninginn hafi bein réttaráhrif í landsrétti og að það gangi framar innlendri reglu, sem ekki hefur tekið viðkomandi EES-reglu réttilega upp í landsrétt, ber landsdómstóli skylda til að tryggja að markmiðið sem stefnt er að með tilskipuninni náist, að svo miklu leyti sem unnt er, með samræmdri túlkun landsréttar við ákvæði EES-réttar.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Kveðið upp í heyranda hljóði í Lúxemborg 28. september 2012.

Gunnar Selvik
dómritari

Carl Baudenbacher
forseti

REPORT FOR THE HEARING

in Case E-18/11

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 between

Irish Bank Resolution Corporation Ltd

and

Kaupthing Bank hf.

concerning the interpretation of Article 14 of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions.

I INTRODUCTION

1. By a letter dated 22 December 2011, registered at the EFTA Court on 22 December 2011, the Héraðsdómur Reykjavíkur (Reykjavík District Court) made a request for an Advisory Opinion in a case pending before it between the Irish Bank Resolution Corporation Ltd (hereinafter "IBRC" or "Plaintiff") and Kaupthing Bank hf. (hereinafter "Kaupthing" or "Defendant").

2. The winding-up committee of Kaupthing issued an invitation to its creditors to lodge claims regarding the winding up of the Defendant which was first published in the Icelandic Legal Gazette on 30 June 2009. All those claiming debts of any sort, or other rights against Kaupthing, or assets controlled by it, were urged to submit their claims in writing to the winding-up committee within six months. The latter rejected the claims of IBRC, which was not individually informed by the winding-up committee, because their claims were submitted on 14 April 2010 although the period in which to submit claims set by the winding-up committee had already expired on 30 December 2009.

3. This case raises the question, first, whether the winding-up committee was obliged, as a matter of Icelandic law, including rules which are derived from the EEA Agreement, to inform the

SKÝRSLA FRAMSÖGUMANNS

í máli E-18/11

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

Irish Bank Resolution Corporation Ltd

og

Kaupþings banka hf.

varðandi túlkun á 14. gr. tilskipunar Evrópuþingsins og ráðsins 2001/24/EB frá 4. apríl 2001 um endurskipulagningu og slit lánastofnana.

I INNGANGUR

1. Með bréfi dagsettu 22. desember 2011, sem skráð var í málaskrá dómstólsins 22. desember 2001, óskaði Héraðsdómur Reykjavíkur eftir ráðgefandi áliti í máli sem rekið er fyrir dómstólnum milli Irish Bank Resolution Corporation Ltd (IBRC eða stefnandi) og Kaupþing banki hf. (Kaupþing eða stefndi).

2. Slitastjórn Kaupþings innkallaði kröfur lánardrottna sinna vegna slita stefnda, en innköllunin birtist fyrst í Lögbirtingablaðinu þann 30. júní 2009. Allir þeir, sem lýstu skuldakröfum, eða öðrum réttindum, gegn Kaupþingi, eða eignum sem það ræður yfir, voru hvattir til að leggja fram kröfur sínar skriflega til slitastjórnarinnar innan sex mánaða. Slitastjórnin hafnaði kröfum IBRC, sem hafði ekki fengið sérstaka tilkynningu frá slitastjórninni, á þeirri forsendu að kröfurnar voru settar fram 14. apríl 2010, en fresturinn sem slitastjórnin hafði veitt til að leggja fram kröfur rann út 30. desember 2009.

3. Í þessu máli reynir fyrst á það hvort slitastjórnin var skuldbundin, samkvæmt íslenskum lögum, að meðtöldum þeim reglum sem leiddar eru af EES-samningnum, til þess að tilkynna stefnanda, sem þekktum lánardrottni með búsetu í EES-ríki, um

Plaintiff, as a known creditor residing in a EEA State, of the Defendant's winding up, when the time limit for the lodging of claims was to expire and the consequences of not lodging within the time limit. In addition, the question is further raised whether, given that the Plaintiff was not individually notified of the winding up, the winding-up committee was obliged to accept its claim as valid in the Defendant's winding-up proceedings even though it was received subsequent to the expiry of the time limit.

4. The dispute arose because of an apparent inconsistency between the Icelandic text of Article 14 of the Directive 2001/24/EC (hereinafter "the Directive") and other versions of the provision in languages referred to in Article 129 of the EEA Agreement (hereinafter "EEA").

II LEGAL BACKGROUND

EEA law

5. Article 2(a) EEA reads as follows:

For the purposes of this Agreement:

(a) the term "Agreement" means the main Agreement, its Protocols and Annexes as well as the acts referred to therein;

6. Article 119 EEA reads as follows:

The Annexes and the acts referred to therein as adapted for the purposes of this Agreement as well as the Protocols shall form an integral part of this Agreement.

7. Article 129(1) EEA reads as follows:

1. This Agreement is drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Icelandic, Italian, Norwegian, Portuguese, Spanish and Swedish languages, each of these texts being equally authentic.

Pursuant to the enlargements of the European Economic Area the versions of this Agreement in the Bulgarian, Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Romanian, Slovak and Slovenian languages shall be equally authentic.

slit stefnda, hvenær fresturinn til að lýsa kröfum átti að renna út og um afleiðingarnar þess að kröfum væri ekki lýst innan frestsins. Að auki, reynir á það álitaefni hvort að slitastjórninni var skylt að viðurkenna kröfu stefnanda, sem gilda kröfu við slitameðferð stefnda, þrátt fyrir að hafa móttekið hana eftir að kröfulýsingarfrestur rann út, þar sem að stefnandi fékk ekki sérstaka tilkynningu um slitin.

4. Ágreiningurinn kom upp vegna augljóss ósamræmis á milli íslenska texta 14. gr. tilskipunar 2001/24/EB (tilskipunin) og annarra útgáfna ákvæðisins á tungumálum sem um getur í 129. gr. EES-samningsins (EES).

II LÖGGJÖF

EES-réttur

5. A-liður 2. gr. EES-samningsins er svohljóðandi:

Í þessum samningi merkir:

a) hugtakið „samningur“ meginmál samningsins, bókanir við hann og viðauka auk þeirra gerða sem þar er vísað til,

6. 119. gr. EES-samningsins er svohljóðandi:

Viðaukar, svo og gerðir sem vísað er til í þeim og aðlagaðar eru vegna samnings þessa, skulu auk bókana vera óaðskiljanlegur hluti samningsins.

7. 1. mgr. 129. gr. EES-samningsins er svohljóðandi:

1. Samningur þessi er gerður í einu frumriti á dönsku, ensku, finnsku, frönsku, grísku, hollensku, íslensku, ítölsku, norsku, portúgölsku, spænsku, sænsku og þýsku og er hver þessara texta jafngildur.

Vegna stækkana Evrópska efnahagssvæðisins telst texti samnings þessa jafngildur á búlgörsku, eistnesku, lettnesku, lithásku, maltnesku, pólsku, rúmensku, slóvensku, slóvösku, tékknesku og ungversku.

The texts of the acts referred to in the Annexes are equally authentic in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages as published in the Official Journal of the European Union and shall for the authentication thereof be drawn up in the Icelandic and Norwegian languages and published in the EEA Supplement to the Official Journal of the European Union.

Directive 2001/24/EC[1]

8. The English language version of recital 20 reads as follows:

Provision of information to known creditors on an individual basis is as essential as publication to enable them, where necessary, to lodge their claims or submit observations relating to their claims within the prescribed time limits. This should take place without discrimination against creditors domiciled in a Member State other than the home Member State, based on their place of residence or the nature of their claims. Creditors must be kept regularly informed in an appropriate manner throughout winding-up proceedings.

9. The English language version of Article 7 of the Directive reads as follows:

Duty to inform known creditors and right to lodge claims

1. Where the legislation of the home Member State requires lodgement of a claim with a view to its recognition or provides for compulsory notification of the measure to creditors who have their domiciles, normal places of residence or head offices in that State, the administrative or judicial authorities of the home Member State or the administrator shall also inform known creditors who have their domiciles, normal places of residence or head offices in other Member States, in accordance with the procedures laid down in Articles 14 and 17(1).

2. Where the legislation of the home Member State provides for the right of creditors who have their domiciles, normal places of residence or head offices in that State to lodge claims or to submit observations

[1] of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, OJ 2001 L 125, p. 15.

Textar gerða, sem vísað er til í viðaukunum, eru jafngildir á búlgörsku, dönsku, eistnesku, ensku, finnsku, frönsku, grísku, hollensku, ítölsku, lettnesku, litháísku, maltnesku, pólsku, portúgölsku, rúmensku, slóvensku, slóvösku, spænsku, sænsku, tékknesku, ungversku og þýsku eins og þeir birtast í Stjórnartíðindum Evrópusambandsins og skulu með tilliti til jafngildingar þýddir á íslensku og norsku og birtir í EES-viðbæti við Stjórnartíðindi Evrópusambandsins.

Tilskipun 2001/24/EB[1]

8. Enska útgáfa 20. töluliðs formálsorðanna er svohljóðandi:

Provision of information to known creditors on an individual basis is as essential as publication to enable them, where necessary, to lodge their claims or submit observations relating to their claims within the prescribed time limits. This should take place without discrimination against creditors domiciled in a Member State other than the home Member State, based on their place of residence or the nature of their claims. Creditors must be kept regularly informed in an appropriate manner throughout winding-up proceedings.

9. Enska útgáfa 7. gr. tilskipunarinnar er svohljóðandi:

Duty to inform known creditors and right to lodge claims

1. Where the legislation of the home Member State requires lodgement of a claim with a view to its recognition or provides for compulsory notification of the measure to creditors who have their domiciles, normal places of residence or head offices in that State, the administrative or judicial authorities of the home Member State or the administrator shall also inform known creditors who have their domiciles, normal places of residence or head offices in other Member States, in accordance with the procedures laid down in Articles 14 and 17(1).

2. Where the legislation of the home Member State provides for the right of creditors who have their domiciles, normal places of residence or head offices in that State to lodge claims or to submit observations

[1] Evrópuþingsins og ráðsins 2001/24/EB frá 4. apríl 2001 um endurskipulagningu og slit lánastofnana, Stjtíð. EB L 125, 2001, bls. 15.

concerning their claims, creditors who have their domiciles, normal places of residence or head offices in other Member States shall also have that right in accordance with the procedures laid down in Article 16 and Article 17(2).

10. The English language version of Article 13 of the Directive reads as follows:

Publication

The liquidators or any administrative or judicial authority shall announce the decision to open winding-up proceedings through publication of an extract from the winding-up decision in the Official Journal of the European Communities and at least two national newspapers in each of the host Member States.

11. The English language version of Article 14 of the Directive reads as follows:

Provision of information to known creditors

1. When winding-up proceedings are opened, the administrative or judicial authority of the home Member State or the liquidator shall without delay individually inform known creditors who have their domiciles, normal places of residence or head offices in other Member States, except in cases where the legislation of the home State does not require lodgement of the claim with a view to its recognition.

2. That information, provided by the dispatch of a notice, shall in particular deal with time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims or observations relating to claims and the other measures laid down. Such a notice shall also indicate whether creditors whose claims are preferential or secured in re need lodge their claims.

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11. Enska útgáfa 14. gr. tilskipunarinnar er svohljóðandi:

Provision of information to known creditors

1. When winding-up proceedings are opened, the administrative or judicial authority of the home Member State or the liquidator shall without delay individually inform known creditors who have their domiciles, normal places of residence or head offices in other Member States, except in cases where the legislation of the home State does not require lodgement of the claim with a view to its recognition.

2. That information, provided by the dispatch of a notice, shall in particular deal with time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims or observations relating to claims and the other measures laid down. Such a notice shall also indicate whether creditors whose claims are preferential or secured in re need lodge their claims.

12. Directive 2001/24/EC was incorporated into Annex IX to the EEA Agreement at point 16c.[2] Directive 2001/24/EC was published in the Icelandic language in the EEA Supplement to the Official Journal of the European Communities.[3]

13. The Icelandic language version of recital 20 reads as follows:

Upplýsingamiðlun til þekktra lánardrottna, hvers þeirra um sig, er jafnmikilvæg og birting til að gera þeim kleift, þegar það á við, að lýsa kröfum eða gera athugasemdir varðandi kröfur sínar innan tilskilinna tímamarka. Þetta ætti að fara fram án mismununar gagnvart lánardrottnum með lögheimili í aðildarríki öðru en heimaðildarríkinu, eftir því hvar þeir hafa búsetu eða hvers eðlis kröfur þeirra eru. Lánardrottnum skulu reglulega, og á viðeigandi hátt, gefnar upplýsingar á meðan á slitameðferð stendur.

14. The Icelandic language version of Article 7 of the Directive reads as follows:

Skyldan til að veita þekktum lánardrottnum upplýsingar og rétturinn til að lýsa kröfum

1. Þegar krafist er samkvæmt löggjöf heimaaðildarríkis að kröfum sé lýst eigi að taka þær gildar eða kveðið er á um að lögboðið sé að tilkynna lánardrottnum, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu sína í því ríki, um ráðstöfunina skulu stjórnvöld eða dómsmálayfirvöld heimaaðildar-ríkisins eða stjórnandi einnig tilkynna það þekktum lánardrottnum, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu sína í öðrum aðildarríkjum, í samræmi við málsmeðferðina sem mælt er fyrir um í 14. gr. og 1. mgr. 17. gr.

2. Þegar löggjöf heimaaðildarríkis kveður á um réttindi lánardrottna, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu sína í því ríki, til að lýsa kröfum sínum eða leggja fram athugasemdir varðandi þær skulu lánardrottnar, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu sína í öðrum aðildarríkjum, einnig hafa þann rétt í samræmi við málsmeðferðina sem mælt er fyrir um í 16. gr. og 2. mgr. 17. gr.

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2 Inserted by Decision of the EEA Joint Committee No 167/2002 (OJ 2003 L 38, p. 28, and EEA Supplement No 9, 13.2.2003, p. 20). Entered into force on 1 August 2003.

3 EEA Supplement No 29, 10.6.2004, p. 198.

12. Tilskipun 2001/24/EB var tekin upp 16. lið c í viðauka IX við EES-samninginn.[2] Tilskipun 2001/24/EB var birt á íslensku í EES-viðbæti við Stjórnartíðindi Evrópusambandsins.[3]

13. Íslenska útgáfa 20. töluliðs formálsorðanna er svohljóðandi:

Upplýsingamiðlun til þekktra lánardrottna, hvers þeirra um sig, er jafnmikilvæg og birting til að gera þeim kleift, þegar það á við, að lýsa kröfum eða gera athugasemdir varðandi kröfur sínar innan tilskilinna tímamarka. Þetta ætti að fara fram án mismununar gagnvart lánardrottnum með lögheimili í aðildarríki öðru en heimaaðildarríkinu, eftir því hvar þeir hafa búsetu eða hvers eðlis kröfur þeirra eru. Lánardrottnum skulu reglulega, og á viðeigandi hátt, gefnar upplýsingar á meðan á slitameðferð stendur.

14. Íslenska útgáfa 7. gr. tilskipunarinnar er svohljóðandi:

Skyldan til að veita þekktum lánardrottnum upplýsingar og rétturinn til að lýsa kröfum

1. Þegar krafist er samkvæmt löggjöf heimaaðildarríkis að kröfum sé lýst eigi að taka þær gildar eða kveðið er á um að lögboðið sé að tilkynna lánardrottnum, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu sína í því ríki, um ráðstöfunina skulu stjórnvöld eða dómsmálayfirvöld heimaaðildarríkisins eða stjórnandi einnig tilkynna það þekktum lánardrottnum, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu sína í öðrum aðildarríkjum, í samræmi við málsmeðferðina sem mælt er fyrir um í 14. gr. og 1. mgr. 17. gr.

2. Þegar löggjöf heimaaðildarríkis kveður á um réttindi lánardrottna, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu sína í því ríki, til að lýsa kröfum sínum eða leggja fram athugasemdir varðandi þær skulu lánardrottnar, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu sína í öðrum aðildarríkjum, einnig hafa þann rétt í samræmi við málsmeðferðina sem mælt er fyrir um í 16. gr. og 2. mgr. 17. gr.

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[2] Felld inn með ákvörðun sameiginlegu EES-nefndarinnar nr. 167/2002 (Stjtíð. ESB 2003 L 38, bls. 28 og EES-viðbætir nr. 9, 13.2.2003. bls. 20). Öðlaðist gildi 1. ágúst 2003.
[3] EES-viðbætir nr. 29, 10.6.2004, bls. 198.

15. The Icelandic language version of Article 13 of the Directive reads as follows:

Birting

Skiptastjórar eða stjórnvöld eða dómsmálayfirvöld skulu tilkynna um þá ákvörðun að hefja slitameðferð með birtingu útdráttar úr slitaákvörðuninni í Stjórnartíðindum Evrópu-bandalaganna og í a.m.k. tveimur innlendum dagblöðum í hverju gistiaðildarríki.

16. The Icelandic language version of Article 14 of the Directive reads as follows:

Tilhögun upplýsingamiðlunar til þekktra lánardrottna[4]

1. Þegar slitameðferð hefst skulu stjórnvöld eða dómsmálayfirvöld heimaðildarríkisins eða skiptastjórinn upplýsa án tafar alla lánardrottna, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu í öðrum aðildarríkjum, um það nema í tilvikum þegar í löggjöf heimaaðildarríkis þess er ekki krafist að kröfunni sé lýst til að hún fáist viðurkennd.[5]

2. Þessar upplýsingar skulu gefnar í formi auglýsingar þar sem fram koma tímamörk og viðurlög ef þau eru ekki virt, hvaða aðili hefur vald til að taka við kröfum sem lýst er eða athugasemdum sem eru lagðar fram varðandi kröfur og aðrar ráðstafanir sem mælt er fyrir um. Í auglýsingunni skal einnig koma fram hvort þeir sem eiga forgangskröfur eða kröfur sem eru tryggðar samkvæmt hlutarétti þurfi að lýsa þeim.[6]

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4 Translation taken from the written observations submitted by the Plaintiff: "Arrangements for the disclosure of information to known creditors".

5 Translation taken from the written observations submitted by the Plaintiff and Defendant: "When winding-up proceedings are opened, the administrative or judicial authorities of the home Member State or the liquidator shall without delay inform all creditors, which have their domicile, permanent residence or head offices in other Member States, thereof except in cases where the legislation of the home Member State does not require the lodgement of the claim with a view to its recognition".

6 Translation taken from the written observations submitted by the Plaintiff: "This information shall be provided in the form of an advertisement, which includes time limits and the penalty for non-observance of the time limits, the party empowered to take delivery of lodged claims or observations submitted regarding claims and other stipulated measures. The advertisement shall also indicate whether holders of preferential claims or claims secured under in re need to lodge such claims."

15. Íslenska útgáfa 13. gr. tilskipunarinnar er svohljóðandi:

Birting

Skiptastjórar eða stjórnvöld eða dómsmálayfirvöld skulu tilkynna um þá ákvörðun að hefja slitameðferð með birtingu útdráttar úr slitaákvörðuninni í Stjórnartíðindum Evrópubandalaganna og í a.m.k. tveimur innlendum dagblöðum í hverju gistiaðildarríki.

16. Íslenska útgáfa 14. gr. tilskipunarinnar er svohljóðandi:

Tilhögun upplýsingamiðlunar til þekktra lánardrottna[4]

1. Þegar slitameðferð hefst skulu stjórnvöld eða dómsmálayfirvöld heimaðildarríkisins eða skiptastjórinn upplýsa án tafar alla lánardrottna, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu í öðrum aðildarríkjum, um það nema í tilvikum þegar í löggjöf heimaaðildarríkis þess er ekki krafist að kröfunni sé lýst til að hún fáist viðurkennd.[5]

2. Þessar upplýsingar skulu gefnar í formi auglýsingar þar sem fram koma tímamörk og viðurlög ef þau eru ekki virt, hvaða aðili hefur vald til að taka við kröfum sem lýst er eða athugasemdum sem eru lagðar fram varðandi kröfur og aðrar ráðstafanir sem mælt er fyrir um. Í auglýsingunni skal einnig koma fram hvort þeir sem eiga forgangskröfur eða kröfur sem eru tryggðar samkvæmt hlutarétti þurfi að lýsa þeim.[6]

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4 Þýðing fengin úr skriflegum athugasemdum sem stefnandi lagði fram: „Arrangements for the disclosure of information to known creditors".

5 Þýðing fengin úr skriflegum athugasemdum sem stefnandi og stefndi lögðu fram: „When winding-up proceedings are opened, the administrative or judicial authorities of the home Member State or the liquidator shall without delay inform all creditors, which have their domicile, permanent residence or head offices in other Member States, thereof except in cases where the legislation of the home Member State does not require the lodgment of the claim with a view to its recognition."

6 Þýðing fengin úr skriflegum athugasemdum sem stefnandi lagði fram: „This information shall be provided in the form of an advertisement, which includes time limits and the penalty for non-observance of the time limits, the party empowered to take delivery of lodged claims or observations submitted regarding claims and other stipulated measures. The advertisement shall also indicate whether holders of preferential claims or claims secured under in re need to lodge such claims. "

National law

17. According to Article 3 of Act No 2/1993 on the European Economic Area, acts and rules shall be interpreted, to the extent appropriate, in accordance with the EEA Agreement and the rules which are derived from it.

18. Directive 2001/24/EC has been implemented in Icelandic law by Act No 161/2002 on Financial Undertakings. The second paragraph of Article 102 of that Act reads:

    Once a Winding-up Committee has been appointed for a financial undertaking, the Committee must without delay issue and have published in the Legal Gazette an invitation to lodge claims in connection with the winding-up. The same rules shall apply concerning the substance of the invitation to lodge claims, the time limit for lodging claims and notifications or advertisements for foreign creditors as apply in insolvency proceedings.

19. Those rules referred to are found, for instance, in the first paragraph of Article 86 of Act No 21/1991 on Bankruptcy *et al.* ("Bankruptcy Act") which reads:

    In addition to issuing an invitation to lodge claims, as provided for in Article 85, a liquidator may seek knowledge especially as to whether any party who may have a claim against the estate is domiciled abroad. If evidence appears of such, the liquidator may inform the party concerned as soon as possible of the insolvency proceedings, when the time limit for lodging claims expires and what consequences it can have if a claim is not lodged within the time limit.

20. According to the first paragraph of Article 102 of Act No 161/2002, as regards claims against the undertaking, on the winding up of a financial undertaking essentially the same rules apply as in the case of insolvency proceedings. Therefore, Article 118 of Act No 21/1991 applies to such claims, including point 2 of that Article. This provides for an exception to the cancellation of a claim against an insolvent estate which has been lodged after the expiration of the time limit for lodging claims "if the creditor resides abroad and neither knew or should have known of the insolvency winding-up, provided its claim is lodged without undue

Landsréttur

17. Samkvæmt 3. gr. laga nr. 2/1993 um Evrópska efnahagssvæðið, skal skýra lög og reglur, að svo miklu leyti sem við á, í samræmi við EES-samninginn og þær reglur sem á honum byggja.

18. Tilskipun 2001/24/EB var innleidd í íslenska löggjöf með lögum nr. 161/2002 um fjármálafyrirtæki. 2. mgr. 102. gr. þeirra laga er svohljóðandi:

Þegar fjármálafyrirtæki hefur verið skipuð slitastjórn, skal hún tafarlaust gefa út og fá birta í Lögbirtingablaði innköllun vegna slitanna. Um efni innköllunar, kröfulýsingarfrest og tilkynningar eða auglýsingar vegna erlendra kröfuhafa skal beitt sömu reglum og við gjaldþrotaskipti.

19. Þessar reglur, sem vísað er til, er t.d. að finna í 1. mgr. 86. gr. laga um gjaldþrotaskipti nr. 21/1991 o.fl. (gjaldþrotaskiptalög) sem er svohljóðandi:

Jafnframt því að gefa út innköllun skv. 85. gr. er skiptastjóra rétt að leita sérstaklega vitneskju um hvort einhver sá, sem kann að telja til kröfu á hendur þrotabúinu, sé búsettur erlendis. Komi fram vitneskja um slíkt er skiptastjóra rétt að tilkynna hlutaðeiganda svo fljótt sem verða má um gjaldþrotaskiptin, hvenær kröfulýsingarfrestur endi og hverjar afleiðingar það geti haft að kröfu verði ekki lýst innan frestsins.

20. Samkvæmt 1. mgr. 102. gr. laga nr. 161/2002, að því er varðar kröfur á hendur fyrirtækinu, gilda sömu reglur við slit fjármálafyrirtækis og við gjaldþrotaskipti. Því gildir 118. gr. laga nr. 21/1991 um þessar kröfur þ.m.t. 2. töluliður þeirrar greinar, sem kveður á um undanþágu frá niðurfellingu kröfu á hendur gjaldþrota búi, sem hefur verið lýst eftir að fresturinn til kröfulýsingar rann út „ef kröfuhafinn er búsettur erlendis og hafi hvorki verið kunnugt né mátt vera kunnugt um gjaldþrotaskiptin,

delay and before a meeting of creditors is convened to consider a proposal for distributions from the estate".

21. Article 104 of Act No 161/2002 sets out special rules for the winding up of a credit institution with a head office in Iceland and branches in another EEA State. When that provision was first inserted into the Act, by Article 11 of Act No 130/2004, its fourth paragraph stated:

If a known creditor of a credit institution is resident in another state of the European Economic Area, the liquidator shall, without delay, notify the creditor of the commencement of the winding up. The notification shall state the time limit for lodging claims, where claims shall be directed and the consequences of improperly lodging claims, as provided for in rules set by the Minister.

22. On the adoption of Act No 108/2006, the first sentence of the provision was amended, replacing the words "in another state of the European Economic Area" with the words "in another Member State".

23. On the basis of that provision, the Icelandic Minister of Commerce subsequently issued a Regulation on the notification and publication of decisions on reorganisation and winding up of credit institutions. This is Icelandic Regulation No 872 of 5 October 2006. In excerpt, Article 4 of the Regulation states:

If a known creditor of a credit institution is resident in another Member State of the European Economic Area ... the liquidator shall notify the creditor of the commencement of the winding up. The notification shall be in the form of an advertisement, providing information on the time limit for lodging claims, where the claims shall be directed and penalties for improperly lodged claims. The advertisement ... shall be published in Icelandic. The heading of the advertisement shall be "Invitation to lodge claims in insolvency proceedings, time limit for lodging claims", in all languages of Member States of the European Economic Area.

enda sé kröfunni lýst án ástæðulausra tafa og áður en boðað er til skiptafundar um frumvarp til úthlutunar úr búinu“.

21. Ákvæði 104. gr. laga nr. 161/2002 setur fram reglur um slit á lánastofnun með höfuðstöðvar á Íslandi og útibú í öðru EES-ríki. Þegar það ákvæði var fyrst fellt inn í lögin með 11. gr. laga nr. 130/2004, kvað fjórða málsgrein hennar á um að:

Nú er þekktur kröfuhafi lánastofnunar búsettur í öðru ríki innan Evrópska efnahagssvæðisins, og skal þá skiptastjóri án tafar tilkynna honum um upphaf skiptanna. Í tilkynningunni skal greina frá kröfulýsingarfresti, hvert beina skuli kröfulýsingu og afleiðingum vanlýsingar í samræmi við reglur sem ráðherra setur.

22. Með samþykkt laga nr. 108/2006, var fyrstu málsgrein ákvæðisins breytt og í stað orðanna „í öðru ríki innan Evrópska efnahagssvæðisins“ kom „í öðru aðildarríki“.

23. Á grundvelli þessa ákvæðis, setti viðskiptaráðherra Íslands reglugerð um tilkynningu og birtingu ákvarðana um endurskipulagningu fjárhags og slit lánastofnana. Þetta er íslensk reglugerð nr. 872 frá 5. október 2006. Í úrdrætti úr 4. gr. kemur fram:

Nú er þekktur kröfuhafi lánastofnunar búsettur í öðru ríki innan Evrópska efnahagssvæðisins ... og skal þá skiptastjóri án tafar tilkynna honum um upphaf skiptanna. Tilkynningin skal vera í formi auglýsingar og þar skulu fram koma upplýsingar um kröfulýsingarfrest, hvert beina skuli kröfulýsingu og viðurlög við vanlýsingum. Auglýsing ... skal birt á íslensku. Fyrirsögn auglýsingarinnar skal vera, Innköllun vegna gjaldþrotaskipta, kröfulýsingarfrestur, á öllum tungumálum aðildarríkja Evrópska efnahagssvæðisins.

III FACTS AND PROCEDURE

24. By a letter dated 22 December 2011, registered at the EFTA Court on 22 December 2011, Reykjavík District Court made a request for an Advisory Opinion in a case pending before it between the Irish Bank Resolution Corporation Ltd and Kaupthing Bank hf.

25. On 9 October 2008, the Icelandic Financial Supervisory Authority took over the power of the shareholders' meeting of Kaupthing, dismissed its board of directors and appointed a resolution committee which immediately assumed control of the bank.

26. Anglo Irish Bank Corporation plc held two Kaupthing bonds. It was nationalised by the Irish State on 21 January 2009. Anglo Irish Bank Corporation Limited was renamed Irish Bank Resolution Corporation Limited on 14 October 2011.

27. On 25 May 2009, Reykjavík District Court approved a request from the resolution committee and appointed a winding-up committee for the estate.

28. On 30 June 2009, the Defendant issued and published an invitation for creditors to lodge claims according to the winding-up procedure in the Icelandic Legal Gazette (Lögbirtingablað). All those claiming debts of any sort, or other rights against Kaupthing, or assets controlled by it, were urged to submit their claims in writing to the Winding-Up Committee within six months of the publication of the notice. The invitation stated that if a claim were not submitted within the aforementioned time limit, it would have the same legal effect as if it were not properly submitted. Such a claim would therefore be deemed to be null and void against Kaupthing unless certain exceptions applied. At the same time several invitations were published in daily newspapers in Iceland and in the countries Kaupthing had done business, including, *inter alia*, the United Kingdom, Germany, Spain, the Netherlands, Austria and Ireland. In Ireland, the invitation to lodge claims was published in the *Irish Times* on 21 July 2009.

III MÁLAVEXTIR OG MEÐFERÐ MÁLSINS

24. Með bréfi dagsettu 22. desember 2011, sem skráð var í málaskrá EFTA-dómstólsins 22. desember 2011, óskaði Héraðsdómur Reykjavíkur eftir ráðgefandi áliti, í máli sem rekið er fyrir dómstólnum milli Irish Bank Resolution Corporation Ltd og Kaupþings banka hf.

25. Þann 9. október 2008 tók íslenska Fjármálaeftirlitið yfir völd hlutahafafundar Kaupþings, vék stjórn bankans til hliðar og skipaði honum skilanefnd, sem tók þegar í stað við stjórn hans.

26. Anglo Irish Bank Corporation plc átti tvö skuldabréf á hendur Kaupþingi. Anglo Irish Bank Corporation Ltd var þjóðnýttur af írska ríkinu 21. janúar 2009 og gefið nýtt nafn, Irish Bank Resolution Corporation Limited, 14. október 2011.

27. Þann 25. maí 2009 samþykkti Héraðsdómur Reykjavíkur beiðni frá skilanefndinni og skipaði slitastjórn fyrir búið.

28. Þann 30. júní innkallaði stefndi kröfur lánardrottna og birti innköllunina í Lögbirtingablaðinu, þar sem kröfuhöfum var veittur kostur á að setja kröfur sínar fram í samræmi við slitameðferðina. Allir þeir, sem lýstu skuldakröfum, eða öðrum réttindum gegn Kaupþingi, eða eignum sem félagið réð yfir, voru hvattir til að leggja fram kröfur sínar skriflega til slitastjórnarinnar, innan sex mánaða frá birtingu tilkynningarinnar. Í innkölluninni kom fram, að ef að kröfur væru ekki lagðar fram innan fyrrnefnds frests, hefði það sömu lagalegu áhrif eins og ef um vanlýsingu væri að ræða. Slíkar kröfur myndu því teljast ógildar gegn Kaupþingi nema ef tilteknar undanþágur giltu um þær. Á sama tíma voru nokkrar innkallanir birtar í dagblöðum á Íslandi og í þeim löndum þar sem Kaupþing stundaði viðskipti, m.a. Bretlandi, Spáni, Írlandi, Þýskalandi, Hollandi og Austurríki. Á Írlandi var innköllun krafna birt í *Irish Times* 21. júní 2009.

29. On 22 July 2009 and 18 November 2009, as the holder of two bonds, the Plaintiff received two notifications through the Clearstream securities service of the invitation to lodge claims.

30. Additionally, the invitations were published in the *Financial Times* and the Official Journal of the European Union[7] on 15 August 2009 and on Kaupthing's website. IBRC was not individually notified.

31. The time limit within which to lodge claims expired on 30 December 2009.

32. On 14 April 2010, IBRC filed claims with the Winding-up Committee concerning two bonds, for a total amount of EUR 15 558 733. The Plaintiff demanded that it be recognised that the claims had been received within the time limit for lodging claims and be added to the list of claims in the bank's winding-up proceedings.

33. The Defendant rejected the Plaintiff's claim as out of time, on the grounds that an email communication from the Plaintiff of 29 October 2008 could not be considered a claim lodged within the meaning of the relevant national provisions.

34. Meetings took place on 27 May and 29 June 2010 at which the parties' dispute could not be resolved. Thereafter, a decision was taken to refer the dispute to Reykjavík District Court, where the case was filed by the Winding-Up Committee on 24 September 2010.

35. At the oral hearing on 7 September 2011, the Plaintiff requested the District Court to seek an advisory opinion from the EFTA Court to establish whether the provision set out in the first paragraph of Article 86 of Act No 21/1991 was in conformity with the substance of Directive 2001/24/EC. Kaupthing objected to IBRC's request. The Plaintiff contends that, according to that provision, the Defendant should have sent the Plaintiff, as a known creditor, notification with information on the winding-up proceedings. The Defendant maintains that the provision

[7] OJ 2009 C 192, p. 16.

29. Þann 22. júlí 2009 og 18. nóvember 2009, fékk stefnandi, sem handhafi tveggja skuldabréfa, tvær tilkynningar, í gegnum Clearstream securities service um innköllun krafna.

30. Að auki var innköllunin birt í *Financial Times* og Stjórnartíðindum Evrópusambandsins[7] 15. ágúst 2009 og á vefsetri Kaupþings.

31. Fresturinn til þess að lýsa kröfum við slitin rann út 30. desember 2009.

32. Þann 14. apríl 2010 lagði IBRC inn kröfur til slitastjórnarinnar varðandi tvö skuldabréf að heildarfjárhæð 15 558 733 evra. Stefnandi krafðist viðurkenningar á því að kröfurnar hefðu verið mótteknar innan kröfulýsingarfrestsins, og að þeim yrði bætt á kröfulista við slitameðferð bankans.

33. Stefndi hafnaði kröfu stefnanda sem of seint framkominni á þeim grundvelli að ekki væri hægt að telja orðsendingu í tölvupósti frá stefnanda þann 29. október 2008 sem lýsta kröfu í skilningi viðkomandi ákvæða landsréttar.

34. Fundir voru haldnir 27. maí 2010 og 29. júní sama ár þar sem ekki náðist að að leysa úr ágreiningi aðila. Eftir það var ákvörðun tekin af hálfu slitastjórnar um að vísa deilunni til Héraðsdóms Reykjavíkur 24. september 2010.

35. Í þinghaldi 7. september 2011, fór stefnandi fram á það að héraðsdómur leitaði eftir ráðgefandi áliti frá EFTA-dómstólnum til að fá úr því skorið hvort ákvæðið 86. gr. laga nr. 21/1991 sé í samræmi við efni tilskipunar 2001/24/EB. Kaupþing mótmælti beiðni IBRS. Stefnandi staðhæfir að samkvæmt þessu ákvæði hafi stefndi átt að senda stefnanda, sem þekktum lánardrottni, tilkynningu með upplýsingum um slitameðferðina. Stefndi heldur

[7] Stjtíð. 2009 C 192, bls. 16.

did not imply any obligation to do so, but instead constituted a recommendation to the appointed liquidator to send such an invitation to lodge claims.

36. This case raises the question, first, whether the Winding-Up Committee was obliged, as a matter of Icelandic law, including rules which are derived from the EEA Agreement, to inform the Plaintiff, as a known creditor residing in a EEA State, of the Defendant's winding up, when the time limit for the lodging of claims was to expire and the consequences of not lodging within the time limit. In addition, the question is further raised whether, given that the Plaintiff was not individually notified of the winding up, the Winding-up Committee was obliged to accept its claim as valid in the Defendant's winding-up proceedings even though it was received subsequent to the expiry of the time limit.

37. Following oral submissions from both parties on 19 October 2011, Reykjavík District Court granted the request that an advisory opinion should be sought. Kaupthing referred Reykjavík District Court's ruling to the Supreme Court of Iceland by way of appeal on 21 November 2011, arguing that the District Court's decision should be set aside. On 16 December 2011, the Supreme Court upheld the decision to seek an advisory opinion but substantially amended the questions asked.

IV QUESTIONS REFERRED

38. Reykjavík District Court referred the following questions on 8 November 2011:

1. Does it accord with the provision of Article 14 of Directive 2001/24/EC of 4 April 2001, on the reorganisation and winding up of credit institutions, to publish an invitation to lodge claims for known creditors which have their domicile, permanent residence or head offices in other Member States in the manner practised by the Winding-up Board of Kaupthing Bank hf. which is described in this Ruling?

2. If the reply to the first question is that sufficient regard was not had for the rules of Article 14 of the Directive when issuing an invitation to lodge claims, an opinion is requested as to what impact this has on the winding-up proceedings of the credit institution.

því fram að ákvæðið gefi ekki til kynna neinar skyldur til þess að gera það, en mæli þess í stað með því að tilnefndur skiptastjóri sendi slíka innköllun krafna.

36. Í þessu máli reynir fyrst á, hvort að slitastjórnin var skuldbundin, samkvæmt íslenskum lögum, að meðtöldum þeim reglum sem leiddar eru af EES-samningnum, til að tilkynna stefnanda, sem þekktum lánardrottni með búsetu í EES-ríki, um slit stefnda, hvenær fresturinn til að lýsa kröfum rynni út og um afleiðingar þess að kröfum væri ekki lýst innan frestsins. Að auki, reynir á það álitaefni hvort að slitastjórninni var skylt að viðurkenna kröfu stefnanda, sem gilda við slitameðferð stefnda, þrátt fyrir að hafa móttekið hana eftir að kröfulýsingarfrestur rann út, þar sem að stefnandi fékk ekki sérstaka tilkynningu um slitin.

37. Í framhaldi af munnlegum málflutningi beggja aðila 19. október 2011 féllst Héraðsdómur Reykjavíkur á að leita ráðgefandi álits. Kaupþing kærði úrskurð héraðsdóms til Hæstaréttar Íslands 21. nóvember 2011 með þeim rökum að fella bæri ákvörðun Héraðsdóms úr gildi. Þann 16. desember 2011 staðfesti Hæstiréttur niðurstöðu héraðsdóms um að leita skyldi ráðgefandi álits, en breytti spurningunum verulega.

IV ÁLITAEFNI

38. Héraðsdómur Reykjavíkur ákvað að leita ráðgefandi álits á eftirfarandi spurningum 8. nóvember 2011 og setti eftirfarandi spurningar fram:

1. Samræmist það ákvæði 14. gr. tilskipunar 2001/24/EB frá 4. apríl 2001, um endurskipulagningu og slit lánastofnana, að birta innköllun til þekktra lánardrottna, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu í öðrum aðildarríkjum á Evrópska efnahagssvæðinu, með þeim hætti sem slitastjórn Kaupþings banka hf. viðhafði og sem lýst er í úrskurði þessum?

2. Ef svarið við fyrri spurningunni er á þá leið að við innköllun krafna hafi ekki verið gætt reglna 14. gr. tilskipunarinnar, er leitað álits á því hvaða áhrif það hafi við slitameðferð lánastofnunarinnar?

39. Following the Supreme Court of Iceland's judgment of 16 December 2011, the Reykjavík District Court referred on 22 December 2011 the following amended questions to the Court:

1. In the case of a discrepancy between the text of the EEA Agreement or rules based upon it, in different languages, so that the substance of individual provisions or rules is unclear, how should their substance be construed in order to apply them in resolving disputes?

2. Having regard to the answer to question 1, does it comply with paragraph 1 of Article 14 of Directive 2001/24/EC on the reorganisation and winding up of credit institutions that the national legislation of a state, which is a member of the European Economic Area, vests the Winding-up Board or other competent authority or agency with competence to decide whether information should be disclosed on the aspects described in the provision, with an advertisement published abroad instead of individually notifying all known creditors?

40. In the submitted written observations, the parties have not unanimously addressed those questions referred by the Reykjavík District Court, as amended by the Supreme Court of Iceland.

V WRITTEN OBSERVATIONS

41. 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 Eggert B. Ólafsson, District Court Attorney;
- the Defendant, represented by Þröstur Ríkharðsson, District Court Attorney;
- the Icelandic Government, represented by Þóra M. Hjaltested, Director, Ministry of Economic Affairs, acting as Agent, and Áslaug Árnadóttir, District Court Attorney, acting as Counsel;
- the Estonian Government, represented by Marika Linntam, Director, European Union Litigation Division of the Legal Department, Ministry of Foreign Affairs, acting as Agent;

39. Í framhaldi af dómi Hæstaréttar Íslands 16. desember 2011 beindi Héraðsdómur Reykjavíkur eftirfarandi breyttum spurningum til dómstólsins 22. desember 2011:

1. Ef misræmi er milli texta samningsins um Evrópska efnahagssvæðið eða reglna, sem á honum byggja, á mismunandi tungumálum þannig að efni einstakra ákvæða eða reglna er óljóst, hvernig ber að leiða efni þeirra í ljós svo að beita megi þeim við lausn ágreiningsmála?

2. Að teknu tilliti til svars við spurningu 1, samrýmist það 1. mgr. 14. gr. tilskipunar 2001/24/EB um endurskipulagningu og slit lánastofnana að í lögum ríkis, sem er aðili að samningnum um Evrópska efnahagssvæðis, sé það lagt í vald slitastjórnar eða annars þar til bærs stjórnvalds eða sýslunarmanns að ákveða hvort upplýsa skuli um þau atriði, sem þar eru greind, með auglýsingu, birtri erlendis, í stað sérstakrar tilkynningar til hvers og eins þekkts lánardrottins?

40. Ekki var fullt samræmi milli þeirra, sem skiluðu inn skriflegum greinargerðum í málinu, varðandi það hvort þeir svöruðu spurningum héraðsdóms, eins og þeim var breytt af Hæstarétti Íslands, eða upphaflegum spurningum úr úrskurði héraðsdóms.

V SKRIFLEGAR GREINARGERÐIR

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

- Stefnanda, Irish Bank Resolution Corporation Ltd. Í fyrirsvari er Eggert B. Ólafsson, héraðsdómslögmaður,
- Stefnda, Kaupþingi hf. Í fyrirsvari er Þröstur Ríkharðsson, héraðsdómslögmaður,
- Ríkisstjórn Íslands. Í fyrirsvari sem umboðsmaður er Þóra M. Hjaltested, skrifstofustjóri í efnahags- og viðskipta-ráðuneytinu, og sem ráðgjafi Áslaug Árnadóttir, héraðsdóms-lögmaður,
- Ríkisstjórn Eistlands. Í fyrirsvari sem umboðsmaður er Marika Linntam deildarstjóri í málaferladeild Evrópusambandsins á lagaskrifstofu utanríkisráðuneytisins,

– the EFTA Surveillance Authority (hereinafter "ESA"), represented by Xavier Lewis, Director, and Maria Moustakali, Temporary Officer, of the Department of Legal & Executive Affairs, acting as Agents; and

– the European Commission (hereinafter "Commission"), represented by Albert Nijenhuis and Julie Samnadda, members of its Legal Service, acting as Agents.

VI SUMMARY OF THE ARGUMENTS SUBMITTED

The Plaintiff

The first question

42. The Plaintiff considers that Reykjavík District Court is seeking in essence to establish whether Article 14 of Directive 2001/24/EC as it appears and is published in Icelandic in the EEA Supplement of the Official Journal of the European Union (hereinafter "Official Journal") reflects the correct meaning of the provision in EEA law. The Plaintiff submits that, in the national proceedings, it demonstrated that the wording of Article 14 in Directive 2001/24/EC published in Icelandic in the EEA Supplement was not consistent with the wording of the English version of the Article published in the Official Journal. Arguing that Article 14 as it appears in Icelandic in the EEA Supplement is at odds with the substance of the provision as provided for in EEA law, the Plaintiff asserted before the national court that Article 86 of the Icelandic Bankruptcy Act and Icelandic Regulation 872/2006 as interpreted and applied by the Defendant are incompatible with the Directive.

43. The Plaintiff submits that discrepancies in wording between different language versions of EEA acts are not uncommon. EEA case-law provides for three main methods of construction when the problem of divergence between EEA texts arises. These involve: (i) a comparison of the text in question in the various EEA languages; (ii) an analysis of the purpose and objective of the provision in question; and (iii) a consideration of the drafting language and the preparatory works. The Plaintiff contends that the first two methods of construction reveal unequivocally that the correct meaning of Article 14 of the Directive is that found

– Eftirlitsstofnun EFTA (ESA). Í fyrirsvari sem umboðsmenn eru Xavier Lewis, deildarstjóri og Maria Moustakali, skammtímafulltrúi á lögfræði- og framkvæmdasviði, og
– Framkvæmdastjórn Evrópusambandsins (framkvæmdastjórnin). Í fyrirsvari sem umboðsmenn Albert Nijenhuis og Julie Samnadda, hjá lagaskrifstofu framkvæmdastjórnarinnar.

VI SAMANTEKT YFIR MÁLSÁSTÆÐUR

Stefnandi

Fyrsta spurningin

42. Stefnandi telur að Héraðsdómur Reykjavíkur sé í megindráttum að leitast við að kanna hvort að 14. gr. tilskipunar 2001/24/EB, eins og hún birtist og er útgefin á íslensku í EES-viðbæti við Stjórnartíðindi Evrópusambandsins (Stjórnartíðindi), endurspegli rétta merkingu ákvæðisins að EES-rétti. Stefnandi vísar til þess að í innlendu málsmeðferðinni, hafi það sýnt sig að orðalag 14. gr. tilskipunar 2001/24/EB á íslensku, birt í EES-viðbætinum, hafi ekki verið í samræmi við orðalag ensku útgáfunnar á ákvæðinu, sem var birt í Stjórnartíðindunum. Með þeim rökum að 14. gr. eins og hún birtist í EES-viðbætinum sé andstæð inntaki ákvæðisins eins og kveðið sé á um í EES-réttinum, fullyrti stefnandi fyrir Héraðsdómi Reykjavíkur að 86. gr. íslensku gjaldþrotaskiptalaganna og íslensk reglugerð nr. 872/2006, eins og þær væru túlkaðar og þeim beitt af stefnda, væru ósamrýmanlegar tilskipuninni.

43. Stefnandi heldur því fram að ósamræmi í orðalagi á milli útgáfna EES-gerða á mismunandi tungumálum sé ekki óalgengt. Dómaframkvæmd EES kveði á um þrjár meginaðferðir við túlkun þegar upp komi vandamál vegna munar á milli EES-texta. Þær feli í sér: (i) samanburð á textanum sem um ræði á ólíkum EES-tungumálum, (ii) greiningu á tilgangi og markmiði ákvæðisins sem um ræðir, og (iii) að höfð sé hliðsjón af tungumáli sem notað var við drögin og í lögskýringargögnum. Stefnandi staðhæfir að fyrstu tvær aðferðirnar við túlkun leiði ótvírætt í ljós að rétta merkingu 14. gr. tilskipunarinnar sé að finna í enskri

in the English version of the Directive. While the third method is not available to the Plaintiff, there is no reason to assume that the result would be different.

Comparison of different language versions

44. The Plaintiff contends that the Court of Justice of the European Union (hereinafter "ECJ") has held that the wording contained in the majority of the language versions should be accepted.[8] This approach was taken by the EFTA Court in Case E-9/97 *Sveinbjörnsdóttir*, in which it stated "[I]n the case of differing authentic language versions, a preferred starting point for the interpretation will be to choose one that has the broadest basis in the various language versions".[9]

Purpose and general scheme of the rules

45. The Plaintiff submits that when there is a divergence between language versions concerning the meaning of a provision that provision must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part. The Plaintiff notes that in *CILFIT* the ECJ held that every provision of Community law must be placed in its context and be interpreted in the light of Community law as a whole, having regard to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.[10]

46. Having regard to recital 20 in the preamble to the Directive, the Plaintiff contends that the general scheme of the Directive is to contribute to the furtherance of the objectives of freedom of establishment and the freedom to provide financial services by ensuring, *inter alia*, the equal treatment of creditors of credit institutions and refers in that connection to recitals 12 and 16 to the Directive.

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8 Reference is made to Case C-64/95 *Konservenfabrik Lubella Friedrich Buker* GmbH & Co v *Hauptzollamt Cottbus* [1996] ECR I-5105, paragraph 18.

9 Reference is made to Case E-9/97 *Erla María Sveinbjörnsdóttir* v *Iceland,* [1998] EFTA Ct. Rep. 95, paragraph 28.

10 Reference is made to Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA* v *Ministry of Health* [1982] ECR 3415, paragraph 20.

útgáfa tilskipunarinnar. Þótt þriðja aðferðin sé ekki tiltæk stefnanda, sé engin ástæða til að ætla að ólík niðurstaða fengist.

Samanburður á útgáfum eftir mismunandi tungumálum

44. Stefnandi staðhæfir að Dómstóll Evrópusambandsins (Evrópudómstóllinn) hafi lagt til grundvallar að það orðalag sem sé notað í flestum útgáfum skuli tekið gilt.[8] EFTA-dómstóllinn studdist við þessa nálgun í máli E-9/97 *Sveinbjörnsdóttir*, þar sem fram kemur að „[þ]egar munur er á útgáfum á hinum ýmsu tungumálum, sem öll hafa sama vægi, er eðlilegt við túlkun að ganga út frá því að sú skýring skuli valin sem styðst við sem flestar tungumálaútgáfur".[9]

Tilgangur og almenn fyrirætlan með reglunum

45. Stefnandi heldur því fram að þegar að um sé að ræða ósamræmi á milli útgáfa á mismunandi tungumálum, sem varði merkingu ákvæðis, skuli það túlkað með vísan til tilgangs og almennrar fyrirætlanar með reglunum, sem það sé hluti af. Stefnandi bendir á að í *CILFIT* málinu, hafi Evrópudómstóllinn lagt til grundvallar að öll ákvæði bandalagsréttar skyldu sett í rétt samhengi og túlkuð í ljósi bandalagsréttar sem heildar, með hliðsjón af markmiðum og þróunarstigi þeirra, á þeim degi sem umræddu ákvæði eigi að beita.[10]

46. Stefnandi staðhæfir, með hliðsjón af 20. liðs inngangsorða tilskipunarinnar, að almenn fyrirætlan með tilskipuninni sé að stuðla að framkvæmd markmiðanna með staðfestuétti og frelsi til að veita fjármálaþjónustu, með því að tryggja m.a. jafna meðferð lánardrottna fjármálastofnanna, og vísar í því samhengi til 12. og 16. liða inngangsorða tilskipunarinnar.

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8 Tilvísun í mál C-64/95 *Konservenfabrik Lubella Friedrich Buker* GmbH & Co gegn *Hauptzollamt Cottbus* [1996] ECR I-5105, 18. málsgr.

9 Tilvísun í mál E-9/97 *Erla María Sveinbjörnsdóttir* gegn *Íslandi,* [1998] EFTA Ct. Rep. 95, 28. málsgr.

10 Tilvísun í mál 283/81 *Srl CILFIT og Lanificio di Gavardo SpA* gegn *Ministry of Health* [1982] ECR 3415, 20. málsgr.

47. The Plaintiff submits that, unlike the English, Norwegian or German versions of Article 14(1) of the Directive, the Icelandic version does not contain the word "individually". Therefore, unlike those three versions, the Icelandic text does not convey a duty to individually notify known creditors.

48. Similarly, the Plaintiff asserts that there are similar differences in meaning between the Icelandic and English, Norwegian and German versions of Article 14(2) of the Directive.

49. The Plaintiff contends that the French, Danish and Swedish versions of Article 14 provide that known EEA creditors outside the home Member State shall be informed on an individual basis by the dispatch of a notification.

50. Therefore, and having regard to the purpose and general scheme of the Directive, the Plaintiff submits that the correct meaning of Article 14(2) of the Directive is to be found in the English language version. Consequently, the Plaintiff asserts that the Defendant's application of the relevant provisions of Icelandic law in the Kaupthing winding-up proceedings is incompatible with the requirements of Article 14 of the Directive.

51. The Plaintiff submits that the answer to the first question should be that: -

"Article 14 of Directive 200l/24/EC as it appears and is published in Icelandic in the EEA Supplement to Official Journal of The European Union does not reflect the correct meaning of Artilclel4 of Directive 2001/24/EC. The provision provides (i) that when winding-up proceedings are opened, the administrative or judicial authority of the home Member State or the liquidator shall without delay individually inform known creditors who have their domiciles, normal places of residence or head offices in other Member States, except in cases where the legislation of the home State does not require lodgement of the claim with a view to its recognition, and (ii) that the information referred to in paragraph (i) is to be provided by the dispatch of a notice that in particular shall deal with time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept

47. Stefnandi heldur því fram að ólíkt ensku, norsku eða þýsku útgáfum 1. mgr. 14. gr. tilskipunarinnar, innihaldi íslenska útgáfa ekki orðin „sérstakar tilkynningar til hvers og eins“. Því beri íslenska útgáfan, ólíkt þessum þremur útgáfum, ekki með sér skyldu til að sérstakrar tilkynningar gagnvart hverjum og einum þekktum lánardrottni.

48. Stefnandi fullyrðir, að á sama hátt sé svipaður merkingarmunur á íslensku útgáfu 2. mgr. 14. gr. tilskipunarinnar og þeim ensku, norsku og þýsku.

49. Stefnandi staðhæfir að frönsku, dönsku og sænsku útgáfurnar af 14. gr. kveði á um að upplýsa skuli hvern og einn þekktan EES-lánardrottinn, utan heimaaðildarríkis, með sendingu tilkynningar.

50. Stefnandi staðhæfir að þess vegna og að teknu tilliti til tilgangs og almennrar fyrirætlanar með tilskipuninni sé rétta merkingu 2. mgr. 14. gr. tilskipunarinnar að finna í ensku útgáfunni. Stefnandi fullyrðir að af þessum sökum sé beiting stefnda á viðkomandi ákvæðum íslenskra laga við slitameðferð Kaupþings ósamrýmanleg kröfum 14. gr. tilskipunarinnar.

51. Stefnandi telur að svarið við fyrstu spurningunni ætti að vera:

„Ákvæði 14. gr. tilskipunar 2001/24/EB eins og hún birtist og er útgefin í EES-viðbæti við Stjórnartíðindi Evrópusambandsins, endurspeglar ekki rétta merkingu 14. gr. tilskipunar 2001/24/EB. Ákvæðið kveður á um að (i) þegar að slitameðferð hefst, skuli stjórnvöld eða dómsmálayfirvald heimaaðildarríkisins eða skiptastjórinn upplýsa án tafar alla lánardrottna, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu í öðrum aðildarríkjum, um það nema í tilvikum þegar í löggjöf heimaaðildarríkis sé þess ekki krafist, að kröfunni sé lýst til að hún fáist viðurkennd, og (ii) að upplýsingarnar sem vísað er til í i-lið skuli gefnar í formi auglýsingar þar sem einkum hún og viðurlög sem mælt er fyrir um varðandi tímamörkin, hvaða aðili hefur vald til að taka við kröfum sem lýst er eða athugasemdum sem eru lagðar fram varðandi kröfur og aðrar ráðstafanir sem mælt er fyrir

the lodgment of claims or observations relating to claims and the other measures laid down. Such a notice shall also indicate whether creditors whose claims are preferential or secured in re need lodge their claims"

The second question

52. The Plaintiff submits that the second question referred by Reykjavík District Court essentially seeks to establish what consequences, if any, there are for the winding-up proceedings of an EEA financial undertaking if the competent authority fails to dispatch a notification as prescribed in Article 14(2) of the Directive to each known creditor in other Member States under circumstances in which the lodgement of a claim is a requirement for its recognition under the national legislation governing the winding-up proceedings.

53. The Plaintiff submits that the principle of freedom of establishment and the freedom to provide services within the EEA entitles financial undertakings to set up branches and to offer their services throughout the EEA. However, within the EEA, some rules applicable to the reorganisation and winding up of financial undertakings are country specific, divergent and remain non-harmonised. These include the rules on the handling of claims and the consequences of not filing a formal proof of a claim in winding-up proceedings. In the Plaintiff's view, this contradicts the objectives of the internal market by creating unequal conditions for creditors, depending on their location and contributes to the uncertainty of creditors when dealing with financial institutions from EEA States other than their own due to unfamiliarity with their legislation and thereby hampers the provision of cross-border services.

54. The Plaintiff contends that the purpose of Directive 2001/24/EC is to address, to the extent possible, the problems and risks which divergent national rules have, in this regard, on the internal market. Therefore, Article 16(1) establishes the principle that EEA creditors outside the home Member State of the credit institution shall have the right to lodge claims or to submit written

um. Í auglýsingunni skal einnig koma fram hvort þeir sem eiga forgangskröfur eða kröfur sem eru tryggðar samkvæmt hlutarétti þurfi að lýsa þeim.“

Önnur spurningin

52. Stefnandi heldur því fram að með annarri spurningunni sem Héraðsdómur Reykjavíkur beinir til dómstólsins sé leitast við að kanna hvaða afleiðingar það hafi, ef einhverjar, fyrir slitameðferð fjármálafyrirtækis innan EES, ef viðeigandi stjórnvald sendir ekki tilkynningu, eins og mælt sé fyrir um í 2. mgr. 14. gr. tilskipunarinnar, til hvers og eins þekkts lánardrottins í öðrum aðildarríkjum, í tilvikum þegar lög viðkomandi lands áskilji að kröfu sé lýst svo hún geti fengist viðurkenndvið slitameðferðina.

53. Stefnandi heldur því fram að meginreglan um staðfesturétt og frelsi til að veita þjónustu innan EES, heimili fjármálafyrirtækjum að stofna útibú og bjóða þjónustu þeirra á gervöllu Evrópska efnahagssvæðinu. Innan EES séu þó nokkrar reglur, sem gildi um endurskipulagningu og slit lánastofnana, bundnar við tiltekin lönd, sem séu mismunandi og því áfram ósamræmdar. Þar með talið séu reglurnar um meðhöndlun krafna og afleiðingar þess að ekki sé lögð inn formleg sönnun á kröfu við slitameðferð. Það er skoðun stefnanda að þetta sé í mótsögn við markmið innri markaðarins, þetta skapi ójöfn skilyrði fyrir lánardrottna, eftir því hvar þeir séu staðsettir og stuðli að óvissu lánardrottna í viðskiptum við fjármálafyrirtæki í öðrum EES-ríkjum en þeirra eigin, vegna ókunnugleika á löggjöf þeirra og því hindri ákvæðið þjónustu yfir landamæri.

54. Stefnandi staðhæfir að tilgangur tilskipunar 2001/24/EB sé að takast á við, að því marki sem hægt sé, vandamál og áhættu sem mismunandi reglur landsréttar skapi, í þessu tilliti á innri markaðnum. Þess vegna sé meginreglunni, um að EES-lánardrottnar utan heimaaðildarríkis lánastofnunarinnar skuli hafa rétt til þess að lýsa kröfum eða leggja fram skriflegar athugasemdir er þær varði, komið á með 1. mgr. 16. gr. Til að

observations relating to claims. To facilitate that right, Article 14 of the Directive sets out mandatory rules on the provision of information to EEA creditors known to the institution being wound up.

55. The Plaintiff submits that Article 118, point 2, of the Icelandic Bankruptcy Act provides that a foreign creditor who has not filed a claim within the prescribed deadline has the possibility of having his claim accepted under certain conditions. However, these conditions are stringent and strictly applied.[11]

56. In the national proceedings, the Plaintiff contended that as it had not received an individual notification, as prescribed in Article 14 of the Directive, the rejection of its claims was without foundation and that, therefore, its claims remain valid against the estate. It submits that the rejection of its claims entails an unlawful restriction of its right under Article 16(1) of the Directive, and, at the same time, a corresponding violation by the Defendant of that right.

57. The Plaintiff notes that Iceland, as an EEA State, has an obligation to apply its national law in a manner which conforms to EEA law in the relevant field.[12] It submits that the Winding-Up Board of Kaupthing has the status of a public authority in Iceland. The Board's tasks and responsibilities are set out in the Bankruptcy Act and the Act on Financial Undertakings. The Board makes decisions, which may be referred to the courts, concerning the rights and interests of creditors. In adopting those decisions, the Winding-Up Board applies and interprets the relevant law. Individually, each member of the Winding-Up Board, appointed by Reykjavík District Court, acts in the capacity of a public official subject to the applicable rules pertaining to his tasks and duties.

58. The Plaintiff notes that the preamble to the EEA Agreement emphasises that an important objective of the Agreement is to ensure that individuals and economic operators are equally treated, have equal conditions of competition, and have adequate

[11] Reference is made to the ruling of the Supreme Court of Iceland in case 619/2010, translated paragraphs of which are attached in Annex 3 to the Plaintiff's submissions.

[12] Reference is made to Article 3(2) EEA.

greiða fyrir þessum rétti, kveði 14. gr. tilskipunarinnar á um ófrávíkjanlega reglu varðandi tilhögun upplýsingamiðlunar til EES-lánardrottna sem kunnir séu þeirri stofnun sem slitið sé.

55. Stefnandi heldur því fram að í 2. tölulið 118. gr. íslensku gjaldþrotaskiptalaganna sé kveðið á um að útlendir lánardrottnar, sem ekki hafi lagt fram kröfu innan tilskilins frest, eigi möguleika á að fá kröfu sína samþykkta að tilteknum skilyrðum uppfylltum. Þessi skilyrði séu þó ströng og þeim skuli fylgt í einu og öllu.[11]

56. Stefnandi staðhæfði, við innlendu málsmeðferðina, að þar sem hann hefði ekki móttekið sérstaka tilkynningu, eins og lýst væri í 14. gr. tilskipunarinnar, hefði höfnun á kröfu hans verið tilhæfulaus, og að þess vegna væru kröfur hans í búið áfram gildar. Hann heldur því fram að höfnun krafnanna feli í sér ólögmæta takmörkun á rétti sínum samkvæmt 1. mgr. 16. gr. tilskipunarinnar og samhliða feli höfnunin í sér brot stefnda á þeim rétti.

57. Stefnandi bendir á að Íslandi beri, sem EES-ríki, skylda til að beita landsrétti í samræmi við EES-rétt á viðkomandi sviði.[12] Hann heldur því fram að slitastjórn Kaupþings hafi stöðu opinbers yfirvalds á Íslandi. Kveðið sé á um hlutverk og ábyrgð slitastjórnarinnar í gjaldþrotaskiptalögunum og í lögum um fjármálafyrirtæki. Slitastjórnin taki ákvarðanir, sem heimilt sé að vísa til dómstólanna varðandi réttindi og hagsmuni lánardrottna. Þegar að slitastjórnin samþykki þessar ákvarðanir, beiti hún og túlki viðkomandi lög. Hver einstakur meðlimur slitastjórnar, skipaður af Héraðsdómi Reykjavíkur, komi fram sem opinber sýslunarmaður og heyri þar með undir viðkomandi reglur varðandi hlutverk hans og skyldur.

58. Stefnandi tekur fram að í formála við EES-samninginn sé áhersla lögð á að mikilvægt markmið samningsins sé að tryggja jafnræði gagnvart einstaklingum og aðilum í atvinnurekstri, að þeir hafi

[11] Tilvísun í dóm Hæstaréttar Íslands í máli nr. 619/2010, þýddar málsgreinar úr honum fylgja með í 3. viðauka við greinargerð stefnanda.
[12] Tilvísun í 2. mgr. 3. gr. EES.

means of enforcement.[13] Moreover, national courts are obliged to "consider any relevant element of EEA law, whether implemented or not, when interpreting national law".[14]

59. According to the Plaintiff, a provision of EEA law that is both unconditional and (sufficiently) precise is capable of conferring upon individuals and economic operators, rights and obligations which can be relied upon before national courts of EFTA/EEA States. While in EU law, this principle is introduced through case-law, under the EEA Agreement the same principles apply as a result of the objectives of the Agreement as set out, *inter alia*, in recitals 4 and 15 in the preamble to the Agreement.

60. Article 14 of the Directive, the Plaintiff submits, contains a clear and precise substantive provision setting out the duties of an administrator of a failed bank in relation to known EEA creditors outside the home Member State of the bank in question when winding-up proceedings commence. In its view, the wording of Article 14 of the Directive leaves no room for a choice of measures when it comes to informing known creditors of the opening of winding-up proceedings and the consequences of not lodging a claim within the deadline.

61. The Plaintiff submits that the Court's reply to the second question should be that: ·

62. "competent authorities in charge of winding-up proceedings of a financial undertaking within an EFTA State that is a Contracting Party to the EEA Agreement and whose legislation requires the lodgment of a claim with a view to its recognition is obliged to apply the relevant legislation in such a way that substantively conforms with the requirement of Article 14 of Directive 2001/24/EC. In view of the right of creditors who have their domicile, normal place of residence or head office in a Member State other than the home Member State, to lodge claims as enshrined in Article 16(1) of Directive 2001/24/EC, any execution of winding-up proceedings that does not meet the

[13] Reference is made to *Sveinbjörnsdóttir*, cited above, paragraph 63.
[14] Reference is made to Case E-4/01 *Karl K. Karlsson hf.* v *The Icelandic State* [2002] EFTA Ct. Rep. 240, paragraph 28.

sömu samkeppnisskilyrði og viðeigandi réttarúrræði.[13] Þar að auki beri dómstólum samningsríkjanna skylda „við skýringu landsréttar að taka mið af EES-réttinum í heild, hvort sem ákvæði hans hafa verið lögfest eða ekki“.[14]

59. Samkvæmt stefnanda getur ákvæði EES-réttar, sem er hvort tveggja óskilyrt og (nægjanlega) nákvæmt, veitt einstaklingum og aðilum í atvinnurekstri réttindi og skyldur sem hægt sé að byggja á fyrir landsbundnum dómstólum EFTA-ríkjanna innan EES. Þessi meginregla sé tilkomin í ESB rétt í gegnum dómaframkvæmd, en samkvæmt EES-samningnum sé sömu meginreglu beitt á grundvelli markmiða samningsins eins og þau birtist m.a. í 4. og 15. töluliðum formálsorða samningsins.

60. Stefnandi heldur því fram að 14. gr. tilskipunarinnar feli í sér skýr og nákvæm efnisákvæði, þar sem settar séu fram skyldur þess sem stjórni slitum fallins banka, gagnvart þekktum EES-lánardrottni, utan heimaaðildarríkis bankans, sem um er að ræða, þegar slitameðferð hefst. Það sé mat hans að orðalag 14. gr. tilskipunarinnar veiti ekki svigrúm til að velja aðferðir við að tilkynna þekktum lánardrottni um upphaf slitameðferðar og afleiðingar þess að kröfur séu ekki lagðar fram innan frestsins.

61. Stefnandi telur að svar dómstólsins við annarri spurningunni ætti að vera:

62. „Lögbær yfirvöld, sem bera ábyrgð á slitameðferð fjármála-fyrirtækis innan EFTA-ríkis, sem er samningsaðili að EES-samningnum og í hvers löggjöf þess er krafist að kröfu sé lýst til að hún fáist viðurkennd, ber skylda til þess að beita viðkomandi löggjöf á þann máta að hún sé, í reynd, í samræmi við kröfur 14. gr. tilskipunar 2001/24/EB. Með hliðsjón af réttindum lánardrottna, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu í öðrum aðildarríkjum en heimaaðildarríkinu, til að lýsa kröfum eins og er að finna í 1. mgr. 16. gr. tilskipunar 2001/24/EB, er má hvers kyns framkvæmd á slitameðferð, sem sem ekki uppfyllir kröfur 14. gr. tilskipunar 2001/24/EB, ekki verða til

[13] Tilvísun í mál *Erlu Maríu Sveinbjörnsdóttur*, áður tilvitnað, 63. málsgr.
[14] Tilvísun í mál E-4/01 *Karl K. Karlsson hf.* gegn *íslenska Ríkinu* [2002] EFTA Ct. Rep. 240, 28. málsgr.

requirements of Article 14 of Directive 2001/24/EC may not have the consequence that a creditor be deprived of his right to lodge a claim."

The Defendant

The first question

63. The Defendant submits that Reykjavík District Court is seeking essentially to establish how the substantive content of Article 14 of the Directive should be determined taking into account the discrepancy between the English and Icelandic versions of the Directive and the fact that both versions form a part of the EEA Agreement and are equally authentic.[15]

64. The Defendant notes that the Directive has been incorporated into the EEA Agreement[16] and that the Icelandic version of the Directive was published in the EEA supplement to the Official Journal.[17] The Icelandic version of the Directive forms a part of the EEA Agreement.[18]

65. The Defendant submits that the English and Icelandic versions of the Directive are both equally authentic. The two versions cannot be considered equally authentic if only one version is applied and not the other. Therefore, the Plaintiff's contention that the English version of the Directive must be applied would infringe Articles 2, 119 and 129 EEA. Moreover, the Defendant stresses, it would be incompatible with the requirement for the uniform application of EEA law if one language version were to override another.[19]

66. The Defendant contends that Article 14 of the Directive should be interpreted by reference to the purpose and general scheme of the Directive.[20] Similarly, the Defendant rejects the view that

15 Reference is made to Articles 2 and 129 EEA.

16 Reference is made to Decision of the EEA Joint Committee No 167/2002 of 6 December 2002.

17 Reference is made to EEA Supplement No 29 to the Official Journal of the European Union, 10.6.2004, p. 198.

18 Reference is made to Articles 2, 119 and 129 EEA.

19 Reference is made to Case C-149/97 *The Institute of the Motor Industry* v *Commissioners of Customs and Excise* [1998] ECR I-7053, paragraph 16.

20 Reference is made to Case 30/77 *Regina* v *Pierre Bouchereau* [1977] ECR 1999, paragraph 14, and Case C-372/88 *Milk Marketing Board of England and Wales* v *Cricket St. Thomas Estate* [1990] ECR I-1345, paragraphs 18 and 19.

þess að lánardrottinn sé sviptur réttindum sínum til þess að lýsa kröfu.“

Stefndi

Fyrsta spurningin

63. Stefndi heldur því fram að Héraðsdómur Reykjavíkur leitist við að staðfesta hvernig efnislegt innihald 14. gr. tilskipunarinnar skuli ákvarðað, að teknu tilliti til ósamræmisins á milli ensku og íslensku útgáfa tilskipunarinnar og þeirrar staðreyndar að báðar útgáfurnar myndi hluta af EES-samningnum og séu jafngildar.[15]

64. Stefndi bendir á að tilskipunin hafi verið tekin upp í EES-samninginn[16] og íslenska útgáfa tilskipunarinnar hafi verið birt í EES-viðbæti við Stjórnartíðindi Evrópusambandsins.[17] Íslenska útgáfan myndi hluta af EES-samningnum.[18]

65. Stefndi heldur því fram að ensku og íslensku útgáfur tilskipunarinnar séu jafngildar. Þessar tvær útgáfur geti ekki talist jafngildar ef einungis annarri er beitt en hinni ekki. Því myndi staðhæfing stefnanda um að beita eigi ensku útgáfu tilskipunarinnar brjóta í bága við 2., 119. og 129. gr. EES. Þar að auki leggur stefndi áherslu á, að það væri ósamrýmanlegt kröfunni um samræmda beitingu EES-réttar ef ein tungumálaútgáfa hefði meira vægi en önnur.[19]

66. Stefndi staðhæfir að túlka beri 14. gr. tilskipunarinnar með hliðsjón af tilgangi og almennri fyrirætlan hennar.[20] Á sama hátt hafnar stefndi því sjónarmiði að meirihluti tungumálaútgáfna tilskipunar skuli hafa meira vægi en tiltekin tungumálaútgáfa, í þeim tilvikum þegar um ósamræmi sé að ræða. Með vísan

15 Tilvísun í 2. og 129. gr. EES.
16 Tilvísun í ákvörðun sameiginlegu EES-nefndarinnar 167/2002 frá 6. desember 2002.
17 Tilvísun í EES-viðbæti nr. 29 við Stjórnartíðindi Evrópusambandsins 10.6.2004, bls. 198.
18 Tilvísun í 2. og 129. gr. EES.
19 Tilvísun í mál C-149/97 *The Institute of the Motor Industry* gegn *Commissioners of Customs and Excise* [1998] ECR I-7053, 16. málsgr.
20 Tilvísun í mál 30/77 *Regina* gegn *Pierre Bouchereau* [1977] ECR 1999, 14. málsgr., og mál C-372/88 *Milk Marketing Board of England and Wales* gegn *Cricket St. Thomas Estate* [1990] ECR I-1345, 18. og 19. málsgr.

a majority of language versions of a directive should override a particular language version in case of a divergence. Making reference to case-law, it observes that examples exist where a single language version has been favoured over the majority.[21]

67. The Defendant submits that, where a discrepancy is found between the Icelandic and English language versions of Article 14 of the Directive, the Icelandic version should be interpreted by reference to the purpose and general scheme of that version of the Directive. Therefore the Court should answer the first question as follows: -

"[I]n the case of discrepancy between the text of the EEA Agreement or rules based upon it, in different languages, one language version of the EEA Agreement or rules based on it does not override another language version. In such cases substantive provisions and rules shall be construed by reference to the purpose and general scheme of the rules of which it forms a part."

The second question

68. The Defendant notes that Reykjavík District Court essentially seeks to ascertain whether, under EEA law, the provision included in Article 14 of the Directive, which provides that a liquidator "shall without delay individually inform known creditors", is to prevail over Article 86 of the Icelandic Bankruptcy Act, which vests, *inter alia*, a liquidator with the power to determine how information should be disclosed to creditors.

69. The Defendant notes, by reference to the Icelandic Supreme Court's judgment of 16 December 2011, that this case concerns a legal dispute between the Plaintiff and Defendant on various matters of fact and law, most importantly provisions of the Icelandic Bankruptcy Act. In addition, it observes that proceedings under Article 34 SCA are based on a clear separation of functions between the Court and national courts. It falls to the national court to ascertain the facts and interpret disputed

[21] Reference is made to Case 76/77 *Auditeur du travail* v *Bernard Dufour, SA Creyf's Interim and SA Creyf's Industrial* [1977] ECR 2485, paragraphs 15 and 16, and Joined Cases 233/78, 234/78 and 235/78 *Benedikt Lentes and Others* v *Germany* [1979] ECR 2305, paragraphs 13 and 14.

til dómaframkvæmdar, veiti hann því athygli að til séu dæmi þess að einni tungumálaútgáfu hafi verið veitt meira vægi en meirihlutanum.[21]

67. Stefndi heldur því fram að þegar um sé að ræða ósamræmi á milli íslensku og ensku tungumálaútgáfu 14. gr. tilskipunarinnar, skuli túlka íslensku útgáfuna með vísan til tilgangs og almennrar fyrirætlanar með þeirri útgáfu tilskipunarinnar. Þess vegna ætti dómstóllinn að svara fyrstu spurningunni á eftirfarandi hátt: ·

„[E]f ósamræmi er á milli texta samningsins um Evrópska efnahagssvæðið eða reglna, sem á honum byggja, á mismunandi tungumálum, er ein tungumálaútgáfa EES-samningsins eða reglur sem á honum byggja ekki veigameiri en önnur tungumálaútgáfa. Í slíkum tilvikum skulu efnisákvæði og reglur túlkaðar með vísan til tilgangs og almennrar fyrirætlanar með reglunum sem þær eru hluti af.“

Önnur spurningin

68. Stefndi tekur fram að í meginatriðum sé Héraðsdómur Reykjavíkur að leitast við að kanna hvort ákvæði 14. gr. tilskipunarinnar, um að skiptastjóri skuli „tilkynna sérstaklega án tafar hverjum og einum þekktum lánardrottni“, gangi samkvæmt EES-rétti ,framar 86. gr. íslensku gjaldþrotaskiptalaganna, sem feli m.a. skiptastjóra vald til að ákvarða hvernig miðla skuli upplýsingum til lánardrottna.

69. Stefnandi heldur því fram, með vísan til dóms Hæstaréttar Íslands frá 16. desember 2011, að mál þetta varði lagalegan ágreining á milli stefnanda og stefnda um ólík sönnunaratriði og lög, en þar á meðal séu ákvæði íslensku gjaldþrotaskiptalaganna mikilvægust. Að auki bendir hann á, að málsmeðferð samkvæmt 34. gr. ESE-samningsins byggist á skýrri aðgreiningu á hlutverkum dómstólsins og dómstóla samningsríkjanna. Það sé hlutverk Héraðsdóms Reykjavíkur að ganga úr skugga um staðreyndir og túlka ákvæði landsréttar sem ágreiningurinn standi um. EFTA-

[21] Tilvísun í mál 76/77 *Auditeur du travail* gegn *Bernard Dufour, SA Creyf's Interim and SA Creyf's Industrial* [1977] ECR 2485, 15. og 16. málsgr. og í sameinuðu málin 233/78, 234/78 og 235/78 *Benedikt Lentes and Others* gegn *Þýskalandi* [1979]ECR 2305, 13. og 14. málsgr.

provisions of national legislation. The EFTA Court has jurisdiction to give an advisory opinion on the EEA Agreement, its Protocols and Annexes.[22]

70. The Defendant submits that directives incorporated into the EEA Agreement by the EEA Joint Committee are binding, as to the result to be achieved, upon a Member State, but leave the choice of form and methods to the national authorities.[23] Member States are obliged, when transposing a directive, to ensure that it is effective whilst retaining a broad discretion as to the choice of methods of implementation. However, the transposition of a directive does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation.[24] The Defendant submits that such discretion has been employed by Iceland in the case at hand and observes that it relied on the relevant laws and regulations when initiating the winding-up proceedings.

71. The Defendant submits, having regard to the answer it proposes to the first question, that when interpreting Article 14 of the Directive, a particular emphasis should be put on the purpose and the general scheme of the directive. It submits that recitals 16 and 17 to the Directive emphasise the sole jurisdiction of the home Member State in the winding-up process.

72. The Defendant submits further that articles of the Directive concerning the reorganisation of credit institutions are also of importance. In particular, Article 7 of the Directive contains a provision dealing with "known creditors". The Defendant notes the emphasis, in Article 7(1) of the Directive, placed on the home Member State's discretion with regard to how claims should be lodged. In its view, this approach reflects the objectives set out

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22 Reference is made to Case E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1995] EFTA Ct. Rep. 15, paragraph 78, and Case E-16/10 *Philip Morris Norway AS* v *Staten v/Helse- og omsorgsdepartementet* [2011] EFTA Ct. Rep. 330, paragraph 87.

23 Reference is made to Article 7 EEA.

24 Reference is made to Case C-388/07 *The Queen, on the application of The Incorporated Trustees of the National Council for Ageing (Age Concern England)* v *Secretary of State for Business, Enterprise and Regulatory Reform* ("*Age Concern England*") [2009] ECR I-1569, paragraph 42.

dómstóllinn hafi dómsvald til að veita ráðgefandi álit á EES-samningnum, bókunum og viðaukum hans.[22]

70. Stefndi heldur því fram að tilskipanir, sem teknar séu upp í EES-samninginn af sameiginlegu EES-nefndinni, séu bindandi fyrir samningsríki að því er varði þau markmið sem stefnt sé að, en lögbærum yfirvöldum í hverju ríki sé eftirlátið á hvern hátt og með hvaða ráðum þeim skuli náð.[23] Aðildarríki séu skuldbundin, þegar þau innleiði tilskipun, til að tryggja að hún sé skilvirk en þau hafi víðtækt svigrúm við val á aðferðum við innleiðingu. Hins vegar krefjist innleiðing á tilskipun þess þó ekki endilega að ákvæðin séu formlega og ótvírætt orðrétt felld inn í tiltekna lagasetningu.[24] Stefndi heldur því fram að slíkt svigrúm hafi verið nýtt af hálfu Íslands í því máli sem um ræði og bendir á að hann hafi reitt sig á viðkomandi lög og reglugerðir við upphaf slitameðferðarinnar.

71. Stefndi heldur því fram, með hliðsjón af svarinu sem hann leggur til við fyrstu spurningunni, að við túlkun á 14. gr. tilskipunarinnar, skuli leggja sérstaka áherslu á tilgang og almenna fyrirætlan með tilskipuninni. Hann heldur því fram að í 16. og 17. tölulið formálsorða tilskipunarinnar sé lögð áhersla á að heimaaðildarríkið hafi eitt lögsögu við slitameðferðina.

72. Stefndi heldur því ennfremur fram að ákvæði tilskipunarinnar, varðandi endurskipulagningu lánastofnanna, séu einnig mikilvæg. Einkum innihaldi 7. gr. tilskipunarinnar ákvæði, sem varði „þekkta lánardrottna“. Stefndi bendir á þá áherslu í 1. mgr. 7. gr. tilskipunarinnar sem lögð sé á svigrúm heimaaðildarríkisins varðandi það hvernig kröfum skuli lýst. Að hans mati endurspeglar þessi nálgun markmiðin sem sett séu fram í 16. og 17. tölulið formálsorða tilskipunarinnar og sýni fram á að tilskipuninni sé ekki ætlað að samræma löggjöf aðildarríkisins, heldur frekar

[22] Tilvísun í mál E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994-1195] EFTA Ct. Rep. 15, 78. málsgr. og mál E-16/10 *Philip Morris Norway AS* gegn *Staten v/Helse- og omsorgsdepartementet* [2011] EFTA Ct. Rep. 330, 87. málsgr.

[23] Tilvísun í 7. gr. EES.

[24] Tilvísun í mál C-388/07 *The Queen, on the application of The Incorporated Trustees of the National Council for Ageing (Age Concern England)* gegn *Secretary of State for Business, Enterprise and Regulatory Reform* („*Age Concern England*“) [2009] ECR I-1569, 42. málsgr.

in recitals 16 and 17 to the Directive and demonstrates that the Directive is not intended to harmonise the legislation of the Member States, but rather to ensure the mutual recognition of the reorganisation and winding-up procedures of the Member States. Further, the Defendant notes that Article 10(2)(f) to (g) of the Directive provides that the law of the home Member State shall determine, first, which claims are to be lodged against the credit institution and the treatment of claims arising after the opening of winding-up proceedings, and, second, the rules governing the lodging, verification and admission of claims.

73. The Defendant notes that the term "known creditors" is not to be found in Article 14(1) of the Icelandic version of the Directive, with "all creditors" being used instead. In that regard, it stresses, however, the heading given in Icelandic to Article 14 of the Directive "Tilhögun upplýsingamiðlunar til þekktra lánardrottna" which means "Provision of information to known creditors". Therefore, in its view, when interpreting the concept of "all creditors" in Article 14(1) of the Directive this should be understood as meaning "all known creditors".

74. The Defendant observes that, although Article 14(1) of the English version of the Directive prescribes that a liquidator shall without delay "individually inform known creditors", which is to be done, according to Article 14(2), by "the dispatch of a notice", the Directive does not prescribe where this notice is to be sent. Therefore, according to the Defendant, a Member State has considerable discretion as to how this is done and it may be left to a liquidator to decide on a case-by-case basis how foreign creditors are to be individually notified.

75. The Defendant notes that the Plaintiff holds bonds issued by the Defendant which can be freely sold without the direct knowledge of the Defendant. Therefore, in its view, an advertisement, as prescribed by paragraph 2 of Article 86 of Act No 21/1991 and paragraph 4 of Article 104 of Act No 161/2002 on Financial Undertakings in conjunction with paragraph 2 of Article 4 of Icelandic Regulation 872/2006, can be more effective in informing creditors about the winding-up proceedings. Moreover,

að tryggja gagnkvæma viðurkenningu á endurskipulagningu og slitameðferð aðildarríkjanna. Enn fremur bendir stefndi á að í f- og g-lið 2. mgr. 10. gr. tilskipunarinnar sé kveðið á um að lög heimaaðildarríkisins skuli einkum ákvarða, í fyrsta lagi, kröfur á hendur lánastofnuninni og meðferð þeirra krafna sem lýst sé eftir að slitameðferð hefjist, og í öðru lagi, reglur sem gildi um kröfulýsingu, sannprófun og skráningu krafna.

73. Stefndi bendir á að hugtakið „þekktur lánardrottinn“ sé ekki að finna í 1. mgr. 14. gr. íslensku útgáfunnar á tilskipuninni, þar sem orðasambandið „allir lánardrottnar“ sé notað í staðinn. Að því er þetta varði, leggi hann þó áherslu á að fyrirsögn 14. gr. tilskipunarinnar á íslensku „Tilhögun upplýsingamiðlunar til þekktra lánardrottna“ sem merki “Provision of information to known creditors“. Það sé því skoðun hans, að við túlkun á hugtakinu „allir lánardrottnar“ í 1. mgr. 14. gr. beri að skilja það í merkingunni „allir þekktir lánardrottnar“.

74. Stefndi bendir á að þrátt fyrir að ensk útgáfa 1. mgr. 14. gr. tilskipunarinnar mæli fyrir um að skiptastjóri skuli án tafar „individually inform known creditors”, sem samkvæmt 2. mgr. 14. gr. eigi að fara fram með „dispatch of a notice”, þá sé ekki mælt fyrir um í tilskipuninni hvert senda eigi tilkynninguna. Því sé það álit stefnda að aðildarríki hafi umtalsvert sjálfræði til að ákveða hvernig þetta sé gert og þá jafnvel þannig að skiptastjóra sé látið eftir að ákveða, í hverju tilviki fyrir sig, hvernig beri að tilkynna sérstaklega hverjum og einum erlendum lánardrottni um þessi atriði.

75. Stefndi bendir á að stefnandi sé handhafi skuldabréfa, sem stefndi gaf út, og sem auðveldlega sé hægt að selja, án þess að stefndi hafi beina vitneskju um það. Því sé það skoðun hans að auglýsing eins og lýst sé í 2. mgr. 86. gr. laga nr. 21/1991 og 4. mgr. 104. gr. laga nr. 161/2002 um fjármálafyrirtæki í tengslum við 2. mgr. 4. gr. íslensku reglugerðarinnar nr. 872/2006, geti verið áhrifaríkari við að upplýsa lánardrottna um slitameðferð. Ennfremur fullyrðir stefndi að hans nálgun, það er að tilkynna verðbréfaþjónustufyrirtækjum sem hýsi viðskiptabréfin

the Defendant avers that its approach, that is, to notify securities services companies, which host the negotiable instruments electronically, can be particularly effective. In that way a statement is posted on every bond issued by the Defendant and all current bond holders are informed simultaneously.

76. In the Defendant's view, an interpretation of Article 14(1) of the Directive which required the individual notification of known creditors at their domicile would exclude purchasers of a credit institution's bonds on the secondary market as the credit institution does not know the identity of those purchasers.

If national law is found to be incompatible with Directive 2001/24/EC

77. The Defendant submits that, if the Court concludes that a provision of national law vesting power in a liquidator to decide how known creditors are notified is incompatible with the Directive, the question arises whether the present case concerns the non-implementation or incorrect implementation of EEA law. In neither case, the Defendant submits, can Article 14(1) of the Directive override provisions of national law.

Non-implementation of the Directive

78. According to the Defendant, EEA law provides that the EFTA States are obliged to ensure that EEA rules that have been implemented prevail over national legal provisions. The EEA Agreement does not require any Contracting Party to transfer legal powers to any institution of the EEA and, moreover, the homogeneity of the EEA must be achieved through national procedures.[25] However, if EEA rules have not been implemented into national law, they cannot take precedence over conflicting national law provisions.[26] Therefore, if the Court concludes that Article 14(1) of the Directive has not been implemented into national law, it cannot take precedence over the relevant articles of the Icelandic Bankruptcy.

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[25] Reference is made to the preamble to Protocol 35 to the EEA Agreement, and *Karlsson*, cited above, paragraph 28.

[26] Reference is made to Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 40.

með rafrænum hætti, geti verið sérstaklega skilvirk. Á þann hátt fylgi yfirlýsing hverju skuldabréfi, sem stefndi hafi gefið út, og allir núverandi skuldabréfaeigendur séu upplýstir jafn óðum.

76. Að mati stefnda myndi túlkun á 1. mgr. 14. gr., sem krefðist sérstakrar tilkynningar til hvers og eins þekkts lánardrottins, á lögheimili þeirra, útiloka kaupendur skuldabréfa lánastofnana á eftirmörkuðum þar sem að lánastofnunin þekki ekki auðkenni slíkra kaupanda.

Ef landsréttur verður talinn ósamrýmanlegur tilskipun 2001/24/EB

77. Stefndi heldur því fram að ef að niðurstaða dómstólsins verði að ákvæði landsréttar, sem veiti skiptastjóra vald til þess að ákveða hvernig upplýsa skuli þekkta lánardrottna, séu ósamrýmanleg tilskipuninni, vakni sú spurning hvort að þetta mál varði EES-rétt sem ekki hafi verið innleiddur eða ranga innleiðingu hans. Stefndi heldur því fram að í hvorugu tilvikinu gangi 1. mgr. 14. gr. framar ákvæðum landsréttar.

Tilskipunin hefur ekki verið innleidd

78. Samkvæmt stefnda er kveðið á um í EES-rétti að EFTA-ríkjunum beri að tryggja að EES-reglur, sem hafi verið innleiddar, gangi framar landsbundnum lagaákvæðum. EES-samningurinn feli ekki í sér að samningsaðilar yfirfæri lagalegar heimildir til stofnanna EES, en þar að auki skuli einsleitni EES nást með innlendri málsmeðferð.[25] Hafi EES-reglur ekki verið innleiddar í landsrétt, geti þær ekki gengið framar ákvæðum landsréttar, sem stangist á við þær.[26] Af þeim sökum geti niðurstaða dómstólsins, ef hún verður á þann veg að 1. mgr. 14. gr. tilskipunarinnar hafi ekki verið innleidd í landsrétt, ekki gengið framar viðkomandi ákvæðum íslensku gjaldþrotaskiptalaganna.

[25] Tilvísun í formála við bókun 35 við EES-samninginn, og í 28. málsgr. í máli *Karls K. Karlssonar hf.*, sem vísað er til hér að ofan.
[26] Tilvísun í mál E-1/07 *Criminal proceedings gegn A* [2007] EFTA Ct. Rep. 246, 40. málsgr.

Implementation incompatible with the Directive

79. In the Defendant's view, individuals and economic operators are entitled to claim that EEA rules take precedence over provisions of national law when conflict arises between implemented EEA rules and national law provisions. An entity which invokes rights derived from the EEA Agreement must be an "individual or economic operator" and the relevant provision of a directive must be "unconditional and sufficiently precise".[27] The Defendant contends that neither of these two requirements is fulfilled in the present case.

80. First, the Defendant asserts that the Plaintiff is not an economic operator in the traditional sense of the concept as it was nationalised in January 2009 and is now fully owned and controlled by the Irish State.[28] Moreover, the Plaintiff is "an asset recovery bank, committed to running the Bank in the public interest and in a manner that minimizes the cost to the Irish taxpayer".[29]

81. In the alternative, if the Plaintiff is an economic operator, it cannot in any event enforce a right under Article 14(1) of the Directive against another economic operator, the Defendant, before a national court.[30]

82. Second, Article 14(1) of the Directive lacks clarity on the manner in which known creditors should be individually notified. This lack of "sufficient precision" precludes the Directive from taking precedence over national law, and ensures that EEA Member States retain discretion in deciding how known creditors are to be "individually notified".

83. The Defendant submits that the second question referred should be answered as follows: ·

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27 Reference is made to *Restamark*, cited above, paragraph 77.

28 Reference is made to http://www.ibrc.ie/About_us/Nationalisation/.

29 Reference is made to http://www.ibrc.ie/About_us/.

30 Reference is made to Case C-91/92 *Paola Faccini Dori* v *Recreb Srl* [1994] ECR I-3325, paragraphs 22 and 24-25, Case C-192/94 *El Corte Inglés SA* v *Cristina Blázquez Rivero* [1996] ECR I-1281, paragraphs 15-21, and Case C-168/95 *Criminal proceedings against Luciano Arcaro* [1996] ECR I-4705, paragraphs 33-38.

Innleiðingin er ósamrýmanleg tilskipunninni

79. Að mati stefnda, hafa einstaklingar og aðilar í atvinnurekstri heimild til að fara fram á að EES-reglur gangi framar ákvæðum landsréttar þegar ágreiningur rís á milli innleiddra EES-reglna og ákvæða landsréttar. Aðili sem ber fyrir sig rétt sem leiðir af EES-samningnum verður að vera „einstaklingur eða aðili í atvinnurekstri“ og viðkomandi ákvæði tilskipunarinnar skal vera „óskilyrt og nægjanlega nákvæmt“.[27] Stefndi staðhæfir að hvorugu þessara skilyrða sé fullnægt í þessu máli.

80. Í fyrsta lagi, fullyrðir stefndi að stefnandi sé ekki aðili í atvinnurekstri, í hefðbundnum skilningi hugtaksins, þar sem að bankinn hafi verið þjóðnýttur í janúar 2009 og sé nú að öllu leyti í eigu og undir stjórn írska ríkisins.[28] Enn fremur sé stefnandi „banki sem fáist við endurheimtu eigna og sé hann skuldbundinn til að reka bankann í almannaþágu og á þann veg er lágmarki kostnað írskra skattgreiðenda“.[29]

81. Á hinn bóginn ef að stefnandi verður talinn aðili í atvinnurekstri, geti hann ekki í neinu tilviki knúið fram rétt samkvæmt 1. mgr. 14. gr. tilskipunarinnar gegn öðrum aðila í atvinnurekstri, stefnda, fyrir innlendum dómstól.[30]

82. Í öðru lagi skorti 1. mgr. 14. gr. skýrleika varðandi það á hvaða hátt tilkynna skuli hverjum og einum þekktum lánardrottnum sérstaklega. Þessi skortur á „fullnægjandi nákvæmni“ útiloki það að tilskipunin gangi framar landsrétti og tryggi áframhaldandi sjálfræði EES-aðildarríkja til að ákveða hvernig „tilkynna skuli sérstaklega“ hverjum og einum þekktum lánardrottni.

83. Stefndi heldur því fram að annarri spurningunni sem beint sé til dómstólsins ætti að svara á eftirfarandi hátt:

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27 Tilvísun í *Restamark*, áður tilvitnað, 77. málsgr.
28 Tilvísun í http://www.ibrc.ie/About_us/Nationalisation/.
29 Tilvísun í http://www.ibrc.ie/About_us/.
30 Tilvísun í mál C-91/92 *Paola Faccini Dori gegn Recreb Srl* [1994] ECR I-3325, 22. og 24-25. málsgr., mál C-192/94 *El Corte Inglés SA gegn Cristina Blázquez Rivero* [1996] ECR I-1281, 15-21. málsgr., og mál C-168/95 *Criminal proceedings gegn Luciano Arcaro* [1996] ECR I-4705, 33-38. málsgr.

84. "[A]s paragraph 1 of Article 14 of Directive 2001/24/EC does not prescribe how all known creditors of a credit institution should be notified, the national legislation of a Member State of the European Economic Area can vest a Winding-up Board or other competent authorities with competence to decide whether information should be disclosed with an advertisement or other similar notifications."

Government of Iceland

The first question

85. The Government of Iceland submits that Directive 2001/24 is a part of the EEA Agreement, as it was incorporated into the Agreement by EEA Joint Committee Decision No 167/2002 of 6 December 2002, amending Annex IX to the EEA Agreement. The Icelandic version of Directive 2001/24/EC was published in the EEA Supplement of the Official Journal of the European Union on 10 June 2004.

86. The Government of Iceland submits that the Icelandic version of the Directive forms a part of the EEA Agreement,[31] and is as authentic as other versions of the Directive in other languages.

87. The Government of Iceland notes that in case of divergence between the different language versions of an European Union text, the provision in question must be interpreted by reference, *inter alia*, to the purpose and general scheme of the rules of which it forms a part.[32] Therefore, in its view, Article 14 of the Directive should be interpreted by reference to the purpose and general scheme of the Directive.

88. The Icelandic Government refers to cases where a single language version has been preferred over the majority[33] and rejects arguments to the effect that, in the case of divergence, the majority of language versions of a directive are to override a minority of language versions.

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31 Reference is made to Articles 2, 119 and 129 EEA.

32 Reference is made to Case C-351/10 *Zollamt Linz Wels* v *Laki DOOEL*, judgment of 16 June 2011, not yet reported, paragraph 39, and Case C-340/08 *The Queen, on the application of M and Others* v *Her Majesty's Treasury* [2010] ECR I-3913, paragraph 44.

33 Reference is made to *Dufour*, cited above, paragraphs 15 and 16.

84. „[Þ]ar sem 1. málsgrein 14. gr. tilskipunar 2001/24/EB lýsir því ekki hvernig upplýsa skuli alla þekkta lánardrottna lánastofnunar, getur löggjöf samningsríkja Evrópska efnahagssvæðisins falið slitastjórn eða öðru lögbæru yfirvaldi, sem er til þess bært, að ákveða hvort birta skuli upplýsingar með auglýsingu eða með öðrum svipuðum tilkynningum.“

Ríkisstjórn Íslands

Fyrsta spurningin

85. Ríkisstjórn Íslands heldur því fram að tilskipun 2001/24 sé hluti af EES-samningnum, eins og hún var tekinn upp í samninginn með ákvörðun sameiginlegu EES-nefndarinnar nr. 167/2002 frá 6. desember 2002, um breytingu á viðauka IX við EES-samninginn. Íslenska útgáfa tilskipunar 2001/24/EB var birt í EES-viðbæti við Stjórnartíðindi Evrópusambandsins 10. júní 2004.

86. Ríkisstjórn Íslands heldur því fram að íslenska útgáfa tilskipunarinnar sé hluti af EES-samningnum[31] og jafn gild og aðrar útgáfur tilskipunarinnar á öðrum tungumálum.

87. Ríkisstjórn Íslands tekur fram að þegar að um er að ræða ósamræmi á milli mismunandi tungumálaútgáfa, sem varði merkingu ákvæðis, skuli ákvæðið túlkað með vísan til m.a. tilgangs og almennrar fyrirætlanar með reglunum sem það er hluti af.[32] Það sé því sjónarmið hennar að túlka beri 14. gr. tilskipunarinnar með vísun til tilgangs og almennrar fyrirætlanar með tilskipuninni.

88. Ríkisstjórn Íslands vísar í mál þar sem einni tungumálaútgáfu hafi verið veitt meira vægi en meirihluta tungumálaútgáfna[33] og hafnar rökstuðningi þess efnis að ef um ósamleitni sé að ræða, þá hafi meirihluti tungumálaútgáfna meira vægi en minnihluti tungumálaútgáfna.

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31 Tilvísun í 2., 119. og 129. gr. EES.

32 Tilvísun í mál C-351/10 *Zollamt Linz Wels gegn Laki DOOEL*, dómur frá 16. júní 2011, enn óbirtur, 39. málsgr., og í mál C-340/08 *The Queen, on the application of M and Others* gegn *Her Majesty's Treasury* [2010] ECR I-3913, 44. málsgr.

33 Tilvísun í *Dufour*, áður tilvitnað, 15. og 16. málsgr.

89. The Icelandic Government submits that the first question referred, as modified by the Supreme Court of Iceland, should be answered as follows: -

"[I]n the case of a discrepancy between the text of the EEA Agreement or rules based upon it, in different languages, one language versions of a the EEA Agreement or rules based upon it, should not override another language version. In cases of divergence provisions should be interpreted by reference to the purpose and general scheme of the rules of which it forms a part."

The second question

90. The Icelandic Government submits that there is a clear discrepancy between the language versions of the Directive. The Icelandic Government submits that the Directive is based on three main principles: unity, universality and non-discrimination, as clearly follows from the recitals to the Directive.[34]

91. The Icelandic Government contends that the main aim of the Directive is to ensure equal treatment of creditors of financial undertakings in winding-up proceedings, and to ensure that the same law applies to all creditors whether they reside in the home Member State of the financial undertaking or in a different Member State. Consequently, it asserts, the aim of the Directive is not to harmonise Member States' legislation, but to ensure mutual recognition of reorganisation and winding-up procedures among the Member States. The Directive also prescribes that the home Member State shall have sole jurisdiction in the winding-up proceedings.

92. The Icelandic Government observes that Directive 2001/24/EC was implemented into Icelandic law by Act No 130/2004 of 22 December 2004. Article 14 of the Directive was transposed by Paragraph 4 of Article 104 of the Act on Financial Undertakings No 161/2002 and Article 4 of Icelandic Regulation 872/2006. Moreover, ESA received a table of correspondence in relation to the Directive on 30 April 2006.

[34] Reference is made to recitals 16 and 17 in the preamble to Directive 2001/24/EC.

89. Ríkisstjórn Íslands telur að svarið við fyrstu spurningunni sem beint sé til dómstólsins, eins og henni hafi verið breytt af Hæstarétti Íslands, ætti að vera eftirfarandi:

> *„[E]f ósamræmi er á milli texta samningsins um Evrópska efnahagssvæðið eða reglna, sem á honum byggja, á mismunandi tungumálum, er ein tungumálaútgáfa EES-samningsins eða reglna sem á honum byggja, ekki veigameiri en önnur. Í þeim tilvikum að um ósamræmi er að ræða, skal túlka ákvæðin með vísun til tilgangs og almennrar fyrirætlanar með reglunum sem þær eru hluti af.“*

Önnur spurningin

90. Ríkisstjórn Íslands telur að það sé skýrt ósamræmi á milli tungumálaútgáfna tilskipunarinnar. Ríkisstjórn Íslands telur að tilskipunin sé grundvölluð á þremur meginreglum: einingu, algildi og banni við mismunun, eins og skýrt komi fram í formálsorðum tilskipunarinnar.[34]

91. Ríkisstjórn Íslands staðhæfir að meginmarkmið tilskipunarinnar sé að tryggja jafna meðferð lánardrottna fjármálafyrirtæka við slitameðferð, og að tryggja að sömu lög gildi gagnvart öllum lánardrottnum hvort sem þeir hafi fasta búsetu í heimaaðildarríki fjármálafyrirtækisins eða öðru aðildarríki. Af þessum sökum, fullyrðir hún að markmið tilskipunarinnar sé ekki að samræma löggjöf aðildarríkjanna, heldur að tryggja gagnkvæma viðurkenningu á endurskipulagningu og slitameðferð á milli aðildarríkjanna. Í tilskipuninni sé einnig mælt fyrir um, að heimaaðildarríki skuli eitt hafa lögsögu við slitameðferðina.

92. Ríkisstjórn Íslands bendir á að tilskipun 2001/24/EB hafi verið innleidd í íslenskan rétt með lögum nr. 130/2004 frá 22. desember 2004. Ákvæði 14. gr. hafi verið leidd í lög með 4. mgr. 104. gr. laga nr. 161/2002 um fjármálafyrirtæki og með 4. gr. íslensku reglugerðarinnar nr. 872/2006. Ennfremur hafi Eftirlitsstofnun EFTA móttekið samanburðartöflu 30. apríl 2006, í tengslum við tilskipunina.

[34] Tilvísun í 16. og 17. lið inngangsorða tilskipunar 2001/24/EB.

93. The Icelandic Government notes that the Directive was further implemented by Act No 44/2009. The table of correspondence for that implementation was sent to ESA on 29 October 2009. Subsequently, according to the Icelandic Government, ESA conducted a conformity assessment on the implementation of the Directive into the Icelandic legal order. That assessment raised certain issues and was followed by an exchange of information between ESA and the Icelandic Government. However, ESA did not raise any questions regarding the implementation of Article 14 at that time. The Icelandic Government observes that, following the referral of the present case to the EFTA Court, ESA has for the first time sent it a letter inquiring about the implementation of Article 14 of Directive 2001/24.

94. The Icelandic Government stresses that it is for the Government to implement the Directive into the Icelandic legal order.[35] It notes that, according to the ECJ, the implementation of a directive may, depending on its content, be effected in a Member State by way of general principles or a general legal context, provided that they are appropriate for the purpose of guaranteeing in fact the full application of the directive and that, where a provision of the directive is intended to create rights for individuals, the legal position arising from those general principles or that general legal context is sufficiently precise and clear and the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.[36]

95. The Icelandic Government submits that it has considerable discretion when it comes to the method of implementing directives. It asserts that the implementation of Directive 2001/24/EC into Icelandic law is appropriate for the purpose of guaranteeing full application of the Directive and that the Icelandic legislation is sufficient, precise and clear for the aims of the Directive to be achieved.

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35 Reference is made to Article 7 EEA.

36 Reference is made to Case C-388/07 *Age Concern England*, cited above, paragraph 42, Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23, and Case 363/85 *Commission* v *Italy* [1987] ECR 1733, paragraph 7.

93. Ríkisstjórn Íslands bendir á að innleiðing tilskipunarinnar hafi verið styrkt enn frekar með lögum nr. 44/2009. Samanburðartaflan, um þá innleiðingu, hafi verið send til Eftirlitsstofnunar EFTA 29. október 2009. Því næst hafi Eftirlitsstofnun EFTA, samkvæmt ríkisstjórn Íslands, framkvæmt samræmismat á innleiðingu tilskipunarinnar inn í íslenska réttarkerfið. Við það mat hafi komið upp ákveðin mál og í kjölfarið farið fram upplýsingaskipti milli Eftirlitsstofnunar EFTA og ríkisstjórnar Íslands. Þó hafi engar spurningar komið upp af hálfu Eftirlitsstofnunar EFTA varðandi innleiðingu 14. gr. á þeim tíma. Ríkisstjórn Íslands bendir á að í kjölfar þess að málinu hafi verið beint til EFTA-dómstólsins, hafi Eftirlitsstofnun EFTA þá fyrst sent bréf með fyrirspurn varðandi innleiðingu 14. gr. tilskipunar 2001/24.

94. Ríkisstjórn Íslands leggur áherslu á, að það sé ríkisstjórnarinnar að innleiða tilskipunina inn í íslenskt réttarkerfi.[35] Hún bendir á að samkvæmt Evrópudómstólnum geti innleiðing tilskipunarinnar, með hliðsjón af innihaldi hennar, verið virk í aðildarríki á grundvelli almennra meginreglna eða almenns lagaumhverfis, að því tilskildu að þær ráðstafanir séu viðeigandi í því skyni að tryggja í raun fulla beitingu tilskipunarinnar, og í tilvikum þar sem ákvæði tilskipunarinnar sé ætlað að búa til réttindi fyrir einstaklinga, sé réttarstaðan sem hljótist af þessum almennu meginreglum eða almenna lagaumhverfi nægjanlega nákvæm og skýr og einstaklingar geti fullvissað sig um öll réttindi sín og, þar sem það á við, byggt á þeim frammi fyrir dómstólum aðildarríkisins.[36]

95. Ríkisstjórn Íslands heldur því fram að hún hafi umtalsvert sjálfræði að því er varði aðferðir við innleiðingu tilskipana. Hún fullyrðir að innleiðing tilskipunar 2001/24/EB í íslensk lög sé viðeigandi í þeim tilgangi að tryggja fulla beitingu tilskipunarinnar, og íslensk löggjöf sé fullnægjandi, nákvæm og skýr fyrir markmiðin sem ná eigi fram með tilskipuninni.

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35 Tilvísun í 7. gr. EES.

36 Tilvísun í mál C-388/07 *Age Concern England*, áður tilvísað, 42. málsgr., mál 29/84 *Framkvæmdastjórnin* gegn *Þýskalandi* [1985] ECR 1661, 23. málsgr., og mál 363/85 *Framkvæmdastjórnin* gegn *Ítalíu* [1987] ECR 1733, 7. málsgr.

96. The Icelandic Government asserts that Article 14(1) of the English version of the Directive does not really prescribe how "known creditors" should be "individually informed". Although Article 14(2) of the English version of the Directive stipulates that the information should be provided "by the dispatch of a notice", the Directive is silent as to how, or where this notice should be dispatched. Consequently, it contends that the Directive gives Member States considerable discretion in determining how such notices should be dispatched.

97. In the view of the Icelandic Government, Icelandic legislation conforms to the Directive. Article 104(4) of the Act on Financial Undertakings provides that if a known creditor of the credit institution is resident in another Member State, the administrator shall, without delay, "inform the creditor" of the commencement of the winding up. Meanwhile, Article 86(1) and (2) of the Icelandic Bankruptcy Act, which applies to the winding up of financial undertakings in accordance with Article 102(1) of the Act on Financial Undertakings, provides that the liquidator should investigate whether any party who potentially has a claim against the bankruptcy estate is domiciled abroad and, if that is the case, he should "notify the party in question". The equal treatment of creditors is ensured as the same rules apply to all creditors irrespective of the Member State of residence.

98. The Icelandic Government submits that the second question referred, as modified by the Supreme Court of Iceland, should be answered as follows: -

"[A]s Article 14 of Directive 2001/24/EC on the reorganization and winding-up of credit institutions does not prescribe in detail how known creditors of a credit institution should be notified, the national legislation of a state, which is a member of the European Economic Area, can vest the Winding-up Board or other competent authority or agency with the competence to decide how information should be disclosed and whether it should be disclosed with an advertisement or other similar notifications."

96. Ríkisstjórn Íslands staðhæfir að 1. mgr. 14. gr. ensku útgáfunnar á tilskipuninni lýsi því ekki í raun, hvernig „tilkynna skuli hverjum og einum þekktum lánardrottni sérstaklega“. Þrátt fyrir að í 2. mgr. 14. tilskipunarinnar á ensku sé mælt fyrir um að gefa skuli upplýsingarnar „by the dispatch of a notice“, komi ekki fram í tilskipuninni hvernig eða hvar eigi að gefa þessar upplýsingar í formi tilkynningar. Af þessum sökum staðhæfir hún að tilskipunin veiti aðildarríkjum umtalsvert sjálfræði við að ákvarða hvernig senda skuli slíka tilkynningu.

97. Að mati ríkisstjórnar Íslands er íslenska löggjöfin í samræmi við tilskipunina. Í 4. mgr. 104. gr. laga um fjármálafyrirtæki sé kveðið á um, að ef að þekktur kröfuhafi lánastofnunar sé búsettur í öðru aðildarríki, skuli skiptastjóri án tafar „tilkynna honum“ um upphaf skiptanna. Jafnframt kveði 1. og 2. mgr. 86. gr. íslensku gjaldþrotaskiptalaganna, sem gildi um slit fjármálafyrirtæka, í samræmi við 1. mgr. 102. gr. laga um fjármálafyrirtæki, á um að skiptastjóri skuli leita sérstaklega vitneskju um hvort einhver sá, sem kunni að telja til kröfu á hendur þrotabúinu, sé búsettur erlendis, og sé það tilfellið skuli hann „tilkynna hlutaðeiganda“ um það. Jöfn meðferð lánardrottna sé tryggð, þar sem sömu reglur gildi um alla lánardrottna, án tillits til í hvaða aðildarríki þeir hafi búsetu.

98. Ríkisstjórn Íslands telur að svarið við annarri spurningunni sem beint sé til dómstólsins, eins og henni hafi verið breytt af Hæstarétti Íslands, ætti að vera eftirfarandi:

> *„[Þ]ar sem 14. gr. tilskipunar 2001/24/EB lýsir ekki nákvæmlega hvernig upplýsa skuli alla þekkta lánardrottna lánastofnunar, getur löggjöf samningsríkja Evrópska efnahagssvæðisins falið slitastjórn eða öðru lögbæru yfirvaldi, sem er til þess bært, að ákveða hvort að birta skuli upplýsingar með auglýsingu eða með öðrum svipuðum tilkynningum.“*

Government of Estonia

99. The Estonian Government takes the view that the reference for an advisory opinion has mainly arisen due to a difference in the Icelandic version of Article 14 of the Directive. It considers that a uniform interpretation of the Article is of great importance.

100. The Government of Estonia submits that all language versions of the Directive are authentic. However, the different language versions of EU law must be uniformly interpreted. In that context, it stresses that "in the case of divergence between the different language versions of a provision, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part",[37] and by reference to the real intention of the legislature.

101. On the basis of both the wording and the aim of the provision, the Government of Estonia submits that Article 14 of the Directive should be interpreted as a non-discretionary requirement on the administrative or judicial body of the home Member State to send individual notices to all known creditors who have their domiciles, normal place of residence or head offices in the Member State other than the home Member State.

102. The Estonian Government notes that the same wording as the English version of Article 14 of the Directive has been used in the Estonian, French, German, Italian, Finnish and Swedish language versions, which all include the requirement to individually inform all known creditors. It notes that use of the wording "the liquidator shall", provides a strong indication that the Article imposes an obligation and not a discretion on the liquidator to individually notify all known creditors. In its view, the phrase "individually inform" should be interpreted as a requirement to send an individually addressed notice to a known creditor.[38] It

[37] Reference is made to Case C-426/05 *Tele2 Telecommunication GmbH* v *Telekom-Control-Kommission* [2008] ECR I-685, paragraph 25, and Case C-56/06 *Euro Tex Textilverwertung GmbH* v *Hauptzollamt Duisburg* [2007] ECR I-4859, paragraph 27.

[38] Reference is made to the Oxford English Dictionary definition of "individual".

Ríkisstjórn Eistlands

99. Ríkisstjórn Eistlands lítur svo á að beiðnin um ráðgefandi áliti hafi aðallega komið upp vegna mismunar í íslensku útgáfu 14. gr. tilskipunarinnar. Hún telur að samræmd túlkun greinarinnar sé afar mikilvæg.

100. Ríkisstjórn Eistlands heldur því fram að allar tungumálaútgáfur tilskipunarinnar séu jafngildar. Þó verði að túlka mismunandi tungumálaútgáfur ESB-réttar á samræmdan hátt. Í þessu samhengi leggur hún áherslu á „að þegar að um er að ræða ósamræmi, á milli mismunandi tungumálaútgáfa ákvæðis, skuli ákvæðið sem um sé að ræða túlkað með vísan til tilgangs og almennrar fyrirætlanar með reglunum, sem það sé hluti af“[37] og með vísan til raunverulegra áforma með löggjöfinni.

101. Ríkisstjórn Eistlands heldur því fram, hvort heldur sem er á grundvelli orðalags eða markmiðsins með ákvæðinu, að túlka beri 14. gr. tilskipunarinnar sem fortakslausa kröfu, sem ekki lúti ákvörðunum lögbærra yfirvalda eða dómsmálayfirvalda heimaaðildarríkisins, um að senda sérstakar tilkynningar til allra þekktra lánardrottna sem séu með fasta búsetu, lögheimili eða aðalskrifstofu í öðru aðildarríki en heimaaðildarríkinu.

102. Ríkisstjórn Eistlands bendir á að sama orðalag og í notað sé í ensku útgáfu 14. gr. tilskipunarinnar hafi verið notað í eistnesku, frönsku, þýsku, ítölsku, finnsku og sænsku tungumálaútgáfunum, sem allar feli í sér kröfuna um sérstaka tilkynningu til allra þekktra lánardrottna. Hún bendir á að orðalagið „skiptastjóri skal“ gefi sterka vísbendingu um að greinin leggi skyldur, og ekki sjálfræði, á skiptastjóra um að tilkynna sérstaklega öllum þekktum lánardrottnum. Það sé sjónarmið hennar að túlka beri setninguna „individually inform“ sem kröfu um að senda tilkynningu sem sérstaklega sé beint til hvers og eins þekkts lánardrottins.[38] Hún heldur því fram að þessi skilningur á

[37] Tilvísun í mál C-426/05 *Tele2 Telecommunication GmbH* gegn *Telekom-Control-Kommission* [2008] ECR I-685, 25. málsgr., og mál C-56/06 *Euro Tex Textilverwertung GmbH* gegn *Hauptzollamt Duisburg* [2007] ECR I-4859, 27. málsgr.

[38] Tilvísun í skilgreiningu Oxford English Dictionary á „individual“.

submits that this understanding of Article 14 of the Directive is supported by the wording of recital 20 to the Directive.

103. The Estonian Government contends that nothing in Article 14 or the rest of the Directive implies that the competent authority could have a discretion whether or not to individually inform creditors.

104. The Estonian Government stresses that foreign creditors are in a weaker position in comparison to creditors of the home Member State. It contends that the objective of the Directive is to create a legal framework to protect the interests of creditors who are not resident in the Member State in which winding-up proceedings are initiated.[39] In its view, this explains why Article 14 of the Directive requires that all foreign creditors be individually informed.

105. The Estonian Government notes that, pursuant to Article 13 of the Directive, in order to ensure that known creditors have the possibility of lodging their claims within the prescribed time limits, the liquidator or relevant authority must publish a decision to open winding-up proceedings in the Official Journal of the European Union and in local newspapers of the host Member States. In addition, pursuant to Article 14, when the winding-up proceedings are opened, the administrator has to individually notify all known creditors.

106. The Estonian Government considers that these two requirements are complementary and cumulative. It stresses that the duties set out in Articles 13 and 14 of the Directive cannot be regarded as alternative duties but are independent and absolute obligations which the national legislation must achieve. In its view, these obligations cannot be subject to the discretion of the competent authority. Moreover, it submits, individually informing a known creditor by a "notice" should not be understood as a general

[39] Reference is made to the Statement of the Council's Reasons included in Council Common Position No 43/2000, OJ 2000 C 300, p. 13, II Objectives, and III. D Analysis of the Common Position Title III.

14. gr. tilskipunarinnar sé studdur orðalagi 20. liðar inngangsorða tilskipunarinnar.

103. Ríkisstjórn Eistlands staðhæfir að ekkert í 14. gr., eða því sem á eftir kemur í tilskipuninni, gefi í skyn að lögbært yfirvald geti sjálft ráðið því hvort það eigi að að upplýsa hvern og einn lánardrottinn sérstaklega eða ekki.

104. Ríkisstjórn Eistlands leggur áherslu á að erlendir lánardrottnar séu í veikari stöðu í samanburði við lánardrottna heimaaðildarríkisins. Hún staðhæfir að markmiðið með tilskipuninni sé að skapa lagaramma til að verja hagsmuni lánardrottna, sem ekki séu búsettir í því aðildarríki þar sem slitameðferð hefjist.[39] Það sé mat hennar að það útskýri hvers vegna þess sé krafist í 14. gr. tilskipunarinnar, að allir erlendir lánardrottnar fái sérstaka tilkynningu.

105. Ríkisstjórn Eistlands bendir á að samkvæmt 13. gr. tilskipunarinnar, skuli skiptastjóri, til að tryggja að þekktir lánardrottnar hafi möguleika á því að lýsa kröfum sínum innan tilskilinna tímamarka, birta ákvörðun um upphaf slitameðferðar í Stjórnartíðindum Evrópusambandsins og í dagblöðum viðkomandi staða í gistiaðildarríkinu. Að auki skuli skiptastjóri samkvæmt 14. gr. tilkynna öllum þekktum lánardrottnum sérstaklega um það þegar slitameðferð hefjist.

106. Ríkisstjórn Eistlands telur að þessar tvær kröfur séu til fyllingar og uppsöfnunar. Hún leggur áherslu á að ekki sé hægt að líta á skyldurnar sem settar séu fram í 13. og 14. gr. tilskipunarinnar sem valkvæðar, heldur séu þær sjálfstæðar og fortakslausar skyldur sem innlend löggjöf þurfi að uppfylla. Það sé sjónarmið hennar að þessar skyldur geti ekki verið háðar mati lögbæra yfirvaldsins. Enn fremur heldur hún því fram að ekki beri að skilja það, að upplýsa sérstaklega þekktan lánardrottinn með

[39] Tilvísun í yfirlýsingu rökstuðning ráðsins þ.m.t. sameiginlegu afstöðu ráðsins nr. 43/2000, Stjtíð. ESB 2000 C 300, bls. 13, II. markmið, og III. D Greining á sameiginlegri afstöðu III bálkur.

newspaper advertisement or any other means of notification intended to notify more than one person at once.[40]

107. The Estonian Government concludes that: ·

"taking into account the purpose, general scheme as well as the wording of the Directive in most language versions, that have been analysed, it does not comply with paragraph 1 of Article 14 of Directive 2001/24/EC on the reorganisation and winding up of credit institutions if the national legislation of a state, which is a member of the European Economic Area, vests the Winding-up Board or other competent authority or agency with competence to decide whether information should be disclosed on the aspects described in the provision, with an advertisement published abroad instead of individually notifying all known creditors."

The EFTA Surveillance Authority

The first question

108. ESA notes that the order by Reykjavík District Court which formulates the request for the advisory opinion indicates the discrepancy between both the wording and meaning of the English and Icelandic versions of the Directive. ESA submits that there are two differences between the two versions. The first distinction is the reference to "known" creditors and the implicit distinction between "known" and "unknown" creditors in Article 14 of the English version of the Directive. ESA indicates that the Icelandic version makes no reference to "known" or "unknown" creditors and so does not make this distinction.

109. The second difference, ESA continues, is linked to the first and refers to the difference in treatment between known and unknown creditors. ESA notes that, pursuant to the English version of the Directive, the competent authorities of the home Member State or the liquidator have the legal obligation to notify individually each

[40] Reference is made to recital 20 in the preamble to the Directive.

„tilkynningu“, sem almenna dagblaðsauglýsingu eða aðra tilkynningaraðferð, sem ætluð sé til að upplýsa fleiri en einn einstakling í einu.[40]

107. Niðurstaða ríkisstjórnar Eistlands er: ·

„Að teknu tilliti til tilgangs og almennrar fyrirætlanar og orðalags tilskipunarinnar, á flestum tungumálaútgáfum sem hafa verið greindar, samrýmist það ekki 1. mgr. 14. gr. tilskipunar 2001/24/EB um endurskipulagningu og slit lánastofnanna, að í lögum ríkis, sem er aðili að samningum um Evrópska efnahagssvæðið, að lagt sé í vald slitastjórnar eða annars lögbærs yfirvalds eða sýslunarmanns að ákveða hvort upplýsa skuli um þau atriði, sem þar eru greind, með auglýsingu birtri erlendis, í stað sérstakrar tilkynningar til hvers og eins þekkts lánardrottins.“

Eftirlitsstofnun EFTA

Fyrsta spurningin

108. Eftirlitsstofnun EFTA bendir á að úrskurður Héraðsdóms Reykjavíkur, þar sem óskað sé eftir ráðgefandi áliti, gefi til kynna að ósamræmi sé á milli orðalags og merkingar ensku útgáfu tilskipunarinnar og þeirrar íslensku. Eftirlitsstofnun EFTA heldur því fram að það séu tvö atriði sem séu ólík í þessum tveimur útgáfum. Fyrsti greinarmunurinn sé tilvísunin til „þekktra“ lánardrottna og sá greinarmunur sem felst í tilskipuninni varðandi „þekkta“ og „óþekkta“ lánardrottna í 14. gr. ensku útgáfunnar. Eftirlitsstofnun EFTA bendir á að ekki sé skírskotað til „þekktra“ og „óþekktra“ lánardrottna í íslensku útgáfunni og þar sé þessi greinarmunur ekki gerður.

109. Annað atriðið sem greinir hér á milli, heldur Eftirlitsstofnun EFTA áfram, sé tengt því fyrra og vísi í mismuninn á meðferð milli þekktra og óþekktra lánardrottna. Eftirlitsstofnun EFTA bendir á að samkvæmt ensku útgáfunni af tilskipuninni, beri lögbæru yfirvaldi heimaaðildarríkisins eða skiptastjóra, lagaskylda til að tilkynna hverjum og einum þekktum lánardrottni sérstaklega.

[40] Tilvísun í 16. og 17. lið inngangsorða tilskipunar 2001/24/EB.

known creditor. In that connection, Article 14(2) of the Directive sets out the information that known creditors must receive. Conversely, the Icelandic version of the Directive does not provide for an obligation for individual notification to known creditors.

110. Given the divergence in the wording – and consequent legal obligations – in the Icelandic and English versions of the Directive, ESA submits that legal certainty is jeopardised.

111. ESA contends that the different language versions must be given a uniform interpretation and, hence, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.[41] Moreover, in construing a provision of secondary EU law, preference should as far as possible be given to the interpretation which renders the provision consistent with the general principles of EU law and, more specifically, with the principle of legal certainty.[42] It observes that, according to case-law, the wording used in one language version of a European law provision cannot serve as the sole basis of the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement for the uniform application of European law.[43]

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41 Reference is made to Case C-341/01 *PlatoPlastik Robert Frank GmbH* v *Caropack Handelsgesellschaft mbH* [2004] ECR I-4883, paragraph 64, and *M and Others*, cited above, paragraph 44.

42 Reference is made to *M and Others*, cited above, and Case C-1/02 *Privat-Molkerei Borgmann GmbH & Co. KG* v *Hauptzollamt Dortmund* [2004] ECR I-3219, paragraph 30.

43 Reference is made to *Institute of the Motor Industry*, cited above, paragraph 16; Case C-408/06 *Landesanstalt für Landwirtschaft* v *Franz Götz* [2007] ECR I-11295, paragraph 30; Case C-239/07 *Julius Sabatauskas and Others* [2008] ECR I-7523, paragraph 38; and Case C-187/07 *Criminal proceedings against Dirk Endendijk* [2008] ECR I-2115, paragraph 23. Further reference is made to Case C-63/06 *UAB Profisa* v *Muitin's departamentas prie Lietuvos Respublikos finan' ministerijos* [2007] ECR I-3239, paragraphs 13 and 14, with reference to further case-law: Case 26/69 *Erich Stauder* v *City of Ulm* [1969] ECR 419, paragraph 3; Case 55/87 *Alexander Moksel Import und Export GmbH & Co. Handels-KG* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1988] ECR 3845, paragraph 15; Case C-296/95 *The Queen* v *Commissioners of Customs and Excise, ex parte EMU Tabac SARL and Others* [1998] ECR I-1605, paragraph 36; *Bouchereau*, cited above, paragraph 14; Case C-482/98 *Italy* v *Commission* [2000] ECR I-10861, paragraph 49; and *Borgmann*, cited above, paragraph 25.

Í því samhengi séu í 2. mgr. 14. gr. tilskipunarinnar taldar upp þær upplýsingar sem þekktir lánardrottnar verði að fá. Gagnstætt þessu kveði, íslenska útgáfa tilskipunarinnar, ekki á um skyldu um sérstaka tilkynningu til þekktra lánardrottna.

110. Í ljósi ósamræmis varðandi orðalag – og af þeim sökum lagalegra skuldbindinga – samkvæmt íslensku og ensku útgáfu tilskipunarinnar, sé réttarvissu teflt í tvísýnu, að mati Eftirlitsstofnunar EFTA.

111. Eftirlitsstofnun EFTA heldur því fram að túlka beri mismunandi tungumálaútgáfur á samræmdan hátt og því verði að túlka ákvæðið, sem um ræði, með vísan til tilgangs og almennrar fyrirætlanar reglnanna sem það sé hluti af.[41] Enn fremur beri við túlkun á ákvæðum afleidds ESB-réttar að veita þeirri túlkun meira vægi, eftir því sem hægt sé, sem leiði af sér samræmi við almennar meginreglur ESB-réttar og þá sérstaklega meginregluna um réttarvissu.[42] Hún bendir á að samkvæmt dómaframkvæmd, sé ekki hægt að nota orðalag í einni tungumálaútgáfu ákvæða Evrópuréttar, sem eina grundvöll túlkunar þess ákvæðis, eða láta hana vega þyngra en aðrar tungumálaútgáfur. Slík nálgun yrði ósamrýmanleg kröfunni um samræmda beitingu Evrópuréttar.[43]

41 Tilvísun í mál C-341/01 *PlatoPlastik Robert Frank GmbH* gegn *Caropack Handelsgesellschaft mbH* [2004] ECR I-4883, 64. málsgr., og *M and Others*, áður tilvitnað, 44. málsgr.

42 Tilvísun í *M and Others* áður tilvitnað, og mál C-1/02 *Privat-Molkerei Borgmann GmbH & Co. KG* gegn *Hauptzollamt Dortmund* [2004] ECR I-3219, 30. málsgr.

43 Tilvísun í *Institute of the Motor Industry*, áður tilvitnað, 16. málsgr., mál C-408/06 *Landesanstalt für Landwirtschaft* gegn *Franz Götz* [2007] ECR I-11295, 30. málsgr., mál C-239/07 *Julius Sabatauskas and Others* [2008] ECR I-7523, 38. málsgr. og mál C-187/07 *Criminal proceedings against Dirk Endendijk* [2008] ECR I-2115, 23. málsgr. Frekari tilvísun í mál C-63/06 *UAB Profisa* gegn *Muitin's departamentas prie Lietuvos Respublikos finans' ministerijos* [2007] ECR I-3239, 13. og 14. málsgr., með tilvísun í frekari dómaframkvæmd: Mál 26/69 *Erich Stauder* gegn *City of Ulm* [1969] ECR 419, 3. málsgr., mál 55/87 *Alexander Moksel Import und Export GmbH & Co. Handels-KG* gegn *Bundesanstalt für landwirtschaftliche Marktordnung* [1988] ECR 3845, 15. málsgr., mál C-296/95 *The Queen* gegn *Commissioners of Customs and Excise, ex parte EMU Tabac SARL and Others* [1998] ECR I-1605, 36. málsgr., *Bouchereau*, áður tilvitnað, 14. málsgr., mál C-482/98 *Ítalía* gegn *Framkvæmdastjórninni* [2000] ECR I-10861, 14. málsgr., og *Borgmann*, áður tilvitnað, 25. málsgr.

112. ESA submits that the substance of the rule in Article 14 of the Directive must be construed by reference to the other language version of the Directive as well as to the purpose and general scheme of the rules of which it forms part.

113. ESA notes the differences between Article 14 of the Icelandic version of the Directive and the English, French, German, Spanish, Italian, Greek and Norwegian versions which provide for a difference in treatment in relation to known creditors in the sense that in relation to known creditors, individual notification is required.

114. ESA contends that Article 14 of the Directive must be read in light of the purpose set out in recital 20 to the Directive, which is identical in all language versions, including Icelandic. It submits further that the general scheme of the rules provided for by the Directive demonstrates that the European legislature clearly intended to establish an obligation of individual information for known creditors. In its view, this is illustrated by the separation and distinction made in Articles 13 and 14 of the Directive between the considerations and conditions which govern the announcement of the decision to open winding-up proceedings and the provision of information to known creditors.

115. ESA submits that, in light of the above, the competent authorities or the liquidator of the home Member State shall provide the information listed in Article 14(2) of the Directive to known creditors on an individual basis and the Icelandic version of the Directive should be read in this light.

116. ESA stresses that the email the Plaintiff sent to the Kaupthing winding-up board on 29 October 2008, intending to lodge claims over the estate, although apparently not a proper method of lodging a claim, clearly indicates that the Plaintiff was a known creditor. In that regard, ESA contends further that, as the Plaintiff is a credit institution established in the EEA, its domicile, place of residence, or head office could be identified even if it were not already known.

112. Eftirlitsstofnun EFTA heldur því fram að efni reglunnar í 14. gr. tilskipunarinnar beri að túlka með hliðsjón af öðrum útgáfum tilskipunarinnar og tilgangi og almennri fyrirætlan með reglunum sem hún sé hluti af.

113. Eftirlitsstofnun EFTA bendir á mismuninn á milli íslensku útgáfu 14. gr. og þeirrar ensku, frönsku, þýsku, spænsku, ítölsku, grísku og norsku, sem kveði á um ólíka meðferð varðandi þekkta lánardrottna, í þeim skilningi að í tengslum við þekkta lánardrottna sé krafist sérstakrar tilkynningar til hvers og eins.

114. Eftirlitsstofnun EFTA staðhæfir að skýra skuli 14. gr. tilskipunarinnar í ljósi tilgangsins sem settur sé fram í 20. tölulið formálsorða tilskipunarinnar, sem sé nákvæmlega eins á öllum tungumálum, þ.m.t. íslensku. Hún staðhæfir jafnframt að almenn fyrirætlan með reglunum, sem kveðið sé á um í tilskipuninni, sýni að með Evrópulöggjöfinni hafi augljóslega átt að koma á þeirri skyldu að hver og einn lánardrottinn yrði upplýstur sérstaklega. Það sé mat hennar að þetta komi fram, með þeim aðskilnaði og greinarmun, sem gerður sé í 13. og 14. gr. tilskipunarinnar, á milli sjónarmiða og skilyrða sem stýri tilkynningu ákvörðunarinnar um að hefja slitameðferð og á tilhögun upplýsingamiðlunar til þekktra lánardrottna.

115. Eftirlitsstofnun EFTA staðhæfir að í ljósi ofangreinds, skuli lögbær yfirvöld eða skiptastjóri heimaaðildarríkis, veita hverjum og einum þekktum lánardrottni upplýsingarnar, sem taldar séu upp í 2. mgr. 14. gr. tilskipunarinnar og íslenska útgáfa tilskipunarinnar skuli skýrð í þessu ljósi.

116. Eftirlitsstofnun EFTA leggur áherslu á að tölvupósturinn sem stefnandi hafi sent slitastjórn Kaupþings 29. október 2008, þar sem hann hefði ætlað að lýsa kröfu í búið, sem þrátt fyrir að hafa augljóslega ekki verið viðeigandi aðferð við að lýsa kröfu, bendi greinilega til þess að stefnandi hafi verið þekktur lánardrottinn. Eftirlitsstofnun EFTA staðhæfir enn frekar, hvað þetta varði, að þar sem að stefnandi sé lánastofnun, með staðfestu í EES, hefði verið hægt að finna búsetu, lögheimili eða aðalskrifstofu hans, jafnvel þó að það hefði ekki verið þekkt fyrirfram.

117. ESA submits that, as the Plaintiff was a known creditor, the Defendant should have individually informed it regarding the specific conditions for the lodging of its claims. That it did not do so means that the Plaintiff's rights to receive individual notification containing the requisite information as provided for under the Directive have not been respected. ESA contends that the answer to the first question referred must be that: ·

"it does not accord with the provisions of Article 14 of Directive 2001/24/EC of 4 April 2001, on the reorganisation and winding up of credit institutions, to publish an invitation to lodge claims for known creditors which have their domicile, permanent residence or head offices in other Member States in the manner effected by the Winding-Up Board of Kaupthing Bank hf. which is described in the order for reference".

The second question

118. ESA considers that the second question referred by Reykjavík District Court in the wording of 8 November 2011 contains a certain ambiguity. The question could either be read as asking whether the EEA Agreement requires Article 14 of Directive 2001/24 that has been made part of the EEA Agreement to be directly applicable and take precedence over the national rule that fails to transpose the relevant EEA rule correctly into national law or it could simply refer to the practical conclusions which the winding-up board should draw in the proceedings before it.

119. On the matter of direct applicability, ESA submits that, although it could be argued that Article 7 EEA and Protocol 35 to the EEA Agreement are relevant, neither provision provides an answer to the question posed.

120. ESA submits that, according to the Court's case-law, it is inherent in the objectives of the EEA Agreement that national courts are bound to interpret national law, and in particular legislative provisions specifically adopted to transpose EEA rules into

117. Eftirlitsstofnun EFTA heldur því fram að þar sem að stefnandi hafi verið þekktur lánardrottinn, hefði stefndi átt að tilkynna honum sérstaklega, um tilgreind skilyrði varðandi kröfulýsingu. Það að hann hafi ekki gert það, merki að réttur stefnanda til þess að fá sérstaka tilkynningu með nauðsynlegum upplýsingum, eins og kveðið sé á um í tilskipuninni, hafi ekki verið virtur. Eftirlitsstofnun EFTA staðhæfir að svarið við fyrstu spurningunni skuli vera:

„Það samræmist ekki ákvæðum 14. gr. tilskipunar 2001/24/EB frá 4. apríl 2001 um endurskipulagningu og slit lánastofnana, að birta boð um að lýsa kröfum, fyrir þekkta lánardrottna sem eiga lögheimili, fasta búsetu eða höfuðstöðvar í öðrum samningsríkjum, á þann máta sem slitastjórn Kaupþings banka hf. hefur ástundað og sem lýst er í beiðni um ráðgefandi álit.“

Önnur spurningin

118. Eftirlitsstofnun EFTA telur að önnur spurningin sem Héraðsdómur Reykjavíkur beindi til dómstólsins, með orðalaginu frá 8. nóvember 2011, innihaldi ákveðna tvíræðni. Hægt sé að lesa spurninguna annað hvort sem svo, að spurt sé hvort að EES-samningurinn krefjist þess að 14. gr. tilskipunar 2001/24, sem tekin hafi verið upp í EES-samninginn, gildi án frekari lögfestingar og hafi forgang fram yfir landsrétt, sem ekki hafi tekið réttilega upp í landsrétt viðkomandi EES-reglu, eða hún gæti einfaldlega vísað til hagnýtu niðurstöðunnar, sem að slitastjórnin ætti að ná við málsmeðferðina.

119. Um gildi ákvæðisins án frekari lögfestingar, staðhæfir Eftirlitsstofnun EFTA að, þrátt fyrir að hægt sé að færa rök fyrir því að 7. gr. EES og bókun 35 við EES-samninginn hafi þýðingu, veiti hvorugt ákvæðið svar við spurningunni sem sé fram lögð.

120. Eftirlitsstofnun EFTA heldur því fram, að samkvæmt dómaframkvæmd dómstólsins, sé það innbyggt í markmið EES-samningsins að dómstólar aðildarríkjanna séu bundnir af því að túlka landsrétt, og einkum lagaákvæði sem séu sérstaklega samþykkt til að innleiða EES-reglur inn í landsrétt, eins og

national law, as far as possible in conformity with EEA law.[44] It contends that the obligation of harmonious interpretation requires a national court to interpret national law in the light of an inadequately implemented or a non-implemented directive even in a case against an individual[45] or between individuals, as in the case at hand. The national court must apply the interpretative methods recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule.[46] However, in its view, this duty of harmonious interpretation cannot lead to a *contra legem* interpretation or lead to the judicial re-writing of legislation.

121. ESA submits that, if the harmonious interpretation of the implementing measure with the text and purpose of the Directive is not possible, the second question referred becomes more complicated as the EEA Agreement does not entail a transfer of legislative powers or require that non-implemented EEA rules take precedence over conflicting national rules, including those which fail to transpose the relevant EEA rules correctly into national law.[47] In that regard, it submits that EEA law does not require that individuals and economic operators be able to rely directly on non-implemented EEA rules before national courts.[48] ESA contends that this must be interpreted to mean that EEA law does not have direct effect. Therefore, in its view, Article 14 of the Directive cannot take precedence over the conflicting Icelandic rules which fail to transpose the provision correctly into the Icelandic legal order.

122. ESA observes that, according to case-law, in cases of conflict between national law and non-implemented EEA law, the EFTA

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44 Reference is made to Case C-160/01 *Karen Mau* v *Bundesanstalt für Arbeit* [2003] ECR I-4791, paragraph 34, Joined Cases C-397/01 to C-402/01 *Bernhard Pfeiffer and Others* v *Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835, paragraph 114, and Case C-555/07 *Seda Kücükdeveci* v *Swedex GmbH & Co. KG* [2010] ECR I-365, paragraphs 45-48.

45 Reference is made to Case C-106/89 *Marleasing SA* v *La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, paragraphs 7 and 8.

46 Reference is made to *Criminal proceedings against A*, cited above, paragraph 39.

47 Ibid., paragraph 40.

48 Reference is made to *Karlsson*, cited above, paragraph 28.

hægt er í samræmi við EES-rétt.[44] Hún staðhæfir að skyldan um samræmda túlkun, krefjist þess af innlendum dómstólum að þeir túlki landsrétt í ljósi tilskipunar, sem sé innleidd á ófullnægjandi máta eða hafi ekki verið innleidd, jafnvel í málum gegn einstaklingum[45] eða á milli einstaklinga eins og í þessu máli. Héraðsdómur Reykjavíkur verði að beita túlkunaraðferðum, sem viðurkenndar séu í landsrétti, eins og hægt sé, til að ná því markmiði sem leitast er við með viðkomandi EES-reglu.[46] Það sé mat hennar að þessi skylda um samræmda túlkun geti þó ekki leitt til túlkunar í bága við lög eða leitt til þess að lögin séu endursamin fyrir dómi.

121. Eftirlitsstofnun EFTA heldur því fram að samræmd túlkun á innleiðingarráðstöfunum með texta og tilgangi tilskipunarinnar, sé ekki möguleg, önnur spurningin sem beint sé til dómstólsins verði flóknari þar sem að EES-samningurinn feli ekki í sér yfirfærslu á löggjafarvaldi eða krefjist þess að reglur, sem ekki hafi verið innleiddar gangi framar en landsreglurnar sem þær stangist á við, þ.m.t. þær sem ekki innleiði viðkomandi EES-reglur rétt inn í landsrétt.[47] Hún heldur því fram, hvað þetta varðar, að EES-réttur krefjist þess ekki að einstaklingar og aðilar í atvinnurekstri geti reitt sig beint á EES-reglur, sem ekki hafi verið innleiddar, frammi fyrir landsbundnum dómstólum.[48] Eftirlitsstofnun EFTA staðhæfir að þetta beri að túlka á þann hátt að EES-réttur hafi ekki bein réttaráhrif. Því sé það sjónarmið hennar að 14. gr. tilskipunarinnar geti ekki gengið framar en íslenskar reglur sem stangist á við hana og sem hafi lögfest ákvæðið ekki réttilega inn í íslenskt réttarkerfi.

122. Eftirlitsstofnun EFTA bendir á, að samkvæmt dómaframkvæmd, í málum þar sem landsréttur og EES-réttur, sem ekki hafi verið

44 Tilvísun í mál C-160/01 *Karen Mau* gegn *Bundesanstalt für Arbeit* [2003] ECR I-4791, 34. málsgr., sameinuð mál C-397/01 to C-402/01 *Bernhard Pfeiffer and Others* gegn *Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835, 114. málsgr. og mál C-555/07 *Seda Kücükdeveci* gegn *Swedex GmbH & Co. KG* [2010] ECR I-365, 45.-48. málsgr.

45 Tilvísun í mál C-106/89 *Marleasing SA* gegn *La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, 7. og 8. málsgr.

46 Tilvísun í *Meðferð sakamáls* gegn *A*, áður tilvitnað, 39. málsgr.

47 Ibid., 40. málsgr.

48 Tilvísun í mál *Karls K. Karlssonar hf.*, áður tilvitnað, 28. málsgr.

States may decide whether, under their national legal order, national administrative and judicial organs can apply the relevant EEA rule directly and thereby avoid the violation of EEA law.[49] Alternatively, the EFTA State is obliged to provide compensation for loss and damage caused to individuals and economic operators, in accordance with the principle of State liability, which is integral to the EEA Agreement.[50] As a further alternative, ESA notes that, although pursuant to Article 31 SCA it may become involved by commencing proceedings against Iceland, this possibility may not be of great practical value to the parties to the main proceedings.

123. As regards the practical consequences for the winding-up board, ESA stresses that, under the principle of effectiveness, the detailed procedural rules governing actions for safeguarding an individual's rights under EU and EEA law must not make it, in practice, impossible or excessively difficult to exercise the rights conferred by EU law.[51] Likewise, according to the principle of equivalence, the rights conferred on the Plaintiff by Article 14 of the Directive must be respected in a way which is not less favourable than the manner in which the national legal order protects similar rights under purely domestic legislation.[52] Moreover, if Icelandic bankruptcy law permits a winding-up board to admit a claim that has been lodged late due to a procedural error committed by the board, ESA submits that such a solution should be extended to remedy the problem in the present case. However, in this regard, ESA considers that the order for reference contains insufficient information to offer further guidance.

124. ESA proposes that the second question referred be answered as follows: -

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49 Reference is made to *Criminal proceedings against A*, cited above, paragraph 41.

50 Ibid., paragraph 42, with further reference to *Sveinbjörnsdóttir*, paragraph 62 et seq., and *Karlsson*, paragraphs 25 and 37-48, both cited above.

51 Reference is made to Case C-279/09 *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH* v *Bundesrepublik Deutschland*, judgment of 22 December 2010, not yet reported, paragraph 28.

52 Reference is made to Joined Cases C-89/10 and C-96/10 *Q-Beef and Bosschaert*, judgment of 8 September 2011, not yet reported, paragraph 32.

innleiddur, stangist á, geti EFTA-ríkin ákveðið hvort innlendir úrskurðaraðilar á stjórnsýslu- og dómstólastigi geti beitt viðkomandi EES-reglu beint og þannig forðast að brjóta gegn EES-rétti.[49] Að öðrum kosti, sé EFTA-ríkið skyldugt til að greiða bætur fyrir tap og tjón, sem einstaklingar og aðilar í atvinnurekstri hafi orðið fyrir, í samræmi við meginregluna um bótaábyrgð ríkisins, sem sé óaðskiljanlegur hluti EES-samningsins.[50] Sem annan valkost, bendi Eftirlitsstofnun EFTA á að þó að hún geti orðið þátttakandi samkvæmt 31. gr. ESE-samningsins með því að hefja málsmeðferð gegn Íslandi sé sá möguleiki ekki mjög gagnlegur fyrir aðilana í aðalmálsmeðferðinni.

123. Eftirlitsstofnun EFTA leggur áherslu á, að því er varðar hagnýtar afleiðingar fyrir slitastjórnina, að samkvæmt meginreglunni um skilvirkni, megi nákvæmar málsmeðferðarreglur, sem stýri aðgerðum við verndun réttinda einstaklingsins samkvæmt ESB- og EES-rétti ekki leiða til þess, í reynd, að það verði ómögulegt eða óhóflega erfitt að nýta réttindin sem ESB-rétturinn veiti.[51] Á sama hátt, samkvæmt meginreglunni um jafngildi, verði að virða þau réttindi sem 14. gr. tilskipunarinnar veiti stefnanda, á hátt sem ekki sé óhagfelldari en sú vernd sem innlenda réttarkerfið veiti sambærilegum réttindum í tilvikum þar sem beitt sé landsbundinni löggjöf.[52] Jafnframt heldur Eftirlitsstofnun EFTA því fram að ef íslenskur gjaldþrotaskiptaréttur heimili slitastjórnum að samþykkja kröfur, sem lýst hafi verið seint, vegna mistaka stjórnarinnar við málsmeðferð, ætti slík lausn að geta leyst vandann í þessu máli. Þó telji Eftirlitsstofnun EFTA að þessu leyti að beiðnin um ráðgefandi álit veiti ekki nægilegar upplýsingar til að hægt sé að veita frekari leiðbeiningar.

124. Eftirlitsstofnun EFTA leggur til að svarið við annarri spurningunni sem vísað er til dómstólsins skuli vera eftirfarandi:

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49 Tilvísun í *Meðferð sakamáls* gegn *A*, áður tilvitnað, 41. málsgr.

50 Ibid., 42. málsgr., með frekari tilvísun í mál Erlu Maríu *Sveinbjörnsdóttur*, 62. málsgr. og áfram, og *Karls K. Karlssonar hf.*, 25. og 37 -48 málsgr. og 37.-48. málsgr., bæði áður tilvitnuð.

51 Tilvísun í mál C-279/09 *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH* gegn *Bundesrepublik Deutschland*, dómur frá 22. desember 2010, enn óbirtur, 28. málsgr.

52 Tilvísun í sameinuð mál C-89/10 og C-96/10 *Q-Beef and Bosschaert*, dómur frá 8. september 2011, enn óbirtur, 32. málsgr.

"the national court has an obligation of harmonious interpretation of the national measure inadequately transposing Directive 2001/24/EC in the Icelandic legal order in so far as that is possible according to the interpretative methods that are recognised by national law. The principles of equivalence and effectiveness require that the detailed national procedural rules governing actions for safeguarding rights which individuals derive from EEA law must be such that they are not less favourable than those governing similar national actions and that they do not render practically impossible or excessively difficult the exercise of rights conferred by EEA law."

The European Commission

The different language versions

125. The Commission submits that the differences between the Icelandic version of the Directive and the English and other versions are material. These differences have a direct bearing on both the present dispute and Iceland's obligations in transposing the Directive into national law.

126. The Commission notes that while the title of Article 14 of the English version of the Directive is entitled "Provision of information to known creditors", the Icelandic version makes no reference to "known" or "unknown" creditors. Unlike the English version, the Icelandic version of the Directive does not provide for an obligation to individually notify known creditors.

127. The Commission submits that, according to settled ECJ case-law, the different language versions of a text of EU law must be given an uniform interpretation and, hence, in the case of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules which it forms a part.[53] In construing a provision of secondary EU law, preference should as far as possible be given to the interpretation which renders the provision consistent with

[53] Reference is made to *PlatoPlastik Robert Frank*, paragraph 64, and *M and Others*, paragraph 44, both cited above.

„Héraðsdómi Reykjavíkur ber skylda til að túlka lögin, sem innleiddu, á ófullnægjandi máta, tilskipun 2001/24/EB inn í íslenskt réttarkerfi, á samræmdan hátt, að því marki sem mögulegt er samkvæmt túlkunaraðferðum sem viðurkenndar eru að landsrétti. Meginreglan um jafngildi og skilvirkni krefst þess að nákvæmar landsbundnar málsmeðferðarreglur, sem gilda um aðgerðir til þess að standa vörð um réttindi einstaklinga, sem leiða af EES-rétti, verði að vera á þann hátt að þær séu ekki óhagstæðari en þær sem gilda um líkar landsbundnar aðgerðir og þær mega ekki verða til þess, í reynd, að það verði ómögulegt eða óhóflega erfitt að nýta réttindin sem ESB-rétturinn veitir.“

Framkvæmdastjórn Evrópusambandsins

Mismunandi tungumálaútgáfur

125. Framkvæmdastjórnin heldur því fram að mismunurinn á milli íslensku útgáfu tilskipunarinnar og þeirrar ensku og annarra útgáfa, sé efnislegur. Þessi mismunur hafi beina þýðingu, bæði fyrir þessa deilu og skyldur Íslands til innleiðingar tilskipunarinnar í landsrétt.

126. Framkvæmdastjórnin bendir á að þótt titill 14. gr. tilskipunarinnar á ensku sé „Provision of information to known creditors“, vísi íslenska útgáfan ekki í „þekkta“ eða „óþekkta“ lánardrottna. Ólíkt ensku útgáfunni, kveði íslenska útgáfa tilskipunarinnar ekki á um skyldu um sérstaka tilkynningu til hvers og eins þekkts lánardrottins.

127. Framkvæmdastjórnin heldur því að samkvæmt viðurkenndri dómaframkvæmd Evrópudómstólsins, beri að túlka mismunandi tungumálaútgáfur á samræmdan hátt og því verði, ef um sé að ræða mismun á milli tungumálaútgáfna, að túlka ákvæðið sem um ræði með vísan til tilgangs og almennrar fyrirætlanar reglnanna sem það sé hluti af.[53] Við túlkun á ákvæði afleidds ESB-réttar, beri eftir því sem hægt er að veita þeirri túlkun meira vægi

[53] Tilvísun í *PlatoPlastik Robert Frank*, 64. málsgr. og *M and Others*, 44. málsgr. bæði áður tilvitnuð.

the general principles of EU law and, more specifically, with the principle of legal certainty.[54]

128. Moreover, the Commission continues, it is settled case-law that the wording used in one language version of an EU measure cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement for the uniform application of European law.[55] In addition, the Commission notes that Article 129(1) EEA states that the texts of the acts referred to in the Annexes to the Agreement "are equally authentic" in all EU official languages. Those acts are then translated into Icelandic and Norwegian "for the authentication thereof".

129. The Commission notes that, according to settled case-law, the various language versions of a provision of EU law must be uniformly interpreted, and, thus, in the case of divergence between those versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.[56]

130. However, the Commission contends that, in the light of the purpose and general scheme of the rules of which it forms part, the Icelandic version does not suffice for a proper interpretation of the obligations set out in Article 14 of the Directive.

The Directive

131. The Commission submits that the objective of the Directive is clearly stated in recitals 3, 4 and 16 thereto. Under Article 9

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54 Reference is made to *M and Others* and *Borgmann*, paragraph 30, both cited above.

55 Reference is made to *Institute of the Motor Industry*, paragraph 16; *Götz*, paragraph 30; *Sabatauskas and Others*, paragraph 38; and *Endendijk*, paragraph 23, all cited above.

56 Reference is made to *Profisa*, cited above, paragraphs 13 and 14, with reference to further case-law: *Stauder* v *City of Ulm*, cited above, paragraph 3; *Moksel Import und Export*, cited above, paragraph 15; *EMU Tabac and Others*, cited above, paragraph 36; *Bouchereau*, cited above, paragraph 14; *Italy* v *Commission*, cited above, paragraph 49; *Borgmann*, cited above, paragraph 25; Case C-449/93 *Rockfon A/S* v *Specialarbejderforbundet i Danmark* [1995] ECR I-4291, paragraph 28; and Case C-236/97 *Skatteministeriet* v *Aktieselskabet Forsikrinsselskabet Codan* [1998] ECR I-8679, paragraph 28.

sem samræmi ákvæðið almennum meginreglum ESB-réttar, og þá sérstaklega meginreglunni um réttarvissu.[54]

128. Jafnframt, heldur framkvæmdastjórnin áfram, sé það viðurkennd dómaframkvæmd, að orðalag sem notað sé í einni tungumálaútgáfu ráðstafana Evrópuréttar, geti ekki verið eini grundvöllur túlkunar þess ákvæðis, eða vegið þyngra en aðrar tungumálaútgáfur hvað þetta varði. Slík nálgun yrði ósamrýmanleg kröfunum um samræmda beitingu Evrópuréttar.[55] Að auki bendir framkvæmdastjórnin á, að 1. mgr. EES mæli fyrir um að textar gerðanna, sem vísað sé til í viðaukunum við samninginn, „séu jafngildir“ á öllum opinberum tungumálum ESB. Þessar gerðir séu svo þýddar á íslensku og norsku „með tilliti til jafngildingar“.

129. Framkvæmdastjórnin heldur því fram að samkvæmt viðurkenndri dómaframkvæmd Evrópudómstólsins, beri að túlka mismunandi tungumálaútgáfur á samræmdan hátt og því verði, ef um sé að ræða mismun á milli tungumálaútgáfna, að túlka ákvæðið, sem um ræði, með vísan til tilgangs og almennrar fyrirætlanar reglnanna, sem það sé hluti af.[56]

130. Þó staðhæfir framkvæmdastjórnin að í ljósi tilgangs og almennrar fyrirætlan með reglunum sem þær séu hluti af, nægi íslenska útgáfan ekki fyrir tilhlýðilega túlkun á skyldunum, sem settar séu fram í 14. gr. tilskipunarinnar.

Tilskipunin

131. Framkvæmdastjórnin staðhæfir að markmið tilskipunarinnar komi skýrt fram í 3. 4. og 16. lið inngangsorða hennar. Samkvæmt

54 Tilvísun í *M and Others* og *Borgmann*, 30. málsgr., bæði áður tilvitnuð.

55 Tilvísun í *Institute of the Motor Industry*, 16. málsgr., *Götz*, 30. málsgr., *Sabatauskas and Others*, 38. málsgr., og *Endendijk*, 23. málsgr. öll áður tilvitnuð.

56 Tilvísun í *Profisa*,áður tilvitnað, 13. og 14. málsgr. , með tilvísun í frekari dómaframkvæmd, *Stauder* gegn *City of Ulm*, áður tilvitnað, 3. málsgr., *Moksel Import und Export*, áður tilvitnað, 15. málsgr., *EMU Tabac and Others*, áður tilvitnað, 36. málsgr., *Bouchereau*, áður tilvitnað, 14. málsgr., *Ítalía* gegn *framkvæmdastjórninni*, áður tilvitnað, 49. málsgr., *Borgmann*, áður tilvitnað, 25. málsgr.,mál C-449/93 *Rockfon A/S* gegn *Specialarbejderforbundet i Danmark* [1995] ECR I-4291, 25. málsgr., og mál C-236/97 *Skatteministeriet* gegn *Aktieselskabet Forsikrinsselskabet Codan* [1998] ECR I-8679, 28. málsgr.

of the Directive, winding-up proceedings are to be opened and conducted by the responsible authority of the home Member State, that is, the State in which in the credit institution has been authorised.[57] It notes that the Directive requires that all claims by creditors, whether domestic or foreign, must be processed in the same proceedings. Article 16(1) of the Directive provides that any creditor who has his domicile, normal place of residence or head office in a Member State other than the home Member State has the right to lodge claims in the proceedings. Article 16(2) of the Directive sets out the principle of equal treatment of creditors irrespective of nationality and provides that the claims of all creditors whose domiciles, normal places of residence or head offices are in Member States other than the home Member State shall be treated in the same way and accorded the same ranking as claims of an equivalent nature which may be lodged by domestic creditors. Article 10(2)(f) and (g) of the Directive establishes that the law of the home Member State shall determine the claims that are to be lodged against the credit institution and the rules governing the lodging, verification and submission of claims.

132. The Commission asserts that the Directive did not aim to harmonise national legislation but to ensure the mutual recognition of Member States' reorganisation measures and winding-up proceedings as well as the necessary cooperation. In particular, national law determines the nature (administrative or judicial) of reorganisation measures. This, it asserts, is borne out by recitals 3, 4, 16 and 20 to the Directive. The substance of recital 20 of the Directive is identical in all language versions, including the Icelandic version.

133. The Commission submits that Article 14 of the Directive is not a mere "information obligation". In its view, this follows also from the wording of recital 20. It notes that Article 13 of the Directive envisages the publication of the announcement of the decision "to open winding-up proceedings" in the Official Journal

[57] Reference is made to Article 4(7) of Directive 2006/48/EC, OJ 2006 L 177, p. 1.

9. gr. tilskipunarinnar eigi ábyrgt yfirvald heimaaðildarríkis, það er ríkisins þar sem lánastofnun hefur fengið leyfi, að hefja og framkvæma slitameðferð.[57] Hún bendir á að tilskipunin krefjist þess að allar kröfur lánardrottna hvort heldur innlendra eða erlendra, verði að meðhöndla við sömu málsmeðferð. Í 1. mgr. 16. gr. tilskipunarinnar sé kveðið á um að sérhver lánardrottinn, sem hefur lögheimili, fasta búsetu eða aðalskrifstofu í öðrum aðildarríkjum en heimaaðildarríkinu, eigi rétt á því að lýsa kröfum við málsmeðferðina. Í 2. mgr. 16. gr. sé meginreglan um jafna meðferð lánardrottna, óháð þjóðerni sett fram og kveðið á um að kröfur allra lánardrottna, með lögheimili, fasta búsetu eða aðalskrifstofur í aðildarríkjum öðrum en heimaaðildarríkinu, skuli meðhöndla og forgangsraða með sama hætti og sams konar kröfur, sem lýst sé af innlendum lánardrottnum. Í f- og g-lið 2. mgr. 10. gr. tilskipunarinnar sé kveðið á um að lög heimaaðildarríkisins skuli ráða úrslitum um kröfurnar á hendur lánastofnuninni og reglurnar sem gildi um kröfulýsingu, sannprófun og skráningu krafna.

132. Framkvæmdastjórnin staðhæfir að tilskipunin hafi ekki miðað að því að samræma landslöggjöf, heldur að tryggja gagnkvæma viðurkenningu á endurskipulagningarráðstöfunum og slitameðferðum samningsríkjanna og nauðsynlega samvinnu. Það sé einkum landsréttur sem ákvarði eðli (innan stjórnsýslu eða á vegum dómstóla) endurskipulagningarráðstafana. Hún fullyrðir að þetta leiði af 3., 4., 16. og 20. tölulið formálsorða tilskipunarinnar. Efni 20. töluliðs formálsorða tilskipunarinnar sé nákvæmlega eins á öllum tungumálum þ.m.t. íslensku.

133. Framkvæmdastjórnin staðhæfir að 14. gr. tilskipunarinnar kveði á um annað og meira en „upplýsingaskyldu“. Það sé mat hennar að þetta komi einnig fram í orðum 20. töluliðar formálsorðanna. Hún bendir á að 13. gr. tilskipunarinnar geri ráð fyrir birtingu tilkynningarinnar, um þá ákvörðun „að hefja slitameðferð“ í Stjórnartíðindum Evrópubandalaganna og í a.m.k. tveimur innlendum dagblöðum í hverju gistiaðildarríki. Af þessum

[57] Tilvísun í 7. mgr. 4. gr. tilskipunar 2006/48/EB, OJ 2006 L 177, bls. 1.

of the European Union and at least two newspapers in each host Member State. Consequently, according to the Commission, Article 14 of the Directive should be interpreted as establishing an obligation on the liquidator to notify individually known foreign creditors, as national law usually provides for notification to known domestic creditors, of the opening of the winding-up proceedings and of the deadline for the submission of claims. Conversely, in its view, Article 13 of the Directive provides the means for informing unknown creditors of the commencement of proceedings and of their rights through the Official Journal of the European Communities and in at least two national newspapers in each host Member State. As a result, the Commission asserts that Articles 13 and 14 of the Directive have different purposes but are not substitutable. It notes that, similarly, in relation to reorganisation proceedings Articles 6 and 7 of the Directive set out the requirement to give notice to creditors in these two different manners.

134. The Commission submits that, although the Directive does not define either "known creditor" or "creditor", it does not expressly leave the determination of this to national law. In that regard, it observes that, pursuant to Article 2 of the Directive, the terms "winding-up proceedings" and "administrative or judicial authority" are defined by reference to national law. As a result, it asserts that the terms "known creditor" and "creditor" have to be determined by reference to the object and purpose of the rules established in the Directive. It submits that whether any natural or legal person is a known creditor is capable of objective determination particularly by professionals appointed as liquidators.

135. The Commission submits that the exception provided for in Article 14(1) of the Directive, that is, dispensing with the requirement to individually notify foreign creditors where the legislation of the home State does not require lodgement of the claims with a view to their recognition, must be construed restrictively. The Commission asserts that Article 14(1) read together with the recitals and Article 13 of the Directive expressly requires that,

sökum beri, samkvæmt framkvæmdastjórninni, að túlka 14. gr. tilskipunarinnar á þann veg að hún komi á þeirri skyldu, fyrir skiptastjóra að hann upplýsi sérstaklega hvern og einn þekktan erlendan lánardrottinn, eins og landsréttur kveði venjulega á um með tilkynningu til þekktra innlenda lánardrottna, um upphaf slitameðferðar og frest til að leggja fram kröfur. Gagnstætt þessu, sé það mat hennar að 13. gr. tilskipunarinnar kveði á um aðferðir við að upplýsa óþekkta lánardrottna um upphaf málsmeðferðar og réttindi þeirra, með birtingu í Stjórnartíðindum Evrópubandalaganna og í a.m.k. tveimur innlendum dagblöðum í hverju gistiaðildarríki. Framkvæmdastjórnin fullyrðir að niðurstaðan sé, að 13. og 14. gr. tilskipunarinnar hafi ólíkan tilgang en komi ekki í stað hvor annarrar. Hún bendir á að á sama hátt, varðandi endurskipulagningarmálsmeðferðir, séu settar fram í 6. og 7. gr. tilskipunarinnar, kröfur um tilkynningar til lánardrottna á þessa tvo ólíka máta.

134. Framkvæmdastjórnin staðhæfir, að þrátt fyrir að tilskipunin skilgreini hvorki „þekktan lánardrottinn“ eða „lánardrottinn“ láti hún skilgreininguna á þessum hugtökum, ekki eftir landsrétti með skýrum hætti. Hvað þetta varðar, bendir hún á að samkvæmt 2. gr. tilskipunarinnar séu hugtökin „slitameðferð“ og „dómsmálayfirvöld“ skilgreind með vísan til landsréttar. Hún fullyrðir að niðurstaðan sé því að skilgreina beri hugtökin „þekktur lánardrottinn“ og „lánardrottinn“ með vísan til markmiðs og tilgangs reglnanna, sem komið sé á með tilskipuninni. Hún staðhæfir að það hvort *einstaklingur* eða lögaðili teljist þekktur lánardrottinn sé hægt að ákvarða á hlutlægan hátt, einkum af sérfræðingum sem tilnefndir séu sem skiptastjórar.

135. Framkvæmdastjórnin staðhæfir að túlka verði þá undanþágu þröngt, sem kveðið sé á um í 1. mgr. 14. gr. tilskipunarinnar, um að heimilt sé að víkja frá kröfunni um að tilkynna hverjum og einum erlendum lánardrottni sérstaklega þegar að löggjöf heimaaðildarríkisins áskilji ekki að kröfu sé lýst svo hana megi viðurkenna. Framkvæmdastjórnin fullyrðir að ef 1. mgr. 14. gr. sé skýrð með hliðsjón af inngangsorðunum og 13. gr. tilskipunarinnar, þá sé skýrt að þegar ákvörðun sé tekin um að

once a decision is taken to open proceedings, there is a strict obligation to inform on an individual basis known creditors and that this should be done in a manner which ensures equal treatment of creditors in the host and home Member States. The general scheme of the rules of the Directive, the Commission asserts, leads to the conclusion that the European legislature intended to establish a strict obligation of individual information for known creditors and that, therefore, Article 14(1) of the Directive requires actual notice to known creditors.

136. In the light of the final sentence of recital 20 to the Directive, the Commission submits that there is an ongoing obligation, once proceedings are opened and known creditors have been individually informed, to keep all creditors "regularly informed in an appropriate manner throughout winding-up proceedings". In its view, while the Member States would appear to enjoy some discretion as to how creditors are regularly informed, there is no such discretion in relation to the primary obligation in Article 14 of the Directive.

137. The Commission concludes that the Icelandic version of Article 14 of the Directive is deficient. While an invitation to lodge claims was published in Ireland, where the Plaintiff's head office is located, in the *Irish Times* on 21 July 2009, in the Commission's view, this does not comply with the requirements of Article 14(1) or 14(2) of the Directive. It submits that, as the Plaintiff was a known creditor which was capable of being objectively ascertained, the strict obligation of Article 14(1) of the Directive should have applied and, accordingly, the Plaintiff should have been individually informed of the matters required by Article 14(2) of the Directive.

138. The Commission submits that the answer to the first question referred should be that: ·

"[I]t does not accord with the provisions of Article 14 of Directive 2001/24/EC of 4 April 2001, on the reorganisation and winding up of credit institutions, to publish an invitation to lodge claims for known creditors which have their domicile, permanent residence or

hefja málsmeðferð hvíli ströng skylda til að upplýsa sérstaklega hvern og einn þekktan lánardrottinn og að þetta skuli gert á þann hátt sem tryggi jafna meðferð lánardrottna í gisti- og heimaaðildarríkjum. Framkvæmdastjórnin fullyrðir að almenn fyrirætlan með reglum tilskipunarinnar leiði til þeirrar niðurstöðu að Evrópulöggjöfinni sé ætlað að koma á strangri skyldu um að hver og einn þekktur lánardrottinn sé upplýstur sérstaklega og þess vegna sé með 1. mgr. 14. gr. krafist raunverlegrar tilkynningar til þekktra lánardrottna.

136. Í ljósi lokasetningar 20. töluliðs formálssorða tilskipunarinnar, staðhæfir framkvæmdarstjórnin, að það sé viðvarandi skylda, þegar málsmeðferð sé hafin og hver og einn þekktur lánardrottinn hafi fengið sérstaka tilkynningu, að öllum lánardrottnum sé „með reglubundnum hætti, og á viðeigandi hátt, veittar upplýsingar meðan á slitameðferð stendur“. Það sé sjónarmið hennar, að þó svo virðist sem aðildarríki njóti nokkurs sjálfræðis um það hvernig gefa skuli lánardrottnum reglulega upplýsingar, þá sé ekkert slíkt sjálfræði varðandi frumskylduna í 14. gr. tilskipunarinnar.

137. Framkvæmdastjórnin kemst að þeirri niðurstöðu að íslenska útgáfa 14. gr. tilskipunarinnar sé haldin annmörkum. Þó innköllun krafna hafi verið birt 21. júlí 2009 í *the Irish Times* á Írlandi, þar sem aðalskrifstofa stefnanda sé staðsett, sé það sjónarmið framkvæmdastjórnarinnar að birtingin sé ekki í samræmi við kröfur 1. mgr. 14. gr. eða 2. mgr. 14. gr. tilskipunarinnar. Hún staðhæfir, að þar sem hægt hafi verið að ganga úr skugga um það á hlutlægan hátt að stefnandi hafi verið þekktur lánardrottinn, hefði ströng skylda 1. mgr. 14. gr., átt að gilda, og samkvæmt því hefði átt að tilkynna stefnanda sérstaklega um þau efnisatriði sem 2. mgr. 14. gr. tilskipunarinnar áskilur.

138. Framkvæmdastjórnin telur að svarið við fyrstu spurningunni sem vísað hafi verið til dómstólsins ætti vera:

„[Þ]að samræmist ekki ákvæðum 14. gr. tilskipunar 2001/24/EB frá 4. apríl 2001 um endurskipulagningu og slit lánastofnana, að innkalla kröfur þekktra lánardrottna, sem hafa lögheimili, fasta búsetu eða aðalskrifstofu í öðrum aðildarríkjum, á þann hátt sem slitastjórn

head offices in other Member States in the manner practised by the Winding-up Board of Kaupthing Bank hf which is described in the Ruling as Article 14 imposes a strict obligation to individually inform known creditors".

The second question

139. The Commission considers that the national authorities must interpret national law in conformity with the Directive (and not the Icelandic version thereof). It stresses that it is inherent in the objectives of the EEA Agreement that national courts are bound to interpret national law, and in particular legislative provisions specifically adopted to transpose EEA rules into national law, as far as possible in conformity with EEA law.[58] It asserts that the obligation of harmonious interpretation requires a national court to interpret national law in the light of an inadequately implemented or a non-implemented directive even against an individual.[59] In that regard, national courts must apply the interpretative methods recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule.[60]

140. In the case in hand, therefore, the Commission asserts that an interpretation should be adopted that makes it feasible to inform known creditors and, so far as possible, to allow known creditors who would have been in a position to do so to lodge a claim. If it is no longer possible to lodge a claim under national law, taking into account all the circumstances, including the fact that the Plaintiff was precluded from exercising its rights, according to the Commission, there should be a remedy available under national law for the known creditors. Any such remedy should take account of the time limits specified in accordance with Article 14(2) of the Directive and the penalties for failing to adhere to such time limits including any objective justification for imposing those time limits. In summary, therefore, the national court is obliged

58 Reference is made to *Mau*, paragraph 34, and *Pfeiffer and Others*, paragraph 114, both cited above.
59 Reference is made to *Marleasing*, cited above, paragraphs 7-8.
60 Reference is made to *Criminal proceedings against A*, cited above, paragraph 39.

Kaupþings banka hf. gerði það og sem lýst er í úrskurðinum, þar sem 14. gr. leggur á strangar skyldur um sérstaka tilkynningu til hvers og eins þekkts lánardrottins“.

Önnur spurningin

139. Framkvæmdastjórnin telur að innlendum yfirvöldum beri að túlka landsrétt í samræmi við tilskipunina (en ekki íslenska útgáfu hennar). Hún leggur áherslu á að það sé innbyggt í markmið EES-samningsins að dómstólar aðildarríkjanna séu bundnir af því að túlka landsrétt, og þá einkum lagaákvæði sem séu sérstaklega samþykkt til að innleiða EES-reglur inn í landsrétt, til samræmis við EES-rétt eins og unnt sé.[58] Hún fullyrðir að skyldan um samræmda túlkun, krefjist þess af dómstólum samningsríkjanna að þeir túlki landsrétt í ljósi tilskipunar, sem sé innleidd á ófullnægjandi hátt eða hafi ekki verið innleidd, jafnvel í málum gegn einstaklingum.[59] Hvað þetta varði verði dómstólar samningsríkjanna að beita túlkunaraðferðum, sem viðurkenndar séu að landsrétti, eins og hægt sé, til að ná því markmiði sem stefnt sé að með viðkomandi EES-reglu.[60]

140. Framkvæmdastjórnin fullyrðir því, hvað þetta mál varði, að beita verði túlkun sem geri það framkvæmanlegt að upplýsa þekkta lánardrottna, og eftir því sem hægt sé, að heimila öllum þekktum lánardrottnum, sem hefðu verið í aðstöðu til þess, að lýsa kröfu. Ef ekki sé lengur hægt að lýsa kröfu samkvæmt landsrétti, að teknu tilliti til allra aðstæðna, þ.m.t. þeirri staðreynd að stefnandi hafi verið útilokaður frá því að nýta rétt sinn, samkvæmt framkvæmdastjórninni, þá ætti að vera til úrræði samkvæmt landsrétti fyrir þekkta lánardrottna. Öll slík úrræði ættu að taka mið af frestinum sem tilgreindur sé í samræmi við 2. mgr. 14. gr tilskipunarinnar og viðurlögin við því að virða ekki frestinn þ.m.t. hlutlæg rök fyrir því að leggja þennan frest á. Samandregið sé Héraðsdómur Reykjavíkur því skuldbundinn til að túlka landsbundnu ráðstafanirnar sem innleiddu tilskipunina, að því

58 Tilvísun í áður tilvitnuð mál *PlatoPlastik Robert Frank*, 34. málsgr. og *M and Others*, 114. málsgr.
59 Tilvísun í *Marleasing*, áður tilvitnað, 7. – 8. málsgr.
60 Tilvísun í *Meðferð sakamáls* gegn *A*, áður tilvitnað, 39. málsgr.

to interpret the national measure which transposed the Directive so far as this is possible in order to give effect to the proper obligations set out in the Directive.

141. The Commission submits that the answer to the second question referred should be that: ·

"[W]here sufficient regard was not had for the rules in Article 14 of the Directive, the national court has an obligation to interpret the national measure which transposed the Directive in the Icelandic legal order, so far as possible in order to give effect to the proper obligations set out in the Directive".

Carl Baudenbacher

Judge-Rapporteur

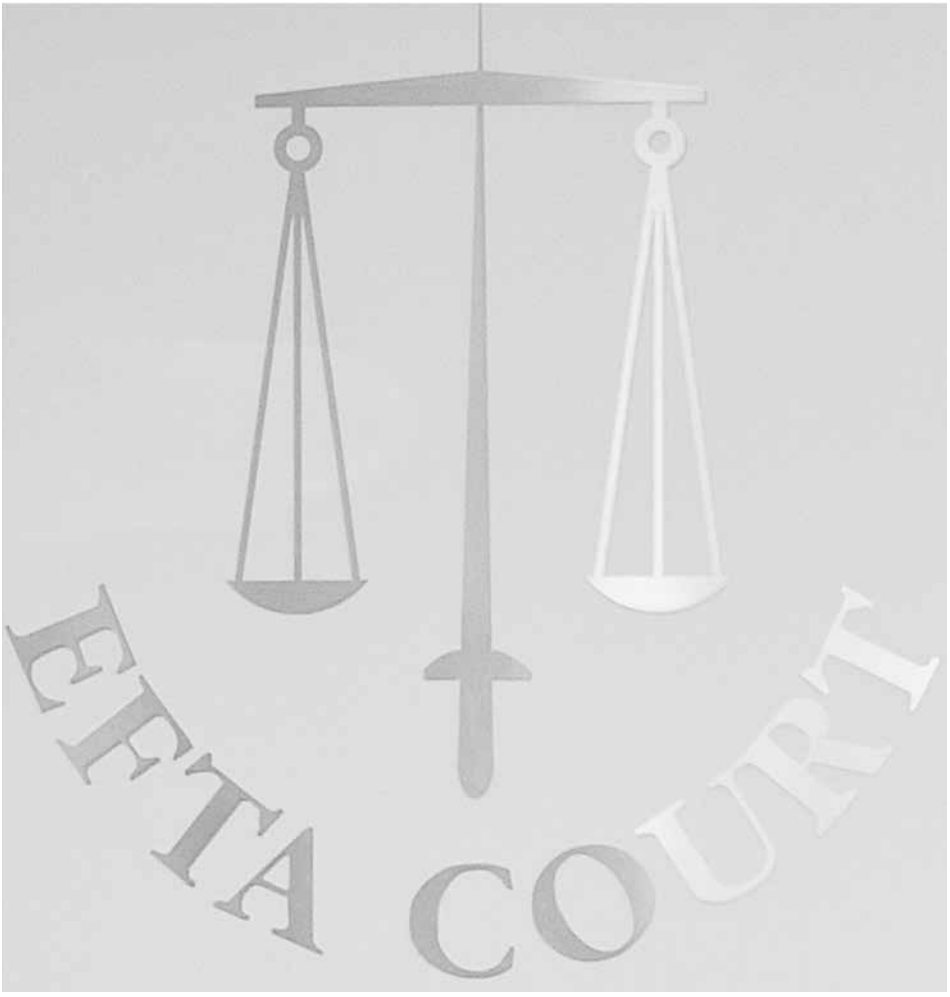
marki sem það sé hægt, til að koma í framkvæmd tilhlýðilegum skyldum, sem settar séu fram í tilskipuninni.

141. Framkvæmdastjórnin telur að svarið við annarri spurningunni sem vísað hafi verið til dómstólsins ætti að vera:

„[Þ]ar sem að ekki var tekið nægjanlegt tillit til reglna 14. gr. tilskipunarinnar, ber Héraðsdómi Reykjavíkur skylda til að túlka innlendu ráðstafanirnar sem innleiddu tilskipunina, eins og hægt er þannig að hinum réttu skuldbindingum samkvæmt tilskipuninni séu veitt réttaráhrif.“

Carl Baudenbacher

Framsögumaður


EFTA COURT

Case E-15/11

Arcade Drilling AS
v
The Norwegian State,
represented by Tax Region West

CASE E-15/11

Arcade Drilling AS

v

The Norwegian State, represented by Tax Region West

(Freedom of establishment – Articles 31 and 34 EEA – Taxation– Anti-avoidance principles – Proportionality)

Summary of the Judgment

1. The question of whether Article 31 EEA applies to a company that seeks to rely on the fundamental freedom enshrined therein is a preliminary matter that, as EEA law now stands, can only be resolved pursuant to the applicable national law. Consequently, the question of whether the company is faced with a restriction on its freedom of establishment within the meaning of Article 31 EEA can only arise if it has been established, in light of the conditions laid down in Article 34 EEA, that the company actually has a right to that freedom.

2. In the absence of clear and precise provisions of national law that a company moving its head office out of an EEA State must liquidate, and of any decision by the competent authorities or courts putting the liquidation into effect, the relocation of a company's head offices to the another EEA State does not frustrate its right to rely on Article 31 EEA. It therefore benefits, in accordance with Article 34 EEA, from the provisions on freedom of establishment under the EEA Agreement, by virtue of its status as company established under the legislation of an EEA State and having its registered office and central management within the European Economic Area.

In such circumstances, the company may rely on Article 31 EEA to challenge the lawfulness of a tax imposed on it by its home State on the occasion of the relocation of its head office to another EEA State.

SAK E-15/11

Arcade Drilling AS

v

Staten v/Skatt vest

(Etableringsfrihet – EØS-avtalen artiklene 31 og 34 – Beskatning – Gjennomskjæringsprinsipper – Forholdsmessighet)

Domssammendrag

1. Spørsmålet om EØS-avtalen artikkel 31 får anvendelse på et selskap som vil påberope seg den grunnleggende frihet som er hjemlet der, er et prejudisielt spørsmål som etter gjeldende EØS-rett utelukkende kan avgjøres etter den relevante nasjonale lovgivning. Spørsmålet om selskapet har blitt pålagt en restriksjon på sin etableringsfrihet etter EØS-avtalen artikkel 31, vil dermed bare oppstå dersom det er godtgjort, i lys av vilkårene fastsatt i EØS-avtalen artikkel 34, at selskapet faktisk er berettiget til denne frihet.

2. I mangel av klare og presise regler i nasjonal rett om at et selskap som flytter sitt hovedkontor ut av en EØS-stat må likvideres, og av en beslutning av kompetente myndigheter eller domstoler om iverksettelse av likvidasjonen, hindrer ikke flyttingen av selskapets hovedkontor til en annen EØS-stat selskapets rett til å påberope seg EØS-avtalen artikkel 31. Det kan derfor bygge på etableringsfriheten etter EØS-avtalen artikkel 34 i kraft av sin status som selskap etablert i henhold til lovgivningen i en EØS-stat, og fordi det har sitt vedtektsbestemte sete og sin sentrale ledelse innenfor Det europeiske økonomiske samarbeidsområde.

Under disse forhold kan et selskap påberope seg EØS-avtalen artikkel 31 for å bestride lovligheten av en skatt ilagt av hjemstaten når det flytter sitt hovedkontor til en annen EØS-stat.

3. In the absence of any unifying or harmonising measures, the EEA States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation. In particular, they are competent to define when a company can operate as a separate legal entity with regard to their powers of taxation, since EEA law contains no uniform definition of which companies may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company.

Accordingly, EEA States must be able to take appropriate measures with a view to preserving the exercise of their tax jurisdiction when a company ceases to exist under that jurisdiction as a result of national company law. In this regard, it must be recalled that preserving the allocation of powers of taxation between the EEA States is a legitimate objective.

Justification on these grounds may be accepted, in particular if the system in question is designed to prevent conduct capable of jeopardising the right of an EEA State to exercise its tax jurisdiction in relation to activities carried out in its territory.

4. For the purposes of preventing tax avoidance, a national measure restricting freedom of establishment may be justified when it specifically targets artificial arrangements designed to circumvent the legislation of the EEA State concerned.

5. The definitive establishment of the amount of tax payable by a company based on the assessment of the tax authorities that the company is in avoidance of taxation consequent to an obligation to wind up and liquidate the company pursuant to national company law, constitutes a restriction under Articles 31 and 34 EEA, if companies deemed to be in breach of such an obligation, but which are not seeking to relocate, are not subjected to liquidation taxation.

This may be justified on the grounds of maintaining the balanced allocation of powers of taxation between the EEA States and preventing tax avoidance. These grounds constitute overriding reasons in the public interest. Moreover, the definitive establishment of the amount of tax payable by a company is appropriate in relation to ensuring the attainment of these objectives.

6. The definitive establishment of the amount of tax payable by a company based on the assessment of the tax authorities in the EEA

3. I mangel av ensartede eller harmoniserende tiltak har EØS-statene fortsatt myndighet til å definere, gjennom traktat eller ensidig handling, kriteriene for fordeling av deres beskatningsmyndighet. De har særlig myndighet til å definere når et selskap kan ha status som juridisk person for skatteformål, ettersom EØS-regelverket ikke inneholder noen ensartet definisjon av hvilke selskaper som kan påberope seg etableringsretten i kraft av en enkelt tilknytningsfaktor som avgjør hvilken nasjonal rett som kommer til anvendelse på et selskap.

Følgelig må EØS-statene ha adgang til å treffe egnede tiltak for å sikre sin beskatningsmyndighet når et selskap som en følge av nasjonal selskapsrett opphører å eksistere under deres jurisdiksjon. Det minnes her om at å sikre fordelingen av beskatningsmyndighet EØS-statene imellom er et legitimt mål.

En rettferdiggjøring begrunnet i slike hensyn vil kunne godtas, spesielt hvis det aktuelle system er utformet for å hindre atferd som kan undergrave en EØS-stats rett til å utøve sin beskatningsmyndighet overfor virksomhet på sitt territorium.

4. Dersom formålet er å hindre skatteomgåelse, kan et nasjonalt tiltak som begrenser etableringsfriheten være berettiget dersom det spesifikt retter seg mot kunstige ordninger beregnet på å omgå lovgivningen i den berørte EØS-stat.

5. En endelig fastsettelse av det skattebeløp et selskap skal betale på grunnlag av vurderingen fra skattemyndighetene i EØS-opprinnelsesstaten om at selskapet har unndratt seg den beskatning som følger av en plikt etter nasjonal selskapsrett til å avvikle og likvidere selskapet, utgjør en restriksjon etter EØS-avtalen artiklene 31 og 34 dersom selskaper som anses å ha misligholdt en slik plikt, men som ikke har flyttet, ikke ilegges likvidasjonsbeskatning

Dette kan rettferdiggjøres ut fra behovet for å opprettholde en balansert fordeling av beskatningsmyndighet EØS-statene imellom og hindre omgåelse av skattereglene. Disse grunner utgjør tvingende allmenne hensyn. Videre er endelig fastsettelse av det skattebeløp et selskap skal betale, egnet til å sikre oppnåelse av disse mål.

6. Den endelige fastsettelse av det skattebeløp et selskap skal betale på grunnlag av vurderingen

State of origin that the company is in avoidance of taxation consequent to an obligation to wind up and liquidate the company pursuant to national company law must be regarded as not going beyond what is necessary to attain the objectives relating to the need to maintain the balanced allocation of powers of taxation between the EEA States and to prevent tax avoidance, insofar as it provides for the consideration of objective and verifiable elements in order to determine whether the relocation of a head office represents an arrangement incompatible with the rules of domestic company law.

7. If the consideration of objective and verifiable elements leads to the conclusion that the company is not in compliance with the rules of national company law and should therefore be subject to liquidation, the definitive establishment of the amount of tax payable must be confined to the consequences of liquidation in order to remain compatible with the principle of proportionality. It is for the national court to verify whether the decision at issue in the main proceedings goes beyond what is necessary to attain the objectives pursued by the legislation.

8. A national measure that prescribes the immediate recovery of tax on unrealised assets and tax positions at the time of the assessment of the tax authorities that a company has lost its status as a separate legal entity under national law, but without any decision by the authorities or courts competent to determine that the company has lost that status, is precluded by Article 31 EEA.

fra skattemyndighetene i EØS-opprinnelsesstaten om at selskapet har unndratt seg den beskatning som følger av en plikt etter nasjonal selskapsrett til å avvikle og likvidere selskapet, må anses ikke å gå lenger enn det som er nødvendig for å nå målene med hensyn til behovet for å opprettholde en balansert fordeling av beskatningsmyndighet EØS-statene imellom og hindre omgåelse av skattereglene, i den grad det bygges på at objektive og verifiserbare elementer skal vurderes for å fastslå om flyttingen av hovedkontoret utgjør en ordning som er i strid med nasjonale selskapsrettslige regler.

7. Dersom vurderingen av objektive og verifiserbare elementer fører til den konklusjon at selskapet ikke oppfyller de nasjonale selskapsrettslige regler og derfor må likvideres, må den endelige fastsettelse begrenses til konsekvensene av likvidasjonen for fortsatt å være i samsvar med forholdsmessighetsprinsippet. Det er opp til den nasjonale domstol å vurdere om vedtaket saken gjelder, går lenger enn det som er nødvendig for å nå de mål lovgivningen har.

8. Et nasjonalt tiltak som fastsetter umiddelbar innkreving av skatt på urealiserte eiendeler og skatteposisjoner på et tidspunkt da skattemyndighetene anser at et selskap har har tapt sin status som juridisk person etter nasjonal lovgivning, men uten noen beslutning av kompetente myndigheter eller domstoler om at selskapet har tapt denne status, er avskåret etter EØS-avtalen artikkel 31.

JUDGMENT OF THE COURT

3 October 2012*

(Freedom of establishment – Articles 31 and 34 EEA – Taxation– Anti-avoidance principles – Proportionality)

In Case E-15/11,

REQUEST to the Court from Oslo tingrett (Oslo 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

Arcade Drilling AS

and

The Norwegian State, represented by Tax Region West,

concerning the interpretation of Articles 31 and 34 of the EEA Agreement.

THE COURT,

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

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

– Arcade Drilling AS, ("Arcade"), represented by Hanne Skaarberg Holen, Ulf Werner Andersen and Daniel M. H. Herde, Advocates at the law firm PricewaterhouseCoopers AS, Oslo;

– the Norwegian State, represented by Anders Wilhelmsen and Amund Noss, Advocates, Office of the Attorney General (Civil Affairs), acting as Agents;

– the Finnish Government, represented by Mervi Pere, Ministry for Foreign Affairs, acting as Agent;

* Language of the request: Norwegian.

EFTA-DOMSTOLENS DOM

3. oktober 2012*

(Etableringsfrihet – EØS-avtalen artiklene 31 og 34 – Beskatning – Gjennomskjæringsprinsipper – Forholdsmessighet)

I sak E-15/11

ANMODNING til EFTA-domstolen i henhold til artikkel 34 i Avtalen mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol fra Oslo tingrett i saken mellom

Arcade Drilling AS

og

Staten v/Skatt vest,

om fortolkningen av EØS-avtalen artiklene 31 og 34.

DOMSTOLEN,

sammensatt av: Carl Baudenbacher, president, Per Christiansen og Páll Hreinsson (saksforberedende dommer), dommere,

justissekretær: Skúli Magnússon,

etter å ha tatt i betraktning de skriftlige innlegg inngitt på vegne av:

– Arcade Drilling AS ("Arcade"), representert ved advokatene Hanne Skaarberg Holen, Ulf Werner Andersen og Daniel M. H. Herde, advokatfirmaet PricewaterhouseCoopers AS, Oslo,
– staten, representert ved advokatene Anders Wilhelmsen og Amund Noss, Regjeringsadvokaten,
– Finlands regjering, representert ved Mervi Pere, Ministry for Foreign Affairs,

* Språket i anmodningen om rådgivende uttalelse: norsk.

– the French Government, represented by Géraud de Bergues, Head of the European Law and International Economic Law Department, and Natacha Rouam, member of the same department, Ministry of Foreign and European Affairs, acting as Agents;
– the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Florence Simonetti, Deputy Director, Department of Legal & Executive Affairs, acting as Agents;
– the European Commission ("the Commission"), represented by Richard Lyal and Walter Mölls, Members of its Legal Service, acting as Agents.

having regard to the Report for the Hearing,

having heard the oral arguments of the Plaintiff, represented by Hanne Skaarberg Holen; the Norwegian State, represented by Anders Wilhelmsen; ESA, represented by Florence Simonetti; and the Commission, represented by Walter Mölls, at the hearing on 29 May 2012,

gives the following

JUDGMENT

I LEGAL CONTEXT

EEA law

1 Article 31 of the EEA Agreement ("EEA") provides:

> *1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected...*

– Frankrikes regjering, representert ved Géraud de Bergues, Head of the European Law and International Economic Law Department, og Natacha Rouam, ansatt samme sted, Ministry of Foreign and European Affairs,
– EFTAs overvåkningsorgan ("ESA"), representert ved Xavier Lewis, Director, og Florence Simonetti, Deputy Director, Department of Legal & Executive Affairs, og
– Europakommisjonen ("Kommisjonen"), representert ved Richard Lyal og Walter Mölls, medlemmer av Kommisjonens juridiske tjeneste,

med henvisning til rettsmøterapporten

og etter å ha hørt muntlige innlegg fra saksøker, representert ved Hanne Skaarberg Holen, fra staten, representert ved Anders Wilhelmsen, ESA, representert ved Florence Simonetti, og Kommisjonen, representert ved Walter Mölls, i rettsmøte 29. mai 2012,

slik

DOM

I RETTSLIG BAKGRUNN

EØS-rett

1 EØS-avtalen artikkel 31 fastsetter:

> *1. I samsvar med bestemmelsene i denne avtale skal det ikke være noen restriksjoner på etableringsadgangen for statsborgere fra en av EFs medlemsstater eller en EFTA-stat på en annen av disse staters territorium. Dette skal gjelde også adgangen til å opprette agenturer, filialer eller datterselskaper for så vidt angår borgere fra en av EFs medlemsstater eller en EFTA-stat som har etablert seg på en av disse staters territorium.*
>
> *Etableringsadgangen skal omfatte adgang til å starte og utøve selvstendig næringsvirksomhet og til å opprette og lede foretak, særlig selskaper som definert i artikkel 34 annet ledd, på de vilkår som lovgivningen i etableringsstaten fastsetter for egne borgere, ...*

2 Article 34 EEA reads:

Companies or firms formed in accordance with the law of an EC Member State or an EFTA State and having their registered office, central administration or principal place of business within the territory of the Contracting Parties shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States.

'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

3 Article 36(1) EEA reads:

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

National Law

The Limited Liability Companies Act

4 Section 2-2 (1) point 2 of the Norwegian Act relating to limited liability companies (the "Limited Liability Companies Act") requires limited liability companies incorporated under Norwegian law to have a "registered office" in Norway. The wording of Section 2-2 (1) of the Limited Liability Companies Act is as follows:

(1) The articles of association are to at a minimum state:

1. *The name of the company;*
2. *The municipality of the kingdom in which the company shall have its registered office;*
3. *The business of the company;*
4. *The size of the share capital, cf. Section 3-1;*
5. *The face value of the shares, cf. Section 3-1;*

2 EØS-avtalen artikkel 34 lyder:

Når det gjelder anvendelsen av bestemmelsene i dette kapittel, skal selskaper som er opprettet i samsvar med lovgivningen i en av EFs medlemsstater eller en EFTA-stat, og som har sitt vedtektsbestemte sete, sin hovedadministrasjon eller sitt hovedforetak innen avtalepartenes territorium, likestilles med fysiske personer som er statsborgere i EFs medlemsstater eller EFTA-statene.

Ved selskaper skal forstås selskaper i sivil- eller handelsrettslig forstand, herunder også kooperative selskaper, samt andre juridiske personer i offentlig- eller privatrettslig forstand, unntatt dem som ikke driver ervervsmessig virksomhet.

3 EØS-avtalen artikkel 36 nr. 1 lyder:

Innen rammen av bestemmelsene i denne avtale skal det ikke være noen restriksjoner på adgangen til å yte tjenester innen avtalepartenes territorium for statsborgere i en av EFs medlemsstater eller en EFTA-stat som har etablert seg i en annen av EFs medlemsstater eller EFTA-stat enn tjenesteyterens mottager.

Nasjonal rett

Lov om aksjeselskaper

4 Den norske lov om aksjeselskaper ("aksjeloven") § 2-2 første ledd nr. 2 krever at aksjeselskaper stiftet etter norsk rett må ha et "forretningskontor" i Norge. Ordlyden i aksjeloven § 2-2 første ledd er som følger:

(1) Vedtektene skal minst angi:

1. *selskapets foretaksnavn;*
2. *den kommune i riket hvor selskapet skal ha sitt forretningskontor;*
3. *selskapets virksomhet;*
4. *aksjekapitalens størrelse, jf § 3-1;*
5. *aksjenes pålydende (nominelle beløp), jf § 3-1;*

6. *The minimum and maximum number of directors on the board of directors cf. Section 6-1;*
7. *If the company shall have more than one general manager or if the board of directors or the corporate assembly has the authority to decide whether the company shall have more than one general manager, and if these are to act collectively as one body;*
8. *What matters are to be resolved at the ordinary general meeting, cf. Section 5-5;*
9. *If the shares of the company are to be registered in a securities register.*

5 At the relevant time, the Limited Liability Companies Act Section 16-15 read:

(1) If the general meeting does not adopt a resolution on dissolution, the district court shall decide by order that the company is to be dissolved in the following cases:

1. *if the company is to be dissolved as a result of statutory provisions or provisions in the articles of association;*
2. *if the company has not notified the Register of Business Enterprises of a board of directors that meets the requirements set out in statutory provisions or pursuant thereto;*
3. *if the company is required by law to have a general manager and has not notified the Register of Business Enterprises of a general manager who meets the statutory requirements;*
4. *if the company has not notified the Register of Business Enterprises of an auditor who meets the statutory requirements;*
5. *if the annual accounts, the directors' report and the auditor's report which the company must submit to the Register of Company Accounts pursuant to Section 8-2 of the Accounting Act have not been submitted within six months of the deadline for submission, or if, upon the expiry of the deadline, the Register of Company Accounts cannot approve material submitted as the annual accounts, directors' report and auditor's report.*

6. *antallet eller laveste og høyeste antall styremedlemmer, jf § 6-1;*

7. *om selskapet skal ha flere daglige ledere eller om styret eller bedriftsforsamlingen skal kunne bestemme at selskapet skal ha flere daglige ledere, samt i så fall om flere daglige ledere skal fungere som kollektivt organ;*

8. *hvilke saker som skal behandles på den ordinære generalforsamlingen, jf § 5-5;*

9. *om selskapets aksjer skal registreres i et verdipapirregister.*

5 På det aktuelle tidspunkt lød aksjeloven § 16-15 slik:

(1) Hvis ikke generalforsamlingen treffer beslutning om oppløsning, skal tingretten ved kjennelse beslutte selskapet oppløst i følgende tilfeller:

1. *når selskapet skal oppløses som følge av bestemmelse i lov eller vedtekter;*

2. *når selskapet ikke har meldt til Foretaksregisteret et styre som fyller de vilkår som følger av bestemmelsene gitt i eller i medhold av lov;*

3. *når selskapet etter loven skal ha daglig leder, og ikke har meldt til Foretaksregisteret en daglig leder som fyller de vilkår som er fastsatt i lov;*

4. *når selskapet ikke har meldt til Foretaksregisteret en revisor som fyller de vilkår som er fastsatt i lov;*

5. *når årsregnskap, årsberetning og revisjonsberetningen som selskapet skal sende til Regnskapsregisteret etter regnskapsloven § 8-2, ikke er innsendt innen seks måneder etter fristen for slik innsendelse, eller når Regnskapsregisteret ved fristens utløp ikke kan godkjenne innsendt materiale som årsregnskap, årsberetning og revisjonsberetning.*

(2) The court may only order the company to be dissolved pursuant to a provision in the articles of association if a shareholder has so demanded, and the general meeting has not adopted a resolution on dissolution pursuant to Section 16-1.

6 At the relevant time, the Limited Liability Companies Act Section 16-16 read:

(1) When the conditions set out in Section 16-15 (1) nos. 1 to 4 have been met, the Register of Business Enterprises must notify the company thereof. In cases as mentioned in Section 16-15 (1) no. 5, the notice will be given by the Register of Company Accounts. The company must be given a period of one month in which to rectify the matter and must be informed of the consequences of any failure to meet the deadline

(2) If the company has not rectified the matter upon expiry of the deadline, the Register of Business Enterprises or the Register of Company Accounts must repeat the warning by the insertion of a notice in the Brønnøysund Register Centre's electronic publication and in abbreviated from in a newspaper which is widely read in the area in which the registered office of the company is located. The notice must state that the terms and conditions for dissolution of the company have been met, and that the company has a deadline of four weeks from the notice was inserted in the Brønnøysund Register Centre's electronic publication in which to rectify the matter. The consequences of any failure to meet the deadline must also be stated.

(3) If it is considered expedient, public notice in accordance with the present provision may instead be given by the district court.

7 At the relevant time, the Limited Liability Companies Act Section 16-17 read:

(1) If the company has exceeded the period in Section 16-16 second paragraph, the Register of Business Enterprises or the Register of Company Accounts shall notify the District Court thereof.

(2) The court shall without further notice decide by decree to dissolve the company pursuant to § 16-15, unless such decision to dissolve has already been adopted by the general meeting. The decree has the same effect as a decree to open bankruptcy proceedings under chapter VIII of the Bankruptcy Act.

(2) Retten kan bare beslutte selskapet oppløst som følge av bestemmelse i vedtektene når en aksjeeier har fremsatt krav om det og generalforsamlingen har unnlatt å treffe beslutning om oppløsning etter § 16-1.

6 På det aktuelle tidspunkt lød aksjeloven § 16-16 slik:

(1) Når vilkårene i § 16-15 første ledd nr 1 til 4 er oppfylt, skal Foretaksregisteret gi selskapet varsel om dette. I tilfelle som nevnt i § 16-15 første ledd nr 5 gis varsel av Regnskapsregisteret. Selskapet skal gis en frist på en måned til å bringe forholdet i orden og underrettes om følgene av at fristen oversittes.

(2) Har selskapet ikke brakt forholdet i orden ved fristens utløp, skal Foretaksregisteret eller Regnskapsregisteret gjenta varselet ved kunngjøring i Brønnøysundregistrenes elektroniske kunngjøringspublikasjon og i kortform i en avis som er alminnelig lest på selskapets forretningssted. I kunngjøringen skal det angis at vilkårene for oppløsning av selskapet er oppfylt, og at selskapet har en frist på fire uker fra den elektroniske kunngjøringen til å bringe forholdet i orden. Følgene av at fristen oversittes skal også angis.

(3) Dersom det finnes hensiktsmessig, kan varsel etter denne bestemmelsen i stedet gis av tingretten.

7 På det aktuelle tidspunkt lød aksjeloven § 16-17 slik:

(1) Har selskapet oversittet fristen etter § 16-16 annet ledd, skal Foretaksregisteret eller Regnskapsregisteret varsle tingretten om dette.

(2) Retten skal uten ytterligere varsel ved kjennelse beslutte selskapet oppløst etter § 16-15, med mindre beslutning om oppløsning allerede er truffet av generalforsamlingen. Kjennelsen har virkning som kjennelse om konkursåpning etter konkursloven kapittel VIII.

(3) *If major social economic considerations so indicate, the King may resolve that the company shall be permitted to continue operations, and that the case shall not be sent to the District Court for compulsory dissolution, but that the company shall be given an extended deadline before compulsory dissolution is implemented. The King shall in such case resolve that the company shall pay a current coercive fine to the state with effect from a date to be stipulated until the matter has been rectified.*

8 In an interpretative statement of 6 January 1998, the Ministry of Justice contended that companies that relocate their head office outside the realm are in breach of Norwegian company legislation. According to that interpretative statement, whether a "head office" can be deemed to have been relocated outside the realm will depend on an "overall evaluation, based not only on where the board's management functions are exercised".

9 It is further noted in the statement that there is no case law defining the conditions for when a head office shall be considered to have been relocated outside the realm, and that, in legal doctrine, opinion varies concerning what is required to establish that a head office has been relocated and whether or not a head office or only a registered office in Norway is required under Norwegian limited liability company legislation.

10 The following passages are presented from the statement:

In our opinion, it needs to be acknowledged that neither the Limited Liability Companies Act nor any other legal sources established a rule which clearly states what affiliation a company needs to have to Norway in order to be Norwegian. The assessment must, as a starting point, be based on a common understanding of the term "head office". In most cases this will probably provide sufficient guidance for establishing the nationality of the company. In some cases, however, the different functions may be divided and spread out, to the extent that it is not obvious where the head office should be considered to be. In such cases the question of nationality must be based on an assessment taking into account all relevant circumstances, in which it will obviously be of importance where the board holds their meetings and where the administration performs their functions. Besides

(3) Dersom vesentlige samfunnsmessige hensyn tilsier det, kan Kongen av eget tiltak treffe vedtak om at selskapet tillates å drive videre, og at saken likevel ikke skal oversendes tingretten for tvangsoppløsning, men at selskapet skal gis en ytterligere frist før tvangsoppløsning gjennomføres. Kongen skal treffe vedtak om at selskapet i så fall skal betale en løpende tvangsmulkt til staten fra en frist som fastsettes og frem til forholdet er rettet.

8 I en tolkningsuttalelse 6. januar 1998 ("første tolkningsuttalelse") har Justisdepartementets lovavdeling lagt til grunn at selskaper som flytter sitt hovedkontor ut av riket, bryter med norsk selskapsrett. Om "hovedkontoret" kan anses flyttet ut av riket, vil etter tolkningsuttalelsen bero på en "helhetsvurdering, hvor man ikke bare kan legge vekt på hvor styret utøver sin funksjon".

9 Det heter videre at det ikke finnes noen rettspraksis som avgjør grensen for når et hovedkontor skal anses å være flyttet ut av riket. Dessuten er det i juridisk teori delte meninger om hva som skal til for å stadfeste at hovedkontoret er flyttet, og om norsk aksjelovgivning krever hovedkontor eller bare forretningskontor i Norge.

10 I uttalelsen kan følgende passasjer leses:

Slik vi ser det, må det erkjennes at det verken fra aksjeloven eller andre rettskilder kan utledes noen regel som klart angir hvilken tilknytning et selskap må ha til Norge for å anses som norsk. Ved vurderingen må man ta utgangspunkt i hva som er en vanlig språklig forståelse av begrepet "hovedkontor". I de fleste tilfellene vil dette antakelig gi et tilstrekkelig svar på hvor selskapet må anses å høre hjemme. Unntaksvis vil det imidlertid være slik at de forskjellige funksjonene er spredt, slik at det ikke er opplagt hvor man skal si at selskapet har hovedkontoret. I så fall må spørsmålet avgjøres ut fra en konkret vurdering, hvor det selvsagt vil være av sentral betydning hvor styret holder sine møter og hvor administrasjonen ellers holder til. Utover dette vil vi ikke se bort fra at det må kunne legges en viss vekt på

this we cannot rule out that other factors in general connecting the company to Norway may be of some importance, meaning that a weaker management connection to Norway may be outweighed by the company being connected to Norway in other ways.

...

3. *Consequences of illegal migration*

   In a case where the management and/or administration of a company to a material extent have been relocated abroad so that it must constitute a violation of the rule that the head office should be in Norway, the question is what consequences this should have. One can imagine several possible judicial consequences; penal liability for the management, relocation of the legal domicile abroad, a shareholder may obtain a ruling of remigration, dissolution of the company, etc. A violation of the rule will not necessarily entail all these consequences. In the following we will only comment on the question of dissolution.

   Irrespective of whether one considers the rule of a company having its registered office in Norway as non-statutory law or as an interpretation of the Limited Liability Companies Act Section 2-2 first paragraph no. 2, there is no doubt that a relocation of the head office is a violation, which the company is obliged to correct. The correction may either take place by remigration or by dissolving and liquidating the company. A limited company may therefore not "migrate" abroad without dissolution and liquidation in accordance with the Limited Liability Companies Act chapter 13 and incorporation in the new jurisdiction of residency in accordance with the relevant rules in that jurisdiction.

   Pursuant to the Limited Liability Companies Act Section 13-1 the general meeting has the authority to resolve on a company's dissolution. The bankruptcy court does not have the authority to rule on a forced dissolution in accordance with Section 13-2. We refer to that Section 13-2 first paragraph no. 1, which authorizes the bankruptcy court to rule on a forced dissolution when "the company shall be dissolved as stated by law", is aimed at statutory provisions which state that a violation has the consequence that the company should be dissolved."

selskapets tilknytning til Norge mer generelt, slik at en svakere tilknytning når det gjelder selskapets ledelse, til en viss grad kan oppveies av at selskapet er knyttet til Norge på andre måter.

...

3. Konsekvenser av ulovlig utflytting

I et tilfelle hvor en så vesentlig del av selskapets ledelse og/ eller administrasjon er flyttet til utlandet at det må ses som et brudd på regelen om at hovedkontoret skal ligge i Norge, reiser spørsmålet seg om hvilke følger dette får. En kan tenke seg flere mulige rettsfølger: straffansvar for ledelsen, flytting av vernetinget til utlandet, at en aksjeeier får dom på tilbakeflytting, oppløsning av selskapet, osv. Et brudd på regelen vil ikke nødvendigvis få alle disse konsekvensene. I det følgende behandler vi bare spørsmålet om oppløsning av selskapet.

Uavhengig av om man ser kravet om at et norsk aksjeselskap skal ha sitt hovedkontor i Norge, som en regel som følger av ulovfestet rett, eller som en følge av en tolkning av aksjeloven § 2-2 første ledd nr 2, er det på det rene at en flytting av hovedkontoret vil være et ulovlig forhold, som selskapet har plikt til å rette opp. Dette må enten skje ved tilbakeflytting eller ved at selskapet oppløses og avvikles. Et aksjeselskap kan dermed ikke "flytte" til utlandet uten oppløsning og avvikling etter aksjeloven kapittel 13 og nystiftelse etter reglene i det nye hjemlandet.

Etter aksjeloven § 13-1 er det generalforsamlingen som har kompetanse til å treffe beslutning om oppløsning. Skifteretten vil ikke ha kompetanse til å treffe beslutning om tvangsoppløsning etter § 13-2. Vi viser til at § 13-2 første ledd nr 1, som gir skifteretten kompetanse til å treffe beslutning om tvangsoppløsning når "selskapet skal oppløses som følge av bestemmelse i lov", tar sikte på lovbestemmelser som selv gir uttrykk for at en overtredelse medfører at selskapet kan tvangsoppløses."

11 According to the Ministry's statement, if a limited liability company's head office is relocated from the realm, this is an illegality that the company is obliged to rectify. This can be done by moving the head office back to the realm or by dissolving and winding up the company. In principle, it is the company's general meeting that has the competence to decide on dissolution or winding up of the company, cf. Section 16-1 of the Limited Liability Companies Act.

Liquidation taxation of companies

The Tax Assessment Act

12 If a limited liability company is dissolved, the company is liable to liquidation tax, which entails that all the company's assets are realised with a tax liability on the company's part pursuant to the universal rules on realisation laid down in the Taxation Act.

13 Before the dissolution of a company is completed, it must submit a tax return and demand an advance assessment, cf. Section 4-7(8) of the Tax Assessment Act. For the current income year, the advance assessment shall cover the period up until the company is finally dissolved, cf. Section 8-10 of the Tax Assessment Act. Consequently, when submitting its tax return for advance assessment, the company shall declare all latent tax liabilities for taxation, including gains on the realisation of assets. The withdrawal of operating assets in connection with dissolution, i.e. as liquidation dividend to the shareholders, is deemed to constitute realisation and must be included for taxation in the advance assessment, cf. Sections 5-1, 5-2 and 5-30 of the Taxation Act.

14 For shareholders liable to taxation in Norway, liquidation will involve realisation tax, i.e. shareholders' gains/losses on the shares will be liable to tax/deductible, cf. Section 10-37 of the Taxation Act.

15 In a statement of 7 May 1998 from the Ministry of Finance (the "second Interpretative Statement"), it is assumed that, when its head office is relocated abroad, a company may be liable to

11 Dersom et aksjeselskaps hovedkontor er flyttet ut av riket, er dette ifølge første tolkningsuttalelse et ulovlig forhold selskapet plikter å avhjelpe. Dette kan skje ved å flytte hovedkontoret tilbake til riket eller ved å oppløse og avvikle selskapet. I utgangspunktet er det selskapets generalforsamling som har kompetanse til å beslutte oppløsning og avvikling av selskapet, jf. aksjeloven § 16-1.

Likvidasjonsbeskatning av selskaper

Ligningsloven

12 Hvis et aksjeselskap faktisk oppløses, skal selskapet likvidasjonsbeskattes ved at alle selskapets eiendeler realiseres med skatteplikt på selskapets hånd etter skattelovens alminnelige realisasjonsregler.

13 Oppløsningen av et selskap er ikke avsluttet før det har levert selvangivelse og krevd seg forhåndslignet, jf. ligningsloven § 4-7 åttende ledd. For det løpende inntektsår skal forhåndsligningen foretas frem til den endelige oppløsning av selskapet, jf. ligningsloven § 8-10. Følgelig skal selskapet ved innlevering av selvangivelse til forhåndsligning oppgi til beskatning alle latente skatteforpliktelser, herunder gevinst ved realisasjon av eiendeler. Uttak av driftsmidler ved oppløsningen, dvs. som likvidasjonsutbytte til aksjonærene, anses som realisasjon på selskapets hånd, og skal medtas til beskatning i forhåndsligningen, jf. skatteloven §§ 5-1, 5-2 og 5-30.

14 For aksjonærer som er skattepliktige til Norge, vil likvidasjon medføre realisasjonsbeskatning, dvs. gevinst/tap på aksjene blir skattepliktig/fradragsberettiget på aksjonærenes hånd, jf. skatteloven § 10-37.

15 I en uttalelse 7. mai 1998 fra Finansdepartementet ("andre tolkningsuttalelse") er det antatt at i utflyttingssaker kan

liquidation tax even if it is not actually liquidated or its dissolution is not demanded.

16 The Ministry of Finance stated:

"In the case that a Norwegian incorporated limited company is no longer considered Norwegian in relation to Norwegian company law, as mentioned, the shareholders are obliged to dissolve the company (as a Norwegian limited company) through dissolution and liquidation, cf. the mentioned statement of 6 January 1998 from the Ministry of Justice. Such liquidation entails taxation in accordance with the Corporate Tax Act Section 5-8. Even if the shareholders neglect this liquidation obligation, there may be a basis for liquidation taxation based on anti-avoidance rules. For the tax authorities it will in such cases be close at hand to consider the failure to dissolve to be tax motivated and disloyal toward Norwegian tax rules (in addition to being illegal and punishable in accordance with the corporate legislation)."

The Double Taxation Convention between Norway and the United Kingdom.

17 Norway and the United Kingdom signed a double taxation convention (hereinafter referred to as the "DTC") on 12 October 2000, which has been effective in Norway since 1 January 2001. The DTC is incorporated into Norwegian law through Act No 15 of 28 July 1949 Relating to the King's Authority to Enter into Agreements with Foreign States for the Prevention of Double Taxation etc.

18 Section 4(1) of the DTC provides:

For the purposes of this Convention, the term 'resident of a Contracting State' means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.

likvidasjonsbeskatning skje selv om selskapet faktisk ikke likvideres eller kreves oppløst.

16 Finansdepartementet uttalte:

For det tilfelle at et norskregistrert aksjeselskap ikke lenger anses som norsk i relasjon til norsk aksjelovgivning som nevnt, har eierne plikt til å avvikle selskapet (som norsk aksjeselskap) gjennom oppløsning og likvidasjon, jfr den nevnte uttalelse av 6. januar 1998 fra Justisdepartementets lovavdeling. Slik likvidasjon medfører likvidasjonsbeskatning etter selskapsskatteloven § 5-8. Selv om eierne forsømmer denne avviklingsplikten, vil det kunne være grunnlag for likvidasjonsbeskatning ut fra gjennomskjæringsbetraktninger. For ligningsmyndighetene vil det i slike tilfeller være nærliggende å bygge på at unnlatelsen av å avvikle det norske selskapet er rent skattemessig motivert og illojal i forhold til norske skatteregler (i tillegg til å være ulovlig og straffbar etter aksjelovgivningen).

Skatteavtalen mellom Norge og Storbritannia

17 Norge og Storbritannia undertegnet 12. oktober 2000 en skatteavtale som trådte i kraft i Norge 1. januar 2001. Skatteavtalen ble inkorporert i norsk rett gjennom lov 28. juli 1949 nr. 15 om adgang for Kongen til å inngå overenskomster med fremmede stater til forebyggelse av dobbeltbeskatning m.v.

18 Skatteavtalens artikkel 4 nr. 1 lyder:

I denne overenskomst betyr uttrykket "person bosatt (hjemmehørende) i en kontraherende stat" enhver person som i henhold til lovgivningen i denne stat er skattepliktig der på grunnlag av domisil, bopel, sete for styre, det sted hvor selskapet er stiftet, eller ethvert annet lignende kriterium og omfatter også denne stat og enhver av dens regionale eller lokale forvaltningsmyndigheter. Uttrykket omfatter imidlertid ikke noen person som er skattepliktig i denne stat bare på grunnlag av inntekt fra kilder i denne stat eller formue som befinner seg der.

19 Section 31(1) of the DTC states:

The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by this Convention insofar as the taxation thereunder is not contrary to this Convention, in particular, to prevent fraud and to facilitate the administration of statutory provisions against legal avoidance. The exchange of information is not restricted by Article 1 of this Convention. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

II BACKGROUND TO THE DISPUTE IN THE MAIN PROCEEDINGS AND QUESTIONS REFERRED FOR AN ADVISORY OPINION

20 In the case pending before the national court, Arcade is seeking the annulment of a decision made by Tax Region West on 22 March 2010 ("the decision at issue in the main proceedings"), which revised the tax assessment of the company on the basis that it was deemed to have relocated its head office outside Norway and was under an obligation to liquidate pursuant to domestic company law.

21 Arcade was incorporated on 26 October 1990 and registered as a Norwegian limited liability company in Norway. The company was part of the Reading & Bates group and, to date, its business has consisted of the ownership and operation of two oil rigs. From 1995, both these rigs were in operation on the UK continental shelf and the company did not have any operational activities in Norway. From 1995, marketing, financing and operational management of both rigs was attended to by employees at

19 Skatteavtalens artikkel 31 nr. 1 fastsetter:

De kompetente myndigheter i de kontraherende stater skal utveksle slike opplysninger som er nødvendige for å gjennomføre bestemmelsene i denne overenskomst eller de interne lovbestemmelser i de kontraherende stater som angår skatter som kommer inn under denne overenskomst, spesielt med sikte på å forhindre svik og lette håndhevingen av lovbestemmelser rettet mot skatteunngåelse. Utvekslingen av opplysninger er ikke begrenset av artikkel 1 i denne overenskomst. Opplysninger som er mottatt av en kontraherende stat skal behandles som hemmelige på samme måte som opplysninger skaffet til veie med hjemmel i intern lovgivning i denne stat. Opplysningene må bare åpenbares for personer eller myndigheter (herunder domstoler og forvaltningsorganer) som har til oppgave å utligne eller innkreve de skatter som kommer inn under overenskomsten, eller å gjennomføre tvangsforføyninger eller annen rettsforfølgning eller avgjøre klager vedrørende disse skatter. Slike personer eller myndigheter skal nytte opplysningene bare til nevnte formål. De kan åpenbare opplysningene under offentlige rettsmøter eller i judisielle avgjørelser.

II BAKGRUNN FOR TVISTEN I SAKEN OG SPØRSMÅLENE FORELAGT FOR RÅDGIVENDE UTTALELSE

20 I saken for den nasjonale domstol krever Arcade at vedtak 22. mars 2010 av Skatt vest ("vedtaket saken gjelder"), som endret ligningen for selskapet med henvisning til at det ble ansett for å ha flyttet sitt hovedkontor ut av Norge og hadde en selskapsrettslig plikt til å likvidere, oppheves.

21 Arcade ble stiftet 26. oktober 1990 og registrert som et norsk aksjeselskap i Norge. Selskapet var del av Reading & Bates-konsernet, og virksomheten har til nå bestått i eierskap og drift av to oljerigger. Fra 1995 var begge riggene i drift på britisk sokkel, og selskapet hadde ingen operativ virksomhet i Norge. Fra 1995 ble markedsføring, finansiering og operativ ledelse av begge riggene ivaretatt av ansatte ved Reading & Bates' kontor i Aberdeen. Fra 1999 ble den ene av de to rigger leid ut til R&B Falcon Canada Co på *bare boat*-vilkår, dvs. at leietaker forestår

Reading & Bates's offices in Aberdeen. From 1999, one of the two rigs was leased to R&B Falcon Canada Co under a bare boat charter, meaning that the rig was operated by the lessee. From 1999 until the present, Arcade's business has consisted of operating one rig and leasing the other. The company's board of directors had two members resident in the USA and two members resident in Norway.

22 From 1995, the company had no employees in Norway. It maintained a registered address, administered by a Norwegian lawyer, and held board meetings and annual general meetings in Norway.

23 On 31 January 2001, Reading & Bates, including Arcade, was taken over by the Transocean group. The key employees at Reading & Bates's Aberdeen office stepped down from their positions, and responsibility for following up Arcade's business was assigned to the Transocean group's Aberdeen office.

24 During the 2001 and 2002 financial years, Arcade was legally registered in Norway; the company had a partially Norwegian board of directors and a Norwegian general manager. With effect from 19 December 2002, the company's Norwegian board members were replaced by board members resident in the UK.

25 The company had activities and operational management functions in Aberdeen, and, after June 2001, the board held its meetings there. Both Norwegian and UK law contained provisions under which the company might conceivably have an obligation to pay tax on all its worldwide income and gains. Pursuant to the Tax Treaty between Norway and the UK, the decisive factor was the "place of effective management" of the company.

26 When it submitted its Norwegian tax return for 2001, the company included a proviso that the UK tax authorities might conclude that the company was based there for tax purposes, in which case the company would no longer be under an obligation to pay tax on all its worldwide income and gains to Norway.

27 The UK tax authorities decided that Arcade was taxable as a UK-based company with effect from 1 January 2001. This decision

driften av riggen. Fra 1999 til dags dato har Arcades virksomhet bestått av drift av én rigg og utleie av den andre. Selskapets styre hadde to medlemmer bosatt i USA og to medlemmer bosatt i Norge.

22 Fra 1995 hadde selskapet ingen ansatte i Norge. Selskapet beholdt et forretningskontor som ble administrert av en norsk advokat, og avholdt enkelte styremøter og årlige generalforsamlinger i Norge.

23 Den 31. januar 2001 overtok Transocean-konsernet Reading & Bates, inklusive Arcade. De sentrale ansatte ved Reading & Bates' Aberdeen-kontor sluttet i sine stillinger, og ansvaret for å følge opp Arcades virksomhet ble overtatt av Transocean-konsernets Aberdeen-kontor.

24 I inntektsårene 2001 og 2002 var Arcade registrert som selskapsrettslig hjemmehørende i Norge; selskapet hadde delvis norsk styre og norsk daglig leder. Fra 19. desember 2002 ble selskapets norske styremedlemmer erstattet av styremedlemmer bosatt i Storbritannia.

25 Selskapet hadde virksomhet og operative ledelsesfunksjoner i Aberdeen, og fra juni 2001 ble styrets møter avholdt der. Både norsk og britisk lovgivning hadde bestemmelser som kunne tenkes å gi selskapet globalskatteplikt. Etter skatteavtalen mellom Norge og Storbritannia var det da avgjørende hvor "setet for den virkelige ledelse" befant seg.

26 Ved innleveringen av norsk selvangivelse for 2001 tok selskapet forbehold om at britiske skattemyndigheter kunne komme til at selskapet var skattemessig hjemmehørende der. I så fall ville selskapet ikke lenger være globalskattepliktig til Norge.

27 Britiske skattemyndigheter fattet vedtak om at Arcade var skattepliktig som hjemmehørende i Storbritannia fra og

was sent to the Stavanger Tax Office. The tax office obtained some more information from the company and then accepted it without further investigation.

28 On 22 March 2010, Tax Region West adopted the decision at issue in the main proceedings and revised Arcade's tax assessment for the 2001 and 2002 income years. Tax Region West found that, with effect from 19 December 2002, Arcade was deemed to have relocated its head office outside Norway and, pursuant to company law, was under an obligation to liquidate. This gave rise to liquidation taxation regardless of whether the company was actually liquidated. Tax Region West has given advance notice of the imposition of 60% additional tax in the case, but a decision concerning additional tax has not been made.

29 The decision at issue in the main proceedings means that Arcade's general business income for 2001 and 2002 is liable to taxation in Norway. The decision also entails liability for Norwegian liquidation tax at the end of 2002. A partial deduction was granted for tax paid abroad. According to the revised assessment, the company's income is to be increased by NOK 70,923,400 for 2001 and by NOK 2,372,777,524 for 2002. A credit deduction of NOK 28,616,806 was granted for tax paid abroad. Of the relevant reassessed items, the liquidation tax constitutes the biggest item by far, involving an increase in income of NOK 2,155,323,524. Tax, additional tax (notified but not imposed) and interest on this amount are estimated to amount to NOK 1,303,539,667.

30 On 20 September 2010, Arcade filed legal action against the Norwegian State, claiming annulment of the decision at issue in the main proceedings. Arcade argued that the assessment is invalid, *inter alia* because the liquidation tax is in contravention of EEA law. Notice of defence was filed on 15 October 2010. The State contests the objections of invalidity and maintains that the decision is valid.

31 On 3 February 2011, Oslo tingrett decided to request an Advisory Opinion on the validity of liquidation tax under EEA law. On

med 1. januar 2001. Dette vedtaket ble oversendt Stavanger likningskontor. Ligningskontoret innhentet noe mer informasjon fra selskapet, og la deretter til grunn opplysningene selskapet hadde gitt uten nærmere undersøkelser.

28 Den 22. mars 2010 fattet Skatt vest vedtaket saken gjelder, om endring av ligningene for Arcade for inntektsårene 2001 og 2002. Skatt vest fant at Arcade fra 19. desember 2002 måtte anses for å ha flyttet sitt hovedkontor ut av Norge og følgelig hadde en selskapsrettslig plikt til å likvidere. Dette utløste likvidasjonsbeskatning uavhengig av om selskapet faktisk var likvidert eller ikke. Skatt vest har varslet om ileggelse av 60 % tilleggsskatt i saken, men slikt vedtak er ikke fattet.

29 Vedtaket saken gjelder innebærer at Arcades alminnelige virksomhetsinntekt for 2001 og 2002 underlegges norsk beskatning. Vedtaket innebærer også norsk likvidasjonsbeskatning ved utgangen av 2002. Det ble gitt delvis fradrag for skatt betalt i utlandet. Endringsligningen ga selskapet en inntektsøkning på kr 70 923 400 for 2001 og på kr 2 372 777 524 for 2002. Fradrag ble innrømmet med kr 28 616 806 for skatt betalt i utlandet. Likvidasjonsbeskatningen utgjør den klart største post som er endret, med en inntektsøkning på kr 2 155 323 524. Skatt, tilleggsskatt (varslet, men ikke ilagt) og renter på dette beløp er estimert til kr 1 303 539 667.

30 Den 20. september 2010 tok Arcade ut stevning mot staten med krav om opphevelse av vedtaket saken gjelder. Arcade anførte at ligningen er ugyldig bl.a. fordi likvidasjonsskatten er i strid med EØS-retten. Tilsvar ble inngitt 15. oktober 2010. Staten bestrider ugyldighetsinnsigelsene og fastholder at ligningen er gyldig.

31 Oslo tingrett besluttet 3. februar 2011 å anmode EFTA-domstolen om en rådgivende uttalelse vedrørende lovligheten

14 June 2011, Oslo tingrett decided on the wording of the questions to be put to the Court. On 19 October 2011, the parties submitted an agreed draft letter containing questions to Oslo tingrett for referral to the Court. On 28 November 2011, Oslo tingrett referred the case to the Court.

32 Oslo tingrett states that the parties to the case disagree about whether an obligation to liquidate exists pursuant to Norwegian law. The Norwegian State has conceded that, in this specific case, liquidation tax cannot be imposed on Arcade if it cannot be established pursuant to company law that a liquidation obligation exists when a limited liability company relocates to another State. The referring court notes that it has not yet concluded as regards this question and that its questions to the Court have therefore been formulated on the assumption that a liquidation obligation exists under Norwegian law.

33 In its request, Oslo tingrett states that, if Arcade is deemed to have relocated its head office to another EEA State, the tax assessment decision will be invalid insofar as the liquidation tax is concerned, provided that such tax is in violation of EEA law. The court has therefore decided to request an Advisory Opinion on the following questions:

1) *Is it a restriction pursuant to Article 31 EEA, cf. Article 34 EEA, to impose liquidation tax on a company if national company law entails an obligation to liquidate the company because the company has relocated its de facto head office from Norway to another EEA State?*

   Is it of any significance that deferral of tax payment is not given until a realisation, if any, is effected?

2) *In the event that the district court holds that a restriction exists: what criteria will be decisive in determining whether the national regulation pursues grounds of overriding public interest and whether it is suitable and necessary for the attainment of such grounds?*

av likvidasjonsskatt etter EØS-retten. I beslutning 14. juni 2011 fastsatte Oslo tingrett formuleringen av spørsmålene til EFTA-domstolen. Partene oversendte den 19. oktober 2011 Oslo tingrett et omforent utkast til spørsmålsskriv til EFTA-domstolen. Den 28. november 2011 oversendte Oslo tingrett saken til EFTA-domstolen.

32 Oslo tingrett uttaler at partene i saken er uenige om det foreligger en likvidasjonsplikt etter norsk intern rett. Staten har i denne konkrete sak godtatt at likvidasjonsbeskatning av Arcade ikke kan skje dersom det ikke kan oppstilles noen selskapsrettslig likvidasjonsplikt ved flytting av et aksjeselskap til en annen stat. Den anmodende domstol bemerker at den ennå ikke har tatt stilling til dette spørsmål, og at spørsmålene til EFTA-domstolen derfor er formulert med en forutsetning om at det etter norsk rett foreligger en likvidasjonsplikt.

33 I sin anmodning uttaler Oslo tingrett at dersom Arcade anses for å ha flyttet sitt hovedkontor til en annen EØS-stat, vil ligningsvedtaket være ugyldig for så vidt gjelder likvidasjonsbeskatningen såfremt slik beskatning er i strid med EØS-retten. Tingretten har derfor besluttet å anmode EFTA-domstolen om en rådgivende uttalelse om følgende spørsmål:

1) *Er det en restriksjon etter EØS-avtalens artikkel 31, jf artikkel 34, å likvidasjonsbeskatte et selskap dersom det etter nasjonal selskapsrett foreligger en plikt til å likvidere selskapet fordi selskapet har flyttet sitt reelle hovedkontor fra Norge til en annen EØS-stat?*

   Har det betydning at det ikke gis utsettelse med skattebetalingen frem til en eventuell realisasjon finner sted?

2) *For det tilfellet at tingretten kommer til at det foreligger en restriksjon: Hvilke kriterier vil være avgjørende for å fastslå om den nasjonale regulering forfølger tvingende allmenne hensyn, og om den er egnet og nødvendig for å nå disse hensyn?*

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

III THE FIRST QUESTION

Preliminary remarks

35 In its first question, the national court asks whether it constitutes a restriction pursuant to Articles 31 and 34 EEA to impose liquidation tax on a company if national company law entails an obligation to liquidate the company because the company has relocated its *de facto* head office from Norway to another EEA State.

36 The Norwegian State argues that it follows from settled case law that Arcade cannot plead infringement of its freedom of establishment under Articles 31 and 34 EEA, as it follows from national company law that a company relocating its effective management to the United Kingdom cannot retain its status as a Norwegian company and thus must be liquidated. This view is, in principle, supported by the Finnish and French Governments.

37 Arcade submits that the contested taxation does not result from a duty under company law to liquidate, but instead from the application of a general anti-tax avoidance principle of Norwegian law. Arcade furthermore contends that it is a fully operational company that has never been requested nor forced to enter into liquidation by the Norwegian authorities. It claims that it maintains its status as a legal person in Norway and that it has done so ever since its incorporation.

38 This argument is, in essence, endorsed by ESA and the Commission. ESA submits that Arcade was never actually liquidated and points out that the request of the national court states that enforced dissolution pursuant to the Limited Liability Companies Act can only be effected after the company has been notified and given a deadline to rectify the situation, and after a decision by a district court.

34 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.

III DET FØRSTE SPØRSMÅL

Innledende bemerkninger

35 I sitt første spørsmål spør den nasjonale domstol om det er en restriksjon etter EØS-avtalens artiklene 31 og 34 å likvidasjonsbeskatte et selskap dersom det etter nasjonal selskapsrett foreligger en plikt til å likvidere selskapet fordi selskapet har flyttet sitt reelle hovedkontor fra Norge til en annen EØS-stat.

36 Staten gjør gjeldende at det følger av fast rettspraksis at Arcade ikke kan påberope seg etableringsfriheten etter EØS-avtalen artiklene 31 og 34 når det følger av nasjonal selskapsrett at et selskap som flytter sin virkelige ledelse til Storbritannia, ikke kan beholde sin status som et norsk selskap og dermed må likvideres. Dette syn støttes i prinsippet av Finlands og Frankrikes regjering.

37 Arcade gjør gjeldende at den omstridte beskatning ikke er en følge av en selskapsrettslig likvidasjonsplikt, men av anvendelsen av en ulovfestet omgåelsesnorm på skatterettens område i norsk rett. . Videre hevder Arcade at det er et fullt operativt selskap som aldri har blitt avkrevd eller tvunget til avvikling av norske myndigheter. Arcade gjør gjeldende at selskapet fortsatt opprettholder sin status som juridisk person i Norge og har gjort dette siden det ble stiftet.

38 ESA og Kommisjonen deler i hovedsak denne oppfatning. ESA anfører at Arcade faktisk aldri ble likvidert, og peker på at det i anmodningen fra den nasjonale domstol uttales at tvangsoppløsning etter aksjeloven bare kan gjennomføres etter varsel til selskapet med frist for å bringe forholdet i orden, og etter beslutning av tingretten.

39 In this regard, both ESA and the Commission point out that the Norwegian authorities responsible for the enforcement of company law have taken no steps to require Arcade to dissolve itself or change its status during the period since its head office was relocated to the United Kingdom. Instead, the only reaction of the Norwegian authorities to the company's relocation of its real seat appears to be the imposition of a tax. The Commission argues that, in these circumstances, it may be questionable whether, in reality, there is any company law obstacle to the relocation, and hence any justification for the tax decision, but that is a matter to be examined by the national court.

40 At the outset, it must be recalled that EEA law contains no uniform definition of which companies may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company. Certain States require that not merely the registered office but also the real seat – that is to say, the central administration of the company – should be situated in their territory. The removal of the central administration from that territory thus presupposes the winding up of the company with all the consequences that winding up entails under company law. The legislation of other States permits companies to transfer their central administration to a foreign country but some of them make that right subject to certain restrictions.

41 Thus, the question of whether Article 31 EEA applies to a company that seeks to rely on the fundamental freedom enshrined therein is a preliminary matter that, as EEA law now stands, can only be resolved pursuant to the applicable national law. Consequently, the question of whether the company is faced with a restriction on its freedom of establishment within the meaning of Article 31 EEA can only arise if it has been established, in light of the conditions laid down in Article 34 EEA, that the company actually has a right to that freedom (see, for comparison, Cases 81/87 *Daily Mail and General Trust* [1988] ECR 5483, paragraphs 19 to 23; C-208/00 *Überseering* [2002] ECR I-9919, paragraphs 67 to 70; and C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 109).

39 I denne sammenheng peker både ESA og Kommisjonen på at norske myndigheter med ansvar for å håndheve aksjeloven ikke har iverksatt noe tiltak for å kreve at selskapet oppløses eller endrer sin status i tiden etter at Arcade flyttet sitt hovedkontor til Storbritannia. Den eneste reaksjon fra norske myndigheter på selskapets flytting av hovedsete synes å være ileggingen av en skatt. Kommisjonen gjør gjeldende at det under disse omstendigheter kan være tvilsomt om selskapsretten faktisk er til hinder for flyttingen, og følgelig om det finnes noen begrunnelse for skattevedtaket, men dette er spørsmål som må avgjøres av den nasjonale domstol.

40 Innledningsvis minnes det om at EØS-retten ikke inneholder noen ensartet definisjon av hvilke selskaper som kan påberope seg etableringsfriheten i kraft av én enkelt tilknytningsfaktor som avgjør hvilken nasjonal rett som kommer til anvendelse på et selskap. Enkelte stater krever ikke bare at det vedtektsbestemte sete men også det faktiske hovedsetet – det vil si selskapets hovedkontor – skal ligge på deres territorium. Å flytte hovedkontoret fra dette territorium forutsetter altså at selskapet avvikles, med alle de konsekvenser som en avvikling selskapsrettslig innebærer. Andre stater tillater selskaper å flytte sitt hovedkontor til et annet land, men i noen av dem er denne rett underlagt visse restriksjoner.

41 Dermed er spørsmålet om EØS-avtalen artikkel 31 får anvendelse på et selskap som vil påberope seg den grunnleggende frihet som er hjemlet der, et prejudisielt spørsmål som etter gjeldende EØS-rett utelukkende kan avgjøres etter den relevante nasjonale lovgivning. Spørsmålet om selskapet har blitt pålagt en restriksjon på sin etableringsfrihet etter EØS-avtalen artikkel 31, vil dermed bare oppstå dersom det er godtgjort, i lys av vilkårene fastsatt i EØS-avtalen artikkel 34, at selskapet faktisk er berettiget til denne frihet (se, for sammenligning, sak 81/87 *Daily Mail og General Trust*, Sml. 1988 s. 5483, avsnittene 19 til 23, C-208/00 *Überseering*, Sml. 2002 s. I-9919, avsnittene 67 til 70, og C-210/06 *Cartesio*, Sml. 2008 s. I-9641, avsnitt 109).

42 According to Oslo tingrett, it is undisputed that Arcade was originally established as a company under Norwegian law. Furthermore, it follows from the request and information submitted by the parties at the oral hearing that Arcade is still operating as a company in Norway and that no procedure whatsoever has been initiated in order to liquidate it.

43 It is also clear from the request that the subject matter of the main proceedings does not relate to a decision to wind up or liquidate the company as a result of failure to meet the requirements of national company law. On the contrary, the proceedings concern the decision of Tax Region West to revise the previous taxation of Arcade and impose additional tax, following its assessment that Arcade failed to comply with its duty to wind up and liquidate pursuant to Norwegian law, thus evading possible liquidation tax. Moreover, it is not contested that the taxation in question is based on the application of the general and unwritten anti-avoidance principles of Norwegian tax law.

44 The decision at issue in the main proceedings does not concern the determination of the conditions required by an EEA State for a company incorporated under its law to be able to retain its status as a company of that State after relocating its head office to another EEA State. It is solely related to attaching tax consequences following the assessment of the tax authorities that a company has failed to liquidate, and does not affect the status of the company as such under the applicable national law. However, the view of the tax authorities that Arcade is obliged to liquidate appears to be based on the fact that the company relocated its seat from Norway to another EEA State, and that it thus lost its connecting factor, and may not retain its status as a company governed under Norwegian law.

45 In the absence of clear and precise provisions of national law that a company moving its head office out of Norway must liquidate, and of any decision by the competent authorities or courts putting the liquidation into effect, the relocation of Arcade's head offices to the United Kingdom does not frustrate its right to rely on Article 31 EEA in the present case. Arcade therefore benefits,

42 Ifølge Oslo tingrett er det ikke omtvistet at Arcade opprinnelig ble etablert som et selskap etter norsk rett. Videre følger det av anmodningen og informasjon fremlagt av partene under den muntlige forhandling, at Arcade fortsatt virker som et selskap i Norge, og at det ikke har blitt iverksatt noen som helst skritt for å likvidere selskapet.

43 Det fremgår også klart av anmodningen at tvistegjenstanden i hovedsaken ikke gjelder en beslutning om avvikling eller likvidasjon av selskapet som en følge av at krav etter nasjonal selskapsrett ikke var oppfylt. Saken er tvert imot begrenset til å gjelde Skatt vests vedtak om endring av tidligere ligninger for Arcade og ileggelse av tilleggsskatt, etter at Skatt vest hadde kommet til at Arcade hadde unnlatt å oppfylle sin avviklings- og likvidasjonsplikt etter norsk rett og dermed hadde unndratt seg en eventuell likvidasjonsbeskatning. Videre er det ikke bestridt at ileggelse av den aktuelle skatt er basert på anvendelsen av norsk skattelovgivnings generelle, ulovfestede gjennomskjæringsregel.

44 Vedtaket saken gjelder, vedrører ikke de krav en EØS-stat kan stille for at et selskap stiftet etter dens nasjonale rett skal kunne beholde sin status som et selskap i denne stat etter å ha flyttet sitt hovedkontor til en annen EØS-stat. Det gjelder utelukkende de skattemessige konsekvenser av at skattemyndighetene vurderte et selskap til ikke å ha oppfylt sin likvidasjonsplikt, og påvirker ikke selskapets status som sådan etter gjeldende nasjonal lovgivning. Imidlertid synes skattemyndighetenes oppfatning om at Arcade har likvidasjonsplikt, å være begrunnet med at selskapet flyttet sitt sete fra Norge til en annen EØS-stat, og at det dermed tapte den tilknytning som kreves for å beholde sin status som et selskap underlagt norsk rett.

45 I mangel av klare og presise regler i nasjonal rett om at et selskap som flytter sitt hovedkontor ut av Norge må likvideres, og av en beslutning av kompetente myndigheter eller domstoler om iverksettelse av likvidasjonen, hindrer ikke flyttingen av Arcades hovedkontor til Storbritannia selskapets rett til å påberope seg EØS-avtalen artikkel 31 i den foreliggende sak. Arcade kan

in accordance with Article 34 EEA, from the provisions on freedom of establishment under the EEA Agreement, by virtue of its status as company established under the legislation of an EEA State and having its registered office and central management within the European Economic Area.

46 In such circumstances, a company may rely on Article 31 EEA to challenge the lawfulness of a tax imposed on it by its home State on the occasion of the relocation of its head office to another EEA State (see, for comparison, Case C-371/10 *National Grid Indus*, judgment of 29 November 2011, not yet reported, paragraphs 31 to 32).

47 Consequently, as suggested by several interested parties that submitted written observations and arguments at the oral hearing, it is appropriate to consider the question of whether the tax imposed on Arcade by the decision of Tax Region West on 22 March 2010 is contrary to Articles 31 and 34 EEA.

Observations submitted to the Court

48 Arcade argues that the revision of its tax assessment for the 2001 and 2002 income years entails immediate taxation, with no option of deferring payment of the tax. Arcade contends that to impose such a tax on the basis that the company has relocated its seat to another EEA State constitutes a restriction pursuant to Articles 31 and 34 EEA.

49 In this regard, Arcade submits that the general anti-tax avoidance rule that forms the basis for the contested taxation is only applied to cross-border relocations. In Arcade's view, imposing an immediate tax charge levied on exit from one EEA State to another is discrimination under the freedom of establishment in cases where no similar taxation is charged in connection with purely domestic relocations.

50 Arcade contends that, pursuant to Norwegian law, the relocation of management functions or operational functions within Norway does not give rise to any form of income taxation, while the

derfor bygge på etableringsfriheten etter EØS-avtalen artikkel 34 i kraft av sin status som selskap etablert i henhold til lovgivningen i en EØS-stat, og fordi det har sitt vedtektsbestemte sete og sin sentrale ledelse innenfor Det europeiske økonomiske samarbeidsområde.

46 Under disse forhold kan et selskap påberope seg EØS-avtalen artikkel 31 for å bestride lovligheten av en skatt ilagt av hjemstaten når det flytter sitt hovedkontor til en annen EØS-stat (se, for sammenligning, sak C-371/10 *National Grid Indus*, dom av 29. november 2011, ennå ikke i Sml., avsnittene 31 og 32).

47 Følgelig er det, som flere berørte parter også har hevdet i skriftlige innlegg og argumenter under den muntlige forhandling, på sin plass å stille spørsmål ved om skatten Arcade ble ilagt ved Skatt vests vedtak av 22. mars 2010, er i strid med EØS-avtalen artiklene 31 og 34.

Innlegg inngitt til EFTA-domstolen

48 Arcade anfører at endringen av ligningene for inntektsårene 2001 og 2002 utløser umiddelbar skatteplikt, uten mulighet for å få utsatt betalingen av skatten. Arcade gjør gjeldende at å ilegge en slik skatt med den begrunnelse at selskapet har flyttet sitt sete til en annen EØS-stat, utgjør en restriksjon etter EØS-avtalen artiklene 31 og 34.

49 Arcade bemerker i denne sammenheng at den ulovfestede omgåelsesnorm, som er grunnlaget for den omstridte beskatning, bare anvendes i tilfeller der flytting av hovedsetet skjer over landegrensene. Slik Arcarde ser det, innebærer et umiddelbart skattekrav ved utflytting fra en EØS-stat til en annen forskjellsbehandling etter etableringsfriheten i tilfeller der ingen tilsvarende skatt ilegges når flyttingen foregår innenlands.

50 Arcade gjør gjeldende at etter norsk rett utløser ikke flytting av ledelsesfunksjoner eller operative funksjoner internt i Norge noen form for inntektsskatt, mens vedtaket saken gjelder

decision at issue in the main proceedings imposes an immediate tax on all unrealised gains upon the relocation of functions to the United Kingdom – as if the company were dissolved at this time. Arcade argues that the cross-border relocation of its place of effective management is objectively comparable to a situation in which a company relocates its place of effective management within an EEA State.

51 This argument is essentially supported by ESA and the Commission. In the view of the Commission, the relocation of a company's seat or assets to another EEA State may trigger an exit tax charge that is not borne by companies that do not relocate their seat, their operations or their assets out of the realm, but only within the national territory. The latter only pay tax when the value of the assets is realised, for example through their disposal. That tax is charged later, sometimes much later. The Commission argues that such a difference in treatment is undeniably an obstacle to free movement, as it places companies that relocate their head office abroad at a clear disadvantage in comparison with companies that do not exercise their right to free movement.

52 Accordingly, Arcade argues that it is a restriction pursuant to Articles 31 and 34 EEA to impose immediate taxation on a company because it has relocated its effective management from Norway to another EEA State. In Arcade's view, if the company is not actually in liquidation, this applies irrespective of whether national law entails an obligation to liquidate.

53 As regards the argument of the Norwegian State that Arcade has a duty to liquidate under Norwegian company law and that the taxation of the company is a result of this duty, Arcade submits that this question is disputed in national law. Moreover, Norwegian companies are not taxed on the basis of an obligation to liquidate, but on their actual disposal of assets as part of the liquidation process.

54 Moreover, in Arcade's opinion, the principle of legal certainty should require that the liquidation taxation be dependent on actual liquidation. Otherwise, it is possible to end up with a

medfører en umiddelbar beskatning av all urealisert gevinst ved flytting av slike funksjoner til Storbritannia – som om selskapet på dette tidspunkt ble oppløst. Arcade anfører at flytting over landegrensene av setet for den virkelige ledelse objektivt sett kan sammenlignes med en situasjon der et selskap flytter setet internt i en EØS-stat.

51 ESA og Kommisjonen støtter i hovedsak dette argument. Slik Kommisjonen ser det, kan flytting av et selskaps hovedsete eller eiendeler til en annen EØS-stat utløse et skattekrav ved utflytting som ikke pålegges selskaper som ikke flytter sitt hovedsete, sin virksomhet eller sine eiendeler ut av riket, men bare innenfor nasjonalt territorium. Sistnevnte betaler bare skatt når eiendelenes verdi realiseres, for eksempel når de avhendes. Dette skattekrav oppstår dermed senere, noen ganger mye senere. Kommisjonen anfører at en slik forskjellsbehandling uten tvil er en hindring for den frie bevegelighet ettersom det innebærer en klar ulempe for selskaper som flytter sitt hovedkontor til utlandet, sammenlignet med selskaper som ikke utøver sin rett til fri bevegelighet.

52 Følgelig anfører Arcade at umiddelbar beskatning av et selskap som følge av at det har flyttet sin virkelige ledelse fra Norge til en annen EØS-stat, utgjør en restriksjon etter EØS-avtalen artiklene 31 og 34. Etter Arcades oppfatning vil dette være tilfelle dersom selskapet ikke faktisk likvideres, uten hensyn til om nasjonal rett fastsetter en plikt til å likvidere selskapet.

53 Når det gjelder statens anførsel om at Arcade har likvidasjonsplikt etter norsk rett, og at beskatningen av selskapet er et resultat av denne plikt, anfører Arcade at dette spørsmål er omstridt i norsk rett. Videre er det ikke likvidasjonsplikten som begrunner beskatningen av norske selskaper, men den faktiske realisasjon av eiendeler som et ledd i likvidasjonsprosessen.

54 Etter Arcades oppfatning tilsier dessuten rettssikkerhetshensyn at likvidasjonsbeskatning forutsetter faktisk likvidasjon. Ellers vil man kunne ende opp i en situasjon der nasjonal

situation in which domestic liquidation taxation only takes place where companies are actually liquidated, while a different and discriminatory rule will apply to cross-border situations. Arcade contends that all the normal liquidation rules under the Limited Liability Companies Act should also apply in a cross-border situation.

55 As regards Arcade's argument that liquidation taxation treats the relocation of a real seat from Norway to the United Kingdom less favourably than a corresponding relocation within Norway, the Norwegian State contends that this is not a relevant comparison. The relevant benchmark is the taxation of a company that does not comply with its obligation to liquidate. Such a company would be subject to liquidation taxation to the same extent as Arcade, regardless of whether or not actual liquidation had taken place. It is the obligation to liquidate that gives rise to the liquidation taxation, not the relocation of the real seat of the head office as such.

56 It is common ground between the parties that the taxation that follows from the decision at issue in the national proceedings is not a direct consequence of liquidation. Instead, this taxation is based on general anti-tax avoidance principles, which Norwegian authorities have applied in arriving at their assessment that Arcade has not met its obligation to liquidate under Norwegian company legislation and thus evaded consequential taxation.

57 However, Arcade claims that these principles are only applied to cross-border relocations. On the other hand, the Norwegian State argues that general unwritten anti-avoidance principles have been applied in order to enable "the actual written statutory rules on liquidation taxation of companies to come into effect". In this regard, the Government argues that, since the company could not retain its status as a Norwegian company under national company law and was obliged to liquidate, but chose not to do so, this was seen as an avoidance of this obligation and the consequent liquidation taxation.

likvidasjonsbeskatning bare vil bli ilagt når selskaper faktisk blir likvidert, mens en annen regel kommer til anvendelse i grenseoverskridende situasjoner, noe som vil innebære forskjellsbehandling. Arcade gjør gjeldende at de alminnelige likvidasjonsregler i aksjeloven bør komme til anvendelse også i grenseoverskridende situasjoner.

55 Når det gjelder Arcades anførsel om at likvidasjonsbeskatningen medfører at flytting av et hovedsete fra Norge til Storbritannia blir mindre gunstig enn tilsvarende flytting internt i Norge, gjør staten gjeldende at sammenligningen ikke er treffende. Det relevante sammenligningsgrunnlag er beskatning av et selskap som ikke overholder sin likvidasjonsplikt. Et slikt selskap ville blitt ilagt likvidasjonsskatt i samme utstrekning som Arcade, uten hensyn til om faktisk likvidasjon hadde funnet sted eller ikke. Det er plikten til å likvidere som utløser likvidasjonsbeskatning, ikke flyttingen av hovedsetet som sådan.

56 Det er enighet mellom partene om at beskatningen som følger av det omstridte vedtak ikke er en direkte konsekvens av likvidasjon. Beskatningen er derimot begrunnet i den ulovfestede omgåelsesnorm, som norske myndigheter la til grunn da de kom til at Arcade ikke har oppfylt sin likvidasjonsplikt etter norsk selskapsrett, og dermed har unndratt seg beskatning i denne sammenheng.

57 Arcade gjør gjeldende at denne regel bare anvendes der flyttingen skjer over landegrensene. Staten anfører derimot at den generelle, ulovfestede gjennomskjæringsregel har blitt anvendt for å sikre at "de lovfestede regler om likvidasjonsbeskatning av selskaper skal få virkning". I den sammenheng anfører staten at siden selskapet ikke kunne beholde sin status som norsk selskap etter nasjonal selskapsrett og dermed var forpliktet til å likvidere, men valgte ikke å gjøre det, ble dette betraktet som en omgåelse av likvidasjonsplikten og likvidasjonsbeskatningen i denne sammenheng.

Findings of the Court

58 Freedom of establishment under Article 34 EEA entails a right for companies, formed in accordance with the law of an EEA State and having their registered office, central administration or principal place of business within the EEA, to pursue their activities in another EEA State through a branch established there.

59 Even though, according to its wording, Article 31 EEA is intended in particular to secure the benefit of national treatment in a host State, it also prohibits the home State from hindering the establishment in other EEA States of its own nationals or companies incorporated under its legislation (see Case E-7/07 *Seabrokers* [2008] EFTA Ct. Rep. 172, paragraph 28, and case law cited).

60 The prohibition on discrimination, whether it has its basis in Article 4, 31 or 40 EEA, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (compare Case C-155/09 *Commission* v *Greece*, judgment of 20 January 2011, not yet reported, paragraph 68 and the case law cited).

61 The Norwegian State maintains that general anti-avoidance principles are applied in the same manner to the taxation of all companies that are deemed to be in avoidance of taxation consequent to the winding up and liquidation of companies. Arcade, on the other hand, submits that these principles are only applied to cross-border situations.

62 If the view of the Norwegian State is correct, the application of anti-avoidance principles should be regarded as being compatible with Articles 31 and 34 EEA.

63 If, however, Arcade's submission is deemed to be correct, such application entails unequal treatment and constitutes a restriction on the freedom of establishment of Norwegian companies. A difference in treatment relating to the taxation being imposed on

Rettens bemerkninger

58 Etableringsfriheten hjemlet i EØS-avtalen artikkel 34 innebærer en rett for selskaper som er opprettet i samsvar med lovgivningen i en EØS-stat, og som har sitt vedtektsbestemte sete, sin hovedadministrasjon eller sitt hovedforetak innenfor EØS-området, til å fortsette sin virksomhet i en annen EØS-stat gjennom en filial etablert der.

59 Selv om EØS-avtalen artikkel 31 etter sin ordlyd særlig har til formål å sikre nasjonal behandling i en vertsstat, forbyr bestemmelsen også at hjemstaten hindrer sine egne statsborgere eller selskaper stiftet i samsvar med dens lovgivning i å etablere seg i en annen EØS-stat (se sak E-7/07 *Seabrokers*, Sml. 2008 s. 172, avsnitt 28, og den rettspraksis som det vises til der).

60 Forbudet mot forskjellsbehandling, enten det er hjemlet i EØS-avtalen artikkel 4, 31 eller 40, forutsetter at sammenlignbare situasjoner ikke skal behandles forskjellig, og at forskjellige situasjoner ikke skal behandles på samme måte med mindre slik behandling er objektivt begrunnet (jf. sak C-155/09 *Kommisjonen* mot *Hellas*, dom av 20. januar 2011, ennå ikke i Sml., avsnitt 68, og den rettspraksis som det vises til der).

61 Staten fastholder at den ulovfestede omgåelsesnorm anvendes på samme måte ved beskatning av alle selskaper som anses å ha unndratt seg beskatning etter avvikling og likvidasjon. Arcade anfører på sin side at denne regel bare anvendes på grenseoverskridende situasjoner.

62 Dersom staten har rett i sin påstand, vil anvendelsen av gjennomskjæringsregelen anses å være i samsvar med EØS-avtalen artiklene 31 og 34.

63 Hvis derimot Arcades syn anses å være riktig, vil anvendelsen av omgåelsesnormen innebære forskjellsbehandling og utgjøre en restriksjon på etableringsfriheten for norske selskaper. Forskjellsbehandling når det gjelder den beskatning

companies by the competent authority on the basis of a general anti-avoidance rule is liable to deter a company incorporated under Norwegian law from relocating its place of management to another EEA State (see, to that effect, Cases C-9/02 *de Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 46; C-470/04 *N* [2006] ECR I-7409, paragraph 35; and *National Grid Indus*, cited above, paragraph 37).

64 Such a difference in treatment cannot be explained by an objective difference in situation. From the point of view of the legislation of an EEA State that aims to tax capital gains and other sources of income generated in its territory, the situation of a company incorporated under the law of that State which relocates its head office to another EEA State is similar as regards the taxation of gains on the assets that were generated in the former State before the relocation of the head office, to that of a company that is also incorporated under the law of the former EEA State that retains its head office in that State (compare *National Grid Indus*, cited above, paragraph 38).

65 In proceedings under Article 34 SCA, the Court cannot resolve a dispute as to how national legislation is in fact applied. Like any other assessment of the facts involved, such a dispute is within the province of the national court. It is therefore for the national court to establish whether the circumstances in the proceedings before it correspond to the situation described in paragraph 62 or 63 of this judgment.

66 In light of the preceding considerations, the answer to the first question must be that a definitive determination of the amount of tax payable by a company that relocates its head office outside the realm of Norway on the basis of the tax authorities' assessment that it is an avoidance of taxation consequent to an obligation to wind up and liquidate the company pursuant to national company law, constitutes a restriction under Articles 31 and 34 EEA, if companies deemed to be in breach of such an obligation, but which are not seeking to relocate, are not subjected to liquidation taxation.

vedkommende myndigheter ilegger selskaper med hjemmel i en generell gjennomskjæringsregel, vil kunne avskrekke et selskap stiftet etter norsk rett fra å flytte setet for den virkelige ledelse til en annen EØS-stat (se saker C-9/02 *de Lasteyrie du Saillant*, Sml. 2004 s. I-2409, avsnitt 46, C-470/04 *N*, Sml. 2006 s. I-7409, avsnitt 35, og *National Grid Indus*, som omtalt over, avsnitt 37).

64 En slik forskjellsbehandling kan ikke forklares med at situasjonene er objektivt forskjellige. For en EØS-stat som vil skattlegge kapitalgevinst og andre inntekter generert på dens territorium, vil et selskap stiftet etter denne stats rett som flytter sitt hovedkontor til en annen EØS-stat, være i samme situasjon etter lovgivningen når det gjelder beskatning av gevinst på eiendeler realisert i den førstnevnte stat før hovedkontoret ble flyttet, som et selskap som også er stiftet etter den førstnevnte stats lovgivning, men som beholder sitt hovedkontor i denne stat (jf. *National Grid Indus*, som omtalt over, avsnitt 38).

65 I saker etter ODA artikkel 34 har EFTA-domstolen ikke anledning til å ta stilling til hvordan den nasjonale lovgivning faktisk skal anvendes. På samme måte som andre vurderinger av de faktiske forhold i saken, er det den nasjonale domstol som skal avgjøre dette spørsmål. Det er derfor den nasjonale domstol som skal vurdere om omstendighetene i saken den har til behandling, tilsvarer situasjonen beskrevet i avsnittene 62 eller 63 i denne dom.

66 I lys av ovenstående betraktninger må svaret på det første spørsmål bli at en endelig fastsettelse av det skattebeløp som skal betales av et selskap som flytter sitt hovedkontor ut av Norge, på grunnlag av skattemyndighetenes vurdering om at det har unndratt seg den beskatning som følger av en plikt etter nasjonal selskapsrett til å avvikle og likvidere selskapet, utgjør en restriksjon etter EØS-avtalen artiklene 31 og 34 dersom selskaper som anses å ha misligholdt en slik plikt, men som ikke har flyttet, ikke ilegges likvidasjonsbeskatning.

IV THE SECOND QUESTION

67 In its second question, the national court asks what criteria will be decisive when determining whether the national regulation in question pursues an overriding public interest and whether it is suitable and necessary for the attainment of such an interest.

68 In other words, the referring court is asking what grounds may justify taxation based on the assumption that a company is obliged to liquidate, even if it is still operating and has not actually been ordered to wind up and liquidate by the competent national administrative or judicial authorities. In this context, it is also appropriate to address the national court's question of whether it is of any significance that deferral of tax payment is not granted until realisation, if any, is effected.

Observations submitted to the Court

69 The Norwegian Government contends that the taxation at issue in the main proceedings is justified by the need to ensure a balanced allocation of powers of taxation between EEA States, and by the objective of preventing avoidance of national legislation. It is submitted that the objective attained by imposing tax on companies that are under an obligation to liquidate and can no longer exist pursuant to Norwegian legislation because they have relocated their real seat to another State is that assets generated by the company while it was legally a Norwegian entity are taxed in Norway.

70 It is also submitted that it will be relevant to apply this tax rule in situations other than cross-border situations in which a failure to effect *de facto* liquidation prevents the settlement of tax positions. In both cases, the application of the rule will rely on a specific assessment based on the same standards. It is argued that the national tax rule that applies to avoidance arrangements of the type in question is clearly appropriate in relation to preventing avoidance of liquidation tax.

71 As regards the need to preserve balanced allocation of powers of taxation, ESA submits that, in the case at hand, both Norwegian

IV DET ANDRE SPØRSMÅL

67 I sitt andre spørsmål spør den nasjonale domstol hvilke kriterier som vil være avgjørende for å fastslå om den nasjonale regulering forfølger et tvingende allment hensyn, og om den er egnet og nødvendig for å ivareta et slikt hensyn.

68 Med andre ord spør den anmodende domstol hvilke hensyn som vil kunne begrunne beskatning såfremt et selskap har likvidasjonsplikt, selv om selskapet fortsatt driver virksomhet og kompetente nasjonale forvaltningsorganer er domstoler ikke faktisk har truffet beslutning om avvikling og likvidasjon av selskapet. I denne sammenheng er det også hensiktsmessig å behandle den nasjonale domstols spørsmål om det har betydning at det ikke gis utsettelse med skattebetalingen frem til en eventuell realisasjon finner sted.

Innlegg inngitt til EFTA-domstolen

69 Norges regjering gjør gjeldende at beskatningen saken gjelder, er berettiget ut fra behovet for å sikre en balansert fordeling av beskatningsmyndighet mellom EØS-statene og målet om å hindre omgåelse av nasjonal lovgivning. Det anføres at det mål som nås ved å beskatte selskaper som har likvidasjonsplikt og ikke lenger kan eksistere etter norsk lovgivning fordi de har flyttet sitt hovedsete til en annen stat, er at verdier som selskapet har generert mens det fortsatt var å regne som et norsk selskap, blir beskattet i Norge.

70 Det anføres likeledes at anvendelse av en slik skatteregel også vil være aktuelt i ikke-grenseoverskridende situasjoner, der unnlatelse av faktisk likvidasjon hindrer oppgjør av skatteposisjoner. I begge tilfeller vil anvendelse av regelen bero på en konkret vurdering basert på samme norm. Det anføres at den nasjonale skatteregel som rammer unnlatelsesarrangementer av den aktuelle type, er klart egnet til å hindre omgåelse av likvidasjonsbeskatningen.

71 Når det gjelder behovet for å bevare en balansert fordeling av beskatningsmyndighet, anfører ESA at i den foreliggende sak

and UK law contain provisions under which Arcade might conceivably have an obligation to pay tax on all its worldwide income and gains. However, pursuant to the double taxation treaty, the decisive factor is the company's place of management. This means that, as long as the place of management was in Norway, Arcade was tax-resident there and paid tax on income and capital gains in Norway even though its actual assets were located in the United Kingdom.

72 In ESA's view, Norway was therefore in principle entitled to tax any unrealised capital gains that arose within the ambit of its power of taxation before Arcade relocated its head office to the United Kingdom.

73 Arcade asserts that neither the balanced allocation of powers of taxation nor the prevention of tax avoidance is an overriding reason that can justify the contested taxation in this matter. In any event, Arcade submits that the taxation is disproportionate, as it does not allow the taxpayer to choose between immediate and deferred taxation.

74 As to the national court's question of whether it is of any significance that deferral of tax payment is not granted until realisation, if any, is effected, Arcade argues that immediate taxation of the company due to the assessment of the tax authorities that it is obliged to liquidate goes further than necessary, as it means that the taxpayer will be subject to double taxation through the taxation of a fictitious liquidation.

75 In Arcade's opinion, it essentially follows from the ECJ's judgment in *National Grid Indus* that taxation without the possibility of deferral of payment of the tax until the time of realisation, as in the present case, must be regarded as disproportionate and that Article 31 EEA precludes national measures that prescribe the immediate recovery of tax on unrealised gains relating to assets of a company relocating its head office to another EEA State prior to actual liquidation. In Arcade's view, it is possible to determine the tax liability when the company relocates its head office and to

inneholder både norsk og britisk lovgivning bestemmelser som kan medføre at Arcade har plikt til å betale skatt på alle inntekter og all gevinst det har i hele verden. Men i henhold til skatteavtalen er den avgjørende faktor hvor selskapets sete for den virkelige ledelse befinner seg. Dette betyr at så lenge den virkelige ledelse var i Norge, var Arcade skattemessig hjemmehørende der og betalte skatt på inntekt og kapitalgevinst i Norge selv om selskapets faktiske eiendeler befant seg i Storbritannia.

72 Slik ESA ser det, var Norge derfor i prinsippet berettiget til å beskatte enhver urealisert kapitalgevinst som hadde oppstått på dens beskatningsområde før Arcade flyttet sitt hovedkontor til Storbritannia.

73 Arcade gjør gjeldende at verken en balansert fordeling av beskatningsmyndighet eller forebygging av omgåelse av skattereglene utgjør et tvingende allment hensyn som kan begrunne utflyttingsskatt i denne sak. Uansett anfører Arcade at beskatningen er uforholdsmessig ettersom den ikke tillater skattyteren å velge mellom umiddelbar eller utsatt beskatning.

74 Når det gjelder den nasjonale domstols spørsmål om det har betydning at det ikke gis utsettelse med skattebetalingen frem til en eventuell realisasjon finner sted, er Arcades argument at umiddelbar beskatning av selskapet som følge av at skattemyndighetene har vurdert det slik at det har likvidasjonsplikt, går lenger enn det som er nødvendig, da det innebærer at skattyteren, fordi han beskattes for en fiktiv likvidasjon, vil bli dobbeltbeskattet.

75 Etter Arcades oppfatning følger det i hovedsak av EU-domstolens dom i *National Grid Indus* at beskatning uten mulighet for å utsette skattebetalingen til realisasjonstidspunktet, som i den foreliggende sak, må betraktes som uforholdsmessig, og at EØS-avtalen artikkel 31 er til hinder for nasjonale tiltak som krever umiddelbar inndrivelse av skatt på urealisert kapitalgevinst vedrørende eiendeler i et selskap som flytter sitt hovedkontor til en annen EØS-stat forut for den faktiske likvidasjon. Arcade har det syn at det er mulig å fastsette skatteplikten når selskapet flytter sitt hovedkontor, og å utsette betalingen til

defer the payment until the dissolution process has reached the point where liabilities to the creditors are normally settled. This would make the taxation more proportionate.

76 The Commission essentially concurs with this view, arguing that, insofar as it is possible for the State of departure to ensure recovery of the tax debt by other means, there is no justification for the immediate payment of tax on the departure of the company or of the assets concerned. It is sufficient that the tax be calculated and charged at some later time when the gain would have become taxable in the ordinary course of events.

77 Arcade, ESA and the Commission submit that, even though Norway is not obliged by the EU Mutual Assistance Directives, during the period in question the country had entered into international agreements on the exchange of information in tax cases with nearly all the EEA States.

78 Moreover, Arcade adds that the company has an obligation to keep accounts and an auditing duty pursuant to Norwegian law, and it therefore submits revised accounts to the Norwegian authorities every year. Hence, the Norwegian tax authorities have every opportunity to check the information provided by the company. Should the company fail to fulfil the above obligations, a possible consequence would be a demand for dissolution from the Norwegian authorities, including related liquidation taxation.

79 The Norwegian State contends that, due to the Norwegian rule of law stating that a company cannot relocate its real seat to another state and continue to be a legally incorporated company, it is not relevant for the purposes of the present case to draw a distinction between the establishment of the amount of tax and the recovery of that tax. The immediate recovery of the tax must in such case also be deemed to be necessary to pursue the objective of preserving the allocation of powers of taxation between the EEA states.

80 If the Court should find that the distinction between the establishment of the amount of tax and its recovery is relevant in the present case, the Norwegian Government submits that Norway

oppløsningsprosessen har kommet til det punkt der gjelden til kreditorer vanligvis gjøres opp. Da ville beskatningen bli mer forholdsmessig.

76 Kommisjonen er i hovedsak enig i dette standpunkt og anfører at i den utstrekning det er mulig for fraflytningsstaten å sikre inndrivelse av skattekravet ved andre midler, er det ingen grunn til å kreve umiddelbar betaling av skatt ved utflyttingen av selskapet eller av de berørte eiendeler. Det er tilstrekkelig at skattekravet beregnes og innkreves på et senere tidspunkt, når gevinsten normalt skulle blitt beskattet.

77 Arcade, ESA og Kommisjonen anfører at selv om Norge ikke er bundet av EUs direktiver om gjensidig bistand, hadde landet i den aktuelle periode inngått internasjonale avtaler om utveksling av informasjon i skattesaker med nesten alle EØS-stater.

78 Arcade legger til at selskapet dessuten har regnskaps- og revisjonsplikt etter norsk lov, og at det derfor sender inn reviderte regnskaper til norske myndigheter hvert år. Følgelig har norske skattemyndigheter alle muligheter til å kontrollere opplysningene fra selskapet. Dersom selskapet unnlater å oppfylle ovennevnte krav, vil en mulig konsekvens kunne være at norske myndigheter begjærer selskapet oppløst, herunder krever den tilhørende likvidasjonsskatt.

79 Staten anfører at på grunn av den norske lovregel om at et selskap ikke kan flytte sitt hovedsete til en annen stat og fortsatt være et lovlig stiftet selskap, er det ikke relevant for den foreliggende sak å trekke opp et skille mellom fastsettelsen av skattebeløp og innkrevingen av skatten. Den umiddelbare innkreving av skatten må i så tilfelle også anses som nødvendig for å kunne forfølge målet om å bevare fordelingen av beskatningsmyndighet mellom medlemsstatene.

80 Om EFTA-domstolen skulle mene at skillet mellom fastsettelsen av skattens beløp og innkrevingen av skatten er relevant i den foreliggende sak, peker staten på at Norge og Storbritannia i 2002

and the United Kingdom had no mutual agreement on recovery of tax for 2002. The Norwegian authorities thus did not have the necessary means to obtain useful information in connection with the recovery of the claim, or to obtain assistance necessary to actually recover the tax claim. The Government argues that it is not relevant, also for this reason, to distinguish between the establishment of the amount of tax and the recovery of the tax in the present case.

81 If the Court should disagree, the Norwegian Government argues that the possible restriction constituted by the tax will be justifiable if the tax authorities in Norway gave Arcade a choice between settling the tax as of 2002, or at the time of subsequent realisation by disposal etc., according to the principles laid down in *National Grid Indus*.

Findings of the Court

82 According to settled case law, a restriction of freedom of establishment is only permissible if it is justified by overriding reasons in the public interest (see, for example, Case E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86, paragraph 41).

83 In such case, it is also necessary that the restriction is appropriate to ensuring the attainment of the objective in question and that it does not go beyond what is necessary to attain that objective (see Case E-9/11 *ESA* v *Norway*, judgment of 16 July 2012, not yet reported, paragraph 83, and case law cited).

84 In the absence of any unifying or harmonising measures, the EEA States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation (compare Case C-540/07 *Commission* v *Italy* [2009] ECR I-10983, paragraph 29, and case law cited). In particular, they are competent to define when a company can operate as a separate legal entity with regard to their powers of taxation, since EEA law, as noted in paragraph 35 above, contains no uniform definition of which companies may enjoy the right of establishment on the basis of a

ikke hadde noen gjensidig avtale om skatteinnkreving. Norske myndigheter hadde dermed ikke de nødvendige virkemidler til å innhente relevant informasjon i forbindelse med inndrivelse av kravet, eller til å få den nødvendige bistand til faktisk å inndrive skattekravet. Staten anfører at det også av denne grunn ikke er relevant i saken her å skille mellom fastsettelse av skattebeløp og innkreving av skatten.

81 Dersom EFTA-domstolen er uenig i dette, mener staten at den mulige restriksjon som skatten måtte utgjøre, vil være rettferdiggjort dersom norske skattemyndigheter ga Arcade valget mellom å gjøre opp skatten per 2002 eller på tidspunktet for en etterfølgende realisasjon ved avhendelse osv., i samsvar med prinsippene fastsatt i *National Grid Indus*.

Rettens bemerkninger

82 Ifølge fast rettspraksis kan en restriksjon på etableringsfriheten bare tillates dersom den er begrunnet i tvingende allmenne hensyn (se f.eks. sak E-3/06 *Ladbrokes*, Sml. 2007 s. 86, avsnitt 41).

83 I så tilfelle er det også nødvendig at restriksjonen er egnet til å nå målet og ikke går lenger enn det som er nødvendig for å nå det (se sak E-9/11 *ESA* mot *Norge*, dom av 16. juli 2012, ennå ikke i Sml., avsnitt 83, og den rettspraksis som det vises til der).

84 I mangel av ensartede eller harmoniserende tiltak har EØS-statene fortsatt myndighet til å definere, gjennom traktat eller ensidig handling, kriteriene for fordeling av deres beskatningsmyndighet (jf. sak C-540/07 *Kommisjonen* mot *Italia*, Sml. 2009 s. I-10983, avsnitt 29, og den rettspraksis som det vises til der). De har særlig myndighet til å definere når et selskap kan ha status som juridisk person for skatteformål, ettersom EØS-regelverket, som anført i avsnitt 40, ikke inneholder noen ensartet definisjon av hvilke selskaper som kan påberope seg

single connecting factor determining the national law applicable to a company.

85 Accordingly, EEA States must be able to take appropriate measures with a view to preserving the exercise of their tax jurisdiction when a company ceases to exist under that jurisdiction as a result of national company law. In this regard, it must be recalled that preserving the allocation of powers of taxation between the EEA States is a legitimate objective (compare, to that effect, Cases C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 35; C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 51; and C-414/06 *Lidl Belgium* [2008] ECR I-3601, paragraph 31).

86 Justification on these grounds may be accepted, in particular if the system in question is designed to prevent conduct capable of jeopardising the right of an EEA State to exercise its tax jurisdiction in relation to activities carried out in its territory (see, for comparison, Case C-311/08 *SGI* [2010] ECR I-487, paragraph 60, and case law cited).

87 As regards the tax avoidance argument, the Court notes that an EEA State is entitled to take measures designed to prevent certain companies established in that State from attempting, under cover of the rights created by the EEA Agreement, from improperly circumventing their national legislation, or to prevent these companies from improperly or fraudulently taking advantage of provisions of EEA law.

88 Although, in such circumstances, national courts may in each case take account of objective evidence of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of EEA law on which they seek to rely. National courts must nevertheless assess such conduct in light of the objectives pursued by those provisions (see, for comparison, Case C-212/97 *Centros* [1999] ECR I-1459, paragraphs 24 and 25, and case law cited; and the Opinion of Advocate General Poiares Maduro in Cases C-255/02 and C-223/03 *Halifax and Others* [2006] ECR I-1609, points 60 ff.).

etableringsretten i kraft av en enkelt tilknytningsfaktor som avgjør hvilken nasjonal rett som kommer til anvendelse på et selskap.

85 Følgelig må EØS-statene ha adgang til å treffe egnede tiltak for å sikre sin beskatningsmyndighet når et selskap som en følge av nasjonal selskapsrett opphører å eksistere under deres jurisdiksjon. Det minnes her om at å sikre fordelingen av beskatningsmyndighet EØS-statene imellom er et legitimt mål (sammenlign saker C-446/03 *Marks & Spencer*, Sml. 2005 s. I-10837, avsnitt 35, C-231/05 *Oy AA*, Sml. 2007 s. I-6373, avsnitt 51, og C-414/06 *Lidl Belgium*, Sml. 2008 s. I-3601, avsnitt 31).

86 En rettferdiggjøring begrunnet i slike hensyn vil kunne godtas, spesielt hvis det aktuelle system er utformet for å hindre atferd som kan undergrave en EØS-stats rett til å utøve sin beskatningsmyndighet overfor virksomhet på sitt territorium (se, for sammenligning, sak C-311/08 *SGI*, Sml. 2010 s. I-487, avsnitt 60, og den rettspraksis som det vises til der).

87 Når det gjelder skatteunndragelsesargumentet, bemerker EFTA-domstolen at en EØS-stat har anledning til å treffe tiltak som tar sikte på å hindre at visse selskaper etablert i denne stat, under dekke av de rettigheter som ble etablert ved EØS-avtalen, urettmessig prøver å omgå nasjonal lovgivning, eller som tar sikte på å hindre at disse selskaper urettmessig eller ved svik utnytter bestemmelsene i EØS-regelverket.

88 Selv om nasjonale domstoler under slike forhold og i hver sak kan ta hensyn til objektive bevis på misbruk eller svikaktig atferd fra de berørte personer for eventuelt å nekte dem å dra fordel av bestemmelsene i EØS-retten som de søker å bygge på, må nasjonale domstoler likevel vurdere atferden i lys av de mål disse bestemmelser forfølger (se, for sammenligning, sak C-212/97 *Centros*, Sml. 1999 s. I-1459, avsnitt 24 og 25, og den rettspraksis som det vises til der, og uttalelse fra generaladvokat Poiares Maduro i sak C-255/02 og C-223/03 *Halifax m.fl.*, Sml. 2006 s. I-1609, punkt 60 flg.).

89 For the purposes of preventing tax avoidance, a national measure restricting freedom of establishment may be justified when it specifically targets artificial arrangements designed to circumvent the legislation of the EEA State concerned (see, to that effect, *Marks & Spencer*, cited above, paragraph 57; and Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 51).

90 If a company ceases to fulfil the requirements for existing as a separate taxable entity under national law in the EEA State of origin by reason of relocating its head office to another EEA State, but continues to operate in the former, this cannot mean that the EEA State of origin has to abandon its right to tax gains that arose within the ambit of its powers of taxation as a consequence of the company losing its legal status. An EEA State is entitled to charge tax on the company's gains and assess its tax positions at the time when the taxpaying entity is dissolved and the gains are distributed to its owners. In this case, the taxation may be based on the principle of fiscal territoriality linked to a temporal component, namely the taxpayer's existence as a separate legal entity for tax purposes within national territory during the period in which the gains arise and other tax positions become effective.

91 In the present case, it must be held that to permit companies to relocate their head office to another EEA State in violation of national company law without this having any consequences for taxation would undermine the balanced allocation of the power to impose taxes between the EEA States.

92 By providing that the resident company is to be taxed in light of an obligation to liquidate, the application of national anti-avoidance principles in the main proceedings enables the Norwegian State to exercise its tax jurisdiction in relation to activities carried out in its territory and prevent practices whereby companies seek to evade taxation obligations that are corollary to failing to meet the conditions of national company legislation.

93 In light of these considerations, concerning the need to both maintain the balanced allocation of powers of taxation between

89 Dersom formålet er å hindre skatteomgåelse, kan et nasjonalt tiltak som begrenser etableringsfriheten være berettiget dersom det spesifikt retter seg mot kunstige ordninger beregnet på å omgå lovgivningen i den berørte EØS-stat (se *Marks & Spencer*, som omtalt over, avsnitt 57, og sak C-196/04 *Cadbury Schweppes og Cadbury Schweppes Overseas*, Sml. 2006 s. I-7995, avsnitt 51).

90 Dersom et selskap ikke lenger oppfyller kravene for å være et selvstendig skattesubjekt hjemmehørende i EØS-opprinnelsesstaten etter nasjonal lovgivning, fordi hovedkontoret er flyttet til en annen EØS-stat, men fortsatt driver virksomhet i førstnevnte, betyr ikke dette at EØS-opprinnelsesstaten må oppgi sin rett til å beskatte kapitalgevinst som er oppstått som følge av at selskapet har tapt sin status som juridisk person. En EØS-stat er berettiget til å beskatte selskapets gevinst og vurdere dets skatteposisjoner på det tidspunkt da det skattepliktige foretak oppløses og overskuddet deles ut til eierne. I dette tilfelle kan beskatningen være basert på det skattemessige territorialprinsipp sammen med en tidskomponent, nemlig den skattepliktiges eksistens som juridisk person for skatteformål på det nasjonale territorium i løpet av den periode der gevinsten oppstår og andre skatteposisjoner blir virksommme.

91 I den foreliggende sak må det sies at å tillate selskaper å flytte sitt hovedkontor til en annen EØS-stat i strid med nasjonal selskapsrett uten at det skal få noen skattemessige konsekvenser, ville undergrave den balanserte fordeling av beskatningsmyndighet mellom EØS-statene.

92 Ved å fastsette at det hjemmehørende selskap skal beskattes på grunn av en likvidasjonsplikt, og ved å anvende en nasjonal gjennomskjæringsregel i saken, settes staten i stand til å utøve sin beskatningsmyndighet overfor virksomhet som utføres på dens territorium, og hindre en praksis der selskaper søker å unndra seg skatteplikt som er en umiddelbar konsekvens av at vilkårene i nasjonal selskapslovgivning ikke er oppfylt.

93 Når det gjelder behovet for å opprettholde en balansert fordeling av beskatningsmyndighet EØS-statene imellom og hindre

the EEA States and prevent tax avoidance, it must be held that a national measure such as the measure at issue in the main proceedings pursues legitimate objectives that are compatible with the EEA Agreement and constitute overriding reasons in the public interest, and that it is appropriate for ensuring the attainment of these objectives.

94 That being the case, it remains necessary to examine whether a measure such as that at issue in the main proceedings goes beyond what is necessary to attain the objectives pursued.

95 A national measure that provides for the consideration of objective and verifiable elements in order to determine whether the relocation of a head office represents an arrangement incompatible with the rules of domestic company law must be regarded as not going beyond what is necessary to attain the objectives relating to the need to maintain the balanced allocation of powers of taxation between the EEA States and to prevent tax avoidance where there is due reason to believe that the relocation in question entails that the company in question ceases to meet the conditions for existing under national law.

96 Where the consideration of such elements leads to the conclusion that the company does not fulfil these conditions and should therefore be subject to liquidation, the corrective tax measure must be confined to the consequences of liquidation in order to remain compatible with the principle of proportionality.

97 In those circumstances, it must be concluded that the definitive establishment of the amount of tax may be proportionate to the set of objectives pursued by it, namely to maintain balanced allocation of powers of taxation and to prevent tax avoidance. This conclusion is subject to verification by the referring court as to the condition that the revised taxation is confined to the consequences of a duty to liquidate, which concerns the interpretation and application of Norwegian law.

98 Moreover, it may be relevant to definitively establish the amount of tax following liquidation before the actual winding up or liquidation in order to clarify the financial situation of the

omgåelse av skattereglene, må et nasjonalt tiltak som det tiltak saken gjelder, i lys av disse betraktninger sies å ha legitime mål som er i samsvar med EØS-avtalen og er begrunnet i tvingende allmenne hensyn, og det må sies å være egnet til å sikre at disse mål nås.

94 Når det er sagt, gjenstår det likevel å vurdere om et tiltak som det saken gjelder, går lenger enn det som er nødvendig for å nå det mål som forfølges.

95 Et nasjonalt tiltak som fastsetter at objektive og verifiserbare elementer skal vurderes for å fastslå om flyttingen av hovedkontoret utgjør en ordning som er i strid med nasjonale selskapsrettslige regler, må anses å ikke gå lenger enn det som er nødvendig for å nå målene med hensyn til behovet for å opprettholde en balansert fordeling av beskatningsmyndighet EØS-statene imellom og hindre omgåelse av skattereglene, dersom det foreligger begrunnet mistanke om at den aktuelle flytting innebærer at selskapet ikke lenger oppfyller vilkårene for å eksistere etter nasjonal rett.

96 Dersom vurderingen av disse elementer fører til den konklusjon at selskapet ikke oppfyller disse vilkår og derfor bør likvideres, må det korrigerende skattetiltak begrenses til konsekvensene av likvidasjonen for fortsatt å være i samsvar med forholdsmessighetsprinsippet.

97 Under disse omstendigheter må det konkluderes at den endelige fastsettelse av skattebeløpet kan stå i forhold til det sett av mål som forfølges, nemlig å opprettholde en balansert fordeling av beskatningsmyndighet og å hindre omgåelse av skattereglene. Denne konklusjon er betinget av den anmodende domstols kontroll når det gjelder vilkåret om at endringsligningen er begrenset til konsekvensene av en likvidasjonsplikt, som gjelder tolkning og anvendelse av norsk lov.

98 Videre kan det være relevant å få endelig fastsatt skattebeløpet som følge av likvidasjon før den faktiske avvikling eller likvidasjon for å få avklart selskapets økonomiske situasjon med hensyn

company with regard to outstanding debts and obligations before its assets are realised and distributed, and thus enhance legal certainty. The Court notes that such clarification may be of particular importance to shareholders where national law prescribes that they may be held personally liable for outstanding taxation debts incurred by the company prior to liquidation.

99 However, the establishment of the amount of tax for a company that has been deemed by the national tax authorities to have lost its status as a separate legal entity must be distinguished from the issue of recovery (see, to that effect, *National Grid Indus*, cited above, paragraph 77).

100 It must be kept in mind that immediate payment of tax relating to unrealised assets and other tax positions may give rise to a significant disadvantage for that company in terms of cash flow and, in some cases, even force it into liquidation. This problem may be avoided by deferring the recovery of the tax debt until such time as the assets and other tax positions, in respect of which a tax amount was established by the authorities of the EEA State on the occasion of the relocation of a company's place of head office to another EEA State, are actually realised (compare *National Grid Indus*, cited above, paragraphs 68 and 73).

101 In this regard, the national authorities may take certain measures in order to secure the eventual payment of the amount of tax, provided that there is a genuine and proven risk of non-recovery.

102 This risk is essentially dependent upon the nature and extent of the company's tax positions, and the sources of information available to the national authorities regarding these tax positions, *inter alia,* through cooperation with and the exchange of information with the authorities of other EEA States.

103 If the nature and extent of those positions means that it would be easy to trace the individual assets, capital and other positions for which a tax amount was ascertained at the time when the company relocated its head office from the EEA State of origin to another EEA State, the company could be offered a choice in the EEA State of origin. It could then choose between immediate

til utestående gjeld og forpliktelser før dets eiendeler realiseres og deles ut, og dermed styrke forutberegneligheten. EFTA-domstolen bemerker at en slik avklaring kan være særlig viktig for aksjonærer der nasjonal rett fastsetter at de kan holdes personlig ansvarlig for utestående skattegjeld som selskapet har pådratt seg før likvidasjon.

99 Imidlertid må man skille mellom fastsettelse av skattebeløp for et selskap som nasjonale skattemyndigheter anser har tapt sin status som juridisk person, og spørsmålet om innkreving (se *National Grind Indus*, som omtalt over, avsnitt 77).

100 Det er viktig å huske at umiddelbar betaling av skatt på urealiserte eiendeler og andre skatteposisjoner kan innebære en betydelig ulempe for selskapets kontantstrøm, og i noen tilfeller til og med tvinge selskapet til å likvidere. Dette problem kan unngås hvis inndrivelsen av skattekravet utsettes til det tidspunkt da eiendeler og andre skatteposisjoner som myndighetene i EØS-staten har fastsatt et skattebeløp for i forbindelse med flyttingen av selskapets hovedkontor til en annen EØS-stat, faktisk realiseres (jf. *National Grid Indus*, som omtalt over, avsnittene 68 og 73).

101 I denne sammenheng kan de nasjonale myndigheter treffe visse tiltak for å sikre betaling av skattebeløpet, såfremt det er en virkelig og dokumentert risiko for at skatten ikke kan inndrives.

102 Denne risiko avhenger særlig av arten og omfanget av selskapets skatteposisjoner og de informasjonskilder som er tilgjengelige for de nasjonale myndigheter med hensyn til disse skatteposisjoner, blant annet gjennom samarbeid med og utveksling av informasjon med myndighetene i andre EØS-stater.

103 Dersom disse posisjoners art og omfang betyr at det vil være lett å spore den enkelte eiendel, kapital og andre posisjoner som et skattebeløp ble fastsatt for på det tidspunkt da selskapet flyttet sitt hovedkontor fra EØS-opprinnelsesstaten til en annen EØS-stat, kan selskapet tilbys et valg i EØS-opprinnelsesstaten. Det vil da

payment of the amount of tax, which creates a disadvantage for that company in terms of cash flow but frees it from subsequent administrative burdens, and deferred payment of the amount of tax. The latter option could possibly entail interest in accordance with the applicable national legislation, which necessarily involves an administrative burden for the company in connection with tracing the relocated assets.

104 Such a choice would constitute a measure that, while being appropriate in relation to ensuring the balanced allocation of powers of taxation between the EEA States and preventing tax avoidance, would be less harmful to the freedom of establishment than the measure at issue in the main proceedings. If a company were to consider the administrative burden in connection with deferred recovery to be excessive, it could opt for immediate payment of the tax (see, for comparison, *National Grid Indus*, cited above, paragraphs 72 and 73).

105 However, account should also be taken of the risk of non-recovery of the tax, which increases with the passage of time. That risk may be taken into account by the EEA State in question through measures such as the provision of a bank guarantee (see, to that effect, *National Grid Indus*, cited above, paragraph 74). In relation to the particular circumstances regarding the liquidation of a company, a bank guarantee might even be unnecessary if the risk of non-recovery is covered by the personal liability of shareholders for outstanding tax debts of the company.

106 Consequently, the answer to the second question must be as follows:

– The definitive establishment of the amount of tax payable by a company based on the assessment of the tax authorities that the company is in avoidance of taxation consequent to an obligation to wind up and liquidate the company pursuant to national company law may be justified on the grounds of maintaining the balanced allocation of powers of taxation between the EEA States and preventing tax avoidance. These grounds constitute overriding reasons in the public interest. Moreover, the definitive establishment of the amount of tax

kunne velge mellom umiddelbar betaling av skattebeløpet, noe som kan innebære en ulempe for selskapets kontantstrøm, men fritar det for senere administrative belastninger, og utsatt betaling av skattebeløpet. Denne siste løsning kan eventuelt utløse renter i samsvar med gjeldende nasjonal lovgivning, noe som nødvendigvis innebærer en administrativ belastning for selskapet når eiendeler som er utflyttet, skal spores.

104 Et slikt valg ville være et tiltak egnet til å sikre en balansert fordeling av beskatningsmyndighet EØS-statene imellom og hindre omgåelse av skattereglene, samtidig som det ville utgjøre et mindre inngrep i etableringsfriheten enn tiltaket som hovedsaken gjelder. Dersom et selskap skulle anse at den administrative belastning ved utsatt innkreving ville være for stor, ville det kunne velge å betale skatten umiddelbart (se, for sammenligning, *National Grid Indus*, som omtalt over, avsnittene 72 og 73).

105 Imidlertid bør det også tas hensyn til risikoen for at skatten ikke vil kunne bli inndrevet vil øke med tiden. Denne risiko kan vedkommende EØS-stat ta i betraktning ved å treffe tiltak, som krav om bankgaranti (se *National Grid Indus*, som omtalt over, avsnitt 74). Under de særlige forhold som likvidasjon av et selskap utgjør, er det heller ikke sikkert at det er nødvendig med en bankgaranti, dersom risikoen for at skatten ikke vil bli inndrevet, er dekket ved at aksjonærene holdes personlig ansvarlig for selskapets utestående skattegjeld.

106 Følgelig må svaret på det annet spørsmål bli som følger:

– Den endelige fastsettelse av det skattebeløp et selskap skal betale på grunnlag av skattemyndighetenes vurdering om at selskapet har unndratt seg den beskatning som følger av en plikt etter nasjonal selskapsrett til å avvikle og likvidere selskapet, kan rettferdiggjøres ut fra behovet for å opprett-holde en balansert fordeling av beskatningsmyndighet EØS-statene imellom og hindre omgåelse av skattereglene. Disse

payable by a company is appropriate in relation to ensuring the attainment of these objectives.

– The definitive establishment of the amount of tax payable by a company based on the assessment of the tax authorities in the EEA State of origin that the company is in avoidance of taxation consequent to an obligation to wind up and liquidate the company pursuant to national company law must be regarded as not going beyond what is necessary to attain the objectives relating to the need to maintain the balanced allocation of powers of taxation between the EEA States and to prevent tax avoidance, insofar as it provides for the consideration of objective and verifiable elements in order to determine whether the relocation of a head office represents an arrangement incompatible with the rules of domestic company law.

– If the consideration of objective and verifiable elements leads to the conclusion that the company is not in compliance with the rules of national company law and should therefore be subject to liquidation, the definitive establishment of the amount of tax payable must be confined to the consequences of liquidation in order to remain compatible with the principle of proportionality. It is for the national court to verify whether the decision at issue in the main proceedings goes beyond what is necessary to attain the objectives pursued by the legislation.

– A national measure that prescribes the immediate recovery of tax on unrealised assets and tax positions at the time of the assessment of the tax authorities that a company has lost its status as a separate legal entity under national law, but without any decision by the authorities or courts competent to determine that the company has lost that status, is precluded by Article 31 EEA.

V COSTS

107 The costs incurred by Arcade, the Norwegian, Finnish and French Governments, ESA and the Commission, which have all submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before

grunner utgjør tvingende allmenne hensyn. Videre er endelig fastsettelse av det skattebeløp et selskap skal betale, egnet til å sikre oppnåelse av disse mål.

– Den endelige fastsettelse av det skattebeløp et selskap skal betale på grunnlag av vurderingen fra skattemyndighetene i EØS-opprinnelsesstaten om at selskapet har unndratt seg den beskatning som følger av en plikt etter nasjonal selskapsrett til å avvikle og likvidere selskapet, må anses ikke å gå lenger enn det som er nødvendig for å nå målene med hensyn til behovet for å opprettholde en balansert fordeling av beskatningsmyndighet EØS-statene imellom og hindre omgåelse av skattereglene, i den grad det bygges på at objektive og verifiserbare elementer skal vurderes for å fastslå om flyttingen av hovedkontoret utgjør en ordning som er i strid med nasjonale selskapsrettslige regler.

– Dersom vurderingen av objektive og verifiserbare elementer fører til den konklusjon at selskapet ikke oppfyller de nasjonale selskapsrettslige regler og derfor må likvideres, må den endelige fastsettelse begrenses til konsekvensene av likvidasjonen for fortsatt å være i samsvar med forholdsmessighetsprinsippet. Det er opp til den nasjonale domstol å vurdere om vedtaket saken gjelder, går lenger enn det som er nødvendig for å nå de mål lovgivningen har.

– Et nasjonalt tiltak som fastsetter umiddelbar innkreving av skatt på urealiserte eiendeler og skatteposisjoner på et tidspunkt da skattemyndighetene anser at et selskap har tapt sin status som juridisk person etter nasjonal lovgivning, uten at det samtidig foreligger en beslutning av kompetente myndigheter eller domstoler om at selskapet har tapt denne status, er avskåret etter EØS-avtalen artikkel 31.

V SAKSOMKOSTNINGER

107 Omkostninger som er påløpt for Arcade, Norges, Finlands og Frankrikes regjeringer, ESA og Kommisjonen, som har inngitt innlegg for EFTA-domstolen, kan ikke kreves dekket. Ettersom foreleggelsen for EFTA-domstolen utgjør ledd i behandlingen av

Oslo tingrett, 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 question referred to it by Oslo tingrett, hereby gives the following Advisory Opinion:

1. **In the absence of clear and precise provisions of national law that a company moving its head office outside the State of incorporation must liquidate, and of any decision by the competent authorities and courts putting the liquidation into effect, the relocation of head office to another EEA State does not frustrate the company's right to rely on Article 31 EEA. In such circumstances, the company may rely on Article 31 EEA to challenge the lawfulness of a tax imposed on it by the home State on the occasion of the relocation of its head office to another EEA State.**

   The definitive establishment of the amount of tax payable by a company that relocates its head office outside the realm of Norway based on the assessment of the tax authorities that it is in avoidance of taxation consequent to an obligation to wind up and liquidate the company pursuant to national company law, constitutes a restriction under Articles 31 and 34 EEA if companies deemed to be in breach of such an obligation, but not seeking relocation, are not subject to liquidation taxation.

2. **The definitive establishment of the amount of tax payable by a company based on the assessment of the tax authorities that the company is in avoidance of taxation consequent to an obligation to wind up and liquidate the company pursuant to national company law may be justified on the grounds of maintaining the balanced allocation of powers of taxation between the EEA States and preventing tax avoidance. These grounds constitute overriding reasons in the public interests. Moreover, the definitive establishment of the amount of tax payable by a company is appropriate in relation to ensuring the attainment of these objectives.**

saken som står for Oslo tingrett, ligger det til tingretten å ta en eventuell avgjørelse om saksomkostninger for partene.

På dette grunnlag avgir

EFTA-DOMSTOLEN

som svar på spørsmålene forelagt den av Oslo tingrett, følgende rådgivende uttalelse:

1. **I mangel av klare og presise regler i nasjonal rett om at et selskap som flytter sitt hovedkontor ut av stiftelsesstaten må likvideres, og av en beslutning av kompetente myndigheter eller domstoler om iverksettelse av likvidasjonen, hindrer ikke flyttingen av hovedkontor til en annen EØS-stat selskapets rett til å påberope seg EØS-avtalen artikkel 31. Under slike omstendigheter kan selskapet påberope seg EØS-avtalen artikkel 31 for å bestride lovligheten av en skatt det er ilagt av hjemstaten fordi hovedkontoret ble flyttet til en annen EØS-stat.**

   En endelig fastsettelse av det skattebeløp som skal betales av et selskap som flytter sitt hovedkontor ut av Norge, på grunn av skattemyndighetenes vurdering om at det har unndratt seg den beskatning som følger av en plikt etter nasjonal selskapsrett til å avvikle og likvidere selskapet, utgjør en restriksjon etter EØS-avtalen artiklene 31 og 34 dersom selskaper som anses å ha misligholdt en slik plikt, men som ikke har flyttet, ikke ilegges likvidasjonsbeskatning.

2. **Den endelige fastsettelse av det skattebeløp et selskap skal betale på grunnlag av skattemyndighetenes vurdering om at selskapet har unndratt seg den beskatning som følger av en plikt etter nasjonal selskapsrett til å avvikle og likvidere selskapet, kan rettferdiggjøres ut fra behovet for å opprettholde en balansert fordeling av beskatningsmyndighet EØS-statene imellom og hindre omgåelse av skattereglene. Disse grunner utgjør tvingende allmenne hensyn. Videre er endelig fastsettelse av det skattebeløp et selskap skal betale, egnet til å sikre oppnåelse av disse mål.**

The definitive establishment of the amount of tax payable by a company based on the assessment of the tax authorities in the EEA State of origin that the company is in avoidance of taxation consequent to an obligation to wind up and liquidate the company pursuant to national company law must be regarded as not going beyond what is necessary to attain the objectives relating to the need to maintain the balanced allocation of powers of taxation between the EEA States and to prevent tax avoidance, insofar as it provides for the consideration of objective and verifiable elements in order to determine whether the relocation of a head office represents an arrangement incompatible with the rules of domestic company law.

If the consideration of objective and verifiable elements leads to the conclusion that the company is not in compliance with the rules of national company law and should therefore be subject to liquidation, the definitive establishment of the amount of tax payable must be confined to the consequences of liquidation in order to remain compatible with the principle of proportionality. It is for the national court to verify whether the decision at issue in the main proceedings goes beyond what is necessary to attain the objectives pursued by the legislation.

A national measure that prescribes the immediate recovery of tax on unrealised assets and tax positions at the time of the assessment of the tax authorities that a company has lost its status as a separate legal entity under national law, but without any decision by the authorities or courts competent to determine that the company has lost that status, is precluded by Article 31 EEA.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 3 October 2012.

Gunnar Selvik
Registrar

Carl Baudenbacher
President

Den endelige fastsettelse av det skattebeløp et selskap skal betale på grunnlag av vurderingen fra skattemyndighetene i EØS-opprinnelsesstaten om at selskapet har unndratt seg den beskatning som følger av en plikt etter nasjonal selskapsrett til å avvikle og likvidere selskapet, må anses ikke å gå lenger enn det som er nødvendig for å nå målene med hensyn til behovet for å opprettholde en balansert fordeling av beskatningsmyndighet EØS-statene imellom og hindre omgåelse av skattereglene, i den grad det bygges på at objektive og verifiserbare elementer skal vurderes for å fastslå om flyttingen av hovedkontoret utgjør en ordning som er i strid med nasjonale selskapsrettslige regler.

Dersom vurderingen av objektive og verifiserbare elementer fører til den konklusjon at selskapet ikke oppfyller de nasjonale selskapsrettslige regler og derfor må likvideres, må den endelige fastsettelse begrenses til konsekvensene av likvidasjonen for fortsatt å være i samsvar med forholdsmessighetsprinsippet. Det er opp til den nasjonale domstol å vurdere om vedtaket saken gjelder, går lenger enn det som er nødvendig for å nå de mål lovgivningen har.

Et nasjonalt tiltak som fastsetter umiddelbar innkreving av skatt på urealiserte eiendeler og skatteposisjoner på et tidspunkt da skattemyndighetene anser at et selskap har har tapt sin status som juridisk person etter nasjonal lovgivning, men uten noen beslutning av kompetente myndigheter eller domstoler om at selskapet har tapt denne status, er avskåret etter EØS-avtalen artikkel 31.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Avsagt i åpen rett i Luxembourg den 3. oktober 2012.

Gunnar Selvik
Justissekretær

Carl Baudenbacher
President

REPORT FOR THE HEARING

in Case E-15/11

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 Oslo tingrett (Oslo District Court) in a case between

Arcade Drilling AS

and

The Norwegian State, represented by Tax Region West,

concerning the interpretation of Articles 31 and 34 of the EEA Agreement.

I FACTS AND PROCEDURE

1. On 22 March 2010, Tax Region West decided to revise the tax assessment of Arcade Drilling AS ('Arcade') for the 2001 and 2002 income years. The main point in the revision decision was that, as from 19 December 2002, Arcade was deemed to have moved its head office out of Norway. Hence, Tax Region West deemed that Arcade was under an obligation pursuant to company law to liquidate, and that this gave rise to liquidation taxation regardless of whether the company was actually liquidated. Tax Region West has given notice of the imposition of 60% additional tax in the case, but a decision concerning additional tax has not been made.

2. On 20 September 2010, Arcade filed legal action against the Norwegian State claiming annulment of the tax assessment for the years in question. Arcade has argued that the assessment is invalid, *inter alia* because the liquidation tax is in contravention of EEA law. Notice of defence was filed on 15 October 2010. The State contests the invalidity objections and maintains that the tax assessment is valid.

3. On 3 February 2011, Oslo tingrett decided to request an Advisory Opinion on the validity of liquidation tax under EEA law. On 14 June 2011, Oslo tingrett decided on the wording of the questions to be put to the Court. On 19 October 2011, the parties

RETTSMØTERAPPORT

i sak E-15/11

ANMODNING til EFTA-domstolen i henhold til artikkel 34 i Avtalen mellom EFTA-statene om opprettelse av et Overvåkningsorgan og en Domstol fra Oslo tingrett i en sak mellom

Arcade Drilling AS

og

Staten v/Skatt Vest,

om fortolkningen av EØS-avtalen artikkel 31 og 34.

I FAKTUM OG SAKSGANG

1. Den 22. mars 2010 fattet Skatt Vest vedtak om endring av ligningene for inntektsårene 2001 og 2002 for Arcade Drilling AS ("Arcade" eller "saksøker"). Hovedpunktet i endringsvedtaket gikk ut på at Arcade fra 19. desember 2002 ble ansett for å ha flyttet sitt hovedkontor ut av Norge. Skatt Vest anså derfor Arcade for å ha en selskapsrettslig plikt til å likvidere, og at dette utløste likvidasjonsbeskatning uavhengig av om selskapet faktisk var likvidert. Skatt Vest har varslet om ileggelse av 60% tilleggsskatt i saken, men det er ikke fattet vedtak om tilleggsskatt.

2. Den 20. september 2010 tok Arcade ut stevning mot staten med krav om opphevelse av ligningene for de aktuelle år. Arcade har anført at ligningen er ugyldig, bl.a. fordi likvidasjonsskatt er i strid med EØS-retten. Tilsvar ble inngitt den 15. oktober 2010. Staten bestrider ugyldighetsinnsigelsene og fastholder at ligningen er gyldig.

3. Oslo tingrett besluttet 3. februar 2011 å anmode EFTA-domstolen om en rådgivende uttalelse vedrørende lovligheten av likvidasjonsskatt etter EØS-retten. Den 14. juni 2011 besluttet Oslo tingrett formuleringen av spørsmålene til EFTA-domstolen. Partene oversendte Oslo tingrett den 19. oktober 2011 et

submitted an agreed draft letter of questions to Oslo tingrett for referral to the Court. On 28 November 2011, Oslo tingrett referred the case to the Court.

4. In its request to the Court, Oslo tingrett states that the parties to the case disagree about whether a liquidation obligation exists pursuant to Norwegian national law. According to the request, the Norwegian State has conceded that, in this specific case, liquidation tax cannot be imposed on Arcade if it cannot be established pursuant to company law that a liquidation obligation exists when a limited liability company emigrates to another State. The referring court notes that it has not yet concluded as regards this question and that its questions for the Court have therefore been formulated on the assumption that a liquidation obligation exists under Norwegian national law.

5. In its request, Oslo tingrett states that, if Arcade is deemed to have moved its head office to another EEA State, the tax assessment decision will be invalid insofar as the liquidation tax is concerned, provided that such tax is in contravention of EEA law. The court has therefore decided to request an Advisory Opinion on the following questions:

   1) *Is it a restriction pursuant to Article 31 EEA, cf. Article 34 EEA, to impose liquidation tax on a company if national company law entails an obligation to liquidate the company because the company has transferred its de facto head office from Norway to another EEA State?*

      Is it of any significance that deferral of tax payment is not given until a realisation, if any, is effected?

   2) *In the event that the district court holds that a restriction exists: what criteria will be decisive in determining whether the national regulation pursues grounds of overriding public interest and whether it is suitable and necessary for the attainment of such grounds?*

omforent utkast til spørsmålsskriv til EFTA-domstolen. Den 28. november 2011 oversendte Oslo tingrett saken til EFTA-domstolen.

4. I sin anmodning til EFTA-domstolen uttaler Oslo tingrett at sakens parter er uenige om det foreligger en likvidasjonsplikt etter norsk intern rett. Det fremgår av anmodningen at staten i denne konkrete sak har godtatt at likvidasjonsbeskatning av Arcade ikke kan skje dersom det etter nasjonal rett ikke kan oppstilles noen selskapsrettslig likvidasjonsplikt ved flytting av et aksjeselskap til en annen stat. Den anmodende domstol bemerker at den ennå ikke har tatt stilling til dette spørsmål, og at spørsmålene til EFTA-domstolen derfor er formulert med en forutsetning om at det etter norsk intern rett foreligger en likvidasjonsplikt.

5. I sin anmodning uttaler Oslo tingrett at dersom Arcade anses for å ha flyttet sitt hovedkontor til en annen EØS-stat, vil ligningsvedtaket være ugyldig for så vidt gjelder likvidasjonsbeskatningen såfremt slik beskatning er i strid med EØS-retten. Tingretten har derfor besluttet å anmode EFTA-domstolen om en rådgivende uttalelse om følgende spørsmål:

   1) *Er det en restriksjon etter EØS-avtalens artikkel 31, jf. artikkel 34, å likvidasjonsbeskatte et selskap dersom det etter nasjonal selskapsrett foreligger en plikt til å likvidere selskapet fordi selskapet har flyttet sitt reelle hovedkontor fra Norge til en annen EØS-stat?*

      Har det betydning at det ikke gis utsettelse med skattebetalingen frem til en eventuell realisasjon finner sted?

   2) *For det tilfellet at tingretten kommer til at det foreligger en restriksjon: Hvilke kriterier vil være avgjørende for å fastslå om den nasjonale regulering forfølger tvingende allmenne hensyn, og om den er egnet og nødvendig for å nå disse hensyn?*

II LEGAL BACKGROUND

EEA Law

6. Article 31 EEA reads:

> *1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected...*

7. Article 34 EEA reads:

> *Companies or firms formed in accordance with the law of an EC Member State or an EFTA State and having their registered office, central administration or principal place of business within the territory of the Contracting Parties shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States.*
>
> *'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.*

National Law

Norwegian limited liability companies legislation

8. Section 2-2 point 2 of the Norwegian Act relating to limited liability companies (the 'Limited Liability Companies Act') requires limited liability companies incorporated under Norwegian

II RETTSLIG BAKGRUNN

EØS-rett

6. EØS-avtalen artikkel 31 lyder:

> *1. I samsvar med bestemmelsene i denne avtale skal det ikke være noen restriksjoner på etableringsadgangen for statsborgere fra en av EFs medlemsstater eller en EFTA-stat på en annen av disse staters territorium. Dette skal gjelde også adgangen til å opprette agenturer, filialer eller datterselskaper for så vidt angår borgere fra en av EFs medlemsstater eller en EFTA-stat som har etablert seg på en av disse staters territorium.*
>
> *Etableringsadgangen skal omfatte adgang til å starte og utøve selvstendig næringsvirksomhet og til å opprette og lede foretak, særlig selskaper som definert i artikkel 34 annet ledd, på de vilkår som lovgivningen i etableringsstaten fastsetter for egne borgere, ...*

7. EØS-avtalen artikkel 34 lyder:

> *Når det gjelder anvendelsen av bestemmelsene i dette kapittel, skal selskaper som er opprettet i samsvar med lovgivningen i en av EFs medlemsstater eller en EFTA-stat, og som har sitt vedtektsbestemte sete, sin hovedadministrasjon eller sitt hovedforetak innen avtalepartenes territorium, likestilles med fysiske personer som er statsborgere i EFs medlemsstater eller EFTA-statene.*
>
> *Ved selskaper skal forstås selskaper i sivil- eller handelsrettslig forstand, herunder også kooperative selskaper, samt andre juridiske personer i offentlig- eller privatrettslig forstand, unntatt dem som ikke driver ervervsmessig virksomhet.*

Nasjonal rett

Norsk aksjelovgivning

8. Den norske lov om aksjeselskaper (aksjeloven) § 2-2 nr. 2 krever at aksjeselskaper stiftet etter norsk rett må ha et "forretningskontor"

law to have a 'registered office' in Norway. The wording of section 2-2 (1) of the Limited Liability Companies Act is as follows:

(1) The articles of association are to at a minimum represent:

1. *The name of the company;*
2. *The municipality of the kingdom in which the company shall have its registered office;*
3. *The business of the company;*
4. *The size of the share capital, cf. section 3-1;*
5. *The face value of the shares, cf. section 3-1;*
6. *The number, or the minimum and maximum, of directors on the board of directors, cf. Section 6-1;*
7. *If the company shall have more than one general manager or if the board of directors or the corporate assembly has the authority to decide whether the company shall have more than one general manager, and if these are to act collectively as one body;*
8. *What matters are to be resolved at the ordinary general meeting, cf. section 5-5;*
9. *If the shares of the company are to be registered in a securities register.*

9. In an interpretative statement of 6 January 1998, the Ministry of Justice has stated that companies that move their head office out of the realm are in breach of Norwegian company legislation. According to that interpretative statement, whether a 'head office' can be deemed to have been moved out of the realm will depend on an 'overall evaluation, based not only on where the board's management functions are exercised'. It is further noted in the statement that there is no case-law defining the conditions for when a head office will be considered to be transferred from the realm, and that, in legal doctrine, opinion varies concerning what is required to establish that a head office has been moved and whether or not a head office or only a registered office in Norway is required under Norwegian limited liability company legislation. From the statement the following passages are presented:

i Norge. Ordlyden i aksjeloven § 2-2 første ledd er som følger:

(1) Vedtektene skal minst angi:

1. *selskapets foretaksnavn;*
2. *den kommune i riket hvor selskapet skal ha sitt forretningskontor;*
3. *selskapets virksomhet;*
4. *aksjekapitalens størrelse, jf § 3-1;*
5. *aksjenes pålydende (nominelle beløp), jf § 3-1;*
6. *antallet eller laveste og høyeste antall styremedlemmer, jf § 6-1;*
7. *om selskapet skal ha flere daglige ledere eller om styret eller bedriftsforsamlingen skal kunne bestemme at selskapet skal ha flere daglige ledere, samt i så fall om flere daglige ledere skal fungere som kollektivt organ;*
8. *hvilke saker som skal behandles på den ordinære generalforsamlingen, jf § 5-5;*
9. *om selskapets aksjer skal registreres i et verdipapirregister.*

9. I en tolkningsuttalelse 6. januar 1998 har Justisdepartementet lagt til grunn at selskaper som flytter sitt hovedkontor ut av riket, bryter norsk aksjeselskapslovgivning. Om "hovedkontoret" kan anses flyttet ut av riket, vil etter tolkningsuttalelsen bero på en "helhetsvurdering, hvor man ikke bare kan legge vekt på hvor styret utøver sin funksjon". Det heter videre at det ikke finnes noen rettspraksis som avgjør grensen for når et hovedkontor kan anses flyttet ut av riket, og at det er delte meninger i juridisk teori om hva som skal til for å stadfeste at hovedkontoret er flyttet, og om norsk aksjelovgivning krever hovedkontor eller bare forretningskontor i Norge. Fra uttalelsen siteres følgende avsnitt:

In our opinion, it needs to be acknowledged that neither the Limited Liability Companies Act nor any other legal sources establish a rule which clearly states what affiliation a company needs to have to Norway in order to be Norwegian. The assessment must, as a starting point, be based on a common understanding of the term "head office". In most cases this will probably provide sufficient guidance for establishing the nationality of the company. In some cases, however, the different functions may be divided and spread out, to the extent that it is not obvious where the head office should be considered to be. In such cases the question of nationality must be decided based on an assessment taking into account all relevant circumstances, in which it will obviously be of importance where the board holds their meetings and where the administration performs their functions. Besides this we cannot rule out that other factors in general connecting the company to Norway may be of somewhat importance, meaning that a weaker management connection to Norway may be outweighed by the company being connected to Norway in other ways.

...

3. Consequences of illegal migration

In a case where the management and/or administration of a company to a material extent have been transferred abroad so that it must constitute a violation of the rule that the head office should be in Norway, the question is what consequences this should have. One can imagine several possible judicial consequences; penal liability for the management, transfer of the legal domicile abroad, a shareholder may obtain a ruling of remigration, dissolution of the company, etc. A violation of the rule will not necessarily entail all these consequences. In the following we will only comment on the question of dissolution.

Irrespective of whether one considers the rule of a company having its registered office in Norway as non-statutory law or as an interpretation of the Limited Liability Companies Act section 2-2 first paragraph no. 2, there is no doubt that a transfer of the head office is a violation, which the company is obliged to correct. The correction may either take place by remigration or by dissolving and liquidating the company. A limited company may therefore not "migrate" abroad without dissolution and liquidation in accordance with the Limited Liability Companies Act chapter 13 and incorporation in the new jurisdiction of residency in accordance with the relevant rules in that jurisdiction.

Slik vi ser det, må det erkjennes at det verken fra aksjeloven eller andre rettskilder kan utledes noen regel som klart angir hvilken tilknytning et selskap må ha til Norge for å anses som norsk. Ved vurderingen må man ta utgangspunkt i hva som er en vanlig språklig forståelse av begrepet "hovedkontor". I de fleste tilfellene vil dette antakelig gi et tilstrekkelig svar på hvor selskapet må anses å høre hjemme. Unntaksvis vil det imidlertid være slik at de forskjelllige funksjonene er spredt, slik at det ikke er opplagt hvor man skal si at selskapet har hovedkontoret. I så fall må spørsmålet avgjøres ut fra en konkret vurdering, hvor det selvsagt vil være av sentral betydning hvor styret holder sine møter og hvor administrasjonen ellers holder til. Utover dette vil vi ikke se bort fra at det må kunne legges en viss vekt på selskapets tilknytning til Norge mer generelt, slik at en svakere tilknytning når det gjelder selskapets ledelse til en viss grad kan oppveies av at selskapet er knyttet til Norge på andre måter.

...

3. Konsekvenser av ulovlig utflytting

I et tilfelle hvor en så vesentlig del av selskapets ledelse og/eller administrasjon er flyttet til utlandet at det må ses som et brudd på regelen om at hovedkontoret skal ligge i Norge, reiser spørsmålet seg om hvilke følger dette får. En kan tenke seg flere mulige rettsfølger: straffansvar for ledelsen, flytting av vernetinget til utlandet, at en aksjeeier får dom på tilbakeflytting, oppløsning av selskapet, osv. Et brudd på regelen vil ikke nødvendigvis få alle disse konsekvensene. I det følgende behandler vi bare spørsmålet om oppløsning av selskapet.

Uavhengig av om man ser kravet om at et norsk aksjeselskap skal ha sitt hovedkontor i Norge, som en regel som følger av ulovfestet rett, eller som en følge av en tolkning av aksjeloven § 2-2 første ledd nr 2, er det på det rene at en flytting av hovedkontoret vil være et ulovlig forhold, som selskapet har plikt til å rette opp. Dette må enten skje ved tilbakeflytting eller ved at selskapet oppløses og avvikles. Et aksjeselskap kan dermed ikke "flytte" til utlandet uten oppløsning og avvikling etter aksjeloven kapittel 13 og nystiftelse etter reglene i det nye hjemlandet.

In accordance with the Limited Liability Companies Act section 13-1 the general meeting has the authority to resolve on a company's dissolution. The bankruptcy court does not have the authority to rule on a forced dissolution in accordance with section 13-2. We refer to section 13-2 first paragraph no. 1, which authorizes the bankruptcy court to rule on a forced dissolution when "the company shall be dissolved as stated by law", is aimed at statutory provisions which state that a violation has the consequence that the company should be dissolved."

10. According to the Ministry's statement, if a limited liability company's head office is moved from the realm, this is an illegality the company is obliged to rectify. This can be done by moving the head office back to the realm or by dissolving and winding up the company. In principle, it is the company's general meeting that has the competence to decide on dissolution or winding up of the company, cf. Section 16-1 of the Limited Liability Companies Act (enclosed). If the general meeting fails to pass such a resolution in connection with moving the head office out of the realm, some commentators assume that the district court can decide to dissolve the company pursuant to Section 16-15(1) point 1 of the Limited Liability Companies Act. This view holds that, in such cases, it follows from the Act that the company must be dissolved. This view is disputed. Enforced dissolution pursuant to the Limited Liability Companies Act can only be effected after the company has been notified and given a deadline to rectify the situation, and after a decision by the district court.

The Limited Liability Companies Act section 16-15 reads:

(1) If the general meeting does not adopt a resolution on dissolution, the district court shall decide by order that the company is to be dissolved in the following cases:

1. if the company is to be dissolved as a result of statutory provisions or provisions in the articles of association;

2. if the company has not notified the Register of Business Enterprises of a board of directors that meets the requirements set out in statutory provisions or pursuant thereto;

3. if the company is required by law to have a general manager and has not notified the Register of Business Enterprises of a general manager who meets the statutory requirements;

Etter aksjeloven § 13-1 er det generalforsamlingen som har kompetanse til å treffe beslutning om oppløsning. Skifteretten vil ikke ha kompetanse til å treffe beslutning om tvangsoppløsning etter § 13-2. Vi viser til at § 13-2 første ledd nr 1, som gir skifteretten kompetanse til å treffe beslutning om tvangsoppløsning når "selskapet skal oppløses som følge av bestemmelse i lov", tar sikte på lovbestemmelser som selv gir uttrykk for at en overtredelse medfører at selskapet kan tvangsoppløses.

10. Dersom et aksjeselskaps hovedkontor er flyttet ut av riket, er dette ifølge Justisdepartementets uttalelse et ulovlig forhold selskapet plikter å rette. Dette kan skje ved å flytte hovedkontoret tilbake til riket eller ved å oppløse og avvikle selskapet. I utgangspunktet er det selskapets generalforsamling som har kompetanse til å beslutte oppløsning og avvikling av selskapet, jf. aksjeloven § 16-1 (vedlagt). Dersom generalforsamlingen i tilfelle utflytting av hovedkontoret lar være å treffe slik beslutning, er det av noen teoretikere antatt at tingretten kan beslutte å oppløse selskapet etter aksjeloven § 16-15 første ledd nr 1. Synspunktet er at det i slike tilfeller følger av loven at selskapet skal oppløses. Synspunktet er omstridt. Tvangsoppløsning etter aksjeloven kan bare gjennomføres etter varsling til selskapet med frist for retting og beslutning av tingretten.

Aksjeloven § 16-15 lyder:

(1) Hvis ikke generalforsamlingen treffer beslutning om oppløsning, skal tingretten ved kjennelse beslutte selskapet oppløst i følgende tilfeller:

1. når selskapet skal oppløses som følge av bestemmelse i lov eller vedtekter;

2. når selskapet ikke har meldt til Foretaksregisteret et styre som fyller de vilkår som følger av bestemmelsene gitt i eller i medhold av lov;

3. når selskapet etter loven skal ha daglig leder, og ikke har meldt til Foretaksregisteret en daglig leder som fyller de vilkår som er fastsatt i lov;

4. *if the company has not notified the Register of Business Enterprises of an auditor who meets the statutory requirements;*

5. *if the annual accounts, the directors' report and the auditor's report which the company must submit to the Register of Company Accounts pursuant to section 8-2 of the Accounting Act have not been submitted within six months of the deadline for submission, or if, upon the expiry of the deadline, the Register of Company Accounts cannot approve material submitted as the annual accounts, directors' report and auditor's report.*

(2) *The court may only order the company to be dissolved pursuant to a provision in the articles of association if a shareholder has so demanded, and the general meeting has not adopted a resolution on dissolution pursuant to section 16-1.*

The Limited Liability Companies Act section16-16 reads:

(1) *When the conditions set out in section 16-15 (1) nos. 1 to 4 have been met, the Register of Business Enterprises must notify the company thereof. In cases as mentioned in section 16-15 (1) no. 5, the notice will be given by the Register of Company Accounts. The company must be given a period of one month in which to rectify the matter and must be informed of the consequences of any failure to meet the deadline.*

(2) *If the company has not rectified the matter upon expiry of the deadline, the Register of Business Enterprises or the Register of Company Accounts must repeat the warning by the insertion of a notice in the Brønnøysund Register Centre's electronic publication and in abbreviated form in a newspaper which is widely read in the area in which the registered office of the company is located. The notice must state that the terms and conditions for dissolution of the company have been met, and that the company has a deadline of four weeks from the notice was inserted in the Brønnøysund Register Centre's electronic publication in which to rectify the matter. The consequences of any failure to meet the deadline must also be stated.*

4. *når selskapet etter loven eller etter vedtak fra skatte- og avgiftsmyndighetene i medhold av lov skal ha revisor, og selskapet ikke har meldt til Foretaksregisteret en revisor som fyller de vilkår som er fastsatt i lov;*

5. *når årsregnskap, årsberetning og revisjonsberetningen som selskapet skal sende til Regnskapsregisteret etter regnskapsloven § 8-2, ikke er innsendt innen seks måneder etter fristen for slik innsendelse, eller når Regnskapsregisteret ved fristens utløp ikke kan godkjenne innsendt materiale som årsregnskap, årsberetning og revisjonsberetning.*

(2) *Retten kan bare beslutte selskapet oppløst som følge av bestemmelse i vedtektene når en aksjeeier har fremsatt krav om det og generalforsamlingen har unnlatt å treffe beslutning om oppløsning etter § 16-1.*

Aksjeloven § 16-16 lyder:

(1) *Når vilkårene i § 16-15 første ledd nr 1 til 4 er oppfylt, skal Foretaksregisteret sende selskapet varsel om dette. I tilfelle som nevnt i § 16-15 første ledd nr 5 sendes varsel av Regnskapsregisteret. Selskapet skal gis en frist på en måned til å bringe forholdet i orden og underrettes om følgene av at fristen oversittes.*

(2) *Har selskapet ikke brakt forholdet i orden ved fristens utløp, skal Foretaksregisteret eller Regnskapsregisteret gjenta varselet ved kunngjøring i Brønnøysundregistrenes elektroniske kunngjøringspublikasjon og i kortform i en avis som er alminnelig lest på selskapets forretningssted. I kunngjøringen skal det angis at vilkårene for oppløsning av selskapet er oppfylt, og at selskapet har en frist på fire uker fra den elektroniske kunngjøringen til å bringe forholdet i orden. Følgene av at fristen oversittes skal også angis.*

(3) If it is considered expedient, public notice in accordance with the present provision may instead be given by the district court.

Liquidation taxation of companies

11. If a limited liability company is dissolved, the company is liable to liquidation tax, which entails that all the company's assets are realised with a tax liability on the company's hands in accordance with the universal rules on realisation laid down in the Taxation Act.

12. Before the dissolution of a company is completed, it must submit a tax return and demand an advance assessment, cf. Section 4-7(8) of the Tax Assessment Act. For the current income year, the advance assessment shall cover the period until the company is finally dissolved, cf. Section 8-10 of the Tax Assessment Act. Consequently, on submitting its tax return for advance assessment, the company shall declare all latent tax liabilities for taxation, including gains on the realisation of assets. The withdrawal of operating assets in connection with dissolution, i.e. as liquidation dividend to the shareholders, is deemed to be realisation and must be included for taxation in the advance assessment, cf. Sections 5-1, 5-2 and 5-30 of the Taxation Act.

13. For shareholders liable to taxation in Norway, liquidation will involve realisation tax, i.e. shareholders' gains/losses on the shares will be liable to tax/deductible, cf. Section 10-37 of the Taxation Act.

14. In a statement of 7 May 1998 from the Ministry of Finance, it is assumed that, in emigration cases, a company can be liable to liquidation tax even if it is not actually liquidated or its dissolution is not demanded. In this regard the following is stated by the Ministry of Finance:

    In the case that a Norwegian incorporated limited company is no longer considered Norwegian in relation to Norwegian company law, as mentioned, the shareholders are obliged to dissolve the company (as a Norwegian limited company) through dissolution and liquidation, cf. the mentioned statement of 6 January 1998 from the Ministry of Justice. Such liquidation entails taxation in accordance

(3) Dersom det finnes hensiktsmessig, kan varsel etter denne bestemmelsen i stedet gis av tingretten.

Likvidasjonsbeskatning av selskaper

11. Hvis et aksjeselskap faktisk oppløses, skal selskapet likvidasjonsbeskattes ved at alle selskapets eiendeler realiseres med skatteplikt på selskapets hånd etter skattelovens alminnelige realisasjonsregler i.

12. Før et selskap oppløses, skal det levere selvangivelse og kreve seg forhåndslignet, jf. ligningsloven § 4-7 åttende ledd. For det løpende inntektsår skal forhåndsligningen foretas frem til oppløsningen av selskapet, jf. ligningsloven § 8-10. Følgelig skal selskapet ved innlevering av selvangivelse til forhåndsligning oppgi til beskatning alle latente skatteforpliktelser, herunder gevinst ved realisasjon av eiendeler. Uttak av driftsmidler ved oppløsningen, dvs. som likvidasjonsutbytte til aksjonærene, anses som realisasjon på selskapets hånd, og skal medtas til beskatning ved forhåndsligningen, jf. skatteloven §§ 5-1, 5-2 og 5-30.

13. For aksjonærer som er skattepliktig til Norge vil likvidasjon medføre realisasjonsbeskatning, dvs. gevinst/tap på aksjene blir skattepliktig/fradragsberettiget på aksjonærenes hånd, jf. skatteloven § 10-37.

14. I en uttalelse fra Finansdepartementet 7. mai 1998 er det lagt til grunn at i utflyttingssaker kan likvidasjonsbeskatning skje selv om selskapet faktisk ikke likvideres eller kreves oppløst. I denne forbindelse uttaler Finansdepartementet:

For det tilfelle at et norskregistrert aksjeselskap ikke lenger anses som norsk i relasjon til norsk aksjelovgivning som nevnt, har eierne plikt til å avvikle selskapet (som norsk aksjeselskap) gjennom oppløsning og likvidasjon, jfr den nevnte uttalelse av 6. januar 1998 fra Justisdepartementets lovavdeling. Slik likvidasjon medfører likvidasjonsbeskatning etter selskapsskatteloven § 5-8. Selv om eierne

with the Corporate Tax Act section 5-8. Even if the shareholders neglect this liquidation obligation, there may be basis for liquidation taxation based on anti avoidance rules. For the tax authorities it will in such cases be close at hand to consider the failure to dissolve to be tax motivated and disloyal toward Norwegian tax rules (in addition to being illegal and punishable in accordance with the corporate legislation).

Other Norwegian tax legislation in 2001 and subsequently

15. In 2001/2002, Norwegian law did not contain any provisions on tax liability in connection with the emigration of companies. The taxation of Arcade is therefore based on the company being subject to a liquidation obligation pursuant to company law, and on the imposition of exit tax on the basis of universal rules on realisation tax, cf. the above, and is independent of its actual liquidation.

16. In 2001/2002, the Norwegian Taxation Act had (and still has) provisions on the reversal of write-downs when a Norwegian company moves its operating assets out of the Norwegian taxation area, cf. Sections 14-60 ff. However, these rules do not apply if a rig has been subject to general write-downs in Norway for at least eight years. This was the case with Arcade's rigs, and these provisions were therefore not applicable.

17. Exit tax for companies was regulated by law in 2007 in the case of SE and SCE companies. In 2008, the legal provision was extended to include other types of enterprises based in Norway, see Section 10-71 of the Taxation Act.

18. In 2010, the EFTA Surveillance Authority (ESA) stated that Norwegian exit tax comes into conflict with the EEA Agreement. In a Reasoned Opinion of 2 March 2011, ESA has given notice of further measures if the Norwegian tax rules are not amended.

19. Based on a consultation paper of 18 January 2010, Norwegian tax legislation was amended with effect from 2011, cf. Legislative Proposition No 78 (2010-2011), which was submitted on 25 March 2011. Following the amendment, a company shall no

forsømmer denne avviklingsplikten, vil det kunne være grunnlag for likvidasjonsbeskatning ut fra gjennomskjæringsbetraktninger. For ligningsmyndighetene vil det i slike tilfeller være nærliggende å bygge på at unnlatelsen av å avvikle det norske selskapet er rent skattemessig motivert, og illojal i forhold til norske skatteregler (i tillegg til å være ulovlig og straffbar etter aksjelovgivningen).

Norsk skattelovgivning for øvrig i 2001 og senere

15. Norsk rett hadde i 2001/2002 ikke lovfestede regler om skatteplikt ved utflytting av selskaper. Beskatningen av Arcade er således begrunnet med at selskapet har selskapsrettslig likvidasjonsplikt, og at utflyttingsskatt kan ilegges basert på de alminnelige regler om realisasjonsbeskatning, jf. ovenfor, og uavhengig av faktisk likvidasjon.

16. Den norske skattelov hadde i 2001/2002 (og har fortsatt) regler om tilbakeføring av avskrivninger når et norsk selskap flytter driftsmidler ut av norsk beskatningsområde, jf. §§ 14-60 flg. Disse regler gjelder imidlertid ikke dersom en rigg har vært gjenstand for alminnelige avskrivninger i Norge i minst åtte år. Dette var tilfelle for Arcades rigger, og disse bestemmelser var følgelig ikke anvendelige.

17. Utflyttingsskatt for selskaper ble lovfestet i 2007 for SE-selskaper og SCE-selskaper. I 2008 ble lovregelen utvidet slik at den også omfatter andre typer selskaper hjemmehørende i Norge, se skatteloven § 10-71 (vedlagt).

18. EFTAs overvåkningsorgan ("ESA") uttalte i 2010 at norsk utflyttingsskatt er i strid med EØS-avtalen. I en grunngitt uttalelse 2. mars 2011 har ESA varslet tiltak dersom ikke norske skatteregler endres.

19. På bakgrunn av et høringsnotat 18. januar 2010 ble norsk skattelovgivning endret med virkning fra 2011, jf. Prop. 78 L (2010-2011), som ble fremlagt 25. mars 2011. Etter endringen skal det ikke lenger utløse noen beskatning om et selskaps

longer be liable to taxation on moving its head office from Norway to another normal tax State in the EEA.

20. In 2008, a provision was adopted relating to realisation settlement upon the withdrawal of assets or liabilities from the Norwegian tax area, cf. Section 9-14 of the Taxation Act. If, at the same time as the company emigrates, individual assets are withdrawn from the Norwegian taxation area, taxation may follow from Section 9-14 of the Taxation Act. In cases like the Arcade case, Section 9-14 of the Taxation Act will in principle result in the taxation of a gain on a rig owned by a company whose seat is moved from Norway to the UK, but deferred payment of such tax is granted. Pursuant to Section 9-14 of the Taxation Act, the assessed tax will lapse if the operating assets are not sold within five years of the income year in which the emigration took place.

21. Exit tax was also introduced for physical persons with effect from 2008, cf. Section 10-70 of the Taxation Act. Pursuant to this provision, taxation can be postponed until the shares are actually realised, and the tax liability lapses if the shares are not sold within five years of relocation.

22. None of these legal provisions are applicable to the assessment of Arcade for 2001/2002, and nor are they invoked as the legal basis for the tax assessment.

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:

- Arcade Drilling ('the Plaintiff'), represented by Hanne Skaarberg Holen, Ulf Werner Andersen and Daniel M. H. Herde, Advocates at the law firm PricewaterhouseCoopers AS, Oslo;
- the Norwegian State ('the Defendant'), represented by Anders F. Wilhelmsen and Amund Noss, Advocates, Office of the Attorney General (Civil Affairs), acting as Agents;
- the Finnish Government, represented by Mervi Pere, Ministry for Foreign Affairs, acting as Agent;

hovedkontor flyttes fra Norge til et annet normalskatteland i EØS.

20. I 2008 ble det vedtatt lovhjemmel om realisasjonsoppgjør ved uttak av eiendeler eller forpliktelser fra norsk beskatningsområde, se skatteloven § 9-14. Dersom det samtidig med utflyttingen av selskapet skjer uttak av enkeltobjekter fra norsk beskatningsområde, kan beskatning følge av skatteloven § 9-14. Skatteloven § 9-14 vil for et tilfelle som Arcade i første omgang gi skatt på gevinst for en rigg som eies av et selskap hvis hovedsete flyttes fra Norge til Storbritannia, men det innrømmes utsatt innbetaling av slik skatt. Den utlignede skatt etter skatteloven § 9-14 bortfaller dersom driftsmidlet ikke er solgt innen 5 år etter inntektsåret for utflyttingen.

21. Det ble også vedtatt utflyttingsskatt for fysiske personer med virkning fra 2008, jf. skatteloven § 10-70. Etter denne bestemmelse kan beskatningen utsettes til aksjene faktisk realiseres, og skatteplikten bortfaller hvis aksjene ikke har blitt solgt innen fem år fra flytting.

22. Ingen av disse lovbestemmelser er anvendelige ved ligningen av Arcade for 2001/2002, og de er heller ikke påberopt som hjemmel for ligningen.

III SKRIFTLIGE INNLEGG

23. I medhold av artikkel 20 i EFTA-domstolens vedtekter og artikkel 97 i rettergangsordningen er skriftlige innlegg inngitt av:

- Arcade Drilling, representert ved advokatene Hanne Skaarberg Holen, Ulf Werner Andersen og Daniel M. H. Herde, advokatfirmaet PricewaterhouseCoopers AS, Oslo,
- staten ("saksøkte"), representert ved advokatene Anders Wilhelmsen og Amund Noss, Regjeringsadvokaten,
- Finlands regjering, representert ved Mervi Pere, Ministry for Foreign Affairs,

– the French Government, represented by Géraud de Bergues, Head of the European Law and International Economic Law Department, and Natacha Rouam, member of the same department, Ministry of Foreign and European Affairs, acting as Agents;
– the EFTA Surveillance Authority ('ESA'), represented by Xavier Lewis, Director, and Florence Simonetti, Deputy Director, Department of Legal and Executive Affairs, acting as Agents;
– the European Commission ('the Commission'), represented by Richard Lyal, Principal Legal Adviser and Walter Mölls, Legal Adviser, members of its Legal Service, acting as Agents.

IV THE FIRST QUESTION

Arcade Drilling

24. Arcade contends that the factual basis for the disputed exit taxation of Arcade is that the company no longer has management functions or carries out business activities within Norway, but has instead transferred these functions to the United Kingdom. In this regard, it argues that the transfer of functions could either be seen as a strengthening of the existing business of a permanent establishment or as a transfer of the effective management of the company, both of which are in principle protected under EEA law.[1] It is clear from the reassessment that is currently tried by the District Court, that the removal of Norwegian board members by replacing them with UK residents and replacing the Norwegian CEO with a CEO resident in the United Kingdom was decisive to trigger the exit taxation.

25. In light of this and since Arcade has been governed by the Norwegian Limited Liability Company Act since 1990 and is registered in the Norwegian Register of Business Enterprises, in addition to having a business address in Norway and operating a rig and having its central administration in the United Kingdom, Arcade contends that it is entitled to invoke the freedom of establishment under Article 31 EEA and challenge the lawfulness of the imposed exit tax.[2]

[1] Reference is made to Case 205/84 *Commission* v *Germany* [1986] ECR 3755.
[2] Reference is made to Case C-371/10 *National Grid Indus*, judgment of 29 November 2011, not yet reported.

– Frankrikes regjering, representert ved Géraud de Bergues, Head of the European Law and International Economic Law Department, og Natacha Rouam, ansatt samme sted, Ministry of Foreign and European Affairs,

– EFTAs overvåkningsorgan, representert ved Xavier Lewis, Director, og Florence Simonetti, Deputy Director, Department of Legal and Executive Affairs, og

– Europakommisjonen ("Kommisjonen"), representert ved Richard Lyal, Principal Legal Adviser og Walter Mölls, Legal Adviser, medlemmer av Kommisjonens juridiske tjeneste.

IV DET FØRSTE SPØRSMÅL

Arcade Drilling

24. Arcade gjør gjeldende at faktagrunnlaget for den omstridte utflyttingsbeskatning av Arcade er at selskapet ikke lenger har ledelsesfunksjoner eller driver forretningsvirksomhet i Norge, men i stedet har flyttet disse funksjoner til Storbritannia. I denne sammenheng anfører saksøker at flyttingen av funksjoner enten kan sees som en styrking av eksisterende virksomhet ved et fast driftssted eller som en flytting av selskapets reelle ledelse ("place of effective management"), som begge i prinsippet er beskyttet etter EØS-retten.[1] Av endringsligningen som er til prøving i tingretten fremgår det klart at utskiftingen av norske styremedlemmer med britiske statsborgere, og utskiftingen av den norske administrerende direktør med en direktør bosatt i Storbritannia, var avgjørende for å utløse utflyttingsskatt.

25. I lys av dette og av at Arcade har vært undergitt norsk aksjelovgivning siden 1990 og er registrert i Foretaksregisteret, i tillegg til å ha en forretningsadresse i Norge, drive en rigg og ha sin sentraladministrasjon i Storbritannia, gjør Arcade gjeldende at man har anledning til å påberope seg etableringsfriheten etter EØS-avtalen artikkel 31 og bestride lovligheten av den ilagte utflyttingsskatt.[2]

[1] Det vises til sak 205/84 *Kommisjonen* mot *Tyskland*, Sml. 1986 s. 3755.
[2] Det vises til sak C-371/10 *National Grid Indus*, dom av 29. november 2011, ennå ikke i Sml.

26. Arcade submits that, as noted in the request of the national court, a transfer of management functions or operational functions within Norway does not give rise to any form of income taxation as a result of the transfer. However, the tax assessment imposes an immediate tax on all unrealised gains in Arcade upon the transfer of functions to the United Kingdom as if the company were dissolved at this time. It argues that imposing an immediate tax charge levied on exit from one EEA State to another is discrimination under the freedom of establishment in cases where no similar taxation is charged in connection with purely domestic transfers.[3] In this regard, it argues that the cross-border transfer of the place of effective management is objectively comparable to a situation in which a company transfers its place of effective management within an EEA State.[4] The legal rule which regulates this matter is not sufficiently clear for those who are subject to it to be able to determine their legal position.

27. Arcade points out that the Norwegian State has argued that, under Norwegian company law, Arcade has a duty to liquidate the company, and consequently that the taxation of the company is a result of this duty. Although it is for the national courts to assess whether or not such a duty exits under Norwegian law, Arcade submits that this question is not at all clear and that most Norwegian legal scholars contest it. Moreover, Norwegian companies are not taxed on the basis of an obligation to liquidate, but on the actual disposal of assets as part of the liquidation process.

28. Arcade contends that the taxation does not result from the alleged duty under company law to liquidate, but instead from application of the general anti-tax avoidance rule, which is only applied to cross-border relocations. Furthermore, Arcade is a fully operational company and has never been requested or forced to enter into liquidation by the Norwegian authorities. In company law terms, Arcade has not migrated from Norway. The company

[3] Case C-9/02 *de Lasteyrie du Saillant* [2004] ECR I-2409 and Case C-470/04 *N* [2006] ECR I-7409.

[4] Reference is made to *National Grid Indus*, cited above, paragraph 38.

26. Som nevnt i anmodningen fra den nasjonale domstol, gjør Arcade gjeldende at flytting av ledelsesfunksjoner eller operative funksjoner internt i Norge ikke utløser noen form for inntektsskatt som følge av flyttingen. Imidlertid medfører ligningen en umiddelbar beskatning av all urealisert gevinst i Arcade ved flyttingen av funksjoner til Storbritannia, som om selskapet på dette tidspunkt ble oppløst. Arcade anfører at et umiddelbart skattekrav ved utflytting fra en EØS-stat til en annen innebærer diskriminering etter reglene om etableringsfrihet i tilfeller der flytting som foregår innenlands, ikke utløser noen tilsvarende skatt.[3] I denne sammenheng anfører saksøker at flytting over landegrensene av selskapets reelle ledelse ("place of effective management") objektivt sett kan sammenlignes med en situasjon der et selskap flytter sin reelle ledelse internt i en EØS-stat.[4] Rettsregelen som regulerer dette spørsmål er ikke tilstrekkelig klar til at de som rammes av den kan forutberegne sin rettsstilling.

27. Arcade peker på at staten har anført at Arcade etter norsk selskapsrett har plikt til å likvidere selskapet, og følgelig at selskapet skal beskattes som følge av denne plikt. Selv om det er opp til nasjonale domstoler å vurdere hvorvidt det etter norsk rett foreligger en slik plikt, anfører Arcade at dette spørsmål ikke på noen måte er klart, og at de fleste norske teoretikere bestrider det. Videre beskattes ikke norske selskaper på grunnlag av en avviklingsplikt, men på den faktiske avhendelse av eiendeler som et ledd i likvidasjonsprosessen.

28. Arcade gjør gjeldende at beskatningen ikke er en følge av den påståtte selskapsrettslige likvidasjonsplikt, men av anvendelsen av den generelle regel om å hindre omgåelse av skattereglene, som bare kommer til anvendelse i tilfeller av flytting ut av landet. Videre er Arcade et fullt operativt selskap og har aldri blitt anmodet om eller tvunget til avvikling av norske myndigheter. I selskapsrettslig sammenheng har Arcade ikke migrert fra Norge.

[3] Sak C-9/02 *de Lasteyrie du Saillant*, Sml. 2004 s. I-2409, og sak C-470/04 *N*, Sml. 2006 s. I-7409.

[4] Det vises til *National Grid Indus*, som omtalt over (avsnitt 38).

has been subject to Norwegian legislation throughout this period, and it still is. The company has met all the requirements of the Limited Companies Act relating to Norwegian limited liability companies, including having a registered office in Norway. Furthermore, the company has also complied with the Norwegian Limited Liability Companies Act's organizational rules and the provisions on undistributable equity, etc. The company's accounts have been prepared and audited in accordance with Norwegian law. It maintains its status as a legal person in Norway and has done so ever since its incorporation. Consequently, the company has the capacity to sue and be sued before Norwegian courts.

29. Arcade argues that the notion that it is within the ambit of the EEA States' power to adopt legislation that could force companies into liquidation, and that the lesser hindrance of exit taxation should therefore be accepted, has been rejected by the Court of Justice of the European Union ("the ECJ").[5] This can also be seen as a question of whether the scope of Article 34 may be limited in cases where States can liquidate the company but have not done so yet. Furthermore, it is submitted that the ECJ has clearly distinguished between company law rules defining connecting factors and tax rules assigning tax consequences to a transfer of the place of management of a company.[6]

30. Accordingly, the imposition of tax on a company constitutes a restriction pursuant to Article 31 EEA, cf. Article 34 EEA, irrespective of whether national company law entails an obligation to liquidate the company because the company has transferred its *de facto* head office from Norway to another EEA State. Therefore, the first paragraph of the first question of the national court must be answered in the affirmative. Arcade also notes that EEA law may affect the rules governing the winding up of companies.[7] In Arcade's opinion, the principle of legal certainty should require that the liquidation taxation should be dependent on an actual liquidation. Otherwise, it is possible to end up

5 Reference is made to *National Grid Indus,* cited above, paragraph 29.
6 Reference is made to *National Grid Indus*, cited above, paragraph 31.
7 Reference is made to *National Grid Indus*, cited above, paragraph 30.

Selskapet har vært underlagt norsk rett gjennom hele denne periode, og er det fortsatt. Selskapet har oppfylt alle krav som aksjeloven stiller til norske aksjeselskaper, inkludert å ha et forretningskontor i Norge. Videre har selskapet overholdt norske regler om organisering av aksjeselskaper, og reglene om bundet egenkapital osv. Selskapets regnskap har blitt utarbeidet og revidert i samsvar med norsk rett. Det opprettholder sin status som juridisk person i Norge og har gjort dette siden det ble stiftet. Derfor har selskapet kompetanse til å saksøke og til å bli saksøkt for norske domstoler.

29. Arcade anfører at oppfatningen om at EØS-statene har kompetanse til å vedta lovgivning som kan tvinge selskaper til å likvidere, og at utflyttingsbeskatning derfor bør aksepteres som et mindre inngripende tiltak, har blitt forkastet av Den europeiske unions domstol ("EU-domstolen").[5] Dette kan også ses på som et spørsmål om rekkevidden av artikkel 34 kan være snevrere i saker hvor statene kan likvidere selskapet, men ennå ikke har gjort dette. Videre anføres det at EU-domstolen klart har skilt mellom selskapsrettslige regler som definerer nødvendig tilknytning, og skatteregler som innebærer at flytting av et selskaps ledelse får skattemessige konsekvenser.[6]

30. Følgelig utgjør beskatning av et selskap en restriksjon etter EØS-avtalen artikkel 31, jf. artikkel 34, uavhengig av om det etter nasjonal selskapsrett foreligger en plikt til å likvidere selskapet fordi selskapet har flyttet sitt reelle hovedkontor fra Norge til en annen EØS-stat. Derfor må første del av det første spørsmål fra den nasjonale domstol besvares bekreftende. Arcade bemerker også at EØS-retten kan påvirke reglene om reorganisering av selskaper.[7] Etter Arcades oppfatning bør forutberegnelighetsprinsippet medføre at likvidasjonsskatten bør være avhengig av faktisk likvidering. I motsatt fall er det mulig at man ender opp med en situasjon hvor likvidasjonsskatt i rent interne tilfeller blir ilagt kun hvor selskaper faktisk blir

5 Det vises til *National Grid Indus*, som omtalt over (avsnitt 29).
6 Det vises til *National Grid Indus*, som omtalt over (avsnitt 31).
7 Det vises til *National Grid Indus*, som omtalt over (avsnitt 30).

with a situation where domestic liquidation taxation only takes place where companies are actually liquidated but a different and discriminatory rule will apply for cross-border situations. In Arcade's opinion all the normal liquidation rules under the Limited Liability Company Act should also apply in a cross-border situation.

31. As regards the second paragraph of the first question, Arcade argues that the reassessment of Arcade entails immediate taxation of the company, with no option of deferring the tax payment. In Arcade's view, the significance of a lack of choice between immediate or deferred taxation of unrealised gains has been addressed by the ECJ. The latter has concluded that Article 49 of the Treaty on the Functioning of the European Union ('TFEU') must be interpreted as precluding legislation of a Member State prescribing the immediate recovery, at the time of the transfer, of tax on unrealised capital gains relating to assets of a company transferring its place of effective management to another Member State.[8] In light of this, exit taxation without the possibility of deferral of the tax payment until the time of realisation, as in the present case, must be regarded as disproportionate.

32. Arcade suggests that the first question be answered as follows:

It is a restriction pursuant to Article 31, cf. Article 34 EEA, to impose immediate taxation on a company irrespective of whether national law entails an obligation to liquidate the company, in case the company is not in liquidation, because the company has transferred its effective management from Norway to another EEA Member State.

The Norwegian State

33. The Norwegian State submits that a company, which, pursuant to national legislation, has an obligation to liquidate, cannot rely on freedom of establishment to avoid the tax consequences of this obligation. A company that does not fulfil the requirements under national legislation cannot rely on freedom of establishment

[8] Reference is made to *National Grid Indus*, cited above, paragraph 2 of the operative part.

likvidert, mens en annerledes og diskriminerende regel vil gjelde for grenseoverskridende tilfeller. Etter Arcades syn bør alle de alminnelige regler om likvidering i aksjeloven gjelde også i en grenseoverskrivende situasjon.

31. Når det gjelder den andre del av det første spørsmål, anfører Arcade at en endring av ligningen for Arcade utløser umiddelbar beskatning av selskapet, uten mulighet for utsettelse med skattebetalingen. Slik Arcade ser det, har EU-domstolen allerede vurdert hva det innebærer at det ikke gis et valg mellom umiddelbar og utsatt beskatning av urealisert gevinst. EU-domstolen har konkludert med at artikkel 49 i traktaten om Den europeiske unions virkemåte ("TEUV") må tolkes slik at den ikke tillater lovgivning i en medlemsstat å kreve umiddelbar betaling på flyttetidspunktet av skatt på urealisert kapitalgevinst vedrørende eiendeler i et selskap som flytter sin reelle ledelse ("place of effective management") til en annen medlemsstat.[8] I lys av dette må utflyttingsbeskatning uten mulighet for utsettelse med skattebetalingen til realisasjonstidspunktet, som i den foreliggende sak, betraktes som uforholdsmessig.

32. Arcade foreslår følgende som svar på det første spørsmål:

Det er en restriksjon etter EØS-avtalen artikkel 31, jf. artikkel 34, å kreve umiddelbar beskatning av et selskap uten hensyn til om nasjonal rett innebærer en plikt til å likvidere selskapet, for det tilfelle at selskapet ikke er under likvidasjon, fordi selskapet har flyttet sin reelle ledelse fra Norge til en annen EØS-stat.

Den norske stat

33. Staten gjør gjeldende at et selskap som i henhold til nasjonal rett har en plikt til å likvidere selskapet, ikke kan påberope seg etableringsfriheten for å unngå de skattemessige konsekvenser av denne plikt. Et selskap som ikke oppfyller kravene i nasjonal lovgivning, kan ikke påberope seg etableringsfriheten etter EØS-

[8] Det vises til *National Grid Indus*, som omtalt over (slutningens punkt 2).

under Article 34 EEA, as it is no longer considered to be 'formed in accordance with the law of an EC Member State or an EFTA State'.

34. It is argued that companies exist solely by virtue of the company law under which they are incorporated, and that no provision is made for companies to exist outside of the foundation for their existence, i.e. the company law of each EEA State. As a result, the ECJ has held in a number of cases that the Member States have power to decide the requirements a company must meet to retain its status as a legally incorporated entity under the Member State's legislation, and thus be capable of enjoying freedom of establishment under Article 31 EEA, cf. Article 34 EEA.[9]

35. On the basis of the case-law cited, the Norwegian State argues that a distinction must be drawn between, on one hand, a company that, regardless of its transfer of its real seat to another EEA State, retains its status as a legally incorporated company under the law of the State and, on the other hand, a company that transfers its real seat to another EEA State, but cannot legally do so under the national law of the State of origin while retaining its status as a legally incorporated company. In the view of the Norwegian State, the former may rely on the freedom of establishment to enable the relocation of its real seat, while the latter may not.

36. A possible exception from the second category might apply when a company wishes to convert itself into a company governed by the company law of the recipient State and the company law of the recipient State allows it to do so. In that case, the company may rely on the freedom of establishment.[10] However, the Norwegian State does not find this exception to be applicable in the present case, since Arcade does not wish to convert itself into a company governed by the law of another EEA State, but to remain a Norwegian company. In this situation, Norway has

[9] Reference is made to Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, paragraph 19; Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraphs 109 to 110, and 111 to 112; and *National Grid Indus*, cited above, paragraphs 26 to 28.

[10] Reference is made to *Cartesio,* cited above, paragraphs 111 to 112.

avtalen artikkel 34, ettersom det ikke lenger anses som "opprettet i samsvar med lovgivningen i en av EFs medlemsstater eller en EFTA-stat".

34. Det anføres at selskaper kun eksisterer i kraft av den selskapslovgivning de er er stiftet etter, og at det ikke foreligger noen bestemmelse som tillater at selskaper kan eksistere utenfor grunnlaget for deres eksistens, nemlig den enkelte EØS-stats selskapsrett. Følgelig har EU-domstolen i en rekke saker uttalt at medlemsstatene har myndighet til å bestemme de krav et selskap må oppfylle for å beholde sin status som lovlig stiftet foretak etter medlemsstatens nasjonale rett, og dermed for å kunne nyte etableringsfriheten etter EØS-avtalen artikkel 31, jf. artikkel 34.[9]

35. Den norske stat anfører at det etter rettspraksis må skilles mellom på den ene side et selskap som, uavhengig av om dets hovedsete flyttes til en annen EØS-stat, beholder sin status som et lovlig stiftet selskap etter denne stats lovgivning, og på den annen side et selskap som flytter sitt hovedsete til en annen EØS-stat, men som etter hjemstatens lovgivning ikke lovlig kan gjøre dette og samtidig beholde sin status som et lovlig stiftet selskap. Slik den norske stat ser det, kan førstnevnte bygge på etableringsfriheten til å flytte sitt hovedsete, mens sistnevnte ikke kan det.

36. Et mulig unntak fra den siste kategori kan komme til anvendelse dersom et selskap ønsker å bli omdannet til et selskap underlagt selskapslovgivningen i tilflytningsstaten, og selskapslovgivningen i tilflytningsstaten tillater dette. I så fall kan selskapet påberope seg etableringsfriheten.[10] Imidlertid finner den norske stat at dette unntaket ikke kommer til anvendelse i den foreliggende sak, ettersom Arcade ikke ønsker å omdannes til et selskap underlagt lovgivningen i en annen EØS-stat, men ønsker å forbli et norsk selskap. I denne situasjon har Norge myndighet til å bestemme

[9] Det vises til sak 81/87 *Daily Mail and General Trust plc*, Sml. 1988 s. 5483 (avsnitt 19); sak C-210/06 *Cartesio*, Sml. 2008 s. I-9641 (avsnitt 109-110 og 111-112), og *National Grid Indus*, som omtalt over (avsnitt 26-28).

[10] Det vises til *Cartesio*, som omtalt over (avsnitt 111–112).

the power to decide whether or not the company can transfer its real seat to another State while retaining its status as a legally incorporated company under Norwegian law.

37. The Norwegian State argues that the tax-related consequences of the obligation to liquidate the company cannot lead to any other outcome. As it is within the power of each EEA State to decide that a company that moves its real seat to another EEA State shall be liquidated, it must also be within the power of the EEA States to levy liquidation tax on the company when it liquidates.

38. The fact that Arcade, or, more precisely, the general meeting of Arcade's shareholders, has not fulfilled the obligation to liquidate cannot in any circumstance mean that Arcade can rely on the freedom of establishment, while another hypothetical company, having duly observed its obligations under Norwegian legislation on limited liability companies, cannot. The Norwegian State argues that the liquidation taxation is a direct and necessary consequence of the obligation to liquidate the company.

39. Moreover, it cannot be of any significance that the Norwegian company law authorities have not taken any specific steps to uncover the company's breach of the obligation to liquidate, or have not actively required Arcade to liquidate. If this were to be deemed significant, there would be no consequences for the company if the, in this case hypothetical, administrative body failed to uncover the company's breach of company law. National legislation cannot be expected or required to place the burden to follow up a company's compliance with this kind of obligation on an administrative body. It must be the responsibility of the companies themselves to observe their obligations under national law.

40. With regard to the sub-question under the first question, the Norwegian State's position is that it is not of any significance that payment of the liquidation tax is not deferred until actual realisation takes place. As soon as it relocated its real seat to another State, the company was no longer a legally incorporated company in Norway and should therefore have been liquidated. The relocation of the company's real seat is, for tax purposes,

om selskapet kan flytte sitt hovedsete til en annen stat og samtidig beholde sin status som et lovlig stiftet aksjeselskap etter norsk rett.

37. Den norske stat anfører at de skattemessige konsekvenser av plikten til å likvidere selskapet ikke kan gi noe annet resultat. Ettersom hver EØS-stat har myndighet til å bestemme at et selskap som flytter sitt hovedsete til en annen EØS-stat skal likvideres, må EØS-statene også ha myndighet til å likvidasjonsbeskatte selskapet når det likvideres.

38. Det forhold at Arcade, eller nærmere bestemt generalforsamlingen i Arcade, ikke har overholdt likvidasjonsplikten, kan ikke under noen omstendighet innebære at Arcade kan påberope seg etableringsfriheten, mens et annet hypotetisk selskap som behørig har overholdt sine forpliktelser i henhold til norsk aksjeselskapslovgivning, ikke kan det. Den norske stat gjør gjeldende at likvidasjonsbeskatningen er en direkte og nødvendig konsekvens av plikten til å likvidere selskapet.

39. Videre kan det ikke være av noen betydning at norske selskapsmyndigheter ikke har truffet særskilte tiltak for å avdekke selskapets brudd på likvidasjonsplikten, eller ikke aktivt har krevd likvidasjon av Arcade. Dersom dette skulle anses å ha betydning, ville det ikke ha noen konsekvenser for selskapet om det – i dette tilfelle hypotetiske – administrative organ unnlot å avdekke selskapets brudd på selskapsretten. Det kan ikke forventes eller kreves av nasjonal lovgivning at belastningen med å følge opp et selskaps overholdelse av den slags plikter pålegges et administrativt organ. Det må være selskapenes eget ansvar å overholde sine plikter etter nasjonal rett.

40. Når det gjelder underspørsmålet til første spørsmål, er den norske stat av den oppfatning at det er uten betydning at betaling av likvidasjonsskatten ikke utsettes til faktisk realisasjon finner sted. Så snart selskapet flyttet sitt hovedsete til en annen stat, var det ikke lenger et lovlig stiftet aksjeselskap i Norge og burde derfor vært likvidert. Flyttingen av selskapets hovedsete anses, for skatteformål, som faktisk realisasjon av selskapets eiendeler.

considered to be an actual realisation of the company's assets. To defer payment until the no longer legally incorporated company actually realises its assets would mean disregarding and rendering worthless the Norwegian legal rule that a company cannot relocate its real seat to another State and continue to be a legally incorporated company.

41. The Norwegian State recognises that it follows from case-law that an EEA State may not deny a legal person status as such if the legal person exists pursuant to the company law of another EEA State.[11] However, it is argued that this case-law has no bearing on the present case, since it does not concern the company law of the recipient State, but the company law of the State in which the company originates (Norway).

42. As regards Arcade's arguments that liquidation taxation treats the transfer of a real seat from Norway to the United Kingdom less favourably than a corresponding move within Norway, the Norwegian State contends that this is not a relevant comparison. If the situation is to be compared with a corresponding internal event, the internal event must be the taxation of a company that does not comply with its obligation to liquidate. Such a company would be subject to liquidation taxation to the same extent as Arcade, regardless of whether or not actual liquidation had taken place. It is the obligation to liquidate that gives rise to the liquidation taxation, not the relocation of the real seat as such.

43. The Norwegian State also disagrees with Arcade's submission that the taxation in the present case is purely a tax law issue, and that company law cannot justify the liquidation taxation. It states that the liquidation taxation is a direct and necessary consequence of the obligation to liquidate the company, not of the relocation of the company's real seat as such. The liquidation taxation cannot be assessed without also taking into account the underlying rule of company law, which is the basis for the establishment of the obligation to liquidate and thus the obligation to pay liquidation tax.

[11] Reference is made to Cases C-212/97 *Centros* [1999] ECR I-1459; C-208/00 *Überseering* [2002] ECR I-9919; and C-167/01 *Inspire Art* [2003] ECR I-10155.

Å utsette betaling til det ikke lenger lovlig stiftede aksjeselskap faktisk realiserer sine eiendeler, ville innebære at man så bort fra den norske rettsregel som sier at et selskap ikke kan flytte sitt hovedsete til en annen stat og fortsette å være et lovlig stiftet selskap, slik at denne regel ville blitt uten innhold.

41. Den norske stat erkjenner at det følger av rettspraksis at en EØS-stat ikke kan nekte status som juridisk person for en juridisk person som eksisterer i kraft av selskapsretten i en annen EØS-stat.[11] Det gjøres imidlertid gjeldende at denne rettspraksis ikke har noen betydning i den foreliggende sak ettersom den ikke gjelder selskapslovgivningen i tilflytningsstaten, men selskapslovgivningen i den stat selskapet har sin opprinnelse (Norge).

42. Når det gjelder Arcades argumenter om at likvidasjonsbeskatningen behandler flytting av et hovedsete fra Norge til Storbritannia mindre gunstig enn tilsvarende flytting internt i Norge, gjør den norske stat gjeldende at sammenligningen ikke er relevant. Dersom situasjonen skal sammenlignes med en tilsvarende intern hendelse, må den interne hendelse være beskatningen av et selskap som ikke overholder sin likvidasjonsplikt. Et slikt selskap ville blitt ilagt likvidasjonsskatt i samme utstrekning som Arcade, uten hensyn til om faktisk likvidasjon hadde funnet sted eller ikke. Det er plikten til å likvidere som utløser likvidasjonsbeskatning, ikke flyttingen av hovedsetet som sådan.

43. Den norske stat er også uenig i Arcades påstand om at beskatningen i nærværende sak er et rent skatterettslig spørsmål, og at en selskapsrettslig bestemmelse ikke kan rettferdiggjøre likvidasjonsbeskatningen. Det anføres at likvidasjonsbeskatningen er en direkte og nødvendig konsekvens av plikten til å likvidere selskapet, ikke av flyttingen av selskapets hovedsete som sådan. Likvidasjonsbeskatningen kan ikke utlignes uten at det også tas hensyn til den underliggende regel i aksjelovgivningen, som er grunnlaget for etableringen av likvidasjonsplikten og dermed plikten til å betale likvidasjonsskatt.

[11] Det vises til sak C212/97 *Centros*, Sml. 1999 s. I-1459; C-208/00 *Überseering*, Sml. 2002 s. I-9919, og sak C-167/01 *Inspire Art*, Sml. 2003 s. I-10155.

44. In the view of the Norwegian State, Arcade's argument in this regard seems to concern whether or not Arcade is in breach of the Norwegian law on limited liability companies. Again, it must be stressed that this is a question for Oslo tingrett to decide in the main proceedings. Furthermore, the Norwegian State does not agree that the liquidation tax imposes a heavier burden on Arcade than an actual liquidation would have done. It is the view of the Norwegian State that the liquidation taxation of Arcade in the present case is fully consistent with the liquidation taxation that would have been imposed if Arcade had been liquidated upon emigration from Norway. For tax purposes, Arcade is considered to have been liquidated before the tax liability to Norway ceased.

45. The Norwegian State further argues that a difference in the tax outcome is not in itself relevant. The EEA Agreement does not guarantee that the transfer of the company's real seat to another Member State will be neutral as regards taxation.[12] If a difference in the tax outcome is deemed relevant by the Court, it must be for the national court to decide whether such a difference is present in this case.

46. Based on the foregoing, the Government concludes that the State of Norway has the power to decide the connecting factors a company must have to Norway to retain its status as a legally incorporated company under Norwegian law. A company in breach of the required connecting factors is no longer a company 'formed in accordance with the law of an EC Member State or an EFTA State', cf. Article 34 EEA and Article 54 TFEU, and thus cannot rely on the freedom of establishment to avoid the obligation to liquidate and the pertaining liquidation tax.

47. The Norwegian State proposes that the first question be answered as follows:

[12] Reference is made to *National Grid Indus,* cited above, and case-law cited.

44. Etter den norske stats syn synes Arcades argument i denne sammenheng å gjelde om Arcade har brutt norsk lov om aksjeselskaper eller ikke. Igjen må det understrekes at dette er et spørsmål som Oslo tingrett må avgjøre i hovedsaken. Videre er den norske stat ikke enig i at likvidasjonsskatten er en større belastning for Arcade enn faktisk likvidasjon ville vært. Etter statens syn er likvidasjonsbeskatningen av Arcade i den foreliggende sak helt i tråd med den likvidasjonsskatt som ville være ilagt dersom Arcade var blitt likvidert ved utflyttingen fra Norge. For skatteformål anses Arcade å være likvidert før skatteplikten til Norge opphørte.

45. Den norske stat anfører videre at et annet skattemessig resultat ikke er relevant som sådan. EØS-avtalen garanterer ikke at flytting av selskapets hovedsete til en annen medlemsstat vil være uten skattemessige virkninger.[12] Dersom EFTA-domstolen anser at et annet skattemessig resultat er relevant, må det være opp til den nasjonale domstol å vurdere om en slik forskjell er relevant i nærværende sak.

46. På grunnlag av det ovenstående konkluderer regjeringen med at den norske stat har myndighet til å bestemme hvilken tilknytning et selskap må ha til Norge for å beholde sin status som et lovlig stiftet aksjeselskap etter norsk rett. Et selskap som ikke har den nødvendige tilknytning, er ikke lenger et selskap "opprettet i samsvar med lovgivningen i en av EFs medlemsstater eller en EFTA-stat", jf. EØS-avtalen artikkel 34 og TFEU artikkel 54, og kan dermed ikke påberope seg etableringsfriheten til å omgå likvidasjonsplikten og den tilhørende likvidasjonsskatt.

47. Den norske stat foreslår at det første spørsmål besvares på følgende måte:

[12] Det vises til *National Grid Indus*, som omtalt over, og den rettspraksis som det vises til der.

A company that under national law has an obligation to liquidate pursuant to a relocation of its real seat to another EEA state, may not rely on Article 31 EEA, cf. Article 34 EEA, to avoid the tax related consequences of its obligation to liquidate. As the company is under an obligation to liquidate, it is of no significance that deferral of tax is not given.

The Finnish Government

48. The Finnish Government considers that it follows from the settled case-law of the ECJ that Arcade cannot plead freedom of establishment, when it follows from the national company law that a company transferring its effective management to the United Kingdom cannot retain its status as a Norwegian company and thus must be liquidated.[13]

49. To this effect, the Finnish Government argues that it follows from case-law that an EEA State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under its national law and, as such, capable of enjoying the right of establishment, and what is required if the company is to subsequently be able to maintain that status.[14] In the case of a company incorporated under its law, an EEA State is therefore able to make the company's right to retain its legal personality under the law of that State subject to restrictions on the transfer abroad of the company's place of effective management.[15]

50. The Finnish Government contends that it is apparent from the request for an Advisory Opinion that the situation in the present case is essentially the same as in the case of *Cartesio*.[16] However, as Arcade's purpose was not to change the applicable company law but the company itself, it was in breach of the connecting factor required by the company law of the State of incorporation. Therefore, it follows from the case-law mentioned that Articles 31

[13] Reference is made to *National Grid Indus*, cited above, paragraph 26.
[14] Reference is made to *Cartesio*, cited above, paragraph 110.
[15] Reference is made to *Überseering*, cited above, paragraph 70.
[16] Reference is made to *Cartesio*, cited above.

Et selskap som etter nasjonal rett har en likvidasjonsplikt som følge av at dets hovedsete er flyttet til en annen EØS-stat, kan ikke påberope seg EØS-avtalen artikkel 31, jf. artikkel 34, for å unngå de skattemessige konsekvenser av likvidasjonsplikten. Ettersom selskapet har en likvidasjonsplikt, er det uten betydning at det ikke gis utsettelse på skatten.

Finlands regjering

48. Finlands regjering anser at det følger av fast rettspraksis fra EU-domstolen at Arcade ikke kan påberope seg etableringsfriheten når det følger av nasjonal selskapslovgivning at et selskap som flytter sin reelle ledelse til Storbritannia, ikke kan beholde sin status som et norsk selskap og dermed må likvideres.[13]

49. For å underbygge dette anfører Finlands regjering at det følger av rettspraksis at en EØS-stat har myndighet til å definere både hvilken tilknytning som kreves for at et selskap skal betraktes som stiftet etter nasjonal lovgivning og som sådan kunne nyte etableringsfriheten, og hva som kreves for at selskapet senere skal kunne opprettholde denne status.[14] En EØS-stat kan derfor underlegge selskaper som er stiftet etter dens lovgivning begrensninger på retten til å beholde sin status som juridisk person etter denne lovgivning, dersom selskapets reelle ledelse ("place of effective management") flyttes til utlandet.[15]

50. Finlands regjering gjør gjeldende at det fremgår av anmodningen om rådgivende uttalelse at situasjonen i den foreliggende sak i bunn og grunn er den samme som i *Cartesio*.[16] Men ettersom Arcades siktemål ikke var å komme inn under en annen selskapslovgivning, men å flytte selve selskapet, brøt selskapet den tilknytning som kreves i selskapslovgivningen i stiftelsesstaten. Det følger derfor av den omtalte rettspraksis at EØS-avtalen artikkel 31 og 34 ikke er til hinder for nasjonal lovgivning som innebærer at et selskap som reelt sett flytter sitt

13 Det vises til *National Grid Indus*, som omtalt over (avsnitt 26).
14 Det vises til *Cartesio*, som omtalt over (avsnitt 110).
15 Det vises til *Überseering*, som omtalt over (avsnitt 70).
16 Det vises til *Cartesio*, som omtalt over.

and 34 EEA do not preclude national legislation under which a *de facto* transfer of a company's head office results in the winding up of the company and in the consequences inherently associated with liquidation, including taxation of unrealised capital gains. A company that has an obligation under such legislation to liquidate may not rely on Articles 31 and 34 EEA to avoid the tax-related consequences of such liquidation.

51. The Finnish Government submits that the Court should give the following answer to the first question submitted to it:

Articles 31 and 34 of the EEA Agreement do not preclude national tax authorities from imposing a liquidation tax without any possibility of deferral of payment on a company which transfers its de facto head office from Norway to another EEA State if national company law entails an obligation to liquidate the company because of the transfer.

The French Government

52. The French Government agrees with the Finnish Government that it follows from case-law that the freedom of establishment confers no right on a company incorporated under the national law of an EEA State to retain this status if it breaks the connecting factor required in order to maintain such a status pursuant to this State's national law. Thus, the EEA State of origin may require the company in question to wind up or liquidate.[17]

53. However, it is also submitted that an EEA State of incorporation cannot, by requiring the winding-up or liquidation of the company, prevent that company from moving to another EEA State and converting into a company governed by the law of this latter EEA State, to the extent that it is permitted under that law to do so. Indeed, in such a situation, the company retains its legal personality and is converted into a company governed by the law of the host EEA State as soon as it ceases to fulfil the conditions set out in the law of the EEA State of origin for being considered as a legal person.[18]

[17] Reference is made to *Daily Mail,* cited above, paragraphs 23 to 24; *Cartesio*, cited above, paragraphs 110 to 113; and *National Grid Indus*, cited above, paragraphs 27 to 33.

[18] Reference is made to *Cartesio*, cited above, paragraph 112.

hovedkontor må avvikles, med de konsekvenser som nødvendigvis er forbundet med likvidasjon, herunder beskatning av urealisert kapitalgevinst. Et selskap som etter slik lovgivning har en likvidasjonsplikt, kan ikke påberope seg EØS-avtalen artikkel 31 og 34 for å unngå de skattemessige konsekvenser av slik likvidasjon.

51. Finlands regjering anfører at EFTA-domstolen bør gi følgende svar på det første spørsmål den er forelagt:

EØS-avtalen artikkel 31 og 34 er ikke til hinder for at nasjonale skattemyndigheter kan likvidasjonsbeskatte et selskap som flytter sitt reelle hovedkontor fra Norge til en annen EØS-stat, uten mulighet for utsettelse med skattebetalingen, dersom det etter nasjonal selskapsrett foreligger en plikt til å likvidere selskapet som følge av flyttingen.

Frankrikes regjering

52. Frankrikes regjering er enig med Finlands regjering i at det følger av rettspraksis at etableringsfriheten ikke gir et selskap stiftet etter en EØS-stats nasjonale rett anledning til å beholde denne status dersom selskapet bryter tilknytningen som kreves etter denne stats nasjonale rett for å beholde statusen. Dermed kan EØS-opprinnelsesstaten kreve avvikling eller likvidasjon av det aktuelle selskap.[17]

53. Det anføres imidlertid også at en EØS-stiftelsesstat, når den krever avvikling eller likvidasjon av selskapet, ikke kan hindre selskapet i å flytte til en annen EØS-stat og omdannes til et selskap underlagt lovgivningen i sistnevnte EØS-stat, i den utstrekning denne lovgivning tillater dette. I en slik situasjon beholder selskapet sin status som juridisk person og omdannes til et selskap underlagt lovgivningen i EØS-vertsstaten så snart det ikke lenger oppfyller vilkårene fastsatt i lovgivningen i EØS-opprinnelsesstaten for å kunne betraktes som en juridisk person.[18]

[17] Det vises til *Daily Mail*, som omtalt over (avsnitt 23-24); *Cartesio*, som omtalt over (avsnitt 110-113), og *National Grid Indus*, som omtalt over (avsnitt 27-33).
[18] Det vises til *Cartesio* (avsnitt 112).

54. In these circumstances, the company can rely on the freedom of establishment under Article 31 EEA from the perspective of the host State in order to challenge the lawfulness of the requirement to wind up in the State of origin. However this instantaneous transfer of the company's legal personality from the State of origin to the host State must be provided for by the law of this latter State in a way that allows the company to retain its original legal personality without having to be newly formed.

55. The French Government argues that such a scenario is not involved in the present case, since it appears from the request that Arcade Drilling does not intend to convert into a company governed by British law. In that case, the EEA State of incorporation can require the company to wind up or liquidate without the company being able to invoke the freedom of establishment to challenge the lawfulness of its obligation to wind up or liquidate. Indeed, if, on emigrating, the company neither retains its status as a company of the EEA State of incorporation nor converts itself into a company governed by the legislation of the host EEA State, it will no longer exist as a company. Thus, it will no longer be formed in accordance with the law of an EEA State and be able to invoke the freedom of establishment against the State of incorporation.

56. Moreover, if the host EEA State does not allow a company incorporated under the law of another EEA State to convert into a company governed by its law when this company transfers its head office to its territory, the company's shareholders will have no choice but to create a new company in the host EEA State. This new company will not be able to rely on the freedom of establishment in order to contest the obligation imposed by the EEA State of origin on the former company to wind up or liquidate; the obligation to wind up or liquidate does not apply to the newly created company, but to the former one. In other words, the discontinuity of the company's legal personality prevents the new company from invoking the freedom of establishment to challenge the lawfulness of the obligation of the former company to wind up or liquidate in the EEA State of origin.

54. Under slike omstendigheter kan selskapet påberope seg etableringsfriheten hjemlet i EØS-avtalen artikkel 31 i et vertsstatsperspektiv for å bestride lovligheten av kravet om å avvikle i opprinnelsesstaten. Imidlertid må en slik flytting med umiddelbar virkning for selskapets status som juridisk person fra opprinnelsesstaten til vertsstaten være hjemlet i lovgivningen i sistnevnte stat på en måte som tillater selskapet å beholde sin opprinnelige juridiske person uten å måtte bli opprettet på ny.

55. Frankrikes regjering anfører at den foreliggende sak ikke gjelder en slik situasjon, siden det fremgår av anmodningen at Arcade ikke har til hensikt å bli omdannet til et selskap underlagt britisk lovgivning. I så tilfelle kan EØS-stiftelsesstaten kreve avvikling eller likvidasjon av selskapet uten at selskapet kan påberope seg etableringsfriheten for å bestride lovligheten av avviklings- eller likvidasjonsplikten. Dersom selskapet ved flytting verken beholder sin status som selskap i EØS-stiftelsesstaten eller omdannes til et selskap underlagt lovgivningen i EØS-vertsstaten, vil det ikke lenger eksistere som selskap. Dermed vil det ikke lenger være dannet i samsvar med lovgivningen i en EØS-stat og heller ikke kunne påberope seg etableringsfriheten overfor stiftelsesstaten.

56. Dersom EØS-vertsstaten ikke tillater et selskap stiftet etter lovgivningen i en annen EØS-stat å bli omdannet til et selskap underlagt dens lovgivning når selskapet flytter sitt hovedkontor til denne stats territorium, vil selskapets aksjonærer ikke ha annet valg enn å danne et nytt selskap i EØS-vertsstaten. Dette nye selskap vil ikke kunne påberope seg etableringsfriheten for å bestride den plikt til avvikling eller likvidasjon som EØS-opprinnelsesstaten påla det tidligere selskap; plikten til å avvikle eller likvidere gjelder ikke for det nydannede selskap, men for det gamle. Med andre ord er diskontinuitet i selskapets juridiske personlighet til hinder for at det nye selskap kan påberope seg etableringsfriheten for å bestride lovligheten av det tidligere selskaps plikt til avvikling eller likvidasjon i EØS-opprinnelsesstaten.

57. The French Government submits that the Court should answer the first question in the following manner:

A company incorporated under the law of an EEA Member State which transfers its real head office to another Member State, without being allowed to retain its status as a company governed by the law of the Member State of origin cannot rely on Article 31 EEA against this Member State to challenge the lawfulness of the obligation to liquidate and to pay a liquidation tax on the unrealised capital gains relating to its assets, even though no tax payment deferral is granted.

The EFTA Surveillance Authority

58. ESA argues that it now follows from case-law that, once a State has asserted its jurisdiction on a company, the exercise of such jurisdiction should be in conformity with the right of establishment. In other words, EEA States shall, at least, be required to apply their connecting factors in a way that respects the fundamental freedoms.

59. As regards the present case, ESA contends that the liquidation tax is alien to the connecting factor. In ESA's view, Norwegian company law relies *a priori* on the incorporation system, for which it is typical that a company does not cease to exist if its real seat is transferred abroad.

60. In the case at hand, ESA submits that the company was never actually liquidated. In this regard, ESA points out that the request of the referring court states that enforced dissolution pursuant to the Limited Liability Companies Act can only be effected after the company has been notified and given a deadline to rectify the situation and after a decision by a district court. However, in the present case, it seems that the Norwegian company law authorities have never found, or filed a complaint concerning, breaches of Norwegian company law or required that Arcade be liquidated. The only reaction of the Norwegian authorities to the company's transfer of real seat appears to be the imposition of a tax. Meanwhile, the company is still registered under the Norwegian Central Coordinating Register for Legal Entities and

57. Frankrikes regjering foreslår at EFTA-domstolen bør besvare det første spørsmål som følger:

Et selskap behørig stiftet etter lovgivningen i en EØS-medlemsstat, som flytter sitt reelle hovedkontor til en annen medlemsstat uten at det tillates å beholde sin status som selskap underlagt lovgivningen i opprinnelsesstaten, kan ikke påberope seg EØS-avtalen artikkel 31 overfor denne medlemsstat for å bestride lovligheten av plikten til å likvidere og til å betale en likvidasjonsskatt på urealisert kapitalgevinst i tilknytning til sine eiendeler, selv om det ikke gis noen utsettelse med skattebetalingen.

EFTAs overvåkningsorgan

58. ESA gjør gjeldende at det nå følger av rettspraksis at når et selskap faller inn under en stats jurisdiksjon, skal jurisdiksjonen utøves i samsvar med etableringsretten. Med andre ord skal EØS-statene i det minste anvende kravet om tilknytning på en måte som respekterer de grunnleggende friheter.

59. Når det gjelder denne sak, anfører ESA at likvidasjonsskatten er et fremmedelement hva angår kravet om tilknytning. Etter ESAs oppfatning er norsk selskapslovgivning i utgangspunktet basert på stiftelsesprinsippet, og typisk for dette er at et selskap ikke opphører å eksistere selv om dets hovedsete flyttes utenlands.

60. I den foreliggende sak gjør ESA gjeldende at selskapet rent faktisk aldri ble likvidert. Her peker ESA på at det i anmodningen fra den nasjonaledomstol opplyses at tvangsoppløsning etter aksjeloven bare kan gjennomføres etter varsling til selskapet med frist for retting og beslutning av tingretten. I saken her synes det imidlertid som om norske selskapsmyndigheter aldri har funnet brudd på norsk selskapslovgivning, eller inngitt en klage på dette, eller krevet at Arcade skulle likvideres. Den eneste reaksjon fra norske myndigheter på selskapets flytting av hovedsete synes å være ileggingen av en skatt. I mellomtiden er selskapet fortsatt registrert i det norske Enhetsregister og synes å oppfylle alle de krav aksjeloven stiller med hensyn til kapital og revisjon av

appears to comply with company law requirements regarding capital and the auditing of accounts. Accordingly, the company continued to exist both in law and in fact.

61. ESA submits that, regardless of how the national court might ultimately interpret Section 2.2 of the Norwegian Limited Liability Companies Act, it is obvious that Arcade never ceased to exist under Norwegian law. The company should thus be considered to be a legal person fulfilling the criteria laid down in Article 34 EEA and, as such, to benefit in principle from the freedom of establishment.[19]

62. ESA assumes that the objective of the extensive interpretation of Section 2-2 point 2 of the Limited Liability Companies Act by the Norwegian authorities is not necessarily to introduce an additional connecting factor, but rather to impose a tax on the capital gains of companies that transfer their real seat and thereby leave the Norwegian tax jurisdiction. It argues that the two interpretative statements issued by the Ministries of Justice and Finance, respectively, entail that exit tax shall be paid if a company that is established in an incorporation system jurisdiction transfers its place of effective management abroad.

63. ESA contends that the liquidation taxation imposed upon the transfer of tax residence is an alien or extraneous element in the legal rules governing the migration of companies. In this regard, ESA argues that extraneous rules that are added to the actual connecting factors (namely, the place of incorporation in an incorporation system) should not fall outside the scope of the freedom of establishment.

64. If it were otherwise, an exit tax could be imposed without it being considered to be a restriction on the freedom of establishment when the applicable company law rule allows for a change of place of establishment, even if the company never ceases to exist. When, however, a State imposes a tax separately from the company law rule system, such a tax would be considered

[19] Reference is made to the Opinion of Advocate General Jääskinen in Case C-378/10 *VALE* of 15 December 2011, not yet reported, points 44 to 46, 50 and 68.

regnskapene. Følgelig fortsatte selskapet å eksistere både rettslig og faktisk.

61. ESA anfører at uansett hvordan den nasjonale domstol i siste instans vil tolke § 2-2 i den norske aksjelov, er det klart at Arcade aldri opphørte å eksistere etter norsk rett. Selskapet bør derfor ses som en juridisk person som oppfyller kriteriene fastsatt i EØS-avtalen artikkel 34, og bør som sådan i prinsippet kunne dra fordel av etableringsfriheten.[19]

62. ESA antar at formålet med norske myndigheters brede tolkning av aksjeloven § 2-2 nr. 2 ikke nødvendigvis er å innføre et ytterligere krav om tilknytning, men snarere å ilegge en skatt på kapitalgevinst på selskaper som flytter sitt hovedsete og dermed forlater norsk beskatningsområde. ESA gjør gjeldende at de to tolkningsuttalelser fra henholdsvis Justisdepartementet og Finansdepartementet innebærer at utflyttingsskatt skal betales dersom et selskap som er etablert i en jurisdiksjon basert på stiftelsesprinsippet, flytter sin reelle ledelse ("place of effective management") utenlands.

63. ESA anser at likvidasjonsskatten som ble ilagt ved skifte av skattemessig hjemsted er fremmedartet eller et utenforliggende element hva angår de rettsregler som regulerer flytting av selskaper. I denne sammenheng anfører ESA at utenforliggende regler som kommer i tillegg til kravet om tilknytning (nemlig stiftelsessted i et system basert på stiftelsesprinsippet), ikke bør falle utenfor virkeområdet for etableringsfriheten.

64. I motsatt fall kunne en utflyttingsskatt blitt ilagt uten å bli betraktet som en begrensning på etableringsfriheten dersom den regel i aksjeloven som kommer til anvendelse tillater skifte av etableringssted, selv om selskapet aldri opphører å eksistere. Men dersom en stat ilegger en skatt uavhengig av selskapslovgivningen, ville en slik skatt anses som en begrensning

[19] Det vises til uttalelse fra generaladvokat Jääskinen i sak C-378/10 *VALE*, avgitt 15. desember 2011, ennå ikke i Sml. (avsnitt 44-46, 50 og 68).

to be a restriction on the freedom of establishment. Similar situations would thus be treated differently with regard to EEA law depending on whether a State chooses to link the exit tax in an artificial manner to its company law or to adopt it as a clear exit tax.

65. If the Court were to decide that, even though States are free to determine under which circumstances a company continues to exist, any alien element, such as an exit tax that has no link to the actual existence of a company, shall fall under the scope of the freedom of establishment, ESA argues that the exit tax in the case at hand was imposed on a company that had transferred its head office and, as a result, had changed its residency for tax purposes. A similar transfer of head offices within Norwegian territory would not trigger any taxation on unrealised capital gains.

66. Furthermore, had the company's residence remained in Norway, any profit would not have been deemed to be earned or become subject to taxation until, and if, the company had actually realised the relevant assets. Moreover, the liquidation tax on Arcade entails immediate taxation of potential capital gains on a construed disposal of the two rigs owned by the company. The tax assessment has given rise to a claim for the immediate payment of exit tax, without deferral.

67. ESA contends that the Norwegian practice also treats the cross-border movement of a company's residence through the transfer of its real seat as a taxable event, whereas comparable domestic movements are not taxed. The cross-border movement therefore leads to earlier taxation than would a purely domestic transfer of seat.

68. The fact that this taxation is linked to the market value of the assets at the time of exit might potentially lead to tax being levied on an amount higher than any actual gains that might be achieved if the assets were realised at a later stage. Moreover, it is not taken into account that the value of the assets may actually decrease in the period between the time of exit and the time when the assets are actually realised.[20]

[20] Reference is made to Case C-470/04 *N*, cited above, paragraph 54.

på etableringsfriheten. Tilsvarende situasjoner vil dermed bli behandlet forskjellig etter EØS-retten alt etter som staten velger å knytte utflyttingsskatten på kunstig vis til selskapslovgivningen eller vedta den som en ren utflyttingsskatt.

65. Dersom EFTA-domstolen legger til grunn at selv om statene fritt kan bestemme under hvilke omstendigheter et selskap fortsetter å eksistere, skal ethvert fremmedelement, som en utflyttingsskatt som ikke har noen tilknytning til selskapets faktiske eksistens, falle inn under etableringsfrihetens virkeområde, anfører ESA at utflyttingsskatten i den foreliggende sak ble ilagt et selskap som hadde flyttet sitt hovedkontor og følgelig hadde endret sitt skattemessige hjemsted. En tilsvarende flytting av hovedkontor internt på norsk territorium ville ikke utløst skatt på urealisert kapitalgevinst.

66. Hadde selskapet beholdt sitt hjemsted i Norge, ville ingen gevinst blitt ansett som opptjent eller bli beskattet før, og bare dersom, selskapet faktisk hadde realisert de aktuelle eiendeler. Videre innebærer likvidasjonsskatten Arcade ble ilagt en umiddelbar beskatning av en potensiell kapitalgevinst i tilfelle av en hypotetisk avhendelse av de to riggene selskapet eier. Ligningen har utløst krav om umiddelbar betaling av utflyttingsskatt, uten utsettelse.

67. ESA hevder at den norske praksis også behandler flytting ut av landet av et selskaps hjemsted ved flytting av dets hovedsete som en skattbar hendelse, mens tilsvarende innenlandsk flytting ikke beskattes. Bevegelser over landegrensene fører derfor til tidligere beskatning enn en rent innenlandsk flytting av hovedsete.

68. Det at denne skatt er knyttet til eiendelenes markedsverdi på utflyttingstidspunktet, kan potensielt føre til beskatning av et høyere beløp enn den faktiske gevinst som eventuelt oppnås dersom eiendelene realiseres på et senere tidspunkt. Videre blir det ikke tatt i betraktning at verdien av eiendelene faktisk kan falle i perioden mellom utflyttingstidspunktet og det tidspunkt da eiendelene faktisk realiseres.[20]

[20] Det vises til sak C-470/04 *N*, Sml. 2006 s. I-7409 (avsnitt 54).

69. The assets might also never be realised, such as when capital goods are fully used and depreciated over their useful life and then subsequently totally written off. In such cases, their end value could even potentially be negative when costs are involved in their disposal.

70. Despite this, the calculation and taxation in the case at hand are final under national law according to the request of the referring court. This has the effect that the exiting company is taxed on hypothetical unrealised gains despite the fact that actual gains upon subsequent realisation are uncertain, or may be far lower or not arise at all (if the realisation of the asset results in a loss). Conversely, if the company remains in Norway instead, such developments will be taken into account in calculating any profit. Thus, the provisions on exit taxation could entail that a company exercising its freedom of establishment is taxed higher than a company that remains in Norway and/or is taxed on profits that it might never actually earn.

71. It is submitted that this unequal treatment works to the disadvantage of cross-border transfers, a disadvantage that, from a financial perspective, may even assume existential dimensions. Because of its deterrent effect, final settlement tax such as that in the present case is likely to prevent the exercise of the freedom of establishment guaranteed by EEA law, and it therefore represents a restriction of that freedom.

72. ESA submits that the first question be answered as follows:

A company incorporated under the law of an EEA State which transfers its place of effective management to another EEA State, may rely on Article 31 EEA for the purpose of challenging the lawfulness of a liquidation tax imposed on it by the State of origin on the occasion of the transfer of the place of effective management where:

– *The applicable company law provision of the State of origin only states that companies incorporated under this State's law shall have their registered office in this State;*

– *The actual liquidation of the company in question was neither required nor enforced by the competent authorities of the State of*

69. Det kan også hende at eiendelene aldri blir realisert, for eksempel når kapitalvarer er fullt utnyttet over hele sin økonomiske levetid og deretter blir helt avskrevet. I slike tilfeller kan deres sluttverdi til og med være negativ dersom avhendelsen innebærer kostnader.

70. Ifølge anmodningen fra den nasjonale domstol er likevel beregningen og beskatningen i den foreliggende sak endelig etter nasjonal rett. Dette medfører at det utflyttende selskap beskattes på grunnlag av en hypotetisk urealisert gevinst til tross for at faktisk gevinst ved en senere realisasjon er usikker eller kan være langt lavere eller ikke oppstå i det hele tatt (dersom realisasjonen av eiendelen fører til et tap). Dersom selskapet i stedet holder seg i Norge, vil slike forhold derimot bli tatt i betraktning når eventuell gevinst beregnes. Dermed kan bestemmelsene om utflyttingsskatt innebære at et selskap som utøver sin etableringsfrihet beskattes høyere enn et selskap som forblir i Norge, og/eller beskattes på gevinst som det faktisk aldri vil få.

71. Det anføres at denne forskjellsbehandling er til ulempe ved flytting over landegrensene, en ulempe som i et økonomisk perspektiv til og med kan få følger for selskapets eksistens . På grunn av dens avskrekkende virkning, vil en endelig oppgjørsskatt som i denne sak lett kunne være til hinder for utøvelsen av den etableringsfrihet som er tilsikret i EØS-retten, og den representerer derfor en restriksjon på denne frihet.

72. ESA foreslår følgende som svar på det første spørsmål:

Et selskap stiftet etter lovgivningen i en EØS-stat, som flytter sin reelle ledelse ("place of effective management") til en annen EØS-stat, kan påberope seg EØS-avtalen artikkel 31 for å bestride lovligheten av en likvidasjonsskatt det er ilagt av sin opprinnelsesstat i forbindelse med flyttingen av den reelle ledelse dersom:

- *den bestemmelse som kommer til anvendelse i opprinnelsesstatens selskapslovgivning bare fastsetter at selskaper stiftet etter denne statens lovgivning skal ha sitt forretningskontor i denne stat,*
- *faktisk likvidasjon av det aktuelle selskap verken var krevd eller gjennomført ved tvang av vedkommende myndigheter i opprin-*

origin with the result that the company continued to exist under that State's register of companies and to carry out its activities.

The European Commission

73. According to the Commission, the ECJ has consistently held that the question of whether Article 49 TFEU applies to a company that seeks to rely on the freedom of establishment is a preliminary matter that can only be resolved by reference to the applicable national law. That is to say, before that provision can be applied, it must first be determined, in the light of the conditions laid down in Article 54 TFEU, that the company actually has a right to that freedom.[21]

74. The Commission submits that an EEA State has the power to define the connecting factor that is required of a company incorporated under its national law, and only a company, which thus has legal personality, enjoys the right of establishment. An EEA State may thus make the right of a company incorporated under its law to retain its legal personality under the law of that State subject to the maintenance in that State of the company's place of effective management.

75. In the Commission's view, that does not mean that an EEA State may simply forbid the 'emigration' of a company incorporated under its law or attach obligations to such emigration without regard to any obligations under EU or EEA law. An EEA State may refuse to permit a company governed by its law to retain that status if the company moves its seat to another EEA State, thus breaking the necessary connecting factor. It may not, however, by requiring the winding-up or liquidation of the company, prevent a company from converting itself into a company governed by the law of the other EEA State, to the extent that it is permitted under that law to do so. [22]

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[21] Reference is made to *National Grid Indus*, cited above, paragraphs 26 to 27; *Daily Mail*, cited above, paragraphs 19 to 23; *Überseering*, cited above, paragraphs 67 to 70; and *Cartesio*, cited above, paragraph 109.

[22] Reference is made to *Cartesio*, cited above, paragraphs 111 to 112.

nelsesstaten, med det resultat at selskapet fortsatte å eksistere i vedkommende stats foretaksregister og fortsatte å utføre sin virksomhet.

Europakommisjonen

73. Ifølge Kommisjonen har EU-domstolen konsekvent lagt til grunn at hvorvidt TEUV artikkel 49 får anvendelse på et selskap som søker å påberope seg etableringsfriheten, er et prejudisielt spørsmål som utelukkende kan avgjøres ved henvisning til gjeldende nasjonal lovgivning. Det vil si at før den aktuelle bestemmelse kan anvendes, må det først fastslås, i lys av vilkårene fastsatt i TEUV artikkel 54, at selskapet faktisk kan påberope seg denne frihet.[21]

74. Kommisjonen anfører at en EØS-stat har myndighet til å definere den tilknytning som er påkrevet av et selskap stiftet etter dens interne rett, og bare et selskap som dermed har juridisk personlighet, kan påberope seg etableringsretten. En EØS-stat kan dermed sette som vilkår for at et selskap stiftet etter dens nasjonale lovgivning skal kunne beholde sin status som juridisk person etter denne stats lovgivning, at selskapets reelle ledelse ("place of effective management") forblir i staten.

75. Slik Kommisjonen ser det, betyr dette ikke at en EØS-stat ganske enkelt kan forby "utflytting" av et selskap stiftet etter dens lovgivning eller knytte plikter til slik utflytting, uten hensyn til eventuelle plikter etter EU- eller EØS-retten. En EØS-stat kan nekte å tillate at et selskap underlagt dens lovgivning beholder denne status dersom selskapet flytter sitt hovedsete til en annen EØS-stat, siden den da bryter den nødvendige tilknytning. Den kan imidlertid ikke, ved å kreve avvikling eller likvidasjon av selskapet, hindre at et selskap omdannes til et selskap underlagt lovgivningen i den annen EØS-stat, dersom denne lovgivning tillater dette. [22]

[21] Det vises til *National Grid Indus*, som omtalt over (avsnitt 26-27); *Daily Mail*, som omtalt over (avsnitt 19-23); *Überseering*, som omtalt over (avsnitt 67-70), og *Cartesio*, som omtalt over (avsnitt 109).

[22] Det vises til *Cartesio*, som omtalt over (avsnitt 111-112).

76. Accordingly, even when an EEA State makes the enjoyment of legal personality under its company legislation conditional on the maintenance in its territory of the company's head office, a company incorporated under that legislation may move its head office while at the same time converting itself into a company recognised by the legislation of the destination EEA State, and in those circumstances, it is entitled to rely on the freedom of establishment in order to oppose measures that seek to prevent or present an obstacle to such a move.

77. If Arcade is converted into a UK company, it is therefore entitled to rely on the freedom of establishment in order to challenge the requirement to pay liquidation tax. If it is not, and if it does not move its central management and control back to Norway, then — always assuming that the Norwegian tax authorities are correct in their assertion that Norwegian company law requires the head office of a company to be located in national territory — the dissolution of the company would appear to be inevitable. Such a measure is not in itself a restriction contrary to the EEA Agreement for the reasons set out above. Any normal tax consequences of such dissolution would not constitute a restriction either. The question of the deferred payment of tax does not arise in this hypothesis, for there is no longer any taxpayer in respect of whom payment can be deferred.

78. It is relevant in the present case that the Norwegian authorities responsible for the administration of company law have taken no steps to require Arcade to dissolve itself or change its status during the period since its central management was moved to the United Kingdom. The revision decision was taken by the tax authorities some eight years after that move. In these circumstances, it may be thought questionable whether, in reality, there is any company law obstacle to the move, and hence any justification for the tax decision. That is a matter to be examined by the national court. Moreover, it follows that any dissolution and any consequent tax liability can only arise now; there would not appear to be any basis for a tax claim based on an event – dissolution – that did not take place ten years ago.

76. Selv om en EØS-stat gjør status som juridisk person etter dens selskapslovgivning betinget av at selskapet har sitt hovedkontor på dens territorium, kan et selskap stiftet etter denne lovgivning derfor flytte sitt hovedkontor samtidig som det omdannes til et selskap undergitt lovgivningen i EØS-tilflytningsstaten. Under disse omstendigheter har selskapet anledning til å påberope seg etableringsfriheten for å bestride tiltak som søker å forhindre eller utgjør et hinder for slik flytting.

77. Om Arcade omdannes til et britisk selskap, kan det derfor påberope seg etableringsfriheten for å bestride kravet om betaling av likvidasjonsskatt. Om det ikke gjør det, og om det ikke flytter sin sentrale ledelse og styring tilbake til Norge,vil – fortsatt under den forutsetning at norske skattemyndigheter har rett i at norsk aksjelovgivning krever at et selskaps hovedkontor skal være lokalisert på nasjonalt territorium – oppløsning av selskapet ikke være til å unngå. Som det er redegjort for over, er et slikt tiltak ikke som sådan en restriksjon i strid med EØS-avtalen. Enhver ordinær skattekonsekvens av slik oppløsning vil heller ikke utgjøre en restriksjon. Spørsmålet om utsatt innbetaling av skatt er i denne hypotese ikke relevant, for det vil da ikke finnes noen skattyter som betaling kan utsettes for.

78. Det er i den foreliggende sak relevant at norske myndigheter med ansvar for å forvalte aksjeselskapslovgivningen ikke har iverksatt noe tiltak for å kreve at Arcade oppløses eller endrer sin status i tiden etter at selskapets sentrale ledelse ble flyttet til Storbritannia. Skattemyndighetene fattet endringsvedtaket ca. åtte år etter flyttingen. Under disse omstendigheter kan det tenkes å være tvilsomt om det i realiteten er noe selskapsrettslig hinder for flyttingen, og følgelig noen begrunnelse for skattevedtaket. Dette er spørsmål som hører under den nasjonale domstol. Videre følger det at en oppløsning og en tilknyttet skatteplikt bare kan oppstå nå; det synes ikke å være noe grunnlag for et skattekrav basert på en hendelse – oppløsning – som ikke fant sted for ti år siden.

79. Insofar as Arcade is entitled to rely on the freedom of establishment on the grounds that it has been converted into a UK company, the further question arises of whether and to what extent Norway is entitled to impose tax on the basis of the removal of the company's head office from Norway (an 'exit tax'). The request of Oslo tingrett raises no such hypothesis for the good reason that it is not the basis of the proceedings now pending before it. For the sake of completeness, the Commission will nevertheless make brief observations on this point.

80. The movement of a company's seat or assets may trigger an exit tax charge that is not borne by companies that do not move their seat, their operations or their assets (or that move them only within national territory). The latter only pay tax when the value of assets is realised, for example through their disposal. That tax charge takes place later, sometimes much later. Such a difference in treatment is undeniably an obstacle to free movement. It places companies that move at a clear disadvantage compared with companies that do not exercise their right to free movement.

81. The Commission submits that the first question of the referring court should be answered as follows:

a) *Article 31 EEA must be interpreted as not precluding the imposition by an EEA State of liquidation tax where, owing to the transfer of a company's head office from that State to another EEA State, the company has lost its legal personality as a company of that State and has therefore been dissolved.*

b) *Article 31 EEA must be interpreted as precluding the imposition of a liquidation obligation and the consequent imposition of liquidation tax by an EEA State on account of the transfer of a company's head office from that State to another EEA State where the company has, without being dissolved, become a company under the legislation of the latter State.*

79. I den utstrekning Arcade er berettiget til å påberope seg etableringsfriheten på grunnlag av at selskapet er omdannet til et britisk selskap, oppstår spørsmålet om, og i hvilken utstrekning, Norge er berettiget til å ilegge skatt med henvisning til at selskapets hovedkontor er flyttet fra Norge ("utflyttingsskatt"). Anmodningen fra Oslo tingrett inneholder ingen slik hypotese av den gode grunn at dette ikke er en del av saken den nå har til behandling. For fullstendighetens skyld vil Kommisjonen likevel kort kommentere dette punkt.

80. Flytting av et selskaps hovedsete eller eiendeler kan utløse et skattekrav ved utflytting som ikke pålegges selskaper som ikke flytter sitt hovedsete, sin virksomhet eller sine eiendeler (eller som bare flytter dem innenfor nasjonalt territorium). Sistnevnte betaler skatt kun når eiendelenes verdi realiseres, for eksempel når de avhendes. Dette skattekrav oppstår senere, noen ganger mye senere. En slik forskjellsbehandling er uten tvil en hindring for den frie bevegelighet. Den setter selskaper som flytter i en klart mer ugunstig stilling enn selskaper som ikke utøver sin rett til fri bevegelighet.

81. Kommisjonen foreslår følgende som svar på det første spørsmål fra den anmodende domstol:

    a) *EØS-avtalen artikkel 31 må tolkes slik at den ikke er til hinder for at en EØS-stat kan ilegge likvidasjonsskatt i tilfeller der selskapet har tapt sin juridiske status som selskap i denne stat og som en følge av dette er blitt oppløst, på grunn av at selskapets hovedkontor er flyttet fra denne stat til en annen EØS-stat.*

    b) *EØS-avtalen artikkel 31 må tolkes slik at den er til hinder for at en EØS-stat kan pålegge likvidasjonsplikt og en derav følgende likvidasjonsskatt på grunnlag av flyttingen av et selskaps hovedkontor fra denne stat til en annen EØS-stat der selskapet, uten å være oppløst, er blitt et selskap etter lovgivningen i sistnevnte stat.*

V THE SECOND QUESTION

Arcade Drilling

82. If this case is regarded as a tax case, Arcade asserts that neither the balanced allocation of powers of taxation nor the prevention of tax avoidance is an overriding reason that can justify exit taxation in this matter. Further, the restriction is not suitable for attaining the objective of securing a balanced allocation of taxing rights, as foreign companies tax resident in Norway were not subject to this taxation, an unequal treatment which is also a breach of the principle of equal treatment in EU law. On the other hand, if this is a company law case, the tax justifications are not relevant. In any event, Arcade submits that the taxation is disproportionate, as it does not allow the taxpayer to choose between immediate or deferred taxation.[23]

83. Arcade further argues that the taxation is based on a fiction that the company has been liquidated. It is contended that, if the company had actually been liquidated, this would have entailed a taxable event in both the United Kingdom and Norway. The Norwegian tax authorities would have had to grant foreign tax credit relief under the Double Tax Convention between Norway and the United Kingdom. In effect, the Norwegian State would only be allowed to collect the amount of tax assessed in Norway that exceeds the tax assessed in the United Kingdom. Instead, the tax assessment in the present case taxes the full amount of unrealised capital gains without regard to the taxing rights of the United Kingdom.

84. In Arcade's view, this clearly demonstrates that the Norwegian exit taxation is not based on a coherent territorial principle but rather on fiscal grounds. In this regard, Arcade submits that the ECJ has never accepted preservation of fiscal revenue as an imperative reason in the public interest in any tax case. Therefore, simple loss of receipts suffered by an EEA State because a taxpayer has moved his tax residence to another EEA State, where the

[23] Reference is made to *National Grid Indus*, cited above.

V DET ANDRE SPØRSMÅL

Arcade Drilling

82. Dersom saken vurderes å være en skattesak, gjør Arcade gjeldende at verken en balansert fordeling av beskatnings-myndighet eller forebygging av omgåelse av skattereglene utgjør et tvingende allment hensyn som begrunner utflyttingsskatt i denne sak. Videre er restriksjonen ikke egnet til å nå målet om å sikre en balansert fordeling av beskatningsmyndighet, idet utenlandske selskaper skattemessig hjemmehørende i Norge ikke var underlagt skatten. En slik forskjellsbehandling er også et brudd på prinsippet om likebehandling i EU-retten. Dersom saken motsetningsvis regnes som en sak etter selskapsretten, er rettferdiggjøring begrunnet i skatteformål ikke relevant. Uansett anfører Arcade at beskatningen er uforholdsmessig ettersom den ikke tillater skattyteren å velge mellom umiddelbar eller utsatt beskatning.[23]

83. Arcade anfører videre at beskatningen er basert på en fiksjon om at selskapet er likvidert. Det hevdes at om selskapet faktisk hadde blitt likvidert, ville dette utgjort en skattbar hendelse både i Storbritannia og i Norge. Norske skattemyndigheter ville i henhold til skatteavtalen mellom Norge og Storbritannia ha måttet gi et fradrag i norsk skatt for skatt betalt på samme inntekt i Storbritannia. Faktisk ville den norske stat bare ha kunnet innkreve det beløp av skatten ilignet i Norge som overskrider ilignet skatt i Storbritannia. I stedet innebærer ligningen i den foreliggende sak at urealiserte kapitalgevinster undergis full beskatning, uten hensyn til Storbritannias beskatningsrett.

84. Etter Arcades oppfatning viser dette klart at norsk utflyttingsbeskatning ikke er basert på et sammenhengende territorialprinsipp men snarere er fiskalt begrunnet. Arcade anfører at EU-domstolen aldri har akseptert opprettholdelse av skatteprovenyet som et tvingende allment hensyn i noen skattesak. Derfor kan ikke alene et tap av inntekter i en EØS-stat, fordi en skatteyter har flyttet sitt skattemessige

[23] Det vises til *National Grid Indus*, som omtalt over.

tax system is different and may be more advantageous for him, cannot in itself justify a restriction on the right of establishment. Moreover, with regard to the tax evasion argument put forward by the Norwegian State, Arcade submits that this has already been rejected in *National Grid Indus.*[24]

85. Arcade submits that it should be noted that the Norwegian parliament, with effect from 2011, has adopted new exit tax rules on the transfer of tax residency for Norwegian limited liability companies. Under the new rules, companies are entitled to defer taxation of unrealised gains until actual realisation takes place. Even in the event that a duty to liquidate a Norwegian company actually exists as a result of a transfer of the place of its effective management, no immediate taxation will be imposed under the newly adopted legislation. In Arcade's view, this clearly demonstrates that the allocation of powers of taxation, or even the prevention of tax avoidance, does not in any way necessitate immediate taxation as imposed by the Norwegian tax authorities in this case.

86. Arcade accordingly submits that the answer to the referring court's second question should be as follows:

Article 31 EEA must be interpreted as precluding legislation of a Member State which prescribes the immediate recovery of tax on unrealised capital gains related to assets if a company transferring its place of effective management to another Member State at the very time of that transfer.

The Norwegian State

87. Should the Court find that the liquidation taxation of Arcade constitutes a restriction, the Norwegian Government submits that the liquidation taxation is justified on the basis of overriding public interests, namely the objective of preserving the allocation of powers of taxation between the EEA States and the objective of

[24] Reference is made to *National Grid Indus,* cited above, paragraph 84.

hjemsted til en annen EØS-stat med et annet skattesystem som kanskje er gunstigere for ham, ikke i seg selv begrunne en restriksjon på etableringsfriheten. Når det gjelder skatteunndragelsesargumentet som den norske stat har fremsatt, anfører Arcade videre at dette ble forkastet allerede i *National Grid Indus.*[24]

85. Arcade anfører at det bør bemerkes at Stortinget har vedtatt nye regler om utflyttingsskatt som trådte i kraft i 2011, om flytting av skattemessig hjemsted for norske aksjeselskaper. Etter de nye regler har selskaper anledning til å utsette beskatning av urealisert gevinst til realisasjonen faktisk finner sted. Selv der det faktisk foreligger en plikt til å likvidere et norsk selskap som følge av flytting av dets reelle ledelse ("place of its effective management"), utløses det etter den nye lovgivning ikke noen umiddelbar skatteplikt. Etter Arcades oppfatning viser dette tydelig at allokeringen av beskatningsmyndighet, eller til og med hensynet til å hindre skatteomgåelse, ikke på noen måte krever umiddelbar beskatning slik norske skattemyndigheter har krevd i denne sak.

86. Arcade gjør følgelig gjeldende at svaret på det andre spørsmål fra den anmodende domstol bør besvares som følger:

EØS-avtalen artikkel 31 må tolkes slik at den er til hinder for at en medlemsstat kan ha en lovgivning som fastsetter umiddelbar innkreving av skatt på urealisert kapitalgevinst knyttet til et selskaps eiendeler dersom selskapet flytter sin reelle ledelse ("place of effective management") til en annen medlemsstat, på det tidspunkt flyttingen finner sted.

Den norske stat

87. Dersom EFTA-domstolen kommer til at likvidasjonsbeskatningen av Arcade utgjør en restriksjon, gjør Norges regjering gjeldende at likvidasjonsbeskatningen er begrunnet i tvingende allmenne hensyn, nemlig målet om å bevare fordelingen av beskatningsmyndighet mellom EØS-statene og målet om å unngå

[24] Det vises til *National Grid Indus*, som omtalt over (avsnitt 84).

preventing avoidance of national legislation. It is argued that both these objectives are legitimate.[25]

88. In the view of the Government, the company law rule setting out the connecting factors required for a company to retain its status as a legally incorporated company can clearly be justified by the objective of protecting the company's creditors, the company's employees and other stakeholders in the company, and must be seen as appropriate and necessary to attain this objective. Among other things, this is shown by the procedures that must be followed when an SE company moves between EEA States.[26]

89. The Norwegian Government further submits that the potential restriction must be the tax consequence of the obligation to liquidate, namely the liquidation tax. It is argued that the liquidation taxation of a company in breach of its obligation to liquidate can be justified on grounds of preventing avoidance of national legislation. The relevant Norwegian tax rule will be applicable in cases where *de facto* liquidation is not effected, and the rule is designed to prevent avoidance of the related liquidation taxation that would otherwise arise. It will also be relevant to apply this tax rule in situations other than cross-border situations, where a failure to effect *de facto* liquidation prevents the settlement of tax positions. In both cases, application of the rule will rely on a specific assessment, based on the same standards. It is argued that the national tax rule that applies to avoidance arrangements of the type in question is clearly appropriate in relation to preventing avoidance of liquidation tax.

90. With regard to the objective of preserving the allocation of powers of taxation between the EEA States, the Government argues that the liquidation taxation is a direct and necessary consequence of the company in question's breach of Norwegian company law. As such, it cannot be regarded as an 'exit tax', but as a liquidation tax. The Government argues that to find

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25 Reference is made to *National Grid Indus*, cited above, paragraphs 45 and 84, and case-law cited.

26 Reference is made to Article 8 of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for European company (SE), OJ 2001 L 294, 10.11.2001, p. 1-21.

omgåelse av nasjonal lovgivning. Det gjøres gjeldende at begge disse mål er legitime.[25]

88. Etter regjeringens syn kan den regel i aksjeloven som fastsetter hvilken tilknytning et selskap må ha for at det skal beholde sin status som et lovlig stiftet selskap, klart begrunnes i målet om å beskytte selskapets kreditorer, ansatte og andre interessenter i selskapet, og den må anses som egnet og nødvendig for å nå dette mål. Dette fremgår blant annet av de prosedyrer som må følges når et SE-selskap flytter fra en EØS-stat til en annen.[26]

89. Norges regjering anfører videre at den mulige restriksjon må være den skattemessige konsekvens av likvidasjonsplikten, nemlig likvidasjonsskatten. Det anføres at likvidasjonsbeskatning av et selskap som har brutt sin plikt til å likvidere, kan begrunnes i hensynet til å hindre omgåelse av nasjonal lovgivning. Den aktuelle norske skatteregel vil komme til anvendelse i tilfeller der faktisk likvidasjon unnlates, og regelen er ment å hindre omgåelse av den tilhørende likvidasjonsskatt som ellers ville oppstå. Anvendelse av denne skatteregel vil være aktuelt også i ikke-grenseoverskridende situasjoner, der unnlatelse av faktisk likvidasjon hindrer oppgjør av skatteposisjoner. I begge tilfeller vil anvendelse av regelen bero på en konkret vurdering, basert på samme norm. Det anføres at den nasjonale skatteregel som rammer unnlatelsesarrangementer av den aktuelle type, er klart egnet til og nødvendig for å hindre omgåelse av likvidasjonsbeskatningen.

90. Når det gjelder målet om å bevare fordelingen av beskatningsmyndighet mellom EØS-statene, anfører regjeringen at likvidasjonsbeskatning er en direkte og nødvendig konsekvens av vedkommende selskaps brudd på norsk aksjelov. Derfor kan skatten ikke betraktes som en "utflyttingsskatt", men som en likvidasjonsskatt. Regjeringen anfører at å konkludere med at

[25] Det vises til *National Grid Indus*, som omtalt over (avsnitt 45 og 84), og den rettspraksis som det vises til der.

[26] Det vises til artikkel 8 i rådsforordning (EF) nr. 2157/2001 av 8. oktober 2001 om vedtektene for det europeiske selskap (SE), EFT 2001 L 294 av 10.11.2001, s. 1-21.

that the tax-related consequence of the obligation to liquidate constitutes a restriction that cannot be justified would mean that the Norwegian company law rule setting out the connecting factors a company must have to Norway to retain its status as a legally incorporated company would have to be disregarded. This would be contrary to established case-law stating that the EEA States have the power to define the connecting factors required to retain status as a legally incorporated company under national legislation.

91. Nevertheless, it is the Government's view that the liquidation taxation can be justified by the objective of preserving the allocation of powers of taxation between the EEA States in situations where the obligation to liquidate has arisen due to the relocation of a company's real seat to another EEA State.

92. Furthermore, the objective achieved by imposing tax on companies that can no longer exist pursuant to Norwegian legislation because they have moved their real seat to another State is that values generated by the company while it was a legally incorporated Norwegian entity are taxed in Norway. In this regard, the objective of preserving the allocation of powers of taxation between the EEA States is a legitimate objective.[27] As Arcade was no longer liable to pay tax in Norway subsequent to its emigration, the liquidation taxation at the time of emigration was therefore appropriate to attain the objective in question.[28] The Government also believes that this measure is necessary to preserve the allocation of powers of taxation between the EEA states, i.e. that the same level of protection cannot be achieved by less restrictive means.

93. The Government argues that applying the reasoning of *National Grid Indus* to the present case would entail that immediate establishment of the amount of tax is necessary, but that Arcade should be able to choose between immediate payment of the tax

[27] Reference is made to *National Grid Indus*, cited above, paragraphs 45 to 46, and case-law cited.

[28] Reference is made to *National Grid Indus*, cited above, paragraphs 47 to 48.

de skattemessige konsekvenser av plikten til å likvidere utgjør en restriksjon som ikke kan rettferdiggjøres, ville innebære at man så bort fra regelen i norsk aksjelovgivning som fastsetter hvilken tilknytning et selskap må ha til Norge for å beholde sin status som et lovlig stiftet selskap. Dette ville være i strid med fast rettspraksis, som tilsier at EØS-statene har myndighet til å definere den tilknytning som kreves for å beholde statusen som et lovlig stiftet selskap etter nasjonal lovgivning.

91. Uansett mener regjeringen at likvidasjonsbeskatning kan rettferdiggjøres med grunnlag i målet om å bevare fordelingen av beskatningsmyndighet mellom EØS-statene i tilfeller der plikten til å likvidere har oppstått som følge av at et selskap har flyttet sitt hovedsete til en annen EØS-stat.

92. Videre er det mål som nås ved å beskatte selskaper som ikke lenger kan eksistere etter norsk lovgivning fordi de har flyttet sitt hovedsete til en annen stat, at verdier som selskapet har generert mens det var et lovlig stiftet norsk selskap, blir beskattet i Norge. I denne sammenheng er målet om å bevare allokeringen av beskatningsmyndighet mellom EØS-statene et legitimt mål.[27] Siden Arcade etter utflyttingen ikke lenger var skattepliktig til Norge, var likvidasjonsbeskatningen på utflyttingstidspunktet derfor egnet til å oppnå det aktuelle mål.[28] Regjeringen mener også at dette tiltak er nødvendig for å bevare fordelingen av beskatningsmyndighet mellom EØS-statene, dvs. at samme beskyttelsesnivå ikke kan oppnås med mindre inngripende virkemidler.

93. Regjeringen anfører at å anvende samme resonnement på den foreliggende sak som i *National Grid Indus,* ville innebære at det blir nødvendig å fastsette skattebeløpet umiddelbart, men at Arcade burde kunne velge mellom umiddelbar og utsatt betaling

[27] Det vises til *National Grid Indus*, som omtalt over (avsnitt 45-46), og den rettspraksis som det vises til der.
[28] Det vises til *National Grid Indus*, som omtalt over (avsnitt 47-48).

and deferred payment of the tax until the time of subsequent realisation by disposal etc.[29]

94. However, as Arcade is no longer a legally incorporated company under Norwegian law following its relocation, the case manifestly differs from *National Grid Indus*. Therefore, it is not relevant to draw a distinction between the establishment of the amount of tax and the recovery of the tax. The immediate recovery of the tax must therefore also be deemed necessary in order to pursue the objective of preserving the allocation of powers of taxation between the EEA States.

95. If the Court should for some reason find that the distinction between the establishment of the amount of tax and the recovery of the tax is relevant in the present case, the Government points out that in 2002 Norway and the United Kingdom had no mutual agreement on the recovery of tax. The Norwegian authorities thus did not have the means necessary to obtain useful information in connection with the recovery of the claim, or to obtain the assistance required to actually recover the tax claim.[30] Also for this reason, it is not relevant to distinguish between the establishment of the amount of tax and the recovery of the tax in the present case.

96. Should the Court disagree with this, it is the Government's view that the possible restriction constituted by the tax will be justifiable if the tax authorities in Norway gave Arcade a choice between settling the tax as of 2002, or at the time of subsequent realisation by disposal etc., according to the principles laid down in *National Grid Indus*.

97. With regard to the objective of preventing avoidance of liquidation tax, it is argued that the national tax rule that applies to avoidance arrangements of the type in question is clearly necessary to achieve this objective. In the present case,

[29] Reference is made to *National Grid Indus,* cited above, paragraphs 52 to 64, and paragraphs 65 to 75.

[30] As to the opposite effect, reference is made to *National Grid Indus*, cited above, paragraph 78.

av skatten til tidspunktet for en etterfølgende realisasjon ved avhendelse osv.[29]

94. Siden Arcade etter flyttingen ikke lenger er et lovlig stiftet selskap etter norsk lov, ligger denne sak imidlertid åpenbart annerledes an enn *National Grid Indus.* Derfor er det ikke relevant å trekke opp et skille mellom fastsettelsen av skattebeløp og innkrevingen av skatten. Den umiddelbare innkreving av skatten må derfor også anses som nødvendig for å kunne forfølge målet om å bevare allokeringen av beskatningsmyndighet mellom EØS-statene.

95. Om EFTA-domstolen av en eller annen grunn skulle mene at skillet mellom fastsettelsen av skattens beløp og innkrevingen av skatten er relevant i den foreliggende sak, peker regjeringen på at Norge og Storbritannia i 2002 ikke hadde noen gjensidig avtale om skatteinnkreving. Norske myndigheter hadde dermed ikke de nødvendige virkemidler til å innhente relevant informasjon i forbindelse med inndrivelse av kravet, eller til å få den nødvendige bistand til faktisk å inndrive skattekravet.[30] Også av denne grunn er det i saken her ikke relevant å skille mellom fastsettelse av skattebeløp og innkreving av skatten.

96. Dersom EFTA-domstolen er uenig i dette, mener regjeringen at den mulige restriksjon som skatten måtte utgjøre, vil være rettferdiggjort dersom norske skattemyndigheter ga Arcade valget mellom å gjøre opp skatten per 2002, eller på tidspunktet for en etterfølgende realisasjon ved avhendelse osv., i samsvar med prinsippene fastsatt i *National Grid Indus*.

97. Når det gjelder målet om å hindre omgåelse av likvidasjonsskatt, anføres det at den nasjonale skatteregel som kommer til anvendelse på unnlatelsesarrangementer av den aktuelle type, klart er nødvendig for å nå dette mål. I den foreliggende sak er det mål som forfølges ikke å hindre en eventuell fremtidig

29 Det vises til *National Grid Indus*, som omtalt over (avsnitt 52-64 og 65-75).
30 Det vises motsetningsvis til *National Grid Indus*, som omtalt over (avsnitt 78).

the objective pursued is not to prevent the possible future avoidance of tax, but an avoidance that has already occurred. The Norwegian Government submits that this differs manifestly from the situation in ECJ case-law, where it has been held that the objective of preventing possible future tax avoidance does not necessitate immediate taxation of a company's transfer of its real seat to another Member State.[31] As the avoidance in the present case has already taken place, immediate liquidation taxation is necessary.

98. The Norwegian Government submits that the second question be answered as follows:

In the event that the national court should find that Article 31 EEA, cf. Article 34 EEA, is applicable, the liquidation taxation may be found to be appropriate and necessary to pursue the objectives of preserving the allocation of powers of taxation between the EEA States and to prevent avoidance of national legislation, the specific application of which is for the national court to finally assess in the main proceedings.

The Finnish Government

99. In the event that the Court should hold that Articles 31 and 34 EEA do apply and a restriction exists, the Finnish Government submits that it is justified by the objective of ensuring the balanced allocation of powers of taxation between the EEA States.

100. In support of this argument, the Government firstly submits that preserving the allocation of powers of taxation between the EEA States is a legitimate objective that can justify restrictions on the freedom of establishment.[32] Secondly, it is clear that legislation pursuant to which the transfer of the seat results in the taxation of unrealised capital gains is appropriate to ensure the

[31] Reference is made to *National Grid Indus*, cited above, paragraphs 83 to 84.

[32] Reference is made to *National Grid Indus*, cited above, paragraph 45; Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 45; and Case C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 51.

skatteomgåelse, men en omgåelse som allerede har funnet sted. Norges regjering anfører at dette åpenbart er annerledes enn i tilfellene behandlet i EU-domstolens rettspraksis, der det har blitt lagt til grunn at målet om å hindre eventuell fremtidig skatteomgåelse ikke krever umiddelbar beskatning av et selskaps flytting av hovedsete til en annen medlemsstat.[31] Ettersom omgåelsen i foreliggende sak allerede har funnet sted, er umiddelbar likvidasjonsbeskatning nødvendig.

98. Norges regjering foreslår at det andre spørsmål besvares på følgende måte:

For det tilfelle at den nasjonale domstol skulle komme til at EØS-avtalen artikkel 31 jf. 34 kommer til anvendelse, kan likvidasjonsbeskatningen anses å være egnet og nødvendig for å forfølge målet om å bevare fordelingen av beskatningsmyndighet mellom EØS-statene og hindre omgåelse av nasjonal lovgivning, hvis konkrete anvendelse den nasjonale domstol skal foreta en endelig bedømmelse av i hovedsaken.

Finlands regjering

99. For det tilfelle at EFTA-domstolen skulle mene at EØS-avtalen artikkel 31 og 34 kommer til anvendelse og at det foreligger en restriksjon, anfører Finlands regjering at den kan rettferdiggjøres ut fra målet om å sikre en balansert fordeling av beskatningsmyndighet mellom EØS-statene.

100. Til støtte for dette argument anfører regjeringen for det første at å bevare fordelingen av beskatningsmyndighet mellom EØS-statene er et legitimt mål som kan rettferdiggjøre restriksjoner på etableringsfriheten.[32] Dernest er det klart at en lovgivning hvor flytting av hovedsete medfører beskatning

31 Det vises til *National Grid Indus*, som omtalt over (avsnitt 83-84).
32 Det vises til *National Grid Indus*, som omtalt over (avsnitt 45); sak C-446/03 *Marks & Spencer*, Sml. 2005 s. I-10837 (avsnitt 45), og sak C-231/05 *Oy AA*, Sml. 2007 s. I-6373 (avsnitt 51).

preservation of the allocation of powers of taxation between the EEA States concerned.[33] Thirdly, it has to be examined whether legislation such as that at issue in the main proceedings goes beyond what is necessary to attain the objective it pursues. In the last resort it is for the national court to make this assessment taking into account all the facts of the case.

101. The Finnish Government further argues that a distinction was drawn in *National Grid Indus* between the establishment of the amount of tax and the recovery of the tax.[34] It argues that it clearly follows from the judgment that establishing the amount of tax at the time of the transfer of a company's place of effective management complies with the principle of proportionality.[35]

102. As regards the recovery of the tax, the ECJ stated in that case that, compared with the immediate payment obligation, national legislation offering an emigrating company a choice between immediate payment and deferred payment of the amount of tax would constitute a measure that, while being appropriate to ensure the balanced allocation of powers of taxation between the Member States, would be less harmful to freedom of establishment.[36] It was further stated that an appropriate solution could be recovery of the tax debt at the time of the actual realisation in the host Member State. A company could thus avoid the cash flow problems that could result from the immediate recovery of the tax.[37]

103. In the view of the Finnish Government, however, the circumstances in the present case differ from those in *National Grid Indus* in that Arcade, since the *de facto* transfer of its head office, is no longer a legally incorporated company under Norwegian law. Pursuant to Norwegian company law, a company transferring its head office must be placed into liquidation. As liquidation is the process by which a company is brought to an end and the assets and property of the company redistributed, the Finnish Government

33 Reference is made to *National Grid Indus*, cited above, paragraph 48.
34 Reference is made to *National Grid Indus*, cited above, paragraph 51.
35 Reference is made to *National Grid Indus*, cited above, paragraph 52.
36 Reference is made to *National Grid Indus*, cited above, paragraph 73.
37 Reference is made to *National Grid Indus*, cited above, paragraph 68.

av urealisert kapitalgevinst er egnet til å bevare fordelingen av beskatningsmyndighet mellom de berørte EØS-stater.[33] For det tredje må det vurderes om en lovgivning som den hovedsaken gjelder, går lenger enn det som er nødvendig for å nå sitt mål. I siste instans er det den nasjonale domstol som må foreta denne vurdering på bakgrunn av alle sakens fakta.

101. Finlands regjering anfører videre at det i *National Grid Indus* ble trukket et skille mellom fastsettelsen av skatt og innkrevingen av skatten.[34] Det anføres at det fremgår klart av denne dom at å fastsette skattebeløpet på det tidspunkt et selskaps reelle ledelse ("place of effective management") flyttes, er i samsvar med forholdsmessighetsprinsippet.[35]

102. Når det gjelder inndrivelsen av skatten, fastslo EU-domstolen i nevnte sak at sammenlignet med en umiddelbar betalingsplikt, ville en nasjonal lovgivning som ga et utflyttende selskap valget mellom umiddelbar betaling og utsatt betaling av skattebeløpet, utgjøre et tiltak som, selv om det var egnet til å sikre en balansert fordeling av beskatningsmyndighet medlemsstatene imellom, ville utgjøre et mindre inngrep i etableringsfriheten.[36] Det ble videre fastslått at en forholdsmessig løsning kunne bestå i å inndrive skattekravet på tidspunktet for den faktiske realisasjon i vertsmedlemsstaten. Et selskap vil dermed kunne unngå de kontantstrømproblemer som umiddelbar inndrivelse av skatten kan medføre.[37]

103. Finlands regjering er imidlertid av den oppfatning at omstendighetene i denne sak skiller seg fra situasjonen i *National Grid Indus* idet Arcade ikke lenger er et lovlig stiftet selskap etter norsk rett, siden hovedkontoret rent faktisk ble flyttet. Etter norsk aksjelovgivning må et selskap som flytter sitt hovedkontor likvideres. Ettersom likvidasjon er den prosess som et selskap opphører med og selskapets eiendeler og eiendom omfordeles i,

[33] Det vises til *National Grid Indus*, som omtalt over (avsnitt 48).
[34] Det vises til *National Grid Indus*, som omtalt over (avsnitt 51).
[35] Det vises til *National Grid Indus*, som omtalt over (avsnitt 52).
[36] Det vises til *National Grid Indus*, som omtalt over (avsnitt 73).
[37] Det vises til *National Grid Indus*, som omtalt over (avsnitt 68).

submits that the liquidation of the company could be considered to be a realisation of the company's assets within the meaning of the judgment in *National Grid Indus*. Hence, in cases where the emigrating company is placed in liquidation (whether voluntarily or because it does not satisfy the criteria set forth in national company law), it is not necessary to draw a distinction between the establishment of the amount of tax and the recovery of the tax.

104. Furthermore, it should be noted that the framework of cooperation between the competent authorities of the EU Member States established by Directives 77/799/EEC[38] and 2008/55/EC[39] does not exist between Norway and the United Kingdom. It is submitted that the ECJ has on a number of occasions taken account of this fact when assessing the proportionality of potential restrictions on fundamental freedoms as guaranteed in the EEA Agreement. The Finnish Government argues that this fact should also be taken into consideration in determining whether the proportionality principle precludes immediate recovery of the tax at issue. The national court should consider whether, in the absence of the framework of cooperation established by the above-mentioned directives, such obligations of cooperation exist between the competent authorities in the EEA states in question that afford the national tax authorities actual opportunities to ensure effective debt collection in the case of deferred payment of the amount of tax.

105. In conclusion, the Finnish Government submits that the Court should answer the second question referred to it as follows:

In the event the EFTA Court holds that a restriction exists, it is justified by the objective of ensuring the balanced allocation of powers of

[38] Reference is made to Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member State in the field of direct and indirect taxation, OJ 1977 L 336, p. 15, as amended by Council Directive 92/12/EEC of 25 February 1992, OJ 1992 L 76, p. 1.

[39] Reference is made to Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, OJ 2008 L 150, p. 28, which in turn has been replaced by Council Directive 2010/24/EU of 16 March 2010 on mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ 2010 L 84, p. 1.

anfører Finlands regjering at likvidasjon av selskapet kan anses som realisasjon av selskapets eiendeler i betydningen av dommen i *National Grid Indus*. I saker der det utflyttende selskap er satt i likvidasjon (enten frivillig eller fordi det ikke oppfyller kriteriene i nasjonal selskapslovgivning), er det dermed ikke nødvendig å skille mellom fastsettelsen av skattebeløpet og inndrivelsen av skatten.

104. Dessuten bør det nevnes at det samarbeid mellom rette myndigheter i EU-medlemsstatene som ble innført ved direktiv 77/799/EØF[38] og 2008/55/EF[39], ikke finnes mellom Norge og Storbritannia. Det anføres at EU-domstolen ved flere anledninger har tatt hensyn nettopp til dette faktum i sin vurdering av forholdsmessigheten ved potensielle restriksjoner på de grunnleggende rettigheter som EØS-avtalen sikrer. Finlands regjering anfører at dette forhold også bør tas i betraktning i vurderingen av om forholdsmessighetsprinsippet er til hinder for umiddelbar inndrivelse av den aktuelle skatt. I mangel av det samarbeid som ble innført ved ovennevnte direktiver, bør den nasjonale domstol vurdere om slike samarbeidsforpliktelser finnes mellom vedkommende myndigheter i de berørte EØS-stater, som gir de nasjonale skattemyndigheter reelle muligheter til å sikre faktisk inndrivelse av kravet i tilfelle av utsatt betaling av skattebeløpet.

105. Som konklusjon ber Finlands regjering EFTA-domstolen å besvare det andre spørsmål slik:

For det tilfelle at EFTA-domstolen kommer til at det foreligger en restriksjon, kan denne rettferdiggjøres ut fra målet om å

38 Det vises til rådsdirektiv 77/799/EØF av 19. desember 1977 «om gensidig bistand mellem medlemsstaternes kompetente myndigheder inden for området direkte skatter», EFT 1977 L 336, s. 15, som endret ved rådsdirektiv 92/12/EØF av 25. februar 1992, EFT 1992 L 76, s. 1.

39 Det vises til rådsdirektiv 2008/55/EF av 26. mai 2008 «om gensidig bistand ved inddrivelse af fordringer i forbindelse med visse bidrag, afgifter, skatter og andre foranstaltninger», EUT 2008 L 150, s. 28, som i sin tur er blitt erstattet av rådsdirektiv 2010/24/EU av 16. mars 2010 «om gensidig bistand ved inddrivelse af fordringer i forbindelse med skatter, afgifter og andre foranstaltninger», EUT 2010 L 84, s. 1.

taxation between the Member States. The national legislation at issue is appropriate for ensuring the attainment of the said objective. It is for the national court to make certain, taking into account the facts of the case, that the immediate payment of the liquidation tax does not go beyond what is necessary to attain the objective.

The French Government

106. If an answer to the second question is required, the French Government submits that the obligation to pay the tax in question is justified by the overriding public interest of ensuring the balanced allocation of powers of taxation between EEA States, provided that the national legislation is appropriate in relation to attaining the objective pursued and does not exceed what is necessary in order to achieve it.[40]

107. In this respect, it is argued that ensuring the balanced allocation of powers of taxation between EEA States is a legitimate objective.[41] The French Government further argues that it follows from *National Grid Indus* that Norway is allowed to tax the unrealised capital gains relating to the assets of a company incorporated under its law at the time when its power of taxation in respect of this company ceases to exist, e.g. when this company transfers its real head office to another EEA State.[42]

108. It is submitted that, even though the Norwegian tax legislation was amended in 2010 to the effect that a company is in principle no longer liable to taxation when moving its head office from Norway to another State within the EEA, it does not follow from this amendment that the Norwegian tax provisions in force in 2001-2002 go beyond what is necessary to ensure the balanced allocation of powers of taxation between EEA States. In this respect, it should be stressed that national legislation cannot be

[40] Reference is made to Case E-8/04 *ESA* v *Liechtenstein* [2005] EFTA Ct. Rep. 46, paragraph 23, and case-law cited; and, for comparison, *National Grid Indus*, paragraph 42, and case-law cited.

[41] Reference is made to Case C-470/04 *N*, cited above, paragraph 42; and *National Grid Indus*, cited above, paragraph 45.

[42] Reference is made to *National Grid Indus*, cited above, paragraphs 42 to 86.

sikre en balansert fordeling av beskatningsmyndighet mellom medlemsstatene. Den nasjonale lovgivning saken gjelder er egnet til å sikre oppnåelse av nevnte mål. Det er opp til den nasjonale domstol under hensyn til de faktiske forhold i saken å forsikre seg om – – at umiddelbar betaling av likvidasjonsskatt ikke går lenger enn det som er nødvendig for å nå dette mål.

Frankrikes regjering

106. Dersom det andre spørsmål må besvares, anfører Frankrikes regjering at plikten til å betale den aktuelle skatt er begrunnet i det tvingende allmenne hensyn at det er nødvendig å sikre en balansert fordeling av beskatningsmyndighet mellom EØS-statene, forutsatt at den nasjonale lovgivning er egnet til å oppnå sitt mål og ikke går lenger enn det som er nødvendig for dette.[40]

107. I denne sammenheng anføres det at å sikre en balansert fordeling av beskatningsmyndighet mellom EØS-statene er et legitimt mål.[41] Frankrikes regjering anfører videre at det følger av *National Grid Indus* at Norge har anledning til å beskatte urealisert kapitalgevinst i tilknytning til eiendelene til et selskap stiftet etter norsk rett på det tidspunkt dets beskatningsmyndighet overfor selskapet opphører å eksistere, f.eks. når dette selskap flytter sitt reelle hovedkontor til en annen EØS-stat.[42]

108. Det gjøres gjeldende at selv om norsk skattelovgivning ble endret i 2010 slik at et selskap i prinsippet ikke lenger blir skattepliktig når det flytter sitt hovedkontor fra Norge til en annen stat i EØS-området, så følger det ikke av denne lovendring at norske skatteregler som gjaldt i 2001-2002 går lenger enn det som er nødvendig for å sikre en balansert allokering av beskatningsmyndighet mellom EØS-statene. I denne sammenheng bør det understrekes at nasjonal lovgivning ikke kan betraktes

40 Det vises til sak E-8/04 *EFTAs overvåkningsorgan* mot *Liechtenstein*, EFTA Ct. Rep. 2005 s. 46 (avsnitt 23), og den rettspraksis som det vises til der, og for sammenligning, *National Grid Indus*, som omtalt over (avsnitt 42), og den rettspraksis som det vises til der.

41 Det vises til sak C-470/04 *N*, som omtalt over (avsnitt 42), og *National Grid Indus*, som omtalt over (avsnitt 45).

42 Det vises til *National Grid Indus*, som omtalt over (avsnitt 42-86).

considered to be disproportionate on the sole grounds that it was amended in a more liberal direction.[43]

109. Furthermore, the French Government argues that it is irrelevant that, as a result of the liquidation tax imposed on Arcade, part of the increase in value of its assets from 1995 to 2002 could have been taxed both in Norway and in the United Kingdom. In this regard, the French Government contends that EEA law does not prohibit international juridical double taxation.

110. Secondly, it is submitted that the amount of tax on unrealised capital gains imposed on a company by the EEA State of origin can be assessed definitively at the time of transfer of the company's head office to another EEA State, without that EEA State having to take account of decreases or increases in value that may subsequently occur.

111. Thirdly, the EEA State of origin may have to offer the company concerned the choice between immediate payment and deferred payment of the amount of tax. However, if a deferral of tax payment is granted, the EEA State of origin may, on the one hand, require the payment of interest as well as, on the other hand, taking the necessary measures to prevent the risk of non-recovery of the tax.

112. Concerning this latter point, the EEA State of origin can require a bank guarantee to be furnished.[44] The French government considers that the EEA State of departure could also require the company newly established in another EEA State to appoint a representative who is held jointly and severally liable for the payment of the tax due from the company.

113. In accordance with the above, the French Government suggests that the following answer be given to the questions raised by Oslo tingrett:

Article 31 EEA does not preclude the legislation of an EEA Member

[43] Reference is made to the Opinion of Advocate General Kokott in Case C-498/10 *X*, delivered on 21 December 2011, not yet reported, point 45.

[44] Reference is made to *National Grid Indus*, cited above, paragraph 74.

som uforholdsmessig bare fordi reglene ble endret i en mer liberal retning.[43]

109. Videre anfører Frankrikes regjering at det er irrelevant at likvidasjonsbeskatningen av Arcade medfører at en del av verdistigningen på eiendelene i perioden 1995–2002 kunne ha blitt beskattet både i Norge og i Storbritannia. Frankrikes regjering hevder at EØS-retten ikke er til hinder for internasjonal juridisk dobbeltbeskatning.

110. For det andre anføres det at den skatt et selskap ilegges på urealisert kapitalgevinst av EØS-opprinnelsesstaten, kan utlignes endelig på det tidspunkt selskapet flytter sitt hovedkontor til en annen EØS-stat, uten at sistnevnte EØS-stat må ta hensyn til eventuelt senere verdifall eller verdistigning.

111. For det tredje kan EØS-opprinnelsesstaten måtte tilby vedkommende selskap å velge mellom umiddelbar betaling og utsatt betaling av skattebeløpet. Men dersom utsatt skattebetaling innrømmes, kan EØS-opprinnelsesstaten på den ene side kreve betaling av renter, og på den annen side også treffe de nødvendige tiltak for å forebygge risikoen for at skatten ikke skal bli inndrevet.

112. Når det gjelder dette siste, kan EØS-opprinnelsesstaten kreve en bankgaranti fremlagt.[44] Frankrikes regjering mener at EØS-fraflytningsstaten også burde kunne kreve at et selskap som nylig er etablert i en annen EØS-stat, utpeker en representant som skal være solidarisk ansvarlig for betaling av skatt selskapet er skyldig.

113. På grunnlag av det ovenstående foreslår Frankrikes regjering det følgende som svar på spørsmålene stilt av Oslo tingrett:

EØS-avtalen artikkel 31 er ikke til hinder for at en EØS-stat kan

[43] Det vises til uttalelse fra generaladvokat Kokott i sak C-498/10 *X*, avgitt 21. desember 2011, ennå ikke i Sml. (avsnitt 45).
[44] Det vises til *National Grid Indus*, som omtalt over (avsnitt 74).

State that imposes an exit tax on companies incorporated under national law at the time of transfer of its real head office to another Member State, without taking into account the subsequent decreases or increases in value, provided that a deferral of tax payment is granted. However, if a deferral of tax payment is granted, the Member State of origin can require the payment of interest as well as the provision of a bank guarantee or the appointment of a representative jointly and severally liable for the payment of the tax due by the company.

The EFTA Surveillance Authority

114. ESA argues that, in order for a restriction on the freedom of establishment to be justified by an overriding general interest, the measure in question must be appropriate to ensure the attainment of that objective and must not go beyond what is necessary to attain it. ESA further submits that it follows from the judgment in *National Grid Indus* that preserving the allocation of powers of taxation between the States is a legitimate objective.

115. In the absence of any unifying or harmonising measures, ESA contends that the EEA States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation.[45] In that context, the transfer of the place of effective management of a company of one EEA State to another by which the company ceases to be tax resident in the first State cannot mean that the State of origin has to abandon its right to tax a capital gain that arose within the ambit of its powers of taxation before the transfer.

116. ESA contends that this is the reason why certain EEA States decided to adopt legislation on exit taxation. Exit taxation applied upon the emigration of a company is based on the internationally recognised principle of territoriality in conjunction with a

[45] *National Grid Indus*, cited above, paragraph 45. ESA further notes that EEA States will usually draw guidance from international practice and the model conventions drawn up by the Organisation for Economic Development and Cooperation (OECD).

ha en lovgivning som ilegger selskaper stiftet etter nasjonal rett utflyttingsskatt på det tidspunkt dets reelle hovedkontor flyttes til en annen medlemsstat, uten å ta hensyn til eventuelt senere verdifall eller verdistigning, forutsatt at det gis utsettelse på betalingen av skatten. Dersom det imidlertid gis utsettelse på betalingen av skatten, kan opprinnelsesmedlemsstaten kreve betaling av renter og en bankgaranti fremlagt eller utpeking av en representant som er solidarisk ansvarlig for betaling av skatt selskapet er skyldig.

EFTAs overvåkningsorgan

114. ESA anfører at for at en restriksjon på etableringsfriheten skal kunne rettferdiggjøres i et tvingende allment hensyn, må det aktuelle tiltak være egnet til å nå målet og ikke gå lenger enn det som er nødvendig for dette. ESA anfører videre at det følger av dommen i *National Grid Indus* at å bevare fordelingen av beskatningsmyndighet mellom statene er et legitimt mål.

115. I mangel av ensartede eller harmoniserende tiltak gjør ESA gjeldende at EØS-statene fortsatt har myndighet til å definere, gjennom traktat eller ensidig handling, kriteriene for fordeling av deres beskatningsmyndighet, særlig med sikte på å unngå dobbeltbeskatning.[45] I denne sammenheng kan ikke flytting av den reelle ledelse ("place of effective management") for et selskap fra én EØS-stat til en annen, som medfører at selskapet opphører å være skattemessig hjemmehørende i den første stat, bety at opprinnelsesstaten må oppgi sin rett til å beskatte en kapitalgevinst som oppsto innenfor dens beskatningsområde før flyttingen.

116. ESA hevder at dette er grunnen til at enkelte EØS-stater har valgt å ha regler om utflyttingsbeskatning. Utflyttingsbeskatning som anvendes i forbindelse med emigrasjon av et selskap er basert på det internasjonalt anerkjente territorialprinsipp sammen med en tidskomponent og i hovedsak tjener til å

[45] *National Grid Indus,* som omtalt over (avsnitt 45). ESA bemerker videre at EØS-statene vanligvis vil finne veiledning i internasjonal praksis og mønsteravtalene utarbeidet av Organisasjonen for økonomisk samarbeid og utvikling (OECD).

temporal component, and it essentially serves to allocate the power to tax. It aims to ensure that the whole profit earned by a company in the period when it was liable to tax in a State is also taxed there. For that purpose, any unrealised capital gains that have accrued up to that point are deemed to have been realised upon the date of exit.[46]

117. In the case at hand, ESA submits that both Norwegian and UK law contain provisions under which Arcade might conceivably have an obligation to pay tax on all its worldwide income and gains. However, pursuant to the double taxation treaty, the decisive factor is the place of management of the company. This means that, as long as the place of management was in Norway, Arcade was tax-resident there and paid tax on income and capital gains in Norway even though its actual assets were located in the United Kingdom.

118. Therefore, when Arcade moved its place of management to the United Kingdom and became tax resident there, Norway was in principle entitled to tax any unrealised capital gains that arose within the ambit of its power of taxation before the transfer.

119. In order to assess the proportionality of such legislation, ESA asserts that a distinction must be drawn between the establishment of the amount of tax and the recovery of the tax.

120. As to the definitive establishment of the amount of tax at the time when the company transfers its place of management to another EEA State, ESA argues that it follows from *National Grid Indus* that the State of origin complies with the principle of proportionality if, for the purpose of safeguarding the exercise of its powers of taxation, it determines definitively – without taking account of decreases or increases in value that may subsequently occur – the tax due on the unrealised capital gains that have arisen in its territory at the time when its power of taxation in respect of the company in question ceases to exist.

[46] Reference is made to the Opinion of Advocate General Kokott in *National Grid Indus*, cited above, point 47.

fordele beskatningsmyndighet. Den tar sikte på å sikre at hele fortjenesten opparbeidet i et selskap i den periode det er skattepliktig i en stat, også blir skattlagt der. For dette formål anses enhver urealisert kapitalgevinst opparbeidet til dette punkt å være realisert per utflyttingsdato.[46]

117. I den foreliggende sak anfører ESA at både norsk og britisk lovgivning inneholder bestemmelser som kan medføre at Arcade har plikt til å betale skatt på alle inntekter og all gevinst det har i hele verden. Men i henhold til skatteavtalen er den avgjørende faktor hvor selskapet har sin ledelse ("place of management"). Dette betyr at så lenge ledelsen var i Norge, var Arcade skattemessig hjemmehørende der og betalte skatt på inntekt og kapitalgevinst i Norge selv om selskapets faktiske eiendeler var lokalisert i Storbritannia.

118. Da Arcade flyttet sin ledelse til Storbritannia og ble skattemessig hjemmehørende der, ble Norge derfor i prinsippet berettiget til å beskatte enhver urealisert kapitalgevinst som hadde oppstått på dens beskatningsområde før flyttingen.

119. For å kunne vurdere forholdsmessigheten av en slik lovgivning hevder ESA at det er nødvendig å trekke et skille mellom fastsettelsen av skattebeløpet og innkrevingen av skatten.

120. Når det gjelder den endelige fastsettelse av skattebeløpet på det tidspunkt et selskap flytter sin ledelse til en annen EØS-stat, anfører ESA at det følger av *National Grid Indus* at opprinnelsesstaten har overholdt forholdsmessighetsprinsippet dersom den med sikte på å ivareta utøvelsen av sin beskatningsmyndighet endelig fastsetter – uten å ta hensyn til eventuelt verdifall eller verdistigning som måtte inntreffe senere – den skatt som er skyldig på urealisert kapitalgevinst som var oppstått på dens territorium på det tidspunkt da dens beskatningsmyndighet overfor det aktuelle selskap opphører å eksistere.

[46] Det vises til uttalelse fra generaladvokat Kokott i *National Grid Indus*, som omtalt over (avsnitt 47).

121. With regard to further losses, ESA submits that the host State normally assesses the company's assets and liabilities at market value when the company first becomes taxable in that State. As a result, double taxation would be avoided and subsequent losses in the host State would be taken into account. Moreover, such taxation is permissible pursuant to tax conventions based on the OECD model convention.

122. ESA argues that the judgment of the ECJ in *National Grid Indus* means that the profits of a company that transfers its place of effective management and thereby becomes tax resident in another State are, after the transfer, taxed exclusively in the host State, in accordance with the principle of fiscal territoriality linked to a temporal component. In light of the connection between a company's assets and its taxable profits, and for reasons relating to the symmetry between the right to tax profits and the possibility of deducting losses, it is for the host State, in its tax system, to take account of fluctuations in the value of the assets of that company that occur after the date on which the State of origin loses all fiscal connection with the company.[47]

123. Accordingly, ESA submits that the final settlement tax is intended to maintain the balanced allocation of powers of taxation between EEA States and is appropriate to attain that objective and does not go beyond what is necessary for that purpose.

124. In relation to the immediate recovery of the tax at the time when the company transfers its place of management to another EEA State, ESA submits that immediate payment of the tax, even though the assets of the company have not yet been realised and potentially might never be, is likely to entail cash flow problems.[48] However, the ECJ noted that the asset situation of a company may appear so complex that it is almost impossible to accurately carry out cross-border tracing of the destiny of all the items making up the company's fixed and current assets until

[47] Reference is made to the Opinion of Advocate General Kokott in *National Grid Indus*, cited above, points 76 to 78, and paragraph 58 of the judgment.

[48] Reference is made to *National Grid Indus*, cited above, paragraphs 65 to 86.

121. Når det gjelder senere tap, gjør ESA gjeldende at vertsstaten vanligvis ligner et selskaps eiendeler og gjeld til markedsverdi når selskapet første gang blir skattepliktig i denne stat. Dermed vil man kunne unngå dobbeltbeskatning, og senere tap i vertsstaten vil bli tatt hensyn til. Dessuten er en slik beskatning tillatt etter de skatteavtaler som er basert på OECDs mønsteravtale.

122. ESA anfører at dommen EU-domstolen avsa i *National Grid Indus* innebærer at gevinst hos et selskap som flytter sin reelle ledelse og derved blir skattemessig hjemmehørende i en annen stat, etter flyttingen beskattes utelukkende i vertsstaten, i samsvar med det skattemessige territorialprinsipp knyttet til en tidskomponent. Av hensyn til forbindelsen mellom et selskaps eiendeler og dets skattbare overskudd, og for å ivareta symmetrien mellom retten til å beskatte gevinst og muligheten for tapsfradrag, er det vertsstaten som i sitt skattesystem må ta hensyn til svingninger i verdien av selskapets eiendeler som oppstår etter den dato da opprinnelsesstaten taper all skattemessig tilknytning til selskapet.[47]

123. Følgelig anfører ESA at hensikten med den endelige oppgjørsskatt er å opprettholde balansen i fordelingen av beskatningsmyndighet mellom EØS-statene, og at den er egnet til å nå dette mål og ikke går lenger enn det som er nødvendig.

124. Når det gjelder den umiddelbare innkreving av skatten på det tidspunkt selskapet flytter sin ledelse til en annen EØS-stat, anfører ESA at umiddelbar betaling av skatten, selv om selskapets eiendeler ennå ikke er og potensielt aldri vil bli realisert, nok vil kunne føre til kontantstrømproblemer.[48] Imidlertid har EU-domstolen merket seg at situasjonen vedrørende et selskaps eiendeler kan fremstå som så kompleks at det er nær umulig å foreta en nøyaktig sporing av alle selskapets anleggs- og

[47] Det vises til uttalelse fra generaladvokat Kokott i *National Grid Indus*, som omtalt over (avsnitt 76–78), og dommen i saken (avsnitt 58).
[48] Det vises til *National Grid Indus*, som omtalt over (avsnitt 65-86).

the unrealised capital gains incorporated into those assets are realised. Moreover, such tracing will entail efforts that constitute a considerable or even excessive burden on the company in question.

125. In other situations, the nature and extent of the company's assets would make it easy to carry out a cross-border tracing of the individual assets for which a capital gain was ascertained at the time when the company transferred its place of management to another State. In those circumstances, national legislation offering a company transferring its place of management to another State a choice between immediate payment of the amount of tax, which is a cash flow disadvantage for the company but frees it from subsequent administrative burdens, and deferred payment of the amount of tax, possibly together with interest, would constitute a measure that would be less harmful to the freedom of establishment than an automatic and immediate obligation to pay the exit tax. If a company were to consider the administrative burden in connection with deferred recovery to be excessive, it could opt for immediate payment of the tax.

126. ESA argues that the Norwegian law applicable in the case at hand, as interpreted by the Norwegian authorities, requires the immediate recovery of the liquidation tax on unrealised capital gains relating to assets of companies transferring their place of effective management to another EEA State at the very time of that transfer. ESA submits that this obligation of immediate recovery is disproportionate, with reference to *National Grid Indus*. In ESA's view, companies moving their place of effective management to another EEA State should be given a choice between at least two options: either immediate payment of the tax or deferred payment, possibly with interest. Allowing for deferred payment presupposes that the State of origin will be informed of the realisation of the assets and will be able to effectively recover the tax.

127. In this respect, ESA notes that Norway has concluded multilateral or double taxation treaties with all the other EEA States except Liechtenstein, that contain provisions on the exchange of

omløpsmidler før den urealiserte kapitalgevinst som er inkorporert i eiendelene er realisert. Videre vil slik sporing innebære et arbeid som vil legge en betydelig eller endog for stor belastning på det aktuelle selskap.

125. I andre situasjoner kan selskapets eiendeler være av en slik art og et slikt omfang at det er lett å foreta sporing over landegrensene av de enkelte eiendeler som kapitalgevinst ble fastsatt for på det tidspunkt da selskapet flyttet sin ledelse til en annen stat. Under disse omstendigheter vil en nasjonal lovgivning som tilbyr et selskap som flytter sin ledelse til en annen stat valget mellom umiddelbar betaling av skattebeløpet, som er en ulempe for kontantstrømmen i selskapet men fritar det for senere administrative belastninger, og utsatt betaling av skattebeløpet, eventuelt sammen med renter, være et tiltak som vil utgjøre et mindre inngrep i etableringsfriheten enn en automatisk og umiddelbar plikt til å betale utflyttingsskatten. Dersom et selskap skulle anse at den administrative belastning i forbindelse med utsatt innkreving ville være for stor, kan det velge å betale skatten umiddelbart.

126. ESA anfører at den norske lovgivning som kommer til anvendelse i den foreliggende sak, slik den tolkes av norske myndigheter, krever umiddelbar inndrivelse av likvidasjonsskatten på urealisert kapitalgevinst vedrørende eiendeler i et selskap som flytter sin reelle ledelse til en annen EØS-stat, på det tidspunkt flyttingen finner sted. ESA anfører at plikten til umiddelbar betaling er uforholdsmessig, og viser til *National Grid Indus*. Etter ESAs oppfatning bør selskaper som flytter sin reelle ledelse til en annen EØS-stat gis mulighet til å velge mellom minst to alternativer: Enten umiddelbar betaling av skatten eller utsatt betaling, eventuelt med renter. Muligheten for utsatt betaling forutsetter at opprinnelsesstaten underrettes om realisasjonen av eiendelene og vil være i stand til faktisk å inndrive skatten.

127. I denne sammenheng nevner ESA at Norge har inngått skatteavtaler med alle de andre EØS-stater unntatt Liechtenstein, som inneholder bestemmelser om informasjonsutveksling. Tretten av avtalene inneholder også bestemmelser om gjensidig bistand

information. Thirteen of these treaties also contain provisions on mutual assistance in connection with the collection of tax debts. Moreover, Norway is a party to the 1988 OECD Council Convention on Mutual Assistance in Tax Matters to which eleven other EU Member States are currently parties. This convention provides for all possible forms of cooperation between States in the assessment and collection of taxes. The cooperation ranges from the exchange of information to the recovery of foreign tax claims.

128. ESA acknowledges that, where a company relocates to an EEA State from which Norwegian tax authorities are not able to request assistance in the collection of the taxes due to the absence of relevant agreements, it may prove difficult to recover the tax if the company no longer maintains a branch, subsidiary or any assets in the Norwegian jurisdiction. Even where the company relocates to a State that has concluded a double taxation treaty with Norway that contains provisions on mutual assistance, the cross-border tracing of the assets might prove difficult because of the nature and extent of a these assets. In such cases, ESA admits that, if companies choose to defer payment of the tax, Norway should be entitled to take into account the risk of non-recovery of the tax through measures such as the provision of a bank guarantee.[49]

129. In conclusion, ESA submits that the second question should be answered as follows:

Article 31 EEA must be interpreted as:

– *not precluding legislation of an EEA State under which the amount of tax on unrealized capital gains relating to a company's assets is fixed definitively, without taking account of decreases or increases in value which may occur subsequently, at the time when the company, because of the transfer of its place of effective management to another EEA State, ceases to obtain profits taxable in the former State;*

[49] *National Grid Indus*, cited above, paragraphs 73 and 74.

i forbindelse med inndrivelse av skattekrav. Videre er Norge part i overenskomsten av 1988 om gjensidig administrativ bistand i skattesaker, utarbeidet i samarbeid mellom Europarådet og OECD, som elleve andre EU-medlemsstater for tiden er parter i. Denne avtale åpner for alle mulige former for samarbeid statene imellom i forbindelse med utligning og innkreving av skatt. Samarbeidet dekker alt fra utveksling av informasjon til inndrivelse av utenlandske skattekrav.

128. ESA erkjenner at dersom et selskap flytter til en EØS-stat som norske skattemyndigheter på grunn av mangelen på relevante avtaler ikke kan anmode om bistand fra i forbindelse med inndrivelse av skyldig skatt, kan det være vanskelig å inndrive skatten hvis selskapet ikke lenger har en filial, et datterselskap eller noen eiendeler i norsk jurisdiksjon. Selv der selskapet flytter til en stat som har inngått en skatteavtale med Norge som inneholder bestemmelser om gjensidig bistand, kan eiendelenes art og omfang gjøre det vanskelig å spore dem over landegrensene. I slike tilfeller vedgår ESA at dersom selskapene velger å utsette betalingen av skatten, bør Norge ha anledning til å ta hensyn til risikoen for at skatten ikke blir inndrevet, gjennom tiltak som krav om en bankgaranti.[49]

129. Som konklusjon foreslår ESA at det andre spørsmål besvares som følger:

EØS-avtalen artikkel 31 må forstås slik:

– *at den ikke er til hinder for at en EØS-stat kan ha en lovgivning som tillater endelig fastsettelse av skatt på urealisert kapitalgevinst knyttet til et selskaps eiendeler, uten hensyn til eventuelt verdifall eller verdistigning som måtte inntreffe senere, på det tidspunkt da selskapet, fordi dets reelle ledelse ("place of effective management") er flyttet til en annen EØS-stat, ikke lenger har gevinst som er skattbar i den første stat;*

[49] *National Grid Indus*, som omtalt over (avsnitt 73-74).

– *precluding legislation of an EEA State which prescribes the immediate recovery of tax on unrealized capital gains relating to assets of a company transferring its place of effective management to another Member State at the very time of that transfer.*

The European Commission

130. As to the extent to which the interest of EEA States in ensuring their ability to tax gains made in their territory can justify an obstacle to free movement, the Commission submits that, insofar as it is possible for the State of departure to ensure recovery of the tax debt by other means, there is no justification for the immediate payment of tax on the departure of the company or of the assets concerned. It is sufficient that the tax charge be calculated and collected at some later time, i.e. the moment at which the gain would have become taxable in the ordinary course of events.

131. The Commission notes that this issue is addressed at length in *National Grid Indus,* where it was held that a Member State is entitled to charge tax on capital gains (including recovery of depreciation allowances) accrued in its territory, and in order to do so it may calculate the amount of tax due at the time of departure. It would be disproportionate, however, to require immediate payment so long as it is possible to verify the continued existence and state of the assets. The actual payment of tax should be deferred until such time as a comparable company that did not move would pay tax in respect of the same assets.[50]

132. The Commission recognises that the judgment in *National Grid Indus* is based in part on the existence within the Union of Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures,[51] and that the absence of such an instrument in relations between EU Member States and EFTA States could

[50] Reference is made to *National Grid Indus,* cited above, paragraphs 42 and onwards.
[51] OJ 2008 L 150, p. 28.

– *at den er til hinder for at en EØS-stat kan ha en lovgivning som fastsetter umiddelbar innkreving av skatt på urealisert kapitalgevinst knyttet til eiendeler i et selskap som flytter sin reelle ledelse til en annen medlemsstat, på det tidspunkt flyttingen finner sted.*

Europakommisjonen

130. Når det gjelder i hvilken utstrekning EØS-statenes interesse av å sikre sin mulighet til å beskatte gevinst som er oppstått på deres territorium kan rettferdiggjøre en hindring for den frie bevegelighet, anfører Kommisjonen at i den utstrekning det er mulig for fraflytningsstaten å sikre inndrivelse av skattekravet ved andre midler, er umiddelbar betaling av skatt ved utflyttingen av selskapet eller av de berørte eiendeler ikke berettiget. Det er tilstrekkelig at skattekravet beregnes og innkreves på et senere tidspunkt, dvs. på det tidspunkt da gevinsten normalt skulle blitt beskattet.

131. Kommisjonen bemerker at dette spørsmål er grundig behandlet i *National Grid Indus,* der det ble lagt til grunn at en medlemsstat har anledning til å kreve skatt på kapitalgevinst (herunder tilbakeføring av avskrivningsfradrag) som er oppstått på dens territorium, og kan for å gjøre dette, beregne det skattebeløp som er skyldig på utflyttingstidspunktet. Det ville imidlertid være uforholdsmessig å kreve umiddelbar betaling så lenge det er mulig å verifisere eiendelenes fortsatte eksistens og tilstand. Den faktiske betaling av skatt bør utsettes til slikt tidspunkt da et sammenlignbart selskap som ikke har flyttet, ville betalt skatt for samme eiendeler.[50]

132. Kommisjonen erkjenner at dommen i *National Grid Indus* delvis er basert på eksistensen av rådsdirektiv 2008/55/EF av 26. mai 2008 "om gensidig bistand ved inddrivelse af fordringer i forbindelse med visse bidrag, afgifter, skatter og andre foranstaltninger" i Den europeiske union,[51] og at mangelen på et

[50] Det vises til *National Grid Indus*, som omtalt over (avsnitt 42 flg.).
[51] EUT 2008 L 150, s. 28.

militate in favour of immediate payment, on the grounds that there can be no comparable guarantee of recovery of the tax debt. However, in the circumstances of the present case, where the main assets of the company were located outside Norway at all relevant times, it is not clear what real difference there can be between the situation before and after the move in relation to the recoverability of the tax. More importantly, both the United Kingdom and Norway have ratified the amended OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters, which provides for the recovery of tax claims (see Article 11). The conclusions of the ECJ in *National Grid Indus* are therefore entirely transferable to the circumstances of the present case.

133. The Commission submits that the second question should be answered as follows:

Where a company has transferred its head office from an EEA State to another EEA State and has been converted into a company of the latter State, Article 31 EEA must be interpreted as precluding the immediate recovery of tax on unrealised capital gains relating to the assets of the company. The first State may, however, at the moment of transfer of the head office, definitively fix the amount of tax on unrealised capital gains, without taking into account decreases or increases in value which may occur subsequently.

Páll Hreinsson

Judge-Rapporteur

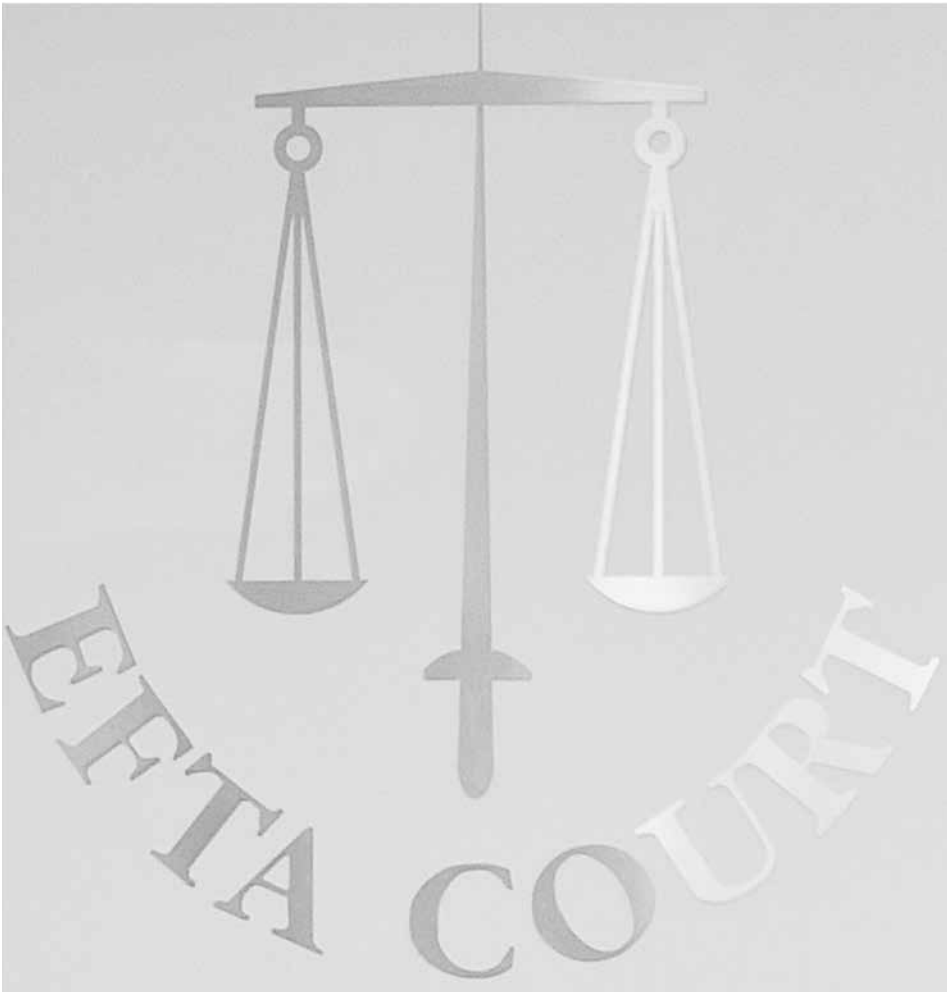
slikt instrument i forholdet mellom EUs medlemsstater og EFTA-statene kunne tale for umiddelbar betaling, med den begrunnelse at det ikke kan foreligge noen tilsvarende garanti for inndrivelse av skattefordringen. Etter omstendighetene i den foreliggende sak, der selskapets viktigste eiendeler på ethvert relevant tidspunkt var lokalisert utenfor Norge, er det imidlertid ikke klart hvilken reell forskjell det kan være mellom situasjonen før og etter flyttingen når det gjelder muligheten for å inndrive skatten. Enda viktigere er det at både Storbritannia og Norge har ratifisert protokollen til endring av overenskomst om gjensidig administrativ bistand i skattesaker, utarbeidet i samarbeid mellom Europarådet og OECD, som også omhandler inndrivelse av skattekrav (se artikkel 11). Konklusjonene til EU-domstolen i *National Grid Indus* kan derfor i sin helhet overføres til omstendighetene i denne sak.

133. Kommisjonen foreslår følgende som svar på det andre spørsmål:

Der et selskap har flyttet sitt hovedkontor fra én EØS-stat til en annen EØS-stat og er omdannet til et selskap i den sistnevnte stat, må EØS-avtalen artikkel 31 tolkes slik at den er til hinder for umiddelbar innkreving av skatt på urealisert kapitalgevinst i tilknytning til selskapets eiendeler. På det tidspunkt hovedkontoret flyttes kan imidlertid den første stat endelig fastsette beløpet av skatten på urealisert kapitalgevinst, uten å ta hensyn til eventuelt verdifall eller verdistigning som måtte inntreffe senere.

Páll Hreinsson

Forberedende dommer


EFTA COURT

Joined Cases E-10/11 and E-11/11

Hurtigruten ASA
Kingdom of Norway
v
EFTA Surveillance Authority

JOINED CASES E-10/11 AND E-11/11

Hurtigruten ASA

Kingdom of Norway

v

EFTA Surveillance Authority

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Maritime transport – Article 61(1) EEA – Article 59(2) EEA – Services of general economic interest – Public service compensation – Overcompensation – Principle of good administration – Legal certainty – Obligation to state reasons)

Summary of the Judgment

1. The derogation provided for by Article 59(2) EEA does not prevent a measure from being classified as State aid within the meaning of Article 61 EEA. Nor could it, once such a classification has been made, allow the EEA State concerned not to notify the measure pursuant to Article 1(3) of Part I of Protocol 3 SCA.

2. Without prejudice to Articles 1, 49, 59 and 61 EEA and Part I of Protocol 3 SCA, in the light of the common values of the EEA States and the place occupied by services of general economic interest in promoting social and territorial cohesion, the EEA States have the right to ensure that such services are able to fulfil their missions when acting within the scope of the EEA Agreement.

3. For such compensation to discharge a public service to escape classification as State aid in a particular case a number of conditions must be satisfied.

First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.

Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage

which may favour the recipient undertaking over competing undertakings.

Payment by an EEA State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, constitutes a financial measure which falls within the concept of State aid within the meaning of Article 61(1) EEA.

Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position.

Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

4. The question whether a measure constitutes State aid must be assessed solely in the context of Article 61(1) EEA and not in the light of an alleged earlier decision-making practice of ESA or the Commission.

5. Compensation is an important element of a public service contract. Amending the compensation during the period of validity of the contract, in the absence of express authority to do so under the terms of the initial contract, might well infringe the principle of transparency.

6. ESA was not required to carry out a detailed economic analysis of the figures since it had explained the respects in which the effect

on trade between EEA States was obvious. Nor was it required to demonstrate the real effect of aid which had not been notified. If it were required to demonstrate the real effect of aid which had already been granted, that would ultimately favour those EEA States which grant aid in breach of the duty to notify laid down in Article 1(3) of Part I of Protocol 3 SCA to the detriment of those which do notify aid at the planning stage.

7. Normally, EEA States enjoy a discretion in defining a service of general economic interest mission and the conditions of its implementation, including the assessment of the additional costs incurred in discharging the mission, which depends on complex economic facts. The scope of the control which ESA is entitled to exercise in that regard is limited to one of manifest error. It follows that the Court's review of ESA's assessment in that regard must observe the same limit and that, accordingly, its review must be confined to ascertaining whether ESA properly found or rejected the existence of a manifest error by the EEA State.

8. If there is a lack of transparency, ESA must be allowed to make its own assessment as to the existence of any overcompensation in order to be able to exercise its supervisory function under Article 61 EEA and Part I of Protocol 3 SCA. In assessing these complex economic facts, ESA enjoys a wide discretion for evaluating additional public service costs when assessing whether the third Altmark criterion is satisfied.

This is particularly so where the EEA State involved has invoked different grounds on which the aid may be regarded as compatible. The Court also notes that the applicants stress the obligation on ESA to make a substantive assessment of the compatibility of the measures in question.

This implies that the Court will only determine whether the evidence adduced by the applicants is sufficient to render the assessment of the complex economic facts made in the contested decision implausible. Under this plausibility review standard, it is not the Court's role to substitute its assessment of the relevant complex economic facts for that made by the institution which adopted the decision. In such a context, the review by the Court consists in ascertaining that ESA complied with the rules governing the

procedure and the rules relating to the duty to give reasons and also that the facts relied on were accurate and that there has been no error of law, manifest error of assessment or misuse of powers.

9. If it is shown that the compensation paid to the undertaking operating the public service does not reflect the costs actually incurred by that undertaking for the purposes of that service, such a system does not satisfy the requirement that compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

10. Article 59(2) EEA does not cover an advantage enjoyed by undertakings entrusted with the operation of a public service in so far as that advantage exceeds the additional costs of performing the public service.

11. The aim of Article 1(3) of Part I of Protocol 3 SCA is to prevent the EEA States from implementing aid contrary to the EEA Agreement. The final sentence of Article 1(3) of Part I of Protocol 3 SCA is the means of safeguarding the machinery for review laid down by that article which, in turn, is essential to ensure the proper functioning of the common market. It follows that even if an EEA State takes the view that the aid measure is compatible with the EEA Agreement, that fact cannot entitle it to defy the clear provisions of Article 1(3) of Part I of Protocol 3 SCA.

12. No provision of EEA law requires ESA, when ordering the recovery of aid declared incompatible with the functioning of the EEA Agreement, to fix the exact amount of the aid to be recovered. It is sufficient for ESA's decision to include information enabling the addressee of the decision to work out itself, without overmuch difficulty, that amount.

The recovery of aid which has been declared incompatible with the functioning of the EEA Agreement is to be carried out in accordance with the rules and procedures laid down by national law.

13. The principle of good administration is a fundamental principle of EEA law.

JUDGMENT OF THE COURT

8 October 2012

(Action for annulment of a decision of the EFTA Surveillance Authority – State aid – Maritime transport – Article 61(1) EEA – Article 59(2) EEA – Services of general economic interest – Public service compensation – Overcompensation – Principle of good administration – Legal certainty – Obligation to state reasons)

In Joined Cases E-10/11 and E-11/11,

Hurtigruten ASA (Case E-10/11), ("Hurtigruten") represented by Siri Teigum and Odd Stemsrud, advocates, for Hurtigruten ASA, Oslo, Norway, and

Kingdom of Norway (Case E-11/11), represented by Ketil Bøe Moen, advocate, Attorney General (Civil Affairs), and Beate Gabrielsen, Adviser, Ministry of Foreign Affairs, acting as Agents,

applicants,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, Fiona Cloarec and Gjermund Mathiesen, Officers, Legal and Executive Affairs, acting as Agents,

defendant,

APPLICATION for the annulment of EFTA Surveillance Authority Decision 205/11/COL of 29 June 2011 on the Supplementary Agreement on the Hurtigruten service,

THE COURT,

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

Registrar: Skúli Magnússon,

having regard to the written pleadings of the parties and the written observations of the European Commission ("the Commission"), represented by Davide Grespan and Margarida Afonso, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral arguments of the Kingdom of Norway, represented by Magnus Schei and Ketil Bøe Moen; Hurtigruten ASA, represented by Siri Teigum; the EFTA Surveillance Authority ("ESA"), represented by Fiona Cloarec and Xavier Lewis; and the Commission, represented by Margarida Afonso and Davide Grespan, at the hearing on 18 April 2012,

gives the following

JUDGMENT

I LEGAL CONTEXT

1 Article 59(2) EEA provides the following:

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

2 Article 61(1) EEA provides the following:

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 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.

4 Article 5 of Part II of Protocol 3 to the 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.

II FACTS

5 Hurtigruten operates maritime transport services consisting of the combined transport of persons and goods along the Norwegian coastline from Bergen in the south to Kirkenes in the north.

6 The operation of the service from 1 January 2005 to 31 December 2012 was the subject of a tender procedure initiated

in June 2004. The only bidders were Ofotens og Vesteraalens Dampskipsselskap ASA and Troms Fylkes Dampskipsselskap. These two companies signed a contract with the Norwegian authorities on 17 December 2004 for the provision of the public service of maritime transport (the "2004 Agreement"). The two companies merged in March 2006 to form Hurtigruten ASA, which now operates the service.

7 Under the 2004 Agreement, the public service obligation was defined. The operator of the service of general economic interest serves 34 predetermined ports of call throughout the year. It is required to operate 11 vessels approved by the Norwegian authorities in advance, and to observe certain maximum prices on the "distance passenger" routes. The ships must carry a minimum of 400 passengers and 150 europalettes of cargo and have at least 150 berths. The ships should offer catering including both hot and cold meals. In addition, Hurtigruten is also a commercial operator offering round trips, excursions and catering on the Bergen-Kirkenes route. Pursuant to the 2004 Agreement, Hurtigruten may not increase ticket prices for the service of general economic interest beyond increases in the consumer price index, but is free to set its prices for commercial activities, such as for round trips, cabins, catering and the transport of cars and goods. It also operates a number of other different cruises visiting various European countries.

8 For the services covered by the 2004 Agreement, the Norwegian authorities agreed to pay a total compensation of NOK 1 899.7 million (2005 prices) over the eight years of the agreement with an automatic increase based on a set price index.

9 Article 7 of the 2004 Agreement establishes an obligation to provide separate accounts and relevant information. Article 8 of the 2004 Agreement contains a revision clause. The revision clause reads as follows:

Official acts that entail considerable changes of cost as well as radical changes of prices of input factors that the parties could not reasonably foresee are grounds for either of the contracting parties to

demand a renegotiation about extraordinary adjustments of the state's remuneration, changes in the service delivered or other measures. In such negotiations, the other party shall be entitled to access all necessary documentation.

10 In the face of financial difficulties experienced by Hurtigruten, the 2004 Agreement was renegotiated. The Norwegian Government stresses that during these renegotiations of the 2004 Agreement, initiated by Hurtigruten, it became increasingly clear in the autumn of 2008 that the company faced severe financial difficulties and that there was a risk of non-performance of the public service obligation.

11 The new agreement was concluded on 27 October 2008 (the "2008 Agreement"). It contained three measures which were expected to expire with the main Agreement on 31 December 2012. First, Hurtigruten was reimbursed a large part of the NOx tax for 2007 and its contributions to the NOx fund for 2008 onwards. Second, it was granted general compensation of NOK 66 million for 2008 and onwards, provided that the company's profitability in connection with the service of general economic interest did not improve considerably and on condition that the general compensation would be necessary to ensure the coverage of costs related to the Norwegian State's acquisition of the service of general economic interest. Third, it was permitted to take one of the 11 vessels out of service during the winter without any reduction in the remuneration for the services provided under the Agreement.

12 By letter of 26 November 2008, the Norwegian authorities informed ESA about the renegotiation of the 2004 Agreement.

13 On 29 June 2010, the Norwegian authorities initiated a tender procedure for the Bergen-Kirkenes route for a period of eight years from 1 January 2013 at the latest. Subsequently, the Norwegian authorities informed ESA that a new contract for the provision of the service from 1 January 2012 to 31 December 2019 was signed with Hurtigruten on 13 April 2011.

14 By letter of 14 July 2010, ESA informed the Norwegian authorities that it had decided to open the formal investigation procedure laid down in Article 1(2) of Part I of Protocol 3 to the SCA ("Protocol 3 SCA") in respect of the additional payments to Hurtigruten in 2008.

15 The decision to initiate the formal investigation procedure (Decision 325/10/COL) was published in the Official Journal of the European Union and the EEA Supplement thereto.

16 By letter of 30 September 2010, the Norwegian authorities forwarded their comments to ESA. Additional emails were sent by the Norwegian authorities on 15 April 2011, 4 May 2011 and 6 May 2011.

17 On 29 June 2011, ESA adopted Decision 205/11/COL ("the contested decision").

III THE CONTESTED DECISION

18 In the contested decision, ESA concluded that the three measures provided for in the 2008 Agreement constituted State aid that was incompatible with the functioning of the EEA Agreement in so far as they constitute a form of overcompensation for public service, and ordered the recovery of the aid.

19 The three measures in question are described in the contested decision as follows:

1. [R]eimbursement of 90% of the so-called NOx tax for 2007 and 90% of the contributions to the NOx Fund from January 2008 onwards for the remaining duration of the [2004] Agreement, i.e. until 31 December 2012;

2. [A] "general compensation" NOK 66 million was granted for 2008 due to the weak financial situation of Hurtigruten resulting from a general increase in costs for the service provided. A general compensation is provided for annually for the remaining duration of the contract, i.e. until 31 December 2012, provided the financial situation of the company related to the public service does not significantly improve; and

3. [A] reduction in the number of ships from 11 to 10 in the winter season (from 1 November to 31 March) until the [2004] Agreement expires, without reducing the remuneration for the service as foreseen under the provisions of the [2004] Agreement. This reduced service is intended to continue throughout the remaining duration of the [2004] Agreement, i.e. until 31 December 2012.

20 On page 7 of the contested decision, ESA notes that "[t]he Norwegian authorities maintain that the measures taken in October 2008 were emergency measures adopted to remedy the acute difficult economic situation of Hurtigruten in 2008, to ensure continuous service in the interim period until a new tendering procedure could be finalised, and in doing so, they acted like a rational market operator ... . Alternatively, in case the Authority were to find that the three measures do constitute state aid within the meaning of Article 61(1) of the EEA Agreement, the Norwegian authorities put forward that the measures constitute necessary compensation for a public service obligation in accordance with Article 59(2) of the EEA Agreement".

21 In the contested decision, ESA concluded that the three measures taken together must be assessed as an aid scheme as "they entail an additional remuneration mechanism in favour of Hurtigruten that extends its application from 2007 until the expiry of the contract, originally foreseen for 31 December 2012".

22 On page 20 of the contested decision under the heading "procedural requirements", section 2 of ESA's assessment, ESA noted that the aid was not notified as required by Article 1(3) of Part I of Protocol 3 SCA.

23 In the contested decision, ESA found that the measures in question involved, at least in part, public service compensation. As such, the measures constituted an advantage conferred on an undertaking which could not be justified by the private investor principle.

24 ESA considered that the scheme did not satisfy the criteria laid down by the Court of Justice of the European Union ("ECJ")

in Case C-280/00 *Altmark* [2003] ECR I-7747 which explicitly clarifies what can and cannot be considered as State aid within the realm of public service compensation.

25 In order to satisfy those criteria, ESA noted that the beneficiary had to be chosen in a public tender. Alternatively, the compensation could not exceed the costs of a well-run undertaking adequately equipped with the means to provide the public service. Moreover, this had to be read in the light of the requirement that the parameters for calculating the compensation payments must be established in advance in an objective and transparent manner.

26 ESA observed that Hurtigruten was chosen as a public service provider following a public procurement procedure in 2004 and concluded that the revision clause was part of the public tender procedure. However, on its assessment, the measures provided for in the 2008 Agreement based on the revision clause were not covered by the original tender.

27 ESA rejected the argument of the Norwegian authorities that the measures did not entail any substantial amendment to the 2004 Agreement and concluded that the State's remuneration in favour of Hurtigruten had been substantially increased, which, in principle, should have triggered a call for a new tender procedure.

28 On page 15 of the contested decision, ESA found that it "does not necessarily hold that any extraordinary compensation granted under a renegotiation clause of a contract that has been put out to tender will fail to clear the fourth *Altmark* criterion and hence involve state aid. However, Article 8 [of the 2004 Agreement] does not ... provide objective and transparent parameters on the basis of which the compensation in the form of the three measures was calculated in line with the requirement of the second *Altmark* criterion". That provision merely gave Hurtigruten the right to initiate renegotiations under certain conditions. Furthermore, according to ESA, the clause did not provide specific guidance on how extra compensation should be calculated. The application of the clause appeared to depend largely on the discretion of the

Norwegian authorities and the negotiating skills of the parties concerned.

29 In that regard, ESA noted that the Norwegian authorities did not present any parameters for the calculation of the compensation granted by the three measures, but made reference to the weak financial position of Hurtigruten.

30 In order to substantiate its contention that, for the purposes of Article 59(2) EEA, Hurtigruten had not been excessively compensated for the provision of a public service, the Norwegian authorities provided ESA with three consultants' reports, the PWC Report of 14 October 2008 (the "PWC Report") and two from BDO Noraudit, its report of 23 March 2009 (the "first BDO Report") and its report of 27 September 2010 (the "second BDO Report").

31 ESA referred to the three reports presented by the Norwegian authorities in the course of the proceedings prior to the adoption of the contested decision. In the contested decision these reports form the basis for ESA's conclusion that the three measures involved overcompensation – that is, the compensation was not limited to the increased cost of providing the public services – and did not clarify the parameters used to determine those costs.

32 As regards the fourth *Altmark* criterion, ESA observed that the Norwegian authorities did not provide any information to substantiate that the compensation was calculated on the basis of costs that a typical undertaking would have incurred.

33 As a result, on page 17 of the contested decision, ESA concluded that neither the second nor the fourth *Altmark* criteria was satisfied.

34 As regards the third *Altmark* criterion, which requires that compensation may not exceed the cost incurred in the discharge of the public service taking into account the revenues earned through the provision of the service and a reasonable profit in that regard, ESA noted in the contested decision that the reports provided by the Norwegian authorities indicated that the three

measures provided for in the 2008 Agreement also served to compensate the costs of activities outside of the public service remit. The second BDO Report indicated that the measures also covered increased costs that did not reflect radical changes that could not reasonably have been foreseen within the meaning of Article 8 of the 2004 Agreement.

35 Moreover, ESA noted that Hurtigruten did not implement separate accounts for the public service and commercial activities. It determined that the reports applied unrepresentative hypothetical costs and revenues where the real costs and revenues were known. Therefore, it concluded that the third *Altmark* criterion was not met.

36 Following its analysis of the *Altmark* criteria, ESA concluded in section 1.3.3.3 of the contested decision that, as three of the four *Altmark* criteria were not met and as only one of the criteria need not be satisfied for State compensation for the provision of a public service to constitute State aid, the three measures could not be held to not confer an advantage on Hurtigruten within the meaning of Article 61 EEA.

37 Finally, ESA found that the new agreement was a selective measure liable to distort competition and affect intra-EEA trade.

38 In section 3 of the contested decision, "Compatibility of the aid", on page 20, ESA noted that "[t]he Norwegian authorities invoke Article 59(2) of the EEA Agreement and maintain that the measures constitute necessary compensation for public service obligation within the framework of the Authority's guidelines on aid to maritime transport and the general principles of public service compensation. Furthermore, they have invoked Article 61(3)(c) and claim that the measures under scrutiny can be deemed compatible with the EEA Agreement as restructuring measures under the [guidelines on State aid for rescuing and restructuring firms in difficulty]."

39 In section 3.3.1 of Part II of the contested decision, ESA held that "[t]he Norwegian authorities have referred to the financial

situation of Hurtigruten in 2008 and the imminent possibility that Hurtigruten would terminate the contract in order to avoid bankruptcy. According to the Norwegian authorities, these circumstances forced them to take emergency measures to ensure the continuation of the service. The Norwegian authorities have argued that the emergency measures may be regarded as legitimate in order to ensure the continuation of the service. However, they have not referred to an exemption provided for under Article 61(3) or any other provision of the EEA Agreement ... ."

40 In its assessment of the public service compensation for the purposes of Article 59(2) EEA, ESA referred to Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), incorporated as point 53a in Annex XIII to the EEA Agreement, ESA's Guidelines on aid to maritime transport, and ESA's Guidelines for State aid in the form of public service compensation.

41 In that regard, ESA concluded that the Hurtigruten Service provided under the 2004 Agreement constitutes a service of general economic interest and that Hurtigruten had been entrusted with the provision of that service. Consequently, two out of three requirements for public service compensation are fulfilled.

42 Third, ESA noted, "the amount of compensation must be granted in a transparent manner, and be proportionate in the sense that it shall not exceed what is necessary to cover the costs incurred in discharging the public service obligations including a reasonable profit".

43 ESA then noted that the Hurtigruten Agreement was concluded on the basis of a public tender, something which usually ensures that no aid is involved in the ensuing contract. However, when granting aid in the form of public service compensation, the Norwegian authorities must ensure that that aid is compatible with the rules applicable to such aid. Importantly, when the aided undertaking

carries out activities falling outside the public service remit, the commercial activities must carry an appropriate share of the fixed costs common to both types of activities.

44 In ESA's assessment, the 2008 Agreement does not fulfil this criterion, as the amount of compensation for the operating costs of the public service shows an inconsistent approach to fixed common costs. There is no separation of the accounts for the public service and other commercial activities, and the compensation is based on unrepresentative hypothetical costs and revenues where the real costs and revenues are known.

45 On the inconsistent approach, ESA found that in cases where public service providers carry out commercial activities besides the public service, the commercial activities must, as a general principle, carry a proportionate share of fixed common costs. Only exceptional circumstances can justify deviations from this principle. ESA concludes that "[t]he Authority cannot see that Hurtigruten is in such an exceptional position. Even if it may be argued that separating the fixed common costs of Hurtigruten's activities inside and outside the public service remit may not always be a straightforward task, separation based on i.a. the revenue stemming from the turnover of the two forms of activities is indeed possible."

46 Further, ESA notes that, in the reports, "several categories of such costs are fully allocated to the public service side (i.a. harbour charges, maintenance, fuel [less the Geirangerfjorden consumption]) ... Due to the insufficient allocation of fixed common costs, the Authority cannot conclude that the two first methods of the PWC Report or the two BDO Reports demonstrate that the three measures do not involve over-compensation for the public service."

47 On page 24 of the contested decision, ESA concluded that "[t]he absence of separate accounts for public service activities and other commercial activities, the inconsistent approach to cost allocation and the reliance on unrepresentative hypothetical (and not actually incurred) costs, entails that the Authority

cannot conclude that the three measures do not involve any over-compensation. On this basis, the Authority concludes that the three measures cannot constitute public service compensation compatible with the functioning of the EEA Agreement on the basis of its Article 59(2)."

48 As for the possibility that the aid constitutes restructuring aid under Article 61(3)(c) EEA, ESA concluded in section 3.3 of the contested decision that the measures did not fulfil the necessary criteria for restructuring aid under the guidelines on State aid for rescuing and restructuring firms in difficulty (the "Rescue and Restructuring Guidelines"), mainly due to the lack of a credible restructuring plan at the time when the aid was granted.

49 On page 25 of the contested decision ESA concludes:

"The Norwegian authorities have referred to the financial situation of Hurtigruten in 2008 and the imminent possibility that Hurtigruten would terminate the contract in order to avoid bankruptcy. According to the Norwegian authorities, these circumstances forced them to take emergency measures to ensure the continuation of the service. The Norwegian authorities have argued that the emergency measures may be regarded as legitimate in order to ensure the continuation of the service. However, they have not referred to an exemption provided for under Article 61(3) or any other provision of the EEA Agreement. In the Authority's view, this argument cannot be assessed as rescue aid under Article 61(3)(c) and the Rescue and Restructuring Guidelines, as rescue aid under the guidelines is by nature a temporary and reversible assistance. The three measures are not."

50. As regards the restructuring plan, ESA takes the following view on page 27 of the contested decision:

"[T]he material existence of a restructuring plan at the time when an EFTA State grants aid is a necessary precondition for the applicability of the Rescue and Restructuring Guidelines. The EFTA State granting the aid has to possess 'when the disputed aid was granted, a restructuring plan meeting the requirements [of the Rescue and Restructuring Guidelines]'.

In line with the Rescue and Restructuring Guidelines, had the three

measures been granted as restructuring aid, the Norwegian authorities should have had a restructuring plan for Hurtigruten at the latest when they made the payment of 125 million NOK in December 2008. The information provided by the Norwegian authorities does not show that the Norwegian authorities were in the position to verify whether a restructuring plan was viable or whether it was based on realistic assumptions, as required under the Rescue and Restructuring Guidelines. The Authority thus concludes that the aid to Hurtigruten was granted without a restructuring plan being available to the Norwegian authorities."

51 Furthermore, ESA notes on pages 27 and 28 of the contested decision that "the documents submitted do not meet the condition set out in the Rescue and Restructuring Guidelines. In particular, they do not in any detail describe the circumstances that led to the company's difficulties, thereby providing a basis for assessing the appropriateness of the aid measures, and the memoranda did not include a market survey as required by the Guidelines."

52 On the basis of its assessment, ESA considered that the three measures were incompatible with the EEA State aid rules.

53 Under the heading Recovery, on page 29 of the contested decision, ESA notes the following:

The Authority must respect the general principle of proportionality when requiring recovery. In accordance with the aim of the recovery and the principle of proportionality, the Authority will only require recovery of the portion of the aid that is incompatible with the functioning of the EEA Agreement. Part of the payments made under the three measures can be considered compatible as a compensation for the provision of a public service obligation. Thus, only the portion of the payments under the three measures that constitutes over-compensation shall be recovered.

The Norwegian authorities are invited to provide detailed and accurate information on the amount of over-compensation granted to Hurtigruten. To determine how much of the payments can be held to be compatible with the functioning of the EEA Agreement on the

basis of its Article 59(2) as public service compensation, due account must be taken of the general principles applicable in this field, and in particular the following:

(i) there needs to be a proper allocation of cost and revenue for the public service and the activities outside the public service remit,

(ii) the public service compensation cannot cover more than a proportionate share of fixed costs common to the public service and the activities outside the public service remit, and

(iii) the calculation of the public service compensation cannot be based on unrepresentative hypothetical costs where real costs are known.

In this context, it is important to recall that in accordance with point 22 of the Public Service Compensation Guidelines, any amount of over-compensation cannot remain available to an undertaking on the ground that it would rank as aid compatible with the EEA Agreement on the basis of other provisions or guidelines unless authorised.

54 Articles 1 to 4 of the operative part of the contested decision read as follows:

Article 1

The three measures provided for in the Supplementary Agreement constitute state aid which is incompatible with the functioning of the EEA Agreement within the meaning of Article 61(1) of the EEA Agreement in so far as they constitute a form of over-compensation for public service.

Article 2

The Norwegian authorities shall take all necessary measures to recover from Hurtigruten the aid referred to in Article 1 and unlawfully made available to Hurtigruten.

Article 3

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 aid to be recovered shall

include interest and compound interest from the date on which it was at the disposal of Hurtigruten until the date of its recovery. Interest shall be calculated on the basis of Article 9 in the EFTA Surveillance Authority Decision No 195/04/COL.

Article 4

By 30 August 2011, Norway shall inform the Authority of the total amount (principal and recovery interests) to be recovered from the beneficiary as well as of the measures planned or taken to recover the aid.

By 30 October 2011, Norway must have executed the Authority's decision and fully recovered the aid.

IV PROCEDURE AND FORMS OF ORDER SOUGHT

55 By an application lodged at the Registry of the Court on 29 August 2011 as Case E-10/11, Hurtigruten brought an action under the first paragraph of Article 36 SCA for annulment of the contested decision.

56 By an application lodged at the Registry of the Court on 29 August 2011 as Case E-11/11, the Kingdom of Norway likewise brought an action for the annulment of the contested decision.

57 Hurtigruten claims that the Court should:

(i) annul the contested decision;

(ii) in the alternative, declare void Articles 2, 3 and 4 of the contested decision, to the extent that they order the recovery of the aid referred to in Article 1 of that decision; and

(iii) order the EFTA Surveillance Authority to bear its own costs and to pay those incurred by Hurtigruten.

58 The Kingdom of Norway claims that the Court should:

(i) annul the contested decision;

(ii) order the EFTA Surveillance Authority to pay the costs of the proceedings.

59 In its defence in Case E-10/11, registered at the Court on 8 December 2011, ESA claims that the Court should:

(i) dismiss the application as unfounded; and

(ii) order the applicant to pay the costs.

60 In its defence in Case E-11/11, registered at the Court on 8 December 2011, ESA claims that the Court should:

(i) dismiss the application as unfounded; and

(ii) order the applicant to pay the costs.

61 The Kingdom of Norway submitted a reply in Case E-11/11 which was registered at the Court on 27 January 2012. ESA's rejoinder was registered at the Court on 7 March 2012.

62 The reply from Hurtigruten in Case E-10/11 was registered at the Court on 1 February 2012. ESA's rejoinder was registered at the Court on 7 March 2012.

63 By a decision of 9 February 2012, pursuant to Article 39 of the Rules of Procedure ("RoP"), and, having received observations from the parties, the Court joined the two cases for the purposes of the written and oral procedures.

64 In both Cases E-10/11 and E-11/11, pursuant to Article 20 of the Statute of the Court, the Commission submitted written observations, registered at the Court on 22 February 2012.

65 On 30 March 2012, as a measure of organisation of procedure under Article 49 RoP, the Court addressed questions to the parties, to which they replied in April 2012.

66 On 30 March 2012, as a measure of inquiry under Article 50 RoP, the Court required the parties to produce certain information. The parties complied in April 2012.

67 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

I – Admissibility of certain documents

68 According to Article 25(2) RoP, English shall be used in the written and oral part of the procedure, unless otherwise provided in those rules. According to Article 25(3) RoP, all supporting documents submitted to the Court shall be in English or be accompanied by a translation into English, unless the Court decides otherwise. According to the second subparagraph of that provision, in the case of lengthy documents, translations may be confined to extracts.

69 Compliance with Article 25 RoP is a procedural requirement which may be raised by the Court on its own motion (see Case E-12/11 *Asker Brygge* v *ESA*, judgment of 17 August 2012, not yet reported, paragraph 33).

70 Consequently, an annex submitted exlusively in Norwegian is inadmissible, unless the document which refers to it contains at least an extract in English as provided for in the second paragraph of Article 25(3) RoP (see Case E-15/10 *Posten Norge* v *ESA*, judgment of 18 April 2012, not yet reported, paragraph 115).

71 In the present case the parties, in particular the applicants, have submitted a large number of annexes in Norwegian only. Additionally, some annexes are in Norwegian and English but with the main body of text in Norwegian only.

72 Annexes A7, A10, A11, A12, A14, A19, A28, A39, A40, A44, and A45, submitted by Hurtigruten in Case E-10/11 are in Norwegian only. Annexes A23, A24, A26, A33, and C12 submitted by Hurtigruten are partly in Norwegian.

73 In Case E-11/11, Annexes A4, A7, A8, A9, A10, A11, A12, A13, A27 and A28 submitted by the Kingdom of Norway are in Norwegian only. Annexes A15 and A18 submitted by the Kingdom of Norway are partly in Norwegian.

74 In Case E-10/11, ESA submitted Annexes B2 and B3 which are solely in Norwegian. In addition, Annex B6 is partly in Norwegian. Annexes B2 and B3 submitted by ESA in Case E-11/11 are only in Norwegian while Annex B6 is in both English and Norwegian. The documents in the two cases are identical and will be treated together for the purposes of admissibility.

75 As regards the annexes submitted by Hurtigruten in Case E-10/11 in Norwegian only, the application contains an extract of Annexes A10, A19, A40 and A44. These annexes are therefore admissible in so far as they have been translated, even though they have been submitted in Norwegian only. However, there is no extract or any reference to the content of Annexes A7, A11, A12, A14, A28, A39 and A45. Consequently, these annexes are inadmissible. Moreover, there is no extract of the text in Norwegian in Annexes A23, A24, A26 and A33. Therefore, these annexes are inadmissible in so far as the Norwegian text is concerned.

76 In relation to the annexes submitted by the Kingdom of Norway in Case E-11/11 in Norwegian only, the application contains an extract of Annex A7 on page 8. This annex is therefore admissible in so far as it has been translated, even though it has been submitted in Norwegian only. However, there is no extract or any reference to the content of Annexes A4, A8, A9, A10, A11, A12, A13, A27 and A28. Consequently, these annexes are inadmissible. Moreover, there is no extract of the text in Norwegian in Annexes A15 and A18. Therefore, these annexes are inadmissible in so far as the Norwegian text is concerned.

77 As regards the annexes submitted by ESA, the Court notes that there is no extract of the text in Norwegian in Annex B6. Therefore, this annex is inadmissible in so far as the Norwegian text is concerned. Annexes B2 and B3 must be treated in a different way. English translations of these documents have been submitted by the applicants. Therefore, in the interests of procedural economy, it is unnecessary for the defendant to submit its own translation of a document already provided in the English language in the application. Therefore, Annexes B2

and B3 are admissible as such but the Court will rely on the translation submitted by the applicants.

78 Pursuant to Article 37 RoP, a party may offer further evidence in reply or rejoinder. The party must, however, give reasons for the delay in offering it.

79 Compliance with Article 37 RoP is a procedural requirement which may be raised by the Court on its own motion (*Asker Brygge* v *ESA*, cited above, paragraph 30).

80 In the rejoinder in Case E-10/11, ESA requests that Annex C12 to the reply of Hurtigruten should be declared inadmissible, since the evidence has been offered in the reply without valid reasons for the delay. Hurtigruten claims that it expected ESA to submit the document in the defence. ESA maintains that this argument cannot suffice to render that annex admissible.

81 In that respect, it must be noted that direct actions pursuant to Article 36 SCA are *inter partes*. According to Article 32 RoP, parties are obliged to annex a file to every pleading which contains the documents relied on in support of it. In the light of those rules, a party cannot invoke the failure of the opposing party to submit a certain document in its defence as a reason why further evidence is offered in reply.

82 It follows from the foregoing that Annex C12 to the reply of Hurtigruten is inadmissible.

83 Pursuant to Article 37 RoP, the references made by Hurtigruten in its reply to its 2007 Annual Report are inadmissible, as it was submitted in the reply without any reasons being given why it was submitted only at this stage of the written procedure.

84 Similarly, Annex C1 to the reply of Norway is inadmissible, since it has been submitted in the reply without any reasons being given why it was submitted only at this stage of the written procedure.

II – Substance of the actions

A – Pleas in law alleging that Article 61(1) EEA is not applicable

1. Introductory remarks

85 The derogation provided for by Article 59(2) EEA does not prevent a measure from being classified as State aid within the meaning of Article 61 EEA. Nor could it, once such a classification has been made, allow the EEA State concerned not to notify the measure pursuant to Article 1(3) of Part I of Protocol 3 SCA (see, for comparison, Case C-172/03 *Wolfgang Heiser* [2005] ECR I-143, paragraph 51).

86 Without prejudice to Articles 1, 49, 59 and 61 EEA and Part I of Protocol 3 SCA, in the light of the common values of the EEA States and the place occupied by services of general economic interest in promoting social and territorial cohesion, the EEA States have the right to ensure that such services are able to fulfil their missions when acting within the scope of the EEA Agreement.

87 It is common ground between the parties that the concept of public service obligation referred to in the *Altmark* judgment is fully applicable to the service of general economic interest addressed by the contested decision and that the latter constitutes a service of general economic interest in the meaning of Article 59(2) EEA.

88 In that judgment, the ECJ established that where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, such that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 61(1) EEA.

89 However, for such compensation to escape classification as State aid in a particular case a number of conditions must be satisfied.

90 First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined (the "first *Altmark* criterion").

91 Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings.

92 Payment by an EEA State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 61(1) EEA (the "second *Altmark* criterion").

93 Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position (the "third *Altmark* criterion").

94 Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (the "fourth *Altmark* criterion").

95 In the present proceedings, it has not been contested that the first criterion was complied with when the Norwegian authorities signed the 2004 and 2008 Agreements conferring upon Hurtigruten the public service obligation to operate the Bergen-Kirkenes route and subsequently provided supplementary funding through the three measures in question.

96 However, in the contested decision, ESA found that the 2008 Agreement did not fulfil the second, third and fourth criteria.

97 Norway maintains that the 2008 Agreement complies with all *Altmark* criteria.

98 Although referring explicitly only to the second and fourth criteria, Hurtigruten maintains that the 2008 Agreement was a necessary measure to cover the costs of the company to operate the service. Therefore, Hurtigruten's plea must be interpreted as meaning that it maintains that all the criteria were satisfied.

99 Finally, it must be noted that a failure to satisfy any one of the four criteria suffices for such a measure to fall within Article 61(1) EEA, and not Article 59(2) EEA.

2. The plea in law alleging that the measure satisfies the second and fourth *Altmark* criteria

(a) Arguments of the parties

100 Norway and Hurtigruten maintain that Article 8 of the 2004 Agreement provided objective and transparent parameters within the meaning of the *Altmark* caselaw for renegotiations of the agreement in the case of unforeseeable events. They assert that the purpose of the renegotiation clause is to restore the economic equilibrium of the contract, as if the unforeseeable events had not occurred.

101 Norway maintains that renegotiation as such is allowed, as shown by Commission Decision 2009/325/EC of 26 November 2008 on State aid C 3/08 (ex NN 102/05) – Czech Republic concerning public service compensations for Southern Moravia

Bus Companies (OJ L 97, 16.4.2009, p. 14). In that case, renegotiation of the contract was accepted by the Commission. In Norway's view, ESA made a manifest error of assessment when it opted for a more formalistic approach than that taken by the Commission in the *Southern Moravia* decision.

102 According to Norway, this possibility to renegotiate is confirmed by national law, in particular Section 36 of the Norwegian Contract Act of 1918. Moreover, the compensation provided under the 2008 Agreement was limited to the actual increased costs. Were this not to be allowed, it would imply a prohibition on the use of all traditional renegotiation clauses. Therefore, in Norway's view, ESA made a manifest error of assessment when it found that the 2008 Agreement did not comply with the second *Altmark* criterion.

103 In their replies, Norway and Hurtigruten stress that Article 8 of the 2004 Agreement must be interpreted in accordance with Norwegian law, in particular Section 36 of the Norwegian Contract Act of 1918, and the UNIDROIT Principles of International Commercial Contracts 2010, in particular Articles 6.2.2 and 6.2.3.

104 According to the applicants, the purpose of these hardship provisions is to impose a duty to renegotiate a contract when certain conditions are met in order to re-establish the equilibrium between the parties. Under national law and the principles of international contract law, this is something that the parties to the contract need to negotiate between themselves in order to re-establish the balance between the parties. Moreover, not each and every provision in a contract must be entirely clear in the sense that the outcome is precisely determined.

105 In its reply, Norway claims that the relevant test must be whether the payments granted go beyond actual costs. If additional compensation does not exceed the actual cost of the unforeseeable event which triggers the renegotiation and those events do not relate to the efficiency of the company, the renegotiation clause and the compensation satisfy all the *Altmark*

criteria. The decisive element is whether the compensation scheme as such provides the necessary objectivity and transparency. In Norway's view, the approach of ESA towards hardship clauses is stricter than that of the Commission in public procurement cases.

106 Moreover, Norway argues that the renegotiation clause is transparent in the sense that it specifies which conditions must be met in order for the right to require renegotiations to be triggered. Amongst other things, the provision stipulates that both parties are entitled to access all necessary documentation.

107 ESA, supported by the Commission, contests those arguments.

(b) Findings of the Court

Applicability of international contract law

108 That the contested decision is incompatible with international contract law and its principles is a new plea in law that must be distinguished from the allegation that ESA made an error of assessment concerning provisions of national contract law, since only the latter are mentioned in the application.

109 The same goes for the plea of Norway that the decision is vitiated by a manifest error of assessment because ESA adopted a stricter approach than the Commission does in public procurement cases.

110 According to Article 37(2) RoP, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

111 As a result, the pleas of Norway and Hurtigruten that the contested decision should be annulled because Article 8 of the 2004 Agreement is a standard hardship clause under the UNIDROIT Principles of International Commercial Contracts are inadmissible.

112 The plea of Norway that the decision is vitiated by a manifest error of assessment because ESA adopted a stricter approach than the Commission does in public procurement cases is inadmissible on the same grounds.

The second and fourth *Altmark* criteria

113 As the General Court held in Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraph 214, and in caselaw cited therein, a certain discretion is not in itself incompatible with the existence of objective and transparent parameters within the meaning of the second *Altmark* criterion, since the determination of the compensation calls for an assessment of complex economic facts.

114 The Court holds that it is precisely because the determination of the compensation is normally subject to only restricted control by ESA, that the second *Altmark* criterion requires that ESA must be in a position to verify the existence of objective and transparent parameters, which must be defined in such a way as to preclude any incompatible or illegal State aid to an undertaking providing a service of general economic interest.

115 The applicants' complaint that in the contested decision ESA departed from its own practice and from that of the Commission must be rejected.

116 In that regard, it would suffice to observe that the question whether a measure constitutes State aid must be assessed solely in the context of Article 61(1) EEA and not in the light of an alleged earlier decision-making practice of ESA or the Commission (see, for comparison, Joined Cases C-106/09 P and C-107/09 P *Commission* v *Government of Gibraltar and United Kingdom*, judgment of 15 November 2011, not yet reported, paragraph 136).

117 However, that complaint also fails because the public service contract underlying the *Southern Moravia* decision is fundamentally different from the open-ended renegotiation clause in the 2004 Agreement. In *Southern Moravia,* the parameters had

been established in advance, the final remuneration was based on evidence of losses and the costs actually incurred. This is clearly different from the situation in the present case where there has been no separation of accounts between the public service remit and Hurtigruten's commercial operations. The parameters for the calculation of the compensation were therefore not established beforehand in a transparent way. On the contrary, they were introduced only through the 2008 Agreement and without a direct link to the actual losses and costs incurred by Hurtigruten.

118 The arguments put forward by Norway and Hurtigruten to the effect that the contested decision must be annulled in light of the interpretation of the renegotiation clause in Article 8 of the 2004 Agreement required by national legislation, in particular Section 36 of the Norwegian Contract Act of 1918, must be rejected.

119 Such an approach would go against the structure and the purpose of the State aid rules. It cannot be accepted, since it would render the control mechanisms established under the EEA Agreement ineffective (see, for comparison, Case C-404/04 P *Technische Glaswerke Ilmenau GmbH* v *Commission* [2007] ECR I-1*, paragraphs 44 and 45). Under Article 1 of Part I of Protocol 3 SCA, ESA has sole competence, subject to review by the Court, to assess the compatibility with the functioning of the EEA Agreement of a State aid measure.

120 Moreover, the arguments that the approach chosen by ESA would prohibit all traditional renegotiation clauses *per se* as it requires the outcome of a contractual regime to be precisely predetermined cannot succeed. Nor can those arguments succeed which relate to the actual costs incurred or the conditions which Article 8 sets out for the right to renegotiations to be triggered and concerning the access to documentation.

121 The Court recalls that, under the second *Altmark* criterion, the parameters on the basis of which public service compensation is calculated must be established in advance in an objective and transparent manner.

122 It is only logical that the assessment of State aid granted under a renegotiation clause in a public service contract, such as Article 8 of the 2004 Agreement, gives due consideration to whether the parameters of the contract as a whole are established in an objective and transparent manner, since the clause is an inherent part of the public service contract.

123 Compensation is an important element of a public service contract. Amending the compensation during the period of validity of the contract, in the absence of express authority to do so under the terms of the initial contract, might well infringe the principle of transparency.

124 None the less, the Court recalls that in the context of Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, incorporated as point 2 in Annex XVI to the EEA Agreement, the adjustment of prices during the course of the contract may be accompanied by an adjustment of their intrinsic amount without giving rise to a new award of a contract provided the adjustment is minimal and objectively justified.

125 However, the renegotiation clause in question covers only "extraordinary adjustments of the state's remuneration, changes in the service delivered or other measures" in the case of "[o]fficial acts that entail considerable changes of cost as well as radical changes of prices of input factors that the parties could not reasonably foresee". The other provisions of the 2004 Agreement establish no parameters whatsoever on the basis of which the public service compensation is calculated. There is no information on how the payments under the 2004 Agreement have been calculated.

126 This confirms ESA's conclusion in the contested decision that the provision in question does not lay down any parameters for the calculation of any supplementary compensation should the compensation awarded through the initial contract be deemed insufficient.

127 Moreover, in the 2004 tender, no possibility of amending the conditions for payment of the successful tenderers was provided. However, Norway could, if necessary, have made provision, in the notice of invitation to tender, for the possibility of amending the conditions for payment of the successful tenderers in certain circumstances by laying down in particular the precise arrangements for any supplementary compensation intended to cover unforeseen losses and costs. That way, the principle of transparency would have been observed (see, for comparison, Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 126).

128 In addition, as ESA found, the clause in question does not set out any limits to any compensation that might be agreed between the parties during a renegotiation of the original agreement (see page 15 of the contested decision).

129 Were such a clause to be regarded as providing an objective and transparent basis for recalculating the necessary compensation in order to offset an established loss or lack of funding for the operation of a service of general economic interest, control of whether EEA States fulfil their obligations under Articles 59 and 61 EEA would be rendered impossible.

130 Therefore, ESA was correct to conclude in the contested decision that the result of the specific application of the renegotiation clause in Article 8 of the 2004 Agreement cannot be considered objective and transparent as a matter of EEA law in the sense required by the second and fourth *Altmark* criteria. Consequently, the present plea must be rejected.

3. The pleas related to the margin of appreciation of an EEA State

(a) Arguments of the parties

131 Hurtigruten claims that ESA committed a manifest error of law and/or fact in relation to the possibility open to the Norwegian authorities to ensure the uninterrupted provision of a service of general economic interest within the meaning of Article 59(2)

EEA. Its main argument is that ESA erred in concluding that the three measures provided for in the 2008 Agreement cannot constitute public service compensation compatible with the functioning of the EEA Agreement on the basis of Article 59 EEA.

132 Hurtigruten maintains that, under Article 59(2) EEA, a government must be entitled to award additional compensation to an undertaking entrusted with a service of general economic interest if this additional payment is necessary in order to ensure the continued operation of the service. The fact that Hurtigruten was under an imminent threat of bankruptcy justifies the additional compensation provided for in the 2008 Agreement.

133 Hurtigruten refers, *inter alia*, to Commission Decision 2011/98/EC of 28 October 2009 on State aid C 16/08 Subsidies to CalMac and NorthLink for maritime transport services in Scotland (OJ L 45, 18.2.2011, p. 33) and submits that ESA failed to respect the discretion enjoyed by EEA States in the assessment of the existence and significance of an emergency situation. It notes that the Commission did not question the Scottish Government's assessment regarding the risk that the entrusted undertaking might become insolvent and the need to maintain the continued operation of the service of general economic interest and, thus, respected the State's discretion in the definition of the service.

134 Further, according to Hurtigruten, ESA failed to apply the criterion concerning anti-competitive behaviour set out by the Commission in *NorthLink & CalMac*.

135 In its reply, Hurtigruten refers to Decision 417/01/COL of 19 December 2001 on compensation for maritime transport services under the "Hurtigruten agreement" ("Decision 417/01/COL") and claims that ESA failed to take this decision into account in its assessment. In that decision, ESA used a different approach to overcompensation, and approved the separation of accounts based on business areas, which was confirmed in the 2004 and 2008 Agreements. In Hurtigruten's view, the contested decision should have addressed why ESA chose a new approach in 2010. Moreover, the contested decision does not give any reasons why,

in comparison with the present case, ESA allowed a longer period for a retendering of the Hurtigruten agreement in the 2001 decision.

136 ESA contests these arguments.

(b) Findings of the Court

137 The arguments related to Decision 417/01/COL have been raised only in Hurtigruten's reply. They must be rejected as inadmissible pursuant to the second paragraph of Article 37 RoP. They constitute new pleas in law introduced in the course of the proceedings, without being based on matters of law or of fact which have come to light in the course of the procedure.

138 A plea which may be regarded as amplifying a plea made previously, whether directly or by implication, in the original application must be considered admissible (see, for comparison, Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Territorio Histórico de Álava and Others* v *Commission* [2009] ECR II-3029, paragraph 189).

139 However, although Hurtigruten submitted Decision 417/01/COL as Annex A2 to its application, the application itself does not contain any pleas or arguments which refer to that decision. As a consequence, this plea is inadmissible.

140 As regards the margin of discretion available to the Norwegian Government to award additional compensation, it appears from the contested decision that ESA did not deny that Hurtigruten was in a difficult financial situation. Consequently, this argument must be rejected.

141 As for the criterion of anti-competitive behaviour, which Hurtigruten claims should have been addressed by ESA in the contested decision in the assessment under Article 59(2) EEA, it must be noted that Hurtigruten cannot criticise the defendant for not having examined the specific effects on competition of the aid in question. That argument lacks any factual basis, as is apparent from pages 19 and 20 of the contested decision. It must also be

noted that the 2004 Agreement gives Hurtigruten a full monopoly on the service in question.

142 ESA was not required to carry out a detailed economic analysis of the figures since it had explained the respects in which the effect on trade between EEA States was obvious. Nor was it required to demonstrate the real effect of aid which had not been notified. If it were required to demonstrate the real effect of aid which had already been granted, that would ultimately favour those EEA States which grant aid in breach of the duty to notify laid down in Article 1(3) of Part I of Protocol 3 SCA to the detriment of those which do notify aid at the planning stage (see, for comparison, Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 33). As a result, the argument must be rejected.

143 Consequently, the present plea must, in part, be declared inadmissible and, in part, be rejected.

4. The pleas in law alleging that the measure satisfies the third *Altmark* criterion and that there has been no overcompensation for the purposes of Article 59(2) EEA

144 In the contested decision, ESA refers to its findings in relation to Article 59(2) EEA to demonstrate that there has been overcompensation and that the third *Altmark* criterion has not been satisfied. The applicants contest that assessment. They contend that the third *Altmark* criterion is satisfied and deny any overcompensation for the purposes of Article 59(2) EEA. Consequently, the evidence and arguments relating to the pleas in law alleging that the measure satisfies the third *Altmark* criterion and that there has been no overcompensation for the purposes of Article 59(2) EEA will be assessed together.

(a) Arguments of the parties

145 Hurtigruten argues that the assessment in the contested decision is vitiated by a manifest error in law, since the additional compensation provided under the 2008 Agreement reflects the cost changes which may be addressed by means of the renegotiation clause.

146 Moreover, in its view, when assessing whether the 2008 Agreement can be declared compatible State aid under Article 59(2) EEA, it is irrelevant whether or not the Hurtigruten service was tendered. Otherwise, the legal procedure chosen to conclude the 2004 Agreement would determine whether the 2008 Agreement may be regarded as compatible aid under Article 59(2) EEA.

147 As regards the issue of overcompensation itself, Hurtigruten maintains that ESA incorrectly interpreted the allocation models in the three reports and contends that the reports contain a proper allocation method. Taken together, these circumstances demonstrate that there is no overcompensation. In any case, Hurtigruten claims that the absence of overcompensation is clear from the BDO Report of 16 August 2011 providing a financial analysis of the coastal route 2005-2010 (the "third BDO Report"), which provides an allocation model accepted by ESA.

148 Norway, on the other hand, maintains that the requirement established in the 2004 Agreement, namely, that in the event of renegotiation both parties must have access to all necessary documentation, ensures that it is only the actual costs which are reimbursed under the renegotiation clause. In addition, as regards the assessment of overcompensation by ESA in the contested decision, Norway argues that ESA made a manifest error of assessment in regard to the allocation models presented in the reports.

149 ESA, supported by the Commission, contests these arguments.

(b) Findings of the Court

150 Normally, EEA States enjoy a discretion in defining a service of general economic interest mission and the conditions of its implementation, including the assessment of the additional costs incurred in discharging the mission, which depends on complex economic facts. The scope of the control which ESA is entitled to exercise in that regard is limited to one of manifest error. It follows that the Court's review of ESA's assessment in that regard

must observe the same limit and that, accordingly, its review must be confined to ascertaining whether ESA properly found or rejected the existence of a manifest error by the EEA State (see, for comparison, *BUPA and Others* v *Commission*, cited above, paragraph 220, and caselaw cited).

151 In the present case, it appears from the contested decision, however, that ESA found the 2008 Agreement not to comply with the criterion of transparency.

152 Moreover, it is clear from the case-file that at Hurtigruten there was never any clear separation of accounts between the public service operations and the commercial operations. Thus, there was no complete, transparent and objective information available as to the costs and revenues of the public service operations. This has not been contested by the applicants.

153 Such a modus operandi cannot be considered consistent with the purpose and the spirit of the third *Altmark* condition in so far as the compensation is not calculated on the basis of elements which are specific, clearly identifiable and capable of being controlled (see, for comparison, *BUPA and Others* v *Commission*, cited above, paragraph 237).

154 As a result of this lack of transparency, ESA must be allowed to make its own assessment as to the existence of any overcompensation in order to be able to exercise its supervisory function under Article 61 EEA and Part I of Protocol 3 SCA. In assessing these complex economic facts, ESA enjoys a wide discretion for evaluating additional public service costs when assessing whether the third *Altmark* criterion is satisfied.

155 This is particularly so where the EEA State involved has invoked different grounds on which the aid may be regarded as compatible. The Court also notes that Norway and Hurtigruten stress the obligation on ESA to make a substantive assessment of the compatibility of the measures in question.

156 This implies that the Court will only determine whether the evidence adduced by the applicants is sufficient to render the

assessment of the complex economic facts made in the contested decision implausible. Under this plausibility review standard, it is not the Court's role to substitute its assessment of the relevant complex economic facts for that made by the institution which adopted the decision. In such a context, the review by the Court consists in ascertaining that ESA complied with the rules governing the procedure and the rules relating to the duty to give reasons and also that the facts relied on were accurate and that there has been no error of law, manifest error of assessment or misuse of powers (see, for comparison, *BUPA and Others* v *Commission*, cited above, paragraph 221, and caselaw cited).

157 It appears from the case-file that, in order to calculate Hurtigruten's financial situation with a view to verifying whether for the discharge of its public service obligations any overcompensation had occurred under the 2008 Agreement, ESA carried out a complex economic analysis on the basis of three studies supplied by the Norwegian Government during the formal investigation procedure.

158 After assessing those reports, ESA concluded that the three measures did not only cover the increased costs of the public service, but also served to compensate the costs of the activities outside the public service remit.

159 Moreover, ESA found that no separate accounts had been implemented and that there was no allocation of proportionate shares of fixed common costs allocated to the commercial activities and thus deducted when determining the State's compensation for the service. In particular, ESA criticised the use of unrepresentative hypothetical costs and revenues where real costs and revenues were known.

160 As for ESA's assessment of the three reports submitted by Norway during the investigation procedure, it must be noted that the applicants also rely on these reports in their applications and that they do not contest the substance of these reports.

161 In addition, it must be observed that the information submitted by Hurtigruten in answer to the measures of inquiry has not been expressly contested by the defendant.

162 As a result, under the present plea, the assessment of the Court is limited to ascertaining that there has been no error of law, manifest error of assessment or misuse of powers by ESA.

163 In this regard, the applicants contest two main aspects of the decision. First, they allege that the compensation did not constitute overcompensation because it was covered by Article 8 of the 2004 Agreement and, second, they contend that ESA made a manifest error of assessment in relation to the cost allocation models in the three reports.

164 Neither of these arguments can be accepted.

165 As regards the application of Article 8 of the 2004 Agreement, the arguments of the applicants must be understood to allege that the Norwegian authorities enjoyed a certain margin of appreciation in order to renegotiate the original agreement such that a continuous service on the Hurtigruten route was ensured.

166 However, as stated above, since Article 8 of the 2004 Agreement, invoked by Norway to justify the increase in compensation for the public service, cannot be considered transparent and objective within the meaning of the ECJ's *Altmark* caselaw, that EEA State cannot invoke the normal margin of appreciation of a State as regards the assessment of costs and cost increases related to a public service.

167 Moreover, the renegotiation provision does not contain any parameters whatsoever for the calculation of any subsequent increase in compensation. On the contrary, the provision does not limit the right to compensation to the actual costs inherent in the provision of the public service in question.

168 Since the renegotiation clause does not contain transparent and objective parameters which could be applied in order to calculate costs and revenues and establish the size of the alleged losses, the applicants cannot rely upon it in order to prove that costs and revenues have been incorrectly calculated.

169 Consequently, the argument of the applicants to the effect that the compensation did not constitute overcompensation because

it was covered by Article 8 of the 2004 Agreement must be considered irrelevant for the purposes of assessing whether the contested decision must be annulled.

170 If it is shown that the compensation paid to the undertaking operating the public service does not reflect the costs actually incurred by that undertaking for the purposes of that service, such a system does not satisfy the requirement that compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations (see, for comparison, Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243, paragraphs 37 to 40).

171 In the contested decision, ESA relies on the three reports submitted by the Norwegian authorities. These reports are presented in the initial section of the contested decision and ESA comes to the conclusion, on page 17, that the reports indicate that the three measures did not only cover the increased costs of the public service, but also served to compensate the costs of activities outside the public service remit.

172 The arguments of the applicants do not serve to render this assessment implausible.

173 Hurtigruten considers that the conclusion of ESA, namely that the "fixed costs common to the public service and the commercial activities tend to be allocated to the public side", is incorrect and that ESA was wrong to dismiss a capacity-based allocation model.

174 Hurtigruten also claims that ESA failed to recognise the *lex specialis* qualities of Article 59(2) EEA and that the purpose of the provision is to "cut through" the market-oriented rules of the EEA Agreement when the application of such rules obstructs the performance of the service of general economic interest.

175 However, Hurtigruten did not keep separate accounts distinguishing between the commercial services and the public service remit. The applicants also admit that for that very reason

it was difficult to present the actual costs and revenues for the public service. Therefore, some of the information which has been submitted by the Norwegian authorities and Hurtigruten, in particular the allocation models, have to be considered as based on assumptions. They are therefore hypothetical.

176 The PwC Report served to analyse cost increases which were considered relevant for the purposes of Article 8 of the 2004 Agreement and which could justify renegotiation within the combined terms of that provision and the *Altmark* criteria. The complementing report, to which Hurtigruten refers, was equally limited in scope.

177 At the same time, it is clear from the case-file that in the report certain fixed costs, such as harbour charges, are fully allocated to the public service remit. As a result, it cannot be considered a manifest error of assessment for ESA to conclude that there was a tendency to allocate these costs to the public service under the 2004 Agreement.

178 Hurtigruten maintains that ESA erroneously failed to explain the limited scope of the first BDO Report, submitted as an answer to a question from ESA.

179 This argument does not concern cost allocation as such. Instead, it is an attempt to use the history of the report as a means of questioning ESA's conclusions on the cost allocation model put forward in the report. Such an argument does not bear any relation to the actual plea of the applicant and must therefore be rejected as irrelevant.

180 The second BDO Report concerns the allocation of fixed and variable costs. They are allocated according to two different models. One is based on "minimum commitment government purchase passenger kilometres" and "actual capacity passenger kilometres", whereas the other is based on "delivered passenger kilometres distance passengers" and "delivered passenger kilometres other passengers". The two allocation models lead to different allocation rates biased towards the public service.

Moreover, the numbers are in part based on assumptions such as a "minimum commitment", which must be considered hypothetical as long as the actual government purchase is not known.

181 As a result, it cannot be considered that ESA committed a manifest error of assessment when it concluded that fixed costs common to the public service and the commercial activities tend to be allocated to the public side.

182 As regards the choice of allocation model, Hurtigruten claims that the use of a revenue-based allocation model, as suggested by ESA, is inconsistent with the notion of a service of general economic interest, since the Norwegian Government has used its discretion to define the service according to capacity. Hurtigruten also argues that, in any case, ESA did not apply the correct test in this regard, because it failed to assess whether in total the revenues under the 2004 Agreement and the 2008 Agreement and the public service revenues were higher than was necessary to cover the costs and to make a reasonable profit in performing the public service.

183 This argument cannot succeed.

184 As far as the allocation model is concerned, it is clear that due to the lack of transparency in the original measure, ESA was left with no other option than to make its own assessment whether Hurtigruten has been overcompensated. It cannot be considered inconsistent to an extent creating a manifest error on the part of ESA to make an assessment of the situation based on costs – at least to the extent that they are known – in order to verify whether the service has been overcompensated.

185 As a result, Hurtigruten's argument that the information which has been submitted in the course of the proceedings fulfils the requirements for a proper allocation of costs set out in the contested decision must also be rejected.

186 The subsequent assessments allegedly confirming the accuracy of the cost allocation and demonstrating an absence of

overcompensation must be rejected as irrelevant. Assessment of the legality of the contested decision must be made based on the information available to ESA at the moment it adopted the decision in question. As a result, these arguments cannot be taken into account in assessing the legality of the contested decision.

187 The Norwegian Government also contests the cost allocation models, even though, in principle, it claims to agree with the test of cost allocation set out in the contested decision. Referring to point 15 of the ESA State aid guidelines on public service obligations, the Norwegian Government makes three claims. It asserts, first, that, on page 23 of the contested decision, ESA made an incorrect assessment of the allocation model set out in the Norwegian authorities' letter to ESA of 30 September 2010. Second, ESA was wrong to reject the suggested allocation model, since it lies within the discretion of the Norwegian Government to choose the appropriate model. Third, ESA made an incorrect assessment in relation to possible overcompensation in failing to acknowledge that the measures were necessary to provide the service in question.

188 The Norwegian Government criticises the conclusion of ESA on page 23 of the contested decision, namely that "several categories of [common costs] are fully allocated to the public service side", which ESA reached on the basis of the PwC Report as well as the two BDO Reports mentioned on pages 7 to 8 of the contested decision.

189 This argument must be rejected. The calculations concerning the financial situation of the Hurtigruten service in the second BDO Report do indeed allocate a large part of the fixed costs to the public service remit. Such costs include port costs, oil and fuel and insurance costs. In view of the lack of transparency, however, ESA cannot be criticised for making an assessment on the basis of the reports submitted by Norway and drawing a general conclusion based on this information.

190 Having regard to the analysis undertaken in the second BDO Report, the Norwegian Government submits that if a comparison

is made with the overall financial result of the Hurtigruten service not all of these fixed costs appear to have been allocated to the public service. This argument cannot be accepted. The presentation of the overall financial result of the Hurtigruten service is based on figures taken from the Hurtigruten Annual Reports 2007 and 2008. The presentation of the financial results of the Vesterålen vessel – used in the second BDO Report to allocate costs – is based on the same sources. At the same time, when the figures concerning Vesterålen are multiplied by a factor of 11 (to reflect the overall fleet size) these do not correspond in any of the entries to the figures in the table showing the overall financial results of Hurtigruten. This indicates that the calculations based on the Vesterålen vessel are neither representative nor sufficiently clear to explain the possible discrepancies. As a result, it cannot be considered that ESA made a manifest error of assessment in relation to cost allocation.

191 As regards ESA's supposed rejection of a capacity-based model, Norway argues that the State should enjoy a wide margin of appreciation when calculating additional compensation for a public service. In its view, the minimum capacity model was in principle compatible with EEA law and ESA made a manifest error in not adopting the model as such. Finally, it asserts that the third BDO Report shows that the service was underfunded and confirms the findings in earlier reports.

192 This argument must be rejected as unfounded. The measures adopted by the Norwegian authorities in the present case did not fulfil the transparency criterion of *Altmark*. As a result, the margin of appreciation available to ESA in assessing the calculation of the compensation for a public service cannot be limited to a manifest error of assessment as it would have been had the State complied with the transparency requirement.

193 ESA did not reject the capacity-based allocation model as such in the contested decision. It found that, in order to determine whether or not the service in question was overcompensated, it would be more appropriate to analyse the actual costs and revenues of Hurtigruten and the vessels operating the Bergen-

Kirkenes route than to employ an allocation model that it considered to appear incorrect. In the light of the above, in particular having regard to the findings on the second BDO Report, the Court holds that, in adopting that approach, ESA did not make a manifest error of assessment.

194 The same must be held, *a fortiori*, in relation to the actual revenues of Hurtigruten. It is for the beneficiary to prove that ESA made a manifest error in assessment in concluding that there was overcompensation under the 2008 Agreement. In a situation such as the present, a beneficiary cannot rely on a measure which is not transparent and on its own lack of transparency in bookkeeping in order to argue that ESA has failed to show the actual revenues of the company.

195 The third BDO Report cannot be used to question the legality of the contested decision. The concept of State aid must be applied to an objective situation, which falls to be appraised on the date on which ESA takes its decision.

196 The contested decision was adopted on 29 June 2011, whereas the third BDO Report is dated 16 August 2011. It is therefore irrelevant for the assessment of the legality of the contested decision.

197 Therefore, this argument must be rejected.

198 Finally, Norway and Hurtigruten claim that the compensation awarded to Hurtigruten under the 2008 Agreement was necessary in order to ensure the performance of the service and that the measures were justified under Article 59(2) EEA. Norway further claims that ESA incorrectly applied Article 59(2) EEA and that this is a manifest error which must lead to the annulment of the contested decision. Finally, Norway argues that the margin of appreciation of the State under Article 59(2) EEA is wide and that ESA committed a methodological error when it made its assessment of the compensation under the 2008 Agreement.

199 Hurtigruten claims that the question whether the Hurtigruten service had been tendered or not must be irrelevant for the

purposes of Article 59(2) EEA when assessing whether the 2008 Agreement can be declared compatible State aid.

200 These arguments must be rejected.

201 A State measure which does not comply with one or more of the *Altmark* conditions must be regarded as State aid (compare *Altmark*, cited above, paragraph 94).

202 It is also clear that Article 59(2) EEA does not cover an advantage enjoyed by undertakings entrusted with the operation of a public service in so far as that advantage exceeds the additional costs of performing the public service (compare Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 33).

203 The 2008 Agreement entails overcompensation and does not satisfy the third *Altmark* criterion. In such a situation, the EEA State concerned cannot rely on Article 59(2) EEA and invoke the necessity test in order to have the aid in question declared compatible with the functioning of the EEA Agreement. The overcompensation of a service of general economic interest by definition entails a compensation that covers more than is necessary in order to ensure the operation of the service.

204 As regards the relevance of the tender, it must be noted that the 2008 Agreement concerned additional compensation for the Hurtigruten service. The question of whether such an aid measure providing additional compensation may be covered by a previous tender procedure can only be determined by objective criteria related to the measure itself and having regard to whether it entails a substantial modification of the original measure.

205 In the contested decision, ESA concludes that the three measures contained in the 2008 Agreement cannot be held to be covered by the original tender, since the substantial adjustments to the original contract normally would have required a new tender procedure. This is supported by the preliminary findings of the Court above that the measure in question is unlawful new aid because of the substantial alterations to the original measure. Therefore, this argument must be rejected.

206 Consequently this plea must be rejected.

B – Pleas in law alleging that the measure can be justified under Article 61(3) EEA (Case E-10/11)

1. Arguments of the parties

207 Hurtigruten admits that no restructuring plan was formally notified to ESA before the measure was implemented. Since the Norwegian authorities assumed that the measure in question did not constitute State aid, they simply informed ESA about the results of the renegotiations by a letter of 28 November 2008 in which the critical financial situation of Hurtigruten was set out. By letter of 30 July 2010, the measures were formally notified to ESA under the Rescue and Restructuring Guidelines.

208 Hurtigruten observes that the non-notification of the measures appears to be the main reason why ESA declined to apply those Guidelines in the case at hand. In that regard, Hurtigruten refers to ESA's statement in the decision to open the formal investigation procedure that the Norwegian authorities did not "follow up with a proper restructuring plan" and inviting them "to provide any documentation deemed necessary for such an assessment". Hurtigruten submits that ESA's conclusion on that point is wrong, since the measures were notified by letter of 4 March 2010 and a restructuring plan was adopted and successfully implemented. Moreover, at the time of adoption of the decision to open the formal investigation procedure, ESA had not even analysed the information provided. However, according to Hurtigruten, information was provided by the Norwegian authorities in their letter of 30 September 2010.

209 Hurtigruten asserts that, irrespective of the information submitted by the Norwegian authorities and received by ESA, ESA has not, with one single exception, submitted any substantive or specific question to the Norwegian authorities on the applicability of these Guidelines.

210 Hurtigruten invites the Court to consider the Guidelines *prima facie* applicable. First, it asserts that, contrary to what is stated

in the contested decision, the Guidelines do not include any unconditional criterion to the effect that a State has to possess a restructuring plan when granting aid. It observes that, in the present case, there was a restructuring plan. Second, the objective of the 2008 Agreement was to downsize and not expand market presence. In Hurtigruten's view, existing caselaw from the ECJ implies that, when a real restructuring plan exists, the substantial applicability of the Guidelines and the compatibility of the aid must be assessed by ESA regardless of when this plan was submitted.

211 According to Hurtigruten, the renegotiation of the 2004 Agreement was an integral and instrumental part of the restructuring plan. If the renegotiations had not succeeded, the private placement of NOK 314 million and instalment of a syndicate loan of NOK 3.3 billion with the banks would not have been successful. The banks and private shareholder participation depended on each other; one action would not have taken place without the other.

212 Hurtigruten claims that the contested decision is vitiated by a manifest error of assessment in relation to Article 61(3) EEA and the Guidelines. It cannot be the case that the Norwegian authorities had to present the restructuring plan exactly at the time when the aid was granted. It suffices that the renegotiations were part of the overall restructuring plan and the plan was fleshed out in parallel. In this respect, Hurtigruten refers to Case C-17/99 *France* v *Commission* [2001] ECR I-2481 and Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103.

213 ESA submits that there were both procedural and substantive reasons not to apply the Guidelines. On the issue of procedure, ESA refers to the comments from the Norwegian authorities of 30 September 2010, which invited ESA to consider the previous letter of 4 March 2010 as a notification *ex post*.

214 In substance, ESA refers to pages 26 to 28 of the contested decision and reiterates its finding that no restructuring plan

existed at the time when the aid was granted and that the documents subsequently sent by the Norwegian authorities do not satisfy the conditions set out in the Guidelines. The existence of a restructuring plan is, however, a precondition for restructuring aid.

215 The Commission supports ESA's position and submits that since Article 61(3) EEA constitutes a derogation from the prohibition on State aid, the burden of proof lies with the State invoking this provision. In substance, the Commission concurs with ESA's finding that the Rescue and Restructuring Guidelines are not applicable. The aid measures provided for in the 2008 Agreement were not linked to a corresponding obligation on the beneficiary to implement a restructuring plan. Moreover, the documents provided at a later stage did not meet the substantive requirements set out in the Guidelines. In particular, the alleged restructuring plan did not include any compensatory measures.

2. Findings of the Court

216 According to Article 1(3) of Part I of Protocol 3 SCA, ESA shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. Moreover, an EEA State may not put an aid measure into effect until a notification procedure has resulted in a final decision.

217 This standstill obligation is detailed in Article 3 of Part II of Protocol 3 SCA, which specifies that notifiable aid shall not be put into effect before ESA has taken, or is deemed to have taken, a decision authorising such aid.

218 This standstill obligation is equally applicable to aid to undertakings operating a service of general economic interest (compare Case C-332/98 *France* v *Commission* [2000] ECR I-4833).

219 The aim of Article 1(3) of Part I of Protocol 3 SCA is to prevent the EEA States from implementing aid contrary to the EEA Agreement. The final sentence of Article 1(3) of Part I of Protocol 3 SCA is the means of safeguarding the machinery for review

laid down by that article which, in turn, is essential to ensure the proper functioning of the common market. It follows that even if an EEA State takes the view that the aid measure is compatible with the EEA Agreement, that fact cannot entitle it to defy the clear provisions of Article 1(3) of Part I of Protocol 3 SCA (compare Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, paragraph 4).

220 The purpose of Article 1(3) of Part I of Protocol 3 SCA is not a mere obligation to notify but an obligation of prior notification which, as such, necessarily implies the suspensory effect required by the final sentence of that provision. It does not therefore, have the effect of disjoining the obligations laid down therein, that is to say, the obligation to notify any new aid and the obligation to suspend temporarily the implementation of that aid.

221 Further, with regard to new aid, Article 1(3) of Part I of Protocol 3 SCA provides that ESA is to be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. It then undertakes an initial examination of the planned aid. If, following that examination, it considers that any such plan is not compatible with the functioning of the EEA Agreement, it must without delay initiate the procedure provided for in paragraph 2 of that article. In such circumstances, the EEA State concerned must not put its proposed measures into effect until the procedure has resulted in a final decision. New aid is therefore subject to a precautionary review by ESA and may not, in principle, be put into effect until such time as the latter has declared it compatible with the Agreement.

222 Even though, in the present proceedings, the character of the 2008 Agreement has not been expressly addressed by the parties, the renegotiations of the 2004 Agreement with the subsequent additions in funding, change to the number of ships required to operate the service and the NOx tax exemption mean that the 2008 Agreement must be considered as new aid for the purposes of Article 1(3) of Part I of Protocol 3 SCA.

223 Hurtigruten concedes that no restructuring plan was formally notified to ESA by the Norwegian Government when the 2008 Agreement was concluded and entered into force. Moreover, the payments had started when ESA was informed of the Agreement. As a result, the 2008 Agreement must be considered unlawful aid within the meaning of Article 1(f) of Part II of Protocol 3 SCA. The fact that Norway subsequently stopped the payments to Hurtigruten pending the outcome of the investigation cannot change this classification. Any interpretation which would have the effect of according favourable treatment to an EEA State which has disregarded its obligations under Article 1(3) of Part I of Protocol 3 SCA must be avoided.

224 Finally, when ESA finds that an aid measure has not been notified and issues a request to the State concerned to provide all documents, information and data needed for the assessment of the compatibility of the aid and the State complies in full with this request, ESA is obliged to examine the compatibility of the aid with the functioning of the EEA Agreement, in accordance with the procedure laid down in Article 1(2) and (3) of Part I of Protocol 3 SCA.

225 It is in the light of these considerations that the Court will assess Hurtigruten's arguments concerning the alleged incorrect application of Article 61(3) EEA and the Rescue and Restructuring Guidelines.

226 Hurtigruten contends that ESA was incorrect to conclude in the decision to open the formal investigation procedure that Hurtigruten did not follow up with a proper restructuring plan. It avers that a restructuring plan for the company was adopted and successfully implemented. The measures in question were notified to ESA on 4 March 2010. Also, Hurtigruten argues, ESA erred in its assumption that the material existence of a restructuring plan at the time when an EFTA State grants an aid is a necessary precondition for the applicability of the Rescue and Restructuring Guidelines. Neither the Rescue and Restructuring Guidelines nor caselaw establishes a strict condition to the effect that the EEA State granting the aid has to possess a restructuring plan when

the disputed aid is granted.

227 The Court notes that ESA's decision to open the formal investigation procedure is not the subject-matter of the present action. As a consequence, any alleged error in that decision cannot lead to the annulment of the contested decision. It follows that this argument must be rejected as irrelevant for the purposes of determining whether the contested decision must be annulled.

228 As for the argument that Norway did not have to possess a restructuring plan at the time when the aid was granted in order to have it treated as restructuring aid under the Rescue and Restructuring Guidelines, it must be recalled that, in a significant individual case, the restructuring plan must be notified to ESA in advance, a rule confirmed and made more explicit in the Rescue and Restructuring Guidelines. These Guidelines expressly require that a viable restructuring/recovery programme be submitted with all relevant detail to ESA (paragraph 34 of the Rescue and Restructuring Guidelines) and that the company fully implement the restructuring plan accepted by ESA (paragraph 46 of the Rescue and Restructuring Guidelines). The Guidelines also provide for the proper implementation of the restructuring plan by requiring the submission of regular detailed reports to ESA (paragraph 48 of the Rescue and Restructuring Guidelines).

229 In the present case, the measures in question were put in place and the first contributions were paid out before the measures were sent to ESA for information and before the measures were formally notified as restructuring aid under the Rescue and Restructuring Guidelines.

230 In the absence of a credible restructuring plan at the time the aid was granted, ESA did not commit a manifest error of assessment when refusing to authorise the aid.

231 Hurtigruten refers to two judgments of the ECJ in order to show that there is no requirement that the Norwegian Government had to possess a restructuring plan when the aid was granted, *France* v *Commission* and *Spain* v *Commission*, both cited above.

232 However, *France* v *Commission* concerned notified aid. In the present case, the Norwegian authorities granted the aid and did not notify ESA, which means that any cooperation between ESA and the Norwegian authorities on a restructuring plan for the undertaking in difficulties was impossible.

233 *Spain* v *Commission* did not concern the applicability of the Guidelines, but an assessment in substance of potential compatibility of the aid by the Commission under Article 107(3)(c) TFEU – the parallel provision to Article 61(3)(c) EEA – even though the aid in that case had not been notified. Consequently, Hurtigruten cannot invoke this judgment in order to show that a restructuring plan is not a precondition for the application of the Guidelines.

234 The Court must therefore examine whether ESA committed a manifest error in concluding that the aid was not conditional on the implementation of a restructuring plan such as to satisfy the requirements of the Rescue and Restructuring Guidelines.

235 In the contested decision ESA concluded that there was no information demonstrating that the restructuring of Hurtigruten was a condition to the aid measures.

236 The evidence put forward by Hurtigruten does not render this conclusion implausible. The company relies on a letter from the Norwegian authorities to ESA of 4 March 2010 which includes a memo of 24 February 2010 on Hurtigruten's restructuring measures, minutes from the board meeting of the company of 22 August 2008, and a presentation by Carnegie and Pareto Securities prepared in September 2008. As the Court has found in paragraph 74 above, Hurtigruten's prospectus of 5 March 2009, Annex A45, is inadmissible.

237 In the contested decision, ESA contends that the granting of the aid in question was not linked to the restructuring plan presented by the company.

238 While it must be acknowledged that the documents together show an attempt to come to terms with the financial difficulties

of Hurtigruten, it is apparent from the case-file that the 2008 Agreement was a condition for the implementation of the other measures considered necessary and was requested by the private investors.

239 What is decisive is that the letter from the Norwegian authorities of 4 March 2010 was sent after the aid had been granted. None of the other documents submitted by the applicant show that the aid through the 2008 Agreement was linked to the condition of a successful restructuring of the company.

240 Therefore, ESA did not commit a manifest error of assessment when it found that the granting of the aid was not linked to a restructuring plan and concluded that the conditions of the Guidelines on restructuring were not fulfilled in the present case.

241 As a result, this plea must be rejected.

C – Pleas in law alleging infringement of the duty to state reasons (Cases E-10/11 and E-11/11)

1. Arguments of Hurtigruten (Case E-10/11)

242 Hurtigruten submits that, in adopting the contested decision, ESA has infringed its obligation to state reasons as required by Article 16 SCA. In its view, the contested decision does not even answer the essential question, whether the 2008 Agreement includes unlawful State aid, in a clear and unequivocal manner.

243 Hurtigruten criticises the fact that, in Article 1 of the operative part of the contested decision, ESA identifies the existence and amount of aid only in so far as the measures constitute overcompensation. Similarly, it contends that the wording on page 29 of the contested decision "the three measures may entail over-compensation" and "[p]art of the payments made under the three measures can be considered compatible" cannot be considered clear and unequivocal.

244 Hurtigruten also contends that, in the contested decision, ESA does not provide real and effective additional guidance

to the Norwegian authorities on whether and to what extent Hurtigruten was overcompensated for operating the service of general economic interest. The contested decision provides even less guidance than the overall framework for services of general economic interest. The criteria laid out on page 29 of the contested decision do not state anything beyond what is already stated in the Guidelines on State aid in the form of public service compensation.

245 According to Hurtigruten, the decision should at least have sketched how a proper allocation of costs and revenues should be understood and what ESA regards as fixed common costs. For the contested decision to have any meaning, it should have addressed the issue of justifiable compensation, *i.e.* whether this involves simply compensation of additional costs covered by the 2008 Agreement or allows for the possibility of compensating the necessary total costs incurred in the provision of a service of general economic interest, as Hurtigruten alleged in its pleas concerning Article 59(2) EEA.

246 Finally, in its reply, Hurtigruten observes that the contested decision fails to mention the second and third parts of what it alleges to be ESA's reasoning on recovery, communicated in a subsequent e-mail, and which Hurtigruten refers to as "ESA logic". Consequently, in its view, the decision must be annulled.

2. Arguments of Norway (Case E-11/11)

247 Norway submits that ESA failed to provide adequate reasoning in the contested decision in three respects.

248 First, the conclusion that the allocation model presented by the Norwegian authorities did not appropriately allocate common costs between the service of general economic interest and commercial activities has not been sufficiently reasoned. The statements are an insufficient basis on which to conclude that a disproportionate share of the common costs has been allocated to the commercial activities. Norway suggests that ESA may have confused the different reports submitted during the administrative

procedure and asserts that ESA failed to assess the refined model presented in response to its decision to open the formal investigation procedure. Norway concedes that in section 4.2.3 of the contested decision ESA attempts to rebut the method of allocation based on the operation of a minimum capacity fleet. However, in its view, the arguments advanced by ESA are based on an erroneous understanding of the cost allocation model.

249 Second, the contested decision does not offer any reasons why, as a matter of law, there was no need for ESA to assess whether the three measures were necessary for Hurtigruten to continue the provision of the public services, *i.e.* whether there was overcompensation. At the same time, the contested decision does not provide any yardstick for the assessment of any possible overcompensation. In Norway's view, the relevant test requires an assessment of the results of the activities performed in providing the service of general economic interest in order to determine whether Hurtigruten was overcompensated for its task. However, ESA did not carry out this test and does not explain why the submissions of the Norwegian authorities in this respect should not be convincing. Instead, ESA appears to focus on purely formal requirements. Norway submits that ESA cannot base its decision to order the recovery of overcompensation on an alleged failure to separate accounts and to provide information, since it was possible for ESA to examine all the legal and economic conditions governing the additional payment and, consequently, impossible, without such an examination, to take a valid decision on whether the measures were necessary.

250 Third, Norway contends that the guidance offered on page 29 of the contested decision does not allow it to calculate the amount to be recovered without overmuch difficulty. The insufficiency of that guidance is all the more evident given the lack of clarity on the question whether the contested decision actually considers Hurtigruten to have been overcompensated at all as a result of incompatible aid.

251 ESA contends that these complaints should be rejected.

3. Findings of the Court

(a) General remarks on the duty to state reasons

252 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, in such a way as to enable the persons concerned to ascertain the reasons for the measure and thus enable them to defend their rights and enable the Court to exercise its power of review (see Joined Cases E-4/10, E-6/10 and E-7/10 *Reassur* [2011] EFTA Ct. Rep. 22, paragraph 171).

253 In that respect it must be noted that ESA is not required to state the reasons why it made a different assessment of a particular aid regime in previous decisions. The concept of State aid must be applied to an objective situation, which falls to be appraised on the date on which the ESA takes its decision (see, for comparison, Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 137).

254 Moreover, the requirements to be satisfied by the statement of reasons depend on 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. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question 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 *Reassur*, cited above, paragraph 172).

255 In particular, ESA is not obliged to adopt a position on all the arguments relied on by the parties concerned. Instead, it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (see *Reassur*, cited above, paragraph 173).

(b) The complaint of Hurtigruten based on the allegation that the decision is neither clear nor unequivocal (Case E-10/11)

256 Hurtigruten's argument raised in its first plea to the effect that ESA has not properly reasoned the contested decision in regard to the application of Article 59(2) EEA cannot be upheld.

257 First, in relation to the right of a State to pay additional compensation to an undertaking entrusted with a service of general economic interest, when such payment comes in addition to the compensation for that service under a contract won after a public tender, it must be recalled that ESA concluded that the measure in question lacked transparency and amounted to overcompensation of the public service in violation of Articles 61(1) and 59(2) EEA. Under such circumstances, the question whether the supplementary compensation was necessary for the continued operation of the service of general economic interest is irrelevant for the conclusion that the measure in question constitutes State aid. Since ESA's findings in that respect have been upheld, it cannot be considered a lack of reasoning if ESA does not address this particular argument, as it is under no obligation to do so.

258 Second, as regards the argument that ESA failed to assess the effect the supplementary compensation may have had in terms of anti-competitive behaviour, it suffices to note that Hurtigruten is the sole operator of the service. The company has not provided any information on how an assessment of its potential violation of competition should have been assessed in the contested decision, and ESA seems to have accepted its role as a monopoly providing the service. As a result, this assessment would have been irrelevant to the findings in the present proceedings and ESA did not violate its obligation to state reasons by leaving this aspect aside.

(c) The complaint of Hurtigruten and Norway based on the allegation that the contested decision was inadequately reasoned in relation to recovery (Cases E-10/11 and E-11/11)

259 The contested decision, on pages 28 and 29, provides sufficient information for the beneficiary and the EEA State concerned to determine, without overmuch difficulty, the amount of aid to be recovered. The argument of Hurtigruten and Norway that the contested decision was inadequately reasoned in relation to recovery must therefore be rejected.

260 Norway claims, moreover, that the contested decision is inadequately reasoned as regards the proposed allocation of costs between the public service and the commercial side. The statements are said to be inadequate to form the basis for the conclusion that a proportionate share of the common costs has not been allocated to the commercial activities. However, as the applicants both admit, this question was addressed in section 4.2.3. of the contested decision. Moreover, on pages 7 to 9 of the contested decision, ESA presents tables and substantive details from the reports in question in order to explain how it reached its conclusion that there was a lack of clarity in the allocation of costs in relation to the Hurtigruten service. As a result, this argument must be rejected.

261 It is necessary to distinguish a plea based on an absence of reasons or inadequacy of the reasons stated from a plea based on an error of fact or law. This last aspect falls under the review of the substantive legality of the contested decision and not the review of an alleged violation of infringement of essential procedural requirements within the meaning of Article 16 SCA (see Joined Cases E-17/10 and E-6/11 *Liechtenstein and VTM* v *ESA*, judgment of 30 March 2012, not yet reported, paragraph 165).

262 A plea alleging absence of reasons or inadequacy of the reasons stated goes to the issue of infringement of essential procedural requirements within the meaning of Article 16 SCA. As a matter of public policy is involved, this may be raised by the Court on

its own motion (Case E-14/10 *Konkurrenten.no* v *ESA* [2011] EFTA Ct. Rep. 268, paragraph 46). By contrast, a plea based on an error of fact or law, which goes to the substantive legality of the contested decision, is concerned with the infringement of a rule of law relating to the application of the EEA Agreement within the meaning of Article 36 SCA. It can be examined by the Court only if raised by the applicant (*Liechtenstein and VTM* v *ESA*, cited above, paragraph 166).

263 Norway's argument that the contested decision is inadequately reasoned as regards the "overall test" to calculate the amount to be recovered concerns the calculation of the compensation for the public service and, as such, the material assessment in the contested decision.

264 As a consequence, this plea must be rejected.

D – The plea based on the alleged obligation to issue an information injunction pursuant to Article 10(3) of Part II of Protocol 3 SCA (Case E-11/11)

1. Arguments of the parties

265 Norway observes that ESA could have issued an information injunction pursuant to Article 10(3) of Part II of Protocol 3 SCA. The decision is said to show that the lack of documentation was the essential reason why ESA could not reach a different conclusion other than to find that Hurtigruten had been overcompensated. Since it did not use all its powers, in Norway's view, ESA cannot base its decision on the fragmentary nature of the information provided. In particular, no specific information request has been submitted to Norwegian authorities. Therefore, the contested decision must be annulled.

266 ESA contends that this plea should be rejected.

2. Findings of the Court

267 In order to make a proper assessment of this plea it is necessary to recall the purpose of the information injunction.

268 Article 10 of Part II of Protocol 3 SCA is applicable in cases concerning unlawful aid, that is new aid put into effect in contravention of the standstill obligation in Article 1(3) of Part I of Protocol 3 SCA.

269 Under Article 10(1) of Part II of Protocol 3 SCA, where ESA has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay. According to the second paragraph of the same provision, ESA shall, if necessary, request information from the EEA State concerned. Under Article 2(2) of Part II of Protocol 3 SCA, which applies *mutatis mutandis*, the EEA State concerned shall provide all information necessary in order to enable ESA to take a decision.

270 It is only if the EEA State concerned does not comply with such an information request that ESA might be under the obligation to issue an information injunction. According to Article 5(1) and (2) of Part II of Protocol 3 SCA, which also apply *mutatis mutandis*, ESA shall request additional information if it considers that the information provided by the EEA State is incomplete. If the EEA State does not comply, ESA has to send out a reminder.

271 It is only after this stage has been reached that ESA shall issue an information injunction under Article 10(3) of Part II of Protocol 3 SCA.

272 It is undisputed between the parties that there was no separation of accounts between the public service side and the commercial side of the operations in question. In its reply, Hurtigruten places great emphasis on the fact that there was a separation of accounts between the different business areas but admits that it did not separate the accounts between the public service side and the commercial operations. This means that the information which Norway alleges is missing and should have given rise to an information injunction is information which the other applicant claimed repeatedly not to exist.

273 Therefore, the present plea must be dismissed.

E – Pleas in law alleging infringement of the principles of legal certainty

1. Arguments of the parties

274 According to Hurtigruten, since ESA relies on an unclear, ambiguous and confusing frame for the contested decision, and since it does not provide a clear framework for the national authorities to calculate the amount of aid and recover any unlawful aid, ESA has violated the principle of legal certainty.

275 Hurtigruten and Norway claim that the wording of Article 1 of the contested decision violates this principle as ESA concludes that the aid is incompatible "in so far as" it constitutes overcompensation.

276 Moreover, according to Norway, the contested decision does not meet the required standard to enable the addressee without overmuch difficulty to determine how much aid must be recovered from the beneficiary. The contested decision is a hypothetical or empty decision which cannot be considered adequate to satisfy the principle of legal clarity.

277 Finally, Norway observes that, if there is not enough information, ESA can issue an information injunction. In the present case, however, it did not issue such an injunction and, moreover, avoided taking a final decision, leaving it for the Norwegian authorities to make an assessment of compatibility. This constitutes a breach of procedure, since the Norwegian authorities have fulfilled their duty to cooperate with ESA during the administrative procedure.

278 In its reply, Norway observes that during the recovery procedure ESA appears to have added two supplementary requirements, not included in the contested decision, to its understanding of Article 59(2) EEA. First, only radical and unforeseeable cost increases can be considered under Article 59(2) EEA. Second, additional compensation may indeed be granted under Article 59(2) EEA, provided that a new tender is immediately announced. In Norway's view, this confirms the lack of clarity of the contested decision.

279 ESA contests these arguments.

2. Findings of the Court

280 Legal certainty is a fundamental principle of EEA law, which may be invoked not only by individuals and economic operators, but also by EEA States (*Liechtenstein and VTM* v *ESA*, cited above, paragraph 141).

281 The principle of legal certainty requires that rules of EEA law be clear and precise, so that interested parties can ascertain their position in situations and legal relationships governed by EEA law (*Liechtenstein and VTM* v *ESA*, cited above, paragraph 142).

282 No provision of EEA law requires ESA, when ordering the recovery of aid declared incompatible with the functioning of the EEA Agreement, to fix the exact amount of the aid to be recovered. It is sufficient for ESA's decision to include information enabling the addressee of the decision to work out itself, without overmuch difficulty, that amount (see, for comparison, Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, paragraph 25, and Case C-441/06 *Commission* v *France* [2007] ECR I-8887, paragraph 29).

283 The recovery of aid which has been declared incompatible with the functioning of the EEA Agreement is to be carried out in accordance with the rules and procedures laid down by national law (see, for comparison, Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraph 90, and the caselaw cited).

284 Further, the obligation on an EEA State to calculate the exact amount of aid to be recovered forms part of the more general reciprocal obligation incumbent upon ESA and the EEA States of sincere cooperation in the implementation of rules concerning State aid in the EEA Agreement.

285 Thus, ESA could legitimately confine itself to declaring that there is an obligation to repay the aid in question and leave it to the national authorities to calculate the exact amounts to be repaid.

286 However, if ESA, pursuant to its obligation to conduct a diligent and impartial examination of the case under Article 1 of Part I of Protocol 3 SCA, does decide to order the recovery of a specific amount, it must assess as accurately as the circumstances of the case will allow, the actual value of the benefit received from the aid by the beneficiary. In restoring the situation existing prior to the payment of the aid, ESA is, on the one hand, obliged to ensure that the real advantage resulting from the aid is eliminated and it must thus order recovery of the aid in full. ESA may not, out of sympathy with the beneficiary, order recovery of an amount which is less than the value of the aid received by the latter. On the other hand, ESA is not entitled to mark its disapproval of the serious character of the illegality by ordering recovery of an amount in excess of the value of the benefit received by the recipient of the aid (see, for comparison, Case T-366/00 *Scott* [2007] ECR II-797, paragraph 95).

287 It is to be noted in this regard that ESA may not be faulted because its assessment is approximate. In the case of non-notified aid, it may be that the circumstances of the case are such that ESA has difficulty in determining the precise value of the aid, particularly where the aid measure does not fulfil the second *Altmark* criterion and the allocation of costs is unclear. Those circumstances must be borne in mind when reviewing the legality of ESA's decision.

288 It is apparent from page 5 of the contested decision that ESA calculated the amount of aid which had been granted at the time it adopted the contested decision. This amount has not been contested by the applicants in the current proceedings.

289 It follows that this amount must be considered the minimum aid amount to be recovered in accordance with Article 2 of the contested decision. The operative part of a decision relating to State aid is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (see, in particular, Case C-355/95 P *TWD* v *Commission* [1997] ECR I-2549, paragraph 21).

290 It is uncontested that, in Article 4 of the contested decision, ESA ordered Norway to inform it of the total amount (principal and recovery interest) to be recovered from the beneficiary as well as of the measures planned or taken to recover the aid and ordered the aid to have been fully recovered by 30 October 2011. However, it also stated in section 5 of the contested decision that the amount would be determined by the Norwegian authorities in collaboration with ESA, within the framework of the recovery procedure. Implementation of the recovery procedure did not therefore depend on fixing the said amount. Therefore, the fact that the exact amount of aid to be recovered had not been laid down definitively cannot prevent the authorities from implementing the recovery procedure for the minimum amount of aid or from cooperating effectively in determining the final amount of the aid to be recovered.

291 As regards the argument that ESA did not provide a reliable calculation method with which to determine the amount of aid to be repaid, it must be pointed out that, on page 29 of the contested decision, ESA lays down parameters for the calculation of the aid to be recovered that would allow the Norwegian authorities to make a definitive proposal. It states in a clear and unequivocal fashion that aid which constitutes overcompensation of the Hurtigruten service must be recovered.

292 The national authorities accordingly have the information enabling them to propose to ESA an exact amount reflecting the overcompensation to Hurtigruten. The national authorities are in fact in the best position, not only to determine the appropriate means to recover the State aid unduly paid, but also to determine the exact amounts to be repaid (see, for comparison, Case C-441/06 *Commission* v *France*, cited above, paragraph 39).

293 ESA's decision contains the appropriate information to enable Norway to determine itself, without too much difficulty, the final aid amount to be recovered, and that amount has to be somewhere within the range established by ESA.

294 It follows that the argument of Norway and Hurtigruten to the effect that ESA did not provide a sufficiently reliable calculation method to determine the amount of aid to be recovered cannot be accepted.

F – Pleas in law alleging infringement of the principles of good administration, due diligence and Article 10 of Part II of Protocol 3 SCA

1. Arguments of the parties

295 Hurtigruten refers to pages 27 to 28 of the contested decision and submits that, given its financial position at the time of conclusion of the 2008 Agreement, the Rescue and Restructuring Guidelines should be assessed to have been of immediate relevance to ESA, as ESA was of the opinion throughout the procedure that the agreement involved State aid. Furthermore, ESA was informed in detail about the applicability of the rescue and restructuring Guidelines in March 2010. Moreover, during the administrative procedure, ESA adopted only one request for information apart from the decision to open the formal investigation procedure.

296 Hurtigruten also refers to Articles 13(1) and 10(3) of Part II of Protocol 3 SCA, authorising ESA to take a decision on the basis of the information available where a State has not complied with an information injunction. In that regard, Hurtigruten claims that, if the information available to ESA is incomplete, it cannot take a decision without issuing an information injunction specifying the information required. In the present case, ESA adopted the contested decision without requesting sufficient information and the contested decision should therefore be annulled since it was adopted in breach of the principle of good administration and of ESA's duty to exercise due diligence.

297 In the alternative, Hurtigruten invites the Court to assess the contested decision as a decision taken on the basis of the information available pursuant to Article 13(1) of Part II of Protocol 3 SCA. In that regard, the contested decision can only be lawful if adopted in the wake of an information injunction

issued by way of a decision pursuant to Article 10(3) of Part II of Protocol 3 SCA. However, no such injunction was issued.

298 Hurtigruten contends that ESA has admitted that it did not receive from the Norwegian authorities all the information necessary to undertake the substantive assessment. No information injunction was issued. Therefore, the decision must be considered as taken on the basis of the information available pursuant to Article 13(1) of Part II of Protocol 3 SCA.

299 Finally, Hurtigruten refers to the ECJ's judgment in Case C-520/07 P *Commission* v *MTU* [2009] ECR I-8555 and submits, in the light of that judgment, that the contested decision should be considered a hypothetical decision. In its view, ESA adopted the decision on the basis of an unlawful negative presumption and, consequently, the decision must be annulled.

300 ESA contests these arguments.

2. Findings of the Court

301 The principle of good administration is a fundamental principle of EEA law (Case E-2/05 *ESA* v *Iceland* [2005] EFTA Ct. Rep. 202, paragraph 22).

302 It includes, in particular, the duty on ESA to examine carefully and impartially all the relevant aspects of the individual case (see, for comparison, Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraphs 14 and 26, and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 62).

303 Where the competent institutions have a power of appraisal, respect for the rights guaranteed by the legal order of the EEA in administrative procedures is of even more fundamental importance.

304 It is in the light of these considerations that the present arguments must be assessed.

305 Hurtigruten claims that ESA violated the principle of good administration and the duty to exercise due diligence by not issuing an information injunction before it took the contested decision. Hurtigruten bases its claim on the fact that since ESA did not ask any questions directly about the applicability of the Rescue and Restructuring Guidelines, the contested decision must be considered a decision taken on incomplete information. This argument cannot be accepted.

306 As the applicants themselves admit, on pages 25 to 28 of the contested decision, ESA made a material assessment on the applicability of the Rescue and Restructuring Guidelines and came to the conclusion that they are not applicable. It is clear that ESA considered that it had enough information to make that assessment. In such a situation, ESA is not under an obligation to issue an information injunction pursuant to Articles 13 and 10 of Part II of Protocol 3 SCA.

307 In the light of the foregoing, Hurtigruten's contention that ESA acted in breach of the duty to exercise due diligence in regard to an alleged "negative presumption" must also be rejected.

308 Finally, whilst it is true that the decision states that the Norwegian Government did not submit a restructuring plan, that statement forms part of a lengthy discussion specifically concerned with the compatibility of the disputed aid with Article 61(3)(c) EEA. Accordingly, far from expressing the idea that ESA did not have the information needed to enable it to carry out that assessment, it emphasises that the conditions to be met if restructuring is to be approved in accordance with the Rescue and Restructuring Guidelines, in particular the very existence of a sound restructuring plan when the aid is granted, were not fulfilled in this case.

309 In those circumstances, it was not appropriate for ESA, which was in a position to make a definitive assessment as to the compatibility of the disputed aid with the common interest on the basis of the information available to it, to require Norway, by means of an information injunction, to provide it with further

information to clarify the factual information before it adopted the contested decision.

310 It follows, therefore, that the plea must be rejected.

G – Pleas in law alleging infringement of the principle of proportionality (Case E-10/11)

1. Arguments of the parties

311 In its application, Hurtigruten submits that, in relation to the recovery of any aid, correct application of the proportionality principle, as enshrined in Article 14 of Part II of Protocol 3 SCA, will take account of the arguments presented on the assessment of whether the aid is compatible with Article 59(2) EEA, that is, compatible aid may not be recovered from the applicant.

312 In its reply, Hurtigruten claims that the stricter approach in relation to overcompensation, applied allegedly by ESA, accepting compensation only where it covers the additional costs in performing the service of general economic interest specified in the renegotiation provision, is in breach of the proportionality principle.

2. Findings of the Court

313 Pursuant to Article 33(1)(c) RoP, an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. The information given must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to give a ruling, if necessary without other supporting information.

314 However, this is not the case here. In its application, Hurtigruten only refers to the principle of proportionality without linking it to any arguments or explaining how this principle has been violated. Since an alleged error of assessment of Article 59(2) EEA and an alleged violation of the principle of proportionality must be seen as two distinct pleas in law, the present plea is inadmissible.

315 The conclusion must be the same in relation to the plea alleging a violation of the principle of proportionality, claimed by Hurtigruten in its reply. In this case, it must be noted that the claim relating to proportionality is linked to the assessment by ESA of the renegotiation clause.

316 According to Article 37(2) RoP, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

317 This is not the case here, as the renegotiation clause was included in the 2004 Agreement and also the subject of the contested decision. Therefore, this plea must also be dismissed as inadmissible.

318 Consequently, the applications must be dismissed in their entirety.

VI COSTS

319 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 applicants to be ordered to pay the costs. Since the latter have been unsuccessful in their applications, they must be ordered to do so. Those costs incurred by the European Commission are not recoverable.

On those grounds,

THE COURT

hereby:

1. Dismisses the applications.

2. Orders the applicants to pay the costs of the proceedings.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 8 October 2012.

Gunnar Selvik Carl Baudenbacher

Registrar President

REPORT FOR THE HEARING

in Joined Cases E-10/11 and E-11/11

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 cases between

Hurtigruten ASA (Case E-10/11),

Kingdom of Norway (Case E-11/11)

and

EFTA Surveillance Authority

seeking the annulment of the EFTA Surveillance Authority's Decision No 205/11/COL of 29 June 2011 on the Supplementary Agreement on the Hurtigruten Service in Norway.

I INTRODUCTION

1. In each of these cases, the applicant seeks annulment of the Decision of the EFTA Surveillance Authority ("ESA") No 205/11/COL of 29 June 2011 on the Supplementary Agreement on the Hurtigruten Service in Norway by which the three measures provided for in the Supplementary Agreement on the Hurtigruten Service in Norway of 27 October 2008 were declared State aid incompatible with the functioning of the EEA Agreement insofar as they constitute a form of overcompensation for the public service (the "contested decision").

2. In Case E-10/11 *Hurtigruten* v *ESA*, Hurtigruten ASA ("Hurtigruten") bases its application on Article 59(2) and Article 61(1) and (3) EEA and certain procedural rules and principles, such as the obligation to state reasons provided for in Article 16 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA").

3. In Case E-11/11 *Kingdom of Norway* v *ESA*, the Kingdom of Norway ("Norway") relies on Articles 59(2) and 61(1) EEA and certain procedural rules and principles, such as the obligation to state reasons established in Article 16 SCA.

4. The European Commission (the "Commission") supports ESA's views.

II FACTS

Background

5. Hurtigruten operates maritime transport services consisting of the combined transport of persons and goods along the Norwegian coastal line from Bergen in the south to Kirkenes in the north.

6. The operation of the service for the period 1 January 2005 to 31 December 2012 was the subject of a tender procedure initiated in June 2004. The only bidders were Ofotens og Vesteraalens Dampskipsselskap ASA and Troms Fylkes Dampskipsselskap. These two companies signed a contract with the Norwegian authorities on 17 December 2004 for the provision of the public service of maritime transport (the "2004 agreement"). The two companies merged in March 2006 to form Hurtigruten, which now operates the service.

7. Under the 2004 agreement, the public service obligation was defined. The operator of the service of general economic interest serves 34 predetermined ports of call throughout the year. It is required to operate 11 vessels approved by the Norwegian authorities in advance and to observe certain maximum prices on the "distance passenger" routes. The ships must carry a minimum of 400 passengers and 150 europalettes of cargo and have at least 150 berths. The ships should offer catering including hot and cold meals. In addition, Hurtigruten is also a commercial operator offering round trips, excursions and catering on the Bergen-Kirkenes route. Pursuant to the 2004 agreement Hurtigruten may not increase ticket prices for the service of general economic interest beyond the consumer price index, but is free to set its prices for commercial activities, such as for round trips, cabins, catering and the transport of cars and goods. It also operates a number of different cruises outside the Bergen-Kirkenes route, visiting various European countries.

8. For the services covered by the 2004 agreement, the Norwegian authorities agreed to pay a total compensation of NOK 1 899.7 million (2005 prices) for the eight years of the agreement with an automatic increase based on a set price index.

9. Article 7 of the 2004 agreement establishes an obligation of accounting separation and on the provision of relevant information. Article 8 of the 2004 agreement contains a revision clause. The revision clause reads as follows:

Official acts that entail considerable changes of cost as well as radical changes of prices of input factors that the parties could not reasonably foresee are grounds for either of the contracting parties to demand a renegotiation about extraordinary adjustments of the state's remuneration, changes in the service delivered or other measures. In such negotiations, the other party shall be entitled to access all necessary documentation.

10. In the face of financial difficulties experienced by Hurtigruten, the 2004 agreement was renegotiated (the Norwegian government stresses that during these renegotiations of the 2004 agreement, initiated by Hurtigruten, it became increasingly clear in the autumn of 2008 that the company faced severe financial difficulties and that there was a risk of non-performance of the public service obligation). The new agreement was concluded on 27 October 2008 (the "2008 agreement"). It contained three measures to expire with the main agreement on 31 December 2012. First, Hurtigruten was reimbursed a large part of the NOx tax[1] for 2007 and its contributions to the NOx fund for 2008 onwards. Second, it was granted general compensation of NOK 66 million for 2008 and onwards, provided that the company's profitability in connection with the service of general economic interest did not improve considerably, and on the condition that the general compensation would be necessary to ensure the coverage of costs related to the Norwegian State's acquisition of the service of general economic interest. Third, it was permitted

[1] The NOx tax system has the objective of encouraging undertakings to lower their NOx emissions and thereby reduce environmental pollution.

to take one of the 11 vessels out of service during the winter without any reduction in the remuneration for the services provided under the agreement.

11. By letter of 26 November 2008, the Norwegian authorities informed ESA about the renegotiation of the 2004 agreement.

12. On 29 June 2010, the Norwegian authorities initiated a tender procedure for the Bergen-Kirkenes route for a period of eight years from 1 January 2013 at the latest. Subsequently, the Norwegian authorities informed ESA that a new contract for the provision of the service covering the period 1 January 2012 to 31 December 2019 was signed with Hurtigruten on 13 April 2011.

13. By letter of 14 July 2010, ESA informed the Norwegian authorities that it had decided to open the formal investigation procedure laid down in Article 1(2) of Part I of Protocol 3 to the SCA ("Protocol 3 SCA") in respect of the additional payments to Hurtigruten in 2008.

14. The decision to initiate the formal investigation procedure (Decision COL 325/10/COL) was published in the Official Journal of the European Union and the EEA Supplement thereto.

15. By letter of 30 September 2010, the Norwegian authorities forwarded their comments to ESA. Additional emails were sent by the Norwegian authorities on 15 April 2011, 4 May 2011 and 6 May 2011.

16. On 29 June 2011, ESA adopted the contested decision.

The contested decision

Introduction

17. In the contested decision, ESA concluded that the three measures provided for in the 2008 agreement constituted State aid that was incompatible with the functioning of the EEA Agreement in so far as they constitute a form of over-compensation for public service, and ordered the recovery of the aid.

18. The three measures in question are described as follows in the contested decision:

1. reimbursement of 90% of the so-called NOx tax for 2007 and 90% of the contributions to the NOx Fund from January 2008 onwards for the remaining duration of the [2004] Agreement, i.e. until 31 December 2012;

2. a "general compensation" NOK 66 million was granted for 2008 due to the weak financial situation of Hurtigruten resulting from a general increase in costs for the service provided. A general compensation is provided for annually for the remaining duration of the contract, i.e. until 31 December 2012, provided the financial situation of the company related to the public service does not significantly improve; and

3. a reduction in the number of ships from 11 to 10 in the winter season (from 1 November to 31 March) until the [2004] Agreement expires, without reducing the remuneration for the service as foreseen under the provisions of the [2004] Agreement. This reduced service is intended to continue throughout the remaining duration of the [2004] Agreement, i.e. until 31 December 2012.

19. In the contested decision, ESA concluded that the three measures taken together must be assessed as an aid scheme as "they entail an additional remuneration mechanism in favour of Hurtigruten that extends its application from 2007 until the expiry of the contract, originally foreseen for 31 December 2012".

20. On page 20 of the contested decision under the heading "procedural requirements", section 2 of ESA's assessment, ESA noted that the aid was not notified as required by Article 1(3) of Part I of Protocol 3 SCA.

The existence of State aid

21. In the contested decision, ESA found that the measures in question involved, at least in part, public service compensation. As such, the measures constituted an advantage conferred on an undertaking which could not be justified by the private investor principle.

22. ESA considered that the scheme did not satisfy the criteria laid down by the Court of Justice of the European Union ("ECJ") in Case C-280/00 *Altmark* [2003] ECR I-7747 "which explicitly clarifies what can and cannot be considered as State aid within the realm of public service compensation".

23. In order to satisfy those criteria, ESA noted that the beneficiary had to be chosen in a public tender. Alternatively, the compensation could not exceed the costs of a well-run undertaking adequately equipped with the means to provide the public service. Moreover, this had to be read in the light of the requirement that the parameters for calculating the compensation payments must be established in advance in an objective and transparent manner.

24. ESA observed that Hurtigruten was chosen as a public service provider following a public procurement procedure in 2004 and concluded that the revision clause was part of the public tender procedure. However, on its assessment, the measures provided for in the 2008 agreement based on the revision clause were not covered by the original tender.

25. It rejected the argument of the Norwegian authorities that the measures did not entail any substantial amendment to the 2004 agreement and concluded that the State's remuneration in favour of Hurtigruten had been substantially increased, which, in principle, could have triggered a call for a new tender procedure.

26. On page 15 of the contested decision, ESA found that it "*does not necessarily hold that any extraordinary compensation granted under a renegotiation clause of a contract that has been put out to tender will fail to clear the fourth Altmark criterion and hence involve state aid. However, Article 8 [of the 2004 agreement] does not ... provide objective and transparent parameters on the basis of which the compensation in the form of the three measures was calculated in line with the requirement of the second Altmark criterion*", since it merely gave Hurtigruten the right to initiate renegotiations under certain conditions. Furthermore, according to ESA, the clause did not provide specific guidance on how extra compensation should be calculated. The application of the clause appeared to depend

largely on the discretion of the Norwegian authorities and the negotiating skills of the parties concerned.

27. In that regard, ESA noted that the Norwegian authorities did not present any parameters for the calculation of the compensation granted by the three measures, but made reference to the weak financial position of Hurtigruten.

28. On page 7 of the contested decision, ESA noted that "*[t]he Norwegian authorities maintain that the measures taken in October 2008 were emergency measures adopted to remedy the acute difficult economic situation of Hurtigruten in 2008, to ensure continuous service in the interim period until a new tendering procedure could be finalised, and in doing so, they acted like a rational market operator...*

...

Alternatively, in case the Authority were to find that the three measures do constitute state aid within the meaning of Article 61(1) of the EEA Agreement, the Norwegian authorities put forward that the measures constitute necessary compensation for a public service obligation in accordance with Article 59(2) of the EEA Agreement."

29. In order to substantiate its contention that, for the purposes of Article 59(2) EEA, Hurtigruten had not been excessively compensated for the provision of a public service, the Norwegian authorities provided ESA with consultants' reports, one commissioned from PWC and two from BDO Noraudit.

30. ESA referred to the three reports presented by the Norwegian authorities in the course of the proceedings prior to the adoption of the contested decision. According to ESA, those reports,[2] the PWC Report of 14 October 2008, the BDO Noraudit report of 23 March 2009 and the BDO Noraudit report of 27 September 2010, indicated that the three measures involved over-compensation – that is, the compensation was not limited to the increased cost of providing the public services – and did not clarify the parameters used to determine those costs.

[2] These reports are presented in detail on pp.7-9 of the contested decision.

31. As regards the fourth *Altmark* criterion, ESA observed that the Norwegian authorities did not provide any information to substantiate that the compensation was calculated on the basis of costs that a typical undertaking would have incurred.

32. As a result, on page 17 of the contested decision, ESA concluded that neither the second nor the fourth *Altmark* criterion was satisfied.

33. As regards the third *Altmark* criterion, which requires that compensation may not exceed the cost incurred in the discharge of the public service taking into account the revenues earned through provision of the service and a reasonable profit in that regard, ESA noted in the contested decision that the reports provided by the Norwegian authorities indicated that the three measures provided for in the 2008 agreement also served to compensate the costs of activities outside of the public service remit. The BDO Noraudit report of 27 September 2010 indicated that the measures also covered increased costs that did not reflect radical changes that could not reasonably have been foreseen within the meaning of Article 8 of the 2004 agreement.

34. Moreover, ESA noted that Hurtigruten did not implement separate accounts for the public service and commercial activities. It determined that the reports applied unrepresentative hypothetical costs and revenues where the real costs and revenues were known. Therefore, it concluded that the third *Altmark* criterion was not met.

35. Following its analysis of the *Altmark* criteria, ESA concluded in section 1.3.3.3 of the contested decision that, as three of the four *Altmark* criteria were not met and as only one of the criteria need not be satisfied for state compensation for the provision of a public service to constitute State aid, the three measures could not be held to not confer an advantage on Hurtigruten within the meaning of Article 61 EEA.

36. Finally, ESA found that the new agreement was a selective measure liable to distort competition and affect intra-EEA trade.

Compatibility of the State aid

37. In section 3 of the contested decision, "Compatibility of the aid", ESA made an assessment of the aid under Article 59(2) EEA (public service compensation) and Article 61(3)(c) EEA (restructuring, or "emergency" aid).

38. In section 3.3.1 of Part II of the contested decision, ESA held that "*[t]he Norwegian authorities have referred to the financial situation of Hurtigruten in 2008 and the imminent possibility that Hurtigruten would terminate the contract in order to avoid bankruptcy. According to the Norwegian authorities, these circumstances forced them to take emergency measures to ensure the continuation of the service. The Norwegian authorities have argued that the emergency measures may be regarded as legitimate in order to ensure the continuation of the service. However, they have not referred to an exemption provided for under Article 61(3) or any other provision of the EEA Agreement...*"

39. In its assessment of the public service compensation for the purposes of Article 59(2) EEA, ESA referred to the Maritime Cabotage Regulation,[3] ESA's Guidelines on aid to maritime transport,[4] and ESA's Guidelines for State aid in the form of public service compensation.[5]

40. In that regard, ESA concluded that the Hurtigruten Service provided under the 2004 agreement constitutes a service of general economic interest. Second, ESA concluded that Hurtigruten has been entrusted with the provision of that service. Consequently, two out of three requirements for public service compensation are fulfilled.

41. In the contested decision, ESA identified the third condition that had to be satisfied. This specifies that the amount of compensation must be granted in a transparent manner and be

[3] Article 4 of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), OJ 1992 L 364, p. 7.

[4] Section 9 of Part IV of the Guidelines of the EFTA Surveillance Authority on aid to maritime transport, published on ESA's website.

[5] Point 2 of Part VI of the Guidelines of the EFTA Surveillance Authority for state aid in the form of public service compensation, published on ESA's website.

proportionate inasmuch as it may not exceed what is necessary to cover the costs incurred in discharging the public service obligations including a reasonable profit.

42. In ESA's assessment, the 2008 agreement does not fulfil the third criterion, as the amount of compensation for the operating costs of the public service shows an inconsistent approach to fixed common costs, there is no separation of the accounts for the public service and other commercial activities, and the compensation is based on unrepresentative hypothetical costs and revenues where the real costs and revenues are known.

43. As for the possibility that the aid constitutes restructuring aid under Article 61(3)(c) EEA, ESA concluded in section 3.3 of the contested decision that the measures did not fulfil the necessary criteria for restructuring aid under the Rescue and Restructuring Guidelines,[6] mainly due to the lack of a credible restructuring plan at the time when the aid was granted. The documents provided by the Norwegian authorities did not meet the requirements necessary for a restructuring plan.

44. On the basis of the information provided to it by the Norwegian authorities, ESA concluded that, when granting the measures in 2008, Norway did not take restructuring into account but was concerned only with the coverage of additional costs linked to the provision of a public service obligation.

45. Articles 1 to 4 of the operative part of the contested decision read as follows:

Article 1

The three measures provided for in the Supplementary Agreement constitute state aid which is incompatible with the functioning of the EEA Agreement within the meaning of Article 61(1) of the EEA Agreement in so far as they constitute a form of over-compensation for public service.

[6] Rescue and Restructuring Guidelines of the EFTA Surveillance Authority.

Article 2

The Norwegian authorities shall take all necessary measures to recover from Hurtigruten the aid referred to in Article 1 and unlawfully made available to Hurtigruten.

Article 3

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 aid to be recovered shall include interest and compound interest from the date on which it was at the disposal of Hurtigruten until the date of its recovery. Interest shall be calculated on the basis of Article 9 in the EFTA Surveillance Authority Decision No 195/04/COL.

Article 4

By 30 August 2011, Norway shall inform the Authority of the total amount (principal and recovery interests) to be recovered from the beneficiary as well as of the measures planned or taken to recover the aid.

By 30 October 2011, Norway must have executed the Authority's decision and fully recovered the aid.

...

III PROCEDURE AND FORMS OF ORDER SOUGHT BY THE PARTIES

46. Case E-10/11 was registered at the Court on 6 September 2011, pursuant to an application by Hurtigruten brought under Article 36(2) SCA seeking annulment of the contested decision.

47. Case E-11/11 was also registered at the Court on 6 September 2011, pursuant to an application by Norway under Article 36(1) SCA seeking annulment of the contested decision.

48. By a decision of 10 February 2012 pursuant to Article 39 of the Rules of Procedure, and, having received observations from the parties, the Court joined the two cases for the purposes of the oral procedure and the final judgment.

49. ESA submitted a defence in Case E-10/11, registered at the Court on 12 December 2011. The reply from Hurtigruten was registered at the Court on 1 February 2012. The rejoinder from ESA was registered at the Court on 7 March 2012.

50. ESA also submitted a defence in Case E-11/11, registered at the Court on 12 December 2011. The reply from Norway was registered at the Court on 27 January 2012. The rejoinder from ESA was registered at the Court on 7 March 2012.

51. In Case E-10/11, Hurtigruten claims that the Court should:

(1) Annul the EFTA Surveillance Authority's Decision No 205/11/COL of 29 June 2011 on the Supplementary Agreement on the Hurtigruten Service;

(2) In the alternative, declare void Articles 2, 3 and 4 of the EFTA Surveillance Authority's Decision No 205/11/COL of 29 June 2011, to the extent that they order the recovery of the aid referred to in Article 1 of that Decision; and

(3) Order the EFTA Surveillance Authority to bear its own costs and to pay those incurred by Hurtigruten ASA.

52. In Case E-11/11, Norway claims that the Court should:

(1) Annul the EFTA Surveillance Authority's Decision No 205/11/COL of 29 June 2011; and

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

53. ESA contends that the Court should:

(i) dismiss the applications as unfounded;

(ii) order the Applicants to pay the costs.

54. The Commission submits that the applications should be dismissed as unfounded.

IV LEGAL CONTEXT

55. Article 59 EEA reads as follows:

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

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

...

56. Article 61 EEA reads as follows:

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

...

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.*

...

57. Article 16 SCA reads as follows:

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

58. Article 10(3) of Part II of Protocol 3 SCA reads as follows:

Where, despite a reminder pursuant to Article 5(2), the EFTA State concerned does not provide the information requested within the period prescribed by [ESA], or where it provides incomplete information, [ESA] shall by decision require the information to be provided (hereinafter referred to as an 'information injunction'). The decision shall specify what information is required and prescribe an appropriate period within which it is to be supplied.

59. Article 13(1) of Part II of Protocol 3 SCA reads as follows:

The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7. If an EFTA State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.

V SUMMARY OF THE PLEAS IN LAW AND ARGUMENTS

Introduction to the pleas in law

60. The applicants have put forward similar pleas in law. In order to present the arguments in the most efficient way, for the purposes of this report for the hearing, the Court will rearrange them slightly.

61. First, this report will present the pleas concerning the application of Article 59(2) EEA and ensuring the operation of a service of general economic interest (**the first plea of Hurtigruten**).

62. Second, this report will present the pleas which concern ESA's application of the *Altmark* criteria in the contested decision (**the third plea of Hurtigruten and the first plea of Norway**).

63. Third, this report will present the pleas on the compensation level and the requirements of Article 59(2) EEA (**second plea of Hurtigruten and the second plea of Norway**).

64. Fourth, the report will present the pleas on the compatibility of the aid in the light of Article 61(3) EEA (**the fourth plea of Hurtigruten**).

65. Finally, the report will present the pleas of the parties on procedural issues, such as the obligation to state reasons (**the fifth plea of Hurtigruten and the third plea of Norway**).

Article 59(2) EEA and ensuring the operation of a service of general economic interest (the first plea of Hurtigruten)

66. Hurtigruten claims that ESA committed a manifest error of law and/or fact in relation to the possibility open to the Norwegian authorities to ensure the uninterrupted provision of a service of general economic interest within the meaning of Article 59(2) EEA.[7]

67. Its main argument under the first plea is that ESA erred in concluding that the three measures provided for in the 2008 agreement cannot constitute public service compensation compatible with the functioning of the EEA Agreement on the basis of Article 59 EEA.

[7] Reference is made to page 7 of the contested decision and section 3.3.1 in Part II and a letter from the Norwegian authorities to ESA of 4 March 2010. Hurtigruten maintains that at the latest by March 2010 the Norwegian authorities invoked the provision of a service of general economic interest within the meaning of Article 59(2) EEA as justifying the compensation paid to Hurtigruten were ESA to classify this payment as aid incompatible with the EEA Agreement pursuant to Article 61(1) EEA .

68. Hurtigruten holds that ESA erred in the contested decision when it found that the notion of State aid in Article 61(1) EEA and the notion of compatible aid enshrined in Article 59(2) EEA have exactly the same scope. The choice of procurement model (tender or otherwise) has no bearing on the notion and scope of compatible State aid pursuant to Article 59(2) EEA. Furthermore, a procedural procurement "choice" (in this case a tender procedure previously imposed by ESA) cannot in itself limit what would otherwise have been considered as compatible State aid under Article 59(2) EEA where the public service in question had not been tendered.

69. Hurtigruten further submit that the correct question to be formulated under Article 59(2) EEA is whether the measure was necessary – in compensation level and time – for maintaining the public service.

70. Hurtigruten maintains that, under Article 59(2) EEA, a government must be entitled to award additional compensation to an undertaking entrusted with a service of general economic interest if this additional compensation is necessary in order to ensure the continued operation of this service. The fact that Hurtigruten was under an imminent threat of bankruptcy justifies the additional compensation provided for under the 2008 supplementary agreement.

71. Hurtigruten refers to the Commission decision *NorthLink & CalMac*,[8] and submits that ESA should not have questioned the assessment that Hurtigruten was in an acute situation in 2008 and depended on reaching an agreement to avoid bankruptcy. It notes that the Commission decision did not question the Scottish Government's assessment regarding the risk that the entrusted undertaking might become insolvent and the need to maintain the continued operation of the service of general economic interest and, thus, respected the State's discretion in the definition of the service.

[8] Reference is made to Commission Decision 2011/98/EC of 28 October 2009 on the *State aid to CalMac and NorthLink*, Case C 16/08 (ex NN 105/05 and NN 35/07), OJ 2011 L 45, p. 33.

72. Hurtigruten contends that the Norwegian authorities should be entitled to the same discretion in their assessment of the existence and significance of an emergency situation where additional funding is required to ensure the continued operation of a service of general economic interest as they enjoy in the definition of such a service.[9]

73. Further, according to Hurtigruten, ESA failed to apply two criteria concerning over-compensation and anti-competitive behaviour set out by the Commission in its *NorthLink & CalMac* decision. More generally, ESA failed to respect the discretion enjoyed by EEA States in the assessment of the existence and significance of an emergency situation.[10]

74. In its reply, Hurtigruten argues that the only substantive objection ESA seemed to have is that the time deemed necessary by the Norwegian authorities to launch a (re)tender for the public service was too long. Hurtigruten notes that ESA seems to disregard the factual point that an immediate retender would merely provide a *carte blanche* to Hurtigruten, as Hurtigruten in such a scenario would be the only company to submit an offer, most likely resulting in a more expensive public service than necessary. Furthermore, Hurtigruten notes that the Norwegian authorities in such a scenario would have failed to honour its obligation to assess the scope of the public service as required by Article 59(2) EEA itself and as held in the SGEI Guidelines and by the ECJ.[11] Hurtigruten refers extensively to ESA's 2001 decision on compensation for maritime transport services.[12] This decision shows, *inter alia*, that the requirement of an "immediate tender" in ESA's defence is manifestly erroneous as ESA in that decision not only accepted a market testing of the public service but

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9 Reference is made to Case T-289/03 *British United Provident Association Ltd (BUPA) and Others* v *Commission* [2008] ECR II-81, paragraph 220.

10 Ibid.

11 Reference is made to Case C-205/99 *Analir and others* [2001] ECR I-1271, paragraphs 34 and 68, and point 10 of the public service compensation Guidelines of the EFTA Surveillance Authority, cited above.

12 Reference is made to Decision of the EFTA Surveillance Authority 417/01/COL of 19 December 2001 on compensation for maritime transport services under the Hurtigruten Agreement.

indeed even imposed an obligation to market test the service. Hurtigruten argues that the time taken in the present case for the retendering of the contract, due regard taken to the fact that ESA did not issue any objections at the time, was appropriate to the effect that the three measures of the 2008 agreement are within the scope of Article 59(2) EEA. In support of this argument, Hurtigruten requests permission to lodge a copy of the Norwegian Government's notification of 11 November 2001 and a copy of the 2001 agreement entrusting the Hurtigruten companies with the provision of services of general economic interest.

75. Finally, in its reply, Hurtigruten rejects the general proposition made by ESA that the present case would have the precedent effect that a State can choose to tender a public service, but at a later stage freely increase the compensation pursuant to Article 59(2) EEA. Generally, an increase in compensation would be necessary for maintaining the public service, and it is not disputed that in such a regular scenario non party can rely on Article 59(2) EEA. In the present case, however, the measures of the 2008 agreement were strictly necessary for maintaining the public service as that concept is enshrined in Article 59(2) EEA.

76. ESA considers Hurtigruten's arguments to be flawed as the 2004 agreement was concluded as the result of a tender. In those circumstances, it was understood that the market had put a correct price on the service. It later emerged that the price was insufficient to cover the costs. When the State decided to intervene, the market no longer determined the price of the Bergen-Kirkenes service. In that connection, ESA observes that there are two ways to determine the cost of a public service. The first is to have a public tender (which was the case here). The second is to calculate the public service compensation in line with Article 59 EEA (this was not the case here).

77. ESA submits that Norway and Hurtigruten in effect submit that a State can choose to tender a public service (thereby sheltering it from State aid scrutiny), but at a later stage freely increase the

compensation by using Article 59 EEA, ESA submits that this approach, if correctly understood, is compatible neither with the tender rules nor Article 59(2) EEA. Accepting such an approach would allow an undertaking to offer a very low bid for a tender to win it and, at a later stage, to be additionally compensated on the basis of Article 59 EEA. In principle, ESA does not oppose the provision of support to maintain a service (or rescue the provider), but maintains that a newly tendered contract should be sought immediately. Consequently, while awaiting the conclusion of the new tender process, aid measures for a temporary period should be notified to ESA and approval requested.

78. ESA argues that it was not entitled to recognise possible losses incurred by Hurtigruten in the past, as the level of compensation awarded under the 2004 agreement to cover the public service during that period had been contractually agreed following an open tender procedure.[13] It considers this approach to be supported by *Combus*[14] in which underbidding during the public tender led the Commission to take the view that the undertaking received State aid.

79. ESA submits that, on its assessment, the 2008 agreement involved increased compensation that went far beyond payments agreed under the tender procedure. First, the costs covered did not relate to radical and unforeseeable increase in costs. Second, whereas the tendered (2004) agreement concerned the payment for the provision of a public service, the 2008 agreement concerned Hurtigruten's activities more generally, effectively including its commercial operations.

80. ESA contends that generally accepted cost accounting principles require an allocation model to be objective and transparent (thereby permitting the model to be verified and avoiding any abuse of discretion). This "objectivity criterion" requires the allocation model to have unbiased principles by which it

[13] Reference is made to Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197 and Case T-157/01 *Danske Busvognmænd* v *Commission* (*Combus*) [2004] ECR II-917.

[14] *Combus*, cited above.

is determined which costs are allocated to each activity. The "transparency criterion" requires the model to show why the common costs have been allocated in a particular manner.

81. ESA claims that it was never been presented with an appropriate cost allocation model of that kind during the administrative procedure. The Norwegian authorities never provided figures showing the costs actually incurred by Hurtigruten in providing the public service. This was an obstacle for ESA in assessing the extent to which the 2008 agreement over-compensated for Hurtigruten's costs in relation to the public service. The absence of separate accounts also complicated ESA's task in assessing whether cross-subsidisation had taken place.

82. ESA refers to the four consultants' reports, the PWC report of 14 October 2008, the BDO Noraudit report of 23 March 2009, the BDO Noraudit report of 27 September 2010 (hypothetical minimum fleet model) and the BDO Noraudit of 16 August 2011 (the passenger kilometres model). It asserts that the different cost allocation models used in the reports show that no adequate cost allocation model had been submitted by the Norwegian authorities before it adopted the contested decision.

83. Inasmuch as the notion of "necessity" is relevant to the assessment under Article 59(2) EEA, ESA submits that the concept is not unlimited and may not be abused. In that connection, ESA refers to the Guidelines and notes that it is not enough that the compensation is necessary. Rather, it may not exceed what is "necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations".[15] Contrary to the argument advanced by Hurtigruten, the test is not whether the compensation was necessary to prevent the bankruptcy of that undertaking.

84. ESA stresses that the 2004 agreement had been tendered. The necessary compensation to cover the costs had been set by the

[15] Reference is made to point 13 of the public service compensation Guidelines of the EFTA Surveillance Authority, cited above.

market. On the other hand, this did not exclude the possibility that unforeseen and radical increases in cost might require additional compensation to cover the operator's costs in providing the public service. However, it has not been shown that the three measures provided for in the 2008 agreement were necessary in that regard. The Norwegian authorities could have acted differently. They could have contacted ESA, notified aid measures for a temporary period and immediately arranged for a new tender procedure as in *NorthLink & CalMac*.

85. ESA considers it necessary to distinguish the facts of the *NorthLink & CalMac* decision from those of the present case. First, in the Scottish case, there was an urgent need to rescue the service, not the operator. Second, those measures were precise, structured and audited. Moreover, the additional compensation was handled in a way that allowed any impact on the market to be measured by the Commission, to be kept to a strict minimum and the service adequately ensured in the short term. In comparison, the manner in which the Norwegian authorities increased Hurtigruten's compensation in the present case simply did not allow ESA to exercise the relevant control over the State aid.

86. As for the arguments on respect for the State's margin of discretion, ESA refers to a draft Commission Communication concerning public service compensation.[16] It notes that there is a wide margin of discretion for States to define public service obligations, subject to verification by ESA whether the State has made a manifest error in defining the service as a service of general economic interest and whether the service involves State aid or not. In this case, ESA respected the Norwegian authorities' discretion to define the service on the Bergen-Kirkenes route as a public service. However, according to ESA, this discretion cannot be extended to permit the State to grant incompatible State aid on the basis that the operator faces bankruptcy.

[16] Reference is made to a draft communication, now adopted as Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ 2012 C 8, p. 4. In addition, ESA refers to the Commission Communication on services of general interest in Europe, OJ 2001 C 17, p. 4.

87. As for an assessment of possible anti-competitive behaviour, ESA submits that there was no requirement to analyse Hurtigruten's activities in this regard. In any event, Hurtigruten would have failed such a test since it was over-compensated.

88. In the rejoinder, ESA claims that the documents from 2001 referred to by Hurtigruten in its reply should not be admitted as they have been introduced at too late a stage in the proceedings.[17]

89. ESA adds that, in any event, the arguments relating to the 2001 decision are irrelevant.

Application of the Altmark criteria by ESA in the contested decision (the third plea of Hurtigruten and the first plea of Norway)

90. Hurtigruten and Norway submit that the three measures provided for in the 2008 agreement satisfied all of the Altmark criteria.

91. In contrast, ESA, supported by the Commission, submits that the contested decision shows that the three measures do not satisfy the second, third and fourth *Altmark* criteria.

92. Hurtigruten submits that the renegotiation of the 2004 agreement satisfies the *Altmark* criteria given that the renegotiation clause was part of the initial tender and was published in the course of the tender procedure.

93. Hurtigruten and Norway assert that the approach used in the contested decision is manifestly wrong. If ESA's position were to be applied, it is argued that hardship provisions in public/private contracts can no longer be interpreted in accordance with general commercial law, including UNIDROIT Principles of International Commercial Contracts and Principles of European Contract Law, with the view of adapting a contract to restore its equilibrium when the conditions of hardship are met. On this point the position of ESA would fundamentally affect almost all public/private contracts within the EEA as most contracts would have one or more hardship provisions. On procedure, if ESA's position

[17] Reference is made to Annex C.12 in the reply.

were to be applied, when a hardship provision is invoked in a public/private contractual relationship that would automatically render it necessary with a notification to the Commission or ESA. Furthermore, the position of a commercial operator in such a scenario would be entirely at the discretionary mercy of the public authorities and the Commission or ESA with no possibility for the commercial operator to affect its own position in the market place or rights under a contractual regime.

94. Moreover, Hurtigruten and Norway assert that, under Norwegian law, the 2004 agreement can be renegotiated either on the basis of the renegotiation clause in the agreement itself or on the basis of section 36 of the Norwegian Contract Act. The question is whether it is possible to include a renegotiation clause intended to restore a balance to the contract without infringing the second *Altmark* criterion.

95. Hurtigruten refer to the practice of the Commission which has accepted price adjustments for "unforeseeable costs" in public service contracts. It submits that the unforeseen introduction of the NOx tax in 2007 should be treated as such an unforeseen event and that, consequently, recovery should not be ordered.

96. Hurtigruten submits that ESA has made a manifest error of assessment in the application of Article 61(1) EEA in concluding that the renegotiation clause does not meet the *Altmark* criteria.

97. Finally, Hurtigruten refers to the PWC reports of 27 September 2007 and 14 October 2008. These reports formed the basis for the conclusion that the Norwegian authorities could pay additional compensation, following renegotiations under Article 8 of the 2004 agreement, without overcompensating Hurtigruten in breach of the *Altmark* criteria. Hurtigruten submits that this model is within the scope of the *Altmark* criteria, and, consequently, that ESA has made a manifest error of law or assessment in relation to Article 61(1) EEA.

98. Norway submits that ESA committed a manifest error of law and/or assessment in finding that the three measures in question constitute State aid within the meaning of Article 61(1) EEA. It

maintains, as it has throughout the administrative procedure, that Hurtigruten has not received an advantage which other undertakings would not also have received under the same circumstances. Moreover, the 2008 agreement fulfils the *Altmark* criteria.

99. Norway refers to section 1.3.3.1 of the contested decision and contests the findings of ESA that the 2008 agreement was not covered by the original tender. In fact, the renegotiation clause was included in the tender documents. The tendering companies submitted a common offer and later merged into one single company. Therefore, it is difficult to see how the three measures provided for in the 2008 agreement could alter the result of the tender process.

100. According to Norway, the 2008 agreement did not change the economic balance of the contract in favour of Hurtigruten but restored the economic balance of the contract.

101. Norway refers to Articles 6.1 and 6.2 of the 2004 agreement and submits that ESA erred in assessing the second *Altmark* criterion against Article 8 of the 2004 agreement (the renegotiation clause) alone and not against the compensation mechanism as a whole, in which the renegotiation clause only represents one of several elements. Norway submits also that ESA erred in failing to recognise that Article 8 of the 2004 agreement, even when taken on its own merit, is consistent with other standard hardship clauses, and that the contested measures are within the scope of that clause. Moreover, ESA erred in adopting a stricter approach towards hardship clauses than that taken by the Commission in public procurement cases.

102. The assertion of ESA that Norway has not shown that the "efficiency" criterion has been satisfied is unsubstantiated and unsupported by the relevant facts. In assessing the renegotiations, it is important to remember that the undertakings entrusted with a public service obligation are not allowed to make more than a reasonable profit. The absence of a possibility to make more than a reasonable profit means that the risks involved with the contract must be reduced. Otherwise, undertakings contemplating the

provision of public services would lack adequate incentives in comparison with those inherent in the provision of commercial services under market conditions. A renegotiation clause in public service contracts is common practice.

103. Norway refers to ESA's demand for "objective and transparent parameters" mentioned in section 1.3.3.1 on page 15 of the contested decision. It interprets ESA's analysis to imply that the *Altmark* criteria cannot be fulfilled unless a renegotiation clause includes objective and transparent parameters on the basis of which extraordinary compensation is calculated. Norway rejects that approach as it would prohibit all renegotiation clauses in public service contracts, which are included, as a rule, to regulate unpredictable events impossible to establish in advance. The very nature of such events means they are impossible to establish in advance in an objective and transparent manner to the extent that ESA appears to require.

104. Instead, the relevant test must be whether payments granted on the basis of the renegotiation clause do not go beyond the actual costs incurred in providing the public service, including a reasonable profit. If this is the case and the events do not relate to the efficiency of the operator, the *Altmark* criteria are satisfied. Norway refers to the Commission's decision *Southern Moravia* and the definition of unforeseen costs in that decision in order to substantiate its contention that the renegotiation clause establishes specific conditions which must be satisfied in order to trigger the right to renegotiations.[18] In the present case, those specified situations are independent of Hurtigruten's management or efficiency. They concern external factors over which the management of Hurtigruten has no influence.

105. Norway submits that the renegotiation clause allows for compensation only in relation to the demonstrable changes in cost which triggered the renegotiation rights, with the aim of

[18] Reference is made to Commission Decision of 26 November 2008 on State aid C 3/08 (ex NN 102/05) – Czech Republic concerning public service compensations for *Southern Moravia Bus Companies* (notified under document number C(2008) 7032), OJ 2009 L 97, p. 14.

restoring the contractual balance in relation to these factors. The clause cannot be interpreted as according the contractor the right to be compensated for factors completely unconnected with the conditions which triggered the right. In its view, the payments made under the three measures at issue in the present case are limited to the actual increase in costs. This is corroborated by *ex post* assessment.

106. In its reply, Norway underlines that Article 8 of the 2004 agreement must be interpreted in the light of applicable Norwegian law, since it falls under Norwegian jurisdiction. In that regard, Norway also refers to the UNIDROIT Principles of International Commercial Contracts 2010, the Principles of European Contract Law (PECL), and section 36 of the Norwegian Contract Act, which allows for renegotiations of contracts. Norway also refers to the draft directive on procurement by entities operating in water, energy, transport and postal sectors, in particular Article 82.[19]

107. Norway claims that the *Altmark* criteria are fulfilled. The renegotiation clause takes due account of the interests of the contracting parties to maintain economic equilibrium even in the case of unforeseen events. It also ensures that any additional compensation is granted in a transparent and objective manner.

108. Norway submits that the conclusion that the *Altmark* criteria are fulfilled applies in particular to the NOx tax/NOx fund reimbursements, since the increased costs due to these NOx charges is an objectively identifiable fact. Should the compensation under the "general compensation" and capacity reduction measures be found to exceed the corresponding actual costs, Norway submits that a different conclusion must be drawn as regards the NOx tax/NOx fund reimbursements.

109. ESA shares the view that Article 8 of the 2004 agreement is a renegotiation clause which can be invoked under two specific

[19] Reference is made to the Proposal for a Directive of the European Parliament and the of the Council on procurement by entities operating in the water, energy, transport and postal services sectors, COM(2011) 895 final.

circumstances: official acts entailing changes of costs and radical and unforeseeable changes in costs. However, the clause does not contain any parameters governing increases in compensation. Therefore, according to ESA, the clause does not satisfy the requirements of objectivity and transparency. In this regard, ESA contends that Norway appears to have misunderstood the *Altmark* test. What is crucial is not whether the right to renegotiate was triggered but whether the clause adequately specified the necessary parameters. A vaguely worded clause of that kind cannot be used to justify an increase in compensation for a public service and shelter it from state aid control in accordance with the *Altmark* criteria.

110. ESA submits that the contested decision demonstrates that the three measures do not satisfy the second, third and fourth *Altmark* criteria.

The second Altmark criterion (compensation calculated on the basis of objective and transparent parameters)

111. The fundamental position of ESA regarding the second *Altmark* criterion is that, in the absence of necessary parameters, guidance or limitations to be applied to determine future increases in compensation, Article 8 of the 2004 agreement did not satisfy the requirements of objectivity and transparency since the parameter on the basis of which compensation is calculated must be established in advance in an objective and transparent manner. In contrast, Article 8 of the 2004 agreement has been applied in a discretionary manner.

112. ESA expands on that position with the following arguments. First, the necessary parameters do not exist. Second, ESA refutes any argument that its assessment of Article 8 of the 2004 agreement must be viewed as a prohibition on renegotiation provisions in public service agreements. Third, any considerations relating to the level of risk that bidders have to calculate into their bids or to the efficient utilisation of community resources do not challenge this assessment. They are simply irrelevant. Fourth, ESA's view on the matter is supported by the evidence submitted

by the Norwegian authorities. Namely, the payments appear to have been determined in light of the negotiating strengths of the parties.

113. ESA submits that the *Southern Moravia* decision has no bearing on this assessment, since it concerned the third *Altmark* criterion. As for the second *Altmark* criterion, the Commission concluded in that case that the price had been established in advance on the basis of statistical data before the selection of operators took place. In contrast, the situation in the present case indicates that the second *Altmark* criterion has not been satisfied.

The third Altmark criterion (compensation must not exceed cost)

114. ESA disagrees with the approach taken by Hurtigruten. Whereas Hurtigruten appears to rely on a parallel between the *Southern Moravia* decision and the consultants' reports prepared between 2007 and 2011 to prove that the 2008 agreement related to cost increases falling within Article 8 of the 2004 agreement, ESA takes a different view.

115. ESA distinguishes the present case from the facts of the *Southern Moravia* decision and notes in particular that the compensation in question was not paid on the basis of prior established parameters or on the basis of proven costs. In the contested decision, ESA found that the lack of separate accounts made it impossible to calculate the losses Hurtigruten alleged were attributable to the public service. The financial reports show that the 2008 agreement went beyond compensation for the services of general economic interest. ESA avers that it has received only hypothetical numbers for the costs and revenue and contends that it has not been shown that Hurtigruten was not over-compensated. In any event, ESA was not in a position to conclude that the payments under the three measures provided for in the 2008 agreement did not exceed actual costs incurred and, consequently, could not find that the third *Altmark* criterion had been satisfied.

The fourth Altmark criterion (the need for a public procurement procedure)

116. ESA contends that the compensation awarded under the 2008 agreement covered more than the cost and prices of input factors which according to the applicants were covered by the original tender on the basis of Article 8 of the 2004 agreement. It follows from the contested decision that the Norwegian authorities could not prove that the compensation covered only such costs. Furthermore, the increase in compensation was not insignificant. ESA contests the purpose of the 2008 agreement. In its view, the retroactive re-establishment of an economic equilibrium or restoration of the balance of a tendered contract defeats the very purpose of the tender itself as it is no longer the market that places a value on the services tendered.

117. Even if it were to be found that the 2008 agreement re-established an economic equilibrium, ESA maintains that the payments also covered costs linked to the commercial activities of Hurtigruten. Finally, ESA observes that the Norwegian authorities have not submitted any information to substantiate that the "efficiency" requirement inherent in the fourth *Altmark* criterion has been satisfied.

118. Contrary to the view taken by Norway, the fact that only one bidder submitted an offer to the tender has no bearing on whether the increased price paid for the service resulting from exercising an open-ended renegotiation clause is covered by the original tender. Moreover, according to ESA, the argument that no other operators would have been interested in bidding as the economic balance of the contract was restored, and not modified, does not hold. No operator that was interested in 2004 could have known that, in 2008, such a restoration would occur.

119. In the view of ESA, Norway's alternative argument in relation to the fourth *Altmark* criterion must also be dismissed. It appears to allege that as regards the "efficiency" criterion, the contested decision is unsubstantiated and unsupported by the facts. ESA counters that is for Norway to demonstrate that this criterion has been satisfied. However, in its view, the Norwegian

authorities were unable to provide information demonstrating that Hurtigruten was an efficient operator of the public service.

The NOx tax

120. ESA considers the NOx tax to be the clearest indication that the measures involved State aid. Hurtigruten was, in effect, largely exempted from having to pay this tax by virtue of compensation allocated to it under the State budget. In support of that view, it refers to a letter of 8 May 2007 in which Hurtigruten claimed that it was impossible to determine how much of the NOx tax fell on its commercial operations and which demanded full reimbursement for its NOx tax payments. Further evidence can be found in a letter from the Norwegian authorities of 16 August 2011 concerning recovery of the State aid which shows that between 58% and 62% of capacity costs were attributable to the public service activities of Hurtigruten. This is considerably lower than the 90% reimbursement of the NOx tax. ESA asserts that it was therefore correct in its finding of over-compensation. Finally, ESA refers to tables set out in reports submitted by Norway to show that the NOx compensation granted exceeded the public service obligation share of Hurtigruten's NOx costs.

121. The Commission considers that the contested decision is correct in its finding that the second, third and fourth *Altmark* criteria were not fulfilled in the present case.

Second criterion

122. The Commission takes the view that Article 8 of the 2004 agreement cannot be regarded as specifying in advance, in an objective and transparent manner, the parameters on the basis of which compensation granted to Hurtigruten was calculated. In view of the broad wording of Article 8 of the 2004 agreement, it is reasonable to conclude that the specific application of this provision appears largely to depend on the discretion of the national authorities.

123. According to the Commission, it is clear that the renegotiation clause falls short of the *Altmark* criteria. Open-ended

renegotiation clauses in public service contracts are inadequate to satisfy the second *Altmark* criterion. This assessment is confirmed by the *Southern Moravia* and *NorthLink & CalMac* decisions. In the present case, Article 8 of the 2004 agreement does not even oblige the parties to resort to an arbitration procedure. It only requires disclosure of all the necessary documentation.

Third criterion

124. The Commission points out that its practice emphasises the need to rely on "actual costs" rather than simple estimations of costs. In this connection, it notes that, whatever the accuracy of the models discussed in the present case, it is common ground that they are estimates of the costs incurred by Hurtigruten. For this reason alone, the additional compensation granted to Hurtigruten cannot be regarded as respecting the third *Altmark* criterion. Moreover, it should be noted that Hurtigruten did not keep separate accounts.

125. The Commission emphasises that, under EU law, the Member States must cooperate with the Commission. This is even more important in the context of services of general economic interest, as only the Member State which alleges that the criteria are fulfilled in respect of a given measure that would otherwise constitute State aid is in possession of the information necessary to show that the relevant criteria have indeed been respected. In any event, according to the Commission, ESA was clearly in a position to conclude that the third *Altmark* criterion was not met in respect of the NOx tax measure, since it provided for reimbursement of 90% of the tax burden.

Fourth criterion

126. The Commission considers Article 8 of the 2004 agreement to be an open-ended renegotiation clause which leaves the parties with unchecked discretion to modify the level of the compensation granted under the public service contract. The provision does not establish an adjustment mechanism for verifiable increases in costs which is transparent and known in advance. Since the

renegotiations resulted in a substantial increase in the level of compensation provided for in the original agreement, these may have infringed the principles of transparency and equal treatment between tenders.

127. In the alternative, the Commission contends that the burden of proof must lie with the State which alleges that the level of compensation has been determined on the basis of the costs that a typical undertaking, well-run and adequately provided with the relevant means, would have incurred.

The compensation level and Article 59(2) EEA (the second plea of Hurtigruten and the second plea of Norway)

128. By its present plea, Hurtigruten submits that the wording of the contested decision is ambiguous, that it is impossible to determine the "yardstick" used to measure any potential over-compensation and that the legal basis is also unclear.

129. Hurtigruten's principal argument is that ESA's substantive assessment under Article 59(2) EEA is incorrect on a conceptual level. The decisive test as set out in Article 59(2) EEA should be whether the additional contributions were necessary in ensuring the performance of the public service. That should be determined by assessing whether Hurtigruten was over-compensated for the public service during the relevant years when all costs and revenues have been appropriately allocated between public and commercial operations, in particular when there was an immediate and realistic risk of non-performance of the service. The annual results related to the service of general economic interest should be decisive.

130. Hurtigruten's alternative argument is that ESA's assessment under Article 59(2) EEA is incorrect on a specific level. Even if overcompensation should be assessed in relation to cost increases rather than on the overall yearly result related to the public service (as ESA does), the reasoning in the contested decision is fundamentally flawed for three reasons: (i) Article 59(2) EEA does not require an assessment of each and every

cost element separately. (ii) ESA accepts only those parts of payments under the 2008 agreement that are compensation for costs beyond radical and unforeseen costs. The question of over-compensation under Article 59(2) EEA cannot be equaled with the right to launch renegotiations.

131. In its challenge to ESA's notion of over-compensation, Hurtigruten draws attention to Article 1 of the contested decision ("in so far as [the measures] constitute a form of over-compensation") and page 24 of the contested decision ("the Authority cannot conclude that the three measures do not involve any over-compensation").

132. Hurtigruten submits that for the purposes of assessment of any possible over-compensation the correct yardstick must be the total costs (and a reasonable profit) involved the provision of the service of general economic interest balanced against the total revenues and compensation for that service. In its view, any form or amount of state compensation is justifiable as compatible aid under Article 59(2) EEA if such compensation is necessary in order not to obstruct an undertaking's performance of the service of general economic interest.

133. According to Hurtigruten, the relevant test in the present case is whether the total revenues it obtains related to the provision of the service of general economic interest, including the revenues from the state under the 2004 agreement, the payments under the 2008 agreement and the revenues from the transport of passengers or goods in performing the service of general economic interest, are higher than necessary to cover the costs and a reasonable profit in performing the service specified under the 2004 agreement.

134. In that regard, Hurtigruten refers to ESA's State Aid Guidelines Part IV, Chapter 1, which state in paragraph 13 that compensation may not exceed "the costs incurred in discharging the public service obligations". Hurtigruten also refers the judgment of the General Court in *FFSA*.[20] Hurtigruten notes that in

[20] Reference is made to Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229.

the decisions following the Commission's 2001 Communication, the Commission essentially limited its assessment of the necessity/proportionality of the aid to the verification that there was no over-compensation in relation to the costs of performing the service of general economic interest.[21]

135. Hurtigruten refers to two decisions in particular, the restructuring aid given to *SNCM* and the decision concerning *NorthLink & CalMac*. In the first decision, the Commission assessed the proportionality of the aid by examining "whether the amount of the subsidies awarded to *SNCM* in the context of its public service obligations for maritime services to Corsica matches the excess costs borne by *SNCM* to satisfy the fundamental requirements of the public service contract".[22]

136. Hurtigruten claims that *NorthLink & CalMac* decision confirms that Hurtigruten may receive additional compensation where the original compensation is insufficient to cover the costs. In that decision, the Commission noted that the compensation awarded altered the nature and extent of the initial tender, but stressed later in the decision that "the compatibility assessment is limited to checking for over-compensation and possible anti-competitive behaviour". In contrast, the contested decision does not even refer to the *NorthLink & CalMac* decision and provides far less any analysis thereof in order to distinguish the cases and justify another conclusion.

Cost allocation

137. Hurtigruten observes that for the comparison of total costs and revenues relating to the provision of the service of general economic interest, a proper allocation of costs and revenues is needed. In that regard, Hurtigruten agrees in principle with the three points concerning the calculation of public service compensation specified by ESA on page 29 of the contested

[21] Reference is made to the 2001 Commission Communication on Services of General Interest, cited above.

[22] Reference is made to the Commission Decision in Case C 58/2002, *Aide à la restructuration de la SNCM*, OJ 2009 L 225, p. 180. A challenge to this decision is pending before the General Court in Case T-565/08 *Corsica Ferries France* v *Commission*.

decision and avers that the cost allocation submitted to ESA in the course of the proceedings complied with these requirements. More specifically, it asserts that:

i) *relying on the costs of the smallest of the eleven ships covered by the 2004 agreement, which have exactly the minimum capacity requested in the 2004 agreement results in a proper allocation of costs for the public service and the activities outside the public service remit;*

ii) *the allocation model results in compensation for the service of general economic interest for merely a proportionate share of the fixed costs relating to these sailings and vessels; and*

iii) *the costs relied upon are actual and representative for the costs of the provision of the service of general economic interest.*

138. Hurtigruten also refers to page 8 and page 23, first paragraph, of the contested decision and asserts that ESA committed a manifest error of assessment in relation to the reports submitted by the Norwegian authorities, that a proper method for the allocation of fixed costs has been relied upon in all the studies to which reference has been made and that the documentation demonstrates that there is no over-compensation incompatible with Article 59(2) EEA or even Article 61(1) EEA.

139. Hurtigruten makes the following observations on the reports from the consulting firms.

140. The contested decision fails to note that the PWC report was updated to 30 June 2008 in a second report of 14 October 2008 submitted when requesting additional compensation.[23] ESA's assessment also fails to reflect the fact that the purpose of the first PWC report was limited to analysing the cost increases which were considered relevant under Article 8 of the 2004 agreement, and which could justify renegotiation within the combined terms of that provision and the *Altmark* criteria. ESA also fails to note that the three methods used in the PWC report are merely three approaches to analysing how costs may be duly allocated.

[23] Reference is made to the PWC Report of 14 October 2008.

It is wrong simply to compare the first and second methods resulting in an incorrect presentation of the facts on page 8 of the contested decision. It is simply not correct that "fixed costs common to the public service and the commercial activities tend to be allocated to the public service side".

141. In relation to the first BDO report,[24] the contested decision fails to explain that its limited scope reflects the fact that the report is drafted as answer to questions in this connection from ESA. Both the PWC report and the first BDO report make allocations of common costs based on capacity, on the definition of the service of general economic interest in terms of the capacity required under the 2004 agreement as a minimum capacity, on the actual costs of the vessel applied using such minimum capacity and with additional restrictions on the cost allocated to the service of general economic interest based on assessment of individual cost groups.

142. In relation the main BDO report,[25] Hurtigruten observes that the contested decision fails to discuss this report. It was submitted to ESA by the Norwegian authorities in a letter of 30 September 2010. The report explains that no over-compensation had taken place. The report includes both a thorough justification for the method applied and a calculation under this method based on the actual accounts of Hurtigruten for 2008. The conclusion of the report is that Hurtigruten, even after having received additional compensation under the supplementary agreement, recorded a deficit in the operation of the service of general economic interest.

143. The underlying methodology of this report, presenting a representative measure of the costs related to the provision of the service of general economic interest based on the minimum capacity required, implies a cost allocation of all costs which are common to the service of general economic interest and commercial services. Consequently, according to Hurtigruten, the contested decision is incorrect on pages 8 and 23. The core

[24] Reference is made to the BDO Noraudit Report of 23 March 2009.
[25] Reference is made to the BDO Noraudit Report of 27 September 2010.

of this error lies in ESA's dismissal of the possibility to use the cost of providing the minimum capacity required under the 2004 agreement when determining the cost to be covered by the State.

144. The statement on page 23 of the contested decision categorising this cost allocation as "hypothetical" is also incorrect. The method takes as its point of departure the actual definition of the service of general economic interest specified in the 2004 agreement, that is, the provision of a certain minimum capacity on a certain route. Hurtigruten stresses that the method applied in the report for assessing possible over-compensation allocates costs on the basis of the actual costs of the actual minimum vessel on an annual basis. Moreover, the assessment also reflects actual revenues.

145. Hurtigruten contends that States enjoy a certain margin of discretion in their choice of models for cost allocation and refers to the General Court judgments in *BUPA* and *FFSA*. Therefore, in its view, the contested decision is wrong to dismiss the cost allocation model of the Norwegian authorities and fails to identify how there could have been a manifest error of assessment on the part of the Norwegian authorities in this regard.

146. Hurtigruten submits further that in the contested decision ESA actually proposes an allocation model which is inconsistent with the service of general economic interest assessment in question. The Norwegian authorities used their discretion when basing the cost allocation model on exploitation of the minimum capacity requested. According to Hurtigruten, it would be inconsistent to use a model based on revenue as is suggested by ESA. In that regard, Hurtigruten refers to *Chronopost II*[26] and the Commission's decision *NorthLink & CalMac*. It notes that, in the latter, the Commission accepted an allocation model based on the use of capacity.

[26] Reference is made to Joined Cases C-341/06 P and C-342/06 P *Chronopost SA and La Poste* v *Union française de l'express (UFEX) and Others* [2008] ECR I-4777.

Subsequent events confirm the cost allocations

147. Finally, Hurtigruten asserts that, when a refined model for cost allocation is applied, the results support its findings. In that regard, Hurtigruten refers to a refined model for cost allocation included in the 2010 tender, which is applicable from 2012.[27] This model is based on a separation of accounts between the service of general economic interest and the commercial activities. An application of this model – which is also based on capacity – to the facts of the case demonstrates that Hurtigruten has not received any over-compensation.

148. These findings support Hurtigruten's contention that ESA erred in the contested decision in not accepting that the cost allocation presented by the Norwegian authorities in the PWC reports and the BDO reports relating to the compensation for a service of general economic interest under the 2004 and 2008 agreements clearly and sufficiently demonstrates that Hurtigruten has not received any over-compensation for such services which is incompatible with Article 59(2) EEA.

149. Finally, Hurtigruten observes that under the new contract for the period 2012 to 2019 concluded following a tender procedure, it will be paid substantially more than under the agreement addressed by the contested decision. In its view, this confirms that there was no over-compensation under the 2008 agreement.

150. Hurtigruten contests ESA's reliance on the Commission decision in *SNCM* and the judgment of the General Court in *Combus*. According to Hurtigruten, those cases involved very different facts.

151. In its reply, Hurtigruten submits that during the recovery procedure, ESA has finally defined its substantive position on the allocation of costs which Hurtigruten characterises as three pillars of "ESA logic". First, there must be a separation of accounts. Second, only the service of general economic interest

[27] Reference is made to Annex C to the invitation to tender of 2010 (Annex A.32 and A.39 of the Application).

related portion of costs that can be considered unforeseen and radically increased may be covered. Third, the different cost elements must be assessed separately. Hurtigruten rejects this "logic". The correct test is whether the additional contributions were necessary in ensuring the performance of the service of general economic interest. In any event, ESA erred in using the criteria for initiating renegotiations under the 2004 agreement to assess the outcome of the renegotiations.

152. Norway refers to Article 1 of the operative part of the contested decision and, in particular, to the fact that the three measures are considered incompatible "in so far as they constitute a form of over-compensation for public service". Norway concurs, at a very general level, with the test of cost allocation set out in the contested decision, and refers to the case-law of the ECJ according to which the relevant test for over-compensation is whether the compensation is necessary in order to enable the undertaking to perform its obligations under economically acceptable conditions. This requires an allocation of the costs common to commercial activities and activities to ensure a service of general economic interest.

153. Norway points to the State aid guidelines on public service obligations,[28] which, even if they are not applicable in the present case, appear, in its view, to formulate accurately the relevant principle, namely, that compensation may cover all variable costs, a contribution to fixed costs, and an adequate return on own capital.

154. In light of this, Norway divides its second plea into three branches. By the first branch Norway alleges a manifest error of assessment in that ESA misunderstood or misinterpreted essential aspects of the allocation model used by Norway, in particular as set out in its letter of 30 September 2010. By the second branch, Norway contends a manifest error of law or assessment in that ESA rejected the allocation model as such as

[28] Reference is made to point 15 of the Guidelines of ESA on State aid in the form of public service compensation, cited above.

an appropriate model for cost allocation, a matter which is well within the margin of discretion of the State. By the third branch Norway alleges an error of law or assessment in that ESA applied an incorrect test of necessity for the purposes of Article 59(2) EEA in relation to possible over-compensation.

The first branch of the second plea – the allocation model

155. The first branch concerns ESA's misinterpretation of the allocation model and not the legality of the model as such. Norway submits that ESA committed a manifest error of assessment in relation to the allocation model relied upon by the Norwegian authorities, in particular, as set out in the letter of 30 September 2010.[29]

156. In the contested decision, ESA fails to take account of the answer submitted by Norway to the opening of the formal investigation procedure on 14 July 2010. In Norway's letter of 30 September 2010, a new analysis of legal and factual matters was presented together with a report from BDO dated 27 September 2010. These documents are reflected only to a limited extent in the contested decision. The letter of 30 September 2010 clearly stated that the Norwegian authorities intended to allocate the costs between commercial and non-commercial activities and explained why this was a challenging task. The purpose of the 2010 BDO report was to allocate the costs and revenues between state purchases and other activities on the coastal route. It is clear that the model applied in the report reflects the fact that the actual fleet performs a larger part of its activities outside the public service remit.

157. Norway refutes the conclusion reached by ESA in the contested decision that this model implies "the lack of common costs" and that "several categories of [common costs] are fully allocated to the public service side ...". Instead, under this model, nearly half of the common costs of performing the coastal route Bergen-Kirkenes are allocated to the commercial side.

[29] Reference is made to the BDO Report of 2010.

158. Norway asserts that the allocation model is based on the minimum requirements in the 2004 agreement. The essence of this model is to quantify the services that are required under the agreement. These costs are allocated to the service of general economic interest, whereas all other costs are allocated to the commercial part of the coastal route.

159. As a result of ESA's misinterpretation, the reasoning in the contested decision is incorrect and, hence, Norway contends that the decision must be annulled.

The second branch of the second plea – error of law and/or assessment in rejecting the allocation model

160. Norway submits that rejection of the minimum capacity allocation model constitutes a manifest error of law and/or assessment. In particular, it criticises the failure of ESA in the contested decision to acknowledge the model as compatible with EEA law.

161. Norway refers to the judgments of the General Court in *BUPA* and *FFSA*, according to which the State enjoys discretion in defining a service of general economic interest and the conditions of its implementation. This discretion is all the wider in evaluating additional public service costs. Thus, according to Norway, having regard to the State's broad discretion in these complex matters, ESA may only turn down the allocation relied upon by the State if it comprises a manifest error.

162. According to Norway, this discretion must be seen against the background that the test of cost allocation is itself vague. The decisive criterion is that there must be an "appropriate" allocation of common costs. The contested decision does not appear to set out more precise parameters. Any estimation of what is an "appropriate" distribution of costs will necessarily be uncertain and difficult. As the relevant costs are common to different activities, one is forced to establish a model that by nature implies estimations and more or less theoretical assessments of how these costs may be distributed in an appropriate manner. By failing to recognise this margin of discretion of the State, ESA

committed a manifest error of law and/or assessment in relation to the model.

163. Norway contends that the starting point for the assessment concerning cost allocation must be the contractual obligations that the model is intended to reflect. The public service obligation is to perform daily sailings between 34 predetermined ports from Bergen to Kirkenes with ships that must have capacity for no less than 400 passengers. The State pays for this capacity and Hurtigruten is obliged to have this capacity available for passengers. However, Hurtigruten is free to use larger ships, which they do. Hence, Norway submits that the capacity allocation model is appropriate.

164. Norway maintains that the essence of this model is to quantify the costs in performing only those tasks required under the 2004 agreement, that is, the costs in performing the sailings with the minimum capacity required by the State. It notes that the model, as set out in the 2010 BDO report, is based on actual costs and revenues as presented by Hurtigruten to the Norwegian authorities in relation to one of the smallest ships on the Bergen-Kirkenes route. The costs and revenues are multiplied by 11 to reflect the number of ships in service, a number which is then modified in several respects in order to reach a more appropriate distribution of fixed costs.

165. Norway refers in particular to two sets of fixed costs. First, certain costs relate only to the commercial activities and are allocated accordingly. This concerns transfer costs and excursion costs. Second, the sales on board are allocated on the basis of passenger revenues from the service of general economic interest and commercial passengers. Remaining costs, such as fuel costs, harbour costs etc, are calculated on the basis of the actual costs related to the ship chosen (MS Vesterålen) multiplied by 11. Norway further submits that no cost element is allocated in full to the public service part of the operations, and ESA errs also on this point.

166. Norway observes that on the basis of that data BDO drew the conclusion in their 2010 report that the minimum cost to operate the fleet was NOK 989 million in 2007 and NOK 1 088 million in 2008. This represents 53% of the total costs in performing the coastal route Bergen-Kirkenes in both of those years. For the same years and having taken account of the additional payments under the 2008 agreement, BDO estimate the deficit related to the service of general economic interest was NOK 211 million in 2007 and NOK 274 million in 2008.

167. Norway submits that in the contested decision ESA should have acknowledged that a minimum capacity model as presented to it was, in principle, compatible with EEA law, appropriate and well within the margin of appreciation of the State.

168. Norway refers to the Commission's decision *NorthLink & CalMac* and submits that neither the Court nor the Commission have questioned the legality of very generally formulated allocation principles based on volumes of, or the capacity of, a service of general economic interest. It submits that the Commission's analysis in that decision demonstrates the acceptance of allocation principles such as those applied by the Norwegian authorities and the restraint exercised by the Commission in that regard.

169. Alternative allocation models, such as the model proposed by ESA based on revenues, have definite weaknesses. In Norway's view, the capacity obligation under the 2004 agreement renders the revenue-based approach of little interest, since the costs related to performing the 2004 agreement are determined more precisely by a capacity-based allocation than a revenue-based allocation.

170. Norway notes that, under the 2004 agreement, Hurtigruten may not increase ticket prices for the service of general economic interest but may do so for commercial activities. Consequently, a revenue-based allocation key could be subject to quite substantial changes from one year to the next. As a result, Norway contends that a cost allocation model based on turnover does not reasonably reflect the actual costs necessary in performing the public service obligations.

171. Norway concedes that in a complex case such as the present any cost allocation model includes inaccuracies and uncertainties. For example, the model was not adjusted to reflect certain sailings in the Geirangerfjorden simply because the deficit in the service of general economic interest activities was so substantial that an adjustment would not have influenced the outcome of the analysis. Moreover, one may question why all the marketing costs are allocated to the commercial activities of Hurtigruten. According to Norway, what is decisive is that the total allocation of common costs in sum is appropriate, not whether single cost elements could possibly have been assessed differently. None of the possible objections to the model would have altered the conclusion that Hurtigruten is not over-compensated for its public service tasks. In Norway's view, this is further supported by the refined analysis undertaken following the adoption of the contested decision and submitted ESA with a view to avoiding the present action.

172. Norway submits that the consequences of the contested decision are difficult to assess.

173. In seeking to determine whether there has been any over-compensation, Norway has developed an alternative and more refined allocation model submitted to ESA on 17 August 2011. According to Norway, this model confirms the legality of the allocation presented. The two models lead to the same conclusion, namely, that, even taking account of the additional payments under the 2008 agreement, Hurtigruten has been undercompensated throughout all the relevant years. Under the refined model, unlike the minimum capacity allocation model relied upon by the Norwegian authorities in the present procedure, the allocation keys are adjusted, inter alia, for the Geiranger operations, leading to a higher allocation of capacity costs to the commercial activities. Notwithstanding that shift in capacity costs to the commercial activities, the 2011 BDO report shows a deficit in the operations of the service of general economic interest for each of the years 2005 to 2010. In none of the years 2007 to 2010 is Hurtigruten over-compensated, even after additional payments and other effects of the 2008

agreement are added. For 2007, the refined models allocate 48% of the costs on the coastal route to the service of general economic interest and for 2008 this figure is 47%.

174. According to Norway, the fact that the refined 2011 model arrives at the same conclusions as the minimum capacity allocation model demonstrates that ESA erred in the contested decision in deciding that the minimum capacity allocation model was not applicable.

The third branch of the second plea – manifest error in law in rejecting an overall analysis for the purposes of possible over-compensation under Article 59(2) EEA

175. According to Norway, it is unclear whether in the contested decision ESA takes the view that over-compensation should be assessed by reference to the total costs of providing the service of general economic interest (plus a reasonable profit) or by reference to a different yardstick such as the costs relating to items that triggered the renegotiations. It appears to Norway that ESA adopted the latter approach in its assessment both for the purposes of Article 61(1) EEA and in relation to Article 59(2) EEA.

176. If that is the case, Norway contends that ESA erred in law, in particular, in failing to acknowledge that the test for the purposes of Article 59(2) EEA is an overall test based on the service of general economic interest as such and that the additional payments were necessary to ensure the maritime transport service at issue in the present case. According to Norway, the necessity test requires a specific assessment of the need for additional contributions based on the total costs and revenues involved. In contrast, there is no efficiency requirement under Article 59(2) EEA. The general test is whether the compensation is necessary in order to enable the undertaking to perform its tasks under economically acceptable conditions. The purpose of the compensation is to ensure cost coverage. There is not even an obligation for the State to choose the least expensive undertaking. Norway also refers to the possibility for cross-compensation in

relation to several tasks which all constitute services of general economic interest.

177. Norway submits that if a public service operator is under-compensated, the State is permitted – but not obliged – under Article 59(2) EEA to amend the act of entrustment in order to increase the level of compensation, provided that the level of compensation does not exceed the total cost plus a reasonable profit. Additional compensation is allowed irrespective of whether the original act of entrustment includes mechanisms for additional compensation or not. The relevant test is the actual, overall result.

178. Norway submits that these principles (i.e. the "necessity test") imply that the additional compensation awarded to Hurtigruten under the 2008 agreement was compatible with the rules and principles governing public service compensation. In the present case, ESA has failed to separate the assessment for the purposes of Article 59(2) EEA from the assessment for the purposes of Article 61(1) EEA. In Norway's view, the 2008 agreement was necessary and did not involve over-compensation for the purposes of Article 59(2) EEA, having regard to the total costs of providing the service of general economic interest.

179. Norway contends that there is no legal basis on which to hold – as ESA did in the contested decision – that in cases where the act of entrustment has been awarded on the basis of a public tender a radically different assessment applies for determining whether there is over-compensation for the purposes of Article 59(2) EEA. First, none of the legal sources concerning Article 59(2) EEA to which it has referred establish a distinction based on the type of act of entrustment used. Second, the basic objectives underpinning the principles of necessary compensation under Article 59(2) EEA will be the same, irrespective of the type of act of entrustment. Third, it should also be noted that the procedure under which a contract is entered into does not as such affect the parties' legal rights and obligations under the contract. Fourth, to adopt an alternative understanding would be paradoxical, since it would imply that the option of using a tender procedure

radically limits the possibility to compensate the operator providing the service of general economic interest in the event of unforeseen costs or revenue decline. Finally, for the purposes of the assessment under Article 59(2) EEA, it is irrelevant whether the public procurement rules have been respected.

180. According to Norway, the service in the present case was undercompensated and having regard to the imminent risk of the termination of the service of general economic interest in 2008, for the purposes of Article 59(2) EEA, the additional contributions were clearly necessary to ensure the performance of the service. Norway emphasises the importance of the emergency situation in relation to its submissions on Article 59(2) EEA, such as its letter to ESA of 4 March 2010. While ESA appears to acknowledge that an emergency situation may substantiate the cancelling of a public service contract, Norway fails to see why the efforts invested by the Norwegian authorities to ensure continued performance should lead ESA to conclude that the 2008 agreement was not necessary for the performance of a service of general economic interest.

181. Norway submits that the 2008 agreement was absolutely necessary. First, there was an imminent risk of termination of the 2004 agreement. Second, there was no alternative service provider. Third, there were challenging negotiations between the Norwegian authorities and Hurtigruten to ensure that contributions were limited to only what was strictly necessary. During the autumn of 2008 it became clear that the cost increases were radical. It became equally clear that the service was undercompensated. It was impossible to secure the services without awarding the additional compensation. A new tender was initiated in 2010. This period of preparation was necessary in order to evaluate all necessary aspects of the service.

182. Norway contends that when assessing a reasonable time frame for a new tender, it is necessary to make an overall assessment of, in particular, the market situation and the likely consequences of the new tender. As it is normally assumed that the price determined on the basis of a competitive procedure will be

lower than the "emergency price", a quick retender may often be reasonable in order to re-establish a presumably lower market price. Several factors called for a different solution in the present case. These are, *inter alia*, the particularities and the complexity of the service, making it very unlikely that a quick retender would provide any alternatives to Hurtigruten, and that it became increasingly clear that Hurtigruten was in fact undercompensated for the service of general economic interest. A new tender would, according to the Norway, very likely lead to higher contributions than under the 2008 agreement. Under these circumstances, Norway considers that it was necessary to make a new and comprehensive assessment of the several elements of the operation of the service of general economic interest on the route Bergen – Kirkenes.

183. Finally, Norway submits that these arguments are supported by the Commission decision in *NorthLink & CalMac*. In that case, the Commission limited its assessment to whether – as an overall conclusion – the undertaking was over-compensated during the relevant period, in other words, whether the overall outcome was over-compensation (over and above a reasonable profit). Norway submits that a State is permitted to amend the act of entrustment and award additional compensation. In its view, the test remains the same irrespective of whether the original contract was subject to a public tender.

184. In its reply, Norway expands its arguments on Article 59(2) EEA and tendered contracts. It asserts that the *raison d'être* of Article 59(2) EEA is that public service considerations should to a certain extent prevail over pure market economic considerations. The prohibition on State aid established in Article 61(1) EEA only comes into play "in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them". This means that, if, following a tender, the market price is inadequate to ensure the public service provision, State aid may be granted. Were this not to be permitted, citizens would be deprived of the public service in question.

185. Norway notes that public procurement rules indicate that some amendments to tendered contracts will always be compatible with the State aid principles. However, it observes that, in the *NorthLink & CalMac* decision, the Commission did not appear to consider the previous tendered agreement relevant for the purposes of its assessment. Moreover, in that decision, an amount of compensation alleged to be outside the scope of the public service obligation was considered compatible with State aid law, as the undertaking had a deficit on its public service activities.

186. Norway acknowledges that when a party to a tendered contract claims to be in need of additional compensation, the tender procedure may influence the assessment under Article 59(2) EEA. It may be difficult to prove that additional compensation is absolutely necessary. There may be additional limits as to the extent of subsequent compensation. Additional compensation under a tendered contract may, in some situations, imply an obligation to retender the service.

187. However, in Norway's view, in the present case, ESA failed to respect those principles in the contested decision. The only substantial argument of ESA is too formalistic, fails to take account of the *raison d'être* of Article 59 EEA and wrongly concludes that application of Article 59(2) EEA to situations such as that of the present case would result in a *carte blanche* for State aid. According to Norway, if the Court were to accept ESA's approach, this would lead to arbitrary results.

188. Finally, Norway contests the relevance of *Corsica Ferries* and *Combus*. In its view, those cases concerned very different circumstances.

189. ESA rejects the assertion that it erred in its assessment of the 2008 agreement. It carried out the correct calculations that led it to conclude that Hurtigruten had been over-compensated and received incompatible State aid. ESA refers to page 21 of the contested decision and the principles set out there such as transparency, proportionality and the notion of a reasonable profit. In the light of those principles, ESA submits that it did not

err in its application of Article 59(2) EEA, since that provision does not permit any assessment of the "total costs and revenues" of the public service at issue in the case.

190. ESA notes that the 2004 agreement was subject to a tendering process. As a general rule, such a contract does not involve State aid. However, in the present case, the increased compensation went far beyond the payments that had been agreed under the tender. First, the increase in costs was not all radical and unforeseeable. Second, the 2008 agreement did not limit the additional compensation to costs linked to the provision of the public service obligation and effectively included Hurtigruten's commercial operations as well. Therefore, the increased compensation was no longer "protected" from the State aid rules that the tendering process was presumed to have offered.

191. ESA asserts that its assessment of the 2008 agreement in the light of Article 59(2) EEA was carried out methodically. It assessed the objectivity and transparency of the cost allocation model and analysed whether the increased compensation led to over-compensation. ESA was unable to conclude that this was not the case. Since over-compensation is not necessary for the operation of a public service it constitutes incompatible State aid that must be recovered.

192. ESA stresses that it does not claim that a public service agreement cannot be modified. Rather, it refused to accept the allocation of State resources to Hurtigruten's commercial activities. ESA notes that Article 3 of the 2008 agreement states that the three measures should not overcompensate Hurtigruten. However, in ESA's assessment, the 2008 agreement went beyond the scope of both its own Article 3 and Article 8 of the 2004 agreement. In other words, the position of Hurtigruten runs counter to the very act entrusting the public service in the first place.

193. Finally, ESA seeks to respond to the arguments of Hurtigruten in which it refers to Commission decisions *SNCM* and *NorthLink & CalMac*. According to ESA, those decisions demonstrate, in fact,

that ESA's assessment was correct. Consequently, the claim that it erred in its interpretation or application of Article 59(2) EEA must be dismissed.

194. As for the alleged errors of law and/or assessment in relation to cost allocation, ESA notes that both ESA and Hurtigruten are agreed, as a starting point, that an assessment under Article 59(2) EEA can only be carried out where there is (i) a proper allocation of Hurtigruten's costs and revenues for the public service and commercial operations, (ii) the compensation does not cover more than a proportionate share of fixed costs common to the public service and commercial operations, and (iii) the compensation is not calculated on the basis of unrepresentative hypothetical costs where real costs are known.

195. In ESA's view, however, the fundamental problem is that ESA was not presented with an appropriate transparent and objective cost allocation model during the administrative procedure. In that regard, ESA contests the arguments of Hurtigruten concerning the BDO report of 27 September 2010. ESA refers to the contested decision and submits that the hypothetical minimum fleet model set out in that report was assessed in the light of the basic principles that need to be applied in assessing compensation for a public service. Only if the calculation principles were respected could ESA have accepted the model set out in that report. As the contested decision shows, they were not.

196. As regards the arguments raised concerning respect for the Norwegian authorities' choice of allocation model, ESA acknowledges that the EEA States have a margin of discretion in that regard. However, this freedom must be exercised having regard to the fundamental principles referred to above. The hypothetical minimum fleet model did not respect those principles. If Hurtigruten's position regarding a State's discretion were to be upheld, this would effectively allow EEA States to devise cost allocation models that permit cross-subsidisation, lead to over-compensation and circumvent State aid control (including judicial review).

197. As regards the argument that a separation of common costs on the basis of revenue resulting from the turnover of the public service and commercial activities could have been carried out, ESA asserts that its problem was the fundamentally general and hypothetical nature of the proposed allocation model. In that regard, it notes that the Norwegian authorities did in fact have access to the actual cost data of the fleet (which was provided swiftly after the contested decision was adopted on 29 June 2011). From ESA's perspective, the hypothetical nature of the model proposed meant that it could not determine the extent to which the model and the public service/commercial cost allocations were unbiased and objective.

198. ESA agrees that the passenger kilometre model is more precise as a cost allocation model but contests the alleged result of this model. In its view, the model does not show that Hurtigruten had not been over-compensated. The argument that over-compensation cannot exist as long as there is a deficit on the public service obligation side is flawed. Moreover, the fact that this transparent and objective model was presented on 16 August 2011 shows that ESA was correct in rejecting the less advanced models presented during the administrative procedure.

199 In relation to the argument of the Norwegian authorities that ESA misinterpreted the allocation model submitted in 2010, ESA maintains that the letter of the Norwegian authorities of 30 September 2010 itself states that the BDO report 2010 "makes an assessment of the compensation based on a theoretical allocation of costs between the public service and the commercial part of the route Bergen – Kirkenes" and "the theoretical assumption that the public service part of the costs might be calculated on the basis of the service being operated with a fleet with the minimum capacity described in the call for tender". The hypothetical nature of the model is illustrated by the fact that it fails to explain why 47% of the total costs of the coastal route are allocated to Hurtigruten's commercial activities.

200 ESA refers to criticism of its findings in the contested decision on the cost allocation made in the reports submitted by the

Norwegian authorities. In response, it reiterates its assessment that certain categories of costs (harbour charges, maintenance and fuel) were fully allocated to the public service side, while others were incorrectly allocated.

201. As regards the costs of the vessel MS Vesterålen, ESA submits that some of the costs for the operations of this ship should have been allocated to its commercial operations. The allocation of costs regarding this ship was not carried out with reference to a specific key in a consistent manner. Furthermore, ESA underlines that the vessel MS Vesterålen exceeded the minimum capacity requirement imposed by the 2004 agreement by 30%.

202. In its rejoinder, ESA rejects the notion of "ESA logic" advanced by Hurtigruten. ESA stresses that the present case concerns the legality of the contested decision, which must be examined in the light of its wording and the relevant facts and circumstances when it was adopted. Consequently, the documents concerning the recovery procedure to which Hurtigruten refer in its reply are irrelevant.

203. Moreover, ESA stresses that the need for a timely re-tender was not an unfounded and novel idea which it proposed in this case.

Minimum capacity allocation model

204. As regards the notion that it committed a manifest error in rejecting the allocation models, ESA maintains that a State only has discretion in its choice of a cost allocation model to the extent that the model reflects the fundamental principles needed.

205. ESA reiterates that the minimum capacity allocation model in the 2010 BDO report is not an acceptable means of establishing the costs of the public service incurred by Hurtigruten, and refers to the contested decision. It contends that, even if the model is more sophisticated than previous models, it is based on the costs and revenues from only one ship and lacks the necessary objectivity and transparency allowing ESA to verify that there was no over-compensation for Hurtigruten's performance of the public service as a whole. Therefore, ESA rejects the argument that it

should have accepted the 2010 BDO minimum capacity allocation model as compatible with EEA law.

206. ESA avers that it did not reject the minimum capacity allocation model on the basis that it was capacity based. It emphasises that its approach is pragmatic and accepts a margin of discretion on the part of the State to choose an appropriate model. However, in the present case, the general and hypothetical nature of the proposed allocation model was neither appropriate nor unavoidable.

Refined model based on separation of accounts

207 ESA agrees with Norway that the passenger kilometres model is more refined. However, it rejects the notion that as the outcome under the refined model is alleged to be the same as under the earlier model this confirms the correctness of the earlier model. ESA emphasises that the model as such was flawed and not simply its results.

Increased compensation involved compatible public service compensation

208 ESA stresses that the fact of tendering meant that the compensation for the public service was the market price. This is relevant as, under Article 59(2) EEA, the compensation may not exceed what is necessary to cover the costs of the public service obligation. ESA avers that it does not hold the test under Article 59(2) EEA to be radically different where the contract has been tendered. Moreover, it views considerations relating to the objectives of Article 59(2) EEA and the binding nature of the act of entrustment as irrelevant. The present case does not concern an infringement of the public procurement rules, but the incompatibility of State aid.

209 The Commission supports the arguments of ESA.

210 In the Commission's view, the interpretation of Article 59(2) EEA suggested by Norway cannot be correct. It would encourage undertakings to obtain the entrustment of public services

through the presentation of unrealistically low bids during the tender procedure, knowing they would be sheltered from the consequences of their poor business decisions by the possibility of later obtaining additional compensation from the State.

211 In that regard, the Commission contends, first, that the arguments of Norway on Article 8 of the 2004 agreement are contradictory. On the one hand, Norway argues that Article 8 complies with the *Altmark* criteria as its effects are established in advance and, on the other, it maintains that any measure pursuant to Article 8 of the 2004 agreement is compatible aid as long as it does not lead to over-compensation, regardless of the factors that led to the increase in costs. Second, Article 59(2) EEA should not be applied in a manner which encourages and rewards unsound economic decisions.

212 The Commission considers that the Community framework for State aid in the form of public service compensation can be of relevance, even if the transport sector is excluded from that framework. It emphasises that, although in the past, when applying Article 59(2) EEA, it has accepted an overall approach to the compensation of costs, its acceptance of this approach has been subject to strict conditions. The Commission notes further that the framework requires the official decision entrusting the public service to specify the parameters for reviewing the compensation. Moreover, if losses are incurred due to bad management, it may be necessary to adopt a more restrictive approach.

Compatibility of the aid under Article 61(3) EEA (the fourth plea of Hurtigruten)

213 Hurtigruten admits that no restructuring plan was formally notified to ESA. It explains that as the Norwegian authorities rightly assumed that the measure in question did not constitute State aid, they simply informed ESA about the results of the renegotiations by a letter of 28 November 2008. The letter set out the critical financial situation of Hurtigruten. By letter of 30 July 2010, the measures were formally notified to ESA under the

State aid Guidelines for aid for rescuing and restructuring firms in difficulty.

214 Hurtigruten notes that the earlier non-notification of the measures appears to be the main reason why ESA declined to apply those Guidelines in the contested decision. In that regard, Hurtigruten refers to the decision to open the formal investigation procedure in which ESA stated that the Norwegian authorities did not "follow up with a proper restructuring plan" and inviting them "to provide any documentation deemed necessary for such an assessment". Hurtigruten submits that ESA's conclusion on that point is wrong, since the measures were notified by letter of 4 March 2010 and a restructuring plan was adopted and successfully implemented. Moreover, at the time of adoption of the decision to open the formal investigation procedure, ESA had not even analysed the information provided. However, according to Hurtigruten, information was provided by the Norwegian authorities in their letter of 30 September 2009.

215 Hurtigruten asserts that, irrespective of the information submitted by the Norwegian authorities and received by ESA, ESA has not, with one single exception, submitted any substantive (specific) question to the Norwegian authorities on the applicability of these Guidelines.

216 Hurtigruten invites the Court to consider the *prima facie* applicability of the Guidelines. ESA has never contested Hurtigruten's contention that at the time of the 2008 agreement it constituted a firm in difficulty within the meaning of those Guidelines. Moreover, according to Hurtigruten, the substantive criteria set out in the Guidelines are fulfilled and it appears that it was simply the lack of notification that led ESA to disregard the Guidelines. The disagreement between Hurtigruten and ESA appears, thus, to be related to the procedural *lacunae* that no notification to ESA was made in 2008 and that the Norwegian authorities did not "commit" to a restructuring plan in accordance with the Guidelines. However, contrary to what is stated in the contested decision, the Guidelines do not include any unconditional criterion to the effect that a State has to possess

a restructuring plan when granting aid. Hurtigruten refers to the case-law on which ESA relies in support of its view[30] and contends that these cases can be distinguished. First, in the present case, there was a restructuring plan. Second, the objective of the 2008 agreement was to downsize and not expand market presence. On its view, that case-law implies that, when a real restructuring plan exists, the substantial applicability of the Guidelines must be assessed by ESA.

217 Hurtigruten contends that, in the present case, there is no reason why ESA should escape its obligation to substantively assess the applicability of the Guidelines. In the light of ECJ case-law, there is nothing to support any departure from the principle that ESA cannot declare aid as incompatible simply because it has not been notified but must examine in substance whether aid unlawfully granted is nevertheless compatible with the common market.[31]

218 Hurtigruten notes that the renegotiation of the 2004 agreement was an integral and instrumental part of the restructuring plan. If the renegotiations had not succeeded, the private placement of NOK 314 million and instalment of a syndicate loan of NOK 3.3 billion with the banks would not have been successful. The banks and private shareholder participations depended on each other; one would not have taken place without the other.

219 With regard to the position taken by ESA that, at the time the 2008 agreement was concluded, the Norwegian authorities could not or did not assess whether Hurtigruten's restructuring plan was based on realistic assumptions, Hurtigruten asserts that the funding from the Norwegian authorities was not in itself sufficient to save Hurtigruten from bankruptcy and, as a consequence, the authorities must have assessed the restructuring plan including the funding by way of the NOK 314 million private placement and the instalment from the bank as a realistic scenario. Moreover, as

30 Reference is made to Case C-17/99 *France* v *Commission* [2001] ECR I-2481 and Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103; see footnote 89 of the contested decision.

31 Reference is made to Case C-301/87 *France v Commission ("Boussac")* [1990] ECR I-307.

a listed company in Norway, Hurtigruten complied with corporate governance rules and continuously reported its status to the market.

220 Therefore, according to Hurtigruten, the contested decision is wrong to state that there was no restructuring plan in accordance with the applicable Guidelines. It cannot be the case that the Norwegian authorities had to present the restructuring plan exactly at the time when the aid was granted. It suffices that the renegotiations were part of the overall restructuring plan and the plan was fleshed out in parallel. Consequently, the contested decision is vitiated by a manifest error of assessment in relation to Article 61(3) EEA and the Guidelines.

221 In its reply, Hurtigruten refers to documents already submitted and claims that ESA's defence is incorrect on three fundamental points.[32] First, ESA was wrong to claim that there had not been any notification. Second, ESA was wrong to find that there was no restructuring plan. Third, ESA was wrong to assume that the aid was not conditioned on the implementation of a restructuring plan as foreseen in the Guidelines.

222. ESA refers to page 25 of the contested decision and notes that Hurtigruten does not appear to dispute the assessment that the requirements for granting rescue aid were not complied with.

223. ESA stresses that there were both procedural and substantive reasons not to apply the Guidelines. On the issue of procedure, ESA refers to the comments from the Norwegian authorities of 30 September 2010, following the decision to open the formal investigation procedure, which invite ESA to consider the previous letter of 4 March 2010 as a notification *ex post*.

224. On the substance, ESA refers to pages 26 to 28 of the contested decision and reiterates its finding that no restructuring plan existed at the time when the aid was granted and that the documents subsequently sent by the Norwegian authorities do not satisfy the conditions set out in the Guidelines. It stresses

[32] Reference is made to the Norwegian Government's letter to the EFTA Surveillance Authority of 4 March 2010 and relevant annexes, included in the Application as Annex A.24.

that the existence of a restructuring plan is a precondition for restructuring aid.

225. According to the Commission, Hurtigruten's fourth plea should be dismissed.

226. The Commission stresses that as Article 61(3) EEA constitutes derogation from the prohibition on State aid the burden of proof lies on the State which invokes this provision. On the substance, it agrees with ESA that the restructuring Guidelines are not applicable. The aid measures provided for in the 2008 agreement were not linked to a corresponding obligation on the beneficiary to implement a restructuring plan. Moreover, the documents provided at a later stage did not meet the substantive requirements set out in the Guidelines. In particular, the alleged restructuring plan did not include any compensatory measures.

Procedural pleas (the fifth plea of Hurtigruten and the third plea of Norway)

Obligation to state reasons

227 Hurtigruten submits that, in adopting the contested decision, ESA has breached its obligation to state reasons as required by Article 16 SCA. In light of the case-law of the Court, the decision breaches that obligation in that it neither discloses in a clear and unequivocal fashion the reasoning followed by ESA nor enables Hurtigruten to ascertain the reasons for the measure. In fact, the contested decision does not even answer the essential question, whether the 2008 agreement includes incompatible State aid, in a clear and unequivocal manner.

228 Hurtigruten criticises the fact that in Article 1 of the operative part of the contested decision, ESA identifies the existence and amount of aid only "in so far" as the measures constitute over-compensation. Similarly, it contends that the wording on page 29 of the contested decision "the three measures may entail over-compensation" and "[p]art of the payments made under the three measures can be considered compatible" cannot be considered clear and unequivocal.

229 Hurtigruten contends that, in the contested decision, ESA does not provide real and effective additional guidance to the Norwegian authorities on whether and to what extent Hurtigruten was over-compensated for operating the service of general economic interest. The criteria laid out on page 29 of the contested decision do not state anything beyond what is already stated in the Guidelines on State aid in the form of public service compensation. The contested decision provides less guidance than the overall framework for services of general economic interest. According to Hurtigruten, the decision should at least have given a sketch as to how a "proper allocation" of costs and revenues is to be understood and what ESA regards as "fixed common costs". For the guidance to have any meaning, it should have addressed the issue of justifiable compensation, i.e. whether this involves simply the compensation of additional costs covered by the 2008 agreement or allows for the possibility of compensating the total costs incurred in the provision of a service of general economic interest, as was raised in its pleas concerning Article 59(2) EEA.

230 In effect, the contested decision relieves ESA of its responsibilities under the EEA Agreement and transfers these back to the national authorities in their entirety. According to Hurtigruten, this cannot withstand scrutiny from the perspective of the obligation to state reasons.

231 Hurtigruten submits further that ESA's assessment of anti-competitive behaviour is clearly inadequate when compared with the Commission decision in *NorthLink & CalMac*.

232 Finally, in its reply, Hurtigruten observes that the contested decision does not mention the second and third parts of what it describes as "ESA logic". Consequently, in its view, the decision must be annulled.

Good administration, due diligence and the requirements of Article 13 in conjunction with Article 10 of Part II of Protocol 3 SCA

233 Hurtigruten refers to pages 27 to 28 of the contested decision and submits that, given its financial position at the time of conclusion of the 2008 agreement, the rescue and restructuring Guidelines should be assessed to have been of immediate relevance to ESA, as ESA was of the opinion throughout the procedure that the agreement involved State aid. Furthermore, ESA was informed in detail about the applicability of the rescue and restructuring Guidelines in March 2010. Moreover, during the administrative procedure, ESA adopted only one request for information apart from the decision to open the formal investigation procedure.

234 Hurtigruten refers to Articles 13(1) and 10(3) of Part II of Protocol 3 SCA authorising ESA to take a decision on the basis of the information available where a State has not complied with an information injunction. In that regard, Hurtigruten claims that, if the information available to ESA is incomplete, it cannot take a decision without issuing an information injunction specifying the information required. As, in the present case, ESA adopted the contested decision without requesting sufficient information, the contested decision should be annulled, as it was adopted in breach of the principle of good administration and of ESA's duty to exercise due diligence.

235 In the alternative, Hurtigruten invites the Court to assess the contested decision as a decision taken "on the basis of the information available" pursuant to Article 13(1) of Part II of Protocol 3 SCA. In that regard, the contested decision can only be lawful if adopted in the wake of an information injunction issued by way of a decision pursuant to Article 10(3) of Part II of Protocol 3 SCA. However, no such injunction was issued.

236 Hurtigruten submits that ESA admit that they have not received all information necessary from the Norwegian authorities to undertake the substantive assessment. No information injunction has been issued. Therefore, the decision must be considered as

taken "on the basis of the information available" pursuant to Article 13(1) of Part II of Protocol 3 SCA.

237 Finally, Hurtigruten refers to the ECJ's judgment in *MTU* and submits in light of that case-law that the contested decision should be considered a hypothetical decision.[33] In its view, ESA adopted the contested decision on an unlawful negative presumption and, consequently, the decision must be annulled.

Legal certainty

238 Hurtigruten submits that, in the present case, it is impossible to assess the framework and the conclusion of the decision itself. In those respects, the decision is unclear and practically impossible to assess. Hurtigruten considers that, with regard to the substantive conclusion of the contested decision, even after careful scrutiny, it is not in a position to assess the framework of its obligations. Hurtigruten recalls that a recovery decision must include information enabling the EEA State to determine the amount to be recovered without too much difficulty.[34] This legal standard has not been met by ESA.

239. Hurtigruten refers to Article 1 of the operative part of the contested decision and submits that it appears as if the three measures "may or may not" involve State aid. It also notes that in section 5 of the contested decision ("Recovery") ESA states that the measures "may" entail over-compensation. As Article 1 of the operative part refers only to Article 61(1) EEA, whereas the guidance on the compatible payments set out on page 29 of the contested decision refers to Article 59(2) EEA, it is difficult to make an assessment of the obligations on the beneficiary. In Hurtigruten's view, this becomes even more apparent when the contested decision is compared with the Commission decision in *NorthLink & CalMac*. This is particularly the case as regards the separation of accounts.

[33] Reference is made to Case C-520/07 P *Commission* v *MTU Friedrichshafen* [2009] ECR I-8555.

[34] Reference is made, *inter alia*, to Case C-480/98 Spain v Commission [2000] ECR I-8717, paragraph 25, and point 36 of ESA's Guidelines on the recovery of unlawful and incompatible State aid.

240. Moreover, according to Hurtigruten, ESA must be under an obligation, in a negative decision at least, to set out its findings in an unambiguous fashion and provide a clear framework for the national authorities on which they may make their implementing assessments. In the present case, the framework of the contested decision is unclear, ambiguous and confusing. The contested decision should have provided additional guidance also on the model and the parameters on which the Norwegian authorities could base their assessments. In the present case, it is impossible to assess the legal framework of the contested decision, which makes it impossible to ascertain whether, in order not to lose the right to judicial review, an application for annulment is necessary. This constitutes a breach of the principle of legal certainty as applicable to negative decisions in State aid cases.

241. Norway advances several procedural pleas.

Legal certainty

242. Norway refers to the case-law of the Court and submits that the lack of clarity and precision in the contested decision raises issues of legal certainty. Norway refers to Article 1 of the operative part of the contested decision and emphasises the findings of ESA that the aid is considered illegal "in so far as" it constitutes over-compensation. In that respect, it is unclear whether ESA considers that there has been any State aid at all. Norway further refers to section 4.2.4 of the contested decision and submits that it is unable to predict its legal position since it is unclear whether the aid is illegal or not.

243. Moreover, according to Norway, the contested decision does not meet the required standard to enable the addressee without overmuch difficulty to determine how much aid must be recovered from the beneficiary. In that regard, Norway refers to Part I and Part II of Protocol 3 SCA, which require ESA to make a positive finding of State aid. In contrast, the contested decision is a hypothetical or empty decision which cannot be considered sufficient to satisfy the principle of legal clarity nor the requirement to state adequate reasons.

244. Finally, Norway observes that, if there is not enough information, ESA can issue an information injunction. In the present case, however, it did not issue such an injunction and, moreover, avoided taking a final decision, leaving it for the Norwegian authorities to make an assessment of compatibility. This constitutes a breach of procedure, since the Norwegian authorities have fulfilled their duty to cooperate with ESA during the administrative procedure.

245. In its reply, Norway observes that ESA appears to have added during the recovery procedure two supplementary requirements, not included in the contested decision, to its understanding of Article 59(2) EEA. First, only radical and unforeseeable cost increases can be considered under Article 59(2) EEA. Second, additional compensation may indeed be granted under Article 59(2) EEA, provided that a new tender is immediately announced. This confirms the lack of clarity of the contested decision.

Failure to state reasons

246. Norway submits that ESA failed to provide adequate reasoning in the contested decision in three respects.

247. First, the conclusion that the allocation model presented by the Norwegian authorities did not appropriately allocate common costs between the service of general economic interest and commercial activities has not been sufficiently reasoned.[35] The statements are an insufficient basis on which to conclude that a disproportionate share of the common costs has been allocated to the commercial activities. Norway suggests that ESA may have confused the different reports submitted during the administrative procedure and asserts that ESA failed to assess the refined model presented in response to its decision to open the formal investigation procedure. Norway concedes that in section 4.2.3 of the contested decision ESA attempts to rebut the method of allocation based on the operation of a minimum capacity fleet. However, in its view, the arguments advanced by ESA are based on an erroneous understanding of the cost allocation model.

[35] Norway refers to sections 1.3.3.2, 3.2.3, 4.2 and 4.3 of the contested decision.

248. Second, the contested decision does not offer any reasons why, as a matter of law, there was no need for ESA to assess whether the three measures were necessary for Hurtigruten to continue the provision of the public services, i.e. whether there was over-compensation. At the same time, the contested decision does not provide any yardstick for the assessment of any possible over-compensation. In Norway's view, the relevant test requires an assessment of the results of the activities performed in providing the service of general economic interest in order to determine whether Hurtigruten was over-compensated for its task. However, ESA did not undertake this test and does not explain why the submissions of the Norwegian authorities in this respect should be rejected. Instead, ESA appears to focus on purely formal requirements. Norway submits that ESA cannot base its decision to order the recovery of over-compensation on an alleged failure to separate accounts and to provide information that was not hypothetical, since it was possible for ESA to examine all the legal and economic conditions governing the additional payment and, consequently, impossible, without such an examination, to take a valid decision as to whether the measures were necessary.[36]

249. Norway observes that ESA could have issued an information injunction pursuant to Article 10(3) of Part II of Protocol 3 SCA. Since it did not use all its powers, in Norway's view, it cannot base its decision on the fragmentary nature of the information provided. In particular, no specific information request has been submitted to Norwegian authorities.

250. Third, Norway contends that the guidance offered on page 29 of the contested decision does not allow it to calculate the amount to be recovered without overmuch difficulty. The insufficiency of that guidance is all the more evident given the lack of clarity on the question whether the contested decision actually considers Hurtigruten to have been over-compensated at all as a result of incompatible aid.

[36] Reference is made to Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV2/Denmark* [2008] ECR II-2935.

251. ESA disagrees.

Lack of reasoning and recovery

252. ESA shares the view taken by Norway that it is not required to set out all the details when ordering recovery. Recovery is an obligation on the State concerned, and it is for the latter to calculate the exact amount. According to ESA, this is particularly the case where a State has not provided sufficient information. It notes in that regard that there is a general duty of EEA States to cooperate with ESA in good faith.

253. According to ESA, given that the Norwegian authorities were able to present a proper allocation model within six weeks of the contested decision, it is clear that the reasoning in the contested decision is not inadequate.

254. ESA submits that, in accordance with case-law, it is not required to discuss all the issues of fact and law raised by interested parties during the administrative procedure.[37]

255. ESA claims that there is no ambiguity to the contested decision. Articles 1 to 4 of the operative part of the contested decision demonstrate that the 2008 agreement entails incompatible State aid in providing for over-compensation for the public service. In support of that argument, ESA refers to pages 17 and 22 to 24 of the contested decision.

256. Moreover, according to ESA, the contested decision answers the arguments of Hurtigruten concerning the conclusion of new contracts in particular on page 20 *et seq.* of the contested decision.

257. As far as recovery is concerned, ESA notes that it is sufficient for the contested decision to include information enabling the national authorities to work out for themselves, without overmuch difficulty, the exact amount of aid to be recovered. In its view, these requirements have been complied with.

[37] Reference is made to Case E-14/10 *Konkurrenten.no AS* v *ESA*, judgment of 22 August 2011, not yet reported.

258. ESA further claims that the argument concerning the criterion of anti-competitive behaviour is irrelevant and, in any event, is not really contested by Hurtigruten.

259. ESA submits that the present case can be distinguished from *Konkurrenten.no*, which covered a different situation concerning new aid.

260. ESA stresses that the contested decision concerns the 2008 agreement and not the compensation under the tendered 2004 agreement. The assessments in the contested decision concern the unforeseeable cost increases addressed by the 2008 agreement and related to the provision of the public service.

261. ESA asserts that Article 1 of the contested decision must be read in context and criticises Norway for reading it in isolation. In that regard, it refers to the reasoning set out in the contested decision and stresses the need to see the contested decision as a whole.

262. ESA does not consider *TV2/Denmark* relevant as that case did not concern the cancellation of a tendered contract for replacement with public service compensation. In any event, ESA claims that it was perfectly possible, given the information available to it, to examine seriously the relevant legal and economic conditions in order to conclude whether over-compensation was involved. The "topping up" argument was not dismissed because of any fragmentary nature of the available information but because the argument is not legally sound. ESA stresses that the contested decision did not seek to justify the dismissal of the "topping up" argument by stating that it was entitled only to rely on the information it had at the time.

263. ESA denies that there was ever need to issue an information injunction pursuant to Article 10(3) of Part II of Protocol 3 SCA. ESA avers that it received the information necessary in relation to the relevant test. In that regard, it refers to the requests for information contained in the decision of 14 July 2010 to open the formal investigation procedure.

264. ESA refers to Part II, sections 3.1 to 3.2.4, of the contested decision where it clearly set out that when an aided undertaking carries out activities falling outside the public service remit, the commercial activities must carry an appropriate share of the fixed costs common to both types of activities. The contested decision explains how the models presented by the Norwegian authorities, including the refined minimum ship model, entail an inadequate allocation of fixed common costs between the public service and the commercial activities of Hurtigruten.

265. In connection with the provision of information and the obligations incumbent on ESA, the Commission underlines that it is for the EEA State which invokes derogation to the prohibition on State aid laid down in the EEA Agreement to provide evidence that the conditions for the application of such derogation are satisfied. Moreover, it emphasises that, according to the case-law, where the institution responsible for the review of State aid is in a position to make a definitive assessment based on the information made available to it during the administrative procedure, that institution is not obliged to require the State concerned, by way of interim decision, to provide further information.

Legal certainty

266. ESA contends that there has been no violation of the principle of legal certainty. The arguments advanced by the applicants do not substantiate a breach of this principle. This applies in particular to the question whether there was over-compensation. ESA submits that it set out detailed arguments in this regard in response to the pleas on reasoning and recovery.

267. ESA emphasises that the contested decision must be read as a whole. It is not lacking in clarity and precision such as to infringe the principle of legal certainty.

Good administration, due diligence and the requirements of Article 13 in conjunction with Article 10 of Part II of Protocol 3 SCA

268. In general, ESA submits that the information asked for and received during the whole procedure demonstrates that the

payments made constitute State aid and that the operator is over-compensated for the provision of the public service such that recovery must be effected. ESA observes that the contested decision was not taken on the basis of Article 13(1) of Part II of Protocol 3 SCA, which allows a decision to be taken on the basis of the information available. ESA also rejects the argument that the decision is hypothetical and, in that regard, refers to the contested decision.

Páll Hreinsson

Judge-Rapporteur

Case E-14/10 COSTS

Konkurrenten.no AS
v
EFTA Surveillance Authority
(Taxation of costs)

CASE E-14/10 COSTS

Konkurrenten.no AS

v

EFTA Surveillance Authority

(Taxation of costs)

Summary of the Order

1. According to the principle of procedural homogeneity, the provisions of the Rules of Procedure must be interpreted in the same way in the EFTA pillar of the EEA as in the EU pillar unless specific circumstances justify different treatment.

2. It follows from Article 69(b) of the Rules of Procedure that recoverable costs are limited, first, to those incurred for the purpose of the proceedings before the Court and, second, to those which are necessary for that purpose.

3. When taxing the recoverable costs, the Court must, in the absence of EEA provisions laying down fee-scales, make an unfettered assessment of the facts of the case, taking into account the purpose and nature of the proceedings, their significance from the point of view of EEA law as well as the difficulties presented by the case, the amount of work generated by the proceedings for the agents and advisers involved and the financial interests which the parties had in the proceedings.

4. Article 66(5) of the Rules of Procedure provides that a decision on costs shall be in accordance with the agreements of the parties, where the parties come to such an agreement.

5. When such a rate presupposes that the work was carried out by an experienced lawyer in the relevant field this requires, in return, a strict assessment of the total number of hours' work essential for the purposes of the proceedings in question.

6. The primary consideration of the Court is the total number of hours of work which may appear to be objectively necessary for the purpose of the proceedings before the Court.

7. It follows from Article 69(b) of the Rules of Procedure that the travel and subsistence expenses subject to recovery are primarily those incurred by the agents, advisers and lawyers of the parties. However, the same costs incurred by the officers of a legal entity which is party to a case may also be recoverable, but only to the extent their participation was necessary for the purposes of the oral hearing. This may be the case if the presence of the party's representatives is required because the Court has requested it, or because the hearing is concerned with the taking of evidence relating to events experienced by the party, or because the course of such events is extremely complicated and is the main point at issue before the Court.

ORDER OF THE COURT

9 November 2012

(Taxation of costs)

In Case E-14/10 COSTS,

Konkurrenten.no AS, established in Evje, Norway, represented by Jon Midthjell, advokat,

applicant,

v

EFTA Surveillance Authority, represented by Xavier Lewis, Director, Department of Legal & Executive Affairs, acting as Agent,

defendant,

APPLICATION for the taxation of costs recoverable following the judgment of the Court of 22 August 2011 in Case E-14/10 *Konkurrenten.no* v *ESA* [2011] EFTA Ct. Rep. 266,

THE COURT,

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

Registrar: Gunnar Selvik,

makes the following

ORDER

I FACTS, PROCEDURE AND FORMS OF ORDER SOUGHT

1 By an application lodged at the Registry of the Court on 2 September 2010, Konkurrenten.no AS ("Konkurrenten" or "the applicant") brought an action under Article 36(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") for annulment of EFTA Surveillance Authority ("ESA" or the

"defendant") Decision No 254/10/COL of 21 June 2010 concerning AS Oslo Sporveier and AS Sporveisbussene ("the contested decision").

2 By judgment of 22 August 2011 in Case E-14/10 Konkurrenten.no v ESA [2011] EFTA Ct. Rep. 266, the Court annulled the contested decision and, pursuant to Article 66(2) of the Rules of Procedure ("RoP"), ordered ESA to pay the costs incurred by the applicant.

3 As the parties have not been able to agree on the costs to be recovered, Konkurrenten lodged an application at the Registry of the Court on 5 March 2012, pursuant to Article 70(1) RoP, where it applied for taxation of the costs it may recover from ESA. In the application, the Court is requested to fix the total amount of those costs at EUR 136 322 together with default interest for payment made later than 14 days after the Court order.

4 By observations lodged at the Registry of the Court on 12 March 2012, ESA requested the Court to fix the total amount of the said costs at EUR 65 000.

5 The applicant claims that it has incurred the following costs:

– EUR 102 130 in legal fees, including EUR 1 700 for the present proceedings in Case E-14/10 COSTS, recoverable under Article 69(b) of the Court's RoP. With the addition of 25% VAT amounting to EUR 25 532, total legal fees claimed amount to EUR 127 662.

– EUR 1 070 in costs for the travel and subsistence of the applicant's Chief Executive Officer ("CEO") to attend the oral hearing in Case E-14/10 on 10 May 2011.

– EUR 1 288 in costs for the travel and subsistence of the applicant's CEO in meeting with counsel in Oslo for three full-day meetings on 28 July and 28 August 2010, to review the evidence and discuss drafts for the application for annulment, and on 25 March 2011 to review the case in detail after the conclusion of the written procedure and discuss the challenges and tactical decisions ahead of the oral hearing.

– EUR 1 379 in costs for travel and subsistence of counsel to attend a court hearing.
– EUR 1 616 in travel and subsistence costs for a witness to attend a court hearing.
– EUR 3 307 in copying and shipment of court pleadings.

II LAW AND ASSESSMENT OF THE CASE

1. Recoverable legal fees

Arguments of the parties

6 As regards the purpose and nature of the proceedings, the applicant asks the Court to recall that its objective was to prevent the defendant from closing a major State aid case involving the second largest bus operator in Norway where the defendant erroneously had allowed the aid recipient to keep a potentially significant amount of unlawful aid granted in the period leading up to the liberalisation of the largest regional market in the country. In this regard, the applicant submits that KTP/Unibuss received NOK 800 million in a capital injection in 2004 and more than NOK 435 million in annual grants from 1997-2008.

7 In terms of how significant the proceedings were from the perspective of the EEA Agreement, the applicant notes that the case dealt with a cornerstone premise of the internal market, namely, that EEA States cannot distort competition in open markets by favouring selected undertakings with unlawful aid.

8 With regard to the difficulties presented by the case, the applicant submits that the body of case law of the Courts of the European Union on the distinction between new and existing aid requires a careful investigation of the aid measure in question and a reasoned analysis of whether any relevant alterations have been made by the EEA State during the period of review. The applicant submits that the relevant period in the case stretched over 14 years and the case presented particular difficulties due to the defendant's opaque reasoning and cursory investigation. These

difficulties were exacerbated when the defendant shifted its position in the defence and put forward a new description of the aid measure and a new analysis of whether any relevant changes had occurred.

9 As for the financial interests the applicant has in the proceedings, it maintains that it has a direct and strong interest in seeing that unlawful aid is recovered from KTP/Unibuss. The aid recipient moved into the express bus market in 2005 and later entered the key market where it was able to invest in an aggressive pricing strategy and a major renewal, upgrade and expansion of its bus fleet, intended to drive the applicant out of its home market.

10 Altogether, the applicant states that the legal work involved in the case amounts to 291 hours. According to the applicant, the work consists of:

- application for annulment, a total of 137.50 hours;
- reply to the defence, a total of 84.25 hours;
- application for measures of organisation leading to the calling of the Court's first witness, a total of 29 hours; response to the application for intervention from KTP/Unibuss, a total of 4.25 hours;
- oral hearing on 10 May 2011 in Luxembourg and necessary preparations for the hearing, a total of 31 hours, and finally,
- application for the taxation of costs in the case, excluding the attempts to come to an agreement with the defendant and the correspondence between the parties in that regard, a total of 5 hours.

11 ESA does not contest the significance of the proceedings, the difficulties in presenting the case, nor the financial interest involved. ESA claims, however, that the applicant has not furnished the requisite supporting documentation to allow a proper and detailed evaluation of the costs actually incurred. Although ESA is prepared to accept, in the light of invoices which the applicant has now produced, that fees have been charged by counsel to the applicant, it is argued that the documentation furnished does not permit ESA or the Court for that matter to

determine whether those costs actually incurred are expenses necessarily incurred within the meaning of Article 69 RoP.

12 ESA submits that counsel for the applicant presented it with a peremptory demand for the payment of EUR 126 960. That claim was accompanied by a two-page document which contained no details, no supporting evidence, no bills, no invoices, no time sheets and no explanations which could possibly serve to examine the claim in the light of Article 69 RoP.

13 ESA states that it responded with a letter dated 19 October 2011 clearly headed "without prejudice". However, counsel for the applicant has now produced that letter to the Court without ESA's knowledge or consent.

14 ESA argues that, instead of supplying the supporting documents requested, which would have afforded it the opportunity to make a reasonable offer to settle this matter, the applicant brought the present application for taxation of costs. In ESA's view, there are grounds in such circumstances to dismiss the application for taxation of costs as premature. Nevertheless, ESA would prefer the matter to be brought to a definitive conclusion and consequently asks the Court to rule on the application as it stands.

15 In this regard, ESA points out that no clear and precise indication is given of what the legal assistance charged for actually related to, for example, whether it comprised the drafting of the application, reply, other pleadings or some form of research. ESA argues that, given the lack of any details, such items are usually disallowed.

16 According to ESA, it is normal, habitual and indeed expected that proper, detailed timesheets will be produced to the Court in taxation of costs proceedings.

17 ESA claims that the applicant has produced barely any more useful supporting documents, and that it is therefore left with only one option which is to estimate what costs the applicant might have necessarily incurred in the proceedings.

18 Given the nature of the case and the fact that the applicant was the complainant in the administrative proceedings and thus fully conversant with the facts and law applicable, ESA estimates reasonable legal fees to amount to 126.25 billable hours. In this estimate, ESA assigns

- 56 billable hours to the drafting of the application;
- 40 hours to drafting the reply;
- 14 hours to measures of organisation;
- 4.25 hours to observations on intervention; and
- 12 hours for preparing and attending the hearing.

19 That totals 126.25 billable hours. Accordingly, the sum of EUR 42 925 corresponds to a reasonable estimate of costs necessarily incurred in these proceedings.

Findings of the Court

20 Under Article 70(1) RoP, the Court shall, if there is a dispute concerning the costs to recovered, on application by the party concerned and after hearing the opposite party, make an order.

21 According to Article 69(b) RoP, "expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers", shall be regarded as costs which are recoverable from the party ordered to pay the costs.

22 These provisions mirror Articles 74(1) and 73(b) of the Rules of Procedure of the Court of Justice of the European Union ("ECJ") and Articles 92(1) and 91(b) of the Rules of Procedure of the General Court of the European Union.

23 According to the principle of procedural homogeneity, the provisions of the Rules of Procedure must be interpreted in the same way in the EFTA pillar of the EEA as in the EU pillar unless specific circumstances justify different treatment (see order of the President of 23 April 2012 in Case E-16/11 *ESA* v *Iceland* (*Icesave*), paragraph 32, and, with regard to the taxation of costs specifically, see order of the Court in Case E-9/04 COSTS II

Bankers' and Securities' Dealers Association of Iceland v *ESA* [2007] EFTA Ct. Rep. 220, paragraph 28).

24 It follows from Article 69(b) RoP that recoverable costs are limited, first, to those incurred for the purpose of the proceedings before the Court and, second, to those which are necessary for that purpose (see, for comparison, order of the ECJ in Case C-104/89 DEP *Mulder and Others* v *Council and Commission* [2004] ECR I-1, paragraph 43, and case law cited, and of 7 June 2012 in Case C-451/10 P-DEP *France Télévisions* v *TF1*, not yet reported, paragraph 17).

25 As regards ESA's observation that counsel for the applicant has produced to the Court its letter of 19 October 2011 clearly headed "without prejudice", the Court notes that EEA law does not contain any rules on the effects of such statements in relation to proceedings for the taxation of recoverable costs. Accordingly, the Court finds no reason to address this submission for the purposes of the current proceedings.

26 When taxing the recoverable costs, it is settled case law that the Court must, in the absence of EEA provisions laying down fee-scales, make an unfettered assessment of the facts of the case, taking into account the purpose and nature of the proceedings, their significance from the point of view of EEA law as well as the difficulties presented by the case, the amount of work generated by the proceedings for the agents and advisers involved and the financial interests which the parties had in the proceedings (see, *mutatis mutandis*, order of the Court in Case E-9/04 COSTS *European Banking Federation* v *ESA* [2007] EFTA Ct. Rep. 74, paragraph 17, and in *Bankers' and Securities' Dealers Association of Iceland* v *ESA*, cited above, paragraph 29).

27 In that respect, it must also be recalled that the ability of the Court to assess the value of work carried out is dependent on the accuracy of the information provided (see, to that effect, order of the General Court in Joined Cases T-226/00 DEP and T-227/00 DEP *Nan Ya Plastics* v *Council* [2003] ECR II-685, paragraph 35, and case law cited).

28 The amount of costs recoverable in the present case must be assessed in the light of those criteria.

29 As regards the hourly rate invoiced, the Court notes that the parties agree that the recoverable lawyers' fees in the case at hand can reasonably be assessed on the basis of an hourly rate of EUR 340. Taking into account that Article 66(5) RoP provides that a decision on costs shall be in accordance with the agreements of the parties, where the parties come to such an agreement, the Court concurs with the parties that the hourly rate of EUR 340 applies for the purposes of the present case.

30 However, it must be noted that this rate presupposes that the work was carried out by an experienced lawyer in the relevant field (compare order of the General Court of 19 December 2006 in Case T-233/99 DEP *Land Nordrhein-Westfalen* v *Commission*, not published in the ECR, paragraph 39). The fact that remuneration at that rate is taken into account requires moreover in return a strict assessment of the total number of hours' work essential for the purposes of the proceedings in question (see, to that effect, order of the ECJ in Joined Cases C-12/03 P-DEP and C-13/03 P-DEP *Tetra Laval* v *Commission* [2010] ECR I-67*, paragraph 63).

31 As regards the difficulties presented by the case and its significance from the perspective of EEA law, it did not raise new points of EEA law. However, the Court notes that the subject-matter and character of the main proceedings involved a degree of complexity in relation to the substance of the action. The Court was required to rule not only on whether ESA's decision contained sufficient reasoning on whether a State measure could be classified as a part of an existing aid scheme, but also on a matter concerning an error of law with regard to ESA's decision not to initiate the formal investigation procedure. The Court also recalls that it took ESA four years to investigate the case before it took the decision contested in the main proceedings.

32 Moreover, the subject-matter of the proceedings covered a long period in time and the applicant's lawyer was not familiar with the case, as he did not represent the applicant in the administrative

procedure which resulted in the adoption of the contested decision. Those factors are likely to have, in part, increased the time which the lawyer had to spend on the preparation of the application.

33 As regards the extent of the work involved in the proceedings before the Court, it follows from the foregoing considerations that the dispute may indeed have required not an inconsiderable amount of work by the applicant's lawyer. Moreover, it must be observed that ESA does not deny that the financial interest of the applicant in the case was significant.

34 However, for the purposes of determining the amount of recoverable legal fees these can usefully be assessed by the Court as a number of hours' work at a certain hourly rate. The primary consideration of the Court is the total number of hours of work which may appear to be objectively necessary for the purpose of the proceedings before the Court (see, to that effect, order of the General Court in Case T-342/99 DEP *Airtours* v *Commission* [2004] ECR II-1785, paragraph 30).

35 Referring to the applicant's specification of the number of hours worked by its counsel at each stage of the procedure, the Court considers the 137.50 hours claimed with regard to the application for annulment and 84.25 hours for reply to the defence, 29 hours for the application for measures of organisation leading to the calling of a witness and 31 hours for the oral hearing on 10 May 2011 in Luxembourg and necessary preparations for that hearing are in excess of what could be considered necessary for the purposes of Article 69(b) RoP. The Court finds that, in the present case, 105 hours spent on the drafting of the application, 55 hours on the reply to the defence, 18 hours relating to the application for measures of organisation, and 26 hours for the preparation of the oral hearing are the maximum which could be regarded as necessary for those purposes.

36 Accordingly, the amount of time claimed for these tasks must be considered more than objectively necessary for the purposes of the proceedings before the Court. However, the Court finds 5

hours for the application for the taxation of costs and 4.25 hours for response to an application for intervention from KTP/Unibuss to be reasonable.

37 Taken together with an hourly rate of EUR 340 and considering all the elements set out above, the Court fixes the equitable assessment of the costs recoverable by the applicant in Case E-14/10 at EUR 69 360 which corresponds to 189 hours of work. In addition to the lawyers' fees, VAT levied at 25% amounts to EUR 17 340.

2. Travel and subsistence costs for the applicant's CEO

38 The applicant also claims that Article 69(b) ROP allows for reasonable travel and subsistence costs where the presence of a company representative during the oral hearing is necessary for the applicant to make full use of its right to be heard. In this case, the applicant's CEO and Chairman of the Board of Directors both attended the hearing. However, the applicant seeks only to recover costs in relation to its CEO.

39 In support of this claim, the applicant submits that it was not represented by counsel during the four years that ESA investigated the State aid complaint that led to the contested decision. Second, neither the intervener, KTP/Unibuss, nor the Norwegian Government were able to submit written observations in time and relied instead on their oral presentations during the hearing, the content of which the applicant had no way of knowing in advance.

40 The applicant further argues that the overall complexity of the issues and the hearing of a witness from the Norwegian Government made the CEO an important source for counsel to be able to consult with during the hearing. It also notes that the ESA was represented by two agents during the hearing and had other officers attend in the audience, and that the Commission and the Norwegian Government were each represented by two agents and that KTP/Unibuss had seven officers of the company attend in addition to its counsel.

41 On this basis, the applicant contends that the presence of the CEO was necessary for counsel to be able to effectively represent the company's interests during the hearing.

42 The applicant seeks to recover travel and subsistence to a total of EUR 1 070. This consists of a roundtrip with KLM (Economy Flex) Kristiansand/Luxembourg at the cost of EUR 499 and subsistence costs, including food, local travel and 2 hotel nights, from 9 to 11 May 2011 in the amount of EUR 571. The applicant adds that there was no available flight the same evening and that travel and subsistence costs of the CEO are lower than what the Court has found reasonable for the witness making a comparable trip.

43 As regards travel and subsistence costs for the applicant's CEO to attend three meetings in Oslo with its counsel on 28 July 2010, 27 August 2010 and 25 March 2011, the applicant maintains that Article 69(b) ROP includes reasonable travel and subsistence costs for meetings in person between counsel and company representatives to prepare for and follow through with the litigation. In this case, the CEO travelled to Oslo to meet with counsel for full day meetings, on 28 July and 27 August 2010 to review the evidence and discuss drafts for the application for annulment, and on 25 March 2011 to review the case in detail after the written procedure and discuss the challenges and tactical decisions ahead of the oral hearing. The applicant seeks to recover a total of EUR 1 288 for these costs. This consists of car travel costs between Evje and Oslo (680 km) for each meeting and subsistence costs (hotel/food for 1 night for each trip).

44 As regards travel and accommodation costs for the hearing, the defendant indicates that it is willing to pay for counsel only.

45 As regards the travel and subsistence costs of the applicant's CEO for meetings in Oslo in July and August 2010 and March 2011, ESA argues that the applicant has provided no justification for the meetings, no explanation of why they were necessary and no link with the different stages or procedures of these proceedings. Consequently, those costs cannot be considered necessarily incurred in the course of these proceedings.

46 As for the costs relating to the attendance of the applicant's CEO at the hearing, the defendant states that, while the travel expenses of counsel are necessarily incurred, the costs relating to officers and employees of the parties are not necessarily incurred unless their presence has been requested by the Court or because they are likely to help explain complex facts essential for the elucidation of the proceedings.

47 In the present case, the defendant maintains that the physical presence of two officers – even of one officer – of the applicant was predictably unnecessary and it could be foreseen that they would not be called upon to help out with complicated factual matters that had, in any event, been adequately canvassed in the written pleadings. Consequently, those costs are not reimbursable as they are not necessarily incurred in these proceedings.

Findings of the Court

48 As regards the costs incurred by the applicant's CEO to attend the oral hearing in Luxembourg, the Court notes that, pursuant to Article 69(b) RoP, "expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers", shall be regarded as costs which are recoverable from the party ordered to pay the costs.

49 It follows from this provision that the travel and subsistence expenses subject to recovery are primarily those incurred by the agents, advisers and lawyers of the applicant. However, the same costs incurred by the applicant's officers may also be recoverable, but only to the extent their participation was necessary for the purposes of the oral hearing.

50 This may be the case if the presence of the applicant's representatives is required because the Court has requested it, or because the hearing is concerned with the taking of evidence relating to events experienced by the applicant, or because the course of such events is extremely complicated and is the main point at issue before the Court (see, to that effect, order of the ECJ in Case C-204/07 P-DEP *C.A.S.* v *Commission* [2009] ECR

I-140*, paragraph 35). As these conditions are not met in the case at hand, the Court finds that they are not recoverable.

51 As regards the claims made for the travel and subsistence costs of the applicant's CEO for meetings in Oslo in July and August 2010 and March 2011, the applicant has not demonstrated that these meetings were objectively necessary for the purpose of the proceedings, nor why it was necessary to hold these meetings in Oslo (see, for comparison, *C.A.S.* v *Commission*, cited above, paragraph 32, and case law cited). Consequently, these costs are not recoverable under Article 69(b) RoP.

3. Other costs

52 The Court notes that the costs of EUR 1 616 for travel and subsistence of a witness to attend the Court hearing on 4 April 2011 and expenses covering shipping and copying at a total of EUR 3 307 and EUR 1 379 for the applicant's counsel's travel expenses and subsistence are not contested. Accordingly, the Court finds that these costs are recoverable under Article 69(b) RoP.

53 It follows from the foregoing that the costs which the Court has found to be recoverable, that is, lawyers' fees at a total of EUR 69 360, VAT at a total of EUR 17 340, travel and subsistence expenses for the applicant's counsel at a total of EUR 1 379, travel expenses and subsistence for one witness at a total of EUR 1 616, and expenses covering shipping and copying at a total of EUR 3 307, amount in total to a recoverable sum of EUR 93 002.

On those grounds,

THE COURT

hereby orders:

The total amount of the costs to be paid by the EFTA Surveillance Authority to Konkurrenten.no AS is fixed at EUR 93 002.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Luxembourg, 9 November 2012

Gunnar Selvik
Registrar

Carl Baudenbacher
President


EFTA COUR


EFTA COURT

Photos: © Rob Schiltz

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 2012 to 31 December 2012. In addition, it has a short section on the Judges and the staff and the Court's activities in 2012.

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